

# 1 The Political System Reform in Belarus: Projects and Ideas

by Andrei Lyakhovich

The need for strategies to develop the state system and the society at large may only arise provided there is consensus among the general public on basic political values, and that the political elite is well aware of national and state interests.

Belarus does not meet either condition. A latent civil war between opposing political forces prevents the country from overcoming institutional and functional crisis in the political system.

The country's ruling elite has not changed since the break-up of the Soviet Union, with functionaries of the Soviet times still at its core. As a result, the ruling elite have failed to adapt to changes following the demise of the Soviet Union. The Belarusian ruling elite's ideology is one of interim rulers who, rather than looking ahead, are concerned with present circumstances, and are interested in the politics of 'right here and right now' instead of the country's longer-term development. These features have affected both the political system's reform in Belarus and the discourse around it.

In the first few years of independence, i.e. since 1991, the Communist elite took a step back from discussing the country's prospects for political development. Democrats, who dominated the debate, insisted that Belarus has a future as a parliamentary republic, a widespread form of governance in Western countries. However, the *nomenklatura* managed to retain real powers and maneuver the discourse in such a way as to suit their interests. The Con-

stitution of Belarus, adopted on 15 March 1994, established the institution of presidency.

However it did not offer clear-cut mechanisms for concentrating power in the hands of the executive, the 1994 Constitution did not rule out such a possibility, either. Loopholes in constitutional provisions allowed President Alyaksandr Lukashenka and his entourage to set up a tight authoritarian system using i.a. the constitutional referendum in 1996.

The succession of the three models in Belarus during its independence, i.e. a parliamentary republic, the 1994 constitution and the 1996 constitution, determined the country's political thinking.

Those who want the country to embark on a democratic path consider the parliamentary republic to be an ideal pattern. As a means to transition towards the ideal model, they suggest a return to the 1994 Constitution, which was adopted when the government's legitimacy was still unquestioned.

Opponents of the authoritarian regime were preoccupied with restoring the 1994 constitutional order, and did not work on alternative proposals to reform the political system.

The authorities have not considered political reforms either, since they regard the system established by the 1996 Constitution as immune from any, even minor, changes. Amendments of the constitution's status proposed by members of the National Assembly, itself a puppet legislature, provoked a harsh response from Alyaksandr Lukashenka.

Some political reform ideas, rather than models or projects can be found in platforms of presidential candidates and political parties, and in papers developed by non-governmental think tanks. Notably, the platforms of presidential candidates and political parties were originally designed as declarations tailored to broad public appeal. They would be of little use for modeling Belarus' actual political future.

## Election platforms of presidential candidates

The first presidential election was held in Belarus following adoption the 1994 Constitution; therefore in their platforms, the candidates viewed the political system as already established.

In his program called 'To Lead the People Away from the Abyss', Presidential candidate Alyaksandr Lukashenka stressed that the government should be directly involved in managing business operators by appointing their chief executive officers<sup>1</sup>. Thereby, he declared that the State retain ownership of the enterprises. This, he purported, would be the key mechanism for consolidating the president's position as the head of State.

The platform of another candidate, Alyaksandr Dubko, entitled 'This Country Needs a Good Manager' lacks understanding of the need to separate the powers. Dubko expressed this even more explicitly than Lukashenka by claiming that 'order should be established in the country from the top downward; the country should have one ruler'<sup>2</sup>.

Both candidates pledged to pursue policies based on the will of the people, thus asserting the president's right to act without any regard for legal or institutional limits.

Lukashenka's pledge to seek 'unification of the former USSR republics'<sup>3</sup>, and Dubko's determination 'not to respond to the Western bait'<sup>4</sup> explicitly indicated that they saw Belarus as being outside Europe.

Democrats Stanislaw Shushkevich and Zyanon Paznyak called for privatization and market-oriented changes in their respective platforms entitled, 'Statehood, Democracy, Market: a Path to Prosperity', and 'Economic Program', in order to build the economic foundations for a democratic state. Both candidates pledged to do their best to prevent Belarus from turning into a Russian backwater and establish a Western-style democracy.

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<sup>1</sup> *Сборник альтернативных программ развития Беларуси, под ред. В. Шлындикова, Минск, Бестпринт, 2001, р. 203.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

In 1999, with the expiration of Lukashenka's term of office under the 1994 Constitution, Belarus' democratic forces held an alternative presidential election. The candidates, Paznyak and former Prime Minister Mikhail Chyhir, called for reinstating the 1994 Constitution.

Both candidates also proposed substantial changes to the political system once established by the organic statute of 1994. They suggested introducing a statute of mixed-member proportional voting system for parliamentary elections, with 50 percent of the seats awarded in single-member districts and 50 percent based on political party lists, or the proportional representation system. Chyhir suggested that the stipulated turnout threshold of 50 percent, which enabled Lukashenka to torpedo the formation of Parliament and local government councils, should be lowered to 25 percent.

Russia's role in the emergence of a severe authoritarian regime in Belarus prompted Paznyak to spelling out clear foreign policy priorities such as joining NATO and building close ties with the European Union. Paznyak said it was essential for national security.

The need for political reform became apparent during the 2001 presidential election. Opposition candidates Syamyon Domash and Uladzimer Hancharyk called for constitutional reform aimed to vest the Parliament with real powers, ensuring independence of courts and the media, giving more powers to central and local governments. Domash suggested introducing a mixed-member proportional voting system<sup>5</sup>.

## Political party platforms

The first party document calling for political reform was the Belarusian Popular Front's 'Program for Perestroika "Revival"' dated 1989.

The program was based on the following political principles:

- Belarus must be a sovereign state and the nation has the right to self-determination;
- political pluralism;

<sup>5</sup> Праграмны выступ кандыдата ў прэзідэнты С. Домаша, «Народная воля» 2001, 28 жніўня.

- the rule of law;
- development of direct forms of democracy;
- independent judiciary and trial by jury;
- freedom of expression, assembly and association, with non-governmental organizations registered pursuant to the notification principle.

The Belarusian Popular Front's 1993 platform further developed the principles of sovereignty and democracy. It suggested the mixed-member proportional voting system for the parliament (*Sojm*) with 80 members (50 percent) elected from political party lists. The party suggested that lawmakers should be barred from holding posts additional to their parliamentary duties.

The program said that strong parliamentary factions would guarantee the parliament's effective operation.

The party also cautioned that the introduction of presidency is fraught with the risk of dictatorship given strong positions of the former Communist *no-menklatura*.

At the same time, the program said that the presidency in Belarus was possible provided that effective checks and balances were in place. This implies parliament playing the key role in the political system and, along with the judiciary, counterbalance the executive. The program called for using the referendum which, at the time, was widely thought to be an effective mechanism of direct democracy. The program reaffirmed the BPF's adherence to the idea of independent judiciary and trial by jury. The document also called for reforming local government and the administrative-territorial system, stressing that changes should be in line with the European Charter on Local Government.

The multi-party system, separation of powers and independence of the media were regarded in the program as an integral part of democracy.

The BPF warned against and declared its opposition to the Russian electronic and print media dominating the market in Belarus, and noted that security of information was important for democracy and independence of Belarus.

The BPF's foreign policy priorities included cooperation with the 'Baltic-Black Sea Community' member states and countries in Central and Eastern Europe and withdrawal from the Commonwealth of Independent States.

On the heels of the Conservative Democratic forces came the Liberal Democrats with their 'Declaration of Program Goals and Principles' adopted by the United Democratic Party of Belarus (UDPB) in 1991. Like the BPF, the UDP called for building a state with effective rule of law, developing civil society institutions and establishing democracy based on the separation of powers and decentralization of government. The program did not offer any model for Belarus' future political system as it was adopted shortly before the 1994 Constitution.

The Conservatives and the Liberals differed in economic and national identity issues. The latter, apart from historic and cultural, had political roots: the UDPB did not regard Belarus' eastern neighbor as a threat to the country's sovereignty.

October 1995 saw Liberal Democratic forces rally round the United Civic Party (UCP). The UCP program did not differ much from that of UDPB, yet it highlighted the growing confrontation between the executive and the legislature. The document stressed that executive by-laws must not limit human rights or impose other unlawful restrictions. The program emphasized the need for establishing a professional parliament (that is, where lawmakers work on a full-time basis and have no right to hold additional posts), enhancing the role of the Constitutional Court in the system of checks and balances, and the need for democratizing local government. The UCP suggested selling the State stake in printing plants to the newspapers and fostering the development of independent media.

The Social-Democratic forces evolved slowly in the post-Communist society. It was only in 1996 that the Belarusian Social Democratic Party 'Narodnaya Hramada' (BSDP) adopted its platform. When set against programs of other democratic parties, their section on Belarus' political future offers little in the way of novelties.

The platform asserts that Belarus should be a parliamentary republic, with the government accountable to the legislature (Supreme Soviet). The lawmakers should be selected on the basis of a mixed-member proportional representation system.

As a rule, political parties do not debate political reform issues outside their platforms. The only exception is the program for a social and economic reform

put forward by the United Civic Party (UCP). However, it presents the political reform from the perspective of social and economic changes. The platform calls for establishing ‘an open political system that would encourage political competition’. The UCP sees the system as a parliamentary republic with parliament being the formative factor for the executive power.

## **Political reform concepts and programs developed by independent experts**

Research on the issue conducted by Belarus’ non-governmental think tanks was either limited to specific aspects rather than looking at the political system’s big picture, or tended to be descriptive instead of being concerned with devising alternative models.

On March 18, 2000 experts of the Stratehiya think tank and those led by the former parliamentary speaker Myacheslaw Hryb communicated a national development strategy entitled ‘The Strategy for Belarus’. The experts, including foreign ones, noted that the document focused on economic reforms and lacked the political dimension. In particular, Piotr Kozarzewski of the Warsaw-based Center for Social and Economic Research (CASE) advised the authors to substantiate the need for transforming Belarus into a parliamentary republic and describe the role of the president, the parliament and the government.

## **Political system models as seen in 1994 and 1996 Constitutions**

The organizational and functional weakness of the Belarusian opposition, and the geopolitical situation made it possible for the former Communist elite to maneuver the political system’s transformation in such a way as to stay in power.

Separation of powers was non-existent in the political system of the Belarusian Soviet Socialist Republic (BSSR). Article 6 of the 1978 BSSR Constitution provided that ‘The Communist Party of the Soviet Union shall be the guiding

and directional force of the Soviet society, the core of its political system, state and public organizations<sup>6</sup>.

After the break-up of the Soviet Union, the government banned the Communist Party of the Soviet Union in Belarus and declared separation of powers. In fact, however, this was not the case. An extensive network of 'patron-client' rings led by former party bosses enabled Prime Minister Vyacheslaw Kebich and his entourage (former Communist party secretaries) to exercise control over the Supreme Soviet and the judiciary, which were only notionally independent of the executive.

Concentration of powers in the Council of Ministers throughout 1992 and 1993 set the stage for introducing the institution of presidency in Belarus. A draft Constitution aiming to serve the interests of Kebich and lobbied by Kebich-controlled parliamentary majority, was designed to give the *nomenklatura* powers and tools for influencing the legislature and judiciary.

The Constitution, adopted by the Supreme Soviet on March 15, 1994, declared separation of powers (Article 6), but did not provide sufficient safeguards for maintaining it.

In addition to purely legislative functions, it vested the Supreme Soviet with considerable powers to form other governmental agencies. Under Article 82 Part 7, the Supreme Soviet appointed judges to the Constitutional, Supreme and Supreme Commercial Courts, the Prosecutor General, the chair and board of the Audit Chamber, and National Bank governors. The Supreme Soviet was also empowered to form the central electoral commission, define domestic and foreign policy priorities (Article 83 Part 9), ratify and renounce international treaties (Article 83 Part 12).

The Constitution gave the Supreme Soviet considerable powers to control public finance. The parliament was designated to pass national budgets, budget performance reports, distribute taxes between central and local budgets (Article 83, Part 10), fix national taxes and duties, and control money supply.

<sup>6</sup> *Канстытуцыя (Асноўны Закон) Беларускай Савецкай Сацыялістычнай Рэспублікі*, Менск, Палымя, 1978, р. 3.



The Constitution also empowered the Supreme Soviet to impeach the president. The legislature also had certain influence on the Cabinet.

Under Article 107, the Supreme Soviet approved the presidential appointment of prime minister, also deputy prime ministers, foreign, finance, defense and interior ministers, and the chair of the Committee for State Security (KGB).

The parliament had powers to hold any Cabinet member accountable. The Supreme Soviet could recommend dismissal of a Cabinet member for breach of the Constitution or laws.

Under the Constitution, the president was declared Head of State and of the executive (Article 95).

In its declaration of branches of power as being independent within their remit (Article 6), the Constitution was ineffective, however, as it enabled the president to upset the system of checks and balances without resorting to direct violations of the organic statute.

In post-Soviet Belarus, broad powers given to the legislature did not guarantee its full independence from the executive. Firstly, with the Communist party nomenklatura retaining its dominance, the majority voting system for the Supreme Soviet provided the ruling elite with a good opportunity to insert its candidates, while the democrats could only count on minor representation in the parliament. Secondly, the Constitution allowed lawmakers to perform their duties while holding management or civil service positions. Article 92 provided, 'A deputy of the Supreme Soviet should exercise their duties in the Supreme Soviet on the professional basis or, if they wish, without abandoning their entrepreneurial or civil service activity'<sup>7</sup>. The loophole offered the executive an opportunity to plant executive officials in the parliament.

The executive retained control over the majority of State-owned assets, thus having additional tools to influence the lawmakers, most of whom held senior management positions before being elected to the Supreme Soviet.

The Constitution provided that the government should guarantee a level playing field for all forms of ownership (Article 13). However, it did not compel

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<sup>7</sup> *Канстытуцыя Рэспублікі Беларусь*, Менск, Беларусь, 1994.

the government to supporting the private sector. The concentration of power and property in the hands of the executive was a crucial factor in consolidating its political position and creating an environment for power to be concentrated in the hands of the head of state.

An important mechanism for strengthening political positions of the president was his personnel policy. Article 100 Part 11 allowed the president to appoint a wide range of government officials and managers to key positions in government and the state-controlled sector of the economy. In a post-Soviet society, in circumstances where not only the greater part of the electorate, but also political and economic elites advocated political ideas of the leader, personal loyalty to the head of state proved essential for pursuing a political career.

