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The Separation of Powers and the Republic of Belarus

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The principle of the separation of power is usually attributed to the ideas of the political philosophers Montesquieu and John Locke. However I believe that it owes its origin to the recognition of a much older phenomenon, put into the famous words of Lord Acton "Power corrupts and absolute power corrupts absolutely".

From this universal truth came the recognition that in an ordered society the three organs of power, the Legislative, the Executive and the Judicial, should have broadly equal status and should exercise their respective powers largely independent of each other, and that if this is not so the concentration of two or three of these powers in the same hands will lead to absolute rule or even tyranny.

The application of the principle in actual practice has not always been easy. This is particularly so in the case of the former socialist countries, for historical reasons. Under the old regime the principle of unity of state power was established in the constitutional framework as interpreted and applied by the one-party system. The task facing the new democracies during the '90s as they set about establishing their new constitutional order was to select a particular system of government - presidential, semi-presidential or parliamentary - and to strike the right balance in the distribution of power between the three organs. The Venice Commission, which played a prominent role in the drawing up of many of the new constitutions, found much enthusiasm for the new order and particularly for the concept of the separation of powers. But not all of the new democracies have found it easy to arrive at, and to maintain, the balance. In some countries the legislature can be too strong, at the expense of the executive, which can be rendered weak and inefficient; in other countries the executive is too strong, which can lead to a weakening of democracy.

For all of these reasons the role of the Judiciary is vital, in adjudicating between the other two organs and restraining excess by either, as well as guarding the interests of the ordinary citizen. Because of the legacy of their history this is obviously the case in the new democracies. But it is also the case in the older, Western democracies where the threat today is not of internal absolutism but of corruption, both real and as perceived and presented by the media, among the rulers which has led to public distrust of political leaders and to a worrying disengagement by the electorate from the democratic process. In all countries, therefore, the judiciary has a vital role in maintaining or, where appropriate, generating, public confidence and respect for itself by its stability and its fearless independence. In the new democracies the particular task of the judiciary is to help, within the constraints of the constitutional framework and their own jurisdiction, to promote the right balance between the executive and the legislative arms of the state.

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Turning now from these general remarks, it is of interest to consider the extent of which they are relevant in the case of the Republic of Belarus. Let us first look at the constitutional framework which is provided by the text adopted at the referendum held on 24 November 1996 and which made important changes to the Constitution which had been adopted at the 13th session of the Supreme Council on 15 March 1994. Because of time constraints I am not going refer to those changes which made improvements on the 1994 text or to the many positive features of the Constitution, such as Article 61 (which, when it becomes effective, will for example enable the ordinary citizen to apply to the European Court of Human Rights at Strasbourg if he believes that his basic human rights and freedoms have not been upheld). Rather, it may be more useful if I offer some thoughts on certain aspects of those parts of the Constitution which are relevant to our discussions today and which I believe are open to criticism.

Article 6 of the Constitution has remained unamended and provides that "the State power in the Republic shall be exercised on the basis of its separation into legislative, executive and judicial power. State bodies, within the limits of their authorities, shall act independently and co-operate with one another, and restrain and counterbalance one another"

This is an admirably clear statement of the classical theory of the separation of powers.

However, an examination of other parts of the Constitution reveals provisions which inhibit, and in some instances prevent, the application of the principle in reality.

For example, in the case of the legislative organ of power, we find that the right to initiate legislative proposals is conferred on the President, the Government, members of Parliament and 50,000 citizens [A99]. However, Article 99 contains the important proviso that draft laws which might reduce state resources or involve or increase expenditure may only be introduced with the consent of the President. This amounts to a virtual power of veto because almost every law involves some public expenditure. This means that the President's power in relation to the initiation of legislation is very much greater than that of the Government or of the members of Parliament.

The limitation of the sessions of the Houses to a total of 170 days beginning and ending on stated dates [A95] deprives the Parliament of the right to organise its activity independently (e.g. to sit in permanent session or to continue debating an important law or public issue). Furthermore, the listing in the 1996 text [A97.2] of the topics which the House of Representatives may legislate upon [cf.A83,1994] can only be a limitation, in the case of Belarus, on the powers which a parliament normally has. By contrast there are no limitations on the subject matter of the decrees and orders which the President may issue [A85] [see also A101] or the acts which the Government may issue and which have binding force in the entire territory of the Republic [A108]. This gives considerable power to the President, who appoints and dismisses the members of the Government [A84.7] and appoints the Prime Minister with the consent of the House of Representatives [A84.6] - which consent, if not granted by the House, will lead to its dissolution and new elections [A106]. Also, the President has an unlimited right to abolish the acts of the Government [A84.25]. While the Government is stated to be the organ exercising executive power [A106], it is accountable to the President and responsible to Parliament [A106]. Although this arrangement is to be found in semi-presidential systems elsewhere, it is accompanied in those countries by rules which maintain a certain balance between president and parliament as well as between president and government. That balance is not evident in the Constitution of the Republic of Belarus where, for example the provision in the 1994 text that Parliament is "the unique legislative body of state authority of the Republic" [A79,1994] has been replaced by the provision that it is "a...legislative body of the Republic" [A90].

