

**The Social Foundations of Constitutions**

Constitutionalism,  
Quasi-Constitutionalism,  
and Representative  
Democracy  
The Case of Bulgaria

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## Executive Summary

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This working paper advances a conception of quasi-constitutionalism defined as more pervasive and less formal than constitutionalism proper. It consists of far-reaching but legally unenforceable constraints and limits on the power of political majorities in areas such as economic policy, foreign relations, social policy, etc. The paper argues that European Union (EU) accession has strengthened quasi-constitutional constraints on the political process in Bulgaria. In contrast, real constitutionalism has not benefited proportionally: the Bulgarian Constitutional Court, for instance, has suffered in terms of status and legitimacy; as has respect for the Constitution itself. The EU accession and the entrenchment of quasi-constitutionalism has served to undermine trust in the representative institutions in Bulgaria, especially the political parties, which has brought into question the principle of responsible and accountable government.

This paper examines a certain peculiarity of Bulgarian constitutionalism. On the one hand, the Bulgarian Constitution, as adopted in 1991, presupposed a majoritarian form of government, in which there were few institutional constraints on the will of the political majority. On the other hand, since 2001 the political process in Bulgaria has become considerably consensual as far as substantive policy questions are concerned. A 'liberal consensus' has emerged, shared by all the major parties.

I argue that this consensus, and its institutionalization in specific processes, structures, and policies, has acquired a quasi-constitutional status. Quasi-constitutionalism serves the same purpose as constitutionalism proper, in that it isolates certain policy areas from the domain of ordinary majoritarian politics. I explore the link between constitutionalism proper and quasi-constitutionalism, the interaction between the two, and the general impact of quasi-constitutionalism on representative democracy. Whereas most scholarly attention is focused on the tension between democracy and constitutionalism proper (the legitimacy of judicial review, rigid constitutions, etc.), quasi-constitutionalism (as a more informal type of constitutionalism, but not necessarily less restrictive for the will of the majority) also presents a revealing and tense relationship with representative democracy. Moreover, I argue that in contemporary politics, quasi-constitutionalism becomes increasingly important. There are interesting links between the rise of informal quasi-constitutionalism and the rise of populism as a reaction to expansive quasi-constitutionalization. Further, the strengthening of quasi-constitutionalism does not necessarily lead to the strengthening of constitutionalism proper. I illustrate these ideas with a case study from Bulgaria, a country which joined the EU in 2007.

## The Majoritarian Foundations: Constitutional Traditions and the New Bulgarian Democracy

The new Bulgarian Constitution was adopted on 12 July 1991 after heated debates in the Grand National Assembly, a constituent representative body designed to establish the legal basis of the transition to a democratic system of government. The Bulgarian Socialist Party (BSP), successor of the former Communist Party, had an absolute majority and an opportunity to dominate the constitution-making process. This dominance led to a situation in which parts of the opposition (led by the Union of Democratic Forces [UDF]) refused to sign the Constitution. Since the Constitution was not to be ratified at a referendum, this was a factor which, at least theoretically, was supposed to cast doubts on the legitimacy of the document and on its reliability as a foundation of the rule of law. However, this did not prove to be the most important shortcoming of the text, and the constitution gradually gained sufficient legitimacy in its practical application.

Due to a complex mixture of traditionalism and political inertia, the Bulgarian founding fathers laid the grounds for a system of separation of powers with a strong emphasis on the representative body, the National Assembly.<sup>1</sup> The 'traditionalist' rhetoric used during the drafting process exploited some of the basic themes from the national constitutional mythology, all of which led to the first Bulgarian constitution adopted in Veliko Turnovo in April 1879. Despite the fact that this constitution provided for a monarchical institution, the one-chamber parliament, the universal suffrage for men, and, most significantly, the democratic way in which it was drafted and adopted, gave a strong egalitarian, majoritarian impetus to the future developments in the country.

The 'rhetoric of the communist legacy', on the other hand, persisted in employing arguments developed in the framework of the communist ideology, not always as a result of intellectual or political conviction but often inadvertently, and because of lack of familiar alternative solutions. The meeting point of these two lines of argument was a certain 'Rousseauistic' constitutional theory of Bulgarian constitutionalism.<sup>2</sup>

The first standard doctrine affected by this theory was the notion of 'parliamentary democracy'. According to Art. 1.1 of the Constitution, Bulgaria is a republic with a parliamentary form of government. The meaning of this provision is to underline the outstanding role of the assembly in the political process and to suggest that it will be the main instrument for expressing the general will of the people, who is the only holder of the sovereignty in the state (Art. 1.2). To ensure the most legitimate delegation of the sovereign powers from the people to the assembly, after an experiment with a mixed system, the Bulgarian electoral law settled on a pure proportional model with a 4 per cent rationalizing threshold.

The privileged position of the assembly in the Bulgarian constitutional order is further consolidated by another standard constitutional doctrine, the separation of powers (Art. 8). Since the parliament is recognized as a decision maker, a strict interpretation of the division of power principle preserves this right exclusively for it, simultaneously reducing the role of the executive to a simple administrator of the legislative will.