The Constitution preserved the Soviet-era administrative division of the country into regions (*oblast*), districts (*rayon*), cities (*horoda*) and other entities (Article 9). It stipulated that citizens should exercise local governance through local soviets, executive and administrative authorities (Article 117). Article 119 provided as follows: ‘Local soviets, within their powers, address local issues with regard to national interests, the interests of the local population, and follow decisions of superior governmental agencies’<sup>8</sup>.

The clause actually codified the existence of ‘the executive power’ before the adoption of respective laws. Lukashenka only needed to qualify ‘executive power’ with ‘presidential’. The power has de facto been run by Lukashenka ever since he came to power.

The Constitution authorized the president to appoint judges, with the exception of those elected by the Supreme Soviet (Article 100 Part 10). The provision enabled the Belarusian ruler to resort to prosecuting his opponents under the penal code.

The Constitution banned censorship and the government’s monopolization of the media (Article 33). However, sufficient guarantees were not provided for the freedom of expression because the country’s major printing plant, Belaruzki Dom Druku, remained under State control. The Constitution did not specify

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<sup>8</sup> Ibid.

the ownership or status of state-owned television and radio stations run by the Belarusian State Television and Radio Company.

The executive still has an opportunity to dominate the information space by resorting to legal proceedings and tax raids to oppress private media, or by denying them a license.

The Constitution stipulated that referenda may be conducted to make decisions on most pressing issues (Article 73). In fact, the head of state could use his executive division to obtain the desired result at a referendum. The executive, in turn, used the soviets to control and brainwash the electorate in the provinces. Near-total control of the media enabled the executive to manipulate public opinion. The ability to predetermine referendum results allowed the president and his entourage to dictate domestic and foreign policy priorities without any regard for the opinion of the Supreme Soviet. Moreover, referendum results could be used as a powerful tool to subjugate the parliament.

The above-said weaknesses of the constitutional checks and balances system enabled Lukashenka to expand his influence in the first year of presidency.

By November 1996, Lukashenka tightened his grip on power and no longer needed to conceal the strings he pulled to control the Supreme Soviet and boost his political clout. Yet, he needed to legalize his informal influence in order to deprive the democrats of the ability to appeal to the Constitutional Court against the Head of State breaching the Constitution.

At the referendum on November 24, 1996, 70.5 percent of the total turnout said 'yes' to Lukashenka's constitutional amendments that expanded his powers.

The president was empowered to call a referendum (Article 84, Part 1). Article 85 empowered the president to rule by decrees 'in instances provided for by the Constitution'<sup>9</sup>. However, the Constitution does not clearly say in what instances the president may resort to decrees.

The Constitution marked a sweeping victory for Lukashenka's team and their efforts to build an effective 'executive division'. Under Article 119, 'heads of local executive and administrative bodies should be appointed and dismissed by

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<sup>9</sup> Ibid.

the President of the Republic of Belarus or by his/her order, and their appointment should be subject to approval by local councils of deputies'<sup>10</sup>.

Constitutional provisions concerning the legislature's role in the political system enhanced presidential powers at the expense of the legislature.

The parliament, now called the National Assembly, consists of two chambers – the House of Representatives (lower) and the Council of the Republic (upper). The powers of the lower chamber are limited to lawmaking. The only exception is that it has the right to endorse the president's choice of prime minister (Article 97, Part 2).

Article 92, which bars members of the lower house from holding governmental, managerial or other posts in addition to their parliamentary duties, does little to elevate the status of the House of Representatives. In fact, the Constitution placed the House of Representatives under total control of the upper chamber, the Council of the Republic.

The Council of the Republic is the house of territorial representation. The six regional and Minsk city soviets each appoint 8 members to the upper chamber, with eight members appointed by the president (Article 91). Thus, the Council of the Republic consists of officials directly or indirectly appointed by the head of state.

Article 98, Part 1 provides that the Council of the Republic should 'approve or reject draft laws adopted by the House of Representatives with regard to amendments and addenda to the Constitution; and provide interpretation of the Constitution and other draft laws'<sup>11</sup>. The clause suggests that the formally elected lower house of the Parliament is not an independent legislative body.

Under Article 98, Part 2, the Council of the Republic confirms the presidential appointment to chair of the Constitutional Court, chair and judges of the Supreme Court, chair and judges of the Supreme Commercial Court, chair of the central electoral commission, the prosecutor general, chair and governors of the National Bank.

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

The Council of the Republic appoints six judges to the Constitutional Court (Article 98, Part 3), and six members of the central electoral commission (Article 98, Part 4). The other six Constitutional Court judges and commissioners are appointed by the president (Article 84, Parts 4 and 10).

Considering that the Council of the Republic is formed by presidential appointees, it is easy to gauge the Belarusian leader's real powers by changing the chamber's name to 'president'. Under such circumstances, the Constitution-stipulated impeachment requirements are extremely difficult to meet.

The 1996 Constitution codified the political system whereby the executive, legislature and judiciary are concentrated in the hands of the president.

Efforts to model a democratic political system for Belarus were largely limited to the political system set out in the 1994 Constitution. However, this model is not optimal. A flawed system of checks and balances, as provided for by the 1994 Constitution, enabled Lukashenka's success in establishing a tight authoritarian regime.

This project is the first attempt undertaken by NGO representatives to create a sound political model that would allow a Belarus guided by the principles of sovereignty and democracy to make steady progress in the context of European integration.

# The Political System in Belarus: a Diagnosis

# 1

## The nature of authoritarian regime in Belarus by Viktor Charnau

In any analysis of political regimes (including authoritarian ones, which include present-day Belarus), an essential criterion is one of the nature of authority, i.e. whether it seeks to preserve status quo or change the society. This criterion allows for identifying the following types of authoritarianism: conservative, reactionary and liberal. Another key criterion for classifying political regimes is that of the holder of power. With this criterion in mind, authoritarian regimes may be classified as personalist dictatorships and oligarchies.

Based on this approach, the current political system in Belarus may be defined as a reactionary, Soviet-conservative personalist dictatorship with strong totalitarian tendencies.

In most post-Soviet countries that embarked on the path of reform, new social relations triggered off rejection of the new realities. The political and ideological incarnation of this trend is a leftist, Soviet-style conservatism of varying degree depending on circumstances: from quite moderate to very aggressive and reactionary. Not only has this Soviet-conservative trend become reactionary in Belarus; it has dominated politics and become the government's ideology of choice.

The regime's militant Soviet conservatism is its inherent political and ideological feature. Other than merely longing for old-style Soviet mentality and former lifestyle, it seeks to prevent global democratization from reaching Belarus at all cost, and restore and modify key elements of the Soviet order such as a strong, vertically integrated executive branch of power, the *subbotniks*<sup>12</sup> and propaganda briefings.

The regime has the following long-term strategic goals that predetermine its behavior:

- consolidate powers of Alyaksandr Lukashenka and prolong his rule for as long as possible;
- restore, modify and preserve key aspects of the former Soviet order;
- expand internally to control parts of the civic society still independent of the regime;
- expand externally towards 'brotherly Russia' with its rich natural resources and the prospect (still unrealistic) of taking the Moscow throne.

The Constitution adopted in 1996 as a result of a coup allowed Lukashenka to:

- a) legalize the dictatorship which, de facto in place at the time, sought in particular to make provisions for the operation of Oprichnina-type<sup>13</sup> supra-governmental institutions such as the Presidential Administration and the Presidential Property Management Department.
- b) Strengthen institutional centralization and consolidate personal power, enhance dictatorship in the form of personal dominance (concentration of all branches of power in the president's hands.)

The president is the main source of power capable of making final political decisions on all issues of social significance. The relative weight of all other officials in State hierarchy depends directly on their loyalty, access and proximity to the president and support on his part.

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<sup>12</sup> From *subбота* (Rus.) = Saturday (ed.). The first communist subbotnik, or a day of voluntary free unpaid labor, was held on April 12, 1919, by railwaymen of the Sortirovochnaya marshalling yards of the Moscow-Kazan Railway. *Subbotniks* were soon being held at many other enterprises in various cities and became a tradition in the Soviet Union (transl.).

<sup>13</sup> A military and administrative elite under Tsar Ivan the Terrible.

The president and his 'vertically integrated' executive division are the only full-fledged institution of government. Powers are not separated vertically or horizontally. The country lacks a developed parliament. The judiciary is hinged on the executive entirely and local forms of self-governance have been eliminated. Directly or indirectly, the president appoints all heads of regional, district and city executive boards.

Despite the semblance of democracy and affirmed political pluralism, in practical terms the regime imposes legal restrictions on and wipes out any possibility of holding fair and competitive elections that could spawn a change of government. Political parties have been ousted from the political system and play a dysfunctional role. Those that exert some form of influence on specific policies are not visible to the public eye and contribute to corruption.

Therefore, the personalist authoritarian regime has minimized the number of players with real institutional ability to make state decisions or affect regime's policies.

## Government structure

To understand the behavior of the government, it is necessary to be able to recognize its structure and functions. Any description of a state usually begins with the definition of the constitutional form of governance.

The form of governance consists in the arrangement of top-level governmental agencies, and relationship vis-à-vis each other and the people. The form of governance is the embodiment of a regime. The legitimacy and efficiency of governmental institutions and stability of the political regime largely depend on the form of government.

In Belarus, the presidency based on direct presidential elections replaced the quasi-parliamentary republic in 1994. On the surface, it represented almost a classic model of presidential constitutional democracy. Still, it enabled the establishment and legalization of personalist dictatorship.

Dictatorship is institutionally incarnated by the super-presidential form of governance established in result of the 1996 coup.



The super-presidential republic is noted for extreme concentration of power in the hands of the president. Other than just being the head of state, he/she also has the right to rule by decree, dissolve the parliament, dismiss the cabinet, appoint and dismiss judges and heads of local authorities.

The 1996 Constitution conferred unlimited and inviolable powers to the president on the one hand, while on the other it gave the authorities the appearance of constitutionality and conformity with European standards. The Constitution declared the president the head of state, guarantor of the Constitution, human rights and freedoms. It vested the president with powers to arbitrate and mediate among various top-level governmental institutions. Statutorily, the president is not the head of the executive power exercised by the government with the prime minister at its head. The government is accountable to the president and the parliament. The president may dissolve the government; the Parliament may take a vote of non-confidence in the government; and the president may dissolve the Parliament.

The system appears to be one of a standard presidential parliamentary republic which, despite all its weak points, is a relatively democratic form of governance. However, in-depth analysis of real powers of various branches shows that this is an authoritarian, super-presidential government system. The affirmed principle of separation of powers has been transformed into an absurd and awkward system of interactions between the authorities under total control of the president.

## **The president**

The president of Belarus plays a special role in the system of governance. It takes more than one article in the Constitution to specify the president's virtually unlimited powers.

However formally not heading the executive (the constitution does not even refer to such a notion), the head of state has real powers of the prime minister.

The president has the right to appoint and dismiss the prime minister subject to parliamentary approval, and other cabinet members, chair cabinet me-

etings and define the structure of the government. The prime minister has no say on cabinet formation or changes in its composition.

The president may issue directives and orders binding for the entire country, and override any governmental decision. Such influence of the president on the executive is characteristic of presidential and super-presidential systems of governance.

In addition to directives and orders, the president may issue law-decrees. If a presidential decree or edict conflicts with a law, the presidential act takes precedence, except for cases where the law empowers the president to issue the decree or edict in question. The president's legislative function is yet again indicative of the super-presidential form of governance.

The president also holds undisputed control of the National Assembly, Belarus' parliament. He directly appoints eight of the 64 members in the Council of the Republic, the upper chamber. Presidents in some parliamentary democracies also have this right, however more symbolic. Besides, the president indirectly appoints other members of the Council of the Republic nominated at joint meetings of the regional and Minsk city soviets and executive committees under the watchful eye of the presidential administration.

Apart from the right of veto, the constitution provides the president with extensive powers to dissolve the parliament. The president may dissolve the National Assembly (1) if it adopts a vote of non-confidence in the government, (2) rejects twice the president's nominee for the post of prime minister (3), repeatedly votes down the government's program of actions (4), 'in the event of repeated or flagrant violations of the Constitution by the parliament', which is absurd from the legal point of view.

A cumbersome impeachment procedure makes it almost impossible to oust the president before the end of term.

The concentration of functions of the head of government and broad powers to dissolve the parliament are indicative of a dangerous shift in the balance of power toward the president, a characteristic of the super-presidential form of governance.

The president in Belarus has unlimited powers to form other State institutions. He/she appoints and dismisses six out of 12 Constitutional Court judges, all judges in common courts of law, six out of 12 members of the central electoral commission, the chair of the State Audit Chamber and heads of local executive and administrative authorities.

Constitutional Court judges are appointed for 11 years, while other officials, including judges, are appointed for unlimited term and may be dismissed by the president at any time. Another symptom of there being a super-presidential republic is that a single person makes appointments to key positions in the judiciary.

Some top-level nominations – the chair of the Constitutional Court, chair and deputy chairs at the Supreme Court, Supreme Commercial Court, chair of the central electoral commission, prosecutor general, chair and governors of the National Bank – need to be endorsed by the Council of the Republic. Surprising as it may seem, however, the president does not need the Council of the Republic's approval to dismiss these officials.

Moreover, under the constitution, the president may dismiss the few senior public officers nominated by the Council of the Republic: six Constitutional Court judges and six members of the central electoral commission. He merely needs to 'notify' dismissal to the Council of the Republic.

The 1996 Constitution legalized the personnel management practices employed by Lukashenka in 1995 and 1996, particularly the dismissal by decree of the chair of the central electoral commission, appointed by the Supreme Soviet and due to be dismissed by the Supreme Soviet only under the 1994 Constitution.

The presidential power rests on the so-called 'president's vertically integrated regional, district, city and town executive committees' headed by Lukashenka-appointed officials.

The Presidential Administration tops the presidential 'vertically integrated' structure. It has very much in common with the former Central Committee of the Communist Party. In the hierarchy of power, the administration is second to the president. It has more powers than the Council of Ministers and the National Assembly. An analysis of the organizational structure of the Presidential

Administration and of the way in which decrees, edicts and directives are enacted, proved that administration officials may impact these processes much more than the government or the parliament.

However, the Administration's functions and powers are not specified by the constitution. Hence, it is a semi-legal authority, 'a state within a state', accountable to the president alone.

