The Importance of Constitutional Law for Belarusian Democracy: An Analysis of the Amended 1994 Constitution and Considerations for Democratic Reform

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Introduction

This paper describes the role of constitutional law in political developments in Belarus since 1994. It analyses how the President of Belarus, Aleksandr Lukashenko, has used changes to the 1994 Belarus Constitution (largely focused on section IV) to consolidate and sustain his centralized, authoritarian rule. In particular, these changes have provided the Office of the President with formal constitutional power to dominate the legislature, local government, the courts, prosecutors and fourth-branch regulatory or integrity institutions. This constitutional authority has therefore subordinated most Belarusian institutions to presidential power. This institutional power has also provided an important tool for the president to dominate informal politics by, for instance, signalling to key elites the centrality of the Office of the President and allowing the president to control or co-opt these elites when necessary.

Any future democratic constitutional reform in Belarus must reinsert formal constitutional checks on the power of the president to control, through appointment and dismissal, the legislature, local government, the courts, prosecutors and fourth-branch regulatory or integrity institutions. Forms of constitutional change that do not amend this arrangement of power will simply serve as window dressing that will not fundamentally alter the structure of power in the constitution. This would give any successor to the current president—even if democratically elected—powerful tools to dominate politics.

As with any democratic and peaceful process for amending the constitution, those who advocate change will have to carefully consider and plan strategies for political negotiations with key state actors, while also soliciting the views of the public and their aspirations for constitutional reform.

This analysis is organized in eight sections. Section 1 provides a brief overview of post-Soviet constitution-making in Belarus. Section 2 describes the 1994 Constitution. Section 3 outlines President Lukashenko's strategy of using referendums to amend the constitution in order to cement his vision of presidential dominance of Belarusian politics. Section 4 describes the new arrangement of power in the 1996 Constitution. Section 5 describes the 2004 referendum and the changes it introduced to the Belarusian Constitution. Section 6 briefly outlines the effects of this constitution on formal and informal Belarusian politics. Section 7 outlines the contemporary discussion on constitutional reform in Belarus. Section 8 concludes by highlighting the possible direction and options for reform that democratic actors may consider in their efforts to recover Belarusian democracy.

1. Overview of Belarusian constitution-making

Belarus adopted its first post-Soviet constitution in 1994. The process of drafting the new constitution began in July 1990 and was led by a Constitutional Commission appointed by the Supreme Council of the Belarusian Soviet Socialist Republic (BSSR), which had been elected in March 1990. The process involved protracted but pluralistic negotiations on several drafts. The commission's working groups disagreed over issues such as whether to adopt a presidential or a parliamentary form of government, the electoral system for future parliaments and models of subnational governance, to name just a few. Almost four years after the start of the process, the Supreme Council adopted Belarus's first post-Soviet constitution in March 1994.

The 1994 Constitution created a presidential system of government.[1] Following free and fair presidential elections, however, the newly elected President Lukashenko used a series of referendums in 1995 and 1996 to eliminate key institutional checks on his power. These changes, which were formalized in 1996, created a new constitutional system of hyper-centralized presidential power. A further referendum removed term limits for the Belarusian president in 2004. This constitutional arrangement has played a key role in allowing Lukashenko to maintain both formal and informal dominance over Belarusian politics since 1996.

2. The 1994 Constitution

The 1994 Belarus Constitution created a presidential system of government underpinned by key principles of democratic constitutionalism. The first two sections contain a number of commitments to the foundational principles of constitutionalism. Article 1 of section I, for instance, describes Belarus as a 'unitary, democratic, and social state based on the rule of law'. Section I also contains a commitment to the individual and her/his rights as a key value (article 2), a commitment to pluralism (article 4) and a guarantee of the separation of powers (article 6). It also commits Belarus to 'recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles' (article 8). The section included a provision making Belarusian the state language and Russian a language of 'inter-ethnic communication' (article 17). This provision reflected an attempt by the drafters of the 1994 Constitution to reassert the Belarusian language and identity in the wake of the collapse of the Soviet Union.

Section II of the Constitution contains a long list of individual rights guarantees, such as the rights to free expression, to free assembly and to participate in political life. These rights provisions also include social and economic rights, such as the right to free education and a cultural life, and to the preservation of national identity. Section III guaranteed direct elections (article 68) as well as the centrality of the legislature in calling referendums (article 74).

