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From Vague Ideas to Unclear
Reality: the Evolution of
Constitutional Control in Belarus
in the Context of Its Influence on
the Human Rights Situation

Master thesis
30 credits (30 ECTS)

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Master's Programme in International Human Rights Law

Spring semester 2011

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Summary

The paper aims at discussing the potential of the Belarus' national mechanism of constitutional control to maintain the adherence of this post-soviet State to national and international human rights standards.

At the outset, the paper provides an overview of the theoretical understanding of constitutional control as an appropriate mechanism of protecting and promoting human rights in the context of post-communist societies transiting to the rule of law and outlines the expectations that the respective institutions need to meet in order to be effective to this end.

Further, and specifically to the example of Belarus, the paper embraces the process of creation of the national Constitutional Court and follows the evolution of its competence. On the parallel basis, account is made of the development of the human rights related activity of the institution in question at different stages of its existence. As a result of the analysis of these two processes – the evolution of the Court's status and the institution's changing commitment to and effectiveness in maintaining the rule of law and the due respect for human rights and freedoms – certain correlations are established between the Court's competence and its human rights role in the society.

Subsequently, the paper provides an overview of the situation of human rights in Belarus, as seen by a number of international human rights mechanisms. This enables us to discuss whether the Belarusian Constitutional Court has succeeded in carrying out its mandate in the field of human rights and whether it moves in the right direction to this end.

Ultimately, the paper highlights the principle shortcomings of the Belarusian institution of constitutional control and opens the way for a discussion on how to address these imperfections.

Abbreviations

UN	United Nations
BSSR	Byelorussian Soviet Socialist Republic
CSCE	Conference on Security and Co-operation in Europe
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention for Human Rights
ECtHR	European Court for Human Rights
HRC	UN Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
NGO	Non-governmental organisation
UDHR	Universal Declaration of Human Rights

1 Introduction

Human rights standards and the need of broader adherence thereto have been enjoying growing attention during the last several decades. A number of human rights instruments have been adopted, some of them almost reaching the global level of ratification. States and international organisations keep extending the international catalogue of human rights standards and deepening their content. Meanwhile, the process of construction of the international legal framework in the sphere of human rights is accompanied with and encouraged by the similar developments at the national level. Nowadays, the vast majority of national constitutions contain their own sets of human rights provisions (national “bills of rights”).

Traditionally, the process of creation of human rights law, be it at the national or international level, is followed by hot debates on how to formulate a certain rule. At the same time, the issue of practical fulfilment of these standards and the actual efficiency of numerous protection mechanisms undeservingly remain in the shadow. Undeservingly, because it does not really matter how extensive and progressive the list of human rights and freedoms is and to what extent it corresponds to the globally set expectations - what in fact matters is whether these provisions actually work or just remain a “dead letter” of law.

In reality, both international and national bills of rights often suffer from their declarative nature, especially if they appear to transmit new values. In young democracies, it may take considerable time and tenacious efforts to help such values strike roots and start being actually beneficial to human beings. Therefore, it is important for any society in transition to establish a system of bodies to take the leadership in bringing the legal content of international and national human rights provisions into practical existence at the national level. S. Sabikenov is of the opinion that “[s]trengthening of statehood should begin with the improvement of the existing and creation of the new procedures, institutions and mechanisms called upon to maintain the actuality of the declared ... human rights”.¹

In young democracies, it will be argued, specialised² constitutional control is among the most suitable mechanisms to promote the due respect for human rights and freedoms. Being designed to ensure the actual effect of national constitutions, including their human rights provisions, constitutional courts can play a leading role in providing an authoritative

¹ S. Sabikenov, *The Activity of the Constitutional Council on Maintenance of the Rights of Human Beings and Citizens* [С. Н. Сабикенов. Деятельность Конституционного Совета по обеспечению прав человека и гражданина], <www.concourt.am/hr/ccl/vestnik/t8.html>, visited on 20 March 2009.

² It is important to underline that, basically, each and every state body and official is tasked to maintain the direct applicability of the constitution and its bill of rights, so the concept “constitutional control” in its broad sense is embracing quite a diversity of organs. The present research is focused on the contribution of specialised institutions of constitutional control – in most cases constitutional courts. Due to the judicial nature of these organs, it is also correct to use the term “constitutional justice” with respect to specialised constitutional control.

interpretation of the national human rights norms and setting valuable precedents of their actual applicability. In doing so, these institutions should be taking into account the latest international developments in the field of human rights, so that they correctly understand the wording and the spirit of human rights provisions and effectively transmit these standards to the national level.

As will be shown in this paper, the construction of an effective model of constitutional control may represent a huge challenge for a society in transition to democracy. Different States employ different models of how specialised constitutional control should be organised. A correlation should exist between the attributes of institution of constitutional control (the range of powers, the requirements for the position of constitutional judges and guarantees of their independence, the institution's accessibility to the authorities and the population at large, etc.) and their potential and ability to influence favourably the human rights situation in the respective country. The present research attempts to look at the case of Belarus, a European post-communist country, and evaluate the role of its Constitutional Court (hereinafter, the Court) in maintaining the rule of law and cultivating the due respect for human rights and freedoms.

The Belarusian Constitutional Court has a primary responsibility for ensuring the due level of the State's compliance with its own Constitution, which means the observance of and the respect for the broad range of human rights standards provided or referred to therein. Based on this presumption, the present research aims at discussing the important question of whether the Court has had enough ability and willingness to fulfil its human rights mandate.

In the starting chapter, we will briefly elaborate on the significance of constitutional control as an important mechanism to secure the realisation of human rights standards. We will also display the specific conditions in young post-soviet countries and outline the expectations that can be set with regard to the role of constitutional courts in transitioning these societies from totalitarianism to democracy, from arbitrariness to the rule of law, from mistreatment of the powerless to sincere belief in human dignity.

In the following chapter, we will examine the long and difficult process of creation of the Constitutional Court of Belarus. Different ideas of how to organise it had been under consideration prior to the Court's creation in 1994, and the process of shaping the competence of this institution has continued ever since. The further chapters will provide an overview of the development of the capacity of the Constitutional Court at different stages of its existence, in order to verify whether this institution has been evolving in the right direction. To this end, we will provide on a parallel basis an overview of the human rights jurisprudence of the Court, in order to assess its engagement in promoting and maintaining human rights standards and protecting citizens from arbitrary and unfair treatment. It will be valuable to establish correlations (if they exist) between the capacity of the Constitutional Court at different stages of its existence and the level of its activeness in the sphere of human rights. Meanwhile, we will pay certain attention to the Court's role in transmitting the internationally recognised understanding of human rights into Belarusian reality.

In order to assess the efficiency of the Belarusian Constitutional Court as a guardian of human rights, we will generally review the level of the State's adherence to universally and nationally recognised human rights standards. In order to be objective, the analysis of the situation of human rights in Belarus will be based only on findings by various international human rights mechanisms, such as treaty bodies and special procedures of the Commission on Human Rights and the Human Rights Council. This analysis will be limited to indications of problematic zones of the Belarusian legislation: it will embrace specific legal provisions (rather than practices) that appear to be conflicting with nationally and internationally recognised human rights provisions. Finally, correlations will be sought between the problems, flagged by international mechanisms, and the issues, considered by the Constitutional Court. The lack of such correlations could indicate the potential failure of the institution in question to play its role of an effective promoter and protector of human rights and freedoms.

Therefore, the purpose of the present research is to outline the expectations concerning the human rights activity of the Constitutional Court on improving the human rights situation in Belarus and to assess the capability of this organ to meet such expectations. 16 years of activity is enough time to come to some conclusions as to the main challenges faced by the Court.

Bearing in mind the time and space constraints the scope of the present research is limited to examination of only those features of specialised constitutional control that are most relevant to its human rights mandate. In the course of the analysis of the Court's human rights jurisprudence, not all cases will find their reflection in the present research, but only those that contain clear human rights issues. The ability of cases to demonstrate the tendencies within the Court's jurisprudence and/or their containing references to sources of international human rights law will be additional selection criteria.

In the process of this research, the earliest developments of the Constitutional Court's capacity (in theory and in practice) and its early jurisprudence will be examined on par with the latest changes, as it is the historical comparison that will allow us to see some trends in the Court's evolution, whether progressive or not. At the same time, it seems to be unfeasible, although rather tempting, to compare the Belarusian institution of specialised constitutional control with analogous organs acting in other countries, because the political, legal and economic conditions are too different.

