Review of an updated draft new Constitution for Belarus

(version dated November 2021)

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I. Introduction and Scope

The comments below relate to the draft version of the new Constitution of Belarus dated 25 November 2021, which was developed by the Public Constitutional Commission with support and advice from national and international experts. This review is based on an unofficial English translation so issues of translation might therefore arise.[1] It follows and builds on comments on earlier drafts provided by International IDEA. This analysis covers the entirety of the draft new Constitution and aims to provide feedback on the changes introduced in the meantime, as well as on the overall draft as it stands.

The comments provided in this review are intended to further expand and build on relevant constitutional expertise and advice that are being made available to the drafters by various experts in constitutional law, as well as national and international actors.

II. Executive Summary

The draft Constitution provides a solid basis for the construction of a parliamentary democracy in Belarus. In order to arrive at the current version, much effort has been made by the drafters and experts involved to assess the shortcomings of the current constitution and to look to examples from other constitutions and country experiences in order to make the transition.

It is welcome that in the course of the draft Constitution's development its authors continued to engage with citizens, and national and international counterparts to seek input and feedback and to further develop and improve the draft on this basis. This engagement has led to further improvement of its technical quality and integration. The drafters have substantially reviewed and improved the structure of the text, its internal cohesion, and the precision of the formulations used. Importantly, a considerable number of past comments and suggestions provided by International IDEA were taken into account and are reflected in the draft. As it stands, the text of the new Constitution is well thought out and overall in line with international standards on guarantees and the protection of fundamental rights and freedoms. Therefore, the draft as such, as well as the process of its development and public consultation to date, deserve a positive assessment.

Substantively, most of the key decisions on constitutional design appear to have made, and a number of elements and choices have remained stable across the drafts. These include the rules on amendment, the basic emphasis on parliament as the major policymaking body, the importance of representative institutions at the local level, and the set-up of the judicial system. The rights provisions are clearly in line with global human rights instruments.

At the same time, with respect to some of the proposed solutions, alternative options might be considered and are recommended, as elaborated below. It is acknowledged, however, that there may not always be a single ideal solution, and some choices remain within the purview of the constitutional and legislative drafters.

[1] This analysis was prepared in English language. Unofficial translation in Russian language is available.

The major change over the course of the year has been in the relative strength of the presidency. In the initial version, reviewed in January, the president's refusal to sign a law could be overcome by a majority of elected deputies. Then, in the April version, a three-fifths vote was required for the Supreme Council to overrule the president's refusal to sign. The current version returns to an absolute majority of deputies, although this time of the *constitutional number* of deputies, which is a slightly higher threshold than the initial formulation of 'elected' deputies. Nonetheless, this basically represents a return to a purer form of parliamentary system. As noted in earlier comments, this leaves the directly elected president relatively weak and could lead to tensions. The president has consistently been described as a foreign policy figure, but most of the key powers are either shared with the government or exercised on the proposal of the government.

Provisions pertaining to the judicial system have also been improved over the course of the year. The concept and structure of the Constitutional Court are more in line with those of other countries, and this body will be important in ensuring compliance with the Constitution. In this most recent version of the draft, juries are allowed but not required—the drafters have wisely left this issue to the future legislature.

Overall, the following key strengths and areas for possible improvement are noted and are elaborated on further in text of this review:

Key strengths

The draft Constitution:

- Is based on the principles of the rule of law and the separation of powers, which is evident in all chapters;
- Establishes respect for key human rights and freedoms;
- Considerably reduces presidential authority;
- Established parliament as the ultimate legislative authority;
- Establishes an independent judiciary with minimal political interference;
- Establishes a Constitutional Court with the possibility of review of individual cases;
- Introduces provisions on stability of electoral legislation and stipulates matters which require approval on two occasions separated by a general election;
- Establishes an independent Human Rights Commissioner as an office that possesses the requisite privileges and immunities to carry out its work;
- Creates a method for amendment of the constitution and transitional provisions that give time to set up the necessary new bodies and bring laws into line.

Remaining gaps and areas for improvement

- The hierarchy of legal norms, in particular the position of international treaties vis-à-vis the draft Constitution, could be clarified;
- The requirement to respect fundamental rights could be made applicable not only to public but also to private sector entities;

- The article on freedom of assembly could be kept to stipulating the right, without any reference in the constitution to advance notifications;
- The state of emergency provisions, including their impact on the conduct of electoral events, could be expanded;
- Provisions on the 'right to resist' require attention and explanation;
- Transitional provisions on appointment procedures to the Central Election Commission could be clarified;
- Provisions on the bribery of voters could be framed as a blanket prohibition;
- Procedures for lifting the immunity of Soim members and applicable exceptions could be reviewed;
- An explicit provision on irremovability or security of tenure for judges could be considered;
- The exact manner of decision-making and/or consideration by the Constitutional Court could be made clearer;
- The role of the Constitutional Court in the amendment of the Constitution could be clarified, as well as the need for international experts in the first National Council on the Judiciary;
- Grounds and procedures could be outlined for the removal from office of the Prosecutor, the Control Chamber and the Commissioner for Human Rights.

