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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

BELARUS

DRAFT FINAL OPINION

ON THE CONSTITUTIONAL REFORM

On the basis of comments by

Mr Nicos ALIVIZATOS (Member, Greece)
Mr Philip DIMITROV (Member, Bulgaria)
Mr Bertrand MATHIEU (Member, Monaco)
Mr Vladan PETROV (Member, Serbia)
Mr Kaarlo TUORI (Honorary President, Finland)

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I. Introduction

1. By letter of 26 August 2021, Mr R. Daems, the then President of the Parliamentary Assembly of the Council of Europe, requested an opinion of the Venice Commission on constitutional reform in Belarus and its compliance with Council of Europe standards.
2. On 27 December 2021 the Belarusian authorities published the draft constitutional amendments with a view to their public discussion and further adoption by way of referendum (CDL-REF(2022)007).
3. On 12 January 2022, the Commission's Bureau authorised the preparation of an Interim Opinion through the urgent procedure, the reason for urgency being that the draft constitutional amendments were planned to be adopted by way of referendum in February 2022 and that the Parliamentary Assembly wished to receive the Opinion of the Venice Commission as early as possible.
4. On 21 February 2022, the Venice Commission issued, pursuant to Article 14a of the Venice Commission's Rules of Procedure, the Urgent Interim Opinion on the constitutional reform in Belarus, which was further endorsed at its 130th Plenary Session (18-19 March 2022) (CDL-AD(2022)008) (hereinafter "the Interim Opinion").
5. On 27 February 2022 the referendum took place; the result was 65,2 % in favour of the amendments, which thus were considered adopted. The final text contained certain modifications as compared to the amendments published in December 2021 (CDL-REF (2022)034).
6. On 17 March 2022 the Committee of Ministers, reiterating their condemnation of the active participation of Belarus in the aggression of the Russian Federation against Ukraine, decided, among other things, to suspend Belarus from its right to participate as an associate member in the work of the Venice Commission.¹ By the same decision, the Committee of Ministers decided to enhance the relations of the Council of Europe with the Belarusian civil society and the opposition in exile. On 7 September 2022 the Committee of Ministers agreed to hold regular exchanges of views with the representatives of the Belarusian democratic forces through a "Contact group" to be set up within the Council of Europe Secretariat.²
7. The Parliamentary Assembly having maintained its request for an opinion on constitutional reform in Belarus, the Venice Commission proceeded with the preparation of the final opinion. It invited representatives of Belarusian democratic forces and the civil society to provide their comments on the adopted constitutional amendments.
8. Mr Nicos Alivizatos (Member, Greece), Mr Philip Dimitrov (Member, Bulgaria), Mr Bertrand Mathieu (Member, Monaco), Mr Vladan Petrov (Member, Serbia) and Mr Kaarlo Tuori (Honorary President, Finland) acted as rapporteurs for the final Opinion. This final opinion does not provide an exhaustive analysis of the constitution of Belarus as results from the constitutional amendments, notably because the rapporteurs have not been able to travel to Belarus and to engage in an open, extensive dialogue with all the stakeholders in the course of the preparation of the opinion. Consultations in writing could be organised with some representatives of civil society of Belarus and of the opposition in exile.

¹ Committee of Ministers of the Council of Europe, *Relations between the Council of Europe and Belarus*, 1429th meeting, 17 March 2022, [CM/Del/Dec\(2022\)1429/2.5](#).

² Committee of Ministers of the Council of Europe, *The Council of Europe and Belarus*, 1441st meeting, 7 September 2022, [CM/Del/Dec\(2022\)1441/2.5](#).

9. The present Opinion was prepared in reliance on an unofficial English translation of the amendments as adopted at the referendum. The translation may not accurately reflect the original version on all points.

10. The Opinion was drafted on the basis of comments by the rapporteurs and the written input of representatives of civil society and the opposition in exile. It was adopted by the Venice Commission at its ... Plenary Session (Venice).

II. Background

11. The Constitution of Belarus, adopted in 1994, was amended in 1996. At that time, two competing draft constitutional amendments were presented for the adoption at the referendum: one was proposed by the President of the Republic and another one was proposed by the Agrarian and Communist Groups of parliamentarians. The referendum took place on 24 November 1996 and resulted in the adoption of the President's draft amendments. In its assessment of the amendments proposed by the President, the Venice Commission observed that, while a number of constitutional provisions on human rights were compatible with the international principles on protection of human rights, the implementation of those principles depended on the establishment of the democratic form of government. The introduction of a bicameral parliamentary system did not enhance the position of Parliament which remained a weak institution, with substantial powers of the President in the legislative process. The Constitutional Court lost the appearances of impartiality given the changes as regards the appointment of its judges and its chairperson; the role of the Constitutional Court considerably decreased on account of the removal of the right of minority MPs to seize the Court. The Government depended on the President who had the right to repeal the governmental acts and to dismiss, on his own initiative, every member of the Government (except for the Prime Minister). The Prosecutor General was appointed by and accountable to the President. The leaders of local executive and administrative bodies were also appointed by the Head of the State. The Commission concluded therefore that those amendments only distorted the balance of powers between the organs of governments, with preponderance of power in the hands of the President.³

12. In 2004 the Constitution of Belarus was subject to further amendment which allowed the incumbent President to be re-elected indefinitely and which, according to the assessment by the Venice Commission, generally aggravated the democratic deficit in the country.⁴

13. In August 2020, the presidential elections in Belarus gave rise to a serious political crisis and another strong wave of persecuting political opposition. Mr A. Lukashenko was re-elected to a sixth consecutive term. Part of the international community rejected the results of these elections as conducted in flagrant violation of internationally recognised standards. The opposition candidate Ms S. Tsikhanouskaya called on Mr A. Lukashenko to start negotiations. A series of peaceful protests were held expressing a desire for a democratic change. The Belarusian authorities reacted with an extensive use of force and many protesters, human rights defenders and members of the opposition were arrested.⁵ According to Freedom House, armed riot police and plainclothes officers detained over 32,000 people. Reports of beatings, torture, and other

³ See Venice Commission, CDL-INF(1996)008, Opinion on the amendments and addenda to the Constitution of the Republic of Belarus as proposed by the President of the Republic and the Agrarian and Communist Groups of parliamentarians.

⁴ See Venice Commission, CDL-AD(2004)029, Opinion on the referendum of 17 October 2004 in Belarus, para. 16.

⁵ For more details, see Venice Commission, CDL-AD(2021)002, Opinion on the compatibility with European standards of certain criminal law provisions used to prosecute peaceful demonstrators and members of the "Coordination Council".

human rights abuses of people in detention have since emerged, and security forces beat, arrested, fined, and in some cases shot Belarusian and foreign journalists covering events.⁶

14. On 15 March 2021 the President established a Constitutional Commission⁷ charged with the task of drafting amendments to the Constitution. The Commission was composed of thirty-six members, including selected representatives of the national parliament, local self-government, the academia, the civil society and business circles. On 21 October 2021 the President established a Working Group⁸ to assist the Constitutional Commission in the drafting process. The Working Group consisted of experts and was managed by the Head of the Presidential Administration.