Unfortunately, the topic of the present research has not attracted much attention of the global scientific community. In the circumstances of the lack of objective literature on the Belarusian mechanism of constitutional control and its human rights activities, the self-conducted analysis of the evolution of the legislation on constitutional control and the Court's jurisprudence, rather than doctrinal sources, will serve as the basis of the present research. The present research dwells on sources available per 1 April 2011. Because the majority of these sources exist in the Russian language without a proper translation into English provided, the reader will have to rely on the author's translation skills.

2 Constitutional Control as a Mechanism of Promotion of Human Rights Standards in the Context of Young Democracies

2.1 The Essence of Constitutional Control and Its Human Rights Mission

Around ninety years have passed since the first institution of specialised constitutional control in Europe - the Constitutional Court of Austria - was established. This institution was created in 1920 under the doctrine by Hans Kelsen, the inventor of the so-called “European model” of constitutional control. Professor G. Vasilevich considers this model as “more pragmatic, because it entails the creation of separate specialised institutions - constitutional courts”.³ Nowadays such courts, or analogous institutions under different names, are active in the majority of States throughout the continent, and they have for sure become important actors in some European democracies. For example, in Germany “[t]he [Federal] Constitutional Court is often called the third chamber of the legislature” and is perceived in some people's eyes as “Germany's most powerful institution”.⁴

It has become more and more difficult to imagine a democratic State without a mechanism to safeguard the order set in the respective constitution. G. Harutyunyan believes that “it is impossible to guarantee constitutional democracy and stability of the social system without introducing an effective mechanism of constitutional justice”.⁵

Specialised constitutional control represents an important tool of the system of checks and balances as it prevents political actors from abusing power by gaining a more privileged position than constitutionally provided. According to V. Zorkin, “[w]ith the help of constitutional control the possibility to misuse institutions of democracy, when arbitrariness may take

³ G. Vasilevich, *Constitutional Justice in the Republic of Belarus* [Василевич Г. Конституционное правосудие в Республике Беларусь], para.2 of chapter 1, <www.concourt.am/armenian/con_right/VasilevichG/g11p2.htm>, visited on 20 March 2009.

⁴Anonymous, ‘Europe: Judgment Days; Germany's Constitutional Court’, *The Economist*. London: (28 March – 3 April 2009, vol. 390, iss. 8624), p. 33.

⁵ G. Harutyunyan, *Efficiency of Constitutional Justice as a Factor of the Constitution's Stability* [Арутюнян Г. Дееспособность конституционного правосудия как фактор стабильности Конституции], <www.concourt.am/armenian/con_right/2.24-2004/harutyunyan.htm>, visited on 20 March 2009.

form of a law, is legitimately averted”.⁶ In concurrence with this opinion, G. Harutyunyan defines the constitutional court as “the main state body ensuring ... that the government restricts itself for the benefit of the principles of law”.⁷ Thus, institutions of constitutional control maintain the rule of law and ensure the strict subordination of everyone, including the authorities, to the legal rules accepted in the society.

Another important task attributed to institutions of specialised constitutional control is, according to G. Harutyunyan, “to conduct constant, continuous and system reveal, evaluation and restoration of the disturbed constitutional balance”.⁸ This scholar believes constitutional control to be “one of core elements of the immune system of the civil society and the law-governed state”, as it is “intended to guarantee the constitutional stability and exclude social cataclysms – by resting upon the fundamental constitutional principles in the first place...”.⁹ In concurrence with the latter opinion, N. Vitrouk explicitly flags the “peacekeeping ... function of constitutional courts, their ability to resolve political conflicts by constitutional means”, which enables “constitutional courts to act as guarantors of political peace, stability and social integration”.¹⁰

Nevertheless, the primary responsibility of institutions of specialised constitutional control is to guarantee the purity of the national legal systems, as they ensure that there are no normative acts in force contradicting the basic principles of the respective legal system. Having found a normative act to be in conflict with constitutional norms or other provisions in a privileged status, constitutional courts, as a rule, declare them unconstitutional and subsequently invalid. G. Vasilevich, as well as many other scholars, is convinced that in such situations “constitutional courts act as ‘negative’ legislators inasmuch as they remove unconstitutional normative acts (or separate provisions thereof) from the legal system”.¹¹

Alongside with, or by means of, elimination of legislative deficiencies and preserving the social stability, institutions of specialised constitutional control can act as key actors in the field of promotion and protection of human rights and freedoms. Almost any national constitution contains a bill

⁶ V. Zorkin, *Constitutional Justice of the New Democracies in the Conditions of Modern Challenges and Threats (Materials for a Speech)*, section 1, <www.mkab.hu/index.php?id=valery_zorkin_president_of_the_constitutional_court_of_russia>, visited on 20 April 2010.

⁷ G. Harutyunyan, *Actual Problems of Improving the System of Constitutional Justice in a Society in Transition: the Example of Armenia* [Арутюнян Г., Актуальные проблемы совершенствования системы конституционного правосудия в переходном обществе: пример Армении], <www.concourt.am/armenian/con_right/4-10-2000/G-Harutunian-aktual.htm>, visited on 20 April 2010.

⁸ *Ibid.*

⁹ G. Harutyunyan, *supra* note 5.

¹⁰ N. Vitrouk, *The Purpose, Tasks and Functions of Constitutional Justice in States of New Democracy* [Витрук Н. Цель, задачи и функции конституционного правосудия в государствах новой демократии], <www.concourt.am/armenian/con_right/2.16-2002/vitruk.htm>, visited on 20 March 2009.

¹¹ G. Vasilevich, *The Constitutional Court of the Republic of Belarus and Its Role in the Formation of a Democratic Social State Governed by the Rule of Law* [Василевич Г. Конституционный Суд Республики Беларусь и его роль в становлении демократического, социального, правового государства], <www.concourt.am/armenian/con_right/4.14-1.15/belarus.htm>, visited on 20 April 2010.

of rights - certain sections or chapters listing the rights and freedoms that persons are entitled to on the territory of this or that State. Such human rights provisions of national constitutions, being inalienable parts of basic laws, should enjoy the same, or even higher, level of applicability comparing to other constitutional provisions. As A. Kochanskaya correctly notes, “[p]rovisions on the fundamentals of constitutional order, on human rights, freedoms and obligations of citizens ... should enjoy the prioritised protection by the constitutional court and, accordingly, should serve as the criterion for deciding on constitutionality of the State’s normative acts”.¹² Therefore, one of the primary tasks of institutions of constitutional control is to withdraw normative acts conflicting with human rights provisions of the respective constitution or going beyond the restrictions legitimately set therein.

Unfortunately, there is no State where the legislation would be fully compliant (both in wording and in practice of implementation) with the respective constitutional bill of rights. Every State knows instances of normative acts containing some additional conditions for the use of certain constitutional rights and freedoms or imposing disproportionately excessive restrictions thereto. Such inconsistency happens worldwide, and even States with strong human rights commitments make no exception. That is why it is so important that there are mechanisms in place, such as institutions of constitutional control, to come into play and eliminate the legal discrepancies.

Of course, the role of constitutional courts should not be limited to mechanical withdrawal of acts and norms lacking correspondence with constitutional human rights provisions (although it is already a difficult task, since the conflict of norms is often of disguised nature). More importantly, institutions of constitutional control play a sophisticated role of “the repository of the living Constitution”.¹³ I. Vida, a Romanian constitutionalist, draws our attention to the fact that “[m]ainly because of its rigid character, the Constitution is a framework of stability but its interpretation will take, nonetheless, equal flexibility in order to adjust constitutional norms to the circumstances...”.¹⁴ In this sense, it would not be exaggeration to say that institutions of specialised constitutional control can act also as “positive” legislators.

According to V. Zorkin, the adaptation of constitutions to the ever-changing reality can only be possible through “interpretation of constitutional provisions, and in the first place - of the fundamental constitutional principles and values, especially in the sphere of fundamental rights”.¹⁵ In the process of revealing the sense and the spirit of these

¹² A. Kochanskaya, *Protection of Human Rights through Constitutional Justice in the Republic of Belarus* [Коханская А. Защита прав человека посредством конституционного правосудия в Республике Беларусь], <www.rpi.msal.ru/prints/200503forlaw1.html>, visited on 20 March 2009.