III. Comments on thematic blocks and sections of the draft constitution

A. Fundamentals of constitutional order, human rights, freedoms and obligations

Possibly by reason of translation, article 2, paragraph 5 of the Chapter is unclear. What the paragraph means by '*right to resist*' [….] '*if the use of legal means turns out to be impossible*' should be clarified. While the historical context of the paragraph is understood, 'tyranny and oppression' should not lead to the use of means that in this case could by inference be illegal—that is, as quoted above, if legal means do not succeed, other means to 'resist' may be used. In a country governed by the rule of law, as Belarus aims to be, this paragraph would benefit from rephrasing.

Historically, many countries have, with good reason, secured in their constitutions a safeguard against a repeat of tyrannical rule, oppression or Nazism by inscribing it directly in the constitution, primarily through the ambit of political party formation. The Basic Law in Germany,[2] for instance, expressly continues the denazification provisions and provides for the prohibition of parties that, in their aims or through the behaviour of their members, are

[2] Article 139 [Continued applicability of denazification provisions] *'The legal provisions enacted for the 'Liberation of the German People from National Socialism and Militarism' shall not be affected by the provisions of this Basic Law'.* Basic Law *(Grundgesetz)* of 23 May 1949.

likely to disrupt the free democratic constitutional order or to cause its downfall.[3] The Italian Constitution prevents any reconstitution of a fascist political party.[4] According to the Venice Commission 'The Danish and Portuguese constitutions, for example, permit the prohibition of parties which resort to or encourage violence, even if it is not subversive or racist. In Albania the law prohibits parties which draw attention to their aims and attempt to achieve them through violence, the use of weapons and other anti-democratic methods'.[5]

Recommendation: *Consider clarifying the meaning of the provision 'if the use of legal means turns out to be impossible'. Instead, the formation of political parties that might be based on hatred, fascist agendas or undemocratic methods of change of government could be more strictly regulated.*

Regarding article 5, it might be more fitting for this article to be named 'hierarchy of legal norms' as it organizes the importance of treaty law, the Constitution and primary laws. Strikingly, paragraph 7 states that 'The Republic of Belarus is not allowed to conclude international treaties that do not comply with the Constitution'. This puts the hierarchy in peril. The Constitution requires ratification of international treaties (art. 95, 1.4) and in article 128(1)2 gives the Constitutional Court the power to review such treaties. That article allows the Court to 'consider the issue' but it might be beneficial to state that it can hold the treaties unconstitutional under article 5.7. Without a clear qualification as to the hierarchy, the Constitution would in fact be above international law but the previous paragraph 6 of article 5 clearly states that international treaties have priority over laws and are part of national legislation. It becomes clear later in the text that they must be signed by the president and ratified by the Soim (art. 94, para. 1.4).

Recommendation: *Consider addressing the contradiction between paragraphs 6 and 7 of article 5, and clarifying paragraph 7 of article 5.*

Chapter 2 on human rights, freedom and obligations covers all the basic human rights that every democratic constitution should contain. Article 10 refers, admirably, to human rights and freedoms that are natural and inalienable. It is unclear, however, whether it is international or general human rights that are being referred to, and whether this category includes rights outside those listed in the Constitution. The courts might use the generality of the phrase to incorporate new rights into the constitutional order.

In addition, paragraph 3 would benefit from clarification of what is meant by human rights being 'natural'. Natural law[6] has a different definition in legal theory to human rights law as enshrined in the treaties. This raises concerns as to whether the addition of this word could

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[3] Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures, Venice Commission, CDL-INF (2000) 1, Section B.

[4] Constitution of the Italian Republic, 27 December 1947, Section on Final and Transitional provisions: XII 'It shall be forbidden to reorganize, under any form whatsoever, the dissolved Fascist party'.

[5] Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures, Venice Commission, CDL-INF (2000) 1, Section B para.6.

[6] The term 'natural law' is ambiguous. According to natural law legal theory, the authority of legal standards necessarily derives, at least in part, from considerations linked to the moral merit of those standards. There are several different legal theories of natural law, which differ from each other with respect to the role that morality plays in determining the authority of legal norms, see https://iep.utm.edu/natlaw/

widen the scope of interpretation of the rights contained in the Constitution, in particular based on morals and ethics rather than constitutional and treaty standards.

Recommendation: *Unless caused by issues of translation, consider deleting or clarifying the word 'natural' from article 10.*

Currently, article 10(4) only applies to state organs. However, constitutions around the world increasingly require that fundamental rights—particularly freedom from discrimination and the rights to equal treatment and opportunities—also be protected in the private, non-state sphere. The application to both state and private spheres imposes a greater responsibility on the state to prevent, impose sanctions on and remedy abuses by private persons, organizations and enterprises, and can be particularly important in preventing rights violations against women and minority groups. See, for instance, the constitutions of Greece (1979), article 25(1); Mozambique (2004), article 56(1); and Angola (2010), article 28(1).

Recommendation: *Consider expanding the application of the requirement to respect fundamental rights to both public and private sector entities. While it is important to ensure a clear distinction between the constitutional duties of the government and constitutional duties in the private sphere, it may be advisable to apply the requirement to respect, at a minimum, rights to non-discrimination and equality to private sphere individuals, organizations and entities, in addition to the state.*

As mentioned in respect of previous drafts, international law recognizes a right of asylum not just for those persecuted based on 'opinion, religious beliefs or nationality' but also for those persecuted on the basis of race, language, association with a nation and membership of a particular social group.[7] The language of the Constitution, in particular in article 12 on foreign citizens and stateless persons, should probably match the language widely used in international law, unless the intention is to exclude these categories intentionally.