Constitutional structure

Section IV created a presidential form of government. It placed an elected president who controls a cabinet of ministers/government alongside a unicameral legislature. The president and the legislature shared appointment power over the courts, prosecutors and other fourth-branch institutions. Local government was to be directly elected.

Legislative power

The first chapter of section IV provided for a fully elected, 260-member unicameral legislature known as the Supreme Council (or Supreme Soviet), which was to be the 'sole

legislative body of state power' (article 79). Much like the Soviet period, the work of this legislature was organized by a smaller executive committee known as the Presidium (article 89). This legislature was to be elected for a period of five years and enjoyed significant powers, such as the power to call referendums and to determine domestic and foreign policy. It also had the power to impeach the president if it determined, by a two-thirds majority, that the president had violated the constitution or committed a criminal offence (article 104). Finally, it could play a key role in amending the constitution (article 83), including through its power to call referendums (article 74).

Executive power

The second chapter of section IV created a relatively powerful president. The president was both Head of State and the head of the executive branch (article 95). As in presidential systems, the president was able to appoint and dismiss a 'Cabinet of Ministers', although this power of appointment to the executive branch required the consent of the legislature (article 107). The need for legislative consent was limited to the presidential appointment of the prime minister and the ministers for foreign affairs, finance, defence and internal affairs, as well as the Chair of the Committee for State Security (article 100). The president also enjoyed other powers typical of presidential systems, such as to grant pardons, represent the state in international relations and assume the position of Commander-in-Chief of the armed forces (article 100).

Judicial power

Judicial power was described in two separate chapters of the Constitution. The third chapter of section IV provided a short description of 'judicial power', which declared the courts to be independent (article 112). The first chapter of section VI—State Monitoring and Supervision—contained a separate section on the Constitutional Court. This provided that the Chair of the Constitutional Court should be nominated by the president but that the remainder of judges were to be chosen by the legislature. All would serve 11-year terms (article 126). It also gave the Constitutional Court the power to review and strike down the constitutionality of laws and executive acts, including presidential decrees (articles 127–29). There was no general ability of members of the public to appeal to the Constitutional Court. Instead, the court considered cases on application from the president, the Chairperson of the Supreme Council, the standing committees of the Supreme Council, no fewer than 70 deputies of the Supreme Council, the Supreme Court, the Supreme Economic Court or the Procurator-General (article 127).[2]

Powers of appointment or dismissal over judicial, prosecutorial and fourth-branch regulatory or integrity institutions

The president and the legislature shared powers of appointment and dismissal.[3] The president was given the power to nominate the heads of key judicial institutions such as the Constitutional Court, the Supreme Court and the Supreme Economic Court (article 100). The president could also nominate theChair of the National Bank and had the authority to appoint 'other officials whose offices are determined by law unless otherwise specified in the Constitution' (article 100). The legislature had power of appointment over the remaining members of the Constitutional Court as well as fourth-branch regulatory or integrity institutions such as the Central Electoral Commission and the Procurator-General (articles 83.6 and 83.7). The legislature also had the power to hold the Procurator-General accountable (article 135) and full power to form and hold accountable the Supervisory Authority (articles 137–40).

Local government

Local Councils of Deputies were directly elected by the people (section V, article 118).

The remaining sections of the 1994 Constitution detailed financial arrangements (section VII) and the process for constitutional amendment, which was controlled by the legislature (section VIII).

3. The Lukashenko presidency, 1994–1996

In 1994, Aleksandr Lukashenko was elected Belarus's first president under this new constitutional arrangement. As head of the executive branch, Lukashenko initially used his formal dominance over the police and other power ministries to consolidate his power (McMahon 1997).[4] President Lukashenko then proceeded to ignore the text of the Constitution by asserting a right to govern by decree without legislative interference. Among these were decrees preventing newspapers from publishing stories critical of Lukashenko (McMahon 1997). A former Belarusian Constitutional Court judge described how 'lawyers in the president's circle referred to the "theory of legal laws" (Lukashuk 1997), an approach based on the belief that 'the president automatically knew better because he was popularly elected' and that if a law passed by the legislature 'contradicts the public mood and the intentions of the president . . . it is "non-legal" and may be ignored' (Lukashuk 1997). Lukashenko therefore proceeded to create an informal form of super-presidential governance.

These actions led him into open conflict with the Constitutional Court, which struck down 11 of his presidential decrees. The legislature (Supreme Soviet) also moved to check his power, creating a 'Movement in Support of the Constitution', which demanded 'support for the rule of law and the decisions of the Constitutional Court' (Lukashuk 2001). The previously disparate political parties in parliament also began to coalesce in opposition to Lukashenko's complete disregard for a law-based state.