¹³ V. Zorkin, *supra* note 6, section 2.

¹⁴ I. Vida, *The Obligatory Force of Decisions of the Constitutional Court for Other Courts as a Stabilising Factor*, <www.concourt.am/armenian/con_right/2.24-2004/vida.htm>, visited on 20 April 2010.

¹⁵ V. Zorkin, *The Role of the Constitutional Court in the Maintenance of Stability and the Constitution’s Development* [Зорькин В. Роль конституционного суда в обеспечении

constitutional principles and values, the institution of constitutional control “bears in mind the concrete historic situation and the needs of the society”, “weighs constitutionally-protected values and finally finds their balance”, which then becomes the basis for “the development of legal positions and the Court’s doctrine”.¹⁶ Subsequently, these “legal positions formulated in acts of constitutional jurisdiction determine the direction of the further development of the whole legal system of the State”.¹⁷

Indeed, acts of constitutional courts are often perceived as a significant and authoritative doctrinal source of law, and not in the last turn – of human rights law. E. Kuris, the former President of the Constitutional Court of Lithuania, is convinced that “constitutional law … in a separate country amounts to the quantity of constitutional provisions that have been interpreted by a respective constitutional court”.¹⁸ Hence, constitutions, as well as human rights standards proclaimed therein, turn into being only through the prism of jurisprudence, formed by respective institutions of constitutional control.

It is difficult to know for sure whether the later assertion is equally applicable to any legal system. Nevertheless, it is obvious that the role of constitutional control in the sphere of implementation of human rights standards is difficult to overestimate. Constitutional courts not only spare the legislation from unconstitutional norms impeding the realisation of national and international human rights standards, but also fill these standards with deeper legal content in the process of formulating legal positions. Institutions of constitutional control adapt the basic laws’ bills of rights to specific historical, economic and political conditions. As a result, the “working life” of the constitution is extended, while, at the same time, the better respect for the basic law and its catalogue of rights and freedoms is maintained.

The role of constitutional control in young democracies is even higher, as it becomes one of the driving engines for considerable social transformations, including the dramatic change in relations between the individual and the State. However, the specific conditions that exist in post-communist States transiting to democracy and the rule of law have an influence on the organisational and operational abilities of constitutional control in these countries. Below follows a description of the main peculiarities attributable to the functioning of specialised constitutional control in newly independent post-communist States.

стабильности и развития Конституции], <www.concourt.am/armenian/con_right/2.24-2004/zorkin.htm>, visited on 20 April 2010.

¹⁶ V. Zorkin, *supra* note 6.

¹⁷ A. Kochanskaya, *supra* note 12.

¹⁸ E. Kūris, *On Stability of the Constitution, Sources of Constitutional Law, and the Seeming Omnipotence of Constitutional Courts* [Курис Э. О стабильности Конституции, источниках конституционного права и мнимом всемогуществе конституционных судов], section 1, <www.concourt.am/armenian/con_right/kuris-egidius/contents.htm>, visited on 10 March 2009.

2.2 Human Rights Oriented Constitutional Control in Young Post-communist States and Its Enlightening Role

Yet, human rights have not become a universally recognised value. Now and then, we can hear comments against the applicability of existing human rights standards for their being designed exclusively by the western civilization and imposed globally without any consideration of local specifics. With regard to the international bill of rights, “[v]arious opponents have rejected comprehensive and core versions of universalism, basing their arguments on the legitimacy of moral or cultural pluralism as well as on the need to adjust human rights standards to various stages of economic and political development”.¹⁹

Even in Western countries, where the democratic traditions and human rights commitments are older and stronger comparing to the rest of the world, the actual applicability of human rights standards may raise questions and cause lively public debates. If we look at Eastern European post-communist States that have recently achieved independence and are still passing the period of dramatic economic and political changes - the so-called period of transition to democracy – the picture is even more complicated.

David M. Beatty notes with appreciation the fact that “after the emancipation of Eastern Europe from the tyranny of communist cliques, country after country has embraced the idea of protecting what it regards as its most cherished human rights and freedoms by incorporating a written bill of rights in its constitution”.²⁰ Within a relatively short period, post-soviet States managed to adopt their new constitutions that reflected the undergoing political and socio-economic changes and proclaimed guarantees for human rights and freedoms.

Nevertheless, despite the idea to adhere to human rights standards was accepted relatively quickly and quite broadly, the question of the proper realisation of this commitment remained open: the mere fact that a national constitution contains a bill of rights in full compliance with the one recognised internationally does not automatically mean that these constitutional rights and freedoms get immediate effect. According to S. Sabikenov, “[t]he solution of the problem of human rights does not come

¹⁹ R. L. Siegel, ‘Universalism and Cultural Relativism: Lessons for Transitional States’, in S. Horowitz and A. Schnabel (eds.), *Human Rights and Societies in Transition: Causes, Consequences, Responses* (United Nations University Press), p. 63, <www.books.google.com/books?id=jpKSesbodMC&printsec=frontcover&dq=Human+rights+and+societies+in+transition:+Causes,+consequences&client=opera>, visited on 13 April 2009.

²⁰ D. M. Beatty, *Human Rights and Judicial Review* (Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1994), p.1, <www.books.google.com/books?id=N_UjZarvAwYC&printsec=frontcover&dq=Constitutional+Review+and+human+rights&source=bl&ots=_66Xj6oi4l&sig=2pIIQf6fDxW1QyesdjJcW0HGzwmw&hl=be&ei=X0fcS9exMaGfOOKhgaQH&sa=X&oi=book_result&ct=result&resnum=8&ved=0CD0Q6AEwBw#v=onepage&q=Constitutional%20Review%20and%20human%20rights&f=false>, visited on 13 April 2009.

down to the extension of the catalogue of rights and freedoms of individuals and citizens, contained in the constitution... In fact, it is a question of the qualitative renovation of the whole concept of rights and obligations of individuals and citizens, as well as of the practice of their constitutional maintenance".²¹

However, in post-soviet States a number of considerable challenges precluded such "qualitative renovation". One problem was the lack of direct applicability of constitutional human rights provisions. Actually, the catalogues of rights and freedoms, contained in the newly adopted constitutions, were not much broader than the ones that had earlier been declared in the older communist constitutions. These old sets of rights had been useless: as G. Vasilevich recalls, "the [soviet] Constitution had been considered as an empty declaration and law enforcement agents, including courts, had not even attempted to refer to the norms of the Constitution when making a decision".²² Therefore, constitutional human rights provisions had had as little effect as analogous standards contained in international human rights instruments that communist States had also been parties to.

G. Vasilevich blames the "archaic approach" whereby "only then will constitutional norms be applicable when they are duplicated in a law or other [subordinated] normative act".²³ Nevertheless, despite reasonable objections pointing to the fact that the basic law is "the core of the legal system" with "supremacy and direct applicability as its most important legal feature"²⁴, the widespread attitude to the basic law as something secondary has obviously survived. As a result, a practical question remains: why would law enforcement agents perceive the newly adopted constitutions with their updated bills of rights as a better authority? With all other conditions remaining unchanged, the mere adoption of a new constitution, however advanced and human rights oriented it was, would mean only the creation of a new source of empty declarations with little practical effect.

The new post-soviet constitutions remained undervalued and perceived as declarative documents also in the light of the fact that the old legislation, although outdated and disproportionately unfavourable towards citizens, would usually remain in force for many years until replaced by something more suitable to the new conditions of freedom and democracy. Such prolongation of the actuality of the outdated legislation put state organs and officials before a difficult dilemma: to apply the old but so familiar and specific legislation or to dare to be guided by the new constitutional rules - maybe a "fashionable" regulator, but still rather abstract and unclear. Unfortunately, the former option often was a more comfortable one: the authorities tended to stick to the older regulations

²¹ S. Sabikenov, *supra* note 1.

²² G. Vasilevich, *Constitution as the Principle Guiding Document for Law Creation and Law Enforcement Activity* [Василевич Г. Конституция — главный документ для законотворческой и правоприменительной деятельности], <www.concourt.am/hr/ccl/vestnik/1.11-2001/Vasilevich.htm>, visited on 23 April 2010.

