

140th anniversary of the Constitution of Veliko Tarnovo

Presentation by
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President of the Venice Commission
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Mr President of Bulgaria,
Ms Speaker of the Parliament,
Mr President of the Constitutional Court,
Excellences,
Ladies and Gentlemen!

It is a great pleasure for me to address you today on the occasion of the 140th anniversary of the Constitution that was enacted in this beautiful town, which was your former capital.

In 1879, when it was enacted, the Tarnovo Constitution was already considered to be a very progressive document.

This First Bulgarian Constitution was an important guiding light for your country and still today, much can be learned from this Constitution as many of its principles remain relevant and important for your country, as well as for other countries in Europe.

Even if the judiciary was not yet a separate constitutional power, the Tarnovo Constitution included many principles which we can find in modern constitutions, such as equality of citizens, protection of religious minorities or the freedom of expression and the abolition of censorship.

First of all, the fact that your Constitution was adopted by a Constituent Assembly is essential. It was not enacted by one person, be it a king or a dictator.

It was the fruit of discussions between *honourables* from all parts of the country. In long discussions between liberals and conservatives, the former prevailed and a progressive constitutional document resulted.

You know much better than I what occurred to this Constitution. It soon came under pressure from various sides, notably from the new Prince.

Following the introduction of censorship in 1880, the whole Constitution was suspended in 1881, but thankfully, the Constitution was restored in 1883¹.

¹ https://en.wikisource.org/wiki/1911_Encyclop%C3%A6dia_Britannica/Bulgaria/History

Even though it suffered further suspensions, the Constitution effectively lasted until 1937, but was finally replaced after the Second World War.

I like to compare the Constitution of Veliko Tarnovo with the Spanish Constitution of Cadiz of 1812, which was also very progressive, however was repealed already in 1814 by King Ferdinand VII.

Both constitutions proclaimed freedom of the press, private property, abolished feudalism and established limits to the power of the prince or king.

The Tarnovo Constitution is also an example of trans-constitutionalism.

Even though Belgium was a country far away from Bulgaria with no political impact on Bulgaria, your Constituent Assembly took inspiration – among others – from the Belgian Constitution of 1830².

The Belgian Constitution itself was inspired by the French and US Constitutions. Here, we witness that constitutional principles and good legal arguments can travel far and wide and inspire constitution drafters as well as those who apply these constitutions.

This is why we, at the Venice Commission, promote co-operation and dialogue between Constitutional Courts and constitutionalists in Europe and beyond.

This brings me to an important role of the Venice Commission, which is trans-constitutionalism and judicial cross-fertilisation.

The main task of the Venice Commission is to assist its Member States in the reform of their Constitutions and para-constitutional legislation, such as electoral laws, laws on the ombudsman institution or law on the constitutional or ordinary judiciary.

When providing such advice, the Venice Commission benefits from the collective wisdom of its 61 Members emanating from various constitutional systems and from the experience they have gathered in their countries.

As concerns Bulgaria, we were lucky to benefit from the advice of great constitutionalists, such as Evgeni Tanchev and now Philip Dimitrov, who have enriched the Venice Commission with their contributions.

Bulgaria joined the Venice Commission in 1992.

Since then, the Venice Commission has prepared many opinions for your country, covering legislation on criminal procedure, rallies, normative acts, forfeiture of assets and political parties or elections.

However, since 1999, the main focus remained the judiciary.

² Armand De Decker, *Étude comparée de la Constitution belge et de la Constitution bulgare*, Colloque organisé au Sénat de Belgique, 10 février 2010 ; Jean F Crombois, How well do constitutions travel across time and space? The Belgian Constitution of 1831 in Bulgarian constitutional history 1879-1940.

Mr President,

As the famous saying goes, not only must Justice be done, it must also be seen to be done.

Appearances of highest courts are therefore important for the perception of justice in our member states.

In Sofia, I noticed that the Constitutional Court works in a building together with the Government.

I do not doubt that in practice there is a clear separation of powers between the Court and the Government, but I think that the Constitutional Court should benefit from a building where it is not seen as being so close to the executive.

In order for Constitutional Justice to be seen to be done by the public, it is also important that the public has access to the Constitutional Court, which is a specialised body of constitutional control.

