Council of Europe
Conseil de l'Europe

Strasbourg, 14 November 1995
<s:\cdl\doc\(95)\cdl\pdg>

Restricted
CDL (95) 76

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION

ON THE LAWS OF THE REPUBLIC OF BELARUS

- I -
THE SUPREME SOVIET

- II -
THE PRESIDENT OF THE REPUBLIC

by

Mr Kestutis LAPINSKAS
(Lithuania)

Comments
on the Laws "The Supreme Soviet of the Republic of Belarus" and "The President of the Republic of Belarus"

by Kestutis LAPINSKAS (Lithuania)

I. Law on the Supreme Soviet of the Republic of Belarus

The Law on the Supreme Soviet of the Republic of Belarus was adopted on the 21st of December 1994. It has been stated in the short preamble, that this Law on the basis and with the purpose of implementation of the Constitution (1994) shall regulate the legal status of the Supreme Soviet, the content and order of its activity, and its assurance. The Law consists of 10 chapters and 118 articles. These comments are aimed to draw attention to some doubtful or debatable statements of the Law, referring to the Constitution of the Republic of Belarus and the principle of separation of powers, there consolidated.

1. To begin with the attention should be directed to the unclear legal nature and purpose of the reviewed act. According to the Article 94 of the Constitution the activities of the Supreme Soviet, bodies thereof and the deputies shall be determined by the Rules of Procedure of the Supreme Soviet as well as by other legislative acts. In the present case the mentioned issues are governed by the Law, not by the Rules of Procedure. It is true, that there are some statutory norms, however there are plenty of norms, governing the order of activities (i.e. procedural), which should be placed in the Rules of Procedure. These are, for instance, the order of law draft consideration and adoption of laws and other acts, organisation of activity of the Supreme Soviet and other issues.

2. The Law includes declarative provisions of non-normative content or issues directly not related to the governed subject. For instance, the necessity to tell the doctrinal provisions on the principles of Parliament activity, Parliament relations with the citizens and their State power exercising forms (Articles 2-5) is doubtful, as well as to speak about the tasks and the purpose of different kinds of courts, of the Procurator General and the Supervisory Authority (Articles 15-19) and similar issues.

3. Article 9 of the Law determines, that "the competence of the Supreme Soviet shall be determined by the Constitution of the Republic of Belarus, this Law and other legislation of the Republic of Belarus". This is an expanding definition of the competence, for it has been determined in the part II of Article 83 of the Constitution of the Republic of Belarus, that "the Supreme Soviet of the Republic of Belarus may resolve issues in accordance with the Constitution.". A similar provision, restricting the State powers has been established in the part I of the Article 7 of the Constitution: "The State and all of its bodies and officials shall be bound by the law and act within the limits of the Constitution and the laws adopted in accordance therewith".

4. According to the Constitution the Supreme Soviet is the highest standing representative and the unique legislative body. There are no direct indications of the executive functions of the said institution. This absence is correct, for the Article 6 of the Constitution has established the principle of separation of powers, i.e. the separation of powers into legislative, executive and judicial. However the law includes provisions indicating the attachment of certain executive functions to the Parliament. It is determinate in the part IV of the Article 12, that the Supreme Soviet shall make decisions, in the course of fulfilling the governing functions; the Article 10 established, that the Supreme Soviet shall fulfil the rights of the owner with the regard to the property of the Republic of Belarus; Article 56 provides for extremely wide control powers which might be treated as the interference of the Supreme Soviet into the sphere (prerogatives) of the executive power.

5. Article 27 of the law has determined too wide and not substantiated (not having constitutional grounds) powers of the Supreme Soviet with the regard to local self-governments. The Supreme Soviet shall establish the system of local self-governments bodies, ensure information, organise the qualification increasment of the personnel, control the activity of local administrations and self-governments. The Parliaments of democratic states usually do not fulfil the above mentioned functions. Some similar functions within the extent, limited by the law, are fulfilled by certain executive power institutions. It should not be forgotten, that too strong interference may always cause certain dangers to the functioning of local self-governments in general.

6. Article 90 of the law determines subjects that have the right of legislative initiative. The Constitutional Court has not been indicated among them. Article 39 of the law of the Supreme Soviet, which defines the form of realisation of the right of legislative initiative, allows to draw a conclusion, that this right is attached to the Constitutional Court as well. Such conclusion has been drawn due to the fact that, in accordance with the Article 130 of the Constitution, the Constitutional Court shall be entitled to submit motions to the Supreme Soviet on the adoption and modification of laws. But the Constitution does not treat such right as the right of legislative initiative. On the contrary, in the part III of the Article 39 of the law on Supreme Soviet, the said right to submit motions to the Supreme Soviet on the adoption of laws has been treated as a form of realisation of the right of legislative initiative.