²³ *Ibid.*

²⁴ *Ibid.*

notwithstanding the old legislation's contradiction (often more than obvious) to the letter and the spirit of the new constitutions.

Therefore, in young democracies, it was not sufficient just to introduce human rights law - it was crucial to maintain the *rule* of such law. No wonder that G. Vasilevich finds it important that the adoption of the new constitution is followed by "the creation of constitutional practice that corresponds to the letter and the spirit of the basic law", thus "facilitating the direct and uniform application of the constitution".²⁵

In this sense, even higher is the significance of constitutional control as a mechanism to "maintain the concurrence of the juridical constitution with the factual one".²⁶ This can be achieved by using the significant enlightening potential that institutions of constitutional control have. E. Kuris correctly highlights a very important detail: while "the operative part of the constitutional court's decision addresses the past ... the reasoning part addresses the future and carries out not only the function of substantiating the decision, but also the preventive function, the function of directing, orienting the legislator to certain constitutional standards, the deviation from which ... is disallowed".²⁷ Indeed, by cultivating the attitude of state bodies and officials towards the respective constitution as a primary guiding source, by stimulating the broadest possible use of human rights standards during the process of law creation, constitutional courts are able to prevent many human rights violations. It can only be added that the jurisprudence, as well as any other activity of institutions of constitutional control, should be targeting not only subjects in the sphere of law creation, but also judges and other law enforcement officials, who need to get a habit and courage to directly apply, and to abide by, human rights provisions of the respective constitution.

The second problem, related to and interconnected with the first one, is the general prevalence of mistrust on the part of the civil society towards the new basic laws and their bills of rights. The memory of the communist era, where the violation of constitutional human rights provisions was as widespread as unpunished, remained firmly stuck in people's mind. Neither had they any habit to use their rights and freedoms, nor had they believed in the possibility to do so. V. Zorkin is convinced that "the respect of fundamental rights and freedoms depends much more on the level of public legal conscience, on well-established traditions and education than on the existence of a written constitution and international declarations".²⁸ This opinion is shared by another Russian constitutionalist, B. Strashun, who believes that "the main reason of fabulousness of a number of constitutional provisions lies in the socio-psychological dimension".²⁹

²⁵ G. Vasilevich, *Constitutional Principles of the Democratic Development of the Republic of Belarus* [Василевич Г. Конституционные принципы демократического развития белорусского государства], <www.concourt.am/armenian/con_right/2.24-2004/vasilevich.htm>, visited on 23 April 2010.

²⁶ *Ibid.*

²⁷ E. Kuris, *supra* note 18, section 9.

²⁸ V. Zorkin, *supra* note 6, section 6.

²⁹ B. Strashun, *The Perspectives of Democracy and Constitutional Justice* [Б. Страшун. Перспективы демократии и конституционное правосудие],

It is obvious that concurrently with the constitutional reform, involving the sensitisation of state officials, it is equally important to change the ordinary people's minds and to overcome the persistent social inertness. In young post-communist States, as well as in other countries in transition, a clear need exists to up-bring the new generations of right-holders, who would have an instilled taste of freedom and a strong standing for pluralism and democracy, as well as zero-tolerance to human rights violations. In V. Zorkin's opinion, such transformation cannot be running fast: "[i]n these conditions the process of real adherence to the rule-of-law principle is long and painful, as human rights culture as an element of social environment requires long time to develop and mature".³⁰ According to B. Strashun's estimations, "it will probably take the duration of life of at least two generations".³¹

However, the real solution of the problem is not only the matter of time, but also the matter of efforts: the value of human rights in a given post-communist society would not be realised automatically by itself – such transformations need a strong impulse and constant maintenance, at least to the point where no reverse is possible. In young democracies, it is institutions of constitutional control that should take the leadership in "infecting" ordinary individuals with the idea that they are worth enjoying the rights and freedoms provided for them in the basic law and the relevant international treaties. In this sense, young democracies' institutions of constitutional control are assigned to be driving the evolution of the psychology of the society in the direction of absorbing the universally recognised values, primarily the adherence to human rights and freedoms.

Therefore, respective institutions of constitutional control should be actively engaged in two important transformations, specific for young post-soviet democracies: the promotion of direct applicability of constitutional human rights standards and the formation in the society of the legal conscience and culture of the level, sufficient for making human rights norms usable. In this sense, constitutional courts are working on "the problem of 'constitutionalisation' of conscience – not only of ordinary citizens but also lawyers, state officials and even judges of other courts".³² It is clear that without this work effectively done any constitutional bill of rights will remain a dead letter, a mere declaration of no practical value.

Hence, the role of constitutional control in young democracies cannot be overestimated, as constitutional courts should play the pioneering role in promoting the progressive changes. At least until the day, when the political and social stability replace the stormy period of transition, when the reliable system of checks and balances is constructed and works properly, when the level of legal culture of individuals is high enough and the civil society is sufficiently developed to be able to respond to human rights violations.

However, constitutional control has to meet a number of special conditions in order to become an effective mechanism of protecting human

<www.concourt.am/armenian/con_right/3.17-2002/strashun.htm>, visited on 23 April 2010.

³⁰ V. Zorkin, *supra* note 6, section 6.

³¹ B. Strashun, *supra* note 29.

³² V. Zorkin, *supra* note 6, section 6.

rights and freedoms. Below follows an outline of prerequisites for purposeful and effective engagement of constitutional courts in improving the human rights situation in young post-communist democracies.

2.3 Core Prerequisites for an Effective Constitutional Control in Young Post-Communist States

The previous sections have shown the burden of responsibility to be born by institutions of constitutional control in young post-communist States and a number of challenges impeding the victorious flourishing of democratic achievements and their human rights implications.

At the same time, as E. Kuris correctly notes, “[t]he creation of a constitutional court, even though it may have a high status in the system of state organs and enjoy high authority in the society, does not as such mean the efficiency of constitutional justice in a given country”³³. A certain favourable framework needs to be constructed in order to enable institutions of specialised constitutional control to carry out their human rights activity effectively and successfully. However, there are no uniform views as to the necessary components of such framework. G. Harutyunyan, for instance, believes that the effectiveness of constitutional control rests upon such factors as “the depth and consistency of constitutional ordering of social relations; the adherence to democratic principles of social development; availability of a certain environment of constitutional democracy; the independence of constitutional control, its all-embracing character, its accessibility to members of society, etc.”³⁴.

V. Pushkash defines the following “optimal” and “interrelated” conditions for effectuation of constitutional justice: “establishment of a mechanism maintaining strict observance of the constitutional court’s decisions; ... the maintenance of clear legal regulation of the organisation and activity of the constitutional court; the high level of professional training for the constitutional court’s judges and other staff; the creation of a scientific, material and technical basis for the constitutional court’s activity”.³⁵

In L. Lazarev’s opinion, “the efficiency of constitutional control, its actual influence ... much depend on constitutional judges themselves, their professionalism and uncompromising legal standing, on legal reasonableness of delivered decisions”. However, this scholar also links the efficiency of constitutional justice with “the level of democratism of the governing political regime and of the constitution” and “the legal and

³³ E. Kuris, *supra* note 18, section 1.

³⁴ G. Harutyunyan, *supra* note 5.

³⁵ V. Pushkash. *The Role of Constitutional Justice in Building a Law-Governed State (the Experience of the Constitutional Court of the Republic of Moldova)* [В. Пушкаш. Роль конституционного правосудия в становлении правового государства (опыт Конституционного Суда Республики Молдова)], <www.concourt.am/armenian/con_right/4.14-1.15/moldova.htm>, visited on 23 April 2010

political culture of the ruling elite and the society” – factors that shape “the [public] attitude towards constitutional justice and [influence] the execution of the constitutional courts’ decisions”.³⁶

None of the above-cited opinions is wrong. However, being unable to formulate a universal recipe, it is worth outlining just the basic prerequisites for establishing an institution of constitutional control that would not only show deep understanding of the value of human rights and human dignity and demonstrate sincere commitments to their promotion and protection, but would be able to actually succeed in this field.