15. On 27 December 2021 the draft amendments were published on the internet for the purpose of their public discussion.

16. In the absence of any cooperation with the Government, the opposition in exile, acting jointly, prepared their own draft Constitution which they presented and discussed on the internet platform.

17. On 27 February 2022 the referendum took place resulting in the adoption of the proposed amendments. The referendum was not recognised by the opposition in exile. The EU,⁹ USA,¹⁰ Canada,¹¹ France,¹² and many other states condemned the referendum, referring to inappropriate context of wide-spread human rights violations and the brutal repression by the State authorities against all segments of the Belarusian society.

18. The constitutional amendments took effect on 15 March 2022.

III. Analysis

A. Amendment process

19. In its Interim Opinion, the Venice Commission looked at the process of the constitutional reform from the perspective of the international rule of law standards, described in particular in the Rule of Law Checklist¹³ as well as the other relevant standards (in particular the Revised Code of Good Practice on Referendums¹⁴ and the Report on constitutional amendment).¹⁵ The

⁶ See Freedom House, *Belarus: Freedom in the World 2021 Country Report* // <https://freedomhouse.org/country/belarus/freedom-world/2021>. See also PACE Resolution 2372 "Human rights violations in Belarus require an international investigation" // <https://pace.coe.int/en/files/29176/html>

⁷ See <https://president.gov.by/ru/documents/ukaz-no-105-ot-16-marta-2021-g>

⁸ See <https://president.gov.by/ru/events/vstrecha-s-rabochey-gruppy-po-dorabotke-proekta-novoy-konstitucii-strany>

⁹ See [Statement](#) from the High Representative/Vice-President Josep Borrell on the constitutional referendum, dated 28 February 2022. // https://www.eeas.europa.eu/eeas/belarus-statement-high-representativevice-president-josep-borrell-constitutional-referendum_en

¹⁰ See [Statement](#) from the U.S. Special Envoy for Belarus, Ambassador Julie D. Fisher, dated 27 February 2022. // <https://by.usembassy.gov/statement-from-the-u-s-special-envoy-for-belarus-ambassador-julie-d-fisher/>

¹¹ See [Statement](#) from the Office of the Minister of Foreign Affairs of Canada, dated 28 February 2022 // <https://www.canada.ca/en/global-affairs/news/2022/02/canada-condemns-fraudulent-constitutional-referendum-in-belarus.html>

¹² See [Statement](#) from the Ministry for Europe and Foreign Affairs, dated 28 February 2022 // <https://www.diplomatie.gouv.fr/en/country-files/belarus/news/article/belarus-france-does-not-recognize-the-results-of-the-supposed-referendum-ballot>

¹³ See Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist.

¹⁴ See Venice Commission, CDL-AD (2022)015, Revised Code of Good Practice on Referendums.

¹⁵ See Venice Commission, CDL-AD(2010)001, Report on constitutional amendment.

Venice Commission criticised the constitutional reform procedure, firstly, because the national parliament as an institution was not involved in the amendment process. As noted previously by the Venice Commission, national parliament is best placed to debate and consider such issues.¹⁶ Adoption of constitutional amendments by Parliament may or may not be followed by a referendum; the latter strengthens the legitimacy of the amendments, provided that the use of referendum complies with the national constitutional system as a whole. However, it is quite rare – and objectionable – for a constitutional amendment to be adopted by a referendum without prior parliamentary approval, because “*there is a strong risk, in particular in new democracies, that referendums on constitutional amendment are turned into plebiscites on the leadership of the country and that such referendums are used as a means to provide legitimacy to authoritarian tendencies*”.¹⁷ Moreover, when a text is put to the vote at the request of a section of the electorate or an authority other than parliament, parliament must be able to give a non-binding opinion on the text put to the vote.¹⁸

20. Secondly, the drafting process did not meet the criterion of transparency which the legitimacy of constitutional amendment requires. It appears that the Constitutional Commission or the Working Group did not conduct their activities with sufficient openness, offering external inputs by all political forces, civil society or private citizens. A certain level of public participation was possible, but only after the draft amendments were published on 27 December 2021.

21. Thirdly, the Venice Commission reiterated that democratic referendums were not possible without respect for human rights, in particular freedom of expression and of the press, freedom of movement inside the country, freedom of assembly and freedom of association for political purposes.¹⁹ If in a functioning democracy sovereignty rests with the people, and it is open to them to decide to give themselves a basic law in whatever terms they wish, this proposition presupposes an informed choice by the people following full public debate during which all points of view may be freely expressed and there are no restrictions on the media.²⁰ The constitutional process at issue has taken place in the aftermath of the August 2020 presidential elections ending with disputed results, and the ensuing imprisonment of opposition politicians and crack-down of oppositional political forces and civil society. It is difficult to see how in this political context the amendment process could ensure a genuine public debate and result in an informed choice by the population.

22. The constitutional referendum took place on 27 February 2022, as announced, just a few days after the full-scale military invasion of Ukraine by the Russian Federation which was conducted partly through the territory of Belarus and with the active support by the official Belarusian authorities (see paragraph 6 above).²¹ This context of military mobilization did not constitute an appropriate setting for a constitutional referendum²² on the ground of the obvious chilling effect which it had on the population of Belarus, which further undermined the legitimacy of the democratic process.²³ The amendment procedure therefore failed to meet the standards

¹⁶ See Venice Commission, CDL-AD(2010)001, Report on constitutional amendment, para. 240.

¹⁷ Ibid., para. 191; see also Venice Commission, CDL-AD(2016)029, Opinion on the draft modifications to the constitution of Azerbaijan submitted to the referendum of 26 September 2016, paras. 15-16.

¹⁸ See Venice Commission, CDL-AD (2022)015, Revised Code of Good Practice on Referendums, III.6.

¹⁹ See Venice Commission, CDL-AD (2022)015, Revised Code of Good Practice on Referendums, II.2

²⁰ See Venice Commission, CDL-AD(2004)029, Opinion on the referendum of 17 October 2004 in Belarus, para. 14.

²¹ See also United Nations General Assembly, A/RES/ES-11/1, Resolution adopted by the General Assembly on 2 March 2022, para. 10.

²² See, *mutatis mutandis*, Venice Commission, CDL-AD(2020)014, Report - Respect for democracy, human rights and the rule of law during states of emergency: reflections, 19 June 2020, para. 120.

²³ See, *mutatis mutandis*, Venice Commission, CDL-AD(2014)002, Opinion on “whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea’s 1992 Constitution is compatible with constitutional principles”, para. 22.

of requisite parliamentary involvement, transparency of drafting process, inclusiveness of public debate and general respect for human rights and fundamental freedoms.

B. Substance of the constitutional amendments

23. The Venice Commission observes at the outset that the analysis of the specific provisions of the constitutional amendments cannot be disassociated from the ultimate question of how the Constitution should be viewed on the global scale. The notion of "Constitution" is not merely formal; it is above all substantial and as such it implies some basic principles, the ones enumerated in the Preamble of the Statute of the Council of Europe, i.e. individual freedom, political liberty and the rule of law which "form the basis of all genuine democracy".

