Strasbourg, 19 October 2007

CDL(2007)078*
Or. Engl.

Opinion No. 444 / 2007

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE CONSTITUTION OF BULGARIA

by

Mr Pieter van DIJK
(Member, Netherlands)

** This document will not be distributed at the meeting. Please bring this copy.*
*** This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

The text of the Constitution as amended leads me to the following comments.

(***N.B.:*** The text was examined by me in the English translation that was submitted to the Venice Commission. Certain of the comments may be related to the translation and not to the authentic text).

Article 4, para 3: It is not clear what “construction” in this context means as compared to “development”. The European Union has been established, and consequently has been construed. Its institutions and law may change, but that seems to be covered by “development” rather than "construction". Perhaps the Bulgarian equivalent of “functioning” would be more appropriate.

Article 5, para 2: The meaning of this provision is not clear. The words “direct applicability” are usually meant to indicate that the provision concerned does not need further implementation by legislation or regulation and, thus, may be directly applied by the courts. It is clear, however, that not all provisions of the Constitution are “directly applicable” in that sense, e.g. Articles 15 and 16, and certain provisions of Chapters Three to Five.

Article 5, para 4: Does the provision that binding treaties supersede “any domestic legislation” also apply to provisions of the Constitution that are not in conformity with treaty obligations? How does paragraph 4 relates to paragraph 1 stipulating that the Constitution shall be the supreme law? It is recommended that the relation between international law and the Constitution be more specifically regulated.

Moreover, paragraph 4 should also include, next to treaties, decisions of international organisations that are binding for Bulgaria, such as certain resolutions of the United Nations Security Council and regulations, directives and certain other decisions of the European Union. Although it may be said that the binding force of these decisions ensues from the treaties establishing these organisations, and that for that reason they are sufficiently covered by the reference to treaties, it is recommended that the Constitution be more specific about the fact that these decisions are also part of the domestic legal order and supersede conflicting domestic law.

Article 6, para 2: The prohibition of discrimination should not be restricted to citizens. According to Article 1 of the European Convention on Human Rights, in connection with Article 14 and with Protocol No. 12, Bulgaria has the obligation to ensure equal treatment to “everyone within its jurisdiction”, which includes aliens. That does not stand in the way of the granting of certain privileges to citizens, such as the right to vote and the right to be elected as a member of the National Assembly. However, such exceptional privileges do not require, and do not justify a general restriction of the right to equal treatment to citizens.

Moreover, the provision is not consistent since, at the same time, it prohibits discrimination on the ground of nationality, which makes the restriction to citizens illogical except for the situations in which a citizen has a double nationality.

Moreover, the equal treatment of members of national minorities, as required by the Framework Convention on National Minorities, should also be given a constitutional basis.

Paragraph 2 contains a limitative list of discrimination grounds. The list is, however, more restricted than that of Article 1, paragraph 1 of Protocol No. 12. Missing are the ground of colour, language and the reference to minority status. Moreover, it may be pointed out that the prohibition of discrimination on the ground of sexual orientation has been expressly recognized

in the law of several European States, and may be also considered at the occasion of the drafting of the next amendments of the Constitution.

Article 7: It should be specified whether this provision also includes illegitimate rulings and acts of the legislature and the judiciary.

Article 9, para 1: In its general and unspecified formulation, this provision would seem a very dangerous one, since its seems to justify a coup d'état by the army. The responsibility for the sovereignty, security and independence of the country has to lay with the three branches of State power mentioned in Article 8, with the checks and balances provided in the Constitution. In the case of an emergency situation, special rules of emergency law may apply, in which case, in very exceptional circumstances, the army may act without any previous instruction from a politically responsible organ. The army may get involved in the protection of State sovereignty, security and independence, but there cannot be a monopoly of the army in this respect in a democratic State governed by the rule of law.

On the other hand, Article 100, paragraph 1 provides that the President of the Republic shall be the Supreme Commander in Chief of the Armed Forces, while paragraph 5 stipulates that in a case of emergency the National Assembly shall be convened. Therefore, the issue raised here may be a matter of terminology and consistency rather than a principal issue.