In order to defeat his opponents in parliament and the Constitutional Court, Lukashenko called for constitutional reform that would, in effect, vastly increase the formal powers of the president over the legislature, the courts, local government and the fourth-branch regulatory or integrity institutions. Lukashenko's strategy was to argue that 'strong' presidential governance was the only way to protect the Belarusian people from the wild capitalism and state disintegration that were spreading across many of the other former-Soviet republics, particularly neighbouring Russia and Ukraine. This strategy was also a reaction against the idea that 'Belarusian' nationality was grounded in a unique Belarusian cultural or historical identity. Instead, Lukashenko stressed Belarus's fundamental kinship with the Russian (and ultimately Slavic) identity. This involved a historical interpretation that centred around the partnership between Belarus and Russia in World War II, and the critical role of the Russian language and culture in Belarusian life. As a proponent of this view described it: 'the Belarusians took possession of their own statehood at the beginning of the 20th century, namely on 1 January 1919', but this statehood was one that was adopted together with Russia and therefore a result of 'the truly invaluable help of the fraternal Russian people in the creation, preservation and strengthening of the Belarusian state' (Melnik 2014). In a series of constitutional referendums, Lukashenko associated this pro-Russian identity with a centralized conception of the presidency (Partlett 2012).

In 1995, for instance, Lukashenko placed questions about this pro-Russian Belarusian identity alongside ones about increasingly centralized presidential power. Among the referendum questions were: (a) whether to make Russian an official state language; (b) whether new national symbols should be adopted, such as a flag that largely resembled the Soviet-era republic banner; (c) whether there should be closer economic integration with Russia; and (d) whether changes should be made to the Constitution that would make it

easier for the president to dissolve the legislature. The first three were binding and the final advisory. All four questions gained strong support, in part because of Lukashenko's ability to control and intimidate the media (McMahon 1997). At the same time, however, adopting Russian as a national language and integrating with Russia were genuinely popular initiatives. The referendum helped to link those popular initiatives with his goal of centralizing constitutional power in the office of the presidency.

In 1996, Lukashenko once again called for a referendum. Following more conflict with the legislature, this was a vote on a full set of constitutional amendments proposed by President Lukashenko as well as a set of alternative amendments proposed by various members of the legislature.[5] Again, the referendum was held in an increasingly repressive environment and involved the extensive use of administrative resources in the campaign, as well as use of the state media. On 24 November 1996, the official results indicated that 70 per cent of voters had approved Lukashenko's amendments (McMahon 1997). The process was condemned by the opposition in parliament and the international community (e.g. OSCE 1996a; OSCE 1996b). Although these referendum questions were deemed non-binding by the Constitutional Court, Lukashenko dissolved the Supreme Soviet following the referendum and put the amendments into effect (Partlett 2012).

4. The 1996 amendments

The 1996 amendments built an entirely new constitutional order and system of state power in Belarus. These amendments made only minor changes to the foundational values and rights contained in sections I and II. The 1994 Belarus Constitution as amended in 1996 therefore remains textually committed to separation of powers, the rule of law and international rights (see Section 1). One alteration to these sections that merits particular mention makes the Russian language a state language on par with the Belarusian language (article 17). The rights provisions were also left largely untouched, with the exception of the insertion of a few more positive rights. Women were given equal rights with men, for instance, and young people were guaranteed the right to spiritual, moral and physical development (article 32). Finally, the state undertook to provide free housing to all those in need (article 48).

The 1996 amendments primarily focused on amending the relationship between the president, parliament, the Cabinet of Ministers and the courts in section IV of the Constitution. These changes fundamentally subordinate the legislature, the judiciary and fourth-branch regulatory or integrity institutions to the formal power of the president. Most notably, they transform the office of the president into the principal law-making institution by placing presidential decrees above laws in most cases (see the analysis of articles 85 and 137 in the 'Executive power' section below). These enhanced powers give the office of president significant formal powers to dominate both formal and informal politics.

Legislative power: The creation of a bicameral legislature

From the perspective of constitutional design, a significant change was the creation of a bicameral legislature. The new bicameral 'National Assembly' in section IV consists of a weakened House of Representatives (the lower house) and a comparatively stronger Council of the Republic (the upper house). This new bicameral legislature—and in particular the upper house—is far more easily controlled by the president while its powers, including over law-making, are enfeebled vis-à-vis the president.