Furthermore, article 12(2) states that asylum seekers 'shall be granted' asylum in accordance with generally recognized norms of international law. It is recommended that a sentence be added that 'the exact procedures will be established by national law'. As drafted, the article seems to *require* Belarus to give asylum to anyone who asks for it. The mandatory language could constrain a future legislature on how it approaches the issue.

Recommendation: *Consider adding a reference to other legislation on the right to seek asylum and broadening the basis.*

Article 15 speaks of the deprivation of liberty and the provisions on the permissible limitations on a person's liberty are largely in line with international standards. The 48-hour limit on holding a person in custody before being brought before a court is the constitutional standard adopted by many states, such as Estonia, Lithuania and Poland. It is recommended again to

[7] The 1951 Convention on Refugees, Article I(A)(2): refugees are those with a 'well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership of a particular social group'. Also consider the example of article 44 of the Constitution of Montenegro: 'A foreign national shall not be expelled from Montenegro to where due to his race, religion, language or association with a nation he/she is threatened with a death sentence, torture, inhumane degradation, persecution or serious violation of rights guaranteed by this Constitution'.

consider that following the said 48 hours, the court is given a time limit on making its court order. In the Czech Republic, Poland and Georgia, the Constitution specifies that the court has 24 hours to make its decision.

Recommendation: *Giving the courts a specific time limit to arrive at any further decision to detain or release would improve the provision as it stands.*

Furthermore, it is worth considering whether article 20 on the inviolability of private life can be merged with article 31 on the inviolability of the home, and to stipulate further requirements.

Recommendation: *Consider merging articles 20 and 31 and stipulate that any search of a home, premises or vehicle may be made only in cases and in a manner specified by statute and based on a court order.*

Article 24 addresses freedom of assembly, and does so in a manner compatible with international standards. However, the paragraph that speaks of 'advance' notification remains. This could hamper interpretation of international law, where spontaneous assemblies are permitted without notification by reason of their reaction to an immediate event.[8] Indeed, there should be no conflation of mass events, such as sporting events and meetings, which may be of a different character. Certainly, the fact that an assembly might disturb traffic does not need to be enshrined at the constitutional level. The European Court of Human Rights has long held that public roads are just as much at the disposal of demonstrators as they are of drivers and cyclists, and a small and temporary disturbance of traffic is no reason to deny or redirect an assembly. Thus, many constitutions leave the right of freedom of peaceful assembly at the general level, including in Lithuania and Poland, to avoid the risk of entrenching practices as mandatory and subjecting them to constitutional review. Notifications, where necessary, can be worked out in legislation.

Recommendation: *Consider removing the mention of advance notification from article 24.*

Article 30 on the rights of property owners provides for compensation to owners of property taken by the state. Article 30(6) could also provide for the right to timely or prompt adjudication, which is the prevailing rule in international law.

Recommendation: *Consider stipulating the right to timely and prompt adjudication in connection with article 30.*

Article 49 is an interesting addition and corollary to the freedom of expression and assembly, essentially understood as enshrining civil disobedience.[9] This article would warrant clarification as it does not appear *prima facie* to be in line with the principles of the rule of law.

Article 52(2) stipulates which rights and freedoms the restrictions permissible under article 52(1) would not be applicable. This provision is interesting but unusual. Crucially, some of the provisions applicable to 'non-restrictable' rights contain what are called internal limitation

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[8] *Bukta v Hungary,* European Court of Human Rights (Application no. 25691/04), Judgment of 17 July 2007.

[9] Henry David Thoreau, Essay '*Resistance to Civil Government*', 1845-1850.

clauses, which are subject to the law. Thus, this preclusion of the possibility of a limitation of rights could contradict the limitations allowed under each individual provision. For instance, article 15(5) states that a person who has been deprived of his or her liberty in an unlawful or ***unreasonable manner, or has been convicted unreasonably***, has the right to compensation of damages from the state.

Article 53 addresses the state of emergency and serves as the derogation clause that allows for the suspension of certain rights during emergencies. It properly excludes certain articles, such as those on freedom from torture, the right to life and freedom of religion, from suspension during emergencies under paragraph 2. However, it does not exclude the right to be free from discrimination laid out in article 27. While it is true that an emergency might require some kind of discrimination, such as on the basis of political or philosophical views in the event of insurrection, it might be possible to add some language about non-discrimination to article 53. The International Covenant on Civil and Political Rights (ICCPR), article 4.1, states that measures in an emergency must not involve discrimination '*solely* on the ground of race, colour, sex, language, religion or social origin' (Emphasis added). Incorporating this language into article 53 is recommended.

In addition, it is worth considering adding set time limits and a procedure into the Constitution, such as a vote in parliament, in order to clearly define for how long the president can put in place a state of emergency (in the power given to him by art. 95, para. 1.9), which must be later approved by the Soim. The length of time is not currently established, or how many times (if any) it can be extended. It is also good practice to require automatic expiration after a set time, unless reaffirmed by parliament, often with an increased votes threshold.

Recommendation: *It would be valuable to consider including non-discrimination as a non-derogable norm into article 53; and the introduction of strict time limits to avoid lengthy or 'permanent' states of emergency, which would limit fundamental rights.*

Furthermore, with regard to the provisions in article 64(3) and article 72(3)1, which stipulate that elections shall not be held during martial law or a state of emergency, consideration may be given to stipulating that this applies to situations of a nationwide state of emergency—or at least that affect significant parts of the country—or that the emergency must seriously affect the organization of elections. Such a stipulation could help safeguard against abuse.