Article 11, para 4: This provision is in violation of the freedom of association as laid down in Article 11 of the European Convention on Human Rights, since the exclusions mentioned - with the exception of "parties which seek the violent seizure of state power" - cannot be justified on the basis of the second paragraph of Article 11. Political parties of a specific denomination are quite common in Europe.

Article 13, para 3: It should be specified, either in the text of the Constitution or in an explanatory memorandum, that the special status of the Eastern Orthodox Christianity does not have any legal consequences that would grant it a privileged treatment in violation of the prohibition of discrimination on the basis of religion laid down in Article 6, paragraph 2.

Article 18, para 3: This provision should either itself, or by reference to an implementing law, ensure that the State rights with respect to radio frequencies do not stand in the way of a reasonable and proportional access to these frequencies by private broadcasting corporations. The reference in Article 5 is too vague in that respect, because it does not contain any constitutional guarantee of access.

Article 19: The reference, in paragraphs 2 and 4, to "citizens" is in clear violation of the freedom of movement and services guaranteed in European Community law, and may be in violation of Protocol No. 12 to the European Convention on Human Rights. Therefore, the restriction to "citizens" has to be deleted. As far as the rights of foreigners is concerned, there should be a reference to the obligations of Bulgaria resulting from its accession to the European Union, and to other treaty obligations, comparable to the reference in new Article 22.

Article 24, para 2: There is no justification for the restriction to the well-being and fundamental rights and freedoms of "citizens". Bulgaria has to ensure those values for all persons under its jurisdiction without discrimination (Article 1 in connection with Article 14 of the European Convention on Human Rights). Moreover, there is the obligation of equal treatment of persons belonging to National Minorities under the Framework Convention.

Chapter Two: The title of the Chapter is incorrect since the constitutional provisions concerning fundamental rights may not be restricted to citizens only. In fact Chapter Two does contain provisions about fundamental rights of foreigners.

More in general, it is preferable not to include a provision about the definition of "citizenship" in the chapter dealing with fundamental rights, since this creates the wrong impression that, in principle, only citizens are entitled to those rights. Article 25 should rather be included in Chapter One.

It is repeated here, that the Constitution preferably should expressly take into account the rights of persons belonging to national minorities.

Article 25, para 5: This provision concerning diplomatic protection is formulated in too absolute terms. In providing diplomatic protection Bulgaria will have to respect the sovereignty and territorial integrity of the foreign State concerned.

Article 26, para 1: For this provision the same holds true: in exercising those rights and fulfilling those obligations the Bulgarian citizen abroad will have to respect the law of the country of residence.

Article 28: This provision is formulated too broad. If, e.g., a policeman kills a person in an action of self defence or if necessary to prevent a serious crime, his action will not be considered “a most severe crime”.

Article 30, para 3: It may be doubted that the period of 24 hours can be met in all circumstances. It is, therefore, recommended that some flexibility is provided for within the limits set by the European Court of Human Rights.

Article 31, para 2: The formulation is too restricted and does not cover other aspects of the right to remain silent in order not to incriminate oneself, and the right to be informed about this right.

Article 31, para 5: This provision does not take into account the situation of persons who have been detained but not (yet) sentenced.

Articles 32: It is to be preferred if a general indication of the grounds of restrictions that may justify interference with the right to respect of privacy, is given in the Constitution itself in an exhaustive way in accordance with the second paragraph of Article 8 of the European Convention of Human Rights, and is not totally left to the legislator.

Article 33, para 2: The term “extreme necessity” is not sufficiently specified. It is preferable that some reference is made in the Constitution itself to specific limitation grounds in conformity with the second paragraph of Article 8 of the European Convention on Human Rights.

Article 36, para 3: The Constitution itself should guarantee that the provisions concerning the use of a minority language laid down in the Framework Convention on National Minorities are guaranteed.

Article 41, para 2: There is no reason to restrict the right of information to citizens.

Article 42, para 1: The exclusion of all non-citizens who are not EU citizens, from local elections, even if they have been residents of the country for a long time, is not in violation of any international or European legal rule, but deviates from a more and more common trend in Europe. It is recommended that this point be reconsidered at a next occasion.