Very worringly, the normal immunity which members of parliament in other countries have in expressing their views is withheld in Belarus in the case of what A102 calls "charges of slander and insult". This entirely vague and subjective formula is open to any interpretation and therefore to being abused.

For all of these reasons - and there are other negative aspects of the constitutional framework relating to the President, the Parliament and the Government which time constraints do not

allow us to go into - the separation of powers between these organs cannot be regarded as satisfactory.

As regards the judiciary, the Constitution, as amended in 1996, contains a number of provisions which give rise to concern.

This is especially regrettable because in any country the relationship between the judicial power and the executive and legislative processes is of enormous importance for the well-being of the country. It is of course true that the great majority of citizens will never become personally involved in any conflict between these organs at the highest level. The average citizen, if he is ever involved in court proceedings at all, whether civil or criminal, will be dealt with in the lower courts, and will know nothing of the great issues of constitutional principle which affect the relationships between the three organs of power. He or she is content if the trial judge gives the case a patient hearing, knows the law and applies it in a fair and unbiased manner. These are the qualities which are universally required in a judge, no less in an old democracy than in a new. It is only the accident of European history that has unfortunately - and often unfairly - placed on the judiciary of the new democracies a heavier burden of convincing their peoples that they possess these qualities than that which rests on their counterparts in countries which have a longer and more settled judicial tradition. Luckily this burden is a phenomenon particular to this generation, and we may anticipate that it will disappear with the passing of time. This is important for the ordinary citizen before the courts but also for economic progress, because if a country does not have the reputation of a stable and reliable judicial system, foreign firms will be reluctant to establish industries or commit themselves as investors or trading partners in the country.

In seeking to identify the balance which should exist in a country between the judicial power and the other powers, one looks in particular at the position of the constitutional court or the court of equivalent jurisdiction.

At this point I wish to emphasise that the views which I am expressing relate only to the position of the Constitutional Court of the Republic of Belarus as it is set out in the Constitution. I am not speaking of the manner in which the Court is carrying out its functions, nor am I discussing the jurisprudence of the Court - and, of course it is by its jurisprudence that the activity of a court is to be judged, and not by the constitutional framwork in which it is obliged to operate and for which it is not responsible. Looking at that framework one notices, in the first place, that while in the 1994 text of the Constitution the Constitutional Court was to be found in a separate chapter [6] under the heading "State Control and Supervision", the ordinary courts being dealt with in a different chapter [5] not under that heading, in the 1996 text the heading has disappeared and the Court is now included in the chapter [5] dealing with the ordinary courts. Whatever may have been the intention of this change, a positive result which should be noted is that it has enabled the Constitutional Court to identify a wider jurisdiction than that conferred on it by A116 in decisions made by it in relation to A60 (which provides that "Everyone shall be guaranteed protection of one's rights and liberties by a competent, independent and impartial court of law ...."), and A122 (which enables certain decisions of local councils to be challenged in a court of law), while A40 enables "everyone" to have "the right to address personal or collective appeals to state bodies" - such as the Court itself).

Under the 1994 Constitution the 11 judges of the Court were appointed by the Supreme Council of the Republic, the elected parliament [A126]. By contrast under the1996

amendments the Court of 12 are appointed in a significantly different manner. Six are appointed by the President and six by the Council of the Republic [A116]. The Chairman is appointed by the President with the consent of the Council of the Republic [A116] [A98]. Because of the even number of judges the composition of the Council is obviously important: 1/8 of its members are appointed by the President.

While the appointment of judges by the Executive is the practice in a number of countries, and has been held not to be in breach of the European Convention on Human Rights *(Campbell & Fell - v - UK, 1984),* the essential point is that in these countries an effective system of checks and balances between the organs of power means that the Executive is subject to measures of control by the courts which, once appointed, are protected from arbitrary interference or removal by the Executive or the Legislature.

In the case of Belarus it is to be noted, regretfully, that the usual protections of judicial independence normally found in a constitution - for example, strict limitations on the grounds for removal from office; prohibition on reduction of salary during period of office, etc. - are absent from the Constitution. Instead, it is provided that the grounds for dismissing a judge are to be determined by ordinary law [A111]. The dismissal is done by the President on notification of the Council of the Republic [A84.11]. The unsatisfactory nature of this arrangement is compounded by the distortion of the balance of powers as between the President and the Council of the Republic (as well as the House of Representatives).