B. Elections and referendums

Provisions pertaining to elections and electoral rights are included in articles 54–64 of the draft Constitution. Several of these articles have undergone review since the May commentary.

1. Amendments to electoral legislation

In addressing a prior recommendation in section 3.5 of the preceding review on restrictions on the amendment of electoral legislation, article 64(5) of the current draft defines the matters which require approval on two occasions separated by a general election. This applies to changes pertaining to electoral rights, the electoral system, and the formation and powers of election commissions. Other matters require only the passage of amending legislation under the regular procedure, albeit constrained by article 64(6) which prohibits this under

martial law or a state of emergency, or less than six months before a general election. This distinction between matters of principle and matters of practicality (e.g., detailing of the processes of registration, candidate nomination, campaign regulation, vote counting and dispute resolution) may prove helpful in practice, enabling timely adjustments in response to any issues that might be identified.

2. Establishment and functioning of the Central Election Commission

The new draft takes a radically different approach to the composition of the Central Election Commission (CEC) to the one in the previous draft text. It contains two clear and valuable provisions: the permanence and independence of the CEC, laid down in article 63(1); and a requirement that the CEC elect its own Chair, Deputy Chair and Secretary from among its membership, contained in article 63(3).

Article 63(2) establishes the CEC as an 11-member body with members appointed by those political parties which have representation in the Soim. The CEC is therefore dependent on the legislature, with no role for the president or the executive. The chosen partisan model has the benefit of preventing capture of the commission by one or two of the largest parties. What kind of party system will emerge in a free Belarus remains to be seen but giving the top 11 parties in parliament a seat on the CEC will go a long way towards ensuring the legitimacy of election management.

The chosen model also lies completely within the 'mutual policing' approach to independent election administration adopted across much of Central and Eastern Europe and the former-Soviet Union since 1989, which has often reflected a lack of trust and confidence that it would be possible to find electoral administrators who would be both genuinely independent and generally accepted as such. This change in approach presumably reflects the views of the drafters following discussions on the principles. While it would be possible to incorporate into the new approach a requirement for CEC members to possess qualifications, as was proposed in International IDEA's earlier recommendations (point 3.3 in the May commentary), this may be more difficult to operate in practice, and could in particular act as a hindrance to the promotion of gender, youth and other diversity in electoral management.

One consequence of the new approach is that the entire CEC membership is renewed at the same time, presumably after the newly elected Soim has been sworn in and all electoral disputes and challenges have been resolved. It therefore implicitly defines the term of office of its Chair, meeting our earlier recommendation in Section 3.4, and of its Deputy Chair and Secretary.

There is no provision for the terms of office of CEC commissioners to be staggered in order to maintain some continuity of institutional memory. (It is difficult to achieve this under the mutual policing model.) Any such continuity will thus be achieved through the permanent secretariat staff of the CEC, which makes these appointments particularly crucial.

The transitional arrangements contained in article 165 for the appointment of the first CEC following the adoption of the constitution raises several questions. Each registered party is entitled to appoint one CEC member, with no link to the membership of the legislature. While this approach recognizes that representation in the existing legislature is not a suitable

criterion: what will be the requirements for registration of a political party at this point? What will stop parties, either new or old, from forming fake or shell parties for the specific purpose of gaining additional CEC members? Is it possible that the new CEC will be so large as to be unworkable?

It is acknowledged that the situation in Belarus is unique, and that there are limited applicable examples of international practice on the establishment of an interim election administration body on which to draw. If alternative or adjusted approaches on the above were to be sought, it might be useful to consider the option of opening up CEC membership to parties that have reregistered by a certain deadline, ideally according to new liberalized rules. Another option would be to have a council of registered parties make the appointments to the transitional commission. Requiring some level of consensus among the parties could lead to a moderate and relatively independent commission. This approach also reduces the likelihood of there being too many members and could also be considered an option for the model of representation for the permanent CEC.

In addition, as the consolidation of democratic political forces takes place, it might even be conceivable to aim for representation in the interim CEC of what would be regarded as the key or largest political forces rather than the entire political spectrum. Additional representation of candidates could be provided for, and the involvement of reputable independent experts from academia, civil society or institutions could be considered as a balance to political representation.

Recommendation: *Consideration could be given to reviewing the transitional provisions to ensure clarity of CEC member appointment procedures.*

3. Electoral System

Articles 70(1) and 70(4) establish a Soim of 220 members elected by the Party List system of proportional representation with constituencies based on local self-government units. This entrenches more detail than the previous draft, as commented on in section 3.7 of the earlier commentary but might be a move by the drafters to ensure that the direction of change encapsulated in the new Constitution is given maximum protection.

Article 70(4) may however raise a question related to the definition and size of local self-government units. If many of the units to be used as constituencies are rural areas that have electorates that qualify them for only a small number of seats—say one or two, the List PR system is not likely to work in the way that is presumably intended. Single-member constituencies will function in a majoritarian manner; two-member constituencies may either give two seats to a locally very strong party, or one seat each to the top two parties—perhaps tending towards the creation of an inbuilt bias towards the second strongest party, as illustrated by the operation of the recently replaced electoral system in Chile.