- The *House of Representatives* is a directly elected body that comprises 110 members (article 91). It has very few powers relative to the upper house, particularly with respect to appointments to or the formation of important judicial, prosecutorial or fourth-branch regulatory or integrity institutions (article 97). The president is given

the *right to dissolve* this body if it refuses to give consent to the president's candidate for prime minister or if it passes a non-binding vote of no confidence in the Cabinet of Ministers (article 106).[6]

- The *Council of the Republic*, by contrast, is not directly elected by the people but instead described as a chamber of territorial representation (article 91). The Constitution, however, does not define the number or provide a list of regions, or specify any rules with regard to them (article 9); all this is determined by legislation. Eight members are directly appointed by the president and the remainder are elected by local councils of deputies from among their ranks (article 91). The 1996 amendments give the president further influence over this indirect election process through a provision that subordinates the 'heads of local executive and administrative organs' to the president (article 119). This upper house, which is strongly influenced by the president, has vast, sole powers of appointment (see below) as well as sole powers to review presidential decrees (article 98) and to approve a declaration of a state of emergency (article 98).

Executive (presidential) power

The amendments also enable the president to further dominate the executive branch of government and provide the president with a number of new and important powers. Among the most notable are:

- The president is given the right to issue decrees that in most cases are *higher* than laws (article 85). Article 137 states that the law shall prevail over decrees only if the authority to issue the decree has been granted by law. This means that any free-standing presidential decrees that do not draw their authority from law can override laws. This effectively turns the office of the presidency into the principal law-making institution in Belarus.
- The president is described as the 'guarantor of the Constitution', has the power to mediate between different state institutions and is given broad immunity (article 79).
- The president gains the authority to initiate referendums and propose constitutional amendments (articles 74 and 138).
- The president takes from the legislative branch key powers of appointment/dismissal over the courts and key fourth-branch regulatory or integrity institutions (see below). Notably, this includes the president taking from the legislative branch the power to appoint and remove the Procurator-General (article 126).
- The president takes from the legislative branch the power to determine the 'guidelines of domestic and foreign policy' (article 79).
- The president is given the right to appoint and dismiss 'heads of local executive and administrative organs' (article 119).

Judicial power

Judicial power is described in section IV of the Constitution. The amendments subordinate the Constitutional Court and other courts to the president. For instance, the president appoints the chairperson of the Constitutional Court with the consent of the Council of the Republic (the upper house) and has sole power to appoint six of the 12 members of the Constitutional Court. The other half are appointed by the Council of the Republic, which is

subordinated to presidential power (see above). The Constitutional Court retains the right to review the constitutionality of laws and executive acts but the manner in which such laws and acts 'lose their legal validity' on determination of their unconstitutionality is to be determined by law (article 116). Furthermore, the amendments remove the provisions that prohibit direct or indirect pressure on the Constitutional Court or its members in connection with the execution of its constitutional review authority, and those which protect the judges on the Constitutional Court from arbitrary arrest or prosecution by requiring consent to prosecute from the legislature (and then the Supreme Council) (formerly articles 126(3) and 131 respectively). The only remaining provision generally prohibits interference in the activities of judges in the administration of justice (article 110). The president also has the power to *dismiss* members of the Constitutional Court, the Supreme Court and the Supreme Economic Court (article 84.11).

Power of appointment and dismissal over prosecutorial and fourth-branch regulatory or integrity institutions

The president, in tandem with the upper house which is effectively controlled by the president, now has control over the appointment and dismissal of key prosecutorial and fourth-branch regulatory or integrity institutions (article 84). For instance, the president *directly* appoints the head and members of the board of the National Bank and half the members and the chairperson of the Central Electoral Commission (article 84). The remaining members of the Central Electoral Commission are appointed by the upper house. Furthermore, in addition to appointment authority with the consent of the upper house over the Procurator-General, the president now has broad power to *dismiss* the Procurator-General (article 126), who is now 'accountable to the President' (article 127). The president also has the power to dismiss the Chair and all the members of the Central Electoral Commission and the National Bank (article 84(11)). Finally, the president has full power to form and control the State Control Committee—the body charged with overseeing national budget execution, the use of state property, legal acts governing property relations, and economic, fiscal and tax issues—(articles 129–31), including the power to directly appoint and dismiss its chairperson.