24. The substantive assessment of the Constitution may involve its further categorisation into one of three groups developed in the constitutional doctrine: (i) Normative Constitutions - the constitutions that respect the individual freedoms, provide the separation of powers and these principles are enforced in practice; (ii) Nominal Constitutions - the constitutions which formally are liberal and democratic, but they are not enforced due to the lack of appropriate conditions; (iii) Semantic Constitutions (or *pseudo-Constitutions*) - the documents entitled "constitutions" with the sole aim to legalise the monopoly of power by an individual or a political party; through such "Constitutions", dictatorial governments pretend to disguise their authoritarianism.²⁴

25. Previous opinions of the Venice Commission on Belarus, as well as the recent developments in the country are indicative of the continued degradation of the Belarusian political regime in the direction of the third model, that of "semantic constitutionalism". That being said, this process is not irreversible, and even a "semantic Constitution" may become a "normative" one when the political tide changes. Examining such constitutions is therefore not a futile exercise., The Venice Commission will assess the present constitutional amendments against the background of these fundamental doctrinal considerations.

1. General provisions

26. The Preamble of the Constitution is supplemented by several provisions which refer to the preservation of national identity and sovereignty, cultural and spiritual traditions, human rights and freedoms, rule of law and social justice, the welfare of citizens, the inviolability of the people's power and the prosperity of the Republic of Belarus.

27. In themselves, these additions do not pose major problems. They are in principle in line with the two foundations of a modern constitution, namely national sovereignty and human rights. From this last point of view, it should be noted that the Constitution no longer refers only to citizens' rights, but also to human rights, which is in keeping with the logic of extending the scope of protection. The same applies to the reference to the rule of law and social justice. These references were already included in the Constitution, but their inclusion in the Preamble gives them an additional foundation. However, in general terms there is an overlap between the provisions in Chapter I ("The fundamentals of the constitutional order") and in Chapter II ("Individual, society, State"), so that the exact legal meaning of the provisions in Chapter I remains unclear.

28. Article 4 reduces the principle of respect for the diversity of political opinions, placing it within the framework of the "ideology of the Belarusian state". This amendment may be used as a tool for limiting democratic freedoms. The question is, of course, what this ideology covers, and, above all, which body is entitled to define its content. This formula may lead the constitutional court and other authorities to interpret the constitutional provisions with reference to the "ideology"

²⁴ The doctrine developed by Karl Loewenstein (1891-1973) in his *Verfassungslehre* (Tubingen, 1959, pp. 148 & ff, 151).

which is not clearly defined in the Constitution. The reference to “ideology” is also likely to call into question the entire mechanism for protecting rights and freedoms, which are otherwise recognised by the Constitution.

29. The amendment to Article 7 of the Constitution postulates the principle of legality, proclaiming that the Constitution has supreme legal force, and the other legal acts should be issued on the basis of and in accordance with the Constitution. The amended text of that Article further provides that the principle of legality should be respected, among others, by the organisations and citizens. This amendment overlaps in a certain way with Article 52 which imposes a general duty to respect the Constitution and the laws of Belarus. The purpose and legal relevance of this amendment therefore remains unclear, while it cannot be excluded that the ulterior motive behind it could be to facilitate control of non-governmental organisations and citizens on a vague constitutional basis.

30. Article 13 deals extensively with the role of the State in relation to property,²⁵ Article 44 in Chapter II sets out the right of property from the perspective of the individual.²⁶ A wide interpretation of Article 13 may have the effect of practically annulling the right to property under Article 44.

31. The new provision in Article 15 which provides that *“the State shall ensure the preservation of historical truth and the memory of the heroic deeds of the Belarusian people during the Great Patriotic War”* seems to impose mandatory history policy. While it is legitimate to recall in the Constitution the history of people, its values and roots, it is in general not the role of the legislator to establish historical truths, especially when such “truth” is not defined. As a result, such a provision is likely to undermine the freedom of research and the freedom of expression, given that this principle may be furthered in ordinary legislation, including the criminal law. Furthermore, it raises the question of which body is entitled to define the truth. The role of this new constitutional

²⁵ Article 13 of the Constitution provides:

“Property may be public and private.

The state shall grant equal rights to all to engage in economic and other activities, except those prohibited by law, and shall guarantee equal protection and equal conditions for the development of all forms of property.

The state guarantees everyone equal opportunities for the free use of abilities and property for entrepreneurial and other economic activities not prohibited by law.

The state regulates economic activity in the interests of individuals and society; ensures the direction and coordination of public and private economic activity for social purposes.

Subsoil, water and forests are the exclusive property of the state. Agricultural land is owned by the state.

The law may also define other objects that are only owned by the state or establish a special procedure for their transfer to private ownership, as well as enshrine the state's exclusive right to carry out certain activities.

The state guarantees workers the right to participate in the management of organisations in order to improve their efficiency and social and economic living standards.”

²⁶ Article 44 of the Constitution provides:

“The State shall guarantee everyone the right to property and shall facilitate its acquisition.

The owner has the right to own, use and dispose of property both individually and jointly with others. The inviolability of property and the right to inherit it shall be protected by law.

Legally acquired property is protected by the state.

The state encourages and protects the savings of citizens and creates guarantees for the repayment of deposits.

Forced alienation of property is permitted only on grounds of public necessity, subject to the conditions and procedures defined by law, with timely and full compensation for the value of the alienated property, and in accordance with a court order.

The exercise of property rights must not be contrary to public benefit and safety, cause damage to the environment, historical and cultural treasures, or infringe on the rights and legally protected interests of others.”

principle is reinforced in Article 52 (duty to respect “national traditions of Belarus”) and especially in Article 54 by the statement that *“the preservation of the historical memory of the heroic past of the Belarusian people ... is the duty of every citizen of the Republic of Belarus”*.

32. In Article 18, Belarus breaks with its self-identified feature as a neutral and nuclear-free state. This is a far-reaching change, particularly in the current geopolitical context. This correlates with the amendment to Article 46 stating that Belarus *“develops nuclear energy for peaceful purposes and ensures safety in the production and use of nuclear energy”*. Moreover, Article 18 introduces a new principle that Belarus *“excludes military aggression from its territory against other states”*, which in the current context is remarkably pertinent (see paragraph 6 above).

2. Fundamental rights

33. Chapter II sets out a list of individual rights; justiciable and other social rights are not clearly separated, so that the legal significance of the relevant provisions is unclear.

34. Article 23 of the Constitution sets out a general clause on restricting rights and freedoms which fails to include the requirement of necessity; the relations between this general clause and the specific clauses included in the ensuing Articles is unclear. Limitations and derogations are not separated, nor are the legal effects of states of emergency or martial law spelled out. Absolute rights are not excluded from restrictions (or derogations).

35. Regrettably, Article 24 providing for the death penalty has been maintained, despite the numerous recommendations on its abolishment by both the Venice Commission²⁷ and the Council of Europe bodies.²⁸

36. While the protection of personal data under Article 28 could be seen as positive, the power of the state to create the “conditions for the protection of personal data and the security of individuals and society in the use of such data” might result in excessive interference with freedom of the press and the free circulation of ideas.

