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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

in co-operation with
THE CONSTITUTIONAL COURT OF BELARUS

INTERNATIONAL CONFERENCE

**“THE ROLE OF CONSTITUTIONAL REVIEW BODIES
IN ENSURING THE RULE OF LAW IN RULE-MAKING
AND LAW-ENFORCEMENT”**

Minsk, Belarus

27-28 April 2017

“OPENING PRESENTATION”

AND

“CONCLUDING REMARKS”

By

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OPENING PRESENTATION

*Chairman,
Honourable judges,
Your Excellencies,
Ladies and Gentlemen,*

It is a pleasure for me to be in Minsk today and to welcome you, on behalf of the Venice Commission, to this International Conference on *the Role of Constitutional Review Bodies in ensuring the Rule of Law in Rule-Making and Law-Enforcement*.

Our co-operation began nearly twenty-three years ago, in November 1994, when Belarus became an Associate Member of the Venice Commission.

Belarus had requested its first opinion from the Venice Commission a year later, in November 1995. The request concerned the laws on the Supreme Soviet and on the President of the Republic.

This was followed by a further request for an opinion another year later, in November 1996, on the amendments to the Constitution of this country.

Already then, the Venice Commission insisted that the judgments rendered by the Constitutional Court be implemented.

*Chairman,
Ladies and Gentlemen,*

Today's topic "*The Role of Constitutional Review Bodies in ensuring the Rule of Law in rule-making and law-enforcement*" is an important one.

The rule of law is a topic that is very dear to the Venice Commission. We have adopted a Checklist on this issue in March of last year – it is a topical theme and far from being confined to the discussion of specialists, it has become a subject of political debate and assessment. However, I will not discuss the Rule of Law Checklist any further, as it will be presented to you by Ms Simona Granata-Menghini later on today.

*Chairman,
Ladies and Gentlemen,*

Experience has taught us that constitutions tend to guarantee the separation of powers, the rule of law and the protection of fundamental rights.

Experience has also shown us that these basic principles and constitutional values must be respected, because they provide the foundation for peace and stability in any given country.

Implementing a constitution, which means turning its abstract provisions into rules that govern everyday life is – however – a difficult task. It should not be left entirely to the legislator.

For this reason, this task is often also entrusted to other organs – constitutional review bodies – and, in particular, to the judges and first and foremost to the constitutional judges. And this is where constitutional justice, and "constitutional review" as well as those bodies that carry out this task, come into play.

Chairman,
Ladies and Gentlemen,

Today's topic is an interesting and important one, because it is not only the Constitution, but constitutional review, which has a significant role to play in upholding the rule of law, democracy and the protection of human rights.

Constitutional review is also important, because it tends to play a key role in ensuring that constitutions, once adopted, remain relevant in daily life.

But, it might be difficult to see how a court could annul laws adopted by Parliament, which represents the sovereign will of the people. This is often referred to as the *counter-majoritarian problem*.

The trend in Europe is to follow Kelsen's idea, whose answer to this problem was to create specialised constitutional courts, which, by virtue of their constitutionally guaranteed function and composition, provide the necessary legitimacy to carry out constitutional control.

This is why these types of courts have a different composition from that of ordinary courts. The concurrence of various powers in the appointment procedure, coupled with a balanced composition of this institution, ensure that the necessary equilibrium for constitutional review is reached.

Chairman,
Ladies and Gentlemen,

The Constitutional Court of Belarus was established in April 1994, just before our co-operation began in November of that same year.

In the two decades of its existence, the Constitutional Court of Belarus had gone through several stages:

(1) It was initially set up as a separate independent body, carrying out a *posteriori* review of the constitutionality of normative legal acts.

(2) Under the new Constitution of 1996, the status of the Constitutional Court had changed. It was included in the judiciary and could no longer initiate proceedings. It carried out a *posteriori* review of the constitutionality of normative legal acts, but only when requested by those on the list of entities that could apply to the Constitutional Court. It also rendered decisions in order to overcome constitutional legal gaps in the law on application by citizens and organisations.

While the role of the Court was reduced due to its inclusion into the ordinary judiciary, this enabled the court to develop a welcome practice of acting on the basis of petitions from individuals because the Constitution provides for access individuals to "courts".

(3) It was in 2008 that the powers of the Constitutional Court were changed, aimed at increasing its role by empowering it to exercise systematic *a priori* review of the constitutionality of laws adopted by Parliament before they were signed and enacted by the President.

A priori review therefore became the main activity of the Constitutional Court.

This was an interesting development. Constitutional Courts in other countries usually have this type of review only for signed treaties before they are ratified.

It is important that a *a priori* review not prevent a *posteriori* review. Unconstitutional elements of a

law are often only revealed once the law is implemented. It is therefore very important that the Constitutional Court be able to provide guidance to ordinary courts and the administration on the correct interpretation of the law, in conformity with the Constitution.

The development of (indirect) individual access to the Constitutional Court directly on the basis of the Constitution was a welcome practice. Important judgments have resulted from this practice.

A *posteriori* individual access to the Constitutional Court is key in the protection of human rights and its introduction should therefore be considered.

*Chairman,
Ladies and Gentlemen,*

With the growing importance and protection of fundamental rights, there is a clear tendency towards the introduction of mechanisms that allow for the protection of individual, fundamental, rights through the constitutional court and, more specifically, for individual access, as the Venice Commission has noted in its Study on individual access to constitutional justice.