Two of the basic elements of the constitutional fashion in Eastern Europe at the time of the drafting, the

1. For an account of Bulgarian constitutionalism see Smilov, D. and Jileva, E. (2009) 'The politics of Bulgarian citizenship: National identity, democracy, and other uses'. In: R. Baubock, B. Perchinig, W. Sievers (eds.), *Citizenship Policies in the New Europe*. Amsterdam: Amsterdam University Press, 2009.

2. Friedrich, K. (1951) 'The Political Theory of the New Democratic Constitutions'. In: A. J. Zurcher (ed.) *Constitutions and Constitutional Trends Since World War II*. New York: New York University Press, pp. 18-19. According to him the term "'Rousseauistic tradition" is not necessarily something to be found in Rousseau himself, but something associated with his work and thought since the French Revolution: radical majoritarianism'. For Friedrich the constitutionalism in Europe after the Second World War was characterized by the very strong influence of this majoritarian tradition, though in different proportions in the various countries.

presidential institution and the constitutional court, were introduced into the text almost without reflection. No one doubted the need for their inclusion, though there were some debates on their role in the whole constitutional structure. The influence of the Rousseauistic theory is more evident in the design of the presidential institution: since the decision-making power is left largely to the assembly, the head of state, though directly elected for a five-year term, is deprived of substantive prerogatives. Even when the president has powers to intervene in the political process, this intervention is almost automatic, and limited to the creation of the necessary conditions for the continuation of the normal functioning of the other institutions. As a result, the legislative and executive functions are strictly divided between the council of ministers and the assembly, while the president is essentially expected to arbitrate, thus exercising the so-called 'neutral powers'.<sup>3</sup>

The only element which primarily does not fit within the Rousseauistic theory is the Constitutional Court, which limits the discretion of the assembly to the boundaries provided by the Constitution (an effect amplified by the heavy amendment procedure). However, from the very beginning there have been some signs of self-restriction from this body, which made its role less prominent than the role of the famous Hungarian Constitutional Court.<sup>4</sup>

Although the Rousseauistic rationale behind the constitutional framework did not produce conditions favourable for outright or repeated violations of human rights or forms of seriously oppressive majoritarianism, it did have one negative consequence in the first five years of the Bulgarian transition. The concentration of the bulk of powers in the assembly led to distorted legislative-executive relations and to a succession of weak cabinets, both in terms of durability and policymaking. The desire to grant to the National Assembly supremacy in the constitutional structure was so obsessive that a constitutional law professor ventured

to advocate the idea that the governmental legislative initiative is incompatible with the separation of powers principle (in a parliamentary system).<sup>5</sup> Legislation was not the only field where the assembly was supposed to be the main actor: its functions expanded to an extent untypical for most parliamentary regimes. For example, it practically attained control over the public electronic media (through a standing committee),<sup>6</sup> it had a monopoly to initiate a referendum (Art. 84.5, strengthening the relations between the 'sovereign will' and its only true interpreter), and it had and has a monopoly over the right to declare martial law (Art. 84.12).<sup>7</sup>

All these arrangements create the impression that the regime operates under majoritarian assembly rule. And indeed, this was the dominant mode of politics in Bulgaria during the 1990s. There were governments dominated by the ex-communist BSP in the period 1992-1996, and governments dominated by the democratic reformist parties in the periods 1991-1992 and 1997-2001. Political life was ideologically charged and society was polarized. The majoritarian constitutional model concentrated a lot of powers in the hands of the parliamentary majority and the government. There were constant allegations by the political opposition that the governing parties were interfering in areas which should be free from partisan politics, such as the public electronic media, the judiciary, and others.

All this came to a rather abrupt end in 2001, when both the ex-communists and the democratic reform parties were swept aside by a new populist player, the former tsar of Bulgaria Simeon II. Since then substantive polarization both in the political arena and in society at large has dramatically decreased. This has happened without any major revision of the Constitution. In the following sections it is argued that this was achieved mainly through *quasi-constitutionalization* of specific elements of democratic politics, limiting the room for manoeuvring and competition among the major political actors.

3. Bliznashki, G. (1992) 'Funktsii na presidentskata institutsia v Bulgaria', *Pravna Misul*, 2: 5.

4. Kolarova, R. (1993) 'A Self Restricting Court', *East European Constitutional Review*, 2(2): 48-51.

5. Boitchev, G. (1991) 'Constitutsia na grajdanskoto obshtestvo i na pravovata durjava', *Pravna Misul*, 2: 5.

6. See Kolarova, R. and Dimitrov, D. (1993) 'Media Wars in Sofia', *East European Constitutional Review*, 2: 3.

7. See Elster, J. (1992) 'On Majoritarianism and Rights', *East European Constitutional Review*, Fall 1992, 23. 'The system with fewest checks and balances is the Bulgarian one (among the countries of Eastern Europe).' [my parenthesis].

## The EU Accession Process and Quasi-Constitutionalism

One of the obvious explanations for quasi-constitutionalization is the EU accession process, since the overarching priority of joining the EU obfuscated the differences between the main political parties.