Article 43: There is no justification for restricting the right to peaceful assembly to citizens. Moreover, some indication of the grounds of restrictions that may justify limiting the right of peaceful assembly, should preferably be laid down in the Constitution itself, in accordance with the second paragraph of Article 11 of the European Convention on Human Rights.

Article 44: There is no justification for restricting the right to association to citizens. Paragraph 2 provides sufficient possibilities to prevent activities of associations of foreigners for the protection of certain interests.

It is preferable that paragraph 3 refers to paragraph 2 for the grounds on which an organisation may be terminated (prohibited).

Article 45: The right of petition should not be restricted to citizens.

Article 47, para 5: It is preferable to list the grounds of interference in family life exhaustively in the Constitution itself, in accordance with the second paragraph of Article 8 of the European Convention on Human Rights.

Articles 48: There is no justification for not extending the right to work to foreigners who legally reside in the country.

Articles 51-53 and 55: The same holds good for the right to social security and welfare aid, for the right to medical insurance, the right to found schools and the right to a healthy environment

Article 57, para 3: The list of non-derogable rights should also include a reference to Article 5, paragraph 3, in accordance with Article 15, paragraph 2 of the European Convention on Human Rights.

Articles 58-61: The restriction to citizens is out of place.

Article 64, para 1: Does the fact that the term of four years is set without leaving any room for exceptions means that the National Assembly cannot be dissolved in the meantime for any reason?

Article 65, para 2: The term “state post” is not very clear. Does this also include membership of a local board or council, and membership of the judiciary?

Article 70, para 1: The term “indictable offence” is not sufficiently clear in the English translation. Does it refer to (a certain category of) serious crimes?

Article 80: There is no justification for restricting this obligation to citizens.

Article 81, para 3: There should be the right of every member of the National Assembly to ask for a secret ballot in certain circumstances.

Article 83: The right of the National Assembly to be informed should be regulated in more express terms. The same holds good for Article 90, paragraph 1.

Article 84, sub 16: What is the meaning of “pass”? Do the annual reports require the approval of the National Assembly? That would mean interference with the independence of the judiciary. It is preferable that the reporting to the National Assembly rests with the Supreme Judicial Council, and covers the material and general functional aspects of the judiciary only.

Article 85, para 1: Should not “ratify” be replaced by: approve? The ratification itself is usually done by the Executive. See Article 92, paragraph 1 and Article 98 under 3.

Article 86, para 2: The restriction to citizens is incorrect.

Article 89, para 3: It is submitted that this period of six months constitutes too great a limitation of parliamentary sovereignty. Even if the grounds are the same, the circumstances or the political climate may have changed.

Article 91a, para 1: The election of the Ombudsman should preferably require a qualified majority to provide the office with a politically and socially broad base.

Article 93, para 4: A provision should be made for the case two candidates obtain the same number of votes.

Article 97, para 4: If and for as long as the Chairperson of the National Assembly will have to assume the Presidency of the Republic, his chairmanship will have to be performed by his deputy. Otherwise there may be the appearance of a mixture of executive and parliamentary powers

Article 108: It is not clear how the responsibility of the Prime Minister under paragraph 2 relates to the responsibility of each individual minister for his own activities under paragraph 3.

Article 117, para 1: The restriction to citizens is not justified.

Article 117, para 2: For the sake of clarity to `independent` should be added `impartial`.
This paragraph puts the prosecutors on the same line with judges as members of the judiciary. If this was a matter of terminology only, it would not meet with much objection. However, the following provisions indicate that it has as a consequence that the different functions of the courts and the prosecution are not sufficiently taken into account. The prosecution should have no involvement whatsoever in the ultimate administration of justice, nor in the appointment and functioning of judges, and the operation of the court system.

Article 120, para 1: It should be specified which court or courts will have jurisdiction to review administrative acts. As the provision reads, it suggests that all courts do so.

Article 120, para 2: The possibility that the law excludes judicial review of certain administrative action may be in violation of the right of access to court under Article 6 of the European Convention on Human Rights, if "civil rights or obligations" in the sense of Article 6 are involved.