## Parliament

The National Assembly is the supreme representative and legislative body in Belarus. It consists of two chambers, the 110-seat House of Representatives elected by secret ballot on the basis of universal, free, equal and direct suffrage, and the 64-seat Council of the Republic, referred to as the chamber of territorial representation. Eight members of the Council of the Republic are appointed by the president of the Republic, while the remaining members, eight from each region and from the city of Minsk, are elected to a four-year term by secret ballot on the basis of equal and indirect suffrage at meetings of the 'basic-level' local soviets (elected councils) in the area. As a rule, nominees to the Council of the Republic are candidates pre-approved by the president.

The Belarusian Constitution delegates the legislative power to the National Assembly, yet the Assembly's role is not decisive in the general legislative process. The drafting of bills, including those governing Belarus' domestic and foreign policies, is not included as main functions of the legislature. The House of Representatives is tasked with considering, rather than drafting bills, which may then be passed or rejected by the Council of the Republic. A bill becomes law once it passes both chambers and is signed by the president.

Under the Constitution, a bill rejected by the Council of the Republic may still pass the legislature if the House of Representatives manages to override the upper chamber's veto with a two-thirds majority of members voting to pass the bill again. However, the bill is subsequently referred to the president who may exercise his right of suspensive veto. In the case of a veto, the legislature may override the veto with two-thirds of each chamber voting to pass the bill again.

Thus, in the course of lawmaking, a bill may be subject to three suspensive vetoes: at the Council of the Republic, from the president and the Council of the Republic again. This points to the main function of the 'semi-appointed' upper chamber, whose very existence makes no sense in a small unitarian state. In the event the House of Representatives escapes presidential control, the Council of the Republic would be an efficient barrier for bills and resolutions adopted by the House of Representatives if they run counter to the president's interests.

A serious restriction on the House of Representatives' right to initiate legislation is provided by Article 99 of the Constitution, which stipulates that bills which may entail lower government revenue or increased spending may be tabled for consideration by the House of Representatives only with consent of the president or the cabinet on the president's request. However, implementation of almost every piece of legislation causes some changes in public spending. Therefore, consistent application of this article of the Constitution would deprive the parliament of the right to initiate laws altogether.

The lawmaking function of the House of Representatives is restricted not only by the Constitution, but also by current unconstitutional legislative practice. In 1997, by way of his presidential edict, Alyaksandr Lukashenka established a so-called National Bill-Drafting Center reporting to the president of the republic. All institutions with a right to initiate laws must refer bills to the Center, rather than directly to the parliament. Even this mechanism alone contradicts the Constitution, which says that each bill must first be considered by the House of Representatives and then by the Council of the Republic.

In some cases, the Center has the right to reject sponsors' requests to draft the bill, in particular if the draft law is deemed to contravene the president's stance or 'impedes the drafting of bills ordered by the President of the Republic or President's Administration'.

Thus, the National Assembly is in fact prevented from initiating bills. The president and his administration can block any legislation before it proposed for the House of Representatives' regular agenda. Each year, Lukashenka issues edicts to adopt a bill-drafting plan and the House of Representatives considers only the bills listed therein.

Under the Constitution, the House of Representatives does not have sufficient powers to influence formation of the Cabinet and other governmental agencies. The House is formally involved in four appointment-related procedures:

1. It deliberates on consent to appointing of a new prime minister. However, if the lower chamber has twice refused to give its assent, this may entail its dissolution. The president does not need the House's consent to dismiss the prime minister.
2. The House of Representatives considers accepting the president's resignation. Since the resignation issue can be initiated by the president only, this function of the lower chamber is of a purely technical nature.
3. The House can initiate the impeachment procedure by accusing the president of high treason or other severe crimes. In this case, the lower chamber decides that investigation of the charges should be conducted. Yet, the investigation itself is to be organized by the Council of the Republic whose members are directly or indirectly appointed by the president. The National Assembly may dismiss the president with a two-third majority in each chamber voting in favor of passing the decision. The entire impeachment procedure should take no more than one month following the date of filing the accusation. If the legislature fails to decide on the president's dismissal, the accusation dies.
4. The House also can take a vote of confidence or no-confidence vis-à-vis the Cabinet, but in the latter case the president may arbitrarily choose between dismissal of the Cabinet and dissolution of the House. A vote of no-confidence vis-à-vis the Cabinet may be initiated by at least one-third of all members of the House of Representatives compared with one-fourth of the MPs in Moldova, one-fifth in Estonia, and one-tenth of members of the lower chamber in Poland and France.

Unlike the House of Representatives, formally the Council of the Republic has greater powers of appointment. It deliberates about consenting to presidential appointees to a rather broad spectrum of government positions; it elects six members of the Constitutional Court, six members of the Central Electoral Commission for Elections and National Referenda. However, the Constitution does

not offer the upper chamber the opportunity to influence the president's decision to dismiss them.

In addition, the upper chamber actually has to consider presidential appointments ex-post, rather than ex-ante. Therefore, the president de facto asks the Council of the Republic merely to acknowledge an accomplished fact. Since the upper chamber was established in 1996, it has never rejected president's appointments, even in justified instances.

Neither parliamentary chamber has supervisory functions. They have no agencies to monitor compliance with laws and resolutions. The Supreme Soviet (the National Assembly's predecessor) elected an Auditing Commission accountable to it. The present State Control Committee reports directly to the president.

Thus, in its current form, the Belarusian legislature is severely restricted in its lawmaking functions, does not influence formation of the Cabinet and other governmental agencies, and has no supervisory functions. This confines any legal possibility for a new political course to be initiated and adopted through the National Assembly virtually to nil. The Constitution currently in force requires that the Assembly be a piece of window-dressing that readily approves the president's decisions.

## **Prime Minister and Cabinet**

The executive branch is represented by the Council of Ministers of the Republic of Belarus which is supposed to put laws to work and is said to be the central body of state governance.

The Belarusian Cabinet officially consists of 38 members: the prime minister, four deputy prime ministers and 33 ministers and heads of other central government agencies. If we take into account the nine State committees reporting to the Council of Ministers, the Cabinet expands to 47 people. This is twice or thrice the number of cabinet members in many other countries. For instance, there are 12 cabinet members in Latvia, 14 in the United States, 17 in Lithuania, 20 in Germany, 21 in Poland and 24 in Russia. Extreme centralization of govern-

ment is the main reason for having such cumbersome administrative machinery which, in its turn, leads to inefficient in governance.

The Cabinet is headed by the prime minister, appointed by the president for an indefinite term by consent of the House of Representatives. The prime minister's relative strength is usually revealed by the degree to which he/she can influence appointment of other Cabinet members. In Belarus, cabinet formation is the sole prerogative of the president. He appoints ministers and other Cabinet members at his own discretion and may dismiss them when he considers it necessary. The prime minister, of course, may propose certain appointments to the president, but the final decision rests with the Head of State. The candidate's loyalty to the president is much more important than his/her competence, skills or experience.

The prime minister's key functions in parliamentary systems of governance include determining the government's political course together with the parliament. Still, in Belarus the president, rather than the prime minister and the National Assembly, sets the guidelines for the country's domestic and foreign policies. The prime minister's function is to use it as a basis for devising the Cabinet's action plan and take measures to implement it.

Since the president of Belarus is the definitive political leader of central government, the premier has the status of administrator. His main mission is to ensure ongoing management of the Cabinet's activities. The prime minister is personally accountable to the president for this job.

The prime minister's absolute dependence on the president determines the status of the Council of Ministers. Rather than political, it is a technical administrative body with functions limited to executing and handling president's decisions. Moreover, direct interference by the President and his Administration in Cabinet's functions is common practice.

Meanwhile, the existence of prime minister's position and the Cabinet's notional accountability to the National Assembly leaves the president, i.e. the actual head of the cabinet, untouchable. Thus, all key government decisions are made by the president, but responsibility for their implementation lies with the



prime minister and other Cabinet members. As a result, the country suffers from an inefficient and irresponsible social and economic policy.

This situation may change dramatically only if the cabinet were to be formed by a democratically elected legislature and were politically accountable to it.

The return of Belarus to the democratic path of development entails dismantling the present system of supra-government and establishing a constitutional form of government based on the rule of parliament and separation of powers.

## Local Government

### By Pyotra Natchyk

The local government system in Belarus is provided for by the Constitution and acts of Parliament which define the structure and powers of local government agencies, and edicts and directives of the Council of Ministers<sup>14</sup> which regulate the activity of local executive authorities and thus influence the implementation of decisions made by bodies of elected representatives.

At the structural level, officially speaking, the country has a system of local government and local government agencies. Article 117 of the Constitution specifies local government bodies such as local soviets or councils, executive and administrative agencies and territorial public agencies reporting to local government. Article 1 of the law 'On Local Government' defines local executive authorities as local government bodies accountable to central government and forming a single system. In fact, local government is structured according to the acts of Parliament, not the Constitution<sup>15</sup>.

Belarus' administrative-cum-territorial division is conducive to effective control of the society from the top down. Belarus is divided into rather large admi-

<sup>14</sup> Указ прэзыдэнта Рэспублікі Беларусі «Аб структуру і ліку работнікаў выканаўчай камітэтаў і мясцовых адміністрацыйна-раёнаў у гарадах» ад 7 снежня 2001 г. № 723. Палажэньне Рады Міністраў «Аб старшыні абласнога, менскага гарадзкога выканаўчага камітэту», зацверджана ўказам прэзыдэнта ад 20 лістапада 1995 г. № 476.

<sup>15</sup> Закон О местном управлении и самоуправлении в Республике Беларусь, Национальный реестр правовых актов Республики Беларусь, 2000 г., № 8, 2/137.

nistrative units with borders determined not so much by territorial concerns as by the location of industrial and agricultural establishments. People living in administrative areas where rural, district and regional soviets are elected, are not so much united by local interests, as by their employment in industrial and agricultural enterprises.

Belarus has six regions (Minsk also has the status of region) and 121 districts and three territorial levels of local soviets and executive committees corresponding to the country's administrative-territorial division:

1. the fundamental level includes urban, town and city soviets (accountable to district authorities);
2. the basic level includes city soviets accountable to regional authorities and district soviets;
3. the regional level includes regional soviets. The Minsk City Soviet has both basic- and regional-level functions.

Legislation does not provide for an intermediate local government and government authorities. Soviets at all levels are local governments with roughly the same powers and functions.

In cities under the authority of regional governments, local governments are the nearest to local communities. There are no representative authorities in city districts, which have local administrations functioning within the executive system. Heads of local administrations are appointed and dismissed by the president, and deputy heads by the chair of the city executive committee. City soviets adopt budgets and budget performance reports of their respective local administrations.

Local soviets are elected for four years and decide on their make-up independently. The law asserts the right of local soviets within their remit to administer local matters in line with the national interests and those of local communities, and requires that they follow decisions of higher-level governmental agencies.

There is no clear-cut division between responsibilities of local soviets at various levels. Their responsibilities largely overlap (e.g. in adopting local programs), and the law allows higher level soviets to supervise those below them.

Therefore, soviets in smaller administrative units follow decisions of higher level soviets rather than make decisions of their own.

A higher level soviet has powers to override decisions taken by a lower level soviet which it deems to be illegal. The president has the right to suspend decisions of local soviets of all levels and ask higher level soviets to overrule them. The Council of the Republic may strike down decisions of all soviets.

The functions of the soviet's executive bodies were initially performed by the executive committees.

The local government reform of 1994 and 1995 made the executive committees accountable to central government for matters resting within its remit, and to local soviets for matters within their jurisdiction. Also, they are directly accountable to the president. The president appoints chairs of regional executive committees, who in turn appoint chairs of their respective executive committees reporting to them. Local soviets merely endorse these appointments. The president or the chair of a superior executive committee may make appointments without consulting local soviets if the latter reject their nominees twice.

Therefore, local soviets are not in a position to influence the procedure of appointing executive officials. In addition, the soviets have no powers to hold executive officials accountable as this is a presidential prerogative.

Higher level executive committees adopt local soviets' staffing plans pursuant to a presidential edict that fixes an approximate number and structure of soviets.

The lack of instruments to influence the executive committees renders the limited powers vested in soviets practically ineffective. Local soviet functions boil down merely to adopting and monitoring general programs for the provision of some public services. Other public services within the remit of executive committees such as healthcare, education, social security etc. are regulated by general laws and policy issues there are mapped out by central government.

Municipal property management and the operation of enterprises, organizations and establishments are the only two matters on which executive committees report to soviets. However, executive committees still have a big say

in these matters as they are responsible for establishing and restructuring enterprises.

The soviets have some powers in managing finance and property. They have budgets fixed within constraints set by superior governmental agencies. Thus, Belarus actually has two local systems: a three-tier local government system, and local governance/administrative system of executive committees which are part of the executive. The executive committees have real direct government powers and are beyond soviets' control.

In the event of dispute within either system, a higher-level authority within it has the final say (an executive authority representative of a larger administrative-territorial unit may overrule decisions of respective authorities in smaller units). There are no mechanisms for settling disputes between local administrative and local government agencies. The Prosecutor General's Office and the State Control Committee supervise the soviets, executive committees and local administrations in cities.

The system falls short of the requirements posed by the European Charter of Local Government. Local government authorities have no real opportunity to manage a major part of local affairs if acting within the limits of law.

The executive committees, formally designed to carry out decisions of local soviets, are not accountable to them. Lack of distinction between functions of local soviets at various levels prevents them from acting independently.

Local soviet decisions on all matters may be overruled by higher level authorities of elected representatives, blocked by executive authorities or suspended by the president. As a rule, higher level soviets have more powers than those reporting to them; consequently, powers of the latter are not exclusive. Dependence from higher level representative authorities does not allow local soviets for administering local affairs effectively.

The functional weakness in the local government system and local government centralization are the main reasons behind the weakness of the local political elite.

Soviets do not operate as agencies that tackle issues of importance to local residents; instead, they are a springboard for local bureaucrats seeking careers

in central government. The inferior status of deputies compromises the whole idea of local government. People distance themselves from local politics and leave it to the central government to tackle local problems.

The local executive elite cannot perform its functions effectively. The appointment and dismissal of executive committee heads and administrative officers is largely determined by political considerations. This exposes the administrative apparatus, which should guarantee efficient management and reduce the risk of tailor-made political decisions, to the power of central government and increases government centralization.

## Electoral system

by Mikhas Pliska

The fundamental peculiarities of Belarus' electoral regulations currently in force are a function both of the mentality of the ruling *nomenklatura*, who have failed to transcend the limitations of Soviet, majority-based election rules, and of the time in which new laws were enacted to govern elections to the Supreme Soviet and local soviets. These laws were enacted in November 1994, i.e. after Alyaksandr Lukashenka was elected president. He made considerable efforts to prevent the use of a mixed system combining majority-based and proportional elements in parliamentary elections, as the Supreme Soviet was originally inclined to pass a law whereby 25 percent of the deputies would be elected on the basis of proportional representation.