Indeed, the EU has an enormous impact on Bulgarian constitutionalism and democratic politics. The overriding goal of Bulgarian governments was to join this prestigious club of countries, making the EU the single most influential factor in the setting of socio-political priorities over the last ten years. Compliance with EU conditionality, adaptation of governmental structures to meet common standards, harmonization of legislation, and so on, were all paramount governmental concerns. Arguably, these concerns superseded even the goal of winning elections; after all, no incumbent government after 1997 was reelected, while all governments followed basically the same political course with regards to the EU. It is true that compliance with EU conditions and norms was sometimes creative, that there were misunderstandings on both sides in the process of negotiations, that the Bulgarian state machinery was and remained inefficient and incompetent in certain areas, and that there were unavoidable unintended consequences. But, generally, all such side-effects pale in comparison with the achievement of EU membership, which proved to be the most important and the most successful political project carried out by Bulgarian democratic institutions since the fall of the old regime in 1989.

Success of this kind confers democratic legitimacy, all the more so if the people perceive it as success. EU membership has no doubt strengthened Bulgarian democracy, to the point that it may now be irreversible.<sup>8</sup> Nostalgia about the old regime remains strong in Eastern Europe in general, but when it comes to the choice of a form of government, democracy comes first for Bulgarians, and this fact should not be underestimated

in a country with no democratic tradition to speak of. Historically, democratically elected governments had led Bulgaria mostly to 'national catastrophes', particularly during the Balkan wars (1912-1913) and the First World War. The remaining pre-communist history was dominated by authoritarianisms of different sorts in most of which Tsar Boris III played a key role. It is all the more significant, then, that his son Simeon II was democratically elected as Prime Minister of Bulgaria in 2001, and that he subjected his political career to the vote of the Bulgarian citizens.

Whilst no one can seriously argue that the EU has had anything but a positive overall effect on Bulgarian democracy, it is nevertheless a frustrated and disillusioned democracy. There are a host of features of Bulgarian public life which disturb analysts and theoreticians, including:

- a lack of trust and confidence in representative structures, especially parliaments and established political parties;
- low levels of participation in democratic politics, whether in election turnout, party membership, or the number of small donations to political parties;
- better political mobilization of the 'losers of the transition' in comparison with the 'winners', which leads to a specific radicalization of the representative process;
- continued emergence of new populist political parties and movements, which offer the personal charisma of their leaders as a substitute for party structure and programmatic coherence;
- increasing focus on 'identity issues' in the political platforms of winning political parties;
- super-independence of the judiciary (including the Constitutional Court) to the extent of becoming self-serving and corporatist.

8. A recent survey confirms the consolidation of democratic attitudes among Bulgarians: <<http://pewglobal.org/reports/pdf/267.pdf>>. See the tables on pages 6 and 21 in particular. Alongside Hungarians, Bulgarians are most unsatisfied with the actual workings of their democracy (76%). In this sense, the Bulgarian democracy could be considered consolidated (since no alternative exists), but frustrated.

## Europeanization and the Rise of New Populism

All of the above listed features arguably diminish the quality of Bulgarian democracy, and contribute to the frustration and discontent of the people in its democratic institutions. The public strongly believes that political elites are corrupt and incompetent, that they (together with organized crime) are the main beneficiaries of the transition, and that there is a necessity for strong-hand leaders who will put things straight in the sphere of politics. In the recent literature, all these developments have been depicted as a 'rise of populism'.<sup>9</sup>

Populists capitalize on the fact that the mainstream political parties have converging programmes in substantive terms, especially in the socio-economic area, such that many people would find difficulty in distinguishing between the positions of the traditional Left and Right on key economic policies. For instance, almost all political parties support neoliberal economic policies of financial prudence and discipline, which are necessary for the Bulgarian accession to the eurozone.

Thus, new populism could be partly explained as a reaction to the quasi-constitutionalization of politics. Since quasi-constitutionalism has constrained the space for political competition in the socio-economic area, issues such as anti-corruption, nationalism, identity, and so on, become the primary focus of politics. On these issues populists are very strong. In general, political parties and movements that challenge the 'transition consensus' become increasingly popular among sections of the population, which consider themselves under-represented by the mainstream. The 'transition consensus', sometimes referred to as 'liberal consensus', was the manifesto of the mainstream parties, or the parties which did most to bring

Bulgaria into the EU. Its main elements are the following:

- commitment to Euro-Atlantic values such as EU and NATO membership;
- commitment to constitutional principles, such as individual rights, separation of powers, etc.;
- commitment to financial prudence and discipline in line with neoliberal economic policies;
- commitment to the social values of liberalism, such as minority rights, tolerance to ethnic and sexual difference, etc.;
- rejection of nationalist rhetoric.

Since 2005, the last two of these commitments have been increasingly under stress in Bulgarian politics. Whilst this is epitomized most clearly with the rise of nationalist-populist parties such as Ataka, there are also 'softer' versions of populism increasingly amenable to challenging some of the other commitments of the consensus, including the Euro-Atlantic dimension.

And here we arrive at the main paradox in the relationship between EU membership and the quality of Bulgarian democracy. On the one hand, it can be argued that EU membership has been extremely beneficial for the entrenching of democracy in the country. On the other hand, the parties who were the most insistent proponents of this membership and European values are recently suffering continuous and humiliating political defeats. Both Ivan Kostov's political party (which was in power between 1997 and 2001) and Simeon II's party (2001-2007 in government) have by now lost public confidence in dramatic proportions (the support for these forces is around 2 per cent at the moment), whilst the Socialists (2005-2009 leading coalition party) suffered heavy defeat in the 2009 parliamentary elections.