Recommendation: *To enable the List PR system to produce roughly proportional results, it may be necessary either to create multi-member electoral districts that combine two or more local self-government units, or to define local self-government units in a way that ensures they are large enough to qualify for multi-member representation.*

In line with international standards, it would also be necessary to address the question of which body will be responsible for determining and adapting constituencies in order to ensure equality of voting power between them. It is also recommended that the intervals within which a review of constituency sizes and boundaries should take place should be stipulated (e.g., after each population census, if this happens, or every ten years). Related provisions can feature in the constitution but may also be addressed in election legislation.

While the electoral system for the Soim is specified in detail, there is no specification of the electoral system for local self-government units. This will presumably be contained in the organic law on local self-government envisaged in article 109(4).

4. Terms of office

The new draft retains the five-year term for the office of the President (art. 90(1)) alongside the four-year term of the Soim (art. 71(1)). In noting that the president appears to retain some significant powers in the new draft, especially in foreign affairs and the security field, the changing relationship between the president and the Soim over a 20-year cycle of elections raised in the May commentary in the second part of section 3.8 retains its relevance.

In terms of synchronization of the two terms to make it less likely that power is consolidated by one side, one option might be to offset presidential elections and Soim elections by two years, holding each at the midpoint of the term of office of the other. This would, however, require a two-year term of office for either the initial president or the initial Soim. If the aim is to constrain the standing and perception of the role of the presidency, the former may be more useful.

5. Appeals of CEC decisions

Article 60(2) of the current draft provides for appeals against election results to the Supreme Court. This addresses an earlier International IDEA recommendation in section 3.2 of the May review. However, unless there is a translation issue, which body makes the initial decision on the results of the election remains unclear. It might be understood that this falls within the purview of the election commissions, but this is not clearly stated in article 62(1).

Recommendation: *Consideration could be given to stipulating in article 60(2) that it is the duty of election commissions to announce the results of elections in a timely manner, to make clear that the commissions make the initial announcement of results.*

In addition, article 60(2) stipulates that 5% of the voters will be able to appeal, but the text does not make it clear how these 5% will be selected and validated. Are these to be signatories in a joint claim? How will the fact that they voted be validated and by whom—the courts or the CEC?

6. Early elections

The new provision on early elections to the Soim addresses a prior recommendation (3.9) by removing the previous provision prohibiting further early elections within six months of early elections. The provision is vague, however, and the definition of an 'exceptional case' for the Soim to call an early election under article 72(1) is still unclear. The same formulation is used

in article 118(2) with regard to early elections to representative bodies of local self-government. To avoid litigation on the basis of this formulation, consideration could be given to omitting it while retaining the envisaged procedural thresholds.

In addition, the electoral provisions related to local self-government (arts 111 and 118) appear to raise the same issues in relation to early elections at the local level. Section 5.2 of the May commentary remains equally relevant when considering the new draft.

7. Observation

It is welcome that the new draft maintains in article 58 the previous approach to the observation of elections. However, it does not take on board recommendation 3.1 from the May 2021 commentary. In particular, consideration of including a safeguard against 'fake' observation was recommended. Consideration could be given to addressing this aspect through sub-legal regulation, including future CEC regulations. This could include more concrete provisions on how procedurally the activities and/or accreditation of such 'fake' observers could be prevented.

It may also be worth considering how the provisions in article 58—as well as other provisions related to electoral rights contained in articles 54–62—are applicable to referendums.

Recommendation: *Consider clarifying how provisions on observation and other relevant guarantees of electoral rights are applicable to referendums and reflecting this accordingly in the draft.*

8. Bribery of voters

Current article 57 prohibits the bribery of voters. There is no reason to restrict this prohibition to 'candidates, political parties and any person directly or indirectly in the election campaign'. The text could just say that the bribery of voters is prohibited.

Recommendation: *Consider reformulating article 57 to provide for a blanket prohibition of bribery of voters as a principle. Consider extending this to undue influence, and also to threats.*

9. Referendum

The responsibility for calling a national referendum is given to the CEC in article 66(1). The timetable will presumably be specified in the organic law required by article 68(1). This addresses the previous International IDEA recommendation 3.6 from the May commentary in relation to the previous article 91.

The exclusion of potential subjects from a national referendum has been clarified and extended in article 66(4). These do not include the declaration and abrogation of a state of emergency or a state of war or peace. If this has not been debated in-depth and rejected by the drafters, it may be worth reconsideration.

Article 67(2) prohibits local referendums on matters 'within the exclusive competence of the representative body of local self-government', presumably as defined in article 112. Much of the content of article 112 is sensibly excluded from local referendums. However, the exclusion

of local development programmes (and consequently policy) in article 112(1)1.4 and of decisions pertaining to local symbols in article 112(1)1.7 from local referendums might not be warranted and could be reconsidered.

C. Executive, legislature, and local self-government

1. The Soim

Article 76 granting immunity to members of the Soim for statements, voting and activities in the performance of their duties is a welcome addition to the draft. It may however be weakened in practice by the exception regarding 'responsibility for insult or slander' at the end of article 76(1), as this clause could be (mis)used to stifle members by means of spurious legal action. In principle, including exceptions alongside immunity provisions is not recommended as members could in any case be held accountable for any crime, subject to the lifting of immunity by the Soim.