The flaw in electoral regulations came to light especially after the political system's change in November 1996, when an authoritarian regime was put in place.

The Electoral Code, enacted in February 2000 on the initiative of President Lukashenka, differs from preceding laws in form rather than content. The 110 members of the House of Representatives, the lower parliamentary chamber, and members of local soviets (councils) are elected the majority basis, where a candidate needs to gain at least 50 percent plus one vote to win in the first round, and a relative majority of votes in the second, runoff round. To be elected president, a candidate needs to win 50 percent plus one vote in the first round or in the second round.

The OSCE Office for Democratic Institutions and Human Rights and the Venice Commission of the Council of Europe have found that Belarus' Electoral Code does not ensure free and democratic elections in the country and does not meet minimal international standards. Similar conclusions were drawn by the OSCE special international observation missions that monitored the preparation and conduct of elections for the House of Representatives in October 2000 and presidential elections in September 2001.

The main failing of the Electoral Code is that it does not restrict the government's arbitrariness in forming electoral commissions at all levels. Practice in this respect shows that the commissions do not represent a wide range of political forces, as there are no legal obstacles for local authorities in denying membership to representatives of the opposition. This allows the executive branch to hold absolute sway of the electoral commissions' activities and the entire election process alike, from registration of candidates to counting the votes.

To exert pressure on voters and rig ballots, electoral authorities make frequent use of the early voting procedure held for five days seven hours a day, as well as voting from home. In the 2000 parliamentary elections, in two electoral districts those who, according to official statistics, exercised their right of early voting totaled more than 50 percent of all eligible voters. The average number of those voting before the polling day accounted for 20 to 30 percent of all voters in the past elections.

Regulations currently in force do not allow candidates to effectively use judicial proceedings if they contest voting results or electoral commissions' decisions to remove them from the run-up.

Candidates are banned from setting up their own election funds and using donations from private persons and organizations for campaign purposes. Public funds provided by the government for candidates are far from being sufficient to conduct an efficient campaign.

Independent observers cannot monitor ballot counting, as they are denied the opportunity to see the contents of ballot boxes and can be evicted from the polling station by order of the local commission's chairperson. In addition, lo-

cal polling commissions are not required to give observers certified copies of official ballot counting reports.

Elections held in Belarus are reminiscent of Soviet-era elections aimed at creating a veneer of legitimacy for the Communist Party's rule. Despite formal rivalry among candidates, only candidates previously approved by the executive authorities can actually be elected. Therefore, to ensure free and fair elections, it is necessary to press not only for changing electoral regulations and procedures but also for democratizing the country's political regime.

## Judiciary

### by Mikhail Pastukhou

The judicial system inherited from the USSR is still being used in Belarus. The new version of the Belarussian Constitution contains a newly amended procedure for appointing judges. Under the 1994 Constitution, the election of judges was the parliament's exclusive prerogative, whereas under the amended Constitution, the president of the republic has the right to appoint the chair and five judges of the Constitutional Court, the chair and judges of the Supreme Court and Supreme Commercial Court, and judges of other courts. The president is also entitled to dismiss the chairs and judges of the highest courts on grounds stipulated by the law, with notice to the Council of the Republic, the upper chamber of the National Assembly.

The system of general jurisdiction courts consists of the Supreme Court of the Republic, regional courts, the Minsk City Court, district and city courts, Belarussian Military Court, and inter-garrison military courts.

The district and city courts, the judicial system's primary level, employ in excess of 800 judges. The regional courts and the Minsk City Court employ 159 judges. The staff of the Supreme Soviet includes 54 judges. The staff of district and city courts comprises 185 judges who try cases under the administrative law.

The system of commercial courts consists of the Supreme Commercial Court, regional commercial courts and the commercial court of the city of Minsk

equal in status to the regional courts. Their function is to settle disputes between undertakings and individuals arising from conducting regular business, and disputes and claims to overrule decisions of governmental agencies related to business interests of undertakings.

The staff of judges in commercial courts is not large. The commercial courts in regions and Minsk have 8 to 14 judges, and the staff of the Supreme Commercial Court includes a total of 18 judges.

The Constitutional Court of the Republic of Belarus was established in late April 1994. After the November 1996 national referendum, which resulted in adopting an amended Constitution, the first Constitutional Court was in fact dissolved. In January 1997, by his edict, President Alyaksandr Lukashenka appointed six judges, including the Court's chair. Another six judges were elected by the upper chamber of the National Assembly, which itself was hand-picked by Lukashenka.

In June 1997, the Constitutional Court Law was radically amended resulting in a considerable change in the place and role of this instrument of governance.

At present, the courts have lost much of their reputation and credit with the people. A confidence poll showed that only 38 percent of the interviewed trusted the judiciary.

Staff fluctuation in courts is high. Out of the current number of general jurisdiction judges, more than half (54 percent) have served for less than five years and 15.8 percent for less than one year. Those in office for five to 10 years total a mere 25 percent, and judges with 10 to 20 years of service make up 15.3 percent.

Dependence of the judiciary on the executive manifests itself in many aspects of their mutual relations: in the procedure of appointing judges, their pay and promotion, nomination for higher category of service, procedure for awarding housing, and disciplinary sanctions.

An important lever against judges is the current procedure for awarding housing. A presidential decree in force since September 1997 provides for granting temporary apartments to judges and prosecutors in need of housing. In the event of his/her dismissal, the judge or prosecutor and all their co-residents sho-



uld be evicted. To be entitled to ownership of such dwellings, judges and prosecutors have to have served for no less than 20 years.

Despite their unlimited-term appointments, judges can be easily removed from position by a presidential edict. This is rather usual. Formal grounds for dismissal are recommended by a qualifying board of judges.

The performance of judges is under constant supervision of judicial agencies. These agencies determine financial and technical support for courts and their staff. They run judicial statistics, form an opinion on judges' fitness for the job, and nominate them to higher positions. The judicial agencies also supervise the courts' timeliness of adjudication. If necessary, they can initiate disciplinary proceedings against judges.

Thus, in current circumstances, Belarus' courts have lost the qualities of judicial bodies such as independence, impartiality and fairness. As a result, they have ceased to perform their main mission of warranting the protection of human rights and liberties.

# The Urgency and Rationale of Reform

by Yuras Likhtarovich

## Urgency

Few in Belarus would argue against the need for political reform. Despite the absence of any major decline in living standards lately, the number of people dissatisfied with the status quo has been on the rise. Alyksandr Lukashenka's low rating in the last few years proves general disappointment with his government's policies.

At the Belarusian Intelligentsia Assembly, the Belarusian intelligentsia have also pointed to the need for changes in statements like 'where is the way out?'<sup>16</sup>, or 'the issue of changes in Belarus has turned into one of saving the nation'<sup>17</sup>.

In contrast to the economy, the political situation has suffered greater instabilities. Instead of evolving, the government system established under the 1994 Constitution saw the personification of power since 1995, resulting in effective legalization of Lukashenka's dictatorial regime<sup>18</sup>. Therefore, it is time to ask

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<sup>16</sup> The question was raised by Pyotar Krauchanka, Belarus' former ambassador to Japan, on his return to Belarus. Cited by Halina Abakunchyk, in 'Participants of the Belarusian Intelligentsia Assembly Come Out for Unity and Vigorous Activity', Radio Liberty, [www.svaboda.org](http://www.svaboda.org).

<sup>17</sup> Statement by Valer Kalinouski at the Belarusian Intelligentsia Assembly, cited by Radio Liberty on 17.03.2003, [www.svaboda.org](http://www.svaboda.org).

<sup>18</sup> The conclusion was made by political analyst Viktor Charnau, 'Form of Governance in Post-Communist Belarus and the Problem of Choice of the Optimal Constitutional Model', Open Society, Information Bulletin № 3, 2000.

what lies ahead if the political system remains unreformed and developments proceed as chartered by the current government.

The gravest consequences would be the collapse and takeover of State institutions by the Lukashenka clique, inefficient governance and slower development of the civic society.

In the short term, the country may be taken hostage by those who are now struggling for power and maintain the system they have created. The society may find itself no longer in a position to influence the developments and control the clique.

Opposition politicians and independent experts speak volumes about the danger of the regime that is being built in Belarus<sup>19</sup>, yet the future may be even worse. A post-Communist hybrid may emerge on the ruins of the Soviet nomenklatura (mainly former secret agents, partly former ideology officers and *apparatchiks*) combined with members of the new elite, or clans coming from the same province. Thus, the cast of players interested in keeping Lukashenka in power is taking shape and gaining strength within the government. Belarus will soon cease to exist as a state with a president, government and parliament, and will turn into a country ruled by Lukashenka's clique acting beyond the political system.

In this system, governmental agencies would whittle down to performing seminal functions: keep the society under control (by harassing dissidents and enlisting new people to keep the society under control), gather information and report on public views and attitudes, tackle day-to-day problems and be the lightning arrester for public discontent<sup>20</sup>. State apparatus would function less and less effectively as officials will not be interested in conducting reforms. People now have limited access to administrative services because of red tape, and this would not change for the better. The quality of public service would remain inferior. Inefficient administration and political system and the lack of institu-

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<sup>19</sup> See chapter on weaknesses of the current political system.

<sup>20</sup> For the sake of comparison, let us recall the basic principle of democratic governance. A government based on democratic principles has two major complementing functions: to exercise strong and fair rule with due regard for public interests and respect personal freedoms in the context of common interests.

tionalized and transparent decision-making procedures breed corruption. Corruption would thrive also because of inefficient service of governmental agencies vis-à-vis the population. Corruption would slow down the development of a market-oriented reform infrastructure, and have adverse effects on education standards. High education standards are needed to reduce the cost of the economy's integration with international markets. The cost of running such a system would be incommensurate with its efficiency. With the Soviet-era public debt still unsettled, the public debt of the Lukashenka regime continues to accrue due to delays in reforming the pension, healthcare and education systems and underdeveloped technical infrastructure. All this is a burden to the population that would also have to be borne by future generations.

The authoritarian government continues to hamper the establishment of a civic society. It should be noted that a civic society cannot develop if people have no opportunity to articulate their interests freely, and come together in carrying out civic projects or joint initiatives. In Belarus, political parties were the prime instrument for articulating public interests. Political parties mushroomed until mid-1990s, and were consistently forming a solid core of the political scene<sup>21</sup>; yet, the constitutional amendments adopted at the 1996 referendum and the authorities' effort to discredit and harass political parties weakened their ability to represent public interests. Civic initiatives, otherwise known as the third sector, started quite late, and consolidated by resisting the authoritarian neo-Soviet regime<sup>22</sup>.

<sup>21</sup> Before Alyaksandr Lukashenka came to power, the nucleus was formed by several parties – BNF, ADPB and HP (AHP since 1995), BSDH, PNZ, KPB, and AP, which worked closely and often formed political alliances. The country's democratic development would ensure stable operation of the Parliament and government founded on a parliamentary majority (coalition of several close parties). With the exception of the latter two, the programs of most parties include proposals for further democratization of the political system and a market-oriented reform. After 1996, the parties focused on resisting dictatorship and forsook differences in their programs. However, forces opposing Lukashenka failed to focus on the goal of ousting the dictator. Probably, they would rally around the idea of European integration.

<sup>22</sup> Before 1994 the third sector concentrated on efforts to win official recognition. It was only on 4<sup>th</sup> October 1994 that the parliament passed a final draft of the law on non-governmental organizations. In the first few years of Belarus' independence, most NGOs sprang up on the ruins of Komsomol (the Leninist Young Communist League), or other Soviet-type organizations such as the Association of War and Labor Veterans. Some of them managed to become independent of the government and grow

However, many NGOs remain purely notional, while the NGOs' caste-like behavior and occasional financial scandals in the third sector have drawn increased criticism from skeptics. In addition, the sweeping slogans<sup>23</sup> widely used by the NGOs are not taken seriously by most people.

In the unreformed economy, most people are employed by the State sector. The threat of unemployment makes them dependent on the employer, i.e. on government, which seeks to tighten control by building a doctrine-based network covering all state-run enterprises.

In a totalitarian state, only the ruling elite are allowed to enjoy a high standard of living, while continuous pressure on managers of undertakings is aimed at preventing a sudden and sharp decline in living standards. In such a situation, the public is increasingly accustomed to passivity, apathy and fear of authority. Thus, the country is losing opportunities for easier (i.e. embraced by the people) and more successful democratization.

## Rationale

The European Union represents a model that would allow Belarus to avoid that prospect. Critics of the EU used to assert that political, economic and social globalization processes taking place within the EU might lead to the extinction of peoples and cultures in Europe. However, the political and economic union contributed to the prosperity of its members and enriched their culture owing to more transparent and direct trade and cultural exchanges. For instance, Ireland was one of the poorest nations in Europe before joining the EU; now, it is among the most prosperous ones. Belarusians should not mistrust and isolate themselves from Europe.

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into truly non-governmental organizations. First NGOs specialized in aid for Chernobyl-stricken areas and population, such as the Foundation 'For the Children of Chernobyl' (1989), or youth issues, such as the Confederation of Youth Associations (1989). The opening of the Soros Foundation office in Belarus boosted the development of various NGOs. But, as Lukashenka tightened his grip on power, the authorities attempted to control the third sector by establishing state-supported quangos (the Belarusian Patriotic Youth Union), and imposing restrictions and stifling NGOs. Many NGO activists filtered into politics by joining anti-dictatorship and pro-democracy forces.

<sup>23</sup> 'human rights', 'freedom of speech and expression', 'democratization of central and local authorities', etc.

The pro-European choice would not lead the nation to extinction, a destination to which the country is led by self-isolation, as it slows the development and makes the nation less competitive in external relations. When unreformed, the country may spawn a system more akin to that of Third World countries. EU membership means high living standards, prosperity, quality products, the rule of law, security and protection. EU membership may be the only chance to warrant personal inviolability and social security if Belarus' legal system adopts the *acquis communautaire*.

Moreover, in practice the idea of a 'European Belarus' is more appealing than the slogans of democracy, human rights, freedom of expression, the meaning of which is often incomprehensible to common people.

This is not to say that it is impossible to implant democratic values in Belarus. Efforts to import and copy the Western model of state and society have failed so far. It appears that it is much better to promote democratic values through a variety of micro-programs that would help the idea of 'Europe' take root in Belarus and fill the Belarusian form with European substance. The urgency of reform will increase as social and economic conditions deteriorate.