Firstly, institutions of constitutional control have to be granted a balanced set of powers that would create room for “healthy” activism. Secondly, they have to be totally independent and neutral, to be free from any external pressure. Thirdly, institutions of constitutional control should afford tight and fruitful cooperation with and be accessible to both the state machinery and ordinary people. And last but not least, constitutional courts should have strong cooperation with the relevant foreign and international structures, should be aware of and open to best practices and international developments in the sphere of implementation of human rights standards. A more detailed overview of the named prerequisites follows below.

2.3.1 Balanced Set of Powers

It goes without saying that among the primary factors determining successful work of a constitutional court (as well as any organ) is the set of powers it has at its disposal. This set of powers needs to be balanced, which means, on the one hand, that the mandate of the respective institution of constitutional control should be broad enough to enable a positive impact on the human rights situation. On the other hand, the mandate should not be overbroad, otherwise the abundance of unnecessary functions may draw the court away from its essential responsibility – protection and promotion of national and international human rights standards. Besides, an over-powerful institution of constitutional control is less likely to enjoy the adequate level of trust on the part of both the authorities and the population, which will in turn undermine their readiness to cooperate and get enlightened.

Talking about the balanced set of powers, we mean in the first place the optimal range of objects of constitutional control. Some constitutional courts are endowed with the function of deciding on disputes between the federal State and its constituent units, to adjudicate on state organs’ competences or act as tribunals on electoral complaints. However, the primary responsibility of any specialised institution of constitutional control is the maintenance of constitutionality of the national legislation, which includes control over the conformity of national normative acts with the constitution, its bill of rights and, where appropriate, also with internationally recognised standards in the field of human rights and

³⁶ L. Lazarev, ‘The Role of the Constitutional Court in the Maintenance of Stability and the Development of the Legal Order’ [Лазарев Л. Роль Конституционного Суда в обеспечении стабильности и развития правопорядка], 3 (48) *Comparative Constitutional Review* (2004), p. 77.

freedoms. Constitutional control over the legislation is the most traditional among constitutional courts' functions - and it also seems to be the most relevant one for these institutions' mission in the sphere of human rights.

Depending on whether the piece of legislation came into force before it becomes subject of control by a constitutional court, such control can be either preliminary (*a priori*) or subsequent (*a posteriori*). On the one hand, the use of the former tool is very promising, as it allows withdrawing unconstitutional normative acts before they come into force, and therefore, before their application results in a violation of someone's human rights and freedoms. On the other hand, it is only in the course of *a posteriori* control that the respective institution of constitutional control has a fundament to substantiate its decision on, as it can look at and rely on the practice of application of the act, constitutionality of which is questioned. In this regard, E. Kuris is of an opinion that "effective ... constitutional control is possible only after the real consequences of application of the [potentially unconstitutional] normative act ... are revealed [which] happens in the process of application of the normative act in question, but not before it takes legal effect".³⁷ Obviously, both forms of constitutional control can be very useful for the sake of protection and promotion of human rights - therefore, they should not exclude, but complement each other.

In any event, it is crucial that institutions of constitutional control have a possibility to try cases before them objectively and professionally, basing their decisions exclusively on the relevant legal findings and never on any other considerations, be they of political, economic or any other nature. The establishment of any inconsistency of legal acts with recognised human rights standards should be adequately reflected in the decision and further eliminated in practice. It goes without saying that constitutional control should result in the delivery of legally binding decisions in the sphere of human rights.

It is equally important that institutions of constitutional control have instruments to enforce their decisions, if they are ignored by the authorities in charge. V. Zorkin drives attention to the fact that "[t]he overcoming of unconstitutional law, i.e. act of representative democracy, by constitutional justice, not always finds understanding, especially when both the law and the Court's decision affect most critical problems of society, on which there is no consolidated citizens' position".³⁸ In this regard, institutions of constitutional control should support their decisions with convincing argumentation, but should also be able to back their decisions before the authorities.

Of course, sometimes it is realistically impossible to immediately withdraw the legislation that has been found unconstitutional, and this problem can be particularly relevant to societies in transition, where any transformation demands considerable economic resources or political efforts. In these situations, it can be acceptable that institutions of constitutional control allow themselves some flexibility and set the time framework for implementation of their decisions. However, such practices have to be resorted to as an exception rather than a rule: everything possible

³⁷ E. Kuris, *supra* note 18, section 1.

³⁸ V. Zorkin, *supra* note 6.

has to be done to exclude any manipulations leading to abuse of such indulgence. Moreover, it is crucial to minimise all negative consequences of the fact that the unconstitutional legislation violating human rights temporarily remains in force.

2.3.2 Independence and Impartiality

It is axiomatic that constitutional justice must be independent if it has pretensions of being useful and effective. M. Baglaj considers independence as “[t]he cornerstone of the Constitutional Court’s functioning”. The scholar further continues: “[o]nly then the State and the People need the Constitutional Court – this fragile child of freedom – when it acts independently and serves to the Constitution only”.³⁹ The same can be said also with regard to impartiality that, according to L. Wildhaber, “lies at the very heart of the notion of justice and fair trial”.⁴⁰

Talking about independence, G. Harutyunyan finds it necessary that “the essence of the concept ‘independence of the system of constitutional justice’ is uncovered”. The scholar believes that the understanding of this concept should go beyond its traditional perception as a mere “absence of external pressure over the functioning of the system”. In fact, “the notion of independence is an aggregate of many components. It is a complex of external and internal factors with a dynamically changing balance of influence”.⁴¹

For the purpose of the present research, it is worth focusing on the following three factors affecting the level of independence of constitutional control in young democracies.

First of all, the level of independence enjoyed by institutions of constitutional control has strong connections with the manner these organs are composed. M. Pikramenos is concerned about “complaints that the governments choose [only those] judges who are politically sympathetic to them”.⁴² Indeed, any effective involvement of constitutional courts in protection of human rights implies a certain degree of confrontation with the authorities. It is the authorities that usually personify the violation of human rights standards, so logically, in the situation when all constitutional judges are appointed by only one political force or branch of power, it is difficult to expect that such judges dare to betray the loyalty expected from them. This

³⁹ M. Baglai, *The Tale of Constitutional Justice in Russia* (Speech of the Chairperson of the Constitutional Court of the Russian Federation) [Баглай М. Слово о конституционном правосудии в России (Выступление Председателя Конституционного Суда Российской Федерации)], <www.concourt.am/armenian/con_right/4.14-1.15/baglai.htm>, visited on 20 April 2010.

⁴⁰ L. Wildhaber, *Judicial Impartiality under the European Convention on Human Rights*, section 1, <www.concourt.am/armenian/con_right/2.12-2001/wildhaber-eng.htm>, visited on 20 April 2010.

⁴¹ G. Harutyunyan, *Methodological Bases of Independence of Constitutional Justice* [Арутюнян Г. Методологические основы независимости конституционного правосудия], <www.concourt.am/armenian/con_right/3.13-2001/harutyunyan.htm>, visited on 20 April 2010.

⁴² M. Pikramenos, *Judicial Independence and Judicial Review of the Constitutionality of Laws: Constitutional Guarantees and Public Practice in Greece*, section 5, <www.concourt.am/armenian/con_right/3.13-2001/pikram.htm>, visited on 20 April 2010.

finding is especially true for cases when the authorities in charge also enjoy the monopolistic right to dismiss constitutional judges. In this sense, it is highly desirable that the formation of institutions of constitutional control, as well as the process of withdrawal of its judges, is accomplished transparently and with engagement of a broad variety of political actors on parity basis.

Meanwhile, attention needs to be paid not only to the question of how constitutional judges are appointed, but also to the issue of who they are chosen from. According to H.-G. Heinrich, “[t]he concept [of judicial independence] can only be meaningful, if it is understood as a moral commitment to decide according to the judges’ best knowledge and to his/her conviction”, therefore, institutions of constitutional control should be composed of “mature personalities, who are capable of independent reasoning and judgement”.⁴³

The second element of independence of constitutional control is the protectability of institutions at stake from any external pressure whatsoever impeding or affecting their activity. For instance, threats of cutting the budget allocated for the needs of an institution of constitutional control may considerably narrow the range of choices this court has in the process of decision-making. As a remedy, strong legal prohibitions on interference with the constitutional courts’ activities can be advised, provided, however, that such prohibitions are not only set in the legislation, but also ensured in practice.