9. For more detailed case-studies of the rise of populism in Eastern Europe see Meseznikov, G. Gyarfasova, O., and Smilov, D. (eds.) (2008) *Populist Politics and Liberal Democracy in Central and Eastern Europe*, IVO (IPA) working paper series, Bratislava. Available at: <http://www.ivo.sk/5353/en/news/ivo-released-working-paper-populist-politics-and-liberal-democracy-in-central-and-eastern-europe>.

## Constraints on Democratic Politics: a Conception of Quasi-Constitutionalism

The term 'constitutionalism' is generally understood to mean the commitment of political actors to the observation of constraining principles in the form of rights and separation of powers.<sup>10</sup> The pre-accession process has helped strengthen the constraining of the powers of political majorities, mainly through the explicit reinforcement of the 'transition liberal consensus' by the EU conditionality. If we consider the political Copenhagen criteria together with the requirement for 'functioning market economy... capable of withstanding competitive pressures', we can see that these conditions in fact overlap with the transition consensus commitments. No serious political actor in Bulgaria could deviate from these commitments, a fact which conferred on them a quasi-constitutional status.

This process could be interpreted as 'quasi-constitutionalization' of politics, since it reached much deeper into the political process than normal constitutions actually do. Quasi-constitutional constraints are not legally enforceable, and isolate policy areas such as economic, social, and foreign policy from the power of political majorities. Quasi-constitutional constraints could be embodied in formal institutions, which parliament can, in principle, dismantle, but the costs of this will be high not only in political terms, but also in terms of parliamentary time, expertise, and other 'transaction costs'. In practice then, deviation from the constraints leaves political actors liable to serious criticism from society at large, external partners, or both, and the political cost of deviation is a significant deterrent. Unsurprisingly, then, quasi-constitutional constraints are habitually observed by the mainstream political players, resulting in extended lifespans beyond those of the existing political majorities themselves.

I will now go on to examine the more concrete expressions of this quasi-constitutionalization as it occurred in Bulgaria over the last twenty years.

### Economic quasi-constitutional constraints

Economic policy was largely a discretionary area for the government until 1996 in Bulgaria. During these first transitional years, the BSP was willing to engage in economic experimentation: it delayed the privatization process, loosened financial discipline for the financing of loss-making state-owned enterprises, and so on. As a result, the financial situation in the country drastically deteriorated at the end of 1996, and the banking system virtually collapsed. In order to tackle hyperinflation, and to restore the trust in the banking system, the Bulgarian government established a currency board, which fixed the rate of the Bulgarian Lev to the rate of the euro (the Deutsche Mark originally). This was the first significant constraint on political discretion in the area of the economy, which deprived the government of the right to alter the exchange rate of the Bulgarian currency. The second major constraint was the conclusion of various agreements with the International Monetary Fund and the World Bank, which provided loans in return for fast reforms in the area of privatization and the improvement of the functioning of the administrative apparatus.

All of these factors significantly reduced the possibility of designing radically different economic policies. Gradually, the two main parties – the UDF, and more significantly the Socialists (BSP) – recognized these constraints as fully legitimate. This recognition, however, brought their economic programmes very close together, and made them virtually indistinguishable after 1997. The beginning of the pre-accession negotiations for EU membership simply reinforced and further legitimated the existing economic constraints, as did potential membership in the eurozone, which would require tight financial discipline in line with neoliberal policies.

10. See Alexander, L. (ed.) (1998) *Constitutionalism: Philosophical Foundations*. Cambridge University Press, Cambridge.

### Political quasi-constitutional constraints

The accession of Bulgaria to EU and NATO imposed a virtual 'political supervisory board' on the Bulgarian government. It had to report regularly to the EU Commission on progress in agreed-upon reforms, as well as to coordinate its foreign policy with EU and NATO partners. The room for independent initiatives was decidedly decreasing, although of course it could not be fully eliminated.

In the area of substantive reforms of the administration and the judiciary, the influence of the EU Commission was very strong: a fact which has been well studied and documented. The overall result of the monitoring and the conditionalities was, by and large, positive from the point of view of the modernization of the country. But it should be noted that political priorities were set up together by the Bulgarian government and the Commission. Due to this joint decision-making, some issues were given much higher political priority on the public agenda, such as the paramount concern given to reform of the judiciary during 2002-2009. The same was true for the fight against corruption and organized crime, whilst areas in which the EU was not that interested, such as the reform of the public education system and healthcare, were systematically neglected by successive governments. The appropriation of public funds is a reliable indicator: while the budget of the judiciary was rising significantly from year to year (as were the salaries of the judiciary), the budget for the education system remained relatively stable (as did the salaries of teachers and university professors). This situation was the reason for a major strike in the school system in the autumn of 2007, which was the biggest strike seen in Bulgaria after the changes in 1989.

### Judicial constitutional and quasi-constitutional constraints

The Bulgarian Constitutional Court (BCC) and the Bulgarian judiciary asserted themselves strongly during the transition period. The Constitutional Court has the *legal power* to curb the will of political majorities by invalidating acts of parliament. In

comparison with the Hungarian Constitutional Court, the BCC has not been activist: in many areas it has been rather self-restricting, leaving more room for manoeuvring to political majorities. However, in a number of areas the BCC has also been very activist in the sense of reading the abstract and indeterminate language of the Bulgarian Constitution contrary to the interpretation of political majorities.