What are the possible benefits of reforms for the people that would approximate the country to the European Union?

The propaganda machinery claims that main achievements of Lukashenka's rule are that: 'above all, we are not involved in internal or external armed conflicts... We have no enemies and make no territorial claims. We have no religious or ethnic enmity'<sup>24</sup>.

Indeed, Belarus is not at war or in external conflict. But, in today's world security is not only guaranteed by a strong army; rather, it results from having a strong economy and effective social security. Belarus lacks all these elements.

Opponents of democratic reform in Belarus maintain that changes would be difficult to carry out because of there being insufficient investments and Europe's indifference to Belarus. However, the main obstacle to reform is in the

<sup>24</sup> А. Лукашенко, *Мы создали страну – будем создавать граждан! Новогоднее поздравление Президента белорусскому народу, «Советская Белоруссия», 3 студзеня 2003.*

reluctance of the clique that seized power to make changes as they represent a threat to the authoritarian system of governance.

Part of the political elite who wish to see a prosperous and civilized Belarus should be interested in a pro-European choice. In current government, officials and members of the puppet legislature are not politicians per se as they merely obey orders of the president, himself the key political figure. Reforms geared to normalize the political system, i.e. balance the branches of power and institutionalize political competition, would enable those sidelined and in opposition to 'the chief politician' to resurface in politics.

The pro-European choice is also in the interests of most civil servants. The reform offers civil servants more benefits than disadvantages. They will see their status elevated, be protected against undue conduct of their superiors, and perform as indicated by their terms of reference. Civil service gains prestige if well paid and offering new career and professional opportunities. Civil servants would become more independent, network with their opposite numbers across Europe and have international career opportunities open.

Taking into account differences within the political elite, a compromise proposal could be one of a pro-European choice and reforms designed at Belarus joining the European Union. This is a constructive line that offers a clear alternative to the Lukashenka model.

The pro-European choice is likely to win majority support because, in geographical terms, Belarus is in Europe and has much in common with the continent in terms of history and culture.

However, the political elite should be aware that much time and effort would be required to join the European Union. In 1993, at the Copenhagen European Council, EU Member States agreed on three EU membership criteria:

- political: stability of institutions which warrant democracy, rule of law, respect for and protection of human rights and minorities;
- economic: a functioning market economy and the capacity to cope with competitive pressures and market forces within the Union;
- ability to take on the obligations resulting from membership, including adherence to the aims of political, economic and monetary union.

Thus, a discussion on joining the European Union will be centered on these three criteria. State institutions play a key role in this process as they would have to align the country's legislation with European standards. This would be impossible without drastic political and economic reforms.

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# 1

## Ideal Political System Model for Belarus

by Viktor Charnau

The new model for Belarus' political system should be based on generally acknowledged principles of the European law such as de-concentration and decentralization of power, parliamentarism, separation of powers, a system of checks and balances, independence of the judiciary, rule of law and respect for human rights and freedoms.

### The supreme government institutions

The bad experience of presidential governance in Belarus has helped consolidate positions of politicians and scientists advocating a West European parliamentary system. A parliamentary system seems attractive for many among Belarus' 'counter-elite' since it appears to be effective in preventing one individual from usurping all powers in the country. Supporters of the parliamentary system refer to constitutional monarchy traditions of the Grand Duchy of Lithuania, and point to a more democratic nature of government and flexibility of the executive.

However, the ideas of 'pure' parliamentary government in Belarus stem from abstract democratic aspirations rather than real conditions that are necessary for a smooth operation of a parliamentary system. And, this is impossible without:

- economic and social stability;
- public consensus on fundamental values;

- well-established party system;
- electoral system limiting the number of acting political parties;
- democratic political culture of the ruling elite and counter-elite;
- deep-rooted democratic traditions;

Belarus does not offer a ready-made environment for a parliamentary system to exist. Quite on the contrary, the country experiences:

- permanent social and economic instability;
- deep division in society over fundamental values and a big divergence in political views that hampers finding a common ground;
- a fragmented political party system with all the characteristics of ‘extreme plurality’;
- an inadequate electoral system, which may contribute to party system fragmentation at the early stage of political reform;
- autocratic traditions;
- lack of experience in democratic governance.

Divided and fragmented as it is, Belarus would be especially vulnerable to the shortcomings of a parliamentary system. Major problems are likely to follow the adoption of the proportional representation or mixed-member proportional voting system. After a parliamentary election, the parliament is unlikely to have a one-party majority; a coalition majority is a more viable option. Coalitions are unlikely to be consolidated and will break up over conflicts among parliamentary factions. Party leaders’ inability to use consensus techniques increases the threat of major parliamentary and government crises. Plagued by internal parliamentary conflicts, the government would be unable to conduct radical and coherent reforms.

Another serious drawback of parliamentary systems is their lack of formal institutional limitations on powers of the parliamentary majority. A referendum is the only possible way for modifying the parliamentary majority’s mistaken policies before the end of term. However, referenda are an easy way to manipulate opinion of an incompetent general public.

Some advocates of a parliamentary system in Belarus suggest that the Constitutional Court should counterbalance the parliament blocking laws that are

unconstitutional and breach international treaties<sup>25</sup>. The measure may not be effective, as legislation that turns government policies in a wrong direction may still be in line with the constitution and international commitments. The Constitutional Court is in no position to assess whether a piece of legislation represents a right or wrong political measure.

Lack of effective control over the parliament is fraught with despotic abuse of authority by a parliamentary majority, especially in transition societies. In that case, power of a parliamentary majority usually concentrates in the office of prime minister, who manipulates the compliant majority. An authoritarian prime minister may cause to subjugate the parliament to him/herself. Belarus was heading for such a premier-led republic in 1993 and 1994.

In certain circumstances, a parliamentary system is more conducive to sustainable democracy than other types of governance. There were just 43 established democracies in the world between 1979 and 1989, including 33 parliamentary systems, five parliamentary-presidential systems and five presidential systems of governance.

Nonetheless, in a divided society the parliamentary system often produces unexpected results. Belarusian political analyst Valery Karbalevich had a reason to say that ‘political will is necessary to pursue reforms. It is easier to concentrate political will in one hand or in a group of people rather than have a Parliament consisting of dozens of lawmakers with various political views’<sup>26</sup>. This is a strong argument in support of restoring the presidential system in Belarus or moving towards a mixed system of government. Experience suggests that it is better to give much power to a limited group or even a sole executive, yet place him/her under effective parliamentary oversight.

Those who call for reanimating the 1994-type presidential system argue that it fits better in the traditions and mentality of the Belarusians. They argue that only a stable executive, relatively independent of power struggles within the

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<sup>25</sup> Гл., напрыклад, матэрыялы круглага стала палітолягаў-юрыстаў *Какой быть Беларуси: президентской или парламентской?*, «Адкрытае грамадства» 2000, № 1, р. 15–16, 17, 18.

<sup>26</sup> Гл. матэрыялы круглага стала палітолягаў-юрыстаў *Какой быть Беларуси: президентской или парламентской?*, «Адкрытае грамадства» 2000, № 1, р. 15–16.

parliament, may bridge rifts in the society fueled by deteriorating living standards and economic crises, pursue the necessary reforms and take the country on a path of socioeconomic growth.

However, in countries with deep-rooted authoritarian traditions such as Belarus, a presidential system always risks transforming itself into a super-presidential government. Not by coincidence, many former Soviet republics mutated in super-presidential states with various degrees of personalization of power. Belarus is not an exception.

New 'democratic' leaders advocating a presidential system are driven by their autocratic habits inherited from past totalitarian regimes. The concentration of power in the president's hands, his/her relative independence of the parliament, and the fact that he/she always represents a voting majority makes it easier for him/her to suppress opposition and establish personalist dictatorship. On the one hand, a presidential republic, where the president and the parliament are elected in separate direct suffrage, requires experience in balancing the interests of the legislature and the government. But on the other, countries that lack such experience chose a presidential system more often<sup>27</sup>.

The president acting as head of state should be above party- and other relatively minor political interests so as to be able to impersonate stability of the State. Yet, in a presidential republic, the president acts not merely in official representative capacity; he also acts as chief executive and leader of a certain political group.

Belarus' presidential system has shown that one of the dangerous consequences of combining ceremonial and executive ('effective') governance is that the head of state takes his supporters to represent the entire nation. He begins to view his policy as one of putting 'the people's will' to effect, and the policy of his opponents as anti-popular efforts aimed at advancing their narrow personal interests. Consequently, the president has refused to recognize restrictions on his mandate and has become extremely hostile toward the opposition. Thus, Be-

<sup>27</sup> Many former British colonies (Kenya, Tanzania, Pakistan) attempted to copy the British parliamentary system, but later opted for a presidential government that better suited their authoritarian traditions.

larus' presidential system of government has proved deficient not only in terms of flexibility but also in any of restricting presidential powers.

In addition, it should be noted that in a divided society it is very difficult for the president to ensure a stable majority in parliament. Moreover, a split in the coalition that rallies around the winning candidate is inevitable: if the cabinet is subordinate to the president, rather than the parliament, the most efficient method for ensuring political gains in next elections is to confront the presidential branch, which is responsible for everything. The president, in his turn, cannot but demand more and more powers, which exacerbates the crisis in his relations with the parliament and political parties.

In effect, presidential democracy engenders a strong conflict between the president and the opposition in the parliament, especially in times of serious social and economic crisis. The only way out of the conflict is a coup which, as a rule, is initiated by the executive power.

There are three major preconditions necessary for at least partial neutralization of the negative consequences of presidentialism in a fragmented society.

Firstly, it is necessary to establish a presidential electoral system capable of ensuring broad support for the elected president. This could be done by preference voting, where people decide which candidate they like best, which candidate ranks as second best etc. In this case, candidates can build their majority around the second and third most important choices of voters who cast their first vote for another candidate. Also, the dual condition principle could be applied which means that, to be elected, a presidential candidate needs to gain a majority of votes not only in total numbers, but also in a stated number of the country's constituencies/territorial units.

Secondly, it is necessary to establish a parliamentary electoral system that would help reduce the number of 'active' political parties to three or four. This could be a relative majority system which would spawn a two-party system, or a two-round majority system which would then breed two stable party coalitions in the legislature. The more parties represented in the parliament, the fewer chances there are of pro-presidential party coalition surviving. Also, this increases a possibility of the president ruling the country with a stable minori-

ty of his supporters in Parliament, with all the ensuing consequences e.g. preventing fast-track radical reforms, and inevitable conflicts and the use of force. Therefore, there are no more than 2 to 6 political parties in all lasting democratic systems of the presidential type.

Thirdly, the political elite should be able and ready to cooperate and compromise which, however, is unrealistic in a divided society.

Other factors to lessen the danger of a strong presidency include (fourthly) establishing an electoral college, and (fifthly) simplification of what is usually an excessively complicated impeachment procedure, provided there is sufficient evidence to prove the malfeasance charges brought against the head of state.

However, all the above-mentioned preconditions are necessary but not sufficient for presidential democracy to operate normally in a split society. The presidential system gets rid of most of its flaws only when factors of a consolidated democratic regime are at play, such as:

- durable consensus in the society regarding democratic procedures and institutions as the most efficient method of governance.
- A two-party system, in which the parties are not ideologized and do not represent opposing political forces of a split society, but rather reflect the greater part of the political spectrum. However, it should be noted that the two-party system is rare on a global scale and may not be established artificially.
- decentralization of government (federalism or developed local government), which implies that real politics is also conducted in regions and local communities. The most important decision-making areas are controlled by local entities. Central government does not bear responsibility for 'everything', and this lessens the threat of pressures on it.
- generally recognized role of the Constitutional Court as the arbitrator in disputes between the legislature and the executive, between central government and local authorities.

Since these conditions do not exist in a transitional society, the danger of presidentialism is very high. This is seen both in Latin American countries and the modern history of CIS countries, including Belarus. In a crisis situation and

with a polarized society, a 'pure' presidential regime with its subordinate 'vertically integrated' system becomes increasingly counterproductive. It contributes to a split in the society instead of leading the nation to concord, and therefore cannot guarantee stability.

Experience from other countries suggests that pure forms of governance have shortcomings revealed especially in societies in transition. A parliamentary republic is often hit by crises of the government and internal government changes. A presidential republic always risks turning into a dictatorial state.

Discussion of an optimal system for Belarus among politicians, political analysts and lawyers has been occasionally more animated, yet misguided in terms of methodology. A choice of the constitutional government system has boiled down to the simple dilemma of a parliamentary vs. presidential republic.

However, the number of purely presidential and parliamentary republics has been declining lately. The last decade has seen various systems mix, interweave and interact thus producing hybrid, semi-presidential and semi-parliamentary governments. The hybrids represent an attempt to combine advantages of the parliamentary and presidential systems and rid the system of shortcomings.

There are two types of mixed government. In a presidential-parliamentary republic, the government is accountable to the president and the parliament, the president appoints and dismisses the prime minister and other cabinet members, while the parliament can vote to dismiss the cabinet (Egypt, Peru, Russia, Turkey, and Ukraine). However, this type of government is rather questionable, as it implies a degree of uncertainty in the work of the cabinet having to serve two masters. Moreover, there is historical evidence that presidential-parliamentary republics can transform into a super-presidential system under certain circumstances (e.g. the Weimar Republic of Germany, the Fifth French Republic under de Gaulle, modern Russia and partly Ukraine).

The second type is a parliamentary-presidential republic where the prime minister and the cabinet are accountable to the parliament only (Austria, Finland, France, Iceland, Lithuania, Poland and Portugal). In a parliamentary-presidential republic, the president's choice of prime minister, as a rule, needs approval by the parliamentary majority. In other words, the legislature has the

prerogative to appoint the prime minister and key ministers. At the same time, unlike in a parliamentary republic, the president has certain rights that ensure the balance of powers and democratic stability (e.g. the right to dissolve the parliament or veto bills).

The parliament's right to remove the prime minister and change the cabinet's composition guarantees flexibility of the government's political course and reduces the risk of conflict between the executive and the legislature. The presidential right to dissolve the parliament and call new elections is a guarantee against recurrent government and parliamentary crises, and adds to the government's stability.

Such a system can be devoid of shortcomings of parliamentary and presidential republics.

In our opinion, a parliamentary-presidential republic would be the optimal choice for Belarus. It would imply giving some presidential prerogatives to the parliament and the government, restoring traditional functions of the parliament and greater independence of the government. Therefore, given the European experience and historical traditions of the Belarusian people, a parliamentary presidential republic may be regarded as an ideal model for Belarus.