37. The new statement in Article 32 that marriage is defined as a union of a woman and a man may be argued as being within the limits of State’s freedom of choice. It is unclear whether this provision would preclude the legislator in future from developing some new forms of personal unions which may be required to accommodate stable homosexual relations and alike.²⁹

²⁷ See Venice Commission, CDL-AD(2007)045, Opinion on the constitutional situation in the Kyrgyz Republic, 17 December 2007, para. 30; CDL-AD(2008)016, Opinion on the draft amendments to the Constitution of Republika Srpska, 16 June 2008, para. 7; CDL-AD(2011)016, Opinion on the new Constitution of Hungary, 20 June 2011, para. 68; CDL-AD(2019)003, Luxembourg Opinion on the proposed revision of the Constitution, 18 March 2019, para. 25; CDL-AD(2015)037, First Opinion on the draft amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, 29 October 2015, para. 35.

²⁸ See Parliamentary Assembly, Resolutions 1044 (1994), 1097 (1996), 1187 (1999); Committee of Ministers of the Council of Europe, Declaration “For a European death-penalty-free area”, 9 November 2000, (cf. Appendix 3 of CM(2000)PV2 prov.), Decision 4.6 “Abolition of the death penalty”, CM/Del/Dec(2021)1401/4.6, 1401st meeting, 14-15 April 2021.

See also Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (ETS No. 114), 28 April 1983; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (ETS No. 187), 3 May 2002, which requires the complete abolition of capital punishment – even for acts committed in time of war.

²⁹ See ECtHR, *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, §§ 76 - 92, ECHR 2013 (extracts); *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, §§ 163 - 188, 21 July 2015

38. The duty of parents under Article 32 to “instil in [their children] a culture of respect for the law and for the historical and national traditions of Belarus” could, broadly interpreted, infringe their right to educate them according to their beliefs.

39. Article 35 remains unchanged, and it leaves the freedoms of assembly and demonstration largely at the mercy of ordinary legislation and implementing authorities. Certain amendments have been made in the determination of the right to establish parties in Article 36 (see also below on the provisions on the financing of political parties and their participation in electoral campaigns); however, that right essentially will be subject to further regulation at the level of ordinary legislation and the practice of its implementation. Article 36 § 4 introduces “paramilitary organisations” which are not defined.

40. Article 41 § 4 allows for forced labour on the basis of a court order, which in effect dismantles the effectiveness of the constitutional protection.

41. Article 45 § 4 has been amended to provide that the citizens shall take care of the preservation of their own health. The legal significance of that amendment is unclear, but it cannot be excluded that the negligence of that obligation may affect the right to health services.

42. Article 62 § 2 provides that “[i]t is prohibited to oppose the provision of legal aid in the Republic of Belarus”. The meaning and the consequences of this provision are unclear, at least in the English translation.

43. Other amendments to this part of the Constitution do not seem to require any specific comments. The text offers some modernisation of recognised rights and freedoms on the one hand, but on the other hand it provides rules which may give grounds for unfounded restrictions of such rights and freedoms. However, it would be ultimately the matter of interpretation and application of the relevant constitutional provisions by the domestic authorities.

3. Electoral system

44. The amended Constitution modifies the scope of the right to vote and the right to stand for election. On the one hand, Article 64 § 2 no longer reverts to the prohibition of the exercise of electoral rights by those citizens who have been placed in pre-trial detention pending consideration of criminal charges against them. On the other hand, this article still provides that no right to vote and to be elected belongs to those who are serving a prison sentence, irrespective of the severity of the crime. This provision will clearly make it impossible for imprisoned political opponents to run for office. Blanket restriction on suffrage based on conviction are problematic from the standpoint of the Council of Europe’s standards.³⁰ The European Court of Human Rights has, for example, criticised the member States for keeping such blanket restrictions in their law, requiring a more tailor-made approach to the disenfranchisement.³¹

45. Articles 69 introduces an innovation by referring to political parties as entities entitled to nominate candidates for elections. Under Article 70 political parties have been included in the list of those organisations which can cover expenses for the election campaign. These provisions are positive as they tend to increase the role of political parties in the electoral process, provided that further legislation on political parties creates the conditions for political pluralism, self-governance of political parties, and their effective participation in political life.

³⁰ See Venice Commission, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, Guideline I. 1.1. d. iv.

³¹ See ECtHR, *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, 6 October 2005; *Frodl v. Austria*, no. 20201/04, 8 April 2010; *Greens and M. T. v. the United Kingdom*, nos. 60041/08 and 60054/08, 23 November 2010, *Scoppola v. Italy (no. 3)* [GC], no. 126/05, 22 May 2012, and *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, 4 July 2013.

46. Another provision in Article 70 prohibits funding of election expenses by foreign states and organisations. In this regard the Council of Europe Committee of Ministers' Recommendation (2003)4 provides that "[s]tates should specifically limit, prohibit or otherwise regulate donations from foreign donors".³² Restrictions on foreign funding is in the interest of avoiding undue influence by foreign interests in domestic political affairs. However, that constitutional provision should not prevent all forms of cooperation between political parties active at an international level. The policy on foreign funding requires a nuanced approach which weighs the protection of national interests against the rights of individuals, groups and associations to co-operate and share information, including across the borders, and the principles of party autonomy and political pluralism in general.³³ Such careful regulations become particularly important in light of the current political context in Belarus where the opposition has been forced to operate from abroad.

47. Article 71 expressly refers to the central electoral commission as the main body responsible for organising national elections and referendums. The amended part of this provision states that the Chairman and the members of the central electoral commission are elected and removed from office by the All-Belarusian People's Assembly (the ABPA). Given the peculiar nature of the ABPA (see the analysis below), this method of appointment does not guarantee the independence and impartiality for the central electoral commission. The effects of this provision are postponed given that putting in place the ABPA will require special legislation (Article 144) and, moreover, the current members of the central electoral authority retain their powers for the duration of their mandate (Article 146).

48. The same Article 71 further provides that the guarantees of independence of the electoral commissions shall be determined by law. The Venice Commission recalls that in order to ensure that elections are properly conducted, or at least to remove serious suspicions of irregularity, independent and impartial electoral commissions must be set up at all levels, from polling station up to the national level. The Venice Commission has observed that in states with little experience of organising pluralist elections, there is too great a risk of the government taking control of the electoral authorities.³⁴ For these purposes, it is preferable to regulate the composition of the electoral authority, including quotas for the judiciary and the political parties, the guarantees against arbitrary dismissal, and the qualified majorities for taking decisions, at the constitutional, and not legislative level.³⁵

49. In sum, the Venice Commission recommends revising the method of election of the members of the central electoral commission and provide for basic guarantees of independence and impartiality of this body and its members at the constitutional level.

4. President of the Republic

50. The Venice Commission Opinion on the 1996 amendments criticised the preponderance of presidential powers. In its Interim Opinion, the Venice Commission criticised the vast powers of the President of the Republic and his predominant role in the political system since 1996. In the Belarusian context, the current constitutional amendments do not alter the dominant position of the President vis-à-vis the government and the two chambers of the national parliament. Legally

³² See Committee of Ministers of the Council of Europe, Recommendation (2003)4 to Member States on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns, 8 April 2003, Article 7.