Thus, during the 1990s, the Bulgarian Constitutional Court managed to bracket out from political competition at least four major substantive policy areas, against the will of governing political majorities. These were restitution of agricultural land, restitution of urban property, judicial independence, and independence of the public electronic media. In all these four areas there was significant political disagreement. In the first two, the disagreement was between the Left and the Right: the Bulgarian Socialist Party and the Union of Democratic Forces. The Socialists opposed the restitution of property nationalized by the communist regime, and instead, introduced a scheme of compensation for the assets with state bonds. The UDF, with the decisive help of the Court in this regard, prevailed: the principle of full restitution for nationalized agricultural property was promoted to the rank of a constitutional principle.

Regarding the independence of the judiciary and the media, the political dividing line ran not so much between Left and Right, but between government and the opposition: throughout the 1990s, Bulgarian governments had tried to assert their influence in these areas. Here again the Court was quite instrumental in curbing these attempts.

Overall, the impact of the Court in this period could be assessed as positive, but again a side-effect of this influence was the diminishing of the room for substantive political competition after the constitutionalization of particular questions.

Since the beginning of the new century, the Constitutional Court has focused predominantly on the issue of judicial independence, interpreting this

principle to prevent the possibility of any major reform of the judicial system. This has brought the Court in conflict with the political establishment, since most of the parties at the present moment would adopt more radical reforms than the Court would be willing to permit. In any event, however, the constitutionalization of a very strict conception of non-interference with the judicial system has further decreased the possibilities for radically different ideas of judicial reform – a policy area which became central in the period 2001-2007.<sup>11</sup>

International courts, and especially the European Court of Human Rights (ECtHR), have had a similar impact on the Bulgarian political process. One issue which illustrates this point concerns the legitimacy of ethnic minority parties. Pressure from the Council of Europe and its bodies was key for the legitimation and legalization of the Movement of Rights and Freedoms, which is primarily an ethnic minority party.

In terms of quasi-constitutional judicial constraints on political majorities, one could point out the increasing assertiveness and the autonomy of the ordinary Bulgarian judiciary. The Supreme Administrative Court (SAC) is a case in point. This body attempted to play a significant role in some of the big privatization projects of the Simeon II government in the period 2001-2005. In coalition with some political actors, the SAC helped to block the privatization of the tobacco monopoly company Bulgartabac. The SAC also threatened to stall one of the major reforms in the education system, by invalidating (temporarily) the introduction of A-level exams. All these instances demonstrate that political majorities face increasing competition from independent judicial bodies in the policymaking process. The EU insistence on issues such as strengthening of judicial capacity, judicial independence, and so forth, have amplified these trends.

### NGOs as quasi-constitutional constraints

NGOs have not been a significant constraining factor on the Bulgarian political process, at least in comparison with the other above mentioned and listed factors. Still, however, there have been examples where NGOs have been successful in the imposition of specific goals and priorities on political actors. The most prominent example of this was the anti-corruption programmes designed by the Coalition 2000 organization and the Centre for the Study of Democracy. With the help of significant foreign aid from USAID, Coalition 2000 managed to raise public awareness of corruption and make anti-corruption one of the top priorities of government. While the results of these efforts are subject to intense debate, it is beyond doubt that the problem itself, as well as the strategies for tackling it (measurements of corruption, design of action plans, creation of anti-corruption commissions and other bodies), were virtually imposed on political actors by NGOs and foreign donors. The EU granted further legitimacy to the NGO-initiated anti-corruption campaigns and compelled successive governments to take them seriously.

All these considerations suggest that the EU accession process has helped the entrenchment of a quasi-constitutionalism which imposes quite comprehensive and pervading constraints on the political process. Paradoxically, however, this entrenchment has arguably had little effect on the development of constitutionalism proper, which consists in respect for the formal Constitution and its protective mechanisms, such as the Constitutional Court. In other words, while quasi-constitutional constraints have flourished in the pre-accession period, the proper constitutional constraints did not fare that well. This is especially true of the Constitutional Court, whose most successful period was the 1990s, and which went through a crisis during the pre-accession years (2001-2007), as I will now examine.

11. For a more detailed account see Smilov, D. (2006) 'EU Enlargement and the Constitutional Principle of Judicial Independence'. In: W. Sadurski, A. Czarnota and M. Krygier (eds.), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Order*. The Netherlands: Springer.

# The Constitutional Court of Bulgaria: How Quasi-Constitutionalism Undermined Constitutionalism Proper

The BCC is a *European*, sometimes called Kelsenian, type of constitutional court. In contrast to the American model, where 'any judge of any court, in any case, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional',<sup>12</sup> in Europe, constitutional courts are specialized jurisdictions having the exclusive power to deal with constitutional disputes. Moreover, they are authorized to review laws in the abstract, that is to say, the case and controversy constraint does not apply to these specialized bodies. In cases of abstract review of constitutionality of legislation, particular state institutions (and in some exceptional cases, individuals) are authorized to challenge laws, without having to prove that they are directly affected by these laws.