One should bear in mind that transition societies usually lack sustainable democratic traditions present in developed democracies. For instance, the French constitution does not formally require that the president should appoint the leader of an election-winning political alliance as prime minister. Still, the French president would not even consider choosing someone else. The winning coalition should naturally form the cabinet. Belarus, Russia, Ukraine and some other CIS countries also have a constitutional provision whereby the president appoints the prime minister. However, in practice, its political interpretation may be quite different. For instance, in Russia the opposition's victory in parliamentary elections would have no impact whatsoever on the government and would not result in a change of prime minister. Moreover, the Russian president may dismiss the prime minister regardless of parliamentary support.

Thus, what is unwritten constitution in established democracies should be written down in the constitution of Belarus.



Above all, the new democratic constitution should specify the procedure of forming (changing) the cabinet and dissolving the parliament. The constitution should include a clear provision requiring the president to appoint the leader of a party (coalition) nominated as prime minister by a parliamentary majority. The president appoints other members of the cabinet nominated by the prime minister. At the same time, the parliament may vote to dismiss the cabinet on certain conditions (on the condition that the motion is put to vote along with a new candidate for the prime minister) followed by resignation of the cabinet. The constitution should clearly stipulate grounds for dissolving the parliament.

However, no matter how well-considered and perfect the wording, it cannot be a panacea against violations of democratic principles. Political elite's willingness to compromise and cooperate is essential for normal functioning of any democratic government, including a parliamentary presidential one.

## Role of the President

Transition to a parliamentary-presidential republic should limit the president's powers so as to ensure dominance of the parliament in the system of governance, and raise the role of the government as an independent political body.

The president is the head of state in this system. He has the following functions:

- ceremonial leadership;
- mediation to ensure balance and stability of power;
- protection of the constitutional system.

In parliamentary governments, the head of state, who functions in ceremonial/representative capacity, and the chief executive are two separate offices. The executive power is exercised by the cabinet accountable to the parliament, while the president acts as the head of state. Unlike parliamentary systems, a parliamentary-presidential system expands powers of the president. Not only is the head of state the symbol of national unity, but also a mediator in settling conflicts among the branches of power and parliamentary gro-

ups; for instance, the president plays a role in selecting a candidate for prime minister, safeguards stability of the executive and prevents abuse of power by the parliament.

In a parliamentary-presidential system, the president has powers to:

- nominate a prime minister;
- make a formal appointment of prime minister after his/her nominee is endorsed by the parliament;
- appoint and dismisses other cabinet members nominated by the prime minister;
- accept resignation of the cabinet when a new cabinet takes office;
- approve nominations for judges with the exception of those appointed by the parliament and the justice minister;
- represent the country in relations with other countries and international organizations;
- negotiate and sign international treaties;
- accept credentials of foreign ambassadors and instruments for recalling foreign diplomats;
- take over command of the armed forces upon imposition of the martial law;
- dissolve the parliament and call early elections if:
  - a) the government loses a no-confidence vote;
  - b) the parliament cannot form the cabinet;

The president may dissolve the parliament or accept resignation of the cabinet if the parliament rejects the cabinet's program twice within a stated limited period.

If forming a cabinet with a parliamentary majority proves impossible, the president appoints the head of a minority cabinet or dissolves the parliament.

The president should have the right to issue decrees within the limits of his/her powers. The decrees have no force of laws and should be endorsed by the prime minister, with the exception of some Constitution-stipulated cases.

The president should be elected in direct suffrage for a four-year term. Presidency should be limited to two terms.

Those eligible to run for president should be citizens of the Republic of Belarus aged 45 and over who have lived permanently in the country for 10 years prior to the election. Candidates should have no criminal record and be fit for civil service.

The president should not run any agency, except for the Presidential Office. The president may not be a member of parliament, or a political party or other political organization, or hold other posts or jobs in addition to the presidency or have any other income, with the exception of fees paid for creative activity.

## Application of the model to the executive

Within the parliamentary-presidential system, the government should be the central political body accountable to the parliament. The executive should have the following functions:

- define state policy priorities;
- implement these policies;
- mobilize the society and the ruling elite in support of its policies;

To perform these functions, the government must:

- develop and pursue domestic and foreign policies;
- enforce laws and carry out decisions of the parliament and directives of the president;
- coordinate work of ministries and other governmental agencies;
- draft budgets and monitor their implementation and be accountable to parliament for budget performance;
- prepare and propose bills to the parliament;
- ensure security, law and order.

The government, or the Cabinet of Ministers, consists of the prime minister and ministers. The cabinet's program, structure and expenditure to maintain government apparatus are subject to parliamentary approval and are included as a separate budget spending item. To perform its functions, the cabinet should be modestly staffed, relatively inexpensive and politically independent.

The president's choice of prime minister needs parliamentary majority approval. The president selects a prime minister in consultation with leaders of parliamentary factions. Once the candidate receives parliamentary approval, the president formally appoints him/her as prime minister. On appointment, the head of government nominates members to his/her cabinet, presents the cabinet's program and asks the Sojm to approve the head of government by a vote of confidence.

If the prime minister loses the vote, or fails to form the cabinet, or if his/her program does not receive majority support in the parliament, the Sojm nominates a new prime minister and members of the cabinet who need support of an absolute majority in the parliament. Subsequently, the president formally appoints a new prime minister and cabinet members. If the newly elected cabinet fails to obtain an absolute majority, the president, following consultation with parliamentary factions, appoints a minority cabinet or dissolves the parliament.

The president appoints and dismisses cabinet ministers nominated by the prime minister. A motion of no confidence may be brought against the cabinet and cabinet members no earlier than 12 months after its formation on the condition that it is supported by at least 20 percent of MPs. The Sojm may vote to remove the prime minister only if it proposes a successor. Following a vote on no-confidence, the Sojm asks the president to dismiss the prime minister. The president must dismiss the prime minister and formally appoint his or her successor. A new no-confidence motion may be initiated no earlier than 12 months after the consideration of the previous one.

The prime minister may ask the parliament to take a vote of confidence on the head of government. If the Sojm rejects the prime minister's motion of confidence, the president may dissolve the parliament at prime minister's request. However, the president should not have the right to dissolve the parliament once the latter nominates a successor by a majority vote.

The prime minister's term of office terminates on the opening of the first session of a newly elected Sojm.

The cabinet must resign if its program has been rejected twice by the Sojm or if the latter votes to remove the prime minister and selects his or her successor.

## Local government

by Andrei Zavadski and Miraslau Kobasa

The system of self-governance in Belarus should take into account the national historic experience of our people and meet the criteria of the European Charter of Local Government.

The model suggests the division of public power into State authorities that include the parliament, president, government (cabinet), courts and their structural and functional divisions, and local government authorities, independent of central or State authorities. A clear division must be drawn between the powers and functions of the central and local governments.

The model suggests two levels of local government with prescribed functions and powers.

The model suggests that the central government set up local branches with responsibilities that do not duplicate, undermine or limit powers of self-governance at the local level.

### Territorial structure of local self-governance

The basic level of local self-governance<sup>28</sup> is an authority representing a community living in one or several villages, or a small town or a city borough.

This local-level authority should be called *pavet*. Belarus should have between 220 and 250 locality-specific bodies of self-governance.

Local governments should be formed according to the following principles. Central towns or villages should have just one local government authority to handle affairs of the central town or village and the area within their jurisdiction.

In cities of over 100,000, local councils or people may use a referendum to form additional local government agencies called *hramada* in certain boroughs. *Hramadas* should have the same powers and responsibilities as *pavets*.

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<sup>28</sup> Hereinafter referred to as 'local government' for the sake of simplicity (ed.).

The second, regional level authority should regulate and manage public affairs of an area comprising several *pavets*, and in the capital city of Minsk. Minsk should have both regional and local level authorities.

A regional authority should be called *zyamlya*. Belarus should have 8 or 9 such regional authorities.

However the geographic areas of local and regional authorities may overlap, they should be independent in exercising their powers.

Boundaries of local authorities' jurisdiction should not be changed without prior consultation of the local communities concerned, by referendum.

### **Rules and ways of exercising local government**

Citizens should exercise their right to local government through referenda, assemblies and other forms of direct participation in public affairs, such as public authorities of local government (councils and committees of *mikrorayons*, borough, house, street, block, village and other authorities, including those represented by one person) and elected councils. Council members should be freely elected in secret ballot on the basis of direct, equal and universal suffrage. Belarus should use a mixed voting system in local elections. Local councils should be elected for a four-year term. After local government reform, the first two types of councils should be elected for a two-year term each.

### **Scope of local government**

Local authorities of all levels should have representative and administrative bodies of the same structure and with same functions. The competence of local authorities should depend on the level of local government.

The principle of subsidiarity should govern vesting local authorities with powers and functions, which implies that local-level authorities will exercise more powers as close to the people as possible.

Powers given to local authorities should normally be full and exclusive. They may not be undermined or limited by another authority, central or regional, except as provided for by the law.

The scope of local authorities may include prescribed powers, powers accepted voluntarily and those delegated by another authority.

### Local authority leadership

The head of a local authority should act as the head of both local representative and executive authorities. The head of a local authority and its members should be elected in secret ballot on the basis of direct, equal, universal suffrage.

Any functions and activities deemed incompatible with the exercise of a local elective office, or conditions for early replacement or reelection of the head should be set out by the law.

The term of office of the head of a local authority should be limited to 4 years. Since the beginning of local government reform, heads of the first two types of councils should be elected for two years.

The head of a *pavet*, a local level authority, should be called *burmistr*. The head of a *zyamlya*, a regional level authority, should be called *zemski halava*. The head of a *hramada*, an additional type of authority, should be called *starasta*.

### Funding local authorities

In line with the principle of subsidiarity, priority should be given to the local level authorities. Local authorities' financial resources should be commensurate with their responsibilities.

A designated portion of national and local taxes, charges and duties should be allocated to local authorities directly and may not be de-committed for the sake of other budgets. Local authorities' financial resources may not be de-committed by order of other local or central authorities.

Protection of financially weaker local authorities calls for putting financial balancing procedures or equivalent measures in place, designed to make up for the effects of unequal distribution of potential sources of finance and the financial burden they must support. Such procedures or measures should not diminish the discretion that local authorities may exercise within their own remit.

Local authorities should be entitled to State budget allocations and should have access to local and national capital markets.

Powers delegated to local authorities should be matched by funds allocated for exercising these powers.

### **Municipal services**

Local government should be exercised by local elected representatives and recruited officers. The latter may not hold office in central government agencies.

The legal status of local elected representatives and officers should provide for free exercise of their functions. Their legal status should allow for appropriate financial compensation of expenses incurred in their exercise of the office in question as well as, where appropriate, compensation for loss of earnings or remuneration for the work done and corresponding social welfare protection.

The exercise of office by officers and local government authorities (both representative and administrative) should be open and transparent, as required by law. All documents passed by local authorities, if unprotected by confidentiality and privacy laws, should be subject to disclosure.

### **Local authorities' right to associate**

In exercising their powers, local authorities should be entitled to cooperate and to form consortia with other local authorities within the legal framework available in order to carry out tasks of common interest. Under such conditions as may be provided for by the law, local authorities should be entitled to cooperate with their counterparts in other countries.

Local authorities at every level may associate. Associations may focus on local, economic, demographic, landscape and other factors. All associations should be affiliated with the Union of Associations of Local Authorities that should represent local authorities on the international scene, in particular in the Council of Europe's Congress of Local and Regional Authorities of Europe.



Central government agencies should not make decisions on matters concerning the activity, rights and powers of local authorities without prior consultation with the Union of Associations of Local Authorities.

### **State administration at local level**

To exercise their powers at local and regional level, central executive authorities may set up local branches and supervise their activity. The activity of central government's local and regional branches should be financed by central government.

The central government may delegate functions of its local and regional branches to the local or regional level of government authorities. Central government may delegate all functions and powers to the local (base) level, while the regional level may be vested with all functions and powers except public safety and security, various inspection agencies and the right to represent central government.

Central government's local branches should not belong to the system of local governance and should not exercise responsibilities of local authorities. Employees of central government's local branches should have the status of state employees.

The exercise of office by officers and agencies representing central government should be open and transparent, as required by law. All documents passed by local authorities, if otherwise not subject to confidentiality or privacy laws, should be made public.

### **Administrative supervision of local authorities**

Administrative supervision of the authorities should be exercised by local branches of central government. Administrative supervision may only be exercised according to designated procedures and in cases provided for by the constitution. Any administrative supervision of activities of local authorities should aim only at ensuring compliance with the law and constitutional principles. For the sake of expediency, however, it may be exercised by higher level authorities in tasks the execution of which is delegated to local authorities.

Should an activity of a local authority be deemed to breach the law, or in the event of dispute between the supervisory and supervised authority, the supervisory authority should appeal to courts to pass a ruling on the supervised local authority.

Administrative supervision of local authorities should be exercised in such a way as to ensure that the controlling authority's intervention is commensurate with the materiality of interests which it intended to protect.

### **Legal protection of local government**

*Pavets* and *zemlyas* should have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local government as are enshrined in the Constitution or national legislation.

Administrative courts should be established to arbitrate disputes concerning the activity of local authorities and local representatives of central government. Administrative courts should arbitrate disputes between local authorities and the State, among local authorities, between local authorities and citizens, and between citizens and the State. The administrative court system should comprise the Supreme Administrative Court and four or five regional administrative courts.

Property claims involving a local authority and the State, or made between local authorities should be heard by commercial courts which should be arranged into a system similar to that of administrative courts.

## **Application of the ideal model to the legislative**

by Viktor Charnau and Mikhail Pastukhou

A unicameral parliament (Sojm) would be the optimal legislature model for Belarus, a small country with a relatively homogenous population. The parliament should have 260 seats (as stipulated by the 1994 Constitution) taken in function

of the administrative division and the population of the country. The parliament should have the following functions within the system of governance:

- draft and pass laws;
- define foreign and domestic policy priorities;
- form the executive and oversee its activity;
- form the judiciary and safeguard its independence;
- call and supervise the conduct of elections and referenda.