The basic idea of the primacy of the Constitution is that the Constitutional Court should “clean” the body of laws from laws that conflict with the Constitution.

However, the Court cannot do so upon its own initiative. This would turn it into a political organ.

The Court therefore needs an occasion to perform this “cleaning” work. It needs appeals that allow it to identify unconstitutional laws and to remove them.

The problem in limiting access to State actors is that it depends on political circumstances whether or not a case reaches the Court.

The Government and the majority in Parliament have little reason to appeal against a law that they have initiated or just adopted.

Even the opposition may have political reasons not to appeal to the Court, for instance when it obtains advantages for not appealing in other areas which need not even be related to the law in question.

The real success story of constitutional courts started after the Second World War, when in Germany citizens and all individuals were enabled to appeal to the Federal Constitutional Court.

Individual access – thoroughly – solves the problem that not enough cases come to the Constitutional Court and that therefore unconstitutional laws remain in force.

In its Report on Individual access to constitutional justice, the Venice Commission made a distinction between various forms of individual access.

A frequent type of access is that of preliminary requests to the Constitutional Court by the ordinary judiciary.

When a law has to be applied to a concrete case and there are doubts whether this law or one of its provisions is constitutional, then the ordinary judge sends a request to the Constitutional Court asking it to examine the constitutionality of this provision.

When the Constitutional Court comes to the conclusion that the law is indeed unconstitutional, it repeals the law and the instant case goes back to the ordinary judge, who decides the case without referring to the repealed unconstitutional law.

Article 150 paragraph 2 of the Bulgarian Constitution provides that the Supreme Court of Cassation and the Supreme Administrative Court can appeal to the Constitutional Court in concrete cases.

This access is quite narrow because it is limited to the Supreme Courts. You should consider opening this access to courts of all levels.

However, even more favourable to human rights protection is direct access of the individual to the Constitutional Court.

The next step on this ladder is the 'normative' constitutional complaint.

This means that individuals can claim at the Constitutional Court the unconstitutionality of a normative act, typically a law that has already been applied in his or her case.

Such an appeal is possible after the final judgment of his or her case. In such cases, the Constitutional Court can annul the law or parts of it when it establishes that, indeed, these provisions are unconstitutional.

The Court then sends the case back to the Supreme Court or to the last court that decided the case, for a new trial.

In this way, the normative constitutional complaint addresses the unconstitutionality of the law itself.

However, in practice, in all countries, most human rights violations are not due to unconstitutional laws, but to unconstitutional individual acts.

It is the other type of individual complaint, the 'full constitutional complaint', which is able to remedy such human rights violations.

This complaint therefore covers the unconstitutionality of a law and even includes the unconstitutional application of a law that is constitutional itself.

Obviously, this full constitutional complaint provides the highest level of human rights protection and this is why the Venice Commission usually recommends the introduction of such a complaint.

The countries which have introduced a full constitutional complaint, such as Germany or Spain, have a significantly lower number of cases at the European Court of Human Rights in Strasbourg, because the Constitutional Court can filter these cases.

It is always better to deal with human rights issues in the country than at the European level.

Only a month ago, another EU Member State, Lithuania, amended its Constitution and introduced the constitutional complaint.

I note that Article 150 of the Bulgarian Constitution provides abstract access – not related to a specific case – to the Constitutional Court for the Ombudsman and the Supreme Bar Council.

This is clearly positive, but does not replace individual access in concrete cases.

Individual access to the Constitutional Court would certainly benefit Bulgarian citizens and the protection of their human rights.

As I explained, there is a wide range of possibilities.

This starts with wider indirect access to the Constitutional Court by all ordinary courts, without a filter by the supreme courts.

A normative constitutional complaint and, even better, a full constitutional complaint would provide comprehensive protection of human rights in Bulgaria.

When the ordinary Courts cannot or do not provide the necessary level of protection, the Constitutional Court should be able to step in and provide the necessary remedy.

Your Constitutional Court has the capacity and - under the guidance of its brilliant President Boris Velchev - the intellectual resources to become an effective remedy for the protection of human rights in your country.

In this respect, we may take inspiration from the Constitution of Veliko Tarnovo and its open approach to the protection of human rights.

I sincerely hope that human rights can be protected even more effectively in your country.

The Venice Commission stands by your side in this endeavour.

Thank you for your attention.