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OPINION ON THE LAWS OF THE REPUBLIC OF BELARUS

-I-
THE SUPREME SOVIET

-II-
THE PRESIDENT OF THE REPUBLIC

by
Ms Anna MILENKOVA
(Bulgaria)

OPINION
on the conformity of the Belarus laws on the Supreme Soviet and the President of the Republic with the Belarus Constitution

I. GENERAL NOTES

The Constitution of the Republic of Belarus of 15 March 1994 can be described as a typically post-communist basic law, marking a first step in the transition towards democratic government and free civil society. The Constitution combines elements of the soviet system and ideas and principles characteristic of contemporary constitutional democracy.

First of all, it is important to note that most of the principles which are solemnly proclaimed in the Constitution are not consistently pursued in the texts determining the status of the different authorities and regulating their relations with each other.

The classic division between the power to frame a constitution and the powers granted by a constitution is not clearly established in the Constitution. As a result, the Supreme Soviet's competences include both the power to adopt and amend the constitution and legislative power. Consequently, the Supreme Soviet could unilaterally change the "rules of the game". This being so, the introduction of constitutional jurisdiction to observe the balance between the different public authorities becomes largely meaningless.

The fundamental principle of constitutional democracy, namely the separation of powers, is not applied fully enough. In the Belarus Constitution there is an imbalance between the different authorities which is subsequently increased in the two laws on, respectively, the Supreme Soviet and the President of the Republic.

Relations between these two institutions have been conceived in such a way as to give the Supreme Soviet a dominant position vis-a-vis the President of the Republic. The advantage enjoyed by one institution in relation to the other derives not only from their respective constitutional positions but also from the roles assigned to them in the political process. Thus, the Supreme Court is expected not simply to be a national legislature but also to be an institution with full authority to define national policy, whereas the President of the Republic heads an executive with very limited functions.

Generally speaking, it is true to say that both laws are of a constitutional nature since they enlarge on provisions of the basic law concerning the legal status of the main political institutions in the power structure. Both laws reproduce certain constitutional provisions word for word and also go into great detail on some aspects.

II. NOTES ON EACH OF THE LAWS

A. LAW ON THE SUPREME SOVIET OF THE REPUBLIC OF BELARUS

1. Article 10 provides that the Supreme Soviet shall have the right of ownership over the property of the Republic of Belarus. As a rule, property rights in such cases lie with the State as a legal entity, whereas the national legislature determines the normative framework and the ways in which these rights are to be exercised. In practice, a collective body with many members, such as a parliament, would have difficulty in exercising the various powers associated with property rights. This is why these powers usually come within the executive's sphere of activity.

2. Article 12, paragraph 3 reproduces the Constitution, stating that the Supreme Soviet shall interpret the articles of the Constitution. In this case, the question inevitably arises of the role of the Constitutional Court and the effectiveness of its acts.

3. Article 12, paragraph 4 and Article 49, paragraph 1 (d), introduce "decrees" as acts of the Supreme Soviet. In Article 12, they are presented as an instrument for exercising administrative powers and powers of control, whereas in Article 49, they are defined as acts through which executive power is exercised. However, both articles diverge from the constitutional principle of the separation of powers, allowing for the possibility of intervention in the executive's sphere of activity.

4. Under Article 39, paragraph 2, the Constitutional Court may submit proposals to the Supreme Soviet regarding the need to amend or supplement the Constitution. Given that initiatives of this kind usually have a political significance, the fact of conferring such a power on the Constitutional Court marks a departure from its basic function, which is to act as arbitrator in national political life.

5. Article 52 provides for special consent procedures which the President of the Republic may propose when he refers an adopted law back to the Supreme Soviet for a second reading. It is not clear that such procedures are absolutely necessary. When the President exercises his veto, the reasoned objections he puts forward are of a fundamental importance and the Supreme Soviet should have complete freedom to hold a debate on these objections and reach a decision. If this is not the case, neither institution can be said to be politically responsible for its actions.

6. Article 58 gives the Supreme Soviet the right to hear reports from cabinet ministers on questions concerning the application of laws. If a Minister is found to have departed from any law, he may be in danger of losing his post. This system of reporting to the Supreme Soviet puts it in too strong a position, giving it practically unlimited scope for influencing the executive.