In many countries, immunity can be lifted in cases of criminal activity, but only by a decision of parliament, often involving a supermajority. In Finland, for instance, immunity can only be lifted by a five-sixths majority. Currently, the draft simply states at the 'consent of the Soim', which presumably means that the normal decision-making procedure would apply. This would allow a majority party to easily remove the immunities of opposition parliamentarians, enabling possible legal harassment.

Recommendation: *It may be worth reviewing the procedures for lifting immunity and, with regard to the exception in article 76(1), considering an exemption from this provision for statements made by members in the chamber of the Soim while in session.*

Article 77(5) concerns closed sessions of the Soim. No discretion is envisaged for the chairperson to hold a closed session without a three-fifths vote, but there may be circumstances in which this is desirable. As drafted, the provision seems to prevent the law from providing the chairperson with sole discretion for ordering a closed session under all circumstances. Consideration could be given to granting the Chairperson such discretion in cases provided for by law.

Article 80(2) on interpellation includes the right to submit an enquiry not just to executive branch officials but also to any 'body of the Soim'. This raises the question of what is contemplated here. This provision could unduly complicate internal parliamentary work if a committee has to answer interpellations from subgroups of legislators while it is engaged in in its internal work.

Article 81(3) on organic law does not mention the organization of the Constitutional Court. It is also possible that subsection 81.3.6 on the judicial system might not cover the Constitutional Court since that body is the subject of its own special Chapter 10 and not included in Chapter 9 on judicial powers.

Recommendation: *Consider adding the Constitutional Court to article 81(3).*

Article 83 refers to the right of the public to make proposals to the legislature. However, subsection 3 does not refer to the procedure for making legislative proposals, but only to

‘draft laws’. Typically, a proposal is more general than a draft law, which implies specific legal language.

Recommendation: *Consider including the word ‘proposals’ in article 83(3).*

Article 88 states that the Soim Rules of Procedure have the ‘effect’ of organic law. The Constitution does not state any ‘effect’ of organic law, but only a special procedure for its adoption. If adopting or amending the Soim Rules of Procedure requires an absolute majority of members of parliament, this is fine, but that should be stated clearly in article 81(3), which only refers to the ‘organization and activity’ of the Soim and makes no mention of ‘Rules of Procedure’.

2. The president

The draft has made an obvious choice in favour of a weaker president than the text reviewed in May. The veto power over legislation can be overcome by an absolute majority of members of parliament, rather than three-fifths as in the previous draft. As noted previously, this weak but directly elected presidency could create some problems, but the drafters recognize this and are willing to take the risk.

Article 90 refers to the procedure for electing the president, using a two-round system. Articles 90(7), 90(8) and 90(9) all refer to the second round, but it is not clear from the text of the latter two provisions that this is the case. If article 90(9) is read on its own, it could be seen as covering the first round.

Recommendation: *Consider combining these three provisions into a single sub-article.*

Article 92 covers early termination of the president’s powers, and states that she or he can resign at any time. However, article 87 requires the Soim to accept the resignation by an absolute majority. This raises the question of what would happen if a president resigned but this resignation was not accepted.

In addition, article 92(3) stipulates that the decision on early removal of the President from office by the Soim is made ‘on the basis of the conclusion of a specially created commission’. It would be advisable to stipulate who in the Soim, and by what majority, may propose the formation of such a commission, and how it would be established and composed.

Article 95(1)3 states that the president can return the law with his ‘objections’.

Recommendation: *The word ‘objections’ should be harmonized with article 86(2), which refers to the president’s ‘comments and proposals’.*

With regard to article 95(2), consideration could be given to clarifying whether a president may refuse proposals on appointments by the government and, if so, on what conditions.

3. The government

Article 100 provides for deputy prime ministers but leaves it unclear whether there is any limit on their number.

Article 101 provides that members of the government are responsible for any decisions by the government for which the member voted. This appears to imply that votes in cabinet will be public, although there appear to be no provisions for such voting elsewhere in the Constitution.

Article 101(3) provides that a member of the government may not be arrested or otherwise deprived of his or her personal liberty without the consent of the Soim. Consideration could be given to stipulating the applicable majority required.

Article 102(1) provides for the nomination of a new prime minister within a month of the date of resignation of the current prime minister. The first election under this Constitution is not likely to involve the prior resignation of a prime minister. It is therefore suggested that the text should read: 'no later than one month from the date of resignation of the prime minister or the date of the general election'. Alternatively, the first election under the new Constitution could be covered by transitional provisions. Consideration could also be given to clarifying whether this provision applies in cases of the removal, resignation or death of a prime minister.

Many parliamentary constitutions require an investiture vote on the government once all ministers have been named. The drafters might consider this. As it stands, the prime minister's appointment requires an absolute majority of members (art. 102(4)) but there is no vote on the government as a whole.

4. Local self-government

Local government powers and structures will be determined by law. The processes for the definition and delineation of local self-government units and administrative-territorial units discussed in section 5.1 of the May commentary have been made much clearer throughout the new draft. However, article 112(1)1 states that the local representative body will approve the 'structure' of the executive body for local self-government. Does this mean different localities could experiment with different structures? For example, the executive could be multi-member or have a shorter term in one region that in another.

Further questions arise in this regard. To what extent (if any) is it intended that executive positions be elected? Is there any thinking about directly elected executive mayors, with roles and powers which (as implicit in 112(1)2) would presumably have to be defined in national legislation? Can each local self-government unit determine its own answers to these questions? Or is the thinking that all local government should be parliamentary? Drafters could consider what approach is envisaged to the above and clarify this in the text as appropriate.