Local government

Heads of local executive and administrative bodies are now appointed by the president and approved in office by local councils of deputies (article 119). The president also has the power to suspend the decisions of local councils of deputies and to cancel the decisions of local executive and administrative bodies (article 84(26)).

Powers to Amend the Constitution

Additional sections confirm the vast powers given to the office of the president. Section VII provides the president with greater power over constitutional change, including the power to initiate constitutional change (articles 138–40). This power is further increased by the president's new power to call referendums (article 74).

5. The 2004 amendment referendum

The 1996 constitutional reform preserved one key limitation on presidential power: that the president can only serve two terms in office. Under existing constitutional rules, Lukashenko faced his final term as president in 2006. To eliminate this vital check on presidential power, Lukashenko called a 2004 referendum to remove the term limits requirement in section IV of the Constitution. Lukashenko used the state-owned media and his control over the Central Electoral Commission to ratify this amendment in a referendum. This removed one

of the final constitutional limits on the personalization of presidential power in the hands of Lukashenko.

6. Effect of the amended constitution on Belarusian politics

Why are these constitutional amendments important? How do they enable President Lukashenko to dominate Belarusian politics? The answers draw on wider research that shows that authoritarianism is not a spontaneous form of political order. Instead, authoritarian leaders must constantly seek to head off threats to their power (Geddes et al. 2018). The formal rules of constitutional design are critical in helping authoritarian leaders to maintain power (Partlett forthcoming). This helps to explain why powerful leaders go to such great lengths to change formal constitutional rules. In the Belarusian context, therefore, the 1996 amendments provided President Lukashenko with a powerful tool for neutralizing threats to his authority and therefore allowing him to continue to dominate both formal and informal politics.

Formal politics

First, these amendments ensure that the president can dominate the legislature as well as courts, local government and fourth-branch regulatory or integrity institutions, including the Central Electoral Commission and the National Bank. The formal powers over the legislature have allowed the president to defuse any attempts by an opposition to use the legislature as a base for checking the power of the president (as happened in 1995 and 1996). Furthermore, presidential control of regulatory or integrity bodies such as the Central Electoral Commission allow the president to co-opt opponents, manipulate electoral rules and disqualify political opponents in order to maintain power and win elections.

Informal politics

This constitutional design also plays an important role in allowing the president to consolidate and maintain informal control over a wide array of competing factions (Geddes et al. 2018). Henry Hale describes how the constitutional centralization of power in the office of the president allows authoritarian leaders to 'signal' to competing groups the particular 'patron' to serve (Hale 2014). In Belarus, the president's vast power allows Lukashenko to signal his dominance to business and other elites. The president's vast power of appointment also enables Lukashenko to defuse or co-opt potential challengers across the elite factions that underpin Belarusian politics. The president's formal power over prosecutors and the courts also gives Lukashenko significant power to control the media and intimidate the opposition through the threat of legal action (see, e.g. BBC 2020).

7. Contemporary Belarusian constitutional reform debates

After the contested presidential elections in August 2020, constitutional reform is on the agenda in Belarus. Democratic opposition actors have signalled their intent to develop their vision for the constitutional reform process and the future constitution to pave the way for, and structure, Belarus's successful democratic transformation.

Over the past several months, Lukashenko's administration has intensified its own work on the process of constitutional reform. Democratic opposition actors consider this government-led process to be a tactic to deflect from mounting domestic and international pressure calling for democratic transition in the country rather than an attempt to enact systemic change. The democratic opposition therefore expects this government-led process to result in only cosmetic changes, with no substantive reforms to the authoritarian nature of the regime.

Real democratic constitutional reform will require limiting the powers of the president and the ability of the president to control the legislative branch, the courts, and other fourth-branch regulatory or integrity institutions. This would mean altering the formal constitutional rules in section IV of the Constitution that enable Lukashenko to dominate Belarusian political institutions. One relatively simple way to begin this process would be to restore the 1994 Constitution and then to amend it over time. Such an approach, however, is but one of several ways in which the constitution-building process could be developed. The choice of approach, and its details, is for the Belarusian people to determine.

As a starting point, the 1994 Constitution may be considered as a baseline for discussions on a reform agenda. As stated above, section IV created a powerful unicameral legislature that could be neither dissolved nor appointed by the president. Furthermore, the 1994 constitution shared appointment powers between the president and the legislature over courts, prosecutors, and important fourth-branch regulatory or integrity institutions. While restoration would not be an end-point for Belarusian democratic aspirations, it would rebalance the relationship between the president and the legislature as well as the judicial, prosecutorial, and fourth-branch regulatory or integrity institutions. Compared to the status quo, a restored constitution would provide an effective baseline for pursuing further targeted reforms.