7. The powers of the Chairman and Vice-chairmen of the Supreme Soviet have been determined in chapter VI (it consists of 10 articles) of the law. These rights are quite big and important (especially those of the Chairman). Concerning that, should be drawn attention, that the grounds or procedure of removing from office of the Chairman and Vice-chairmen have not been determined. A very laconic and inconclusive wording tells, that the said officials can be removed from office by decision of the Supreme Soviet. This indetermination surprises, for the law includes numerous not so much important, in other words, minor, issues.

8. Chapter VIII of the law determines the purpose, composition and competence of a Presidium of the Supreme Soviet. According to the Article 89 of the Constitution, the purpose of the Presidium is "to organise the activity of the Supreme Soviet". Article 79 of the law repeats the constitutional provision, Article 83 details (concretises) it. However, it is doubtful wether the said constitutional provision in the latter case has not been violated, for the point 7 of the Article 83 determines, that the Presidium, in accordance with the law, shall consider other organisation and assurance issues of activity of the Supreme Soviet, Supervisory Authority of the Republic of Belarus, Prosecutor's office and other bodies, formed by the Supreme Soviet and subordinated thereof. We can make a conclusion about strong powers of this body (beyond the constitutional wording) from the provision of the part II of the Article 84 of the law, which says: resolutions of the Presidium of the Supreme Soviet, adopted within the limits of its competence, according to the law, shall be

obligatory fulfilled by all bodies and officials. It is equally interesting, that these generally obligatory acts can not be appealed to the Constitutional Court, but may be abolished only by the Presidium itself and the Supreme Soviet.

9. Article 95 of the law has determined the grounds for the termination of powers of the deputies of the Supreme Soviet. It has been determined in point 9, that in accordance with the law a deputy of the Supreme Soviet may be recalled. However, the Constitution does not provide for the possibility of the recall of a deputy (moreover, the grounds for the termination of powers of the deputies have not been regulated in the Constitution in general). Because of such legal provision, the nature of a deputy's mandate is doubtful, i.e. has the concept of a free mandate not been violated in this case? Does that not mean that the independence of a representative of the nation is again limited by certain elements of the imperative mandate?

II. Law on the President of the Republic of Belarus

Law on the President of the Republic of Belarus was adopted on the 21st of February 1995 and was aimed to realise the provisions of the new Constitution on the legal status of the President, to determine his/her relation ships with other branches of state power. The law consists of 5 chapters and 39 articles.

1. It is doubtful, whether the division of the President competence into "exclusive" (Article 17) and "ordinary" (Article 18) is substantiated. The powers of the President, which have been determined in Article 100 of the Constitution, are rather voluntarily divided in the said two groups of the law. Such classification of powers may become the basis for an incorrect interpretation about paramount and minor powers of the President or for the reasonings (conclusions) that exclusive competence of the President should be realised only by the President himself/herself, however the fulfilment of other powers are the right of the President, but not his/her duty. It is worth noticing, that the said classification has not been based on the separation of powers of the President as a State Head (see Article

18, points 4,9,10,11 and 12) , from those of the Head of executive power either (see Article 18, points 1,2,3,etc.).

2. It is scarcely possible to consider the right of the President, established in the point 4 of Article 18, , as constitutionally substantiated -- to make motions to the Supreme Soviet on discharging the Chairman of the Constitutional Court, Chairman of the Supreme Soviet, Chairman of the Higher Economic Court. The Constitution does not provide for such right directly. It is true, that the law relates this right to a quite important condition -- the necessity to substantiate such proposal. However, it is scarcely sufficient. The grounds for discharging of the Chairmen of Courts should be established in the law. Changing of Chairmen without legal basis might be interpreted as an interference into the independence of judicial power and violation of the principle of the independence of courts.

3. Some control powers of the President are interpreted too widely -- especially on conformity of the acts of executive authorities to the laws. According to the point 21of Article 100 of the Constitution the President has the right " to cancel acts of the executive authorities subordinate to him/her". However in the point 5 of the Article 18 of the law the said right is expanded in this way: "Proceeding from the national interests and the interests of citizenry having residence on the relevant territory, carry out control on conformity of the resolutions and the activity of bodies of power, dependent on him/her, to the legislation of the Republic of Belarus in the following forms:

-- cancel the Acts of the Executive authorities, dependent on the President;

-- cancel the resolutions of local executive and economic bodies that are not in conformity to the legislation."

Thus the Constitution has not vested in the President the right to control the activity of subordinate bodies in general, but only tells about the right to cancel the acts of executive authorities.