Thirdly, certain legislative guarantees have to be foreseen for individual members of institutions of constitutional control, in order to secure their personal independence. Only then can judges be impartial in their activity on protecting their compatriots’ human rights and freedoms, when they know they are protected themselves. To this end, the proper guarantees of immunity from criminal prosecution, guarantees against arbitrary dismissal or against other similar manifestations of pressure should be prescribed for, and actually enjoyed by, all members of the respective constitutional court.

Of course, as has been said, the mere legislative guarantees of independence of constitutional justice can never be enough - political factors should also be taken into account. In this regard, H.-G. Heinrich believes that “[t]he factual independence of the judges is directly dependent on political trust ... Constitutional Courts in particular must be trusted both by the political leaders and by the population in order to be effective”.⁴⁴ The scholar further underlines that “[a]n important contribution to judicial independence can be made by the political leadership. If the political leaders demonstrate that they are willing to accept court rulings that run counter to their interests, the image of [constitutional] justice will be greatly enhanced”.⁴⁵ The problem is that especially in transitional societies one cannot pin too many hopes on constitutional courts’ enjoying sustainable

⁴³ H.-G. Heinrich, *Guarantees of Independence of Constitutional Justice and Interference of the Constitutional Courts on Public Practice*, p. 4,

<[www.venice.coe.int/docs/2001/CDL-JU\(2001\)039-e.pdf](http://www.venice.coe.int/docs/2001/CDL-JU(2001)039-e.pdf)>, visited on 1 September 2010

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, p. 5.

harmony with and considerable support from the authorities, because the essential task of the former is to question the performance of the latter.

Talking about impartiality of constitutional justice, V. Zorkin correctly stresses the obligation of institutions in question to rule “exclusively on matters of law” and evaluate cases “from the point of view of law and not economic or political expediency”.⁴⁶ V. Pushkash warns: “if judges ... get involved in political struggle, constitutional justice will dissolve in the politics, discredit itself”.⁴⁷

At the same time, various commentators recognise that institutions of constitutional control cannot be fully segregated from politics. M. Pikramenos considers constitutional judiciary to be “in a very peculiar position, because judges are not politicians but their decisions have significant influence in the political life”.⁴⁸ Similarly, V. Zorkin highlights “the specific place [of a constitutional court] in the political system” due to the fact that “[b]eing an organ of state power, it acts at the same time as an arbiter between the State, on the one hand, and the citizens and society, on the other”.⁴⁹ Another reason why “one cannot keep the courtroom free of politics or social conflicts” is that, according to H.-G. Heinrich, “[t]he judicial branch is a part of society and reflects its basic structures and cultures”; besides, “[c]ourts are elitist institutions that ... come easily under the pressure of populist opinions”.⁵⁰

It is undisputable that institutions of constitutional control cannot avoid getting involved in political discourse. Neither can one expect, especially in young democracies with the high level of involvement of the society in a political discourse, that constitutional judges can easily abstract themselves from their own political views. However, it is strongly recommended that judges act responsibly and practice self-restraint.

Ideally, constitutional provisions and human rights law should become the only dependence overseen for institutions of constitutional control as a whole, and constitutional judges in particular. As V. Pushkash suggests, “constitutional control does not avoid politics, but approaches the resolution of political problems [exclusively] in the legal manner”.⁵¹ M. Pikramenos calls “judges [to remain] far from the political interests” and adopt “judicial decisions with convincing foundation”.⁵²

The latter point – the need to employ convincing reasoning in decisions – is especially valid for young post-soviet States’ institutions of constitutional control, in the light of these institutions’ task to push on the positive change of human rights attitudes of both the political elites and the populations. According to L. Wildhaber, “[p]ublic perception that justice is impartial is the foundation for the confidence which citizens must have in their judicial system”, therefore “justice must not only be done, it must also

⁴⁶ V. Zorkin, *supra* note 6, section 2.

⁴⁷ V. Pushkash, *supra* note 35.

⁴⁸ M. Pikramenos, *supra* note 42, section 5.

⁴⁹ V. Zorkin, *supra* note 6, section 2.

⁵⁰ H.-G. Heinrich, *supra* note 43, p. 3.

⁵¹ V. Pushkash, *supra* note 35.

⁵² M. Pikramenos, *supra* note 42, section 5.

be seen to be done ... this translates as courts must not only be impartial, they must also be seen to be impartial".⁵³

Hence, independence and impartiality of institutions of constitutional control (both *de jure* and *de facto*) is a key prerequisite for their successful and effective activity. It is important to bear in mind, however, that “[j]udicial independence ... is not, nowadays, a matter of constitutional provisions or institutions” but, “in the first place, a matter of personal responsibility of judges”, who “are obliged, in this complicated political and social environment, to exercise their duties as guards of the individual and social rights...”.⁵⁴

2.3.3 Strong Interaction and Cooperation with the Authorities and the Population

One of the biggest paradoxes of constitutional justice is that, on the one hand, very important functions are attributed to constitutional courts, especially in the sphere of human rights, but, on the other hand, these institutions are often lacking freedom of action. The problem of practically any constitutional court is that it “must not make use of its competences at its own discretion”, but “may exercise its power only if there is a case that is brought to the court in a proper way”.⁵⁵ Thus, institutions of constitutional control face a strong dependence on “supply” of legal matters: constitutional requests lodged with constitutional courts serve as the main “raw material” without which constitutional justice cannot considerably succeed in fulfilling its human rights mandate.

Therefore, in order to be effective in maintaining human rights standards, constitutional courts have to rely on the favourable legislative and political framework for cooperation with and support by the authorities and the population. This means that, firstly, there is a need to determine the broadest possible circle of political actors empowered to initiate constitutional control. Secondly, constitutional justice has to be accessible to individuals and civil society actors.

Talking about political actors - organs and officials empowered to approach constitutional courts with requests - it is important to presume the reluctance of these actors to initiate constitutional control in relation to human rights issues. The explanation to such reluctance is simple: it is mostly to these organs and officials that human rights violations are attributed. They are often the authors or co-authors of the legislation that lacks correspondence with national and international human rights standards, so naturally there is a certain psychological barrier impeding them to question constitutionality of such legislation before institutions of constitutional control.

In this regard, in order to increase the probability that institutions of constitutional control regularly receive requests as to constitutionality of the

⁵³ L. Wildhaber, *supra* note 40, section 1.

⁵⁴ M. Pikramenos, *supra* note 42, section 5.

⁵⁵ S. Walter, *The Execution of the Decisions of the Federal Constitutional Court of Germany*, section I, <www.concourt.am/armenian/con_right/4-10-2000/SusanneWalter.htm>, visited on 20 April 2010.

legislation affecting human rights it is important to ensure that the circle of subjects, empowered to initiate constitutional control, is as broad as possible. Moreover, it is highly desirable that these empowered organs and officials represent the whole diversity of political forces, so that the mechanism of checks and balances works for the triumph of justice and respect for human rights. At the same time, the importance of empowering ordinary courts of all levels, as well as their judges, to directly approach constitutional justice needs to be specifically stressed. For they are the first ones to deal with the legislation, the application of which leads or may lead to human rights violations, courts of law and their judges should be logically guaranteed unimpeded access to the mechanism of constitutional control.

Coming back to the problem of psychological barrier hindering the initiation of constitutional control by empowered organs and officials, it is obvious that the authorities have a fear that by resorting to constitutional justice they directly or indirectly question their own professionalism. Obviously, this destructive manner of thinking should be overcome: empowered subjects have a moral and a legal obligation to refer to institutions of constitutional control all cases of the legislation suspected of lacking compliance with human rights standards. It is in the interests of both the authorities and the population that potential legislative mistakes are timely corrected, and constitutional courts are there to help rather than just to criticise – this is the message that institutions of constitutional control should push forward in order to stimulate fruitful cooperation with the authorities.