³³ See Venice Commission and OSCE/ODIHR, CDL-AD(2020)032, Guidelines on Political Party Regulation, para. 231.

³⁴ See Venice Commission, CDL-AD(2002)023rev2-cor, Explanatory Report to the Code of Good Practice in Electoral Matters, 25 October 2018, paras. 70-71.

³⁵ See Venice Commission, CDL-AD(2002)023rev2-cor, Guideline II.3.1 of the Code of Good Practice in Electoral Matters, 25 October 2018.

complicated relationships among constitutional bodies increase the possibilities for a strong President to exercise control over the state apparatus as a whole.

51. There remains decisive dependence of the government on the President, who, for instance, appoints the Prime Minister (though with a prior consent of the House of Representatives) and other ministers; s/he can on his/her own initiative dismiss the Government, which is “accountable” to him/her; and s/he can revoke the acts of the Government. The President retains control over Parliament which remains a weak institution that can be dismissed by the President on broad grounds. Furthermore, the President calls referendums on the initiative of other constitutional bodies or on his/her own initiative; may declare a state of emergency on broad grounds (for example “mass and other disturbances”); and introduce martial law. If for some, though by no means all, of these provisions parallels may be found in Western constitutions, in these constitutions there exist effective checks and balances that are absent in the constitutional system of Belarus.³⁶

52. In addition, there are no reasonable limitations on the terms of office for the incumbent President given that the limitation of two terms (amended Article 81) will take effect only as from the next presidential election (Article 143 §2); in the meantime, the incumbent President would be allowed to hold simultaneously the post of Chairman of the ABPA (see Article 144); the impeachment procedure for the President has been redesigned but it remains weak; the immunity enjoyed by the President (Article 89) will continue to apply after the expiry of the President’s term; even after the termination of mandate, there is a special provision that former Presidents would be members of both the ABPA (Article 89²) and the Council of the Republic (the upper chamber of Parliament) (Article 91 §2). Lastly, new qualifications for the presidential candidates have been added (for example, a requirement for the absence of “a residence permit or other document of a foreign state entitling him to privileges and other advantages” (Article 80)) which in practice are most likely to exclude from the electoral process the opponents who are currently in exile abroad.³⁷

53. Under Article 84 § 5, the President “Forms, abolishes and reorganises the Administration of the President of the Republic of Belarus, other state bodies and other organisations as well as consultative, advisory and other bodies under the President and determines their status”. This power is totally unlimited, and gives the President an opportunity to strengthen, change or substitute for any constitutional institution, thus overriding and rendering any constitutional setup *de facto* moot.

54. The presidential powers remain strong at the level of local self-governance. The President monitors compliance with the law by local authorities and self-government bodies, and has the right to suspend the decisions of local councils (Article 84, para 26). In addition, the Council of the Republic, where the President’s influence is considerable, can cancel these decisions and even dissolve a council (Article 98, paras. 5 and 6). No judicial guarantees, such as involvement of the Constitutional Court, are included.

55. As previously, the appointment and dismissal of the Prosecutor General is at the hands and at the discretion of the President (a prior consent by the Council of the Republic, though, is required) (Article 126).

56. In conclusion, the Venice Commission reiterates its criticism regarding the overconcentration of powers in the hands of the President, the lack of checks on the President’s power, and the possibility of the re-election of the incumbent President for further consecutive terms.

³⁶ See Venice Commission, CDL-AD(2022)008, Urgent Interim Opinion on Constitutional Reform in Belarus, 5 April 2022, para. 38.

³⁷ See Venice Commission, CDL-AD(2022)008, Urgent Interim Opinion on Constitutional Reform in Belarus, 5 April 2022, paras. 39-43.

5. All-Belarusian People's Assembly

57. The complicated nature of the state organisation is further enhanced by the establishment of an All-Belarusian People's Assembly (ABPA). Its actual establishment may take time because it depends on a special law on procedure of formation of the ABPA. That special law has to be adopted within one year since the date of taking effect of the constitutional amendments (see Article 144).

58. The very justification of the new body is doubtful. The ABPA is defined in the amended Constitution as the highest representative body. However, the "representative" nature of this body is open to doubt. The exact composition of the ABPA is not described in detail: it will include the President of the Republic, former President(s), representatives of the executive, legislative and judicial branches, and representatives of the civil society. The amendments do not say anything about the manner of election of the members of the ABPA. This creates a substantial risk of abuse. Given that the ABPA would be a large body of up to 1,200 members, organised in a pyramidal way and composed of entities very diverse in character, the role of the Presidium of the ABPA becomes decisive at the operational level (Article 89²). The jurisdiction and powers of the Presidium of the ABPA have neither been specified, nor limited, nor has its composition been determined. It is only logical to assume that the President of the Republic would be likely to become the Chairman of the ABPA or play a decisive role in the Presidium.³⁸ In sum, it is difficult to see to what extent this body will be truly representative of the Belarusian society and thus legitimate to express the will of the people.

59. As regards its functions, in certain respects the ABPA will stand above the rest of the state organisation. The ABPA will have a significant decision-making capacity, including the election and dismissal of members of the constitutional court, judges of the supreme court, the central electoral commission, the commitment of military forces outside the territory, and the issuing of binding instructions to State bodies and officials. Appointment to the above-mentioned positions is made upon the "proposal of the President, previously agreed with the Presidium".

60. Some other powers of the ABPA are not clearly defined. For instance, the ABPA will have "the right to consider the question of the legitimacy of elections". However, it remains unclear what exactly its powers regarding elections would be and how these powers would correlate with those of the central electoral commission. Moreover, the possibility of giving "binding instructions to State bodies and officials" is likely to conflict with governmental powers and responsibilities in this area. In addition, the power of the ABPA to annul all legal acts and other decisions, except for the acts of judicial bodies (Article 89⁵), encroaches on the jurisdiction and powers of the other State bodies.³⁹ The ABPA will also have the right to introduce a state of emergency or martial law in case of inaction by the President (Article 89³ §8).

61. The ABPA is therefore a plethoric body bearing the mark of communist "democratic centralism" (which seriously hampers fruitful deliberations and makes elections predictable). Thus, it entails a strong fusion and concentration of powers. Its main objective seems to be maintaining the rule of the current President of the Republic and of its entourage forever, which makes it incompatible with the democratic values enshrined by the Council of Europe.

³⁸ See Venice Commission, CDL-AD(2022)008, Urgent Interim Opinion on Constitutional Reform in Belarus, 5 April 2022, paras. 44, 46-48.

³⁹ See Venice Commission, CDL-AD(2022)008, Urgent Interim Opinion on Constitutional Reform in Belarus, 5 April 2022, paras. 49-51.

6. Parliament

62. The Venice Commission has earlier assessed the position of Parliament in Belarus as weak and subject to strong influence by the President of the Republic.⁴⁰ With the ABPA appearing on the constitutional landscape, the role of Parliament decreases even further. For example, the Council of the Republic (the upper chamber of Parliament) no longer has power to elect six judges of the Constitutional Court and six members of the central electoral commission. Both chambers of Parliament lose their powers to decide on the removal of the President of the Republic from office. These changes shift the power to the ABPA which, in addition, is given a right of legislative initiative (Article 99). At the same time, the amendments include the individually tailored rule that former President of the Republic is an *ex officio* member of the Council of the Republic, for life (Article 91 § 2).