To perform its functions the parliament should have powers to:

- pass and amend the Constitution;
- pass and enforce laws and resolutions;
- call presidential, parliamentary and local elections and referenda;
- nominate the prime minister;
- pass or reject a new government program;
- abolish or establish ministries on recommendation from the government;
- elect and dismiss the chair and members of the central electoral commission;
- elect and dismiss the chair and members of the Audit Chamber;
- elect the judges of the Constitutional Court, Supreme Court and Supreme Commercial Court, the prosecutor general and central bank governors;
- pass the national budget and hear the government's budget performance reports;
- ratify and denounce international treaties;
- sponsor and consider motions of no confidence vis-à-vis the government and elect a new prime minister if the former prime minister fails to pass the vote;
- sponsor and consider no confidence motions against members of the Cabinet;
- consider resignation of the president, impeach the president should he/she violate the Constitution and laws.

In the transition period, Belarus should adopt a mixed-member proportional voting system for parliamentary elections in the foreseeable future. Such

a system enables equal guarantees of national and local interests and representation of all major political parties and figures in parliament.

The parliament should be elected for five years, and its members should work on a full-time basis and be barred from holding government posts during their term.

The legislature should have sufficient financing, supplies and resources to perform its functions.

## **Election System**

by Mikhas Pliska, Syarhei Alfer

The authorities' legitimacy is based on the will of people as expressed in free and democratic elections. Therefore, the electoral system and laws should guarantee the conduct of elections in line with the basic principles laid down in international legal acts. The principles include universal suffrage, equal, free, fair and open (transparent) election, and voting by secret ballot.

The recognition of elections by all opposing sides in the country and the international community is essential for the country's democratic development and for joining the Council of Europe and the European Union.

Below are proposals that may form the basis of Belarus' electoral legislation.

### **Voting System**

To ensure that both national and regional interests are equally respected, and that political parties (alliances) and voters play key roles in an election process, and to give greater stability to political institutions in the country, Belarus should introduce a voting system based on mixed-member proportional representation in parliamentary elections. Half of the seats in a unicameral 260-member parliament are awarded along the lines of party lists, with the other half resulting from majority voting in single-member constituencies.

The single-member majority system is used for electing members of primary-level councils. And mixed proportional-majority system is used both for par-

liamentary and second level (other) elections when 50% are elected by party's lists and other 50% by majority in single-member constituencies.

The winning candidates for the parliament and local councils in single-member constituencies are effectively elected after a single round. The winning candidate is required to garner a majority of the vote.

Voters should be allowed to rank parliamentary or local candidates in order of their preference on a national party ballot (an open party ballot).

To prevent excessive fragmentation of the elected authorities, seats in the parliament and local soviets should be allocated only to parties that pass a 4-percent threshold. If party lists that pass the threshold gain less than 70 percent of the vote, the top performing lists out of those fetching less than 4 percent are added to the allocation of seats until the total vote reaches 70 percent. Seats are allocated to parties according to a quota and the 'largest remainder' formula<sup>29</sup>.

Parliamentary and local elections in Belarus should be held every four years and may not coincide in time.

Presidential elections in Belarus should be held every five years using the absolute majority voting system and may not coincide in time.

No limits should be imposed on turnout in presidential, parliamentary and local elections.

## Electoral rights

Eligible to voting in Belarus are all citizens aged 18 and over, with the exception of persons declared unfit by court decisions. People with a criminal record

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<sup>29</sup> A variety of different formulas exist for accomplishing the actual allocation of seats to parties. One of the simplest is the 'largest remainder formula'. In this approach, the first step is to calculate a quota determined by taking the total number of valid votes in a district, and dividing this by the number of seats. For instance, 100,000 votes were cast and ten seats are to be filled.  $100,000/10 = 10,000$  i.e. the quota. The quota is then divided into the vote that each party receives and the party wins one seat for each whole number produced. Hence, a party that received 38,000 votes, which is divided by 10,000 to produce three seats – with a remainder of 8,000. Once this first allocation of seats is complete, the remaining numbers for the parties are compared and the parties with the largest remainders are allocated the remaining seats (transl.).

may not be elected as deputies. Constituents, political parties and alliances may not recall their deputies. Those eligible for the post of president are citizens of the Republic of Belarus born in this country, aged 35 and over, who have the right to run for elections. A president may not be elected for more than two terms. Eligible to run for the parliament are citizens of the Republic of Belarus aged 21 and over. Eligible for sitting on local councils are citizens of the Republic of Belarus aged 18 and over. A member of parliament cannot hold a local council seat at the same time.

### **Formation of electoral commissions**

Elections are conducted by central (*tseŭtral'naya*), regional (*terytaryal'naya*), district (*akruhoviya*), and precinct (*uchastkoviya*) commissions. Procedures for forming electoral commissions must warrant the largest possible degree of independence from both elected and executive authorities, and prevent political parties and alliances from monopolizing commissions.

The parliament forms the central electoral commission on the party basis with representatives of political parties that are represented in the legislature. Also party non-affiliates may sit on the commission. The chair of the central electoral commission must hold a university degree in law. The chair and secretary of that commission work on a full-time basis. They should not necessarily represent the same party.

Regional (*terytaryal'naya*), district (*akruhoviya*) and precinct (*uchastkoviya*) commissions are formed on the parity basis of representing political parties (or party non-affiliates) that are represented in the legislature. The composition of these commissions is subject to approval by the central electoral commission.

### **Nomination and registration of candidates**

Eligible for registering candidates to parliamentary, presidential and local elections are political parties and registered voters. To register a presidential candidate, or a parliamentary candidate in a single-member constituency, vo-

ters must collect a stipulated number of signatures or pay election bail. Electoral commissions may verify signatures in support of a candidate only at a request from another candidate running for the presidency, the parliament or a local council.

At least 50,000 valid signatures must be presented to the central electoral commission to register a presidential candidate, with at least 5,000 signatures collected in every region and the City of Minsk. A presidential candidate may also be registered on payment of bail of 200 times the country's minimum salary.

To register a parliamentary or local candidate by collection of signatures, signatures of at least one percent of the Belarusian citizens living in a constituency must be presented to the district electoral commission. A parliamentary or local candidate may also be registered on payment of bail of 20 times the minimum salary.

A candidate who falls short of the required number of signatures after verification may pay specified bail in order to be registered.

To register lists of candidates with respective electoral commissions, parties must pay bail of 200 times the minimum salary for a parliamentary election, and 50 times the minimum salary for a local election.

If a presidential candidate, or a parliamentary candidate in a single-member constituency, or a party that put forward its list of candidates gains less than 3 percent of the vote, the bail should not be returned.

Political parties may form alliances for parliamentary and local elections and must register with respective electoral commissions accordingly.

## **Funding elections**

Electoral commissions should be publicly funded, while central and local authorities should be responsible for logistical support.

Presidential candidates, parliamentary and local candidates in single-member constituencies and political parties and alliances that put forward party lists should set up funds to finance their campaigns. Candidates on a party list ballot may not set up campaign funds. The funds should accumulate contribu-

tions from candidates and parties, and donations from individuals and companies, with the exception of foreign entities.

The right to use money out of campaign funds should be given to the presidential, parliamentary or local candidates, political parties and alliances that established these funds. Presidential, parliamentary or local candidates, political parties and alliances should keep record of sources and application of funds and present financial reports to respective electoral commissions.

### **Campaigning**

All candidates for the presidency, parliament or local councils should have equal rights. Candidates may not take advantage of their official position in order to be elected.

The law warrants equal rights to political parties in placing their advertisements in the media, and equal rights to presidential candidates and political parties that register their candidate lists during mandatory election debates.

During campaign, presidential, parliamentary and local candidates, parties and alliances have the right to hold campaign rallies and demonstrations, meet voters at home and in public spaces. Candidates are not required to notify authorities of their planned meetings with voters. Notification is required for rallies, demonstrations and other mass campaign events.

Campaigning (including for boycott of an election) is prohibited on Election Day. Publication of results of election-related opinion polls is prohibited within three days prior to the election.

Campaign ads, public speeches by candidates or their publications in the media may not call for war, incite racial, ethnic or religious hatred, or call for a forcible change of the constitutional system, or violation of territorial integrity of the Republic of Belarus.



## Voting

Local government authorities should list eligible voters in each constituency and transfer these lists to respective commissions. The voting lists should be publicized 15 days prior to election.

All arrangements for printing, storage and transfer of ballot boxes should be open to the public. Ballots should be protected from counterfeiting.

Polling stations should be open for election from 8 a.m. to 8 p.m.

The law allows for voting by mail in addition to voting at polling stations. Eligible voters who cannot come to the polling station for health or other reasons may vote by post. To cast a ballot by post, voters need two special envelopes, a ballot and an identity certificate signed by another person. Voters put their ballots in one envelope and the identity document in the other.

## Liability for breach of the electoral law

Persons who apply for registration as candidates for presidency, the parliament or local councils, as well as political parties and election-focused alliances taking part in elections have the right of judicial recourse against all decisions of electoral commissions, including those concerning election results.

The registration of a candidate for presidency, the parliament, local council or a party list may be judicially declared null and void at the request of a relevant electoral commission, other candidates for presidency, parliament or local council or by political parties and alliances that registered their lists of candidates.

Election fraud, ballot secrecy violations, or rigging vote count by electoral commission members of and other participants in the election process, as well as other breaches of the electoral law are punishable under the Administrative Offences Code and the Criminal Code.

## Election transparency

Elections should be prepared and conducted openly. Governmental agencies, elected authorities and electoral commissions must publicize all decisions regarding preparation and conduct of elections in the media.

The pluralistic composition of electoral commissions and domestic observers should warrant an open election.

Observers from political parties and non-governmental organizations may a) attend meetings of local commissions without prior notice; b) observe the vote count at a distance enabling them to see the content of the ballot boxes; c) recount ballots, if necessary; d) ask commissions for certified copies of polling protocols.

On signing a protocol of voting results, local electoral commissions should post it in the voting room for public notice.

## An ideal model for Belarus' judiciary and law enforcement agencies

by Mikhail Pastukhou

Like in other European countries, courts in Belarus should act as guarantors of human rights and freedoms. Independence of courts is an indispensable condition.

In this report, the judiciary is regarded as a system of state agencies empowered to settle legal disputes and administer punishment to people found guilty of crimes<sup>30</sup>. The judiciary's role in a democratic state is to enforce the law, prevent any arbitrariness in society and defend people's rights and freedoms.

Belarus still has a centralized judicial system which bears on the country's administrative division and the executive power; it operates as a repressive mechanism rather than a tool for protecting against unlawful actions.

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<sup>30</sup> И. И. Мартинович, М. И. Пастухов, *Судебно-правовая реформа в Республике Беларусь*, Мн.: Амафeya, 1995, p. 22.

A new model suggested below is based on international legal acts and the positive experience of the leading European countries. Belarus' new judicial system should comprise the Constitutional Court, general jurisdiction courts, commercial, administrative and other specialized courts.

## Constitutional Court

The Constitutional Court, the top authority within the system of governance, has considerable influence on public authorities and plays a key role in the checks and balances system, and in guaranteeing people's rights and freedoms<sup>31</sup>.

## Constitutional Court powers

It is necessary to expand powers of the Constitutional Court of the Republic of Belarus. It should have powers to:

- 1) interpret the constitution. Constitutional authorities in most European countries such as Bulgaria, the Czech Republic, Germany, Hungary, Poland, Russia, Slovakia and Slovenia have such a function;
- 2) examine international treaties, as yet ineffective, for compliance with Belarus' constitution. This function should help to prevent the country from assuming international commitments that contravene its constitution. Bulgaria, Germany, Hungary, Lithuania, Moldova, Poland, Slovakia and other countries have a constitutional provision on examining international treaties prior to adoption;
- 3) decide on the constitutionality of platforms and activities of political parties. This function would be an additional guarantee of legality in the operation of political parties. Constitutional authorities in Armenia, Germany, Poland, Portugal and Turkey have a similar function;

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<sup>31</sup> Н. В. Витрук, Конституционное правосудие. Судебное конституционное право и процесс. М., 1998; Конституционное правосудие в Республике Беларусь: пятилетний опыт, проблемы и перспективы. Мн., 1999; Конституции государств Европы. В 3 т. М., 2001; Правовое государство. Конституционный суд (Материалы международных семинаров). Мн., 2000.

- 4) assess the wording of questions subject to referenda for compliance with Belarus' constitution. Armenian, Georgian, Italian and Moldovan constitutional authorities have this function;
- 5) arbitrate disputes concerning powers of supreme governmental agencies (the Polish Constitutional Tribunal has this function);
- 6) examine individual complaints. This power is vested in constitutional authorities of most European countries such as Austria, Croatia, the Czech Republic, Germany, Hungary, Spain and Switzerland.

Constitutional complaints are an effective means of safeguarding constitutional rights and freedoms to individuals. However, to prevent backlog, it is necessary to impose certain conditions on accepting complaints from individuals, for instance, a) an individual must have used all other legal means of defense; b) the term for filing complaints should be limited (in Poland, complaints may be filed within two months after a court's final ruling on the case); c) complaints should be examined prior to Constitutional Court hearings to find out whether they are acceptable; d) it is also possible to introduce charges for unfounded appeals, like in Germany.

- 7) assess legal acts issued by central government for constitutionality.

The Constitutional Court's powers may be expanded by amending the current law 'On the Constitutional Court of the Republic of Belarus'.

### **Who can appeal to the Constitutional Court**

The range of those allowed to file a complaint with the Constitutional Court should be expanded. It is necessary to confer this right to groups of parliamentary deputies (the threshold depending on the number of seats in Parliament), the human/civil rights ombudsperson, courts of all levels (in certain circumstances), and individuals (to exercising their right to appeal to the Constitutional Court).

The Constitutional Court should examine cases at plenary meetings and chamber meetings. All Constitutional Court judges take part in plenary meetings on key issues within the court's powers. Less important cases, primarily individual appeals, are examined at chamber meetings.

## Courts of general jurisdiction

The system of courts of general jurisdiction should be built on the following principles: 1) ex-territoriality of the main components of the judiciary; 2) maximum proximity of courts to the population; 3) cases may be tried by a panel of judges or by a judge sitting alone; 4) citizens should participate in proceedings as jurors; 5) panels of judges should be formed to deal with specific cases; 6) a court of appeal should be established, with general courts retaining the appellate jurisdiction.

Belarus should have a three-tier system of general jurisdiction courts: the Supreme Court, regional (Minsk city) courts, and district courts.

Misdemeanor courts should be an independent element in the court system. They should hear relatively uncomplicated criminal and civil cases. Their rulings may be appealed against to the council of the justices of peace, the highest instance of the misdemeanor courts which should meet every month.

The establishment of such courts offers people better access to judicial defense and eases the caseload on district courts which try all cases within their jurisdiction except those under the jurisdiction of misdemeanor courts and the regional (plus Minsk city) courts.