Article 121, para 1: The words "equal conditions for competition" are somewhat strange in the context of judicial proceedings, but this may be a matter of translation. What is probably meant is equal opportunity to present their case ("equality of arms").

Article 121, para 3: It should be added that the decisions and judgments should also be pronounced in public.

Article 122, para 1: The limitation to citizens is incorrect.

Article 122, para 2: This provision does not say anything about the right to, and conditions of free legal aid. This should not be totally left to the legislature.

Articles 124 and 125: The relation between the two provisions is not clear. Article 124 gives the impression that the Court of Cassation has also jurisdiction to review the judgments of the Supreme Administrative Court and even ex officio, but Article 125 provides that the Supreme Administrative Court is the highest instance in administrative proceedings. The relationship between the two high courts needs clarification. The adjective "Supreme" in the case of the Court of Cassation is superfluous and may be misleading in this context.

Moreover, it should be made clear that the Court of Cassation cannot interfere with the functioning and judgments of other courts on its own motion, but only if an admissible appeal in cassation has been lodged.

The same holds good, mutatis mutandis, for the Supreme Administrative Court: it may exercise its review function only if an admissible appeal has been brought.

Article 125, para 2: The words "other acts established by law" are very general and vague. The core of the scope of jurisdiction should be regulated in the Constitution, e.g. whether administrative jurisdiction also extends to judicial review of administrative acts of local authorities.

Article 126, para 1: The provision is very unclear, since the two functions are so different that an equal structure is hardly imaginable. As it reads the provision is without any sense.

Article 127, under 5: This provision is not clear in its English translation, nether as to its contents nor as to it scope.

Article 127, under 6: It is not clear what role the prosecution office may have to play in civil and administrative proceedings. The office should not have any power of supervising or interfering with the functioning of the judiciary.

Article 129, para 2: It should be expressly provided that the President of the Republic may make his appointments only from the list of candidates proposed by the Supreme Judicial Council. Any political influence without procedural restraints has to be avoided. This may be somewhat different in the case of the appointment of the Prosecutor General.

Article 129, para 3: A probation period of five years would seem unnecessarily long in view of the requirements of independence. It is recommended to shorten it to two years.

Article 129, para 3, under 5 in conjunction with (former) para 4: The National Assembly should not have the power to make a proposal concerning the removal of judges. This should be entirely left to the Supreme Judicial Council, with the power of the President as a procedural power only . Otherwise there is the danger of political interference with the administration of justice, and a threat to the independence of individual judges.

Article 130, para 2: That, besides the ex officio members, only practising layers are eligible for membership of the Supreme Judicial Council would seem to be unnecessary restrictive. One could in addition think of law professors and of former judges who have taken up another profession, but also of competent representatives of society who have no legal education.
Persons with any representative mandate or political function should be excluded.

Article 130, para 6: It should be provided that the Supreme Judicial Council acts in these cases on the recommendation of the President or Board of the judicial body concerned, or at least should hear, of course in addition to the person concerned, the President or Board before taking a decision.

Article 130, para 7: It is not clear what the word “pass” means. The Supreme Judicial Council should not have any interference with the substantive character of the administration of justice.

Article 130, para 8, under 3 and 4: It should be specified by whom the member may be removed, since this could lead to interference with the nomination procedure of judges.

Article 130a, under 3: It should be expressly regulated that “may” means that a proposal by the Minister of Justice is not a requirement for one of the decisions mentioned to be taken, and that

the proposals by the Minister are recommendations only and not binding for the Supreme Judicial Council.

Article 130 a, under 4: It may be assumed that “qualification” means “training”.

Article 131: It should be indicated whether the judge concerned may lodge an appeal against the decision of the Supreme Judicial Council to a court other than the court to which he belongs or wished to be admitted. Since the Judicial Council is not a court, access to court should in principle be open to members of the judiciary to have their “civil rights” determined (Article 6 of the European Convention on Human Rights).

Article 132, para 6: This provision is too vague, as it contains the risk of indirect interference with the administration of justice. The inspection should only concern material issues such as the efficiency with which the judicial bodies have spent the money allocated to them.