The protection of fundamental rights is an uphill battle in every country, especially at the moment with the ever increasing threat of terrorism. It is therefore of the utmost importance that constitutional courts be able to play their role as the guarantor of constitutionally protected fundamental rights.

In this context, the freedoms protected by the Constitution of Belarus under Article 33 (freedom of thought/belief/expression), Article 35 (freedom of assembly) and Article 36 (freedom of association), among others, become ever more important.

For instance, as regards the freedom of expression, ordinary laws are often used to restrict rights and freedoms, by subjecting them to state control. But, the freedom of expression – of the individual and the media – enables the public to hold authorities – in the widest sense of the word – accountable through the principles of transparency and an open public debate. A democracy does not fear debate, because it is through open discussion that ideas should be countered and the supremacy of democratic values be demonstrated.

Persuasion through open public debate is the most democratic and effective means of preserving fundamental values.

The same applies to other freedoms, such as the freedom of assembly. An essential part of this freedom is the ability to respond peacefully and immediately (spontaneously) to some occurrence, incident, other assembly, or speech – and should be regarded as an expectable feature of a healthy democracy.

The authorities of a given country should therefore protect and facilitate any spontaneous assembly so long as it is peaceful in nature. It should also be noted that spontaneous and urgent assemblies are protected by Article 11 of the European Convention on Human Rights.

It is important that the Constitutional Court of Belarus to be vigilant in these areas.

*Chairman,
Ladies and Gentlemen,*

I would like to make one final observation, and this is on the exemplary work of the Constitutional Court of Belarus in upholding fundamental rights protected by the Constitution, notably the right to life.

You will remember the Constitutional Court's landmark judgment of 11 March 2004, in which it referred to Article 24 of the Constitution proclaiming the temporary ("until its abolition") and exceptional nature of the death penalty.

Although the judgment did not lead to the abolition of the death penalty, the Constitutional Court recognised that the results of the 1996 Referendum¹ could not preclude the relevant authorities from abolishing the death penalty. On the contrary, the Constitution foresaw the abolition of the death penalty by pointing at its temporary character, so it was the State's obligation to move in this direction.

In other words, the Constitutional Court led the way and we would like to encourage the Belarusian Parliament to follow up on this judgment.

This would be a pivotal move by Belarus and mark an important *rapprochement* between this country and the Council of Europe

*Chairman,
Ladies and Gentlemen,*

Let me end by saying that I wish us to have very interesting discussions on the "*Role of Constitutional Review Bodies in ensuring the Rule of Law in rule-making and law-enforcement*"!

Thank you very much for your attention.

¹ A seven-question referendum was held in Belarus on 24 November 1996. Four questions were put forward by President Alexander Lukashenko on changing the date of the country's independence day, amending the constitution, changing laws on the sale of land and the abolition of the death penalty.

CONCLUDING REMARKS

*Chairman,
Honourable judges
Your Excellencies,
Ladies and Gentlemen,*

We have, for the last two days, heard many interesting presentations and viewpoints; all reflecting in one way or another our common understanding of the rule of law as an ideal we strive to achieve.

We agree that the rule of law goes hand in hand with the separation of powers and human rights. The separation of powers means that no one is able to gain absolute power and stand above the law.

We are also aware that in today's world, we must take into account the current reality of influential actors and factors threatening the rule of law; for example, corruption stemming from the close ties between powerful forces in the financial world and political authorities. Such corruption has become a global epidemic and a serious peril to the delicate pillars we want our societies to rest upon: a strong political democracy, effective protection of human rights and the rule of law.

Yesterday, Ms Simona Granata-Menghini presented the Venice Commission's Rule of Law Checklist adopted by the Commission in March 2016. She reminded us that the rule of law depends on people being collectively responsible. The same goes for the States co-operating here at this international conference on the role of constitutional review bodies in ensuring the rule of law in rule-making and law-enforcement. The collective responsibility in upholding the values essential for our lives and future is our common, universal responsibility and we are pleased to hear the President of the Belarusian Constitutional Court, Mr Petr Miklashevich, emphasize the importance of promoting the Rule of Law Checklist in this region.

We are reminded, here in Minsk, of our common past; the traumas of World War II. The greatest atrocities of World War II in Eastern Europe took place in Belarus. By the end of the war, half the population of Belarus had either been killed or displaced. The world vowed that the crimes and human rights violations of the war would never happen again. The UN's Universal Declaration of Human Rights of 1948 was the first global expression of rights to which all human beings are inherently entitled – and two years later, the European Convention on Human Rights drafted by the newly formed Council of Europe in 1950 marked a turning point in history towards peace and diplomacy – resting on the pillars of democracy, human rights and the Rule of Law.

Ladies and Gentlemen,

On behalf of the Venice Commission, I would like to thank you all for your inspiring speeches and remarks and thank our gracious hosts for this successful and well-organised conference.

We have been told by our colleagues here that the Bison, the European continent's largest land mammal, originates from Belarus and is a national source of pride. The Bison was driven to extinction in the first half of the 20th century. It has become an endangered species, perhaps in a way like the rule of law. But, there is hope; the numbers of Bisons has increased again. There is a symbolic value in bringing back animals that were nearly extinct; it is a sign of hope that if we choose, we can also, with the help of the Venice Commission's Rule of Law Checklist,

enhance the degree of respect in any given country for access to justice and prevention of abuse of powers. My feeling is that a step in the right direction for this region has been taken here in Minsk during the last two days.

Thank you very much.