It is true that the Constitution declares that “any interference in judges’ activities in the administration of justice shall be impermissible and liable to legal action” [A110]. This formula (which was also in the 1994 text) is rather imprecise, and it would be interesting to know what is meant by ‘legal action’, and also whether the jurisprudence of the Constitutional Court - or other courts - over the years contains any example of the application of A110. Certainly it seems less comprehensive than the special protection which was given to the Constitutional Court by the 1994 Constitution but deleted by the 1996 text: “Direct or indirect pressure on the Constitutional Court or its members in connection with the execution of constitutional supervision shall be inadmissible and shall involve responsibility in law” [A126]. The deletion of that very positive provision can hardly be regarded as an improvement, especially in view of the absence of a number of constitutional protections and the consequent exposure of the judges to decisions of the legislature which could adversely affect their salaries or other conditions of office, either generally or in particular instances. It is to be noted also that the protection from arbitrary arrest or prosecution which was given to the Constitutional Court judges by the 1994 Constitution [A131] - which required the consent of the Supreme Council - has been removed by the 1996 text.

The function which has been given to the Constitutional Court by the 1996 text [A94] of deciding whether either or both Houses of the National Assembly have been engaged in “systematic and gross violation of the Constitution”, the President having the function of bringing it into effect, with the consequential dissolution of the House, is undesirable. This is firstly because it brings the Court directly into the political arena, and secondly because it amounts to a continuing threat to the independence of Parliament. This provision, undesirable in any circumstances, is made even more undesirable by the vagueness of the concept “systematic and gross” violation, and by the fact of the preponderance of Presidential nominees on the Court. This combination of factors must inevitably result in a situation where a decision of the Court declaring such a violation will provoke considerable political

controversy and scepticism among the public and be likely to lessen the respect which they should give to the judgements of the most important court in the country.

This is an example of the Court being given a jurisdiction which it ought not to have. By contrast the 1996 text also deprives the Court of an important jurisdiction which it formerly had. Whereas under the 1994 text [A127] the Court could be invoked by, among others, the Chairman of the Supreme Council, permanent committees of the Supreme Council, 70 deputies or the Procurator General, under the 1996 text [A116] the only opportunity which the Parliament now has of invoking the Court is through a majority of either House, while the Procurator General no longer has the right at all. This is a serious diminution of the democratic process because it prevents a minority of members of Parliament from seeking a ruling from the Court, and as we know, minorities are usually the group in any society who are most in need of the protection of the courts.

Furthermore, the provision in the 1994 text [A127] which gave the Court jurisdiction to examine at its own discretion the constitutionality and legality of the regulatory enactments of a State body has been deleted.

Other changes in the constitutional balance of powers which the 1996 text introduced are that the Prosecutor General is now appointed by the President with the consent of the Council of the Republic, and is to be accountable to him [A125-6], whereas under the 1994 Constitution [A134-5] the Procurator General was appointed by the Supreme Council and was accountable to it. Also the State Supervisory Committee is now formed by the President and its Chairman is appointed by him [A130], whereas formerly the Supervisory Authority was established by the Supreme Council, its Chairman was elected by it and the Authority was accountable to it [A138-9].

This concentration in the hands of the President of power in relation to these two State organs (organs to whom is entrusted important functions which should be carried out by them with total independence) adds to the distortion of the balance of powers in the Republic. It is also to be found in other parts of the amended Constitution, such as the provision [A138] that amendments to the Constitution may only be proposed by the President or by 150,000 voters rather than as formerly, when the right was also available to 40 deputies of the Supreme Council [A147].

The legal position created by some of the changes of 1996 is not entirely clear, at least to someone who is using the English translation. For example, the 1994 text provided in A112 that the courts shall administer justice in conformity with "the Constitution, laws and other ensuing regulatory enactments", and it goes on to say that if during a trial a court comes to the conclusion that a regulatory enactment is in conflict with the Constitution <u>or other law</u> it shall make a ruling in accordance with the Constitution <u>and the law</u>. These provisions recognise, firstly, a distinction between "laws" (which presumably are made by Parliament) and "regulatory enactments" (which presumably are of a lower order than laws and are made by some organ other than Parliament). Secondly, these provisions recognise, in accordance with the principle of *intra vires,* the subordination of a regulatory enactment to a law with which it is in conflict.

However, a 1996 amendment to A112 has deleted the reference to "law" in the case of conflicts. It thus appears that there is a *lacuna* in the case of regulatory enactments which are in conflict with a <u>law</u> (as distinct from being in conflict with the Constitution).

Furthermore, whereas the 1994 text stated [A146] in clear terms that in the case of a conflict between a law and a regulatory enactment the law should have priority, the 1996 text provides [A137] that where there is a discrepancy between a law and a decree or ordinance, the law shall prevail only when the power to issue the decree or ordinance was given by the law. Thus, a decree or ordinance which has been issued otherwise than under the law shall prevail over the law. I find this situation puzzling - if I have understood it correctly - and I would welcome a clarification at some stage of our discussions. Obviously it would be undesirable if citizens were to be bound by a regulatory enactment or decree which was in conflict with the law and which the courts would not be able to declare to be *ultra vires* and invalid.

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