On the other hand, President Lukashenko has repeatedly stated that he believes that a strong president is essential for Belarus, although on other occasions has mentioned that some of the current prerogatives of the president could be relegated to other branches of government. It therefore seems likely that a constitutional amendment process that is led entirely by the regime will only include minor adjustments. That said, this type of constitution-making might look similar to Russia's recent reform process. Russia's 2020 constitutional amendments were described as creating a more balanced system of power but in reality, they did the opposite, further strengthening the power of the president. The Russian leadership has openly endorsed Lukashenko's offer of constitutional reform, but without indicating the direction that such change might take.

Although it is still early in the process, President Lukashenko has suggested that Belarus's process of reform will involve a top-down form of public consultation with hand-picked groups followed by a referendum (Tut.by 2020). Lukashenko has argued that this process of consultation and voting will give every Belarusian citizen the power to find a solution to the current impasse. It is possible, however, that this process will seek to create the image of change while keeping key constitutional powers centralized in the office of the presidency. For instance, one of the most frequently mentioned changes is reducing the power of the president to appoint and (perhaps) dismiss judges. Given the president's control over the upper house of the legislature, his ability to issue legislative decrees and his vast power over appointments to other regulatory or integrity institutions, this kind of change in isolation would be merely symbolic and do little to reduce the powers of the president. Therefore, it would do little to rebalance and thus democratize Belarus's constitutional order.

8. Looking ahead: Constitutional provisions central to democratic reform

Constitutional reform will only be conducive to democratic change in Belarus if it reinstates the norms and structures necessary for the effective separation of powers and thereby checks the power of the president over the other branches of government. A truly participatory and consultative constitutional reform *process* would be both desirable and necessary to support effective political transformation and the legitimacy of a new or amended constitution.

In order for amendments to democratize the constitutional system and reinstate an effective system of checks and balances, stakeholders should consider the constitution in a

holistic way, including the ways in which various provisions and institutions interact with one another to maintain the dominance of the president over virtually all aspects of formal and informal politics. Amendments that target particular institutions or powers in isolation, or which address only lower order issues, are likely to achieve little of substance in reforming the status quo.

In determining the potential scope and content of an amendment agenda, stakeholders may wish to consider the following list of key provisions and potential approaches to amendment provided below. The list is not exhaustive. Nor are the potential approaches to reform intended as specific recommendations. Rather, the list provides 'food for thought' from a constitutional design perspective to support further dialogue on an amendment agenda.

Section III on the electoral system and referendums

Article 67: Stipulates that deputies shall be directly elected by citizens.

- This article is ambiguous and has been implemented in such a way that allows only the direct election of deputies to the lower house of parliament. It could be amended for clarity to ensure that direct elections are held for *all* parliamentary and executive elections, including for the upper house (if this upper body is retained, see further discussion below).
- If the upper house continues to be indirectly appointed, attention should be focused on the details of this process. While it is beyond the scope of this interim analysis to propose options for the design of the legislative branch of government in Belarus, the issue of the manner of election, selection or appointment of the upper house should be carefully analysed with full consideration of the relevant comparative experience and with the aim of mitigating excessive presidential influence over the upper house.
- If an upper house is retained, direct elections may be the simplest way to curb excessive executive influence over the body. Furthermore, it is notable that article 91 states that the Council of the Republic is a chamber of territorial representation. However, Belarus is a unitary state in which current regional representation in the upper house is not rooted in a constitutionalized vertical separation of powers structure. Therefore, the role of the upper house in providing regional representation, and thus the manner of its composition, could be linked to provisions creating a more democratic and independent form of local or regional government.

Article 74: States that national referendums shall be called on the initiative of the president, of either house of the legislature or by citizens, subject to prescribed thresholds for legislative and citizen initiatives.

- This provision could be amended in several ways. The most optimal option would of course depend on the role of the president and structure of institutional power relations within the revised constitution. One approach might be to remove the power of the president to propose referendums (see also article 84). The power of the president to appeal directly to the people to approve his reform agenda has, since 1995, been a powerful tool by which to bypass the representative and deliberative institutions of the legislature as the primary law-making body, as well as existing laws and constitutional rules. While there are many virtues to direct democracy devices such as referendums, there are also significant risks. Across the world, there have been many examples of referendums being used to promote majoritarian over pluralistic rule in order to undercut democratic structures and principles, and in particular expand the scope of power and time in office of authoritarian rulers. Given the

experience of Belarus with presidentially initiated referendums, and the weakening of representative democratic institutions since 1996, eliminating this power of the president could be a useful option.