Another difference between the European and American models concerns the appointment of judges. In Europe, not only career judges, but also law professors, lawyers, and sometimes politicians may become members of the Constitutional Court. Also, some European courts (although not the Bulgarian one) enjoy the power of preliminary review

of legislation, that is, review before a particular law has been promulgated and entered into force. Finally, European constitutional courts are often entrusted with a wide range of additional prerogatives not typical for a judicial body: they rule on the constitutionality of political parties, on the validity of elections, in cases of impeachment of politicians, and so on. Table 1 illustrates the close fit between the European model of constitutional review and the BCC.

### The anti-majoritarian Court: 1991-1997

The overall policies of the BCC in this period could be described as anti-majoritarian in the following sense. In this period the country was run mainly by left-wing governments. The only exception was the period 1991-1992 when the UDF was in power in coalition with the Movement of Rights and Freedoms (MRF), the political party of the ethnic Turks in Bulgaria. However, in 1992 the MRF switched sides and formed a government with the BSP, with the result that the Court scrutinized very closely most of the key policies of the socialists, and blocked and reversed many of them. In the area of media regulation the BCC was one of the key opponents of

Table 1:  
**Structure of the Bulgarian Constitutional Court as a 'Kelsenian' court**

No. of Judges	Term of office	Judges appointed by	Eligibility requirements for judges	Petitioners	Quorum	Decision-making rule	Dissenting opinions	Seat of the Court	Staff
12	Nine years, four judges are replaced every three years. No right to re-election. (Art. 147.2)	Four judges by the president; four judges by the National Assembly; four by the general assembly of the judges of the Supreme Administrative Court and the Supreme Court of Cassation (Art. 147.1)	Jurists with high moral and professional standing, having fifteen years of experience as jurists	1/5 of the total number of MPs (48); the President of the Republic; Council of Ministers; Supreme Court of Cassation; Supreme Administrative Court; the Prosecutor General; communal councils (on jurisdictional issues only)	Eight judges for a seating of the Court	Majority of the members of the Court (seven judges at least); in case of ties - six votes to six, the two opinions are published	Judges have the right to sign dissenting opinions, which are not published in the Official Gazette, but only in the annual collection of decisions	Sofia	No legal clerks

12. Shapiro, M. and Stone, A. (eds.) (1994) 'Special Issue: The New Constitutional Politics of Europe', *Comparative Political Studies*, 26; 397-561 at 400.

the socialist Videnov government in its attempts to impose control over the public electronic media. Several times the Court struck down laws of the government concerning the powers and the composition of the regulatory body of the public radio and television (see especially Decisions 15, 16, 24 of 1995; Decisions 7, 21 of 1996). Similarly, the Court opposed the Socialist government of Videnov in the regulation of the judiciary. The Court blocked the attempts of this government to dismiss the existing Supreme Judicial Council members before the expiration of the mandate of the Council, which is a body administering the judiciary (Decision 9 of 1994).

Especially revealing of the anti-majoritarian trend of the policies of the BCC in this period are the decisions of the judges on the restitution of agricultural and urban properties nationalized by the communist regime after 1944. In general, the Court blocked most of the attempts of left-wing governments to revise and to water down the restitution laws adopted by the short-lived right-wing governments in 1991-1992. It is not surprising then that the 'left-wing' judges (judges appointed by a President or a parliamentary majority from the Socialist Party) have filed many more dissenting opinions per head than their colleagues on these issues.

### The Court as a judicial extension of government: 1997-2001

In the following period, the right-wing government of Ivan Kostov enjoyed a far more favourable judicial environment than its predecessors. Surprisingly, the Court allowed governmental intervention with the public electronic media and the Supreme Judicial Council (SJC). As to the judiciary, in 1999 the resolve of the Court to prevent governmental interference with the SJC weakened, when a UDF sponsored *Law on the Judicial System 1998*, envisaged a new formula for the appointment of the judicial quota of the body.<sup>13</sup> Following an established tradition, the government's aim was primarily to dissolve the old SJC,

and thus to eliminate or limit the influence of certain inconvenient members. The judges upheld the new law, arguing that the reappointment was necessary in view of the final completion of the constitutional structure of the judicial system, with the creation of appellate courts and appellate prosecutorial offices.

As to the regulation of the electronic media, with the coming to power of Kostov's cabinet, hopes were high that the situation would be finally resolved in favour of media independence and professionalism. The formula of appointing the regulatory body (NSRT) provided by the new law was not a dramatic improvement, since the members were to be elected by the President of the Republic (4) and the parliamentary majority (5). Since President Stoyanov was from the same party as the ruling majority (UDF), the formula produced similar results as the previous arrangements: dominance of one party in the appointment process.

The BCC disregarded some of its own arguments from previous case law and ultimately upheld the UDF sponsored legislation.<sup>14</sup> It is difficult to explain why the judges went out of their way in this case, particularly bearing in mind the serious pressure from civil society groups and journalists to strike down the law. Was it a sense of political loyalty to the government, or just a misinterpretation of constitutional principles? In any event, the results of the law were the delegitimation of the NSRT and repeated accusations of political partiality. The impression that the ruling party could pick and choose directors of the national radio and television persisted, as well as the public suspicion that the programmes were generally favouring the ruling party and the government. Since the procedure for licensing private radio and television stations was under the control of the NSRT and the government (through a special commission appointed by the cabinet), there were further suspicions that candidates close to the government were favoured. These suspicions were exacerbated when, weeks

13. Decision 1, 1999: *Constitutionality of Amendments to the Law on the Judicial Power 1998*.

14. The Court dealt with the new law in Decision 10, 1999: *Constitutionality of the 1998 Law on Radio and TV*. The judges held that the first factor guaranteeing the independence of the NCRT under the new arrangements was the fact that the MPs were obliged by the Constitution (Art. 67.1) to represent the people as a whole. The second major guarantee for the independence of the NCRT, in the view of the judges, was the principle of 'rotation', according to which the members were to be elected. Thirdly, the Court pointed out that the practice of developed Western democracies showed that such an arrangement was ultimately acceptable.

after Kostov's resignation, the SAC annulled, on the grounds of procedural violations, the license of Nova TV, a private national programme allegedly close to Kostov.