63. The amendments leave the division of powers between the House of Representatives and the Council of the Republic largely untouched. The Council possesses remarkable powers. It is supposed to be the chamber of territorial representation. Yet this characterisation does not sit well with the President's power to appoint eight members or the membership of a former. According to the amended Article 92 § 2, a member of the House of Representatives may not be a member of Government. This further enhances the dependence of the Government on the President.

64. Prior consent of the House of Representatives is required for the presidential appointment of the Prime Minister. While the requirement of prior consent may appear a stronger guarantee than the *post factum* approval, it avoids that the President defy Parliament, while he can influence the decision in a less overt manner.

65. There are specific amendments which concern the functioning of Parliament: (1) the term of office of Parliament is extended from four to five years (Article 93); (2) additional conditions are provided in Article 94 when Parliament cannot be dissolved (during the period when the ABPA decides on the removal of the President from office, in the last year of Parliament's term of office); (3) instead of two regular sessions, the chambers shall meet in one longer session which will last from the third Tuesday of September until the last working day of June of the following year (Article 95); (4) each chamber hears annual reports by the Prosecutor General, the Chairman of the State Control Committee and the Chairman of the Board of the National Bank on the results of their activities (Articles 97 and 98); (5) the rules of procedure for the two chambers and their bodies, and the status of members of each chamber is to be determined by statute, and not only by the rules of procedure of the chambers as it was previously the case (Article 105). However, in the Belarusian constitutional framework, which does not provide for an appropriate system of checks and balances, these amendments do not make any substantial difference and Parliament remains a weak institution.

66. As regards the law-making procedure, a new competence has been given to President who, before signing the law that has just been adopted by Parliament, may ask the Constitutional Court to review its constitutionality (Article 100). If the President submits such a request to the Constitutional Court, the deadline for signing that law shall be suspended pending the examination of the case by the Constitutional Court. The opinion of the Constitutional Court shall be issued no later than ten days from the date of submission of the request by the President. If the Constitutional Court upholds the constitutionality of the newly adopted law, the President shall sign it within five days of the Constitutional Court's ruling. If the Constitutional Court finds the law to be unconstitutional, the President shall return it to the House of Representatives.

⁴⁰ Venice Commission, CDL-INF(1996)008, Opinion on the amendments and addenda to the Constitution of the Republic of Belarus as proposed by the President of the Republic and the Agrarian and Communist Groups of parliamentarians, paras. 14-24.

67. The idea of *ex ante* control of the constitutionality of a bill is not unreasonable, if it is to be conducted within a short time-frame. Some European legal orders provide for an *ex ante* review by the Constitutional Court besides *ex post* review. In order to avoid over-politicising the work of the Constitutional Court and its authority as a judicial body, the right to initiate *ex ante* review should be granted rather restrictively.⁴¹ Currently, this review can be triggered exclusively by the President which creates the impression of another leverage of the President's influence on Parliament. Instead, it would be useful if the parliamentary minority could initiate such a procedure and challenge a draft law passed by the parliamentary majority. On the other hand, the Commission's reservations about the lack of guarantees of independence of the Constitutional Court (see below) render the possibility of seeking an *ex ante* control of constitutionality rather moot.

68. With the removal of Article 101, the Constitution no longer permits the delegation of legislative powers to the President of the Republic, neither does it provide the power of the President of the Republic to issue temporary decrees which have the strength of law. This amendment is one of the rare positive elements in the whole reform; however, it is not sufficient to change the general picture of the President's predominance in the political system.

7. Ordinary courts

69. The Venice Commission reiterates that the main guarantees ensuring the independence of the judiciary should be set out in the Constitution.⁴² In particular, since the appointment of judges is of vital importance for guaranteeing their independence and impartiality, it is recommended to lay down the procedure for their appointment in the Constitution.⁴³ If the appointment decision belongs to the executive, special care has to be taken that it is always based on a nomination procedure in the hands of an independent and apolitical body.⁴⁴ Again, for the reasons of independence and impartiality, the grounds for suspension or dismissal should be provided in the Constitution, and the fair procedure for taking such decisions, as well as the right of appeal of the judge concerned.⁴⁵ These are basic preconditions for judicial authorities to exist as a separate branch of power.

70. While the Constitution proclaims the principle of judicial independence in Article 110, the abovementioned safeguards for ensuring such independence are missing. According to the amendments, the President of the Republic shall appoint and dismiss judges of courts of general jurisdiction (Article 84 (10)). The ABPA shall elect and dismiss the judges of the new Supreme Court, as well as its President and its Vice-Presidents (Article 112¹). In the light of the misgivings about the composition and the legitimacy of the ABPA, and the leading role which is likely to be played by the President in this institution (see above), this method of appointment to the highest

⁴¹ See Venice Commission, CDL-AD(2011)001, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, 28 March 2011, para. 37.

⁴² See Venice Commission, CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, 16 March 2010, para. 22.

⁴³ See Venice Commission, CDL-AD(2008)010, Opinion on the Constitution of Finland, 7 April 2008, para. 112.

⁴⁴ *Ibid*, para. 112.

⁴⁵ See Venice Commission, CDL-AD(2008)010, Opinion on the Constitution of Finland, para. 113; See also CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania, para. 35; CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia, para. 156; CDL-AD(2011)010, Opinion on the Draft Amendments to the Constitution of Montenegro, as well as on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, para. 10; CDL-AD(2005)003, Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by the Venice Commission and OSCE/ODIHR, para. 105; CDL-AD(2002)033, Opinion on the draft amendments to the Constitution of Kyrgyzstan, para. 11.

judicial offices in the country does not guarantee the independence and impartiality of those judges. Furthermore, no safeguards have been put in place to ensure that the decisions concerning the professional career of all judges, including their appointment, promotion and dismissal are taken within a fair procedure and are based on the objective criteria, and not on political or other ulterior considerations. In particular, no judicial council-type body exists which would introduce expertise into the process of judicial appointments and dismissals.

8. Constitutional Court

71. The amended Constitution has provided several changes regarding the Constitutional Court. They concern such aspects as the eligibility criteria for judges of the Constitutional Court, the method of their election, and the competency of the Constitutional Court. As in the case of the ordinary courts, the amendments do not improve the independence of the Constitutional Court.