At the same time, constitutional courts cannot rely on the cooperation with political subjects only, but should also extensively interact with individuals and groups of individuals. This means, in the first place, that constitutional justice should be accessible to ordinary people. According to V. Skomorokha, “[t]he practice of activity of organs of constitutional justice in the area of protection of human rights and freedoms shows that their role is most important, where the national legislation foresees the citizens' right to directly seek protection of their constitutional rights and freedoms before these organs [of constitutional justice]”.⁵⁶

The possibility of institutions of constitutional control to receive and handle appeals from individuals – the so-called constitutional complaints – is easy to argue for: victims of human rights violations have the biggest interest in justice to be established, at least their incentive is objectively much stronger than the one of the authorities. In this context, apart from maximally extending the circle of subjects, entitled to seek constitutional justice, it is crucial to increase the potential of the civil society to bring various human rights problems to the attention of institutions of constitutional control. Otherwise, constitutional courts risk having a very primitive and lop-sided vision of the human rights situation in the respective society, and are therefore unable to become efficient guardians of the constitution and its human rights provisions.

⁵⁶ V. Skomorokha, *On Activities of the Constitutional Court of Ukraine* [Скоморох В. О деятельности Конституционного Суда Украины], <www.concourt.am/armenian/con_right/2.16-2002/skomorox.htm>, visited on 1 September 2010.

Another advantage of the ability of institutions of constitutional control to deal with constitutional complaints can be stressed: according to H.-G. Heinrich, constitutional courts “in transitional countries have to be opened towards ... the population at large”, because “direct access for popular complaints supports and protects [constitutional justice] from political interference”.⁵⁷

As a result, only than can constitutional control be effective in young democracies, when it positions itself as (and in fact is) an unbiased arbiter between and a partner of both the authorities and individuals. To this end, constitutional judges have to be ready to listen to both sides and act in good faith with the aim of improving the human rights situation for the benefit of all.

2.3.4 Use of International Achievements and Gentle Approach to Judging

It is worth reiterating that the period of transition of any post-communist State to the rule of law and to the due level of respect for human rights is full of challenges. According to G. Khetzuriani, “the fundament of the democratic era in post-soviet countries is being built on the soil of authoritarianism, which considerably impedes the process of formation of a social and democratic state based on the rule of law”.⁵⁸ Challenges of political nature are complemented by huge economic, social, cultural, ethnic and other difficulties. All of them directly or indirectly affect respective institutions of constitutional control and subsequently influence their activity in the field of human rights.

But one problem is the unpreparedness of the society to the new and unfamiliar reality of democracy and freedom, the other – even bigger – is the unpreparedness of institutions of constitutional control themselves to be successful guides in this modern reality. A. Maryskin correctly underlines the fact that “constitutional courts are a relatively new phenomenon in post-soviet countries”, so “[o]ften they face problems that had long ago been solved in countries with more balanced systems of constitutional justice”.⁵⁹

In the light of the latter observations, it is worth admitting that the newly created institutions of constitutional control find themselves in a very difficult position. On the one hand, they have a very difficult and responsible mission to carry out - to update the legislation and impose the new human rights-oriented model of thinking on the political elites and the population as a whole. On the other hand, however, constitutional courts have no solid fundament to build on. Having no predecessors, whose

⁵⁷ H.-G. Heinrich, *supra* note 43, p. 8.

⁵⁸ G. Khetzuriani, *Some Problems of Constitutional Justice in Georgia* [Дж. Хетциуани. Некоторые проблемы конституционного правосудия в Грузии]

<www.concourt.am/armenian/con_right/4.14-1.15/georgia.htm>, visited on 21 April 2010.

⁵⁹ A. Maryskin, *The Mechanism of Implementation of Decisions of the Constitutional Court of the Republic of Belarus* [А. Марыскин. Механизм исполнения решений Конституционного Суда Республики Беларусь], <www.concourt.am/armenian/con_right/3.13-2001/belarus.htm>, visited on 21 April 2010.

activity could serve as an example to follow, constitutional courts - young and ambitious, but yet inexperienced - have to start from the zero point.

What makes the situation even more challenging is that institutions of constitutional control have very little room for manoeuvre, and definitely have no right for a mistake, as a bad beginning is very seldom followed by a glorious future.

In the light of the above-mentioned difficulties and in order to remain on the safe side, it is crucial that institutions of constitutional control, firstly, make use of rich international experience accumulated in the sphere of human rights standards and, secondly, that their human rights activity, at least in the beginning, is carried out in a very balanced, cautious and consistent manner.

Talking about reference to international experience, it is worth citing H.-H. Vogel, who stresses the importance of “the role of constitutional courts when it comes to implement guarantees of human rights as established not only in national constitutions, but also in the many international documents of the United Nations, of the Council of Europe and of the European Union”.⁶⁰ In this regard, V. Skomorokha believes that “[t]he combination of the national and international experience ... in the sphere of judicial protection of rights and freedoms of individuals and citizens – is the evidence of filling constitutional [human rights] provisions with real content”.⁶¹

Under “international experience” in the sphere of human rights standards we mean, in the first place, the wide range of international human rights instruments, adopted both at the universal and regional levels. For instance, as T. Morshakova proposes, “[i]f the national constitution fails to concretise a certain basic human right, but only mentions it ... [constitutional courts] should understand the content of this right in accordance with what content is attributed to it in international law and in the international jurisdiction of the Strasbourg Court”.⁶² This opinion is supported by B. Ebzeev, another Russian judge, who is convinced that “the [national] list of [constitutional] rights and freedoms ... is not exhaustive”, because “universal principles of norms of international law are recognised as integrative part of the national legal system”. Therefore, “even if this or that right is textually absent in the Constitution ... [constitutional courts] can nevertheless consider [this right] as fundamental and ensure its proper protection under constitutional law”.⁶³

⁶⁰ H.-H. Vogel, *Constitutional Review and Democracy – Constitutional Courts and the Legislative Process*, p. 11, <[www.venice.coe.int/docs/2003/CDL-JU\(2003\)025-e.pdf](http://www.venice.coe.int/docs/2003/CDL-JU(2003)025-e.pdf)>, visited on 10 January 2010.

⁶¹ V. Skomorokha, *The Constitutional Court of Ukraine: Experience and Problems* [Скоморох В. Конституционный Суд Украины: опыт и проблемы], <www.concourt.am/armenian/con_right/4.14-1.15/ukrain.htm>, visited on 20 April 2010.

⁶² T. Morshakova, *Implementation of International Law in Constitutional Justice: Conclusions and Perspectives* [Морщакова Т. Применение международного права в конституционном правосудии: итоги и перспективы], <www.concourt.am/armenian/con_right/4.14-1.15/morshakov.htm>, visited on 21 April 2010.

⁶³ B. Ebzeev, *Human Rights Protection in the Constitutional Court of the Russian Federation* [Б.С. Эбзеев. Защита прав человека в Конституционном Суде Российской Федерации]

As a result, institutions of constitutional control are very welcome to extensively refer to international human rights instruments, as well as to various interpretive documents and jurisprudence adopted by the international human rights machinery both at the global and regional levels. General Comments and other documents, adopted by the UN treaty bodies and other international organisations, jurisprudence and documents by organs under the auspices of the Council of Europe, among many others, can be a very valuable source of what understanding should be attributed to relevant national human rights provisions.

T. Morshakova brings an example of the Russian Constitutional Court that uses “international legal interpretation of [human] rights and freedoms as an additional theoretic and dogmatic argumentation”. At the same time, the scholar sees no problem in making reference even to “various norms that are not recognised as binding under international law”, because in order “to determine the significance of an international legal rule for the purposes of its domestic application” it is sufficient to look at the content of such international norm, but not at its “formal legal force” or at the fact that “it is universally recognised”. T. Morshakova has no doubts that even “references to ‘soft law’ in the motivation parts of decisions ... help [the Constitutional Court] to enhance its argumentation and its legal position”.⁶⁴ In concurrence, B. Ebzeev commends the situation where institutions of constitutional control give much weight to the European Convention for Human Rights and its understanding at international level: “nowadays any interpretation [of constitutional human rights provisions] that ignores the position of the ECtHR or conflicts with it can hardly be acceptable”.⁶⁵

Besides, in order to help resolving “the problem of self-affirmation” faced by institutions of constitutional control, G. Khetzuriani suggests that these organs “comprehend the experience of [foreign] organs of constitutional control operating in democracies...”.⁶⁶ In general, when interpreting certain national human rights provisions, institutions of constitutional control should be ready to resort to national and foreign doctrine on human rights.