In district courts, cases that entail a prison sentence of up to five years, or civil cases outside the jurisdiction of misdemeanor courts should be tried by a judge sitting alone. A panel of three professional judges should try cases that entail a punishment of five to ten years of imprisonment if the defendant does not demand a trial by jury, as well as complicated civil cases. A professional judge and a jury should hear cases that entail five to ten years of imprisonment if the defendant pleads not guilty and demands a jury trial.

The regional and Minsk city courts should have appellate jurisdiction over district courts. Hearings of defendant appeals should involve all participants in a district court session and result in a new ruling. When considering an appeal, a superior court rules on the basis of case-related evidence. Criminal cases that entail sentences of ten years-to-life imprisonment should be tried by regional (and Minsk city) courts acting as the courts of first instance.

The Supreme Court should have supervisory jurisdiction over all courts of general and appellate jurisdiction at the regional (and Minsk city) level.

The principle of specialization of judges should be widely applied in courts of general jurisdiction as increasing numbers of cases require expertise in specific legal areas.

Courts of general jurisdiction should administer justice in their respective jurisdictions which will not necessarily overlap with administrative districts. Each jurisdiction will cover an area of 350,000–400,000 population. The number of judges in a jurisdiction should depend on the caseload.

Jurisdictions should be divided into judicial precincts, each having a misdemeanor court. A jurisdiction should comprise five to seven precincts. Misdemeanor courts should have two to three judges depending on the caseload.

Public assessors (representatives of the public sitting to advise the judge), should be replaced with the jury, an instrument with a number of unquestionable advantages<sup>32</sup>.

Given financial constraints, scarcity of resources and difficulties in enlisting jurors, the jury should be composed of seven to nine jurors in district courts and of nine to 12 jurors in regional (and Minsk city) courts.

### Commercial courts

The system of specialized commercial courts should remain unchanged. It is necessary to clarify the jurisdiction and practice of commercial courts. Regional and Minsk city commercial courts may set up panels to arbitrate tax, land, customs and bankruptcy cases. The same panels may be set up in the Supreme Commercial Court, which has the appellate jurisdiction.

<sup>32</sup> И. Л. Петрухин, *Суд присяжных: проблемы и перспективы*, «Государство и право» 2001, № 3, стр. 15; И. И. Мартинович, *Введение суда присяжных в Республике Беларусь – требование времени*, «Российская юстиция» 2001, № 8, р. 54.

## Administrative courts

Administrative courts should be established to deal with complaints by citizens, non-governmental organizations and companies against governmental agencies and officials. They should have jurisdiction over the following cases:

- appeals challenging legal acts of the president and the government if the plaintiff does not plead for these acts to be declared unconstitutional;
- appeals against decisions of the central and lower-level electoral commissions;
- appeals against decisions of other governmental agencies, or commission or omission on the part of officials that encroach on civic rights and, in cases stipulated by the law, rights of legal entities;
- cases aimed at suspending or closing a non-governmental organization or association in Belarus for breach of law;
- other public legal disputes resulting from legal and administrative relations.

Considering Belarus' current territorial and administrative structure, the administrative court system should consist of two elements: regional (and Minsk city) administrative courts and the Supreme Administrative Court. The structure of the new judiciary is illustrated below.

## Formation of courts

The procedure for establishing courts should involve the legislature, the executive and the judiciary.

The parliament should elect the judges of the Constitutional, Supreme, Supreme Commercial and Supreme Administrative Courts. The president should appoint judges of general, commercial and administrative courts recommended, respectively, by the chairs of the Supreme, Supreme Commercial and Supreme Administrative Courts.

The chairs and deputy chairs of courts should be elected by judges in secret ballot for a four-year tenure. A judge may not serve more than two consecutive

tenures. The chairs of the supreme courts recommend nominees put forward by judicial self-governance bodies.

Justices of peace should be nominated by judicial self-governance bodies and appointed by the Ministry of Justice.

### **Guarantees of judicial independence**

The new law should specifically emphasize guarantees of judicial independence, and do so via the following mechanisms:

- 1) procedure for appointing or electing judges;
- 2) ban on replacing judges;
- 3) procedure for dismissing or suspending judges;
- 4) procedure for bringing disciplinary action against judges;
- 5) high salaries;
- 6) ban on the transfer of judges without consent;
- 7) right to resignation;
- 8) immunity;
- 9) protection by judicial self-governance bodies.

### **Judicial self-governance**

The role of judicial self-governance should increase in the new system. Judicial councils should address key issues of the judiciary, distribute funds, issue credentials, administer aptitude tests, make recommendations regarding appointment and dismissal of judges.

### **Prosecution**

Radical changes need to be made in the way the work of prosecutors' offices is organized. Their main functions should be to institute and pursue criminal proceedings, substantiate charges in court, oversee investigations and enforce laws in detention centers, reformatory and penitentiary institutions.



Prosecutors should be deprived of the right to warrant arrest of suspects or investigative actions that infringe on individual privacy and property rights. Such warrants should be issued by investigative judges sitting in district courts.

In court proceedings, counsels for the prosecution should represent their office rather than the State. Counsels for the prosecution and defense should have equal rights.

The prosecutor general should be selected by the parliament from at least two candidates for five years.

### **Investigative agencies**

The reform will substantially affect the police and other agencies involved in pre-trial investigation of offenses. The police should be responsible for maintaining law and order and for investigating most offenses.

The country should be divided into police districts (higher level) and precincts (lower level – transl.). Local government agencies should be empowered to form municipal police force.

Internal investigative units within departments (the Prosecutor General's Office, Ministry of Internal Affairs, Committee for State Security [KGB] and Financial Investigations Department) should be eradicated. An Investigative Committee should be established to replace these units and deal with most severe and complex crime cases, as ordered by the Prosecutor General's Office.

### **Secret services**

The KGB should be renamed as the National Security Service (NSS). Its functions and powers should be clearly specified in the law and the agency should be accountable to the parliament.

### **Defense attorneys**

The current ban on the practice of private lawyers should be lifted. Lawyers should be free to choose to join bar associations or set up private firms.

District courts should run an office offering legal services at modest fees and appoint public attorneys at the request of investigative agencies and courts.

## Notaries

Belarus should do away with the current state system of notaries public and establish a Latin-type system where notaries are employed in the private sector, obliged to comply with effective laws and guided in their work by principles such as independence, impartiality, confidentiality of service-related information and full financial liability for results of their work.

The organization and practice of notaries should be governed by a dedicated piece of legislation<sup>33</sup>.

## Regional justice administration (*orhany yustytyi*)

They should retain their administrative functions (office supplies to courts, assessing staffing needs, training judges, gathering statistics etc.) They should select justices of peace, organize court bailiff services, and run correctional and penitentiary institutions etc.

## Reform mechanism

Belarus needs to adopt a detailed plan of reform of the judiciary. The plan was developed by independent lawyers and presented at a conference in November 2000<sup>34</sup>. It calls for revising current legislation regarding the judiciary and law enforcement agencies.

<sup>33</sup> Падрабязьней пра рэформу натарыятаў у Рэспубліцы Беларусь гл.: А. К. Турмович, Концепция нового закона о нотариате [в:] *Материалы международных семинаров «Нотариат. Уполномоченный по правам человека»*, Мн.: Трансформ, 2000, р. 35–40.

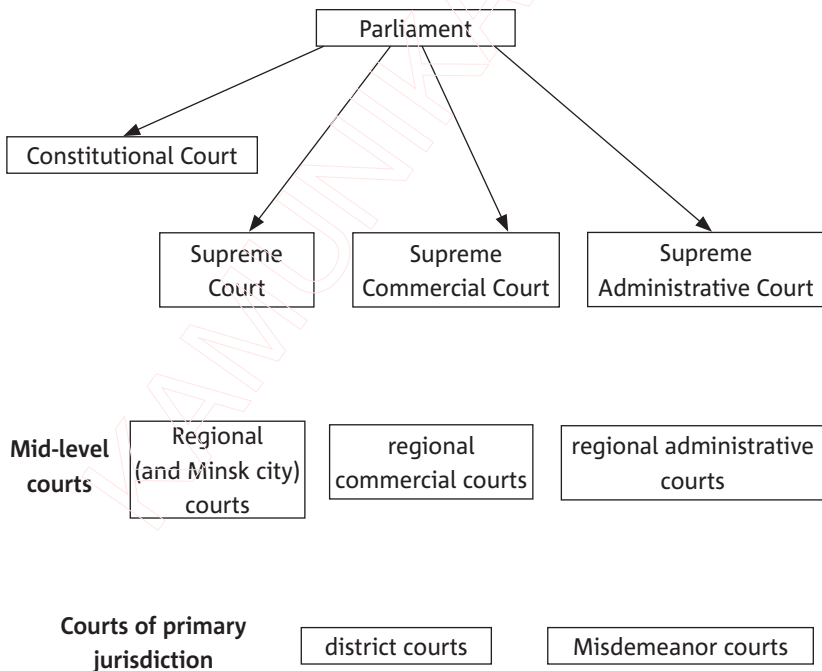
<sup>34</sup> М. И. Пастухов, *Каким быть новому суду в Беларуси. Обоснование новой редакции Концепции судебно-правовой реформы* [в:] *Материалы международных семинаров «Судебно-правовая реформа. Нотариат»*, Мн.: Трансформ, 2000, р. 5–11.

The ultimate goal of the reform is to create an environment for a powerful and independent judiciary, a key guarantor of the civil rights and freedoms, and an effective mechanism to safeguard principles of democratic rule of law.

The parliament should establish a Committee on Judicial and Legal Reform to oversee its progress and coordinate efforts of governmental agencies and non-governmental organizations to carry out the plan.

Appendix

### Judiciary in Belarus after the reform



**Notes:**

1. Superior courts are formed by the parliament.
2. Judges are appointed to mid-level courts by the president from among candidates proposed by judicial self-governance bodies.
3. Justices of peace are appointed by the justice minister for three years from among candidates put forward by judicial self-governance bodies.

## The Constitutional reform by Mikhail Pastukhou

The planned reform of the legislative, executive and judiciary should be codified in the constitution. The question is what version of the constitution should be used as the basis of reform – the one adopted on March 15, 1994, or the amendment enacted on November 26, 1996.

The new edition cannot be regarded legitimate as it was adopted with numerous violations of the law. It was enacted regardless of the Constitutional Court's ruling of November 4, 1996, that constitutional amendments subject to a referendum should not be binding.

The 1994 constitution is the only legitimate basis for a constitutional reform in Belarus. Restoration of that constitution will enable the rule of constitutional law in the country.

On the other hand, much time has elapsed since the 1994 constitution was replaced. Legislation has changed significantly, a new system of governmental agencies has been established and new legal relations have been formed. It is not advisable for laws to retroact. It would be better to use the 1994 constitution to prepare a Small Constitution for the transition period. The Small Constitution should outline principles of the constitutional and government system and map out prospects for drafting the constitution proper.

The preparatory stage of the constitutional reform would be spent drafting the Small Constitution for the transition period, with major political forces discussing its text.

Once the Small Constitution is drafted and finalized, key political forces should call on the public to convene a constitutional assembly with political parties and non-governmental organizations represented according to quotas. Members of the 12<sup>th</sup> and 13<sup>th</sup> Supreme Soviets could also be invited, provided that they recognize the 1994 constitution.

An organizing committee should be formed to comprise leaders of political parties and non-governmental organizations so as to prepare the constitutional assembly. The assembly could be held in Belarus or in a neighboring country, depending on the political situation. The following items are recommended for the assembly's agenda:

- 1) elect the chair and three deputy chairs of the assembly;
- 2) approve the structure and mode of setting up commissions of the assembly;
- 3) provisional rules of procedure of the assembly;
- 4) the small constitution of Belarus ;
- 5) provisional laws that would govern presidential, parliamentary and local elections, the central and local electoral commissions, cabinet formation, the judiciary, Constitutional Court, Parliamentary Audit Chamber, human rights ombudsman, Prosecutor General's Office etc.;
- 6) resolutions on new presidential, parliamentary and local elections.

The constitutional assembly would hold sessions until it addresses all items on the agenda. The constitutional assembly and people who organize its work would have no official powers.

After appointing the central electoral commission, the constitutional assembly would set the date (or dates) of elections.

Before legitimate authorities are formed, the existing governmental institutions and agencies, including the president, the Council of Ministers, ministries, departments, the Committee for State Security, the Prosecutor General's Office and courts, would retain their functions and powers.

With a two-third majority vote, the constitutional assembly may form a public commission to investigate abuse of power during Alyaksandr Lukashenka's rule, and set up a public tribunal made up of lawyers who have not compromi-

sed themselves by working for the regime. The constitutional assembly should prepare regulations regarding these agencies. Once a legitimate judiciary and law enforcement agencies are formed, the public tribunal transfers its case files to courts.

Presidential, parliamentary and local elections should be monitored by international and domestic observers to prevent fraud. Election results are made public and may be appealed against in court. The final results of the vote must be approved by the constitutional assembly.

With the president and members of parliament sworn into office, the mandate of the constitutional assembly is terminated.

Judges of the Constitutional Court, Supreme Court, the Supreme Commercial Court, and other courts (as the case may be) are elected by the parliament from among candidates put forward by judicial self-governance authorities, legal research and education establishments, national human rights organizations, parliamentary factions. All the candidates must meet the criteria for the post.

The human rights ombudsman is elected from among candidates nominated by human rights organizations.

It is necessary to restore the Audit Chamber in the parliament (which would have the status of a standing parliamentary committee). Apart from lawmakers, the Audit Chamber will have experts on staff.

The prosecutor general is elected from among lawyers nominated by parliamentary factions. The prosecutor general is accountable to the parliament and abides by the constitution and laws of the Republic of Belarus.

The next stage of the constitutional reform would consist in drafting an amended constitution on the basis of the Small Constitution. For this purpose, the parliament forms a constitutional commission of lawmakers, politicians, lawyers, economists etc. to draft a new constitution. Work on the constitution should be open to the public, and constitutional provisions should be discussed by parliamentary committees, the entire parliament and in the media.

The parliament votes on the new constitution by roll call. The draft needs a two-thirds support to pass in the parliament. Upon parliamentary approval,

the constitution is put to a referendum. The organic statute takes effect immediately upon receiving support of at least 50 percent of registered voters.

The new constitution takes effect on its approval by the people at a referendum. The referendum should be followed by presidential, parliamentary and local elections.

The constitutional reform may be considered complete after the formation of new representative authorities.

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