- If the power of presidential initiation of referendums were to be retained, alternative approaches to constraining the opportunities for abuse could include:
    - Redistributing agenda-setting competency over the wording of the referendum question as a ballot proposal, and the competency to initiate the referendum between the president and some threshold of the legislature. Currently, the president has both powers.
    - Distinguishing between types of national referendum (binding or non-binding), who is able to initiate each type or types (president, parliament and/or the people), defining which body has agenda-setting competency to write the ballot question(s) and in which circumstances, and delineating the respective subject matter for such referendums across referendum type and initiation competency, all of which would reform the referendum structure more broadly.
- Importantly, amendments to address referendum powers should also consider the relationship with provisions that describe the powers and composition of the electoral management body. These provisions should seek to strengthen that body's political, administrative and financial independence, as well as the structure, independence and jurisdiction of the Constitutional Court (or a similar integrity institution) as the arbiter of whether a referendum took place in a procedurally and substantively constitutional manner.

Section IV on the president

Article 79: Provides that the president is the guarantor of the constitution and of citizens' rights and liberties, and that he/she personifies the unity of the nation and is responsible for setting the main directions of domestic and foreign policy. The president also provides for the protection of national sovereignty and territorial integrity, and mediates between the bodies of state power. Finally, the president shall enjoy immunity and her/his honour and dignity shall be protected by law.

- This article could be amended, for example, to remove some of the broad language about the powers of the president. This may include tempering the president's ability to stand above other constitutional institutions as guarantor of the constitution and mediator between the branches of the state. This would also involve curbing the sweeping immunities of the president. Finally, this provision could be amended to reduce the scope of the day-to-day management powers that are given to the president (e.g. over domestic policy).

Article 84: Delineates the powers of the president. Several approaches to amendment might be advisable. For example:

- Removing or regulating the president's power to dismiss the lower house of parliament (articles 84.3 and 94) as well as the power to appoint and control the upper house of the legislature (see below on legislative power).

- Removing or substantially regulating the president's power to set the main directions of domestic policy, and/or foreign policy.
- Removing the power of the president to cancel decisions or orders made by local government.
- Weakening the president's currently extensive power to determine the structure of the executive branch as well as power of appointment and dismissal over the executive branch of government (see reform of article 106 below).
- Weakening the president's broad powers to appoint and dismiss members of the courts (including the Constitutional Court), prosecutors and fourth-branch regulatory or integrity institutions. These powers should be shared with an elected legislature.
- As noted above, removing or diminishing the president's power to call referendums.

Article 85: In tandem with article 137, this article provides that presidential decrees carry the force of law—and in many cases override laws. While presidential decree powers are not uncommon in modern presidential systems, such powers are generally subordinate to legislation in constitutional democracies. Amendments could include:

- Subordinating presidential decree powers to legislation in all but exceptional cases; limiting law-making decree power to, for example, situations of necessity and urgency, where exceptional circumstances make it impossible to follow regular law-making procedures, and to certain substantive issues, while also prohibiting their use for matters of, for example, criminal, tax or electoral law or the regulation of political parties; and making them of constitutionally limited duration.
- Providing substantive restrictions on decrees issued under a delegation of power from the legislature, particularly with a view to reconstituting a system of effective checks and balances. (This would also require amendments to article 137.)

Section IV on the National Assembly

This section is likely to require a substantial redraft to effectively restore parliament's general legislative competence and to reinstate its ability to hold the president and the executive branch of government accountable. A reform agenda could include:

Article 97: Lists the matters to be settled by law and within the purview of the House of Representatives. This article could be clarified and the list expanded. There could also be clarification of the allocation of reserved powers on legislative competency in other areas.

Articles 90 and 91: Currently establish a bicameral parliament and define the composition of the two houses.

- These could be amended to re-establish a directly elected unicameral legislature. Given that the upper house (Council of the Republic) was established by the 1996 amendments as a chamber of territorial representation, but the Constitution does not delineate territories, territorial matters or rules on territorial autonomy, it is unclear how the structure of Belarus as a centralized unitary state or the composition of the Council of the Republic provides for the representation of regional matters in the legislature. Eliminating this complexity would enable a directly elected unicameral

parliament to more effectively balance the powers of the president. (See article 67 suggestions above).