72. As to the eligibility criteria, the Constitutional Court remains composed of “12 judges who are highly qualified specialists in the field of law and who usually hold academic degrees”, but the previous maximum age limit of 70 years has been removed (Article 116). In the Commission’s view, it would be appropriate to indicate the minimum age for election and the maximum age for retirement⁴⁶ and to set out the required professional experience.⁴⁷

73. The amended Constitution changes the method of election of judges of the Constitutional Court. Previously, six judges were appointed by the President of the Republic and six were elected by the Council of the Republic. Pursuant to the revised Article 116 § 3, all the judges of the Constitutional Court will be elected and dismissed by the ABPA based on the proposal of the President of the Republic preliminarily agreed with the Presidium of the ABPA; the same procedure applies to the election and dismissal of the President and the Vice-President of the Constitutional Court (Article 89³ (9)). In the light of the misgivings about the composition and the legitimacy of the ABPA and the leading role which is likely to be played by the President in this institution (see above), it is doubtful that such a manner of electing the judges of the Constitutional Court and its leadership will ensure their independence. Even in countries where the judges of the Constitutional Court are elected by Parliament, the Venice Commission recommended that their election should be made by a qualified majority⁴⁸ with a mechanism against deadlocks.⁴⁹ The Commission has also stated that while the “parliament-only” model provides for high democratic legitimacy, appointment of the constitutional judges by different state institutions has the advantage of shielding the appointment of a part of the members from political actors.⁵⁰ Moreover, it is preferable that the President of the Constitutional Court be elected by the judges of the Constitutional Court themselves.⁵¹

⁴⁶ See, for example, Venice Commission, CDL-AD(2015)027, Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015, para. 26; CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, para. 77. See also CDL-STD(1997)020, Composition of Constitutional Courts, December 1997, para. 4.1.

⁴⁷ See Venice Commission, CDL-AD(2017)001, Opinion on Questions Relating to the Appointment of Judges of the Constitutional Court of Slovak Republic, paras. 54-56. See also CDL-STD(1997)020, Composition of Constitutional Courts, December 1997, paras. 2.1.

⁴⁸ See Venice Commission, CDL-AD(2007)047, Opinion on the Constitution of Montenegro, 20 December 2007, paras. 122 and 123.

⁴⁹ See Venice Commission, CDL-AD(2012)024, On Two Sets of Draft Amendments to the Constitutional Provisions Relating to the Judiciary of Montenegro, 17 December 2012, para. 35.

⁵⁰ See Venice Commission, CDL-AD(2012)009, Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, 19 June 2012, para. 8.

⁵¹ See Venice Commission, CDL-AD(2012)024, On Two Sets of Draft Amendments to the Constitutional Provisions Relating to the Judiciary of Montenegro, 17 December 2012, paras. 37-38.

74. Article 116¹ redesigns and extends the competencies of the Constitutional Court. It still exercises the control of constitutionality of the legal norms. Article 116 § 1, which determines the purposes of such control, is rather clumsily formulated with many broad expressions. However, it refers, among other things, to the protection of human rights and freedoms guaranteed by the Constitution. The mere fact of mentioning human rights protection as one of the purposes for the revision of the constitutionality of legal acts is a step forward in the direction of strengthening this indispensable role of the Constitutional Court in modern constitutionalism. In fact, it could be viewed as an introduction to the new jurisdiction of the Constitutional Court of Belarus.

75. Further, the Constitutional Court shall give opinions on the interpretation of the Constitution at the requests of the President, the Presidium of the ABPA, the House of Representatives, the Council of the Republic, the Supreme Court, and the Council of Ministers.

76. The Constitutional Court will also issue opinions, at the President's request, on the constitutionality of draft laws amending and supplementing the Constitution. The Venice Commission has observed that there is no generally accepted standard in comparative constitutional law regarding the participation of constitutional courts in the constitutional amendment process, either before or after the adoption of the constitutional amendment. The definition of the scope and nature of constitutional control of constitutional amendments in each country is the result of a complex balance between the principles of "popular sovereignty" and the "rule of law", which also involves the imposition of reasonable limits to the intervention of the judiciary.⁵² The Venice Commission reiterates that any such control "should not deprive of effects the powers or acts of the constituent legislator".⁵³

77. The Constitutional Court also issues opinions at the President's request on the constitutionality of newly adopted laws submitted to the President for signature (discussed above, see paragraphs 66-67); questions submitted to a republican referendum; international treaties which have not yet entered into force.

78. The Constitutional Court may give its conclusion on the facts of systematic or gross violations of the Constitution by the President. That competence is quite common in modern constitutions, but in the Belarusian case it is of limited relevance because it is carried out exclusively on the proposal of the Presidium of the ABPA, which is likely to remain under the effective control of the President of the Republic.

79. Another new competence of the Constitutional Court is ruling upon constitutional complaints (i. e. complaints by citizens about violations of their constitutional rights and freedoms), by reviewing the constitutionality of the laws applied in a particular case, where all other judicial remedies have been exhausted. The following constitutive elements of the constitutional complaint can be seen from the constitutional text: (1) the applicant is a citizen; (2) the object of protection are the human rights and freedoms guaranteed by the Constitution; (3) "contested acts" may be any law applied in a particular case; (4) the constitutional complaint is a subsidiary remedy (it can be used only after all other judicial remedies have been exhausted). The manner in which the Constitutional Court rules upon complaints of citizens will be prescribed by law.

80. These elements of the constitutional complaint suggest that it belongs to a type of normative constitutional complaint, i.e. complaint that does not refer to individual acts of public organs but to the application of the laws itself in concrete cases. Generally speaking, that type of constitutional complaint may be less effective in terms of protecting human rights. As the Venice Commission has observed earlier, normative constitutional complaints are directed against the

⁵² See Venice Commission, CDL-AD(2022)012, Amicus Curiae Brief on the limits of subsequent (a posteriori) review of constitutional amendments by the Constitutional Court of Ukraine, 20 June 2022, para. 22.

⁵³ Ibid., para. 69

application of unconstitutional normative acts. An individual may lodge a complaint to a constitutional court concerning the violation of his or her fundamental rights allegedly committed through an individual act that is based on a normative act, by challenging the constitutionality of the latter. Thus, while the review is related to a specific case, the only subject matter of the complaint is the normative basis for such individual act and not the constitutionality of the act itself. As a result, the individual act applying a normative act cannot be attacked before the constitutional court, and the constitutional court cannot address issues that arise in the context of its implementation. The main rationale for normative constitutional complaints is to protect the constitutional order rather than individual rights. Moreover, they mitigate the risk of overburdening the constitutional court. Since many human rights violations are the results of unconstitutional individual acts rather than unconstitutional normative acts, such violations would escape the normative complaint. Consequently, a normative constitutional complaint is less effective as a remedy if the unconstitutionality resides in the application of the norm, but not in the norm itself.⁵⁴

81. In sum, the competencies of the Constitutional Court have been extended and modernised. However, they only make the missing guarantees for the independence of that Court more pertinent. Bearing in mind the specific context of the Belarusian constitutional and legal order which lack adequate checks and balances and which ensure a predominant role of the President of the Republic, including in the process of appointment of the members of the Constitutional Court, the amendments increasing the role of the Constitutional Court can only serve to disguise the authoritarian essence of the system.