Another example of the accommodation of the policies of the Kostov government by the BCC was the area of healthcare and social security regulation. In this area the Court did not introduce any major revision of the policies of the government, although they were quite controversial politically and affected large groups of citizens (Decisions 12, 1997; 8, 21, 29, 32 of 1998; 5 of 2000).

An assessment of the first ten years of the operation of the Constitutional Court (1991-2001), would suggest that it was an activist and partisan court. In this period, 36% of its decisions invalidated legislation or other important parliamentary and presidential acts; moreover, the judges have ruled that more than half of all petitions alleging unconstitutionality of acts of the president and the parliament have been well founded. Also, in 67% of its decisions the BCC has been petitioned by groups of parliamentarians, which, in most of these cases, means that the political opposition has been the initiator of the proceedings. In other words, the opposition in parliament has actively used judicial review as a political instrument against the majority. (It must be noted, however, that since 2001 this trend is being reversed. At present the Constitutional Court is more often approached by non-politically elected bodies.)

### **2001-2008: Institutionalization and relative marginalization**

At the end of 2002, the Bulgarian Constitutional Court took a key decision with which it invalidated the plan of the current government to reform the judicial system (Decision 13, 2002). The judges argued that many provisions in the amendments to the Law on the Judicial System, sponsored by the government of PM Simeon Sax-Coburg-Gotha, violated the principle of judicial independence in the Bulgarian Constitution.

The BCC has a (not entirely consistent) history of defending judicial independence against interference by the political branches of power – the legislature and the executive. Especially prominent in this regard was the resistance of the Court to the plans of the 1994-1996 Videnov government to introduce substantial judicial reforms, which were in many respects similar to the reforms planned by the present government.

In 1994-1995 the stance of the Constitutional Court was widely acclaimed by commentators of Bulgarian politics, and by representatives of the EU and the Council of Europe. In order to understand better the dynamics of the Court's stance on judicial reform, we must consider the role of the EU, which insisted on judicial reform as a prerequisite for Bulgarian accession.

Judicial reform in Bulgaria has proven one of the most difficult issues of transition politics. Generally, the Bulgarian judicial system is seen as slow, cumbersome, and inefficient. Trials and proceedings last for years, prisons are overcrowded, there is low public trust in the system as a whole, and it has been in a process of constant reforms since the mid-1990s. These criticisms could be found in all of the regular reports of the European Commission regarding the progress of Bulgaria in the implementation of the Copenhagen criteria. Unfortunately, these reports did not provide a reliable comparative framework for the assessment of these problems.

Nevertheless, the jurisprudence of the BCC since 2001 has not accommodated the demands of the Bulgarian government and the EU Commission for radical reforms, including structural reforms concerning the place of the prosecutorial office and the investigators. The Court has stuck to a rigid position, according to which such reforms are to be carried out by a special constituent legislature, a Grand National Assembly. Such a legislature is extremely difficult to convene, and in practice, a requirement for its convening makes radical reform of the judiciary in Bulgaria impossible.

Since 2001, the influence of the Court has decreased, as its efforts to modify and block successive attempts by Bulgarian governments to reform the judiciary, have led to it becoming seen by parts of the public as a self-serving body which stalls necessary reforms. A telling sign was the diminishing number of cases before the Court, which currently stands at only around ten per year, sometimes even fewer. Respect for the Constitution has also suffered as a result of this relationship between the Court and parliament. In order to continue the reform of the judiciary, political majorities in Bulgaria introduced a series of constitutional amendments intended to increase the accountability of the judiciary, which were subsequently partially abolished by the Constitutional Court. Further parliamentary

amendments to the Constitution saw the introduction of a Judicial Inspectorate, which supervises the performance of the judges. The continuing constitutional amendments, accompanied with the generally reluctant attitude of the Court towards them, have served to undermine public trust in, and respect for, the Constitution, such that it has come to be considered defective and responsible for the failures in the justice system.

Thus, while EU accession has contributed to the emergence of a new and pervasive quasi-constitutionalization of Bulgarian politics, it has not necessarily strengthened the powers and legitimacy of the Bulgarian Constitutional Court, nor trust in, and respect for, the Constitution.

## Quasi-Constitutionalism and Representative Democracy

Parliamentary government in Bulgaria follows the ideals of a strong cabinet and executive that were popularized in western Europe after the Second World War, and which feature in most post-War constitutions (primarily the German Basic Law, but elements could be found in the Italian Constitution, and the Constitutions of the Fourth and Fifth French Republics). Sometimes these ideas are grouped together under the heading of 'rationalized parliamentarism', although there is no clear scholarly convention as to the constitutional techniques and arrangements falling into this category.<sup>15</sup> The paradigmatic example of such a technique is the German 'constructive vote of no-confidence', which is designed to prevent parliamentary crises by combining the voting of a chancellor out of office with the appointment of a successor. Most of the techniques are designed to create durable and stable legislative majorities, which can form and support a government.