Article 132, para 7: It is unclear what kind of initiative is meant. The inspectors should not also have the power to investigate complaints; that should be left to the Supreme Judicial Council itself, since this requires knowledge of or experience with the administration of justice.

Article 134, para 1: The restriction to citizens is incorrect.

Article 134, para 2: The law should only regulate certain procedural and safeguarding conditions. In principle, the legal profession should be free to organize the bar and its activities.

Article 136, para 1: The restriction to citizens would seem unjustified in its general scope.

Article 138: The “populace” would seem to include also non-citizens, while Article 42, para 1, indicates that only citizens may vote in local elections. As said before, there is a trend in Europe to also give the right to vote in local elections to non-citizens with residency of a certain duration.

Article 139: It is rather unusual to leave an option as to the way in which the mayor will be elected. Moreover, it is rather unusual that, also in large municipalities, the executive powers are invested in one person only.

Article 142: It would seem that harmony between national and local interests may only be ensured by the National Assembly and the central Government. It is not clear what powers the regions will have in this respect.

Article 143, para 3: The regional interests are not mentioned, although they may have their own specificities.

Article 144: It is not clear what is meant by “their local representatives”.

Article 145: It should be specified which court has jurisdiction in these matters.

Article 147, para 1: It is advisable that the election and appointment of the members of the Constitutional Court be based upon a nomination procedure. The nomination of candidates could be entrusted to the Supreme Judicial Council or to a special body.

Article 147, para 3: “Professional experience” would seem to be too unspecified, since only relevant experience should count.

Article 148, para 1: It should be expressly regulated by whom the mandate of a member of the Constitutional Court may be terminated. That could be the same body by whom the member

concerned has been elected or appointed, as the case may be, but always only at the recommendation of the Constitutional Court itself.

Article 148, para 3: It should be added that the term of office of the new judge will be for the number of years left of the nine years term of his predecessor.

Article 149, para 1, under 4: The subsidiary law of the European Union would seem not to be covered by "international treaties to which Bulgaria is a party". It is recommended to mention European Community law expressly with a reference to the preliminary ruling procedure before the Court of Justice of the European Communities.

Article 150, para 3: The restriction to “citizens” is unjustified.

Article 152: Sufficient room should be left to the Constitutional Court to adopt its own rules of procedure and regulate its own practical organization.

Article 157: It is unclear what is meant by “the generally established procedure”.

Article 160, para 3: The meaning of this provision is not clear. Since the Grand National Assembly has a limited task and limited powers (see Article 162, paragraph 1), there would seem to be no reason why the whole mandate of the National Assembly should end. At least it needs clarification which body will perform the usual parliamentary duties during the performance of its functions by a Grand National Assembly.

Concluding observation

The provisions of the Constitution of the Republic of Bulgaria, including its recent amendments, are on the whole in conformity with European standards.

The most serious shortcoming is the limitation of several fundamental and other rights to citizens, but this may be a matter of wording and/or translation.

The rights of persons belonging to national minorities would seem not to be adequately taken into account.

Moreover, the provisions in the Constitution concerning the possibility of restricting the enjoyment of certain fundamental rights is not very specific, which weakens their constitutional guarantee and makes it impossible to judge their conformity with the exhaustive lists of limitation grounds laid down in the European Convention on Human Rights.

Several points need further clarification, as indicated above. This holds, in particular, good for Chapter Six on the judiciary.

The division of competence between the different judicial bodies is not sufficiently clearly regulated, while certain provisions entail the danger of outside interference with the administration of justice by the courts.

The involvement of the President of the Republic in the appointment of judges should be a merely procedural one, while the actual selection of candidates is made by the Supreme Judicial Council.

Involvement of the executive or the National Assembly in the removal of judges should also be based upon a recommendation of the Supreme Judicial Council or of the court concerned.

The status and powers of the prosecution office remains unclear and seem to have kept certain elements of the former Prokuratura, with the risk of involvement in the functioning of the courts and nomination of judges.

The Inspectors, although formally independent, are given too broad powers, with the risk of indirect interference of the Minister of Justice in the administration of justice.