4. Debatable prerogatives of the President have been worded in Article 21 of the law : "...shall implement measures for protection of interests of the citizens of the Republic of Belarus outside the country, as well as the Byelorussians residing in other States." It would be possible to understand, if the law provided for the actions, exclusively according to the international treaties concluded by Belarus (though the necessity of the

direct participation of the President in such actions is doubtful even in such cases). However, the fact that the law provides for the unilateral actions in foreign countries, i.e. according only to the Constitution and the laws of Belarus, is completely incomprehensible. It looks like the legalisation of intentions to act by force, but this would contradict the principles of foreign policy established in Article 18 of the Constitution.

5.The part II of the Article 24 of the law determines very wide powers of the Security Council: "The Security Council of the Republic of Belarus is the higher collective co-ordinating-and-political body which is established for implementation of the military policy of the republic in the sphere of security, strategy, principles of military development, for ensuring of the guaranteed protection of sovereignty, defence potential of the republic, its economic status, rights and freedoms of citizenry." The fact, that this institution is responsible to take care not only of the security and military issues, but also of economic affairs as well as rights and freedoms of the citizens, is quite surprising. We can also judge about the exclusive powers of this institution from the fact, that in case of the state of emergency, this body may be entrusted with the functions of the State power and administration: "Under the state of emergency, the Security Council shall carry out, on the resolution of the Supreme Soviet, the functions of the state power and administration to ensure the necessary measures for stabilisation of the situation or to repel aggression; shall carry out other functions on the territory of the republic in accordance with the law." In addition, it has been provided for a special law which could determine other functions and powers of the Security Council. Thus , the definition of this body, namely, that it is a "co-ordinating-and-political body" is not precise. On the other hand the Constitution does not provide for a body with exclusively decisive powers (even empowered to substitute over state bodies).

6. Article 25 of the law has defined the powers of the President, as the Commander in Chief of the Armed Forces. Among them could be found the right, which the Constitution does not provide for, namely the right to issue an order to launch military operations without declaring war. This is allowed in three cases: two of them are in fact, related to a sudden invasion of the armed forces on the territory of the State, while the third case has been characterised as "a deliberate invasion into the air-space of the Republic of Belarus". Namely this case is doubtful, because of its insufficient definition as well as the lack of clearness. In such a case the

launching of military operations, in fact, may depend on the most insignificant violation of air - space and its unilateral interpretation as a "deliberate" invasion. Thus, it scarcely conforms to the principles of foreign policy, established in Article 18 of the Constitution.

7. Article 28 of the law establishes the right of the President to appeal to the Constitutional Court. Here, as a matter of fact, are repeated the provisions of points 1 and 2 of the part II of the Article 127 of the Constitution. Nevertheless, the content of provision in the point 2 of the Article 28 is expanded, because after the words "General Procurator" the new words "any state body" are appended.
This contradicts the Constitution, as the said words are not included into the point 2 of the Article 127 of the Constitution.

8. According to the Constitution the President is the Head not only of the State but of the Executive power as well. This is why he administrates all system of executive power bodies and caries out other powers established in the Constitution. However the Constitution does not provide for the President the possibility to substitute any executive power bodies or to take over issues ascribed to their competence. Thus, the provision of the part II of the Article 29 "The President shall ensure the efficient activity of the legislative authorities "hardly corresponds to the Constitution. The attempt to expand unlimitedly the powers of the President does not conform to the common principles of separation of powers and legitimacy, established in Articles 6 and 7 of the Constitution.

9. The heading of Chapter IV does not fully conform to its content. At the beginning of this Chapter (Article 31) is mentioned a constitutional body, i.e. the Cabinet of Ministers, the purpose of which can not be defined as "organisation and ensuring of the activity of the President". This is the purpose of the administration of the President, which is an auxiliary, technical institution, but not a constitutional body. Because of these essential differences, the status of the Cabinet of Ministers should not be discussed in the above mentioned chapter.

The wording of the status of the Cabinet of Ministers in Article 31 of the law does not fully conform to the Constitution. An abbreviated version of Article 106 of the Constitution (very much generalised) is presented in the part I of the Article 31 of the law. But the provision of Article 31 "The Cabinet of Ministers shall ensure the execution of the

decrees and instructions of the President...", as a matter of fact, differs from the norms of Article 101 of the Constitution, which determine, that "The President shall issue, within the limits of his power, edicts and orders and shall organise and supervise their execution". Unwillingly, one may draw the conclusion, that such wordings are aimed to belittle the status of a constitutional body and to impute to it the fulfilment of functions not provided for by the Constitution.

Vilnius
November 6, 1995

Kestutis Lapinskas