- If a bicameral legislature is preserved, article 91 could be considered for amendment to ensure that both the upper house and the lower house are directly elected. Another possibility might be to eliminate the presidential appointment of eight members of the upper house but keep the indirect selection of its remaining members. For such a change to meaningfully reduce the influence of the president over the upper house, however, stakeholders should consider amending the provisions on regional and local government. Article 84, for example, could be amended to further reduce the president's power to call local elections and to 'exercise supervision' over the decisions of local representative bodies or reverse their decisions.

Other potential amendments to section IV could consider mechanisms to enable the legislative branch to hold accountable and scrutinize the actions of both the executive branch of government and the president. This might include, for example:

- Removing article 94, which provides the president with broad powers to dissolve the lower house of the legislature.
- Providing the legislative branch with additional powers over the appointment and removal of ministers, judges, prosecutors and the personnel of fourth-branch regulatory or integrity institutions. One possible way to manage this would be to have the legislature and the president form a bipartisan commission to oversee appointments to key prosecutorial or fourth-branch regulatory or integrity institutions, such as the National Bank, the State Control Committee and the Central Electoral Commission.

Section IV on the executive/Council of Ministers

Article 106: Vests executive power in the executive, defines appointment procedures for the prime minister and the prime minister's responsibilities, and details the resignation, dissolution and dismissal of the government and its members. While the text notes that the government is accountable to the president and responsible to parliament, other clauses and provisions undercut the capacity of parliament to provide any meaningful check on the government. To restore a more balanced relationship (as envisaged in the semi-presidential design indicated in the original 1994 text), stakeholders could consider:

- Reducing the president's capacity to dismiss, on her/his own initiative, every member of the government except the prime minister. Instead, the article could be changed to strengthen the power of the legislature to review and remove the president's appointment powers with regard to the Cabinet of Ministers (including the prime minister).

Section IV on the courts

Article 116: Defines the structure, composition and powers of the Constitutional Court. Currently, the president has significant influence over the composition, dismissal and functional independence of the court. Amendments could include:

- Clearly stating that the Constitutional Court's decisions are formally binding and final.

- Providing individual citizens with the ability to challenge the constitutionality of laws or decrees.

Related amendments could be considered to give the reformed (e.g. a directly elected and perhaps unicameral) legislature more power over judicial appointments.

Beyond this, stakeholders may wish to consider strengthening judicial independence by constitutionalizing matters related to judicial tenure, removal, immunity and accountability, and/or establishing a constitutionally independent judicial services commission.

Section V on local government and self-government

Article 119: Provides the president with the power to appoint and dismiss the heads of local executive and administrative bodies; only their appointment is subject to approval by elected local councils of deputies. Considering the relationship between local authorities and the upper house of parliament, and the lack of rules related to regions or local government, amendments could include:

- Removing presidential powers of appointment and requiring that heads of local government, and of local representative bodies/local councils of deputies, must be directly elected.

It is beyond the scope of this interim analysis to devise a nuanced set of options on the design of subnational governance in Belarus. A comprehensive review and reform of the current model may be necessary in order to develop a meaningful system of local self-government furnished with the necessary administrative and financial capacities to undertake its functions.

Section VII on the Procurator-General's Office

Articles 126–128 address the office of the Procurator General. Given the importance of prosecutorial independence in a democracy, these provisions could be amended, for example, to enhance the independence of the office (article 127). This could be achieved through an appointment mechanism for the Procurator General by a bipartisan appointments commission.

Endnotes

1. The Constitution also gave the Supreme Soviet the power to interpret the constitution (article 83.4). This power ran concurrently with the power of the Constitutional Court to review the constitutionality of laws and executive acts (article 127).
2. The court could consider cases involving the acts of state bodies on its own initiative (article 127).
3. The 1994 Constitution was silent on or left to subsequent legislation the removal of many of these officeholders. See, for example, the statement in article 111 that the basis for the dismissal of judges was to be 'determined by law'.
4. McMahon (1997: 129–37) describes how Lukashenko made use of the security forces and the police to repress dissent.
5. These amendments, which were introduced by the communist and agrarian parties, would have abolished the presidency and transformed Belarus into a parliamentary system.
6. This power had already been approved in principle in another referendum in 1995.

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