9. Prosecutor's office

82. In general, the prosecutorial service follows the Soviet prokuratura system with competences widely exceeding the core prosecutorial function, which is incompatible with the recommendations of the Venice Commission.⁵⁵

83. The Prosecutor General is appointed and dismissed by the President (see above) and appoints lower-level prosecutors. Despite the proclamation in Article 127 that “[t]he Prosecutor General and subordinate prosecutors are independent in the exercise of their powers and are governed by law”, there are no guarantees of independence of the prosecutor's office, such as a qualified majority for the support of the Council of the Republic or a council of prosecutors, or professional requirements for the appointment, or clear and exhaustive grounds for dismissal. In fact, Article 127 clearly states that “[t]he Prosecutor General is accountable to the President in his activities. “

10. Rules on amending and supplementing the Constitution

84. Compared to the earlier text of the Constitution, the list of subjects authorised to initiate the constitutional amendment procedure has been expanded. Previously, only the President of the Republic and no fewer than 150,000 citizens were authorised to initiate the amendment procedure. In almost every modern constitutional state, however, the Parliament, as the highest representative organ of the people, may initiate the amending procedure.⁵⁶ Now it is the case in Belarus, where no less than one-third of the total membership of each chamber of Parliament have the right of initiating a constitutional amendment (Article 138). That change is welcome as it brings Parliament in line with its typical role in procedure for constitutional amendment. Nevertheless, in the absence of free and fair elections administered by an independent central electoral authority that role of Parliament may remain purely technical.

⁵⁴ See Venice Commission, CDL-AD(2021)001, Revised Report on Individual Access to Constitutional Justice, 22 February 2021, paras. 34 and 35.

⁵⁵ See, for example, Venice Commission, CDL-AD(2010)040, Report on European standards as regards the independence of the judicial system: part ii – the prosecution service, para. 73.

⁵⁶ See Venice Commission, CDL-AD(2010)001, Report on Constitutional Amendment, para. 30.

85. Chapters I (“The fundamentals of the constitutional order”), II (“Individual, society, State”), IV (“President, All-Belarusian People's Assembly, Parliament, Government, Courts”), VIII (“Procedure for amending and supplementing the Constitution”) of the Constitution may be amended exclusively by way of referendum (Article 140 § 3). Moreover, under the domestic interpretation of Article 140 any other constitutional provision, besides those relating to such Chapters, may be adopted by referendum without the institutional involvement of Parliament. This transforms the referendum into a regular, instead of an exceptional, tool for amending the Constitution. As discussed above, the practice of constitutional referendums bypassing Parliament is not in accordance with the recommendations of the Venice Commission (see paragraph 19 above).

86. The amended Constitution provides that the decision to amend and supplement the Constitution through a referendum shall be adopted if more than half of the citizens who took part in the voting have voted in favour of that decision. A referendum shall be deemed to have taken place validly if more than half of the citizens on the voting lists have participated in it (Article 140 § 2). This means that amended text of the Constitution requires a turn-out quorum for a constitutional referendum. That is not in line with the recommendation of the Venice Commission which advises not to provide turn-out quorums for the validity of referendums (but accepts approval quorums or a specific majority requirement for referendums on matters of fundamental constitutional significance).⁵⁷

IV. Conclusion

87. The present Opinion was requested by the President of the Parliamentary Assembly of the Council of Europe with the aim of obtaining the assessment of the recent constitutional reform in Belarus and its compliance with Council of Europe standards.

88. The Venice Commission recalls its conclusions in the Urgent Interim Opinion (CDL-AD(2022)008) that the amendment procedure disclosed serious deficiencies. There are no grounds to believe that that the constitutional referendum had any legitimacy of democratic process. The amendment procedure failed to meet the standards of requisite parliamentary involvement, transparency of drafting process, inclusiveness of public debate and general respect for human rights and fundamental freedoms. The start of the aggression of the Russian Federation in Ukraine through the territory of Belarus and with the active participation of its authorities, few days before the referendum, further undermined the legitimacy of the process.

89. As regards the substance of the amendments, they introduce some disputable general provisions: the principle of democracy is placed in the framework of the "ideology of the Belarusian state" with mandatory history policy. This "ideology" is not defined and may represent a threat to the application of constitutional provisions on human rights and fundamental freedoms.

90. As concerns the fundamental rights catalogue, the amendments introduce qualifications which open the possibility for arbitrary restrictions of the exercise of fundamental rights and freedoms. Regrettably, despite the human rights discourse in the amendments to this part of the Constitution, the death penalty has not been abolished.

91. The blank prohibition of foreign funding of electoral campaigns may have practical implications for the opposition which has been forced to leave the country. The independence and impartiality of electoral authorities have not been duly ensured.

⁵⁷ See Venice Commission, CDL-AD (2022)015, Revised Code of Good Practice on Referendums, III.7.a.i.

92. As concerns the institutional setup and the separation of powers, the amendments maintain the extremely powerful role of the current President vis-à-vis the other State powers, which the Commission had already criticised in respect of the Constitution as amended in 1996 and in 2004. The personal dominant position of the incumbent President appears to be even further strengthened, through the individually tailored rules and safeguards aimed at preserving the current state of affairs.

93. The All-Belarusian People's Assembly (the ABPA), a new constitutional body of unclear composition, will have broad and heterogeneous powers. These powers encroach on the competences of the other State bodies. It appears that the Presidium of the ABPA, the composition and powers of which are not determined either, but which will certainly comprise the President, will inevitably play a decisive role at the operational level. The ABPA is therefore a plethoric body bearing the mark of communist "democratic centralism" and entailing a strong fusion and concentration of powers. Its main objective seems to be maintaining the rule of control for the current President of the Republic and of its entourage forever, which makes it incompatible with the democratic values enshrined by the Council of Europe.

94. The modifications to the work of Parliament introduced by the amendments do not make any substantial difference and fail to correct the unbalance of powers in respect of the President. In the same light should be seen the new power of the President to request the Constitutional Court to review the constitutionality of newly adopted laws submitted to him or her for signature. Similarly, on account of the lack of guarantees of independence of the Constitutional Court, the opportunity of such review is likely to remain rather moot. Moreover, in the absence of free and fair elections administered by an independent central electoral authority, the new role of Parliament in initiating a constitutional amendment may remain purely abstract.

95. This constitutional reform appears to be also a lost opportunity for the improvement of the status of the judiciary. No guarantees of independence have been provided. All judges of courts of general jurisdiction are appointed and dismissed by the President of the Republic. The Judges of the new Supreme Court, as well as its President and its Vice-Presidents are elected and dismissed by the ABPA. No judicial council-type of body has been introduced. The extension of competence by the Constitutional Court could be seen as a positive step only in theory, because given the lack of guarantees of independence of this body these amendments seem only to disguise the authoritarian essence of the system. Despite the proclamation in Article 127 that "[t]he Prosecutor General and subordinate prosecutors are independent in the exercise of their powers and are governed by law", there are no guarantees of independence of the prosecutor's office, which is totally accountable to the President.

96. The Venice Commission concludes that the constitutional amendments fail to correct the strong unbalance of powers which already existed in the Constitution of 1996 as amended, and indeed even aggravate it, facilitating the operation of an authoritarian regime. In addition, the constitutional amendments were adopted in disregard of the basic democratic principles,

97. Given numerous procedural, substantial and structural deficiencies in the constitutional reform, a holistic revision of the whole Constitution appears to be indispensable, provided that the conditions for free and pluralistic public debate and fair expression of the popular will are reinstated. In that regard the alternative draft constitution developed by the opposition in exile, discussed by the Venice Commission in its Urgent Interim Opinion, could be a source of inspiration although, as noted, its implementation may, in the Belarusian context, present some difficulties.