7. Article 70 gives excessively wide powers to the Chairman of the Supreme Soviet, including the power to nominate people for key posts in the state apparatus, such as Procurator General. Generally, speaking, the wide powers conferred on the Chairman of the Supreme Soviet give him an enormous role in the country's political life, thereby making him a potential rival to the President of the Republic.

8. Article 95, paragraph 9 states that a deputy's mandate expires in the event of his being "recalled". The "recall" of a deputy is not provided for in the Constitution, but it is a sign and a consequence of the soviet system's use of the "compulsory mandate" (whereby a deputy's right to represent his electors depends on his complying with their instructions). This matter should be covered by the Constitution, and in this way it would be dealt with in a sound and lasting way. It is also worth considering whether an "open mandate" would be preferable to a "compulsory mandate". I think that an "open mandate" is to be preferred because it gives the legislature stability, which is essential if it is to pass the laws needed to bring about reform.

B. LAW ON THE PRESIDENT OF THE REPUBLIC

1. Article 1, paragraphs 1 and 2 define the President of the Republic in two different ways: firstly, as Head of State and the executive, and secondly as the Highest Official in the Republic. As a rule, the status of Head of State excludes the definition of the President as a high-ranking official, as this is an autonomous political institution at the top of the state hierarchy and not an official whose task is ultimately to implement decisions made by others. In this regard, the debate in the French Constitutional Assembly of 1946 is particularly interesting. In some ways the two definitions are mutually exclusive and it is better to keep the term "Head of State", which was used in the Constitution.

2. Article 11, paragraph 4 provides that the President may not exercise his duties from the moment the Constitutional Court delivers its judgment on whether the President has violated the Constitution or an hoc commission reaches its finding on whether the President has committed a crime until a decision is taken by the Supreme Soviet on the issue. During this period, the powers of the President of the Republic are exercised by the Chairman of the Supreme Soviet. However, this temporary suspension of presidential powers could be a premature and excessive measure because in both cases the decision is only a preliminary finding rather than a final political decision. This places potential rivals to the directly elected Head of State in too strong a position. The President could find that his hands are tied before having any real opportunity to put forward a public defence.

3. Article 11, paragraph 6 introduces the mechanism of a no-confidence vote in the President of the Republic by national referendum. This suspension of the President's powers by referendum is not provided for in the Constitution, but is unexpectedly introduced through legislation. From a formal standpoint this is not acceptable because we are faced with a significant amendment and addition to the basic constitutional text. However, this is not the only consideration. The establishment of this kind of direct democracy severely limits the freedom of action of the Head of State, who is simultaneously head of the executive. Comparative law throughout the world shows a diametrically opposed trend towards a stabilisation of the executive, which is thereby rendered considerably more effective. The superficial democracy of the no-confidence mechanism should take second place to the need for an effective government which exercises executive power in a dynamic way.

4. Article 17, paragraph 1 gives the Head of State the exclusive right, with the Supreme Soviet's agreement, to appoint and dismiss the Prime Minister, his Deputies, the Ministers of Foreign Affairs, Finance, Defence and Interior Affairs, and the Chairman of the Committee on State Security, and to accept the resignations of these officials. However, the President may not propose a candidate a second time if he or she has already been rejected by the Supreme Soviet. In this instance, the problem of a potential conflict between institutions has been settled through legislation favouring the national legislature. It is preferable to consolidate the position of the Head of State by giving him the last say in the solving of such problems.

To sum up, it is true to say that in general the issue of conformity of these laws with the Constitution does not and cannot be of fundamental importance because the constitutional system of the Republic of Belarus is dominated by the idea of the Supreme Soviet's full authority.

In both cases, there is a common tendency to consolidate the position of the Supreme Soviet through legislation as a counterweight to the President of the Republic, who exercises executive power. In this way, the principle of the separation of powers is stripped of much of its meaning, since it presupposes and requires a relative balance between legislative and executive powers.

As regards the establishment of the constitutional system itself, it is not based on the idea of the "rigid constitution" through which the prior conditions are created for the existence and functioning of an effective constitutional jurisdiction. For the time being, the Supreme Soviet has the power to frame, amend and interpret the Constitution, which inevitably means that the question of compatibility of the laws analysed above with the Constitution of the Republic of Belarus, and more generally the question of how the constitutionality of legislation is reviewed, is of no particular practical value.

Anne MILENKOVA
Bulgaria