Modification is recommended of article 112(1)3, which allows the representative body to cancel decisions of the executive body if they are incompatible with legislation. There is no problem assigning this power to the representative body, but it is not an 'exclusive' power (as referred to in the title of the article), since a court can also nullify decisions of the executive body that are incompatible with the law, as per article 116.

In addition, it may be worth checking whether the provisions in articles 109(1) and 109(2) would operate to exclude the use of article 67 to call local referendums on the establishment,

amalgamation or amendment of local self-government authorities and/or on their boundaries.

Positively, the recommendation in section 5.3 of the earlier commentary on the powers of local government has probably been addressed by the addition of the exclusive competence to approve development programmes in article 112(1)1.4. The recommendation in section 5.4 on the need to specify a public audit function for local self-governments is covered by the new provision in article 112(1)1.9.

D. Judicial authorities

The judiciary is organized under Chapter 9 and Chapter 10 of the draft Constitution. Chapter 9 deals with the courts in general and Chapter 10 with the Constitutional Court specifically. In general, the articles are well drafted, but some questions remain that are worthy of consideration.

Paragraph 3 of article 119 on the judicial system states that the judicial system is based on the 'principles of territoriality and specialization' but the definition of these principles is not entirely clear.

Judges are chosen by the National Council of Justice. It would be advisable if the 'irremovability' or 'security of tenure' of judges were explicitly stated under article 122. This is a particularly important principle since, under section 4, judges may be dismissed if they refuse to be moved to another court or when a court is 'reorganized'. Such articles may be subject to abuse and therefore would benefit from reinforcement of the principle of irremovability. It is positive that it will be possible to appeal in court against a decision on the removal of a judge.

Recommendation: *Consider explicitly providing for irremovability or security of tenure for judges.*

1. National Council of Justice

Article 125 sets up the National Council of Justice as a professional non-political body for the selection of judges. This approach safeguards the body and its members against political influence. Article 125(9) lists the tasks of the National Council of Justice. Consideration could be given to adding the 'promotion and transfer' of judges. It is assumed that this is also the intent of the drafters, as many such councils have this power. However, if the idea is to allow promotions to be handled by the Supreme Court, the drafters should make this clear.

2. Constitutional Court

Article 127 apparently sets up the Constitutional Court in the following manner: five judges of the Constitutional Court are appointed by the Soim on the recommendation of the president; five are appointed on the recommendation of the chairperson of the Soim; and five are appointed on the recommendation of the chairperson of the Supreme Court. There must be at least two candidates for each vacancy. This would appear to be a relatively large body for a court dealing only with constitutional matters. However, this article, perhaps by

reason of translation, is not written in a way that makes the process of establishing the court immediately clear.

Recommendation: *Consider clarifying the procedures for the appointment of the Constitutional Court.*

The Constitutional Court is renewed one-third at a time every three years, which ensures that the composition of the court overlaps but is not completely congruent with the terms of office of both the President and the Soim.

The individual complaints procedure is welcome, as is the opportunity for the Commissioner for Human rights to submit a claim to the Constitutional Court.

However, article 128 proposes various types of actions that the Constitutional Court can take. On cases submitted by the president or by one-fifth of the Soim, it takes a 'decision' (para. 1.1). In the next paragraph, however, the Constitutional Court may 'consider' the issue of compliance based on a motion from the same actors (para. 1.2). Meanwhile, it can also 'consider' the constitutionality of law from lower courts (rather than 'deciding' on this, para. 1.3). For the Commissioner on Human Rights, the Constitutional Court 'examines' the constitutionality of laws (para. 1.4) but for individuals it again 'considers' constitutionality (para. 1.5). It also 'considers' (para. 1.6) disputes concerning the powers of various authorities, such as the CEC, the Commissioner for Human Rights and the Anti-Corruption committee, among others.

Recommendation: *The manner in which the Constitutional Court hands down its decisions and the weight of these decisions would benefit from clarification.*

In an abundance of caution, it might also be recommended to make clear in article 124 that a lower court that has asked for an opinion from the Constitutional Court about the compatibility of a normative legal act with the Constitution *must* apply the decision of the Constitutional Court. This is not optional. This has been an issue in many countries that have adopted this system. The problem is exacerbated by article 128(1)3, which states that the Constitutional Court will 'consider the issue of constitutionality' in this process. Does this mean that the Constitutional Court does not 'make a decision' on constitutionality when it is referred by an ordinary court? Article 128(1)1 uses the language of 'decision' when the request to the Constitutional Court comes from the president, the government or one-fifth of parliamentarians.

Furthermore, the Constitutional Court has the right to 'suspend the application of normative legal acts' under article 128(3). Does this provision allow the Constitutional Court to do this in the cases where an ordinary court has made the referral? The interaction of constitutional procedure with ordinary judicial procedure is tricky, and careful, clear drafting will prevent controversy down the line.

3. Prosecutor

The draft Constitution appears to be quite well written with regard to the Office of the Prosecutor, but the Venice Commission has commented that not much detail is needed at the level of the Constitution. In fact, all that would be required would be: 'A guarantee of the

independence of the general prosecutor of the Republic in the performance of his/her functions; the method of his appointment; the method of his removal from office'.[10]

Recommendation: *Consideration could be given to making explicit reference to the independence of the prosecutor and to his/her removal from office. Currently, only the manner of appointment is found in article 131.*

The above point on the need to clearly outline the grounds and procedures for removal from office is also applicable to several other institutions discussed below, such as the Control Chamber (art. 141) and the Commissioner for Human Rights (art. 137).