Rationalization of parliamentarism concerns many areas of constitutional law, but we are principally concerned with the following three:

- the electoral procedures (introducing legislative thresholds for avoiding fragmentation of parliament, prohibiting dissolution of parliament and new elections in certain cases, limiting the discretion of presidents and executives to dissolve the parliament and call snap elections, etc.);
  - the process of formation of cabinet (limiting presidential discretion in the appointment of the prime minister, speeding up and facilitating the procedure, etc.);
  - the accountability process (limiting the possibilities of votes of no-confidence in the government); and
- the legislative process (ensuring the dominance of the government in the production of legislation, and limiting the influence of the president, the opposition, or individual MPs).

Of course, possibilities for parliamentary questions, interpellations, votes of no-confidence, investigative commissions, and so forth do exist and the opposition quite regularly uses its right to initiate a vote of no-confidence, the debates on which are also televised, though historically, none of these measures seriously threaten the stability of the government and its control over the legislative agenda of the parliament in routine situations. In order for there to be accountability within the model of 'rationalized parliamentarism', there is a need for relatively stable and programmatic parties. Indeed, 'rationalization' offers very strong institutional incentives for the creation of stable parliamentary majorities and parties in general, even in political contexts where there are no established, programmatic political parties and democratic traditions. In order to ensure accountability of the executive in models of 'rationalized parliamentarism', political parties must demonstrate loyalty to a particular ideology, a coherent means of expressing it to the electorate, and the programmes necessary to implement their principles.

The next section will examine how the trust of the people in the representative structures of democracy in Bulgaria has been undermined, and how this is related to the rise of political populism. Since populism is, to an extent, a reaction to the excesses of quasi-constitutionalism, this loss of confidence in democratic representation may be seen as a consequence of the phenomenon of quasi-constitutionalism itself.

15. The coinage of the term is often attributed to Mirkine-Guetzevitch, B. (1931) *Les nouvelles tendances du droit constitutionnel*, second edition, Paris. For an introduction to 'rationalized parliamentarism' in Eastern Europe see Tanchev, E. (1993) 'Parliamentarism Rationalised', *East European Constitutional Review*, Winter 1993.

## EU integration and its impact upon political accountability

Bulgaria joined the EU with one of the lowest levels of trust in its representative institutions (see Table 2). There was not a single significant period during the transition when the main state institutions enjoyed stable public support. Somewhat paradoxically, however, falling confidence in the representative institutions became even more prominent after the consolidation of the Bulgarian democracy.

Rather than providing independent checks and balances on the political class, the judiciary is regarded by the public as merely another beneficiary of the privileges and impunity of the elite. Frequently, governments start their mandate with a high level of approval, but no government has been re-elected in Bulgaria since 1989, evidence of rapid declines in the levels of confidence of the electorate.

Most significantly, over the last ten years, the 'programmatic' parties, which claim to have an ideology and detailed pre-election programmes, have been in retreat. At the most recent parliamentary elections in July 2009, for instance, the traditional parties of the Left and the Right were swept aside by a newcomer, the political party GERB, which won 116 out of the 240 seats of the Bulgarian parliament.

These developments suggest that the chain of loyalties, crucial for accountability in circumstances of rationalized parliamentarism, as described previously, is seriously disrupted in Bulgaria. People are generally uninterested in party programmes and regard the parties largely as instruments for pre-election mobilization and removal of incumbent governments. This contributes to the emergence of a politics empty of substance, that is instead dominated by populist appeals, identity issues, and personality politics.

Table 2: **Trust in institutions**

	Trust		Distrust	
	EU 25	Bulgaria	EU 25	Bulgaria
Political parties	22%	10%	72%	84%
Parliament	38%	17%	54%	75%
Government	35%	24%	59%	66%
Judicial system	48%	20%	47%	73%
Trade unions	38%	13%	48%	64%

Source: Eurobarometer, N° 66

## Conclusion

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EU accession has strengthened specific informal but far-reaching constraints on the political process in Bulgaria, which constitute a form of 'quasi-constitutionalism'. These constraints have profound implications for the quality of Bulgarian democracy. On the one hand, they have made democracy irreversible and helped ensure its continued consolidation. On the other hand, however, they have constrained the space for political competition among mainstream political parties, which has reduced their potential to mobilize popular support and has created space for the emergence of new

populist political forces. Another undesirable consequence is that the Constitutional Court has suffered in terms of status and legitimacy, as has respect amongst the populace for the Constitution itself. EU accession and the entrenchment of quasi-constitutionalism have contributed to the undermining of trust in the representative institutions in Bulgaria, and especially the political parties, which in turn throws into question the possibility of responsible and accountable government.



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The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

## The Social Foundations of Constitutions

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Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented. Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects. Drawing on the research and literature of politics, economics, and sociology, the programme will examine the concept and practice of representation, the legislative process and the character of modern administrative government, and the role of the judiciary in shaping constitutional instruments such as bills of rights.

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