E. Other institutions

1. The Bar

It is not usual for a constitution to contain regulations concerning the bar and this is normally left to ordinary laws. However, it is both understandable and positive in the case of Belarus to lay down the foundations for a Bar Association, as a special type of association that does not fall under the protection of article 11 of the European Convention on Human Rights, on the grounds that it does not comply with the requirements for voluntariness and independence from the state.[11] The provisions on ensuring accessibility to and avoiding nepotism in such a body are therefore welcome.

2. Commissioner for Human Rights

The section related to the Commissioner on Human Rights is well written and in line with both international law[12] and good practice. This is essential as the draft Constitution establishes that the Commissioner and his or her deputies and staff should enjoy immunities in the execution of their mandate and their powers to request and receive responses from various authorities regarding their adherence to human rights.

3. Government finance

Article 157 provides for fiscal responsibility, along the lines adopted by various countries in the aftermath of the global financial crisis. Keeping debt to a ratio of 40% of gross domestic product, however, is very strict, and only about one-third of countries would meet this standard. Germany, China, Ukraine and most developed countries have higher ratios. It is not immediately clear why such a rigorous approach is necessary or warranted in the case of Belarus.

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[10] Compilation of Venice Commission Opinions and Reports on Prosecutors II, Level of Regulation: Constitutional and Legislative CDL-PI(2015)001, p. 4.

[11] OSCE-ODIHR Guidelines on the Freedom of Association (2014), para. 81.

[12] UN Paris Principles relating to the Status of National Human Rights Institutions, 1993 and the Principles on the Protection and Promotion of the Ombudsman Institution ('The Venice Principles') CDL-AD(2019)005.

F. Amendments to the Constitution and transitional provisions

1. Amendment to the Constitution

Article 160 provides for amending and supplementing the Constitution (para. 1). The method of amendment proposed is by a majority of no less than three-fifths of the constitutional number of deputies in the Soim. However, this does not apply to Chapter 1 on the Fundamentals of the Constitutional Order, which must go to a referendum.

In cases where a new Constitution is planned to be adopted or there are amendments that comprehensively change the structure of a constitution or affect its fundamentals, it may be appropriate to organize a referendum. However, as mentioned above, this should necessarily be preceded by a phase in which parliament discusses and debates the new text, and subsequently adopts it by a reinforced majority. The draft Constitution should provide for meaningful parliamentary debates and for the adoption of constitutional revisions (either partially or entirely replacing the existing constitutional norms) within a clearly defined timeframe and procedure for a qualified vote.

It is positive to note that that a parliamentary vote cannot be circumvented by resort to a referendum by the executive (art. 161). Also worthy of note is the involvement of the Constitutional Court in the process of amendment (art. 160). While such involvement is envisaged in the constitutions of several states, it should be subject to certain conditions.[13] The Constitution should clearly define the scope of such involvement, such as whether the court is reviewing procedural or substantive aspects of the reform; and define the authorities responsible for requesting such a review, as well as the timeframe for it, and the consequences in case the Constitutional Court's vote/opinion is negative or absent. It appears that the draft Constitution has established all these processes bar the last, which is what happens should the Constitutional Court provide a negative decision. *Consideration of this additional aspect is recommended.*

2. Transitional and Final Provisions

The transitional and final provisions set out a clear path post-referendum to a new Constitution. The slight variation seems to be the manner in which the National Council of Justice is nominated for the first time, as this involves nomination of one-third of the members by the Soim (political nominations). However, these nominations would be from among international experts, presumably to assist the start of a new era in the judiciary.

Article 164(3) outlines a schedule of activities that follows the adoption of the Constitution and applicable deadlines. It might be prudent to take account of the challenges of complying with this timeline if the first elections after the adoption of the constitution take time.

Under article 165(3), the CEC would have to be appointed and would then have 60 days to decide on the date of elections, which could take up to five months from the date of adoption of the Constitution under article 166, as preparations may be needed. The Soim may

[13] The Venice Commission Report on Referendums, CDL-AD(2010), para. 58.

therefore have trouble meeting some of these timelines. The short timeframes may also create pressure, which could mean little popular consultation in the making of these laws.

IV. Conclusions and Further Steps

The updated draft of the new Constitution reviewed above constitutes a solid constitutional text that duly enshrines and safeguards fundamental rights and freedoms, provides guarantees on checks and balances, and creates a basis for the construction of a parliamentary democracy in Belarus. It is to be welcomed that in the course of draft's development, its authors have continued to engage with citizens, and national and international counterparts to seek input and suggestions on further developing and improving it. A number of key constitutional design choices appear to have been made; both these and the process of their development overall deserve a positive assessment. Some aspects of the draft could benefit from further development or review, and these are elaborated on in this commentary.

Overall, the comments provided in this review are intended to further expand and build on the relevant constitutional expertise and advice that have already been and are being made available to the drafters by various experts in constitutional law, as well as national and international partners. For its part, International IDEA stands ready to continue to support genuine and truly public efforts to develop a constitutional framework for Belarus that is in line with established principles of democratic constitution-making.