All the above-listed remedies are definitely valid for, but not limited to, the starting periods of the post-soviet constitutional courts’ existence. Even at the later stages, when these institutions had already developed some solid jurisprudence of their own, it is still crucial that they refer to international achievements in the sphere of human rights. Firstly, such reference will strengthen and legitimise the argumentation employed in decision-making. Secondly, institutions of constitutional control retain the opportunity to follow the newest international developments in the field of human rights and subsequently enrich and update national jurisprudence and doctrine. As a result, constitutional courts not only benefit themselves from international expertise accumulated in the sphere of human rights and

Федерации], <www.concourt.am/armenian/con_right/4.18-2002%20-%201.19-2003/Ebzeev.htm>, last visited on 13 April 2008.

⁶⁴ T. Morshakova, *supra* note 62.

⁶⁵ B. Ebzeev, *supra* note 63.

⁶⁶ G. Khetzuriani, *supra* note 58.

freedoms, but they also serve as “conductors” that transmit yet evolving universally recognised values into a national legal context.

Talking about the balanced and cautious strategy of action with regard to promoting new values and ideas among the political elites and the population, it is obvious, especially in transitional societies, that institutions of constitutional control should be able to demonstrate their wisdom in balancing between the conflicting interests (in our case - the interests of the State and its citizens). In young democracies, where basic laws are usually “born” inactive, it is only through the purposeful and consistent interpretation that basic laws gradually come to life.

To be a success, constitutional courts should play the role of convincing teachers, rather than aggressive watchdogs. V. Zorkin is not wrong in comparing institutions of constitutional control with “a gardener growing constitutional principles on native soil, although sometimes poor and desert”.⁶⁷ In this situation, it is justifiable that institutions of constitutional control avoid setting unrealistic goals and make very modest steps in the beginning. H.-G. Heinrich correctly warns that “[a] Constitutional Court will lose the trust if it tries to change the existing order by a ‘legal revolution’, or if it behaves like a select legal caste that pays no heed to the practicalities of the political process or ‘real life’ on the ground. In other words, if it wants to be successful, it has to take the expected impact of its decisions into account”.⁶⁸

At the same time, it does not mean that institutions of constitutional control should allow themselves to compromise manifest and widespread violations of human rights, as the loss of trust from the side of the population may be as detrimental to the cause of constitutional justice as the boycott by the authorities. We have to bear in mind that constitutional control not only shapes the public conscience and attitudes, but also depends on them. Therefore, there always remains a challenging need to maintain and preserve the high level of public trust and authority in the eyes of ordinary people. In this sense, it is important that institutions of constitutional control always employ strong and convincing argumentation behind their decisions.

Consistency is equally important. According to G. Vasilevich, decisions by institutions of constitutional control should orient “not only on the present-day level of social relations, but also see the perspective of the development of legal relations”; in order to avoid “finding itself in a “trap” of contradictions” the constitutional court has to make sure that “its conception of actions is legally consistent”.⁶⁹

Generally speaking, constitutional courts can afford to move at a slow pace in the beginning, because they have no predecessors, on whose practice they could rely. But these organs should be committed to and ready for speeding up their activity with gaining more weight and self-confidence.

⁶⁷ V. Zorkin, *supra* note 6, section 6.

⁶⁸ H.-G. Heinrich, *supra* note 43, p.4.

⁶⁹ G. Vasilevich, *Reflection of Legal Principles in Messages and Other Decisions by the Constitutional Court* [Василевич Г. Отражение правовых принципов в Послании и иных решениях Конституционного Суда], <www.concourt.am/armenian/con_right/2.20-2003/Vasilevich.htm>, visited on 20 April 2010.

Meanwhile, extensive references to international and foreign achievements and developments in the sphere of human rights should help in the creation of the early jurisprudence and gaining the respectful status.

2.4 Concluding Remarks on Constitutional Control and Its Human Rights Mission in Young Democracies

As can be seen from the findings provided above, institutions of constitutional control can be among the most suitable bodies to gradually facilitate the positive changes of the human rights situation through the promotion of the due respect for human rights and the transmission of internationally recognised values into a national context. The value of effective human rights oriented constitutional control is even higher in young States passing their transition to the rule of law and democracy.

Indeed, it is the direct function of constitutional courts to maintain constitutionality of the national legislation, which also means that all national normative acts should be brought in full compliance with the constitutional bill of rights and, if applicable, also with the binding international human rights instruments. By providing official or casual interpretation of constitutional human rights provisions, these organs carry out an important enlightening function, as they drive the evolution of both state officials' and ordinary citizens' mentality and thinking in the direction of acceptance of and respect for human rights.

The constitutional courts' advantage, according to H.-G. Heinrich, is that they "are, in most cases, a new institution that symbolises the re-integration into the Western value community".⁷⁰ For this reason they traditionally enjoy a higher degree of trust from the people, they usually enjoy the broadest guarantees of independence and their activity is most visible - all these factors afford institutions in question sufficient authority and courage to carry out their activity on the improvement of the country's human rights situation.

M. Baglaj is convinced that "[o]nce there is a constitutional court that is independent, righteous and fair, then the democracy, constitutionalism and the rule of law can be found in this country".⁷¹ However, as we have found, a number of other important conditions have to be met. Not only should institutions of constitutional control act exclusively within the legal framework and refrain from basing their decisions on political, economic or whatever other expediency, but they also have to prove to be fair arbiters in the State-*versus*-individual relations. To this end, institutions of constitutional control should make a good use of international experience accumulated in the field of human rights and "plant" the universal understanding of these standards into the national "soil". Meanwhile, this activity has to be carried out gradually, responsibly and in a cautious manner – all for the sake of securing the long-term efficiency.

⁷⁰ H.-G. Heinrich, *supra* note 43, p. 7.

⁷¹ M. Baglai, *supra* note 39.

It is not only the constitutional court's willingness and commitment to work constructively in the right direction that is sufficient, but also its technical ability to do so. In this context, it is crucial for a young democracy to design its institution of constitutional control in the most optimal way, so that it possesses sufficient powers and enough independence to effectively improve the human rights "climate".

The status of institutions of constitutional control varies in different post-communist States and the ideas on how to organise this mechanism are constantly changing, both before and after such institutions were created. Below we will review the basic stages of the long and difficult process of creation of the Belarusian institution of constitutional control, focusing on those features that are most relevant to this institution's human rights mission.

3 The Early Development of Ideas on Constitutional Justice in Belarus

Per aspera ad astra...

3.1 The Committee of Constitutional Supervision (1989)

In Belarus, the first legislative attempt to create an institution of specialised constitutional control dates back to the sunset of the soviet era. The Amendment of 27 October 1989 to the Byelorussian Soviet Socialist Republic's (hereinafter, the BSSR) 1978 Constitution – Basic Law (hereinafter, the 1978 Constitution of the BSSR)⁷² envisaged the creation of the Committee of Constitutional Supervision (hereinafter, the Committee).

The 1978 Constitution of the BSSR did contain a bill of rights (Section II, especially chapter 6 “The Basic Rights, Freedoms and Duties of Citizens of the BSSR”), although this bill of rights possessed some specifics⁷³ in comparison with the one universally recognised. In any event, despite these specific features and notwithstanding the abundance of expressly ideological declarations, the 1978 Constitution's bill of rights was still worth enforcing. Indeed, the core rights and freedoms were there, while the shortly and vaguely formulated provisions could find further elaboration, either through their proper interpretation or in the subordinated legislation. Thus, the Committee of Constitutional Supervision would potentially have a broad field for activity on turning the vision into reality, but, despite the explicit constitutional prescription, this institution was never created.

Nevertheless, it will still be useful to look at this very first model of constitutional control (or, more correctly, constitutional supervision⁷⁴) in

⁷² Constitution (the Basic Law) of the Byelorussian Soviet Socialist Republic, adopted by the Supreme Council of the BSSR (with amendments and addenda introduced through the Laws of BSSR of 21 June 1979 and 27 October 1989) [the 1978 Constitution of the BSSR], <www.pravo.by/lawhistory/konst_1978.htm>, visited on 13 April 2009.

⁷³ For instance, as was traditional for socialist societies, the economic and social rights were expressly prioritised, while the civil and political ones were named very shortly. The list of duties (those were considered inseparable of rights), included the “*obligation* and honour duty to work”, while the evasion from labour was deemed “incompatible with the principles of the socialist society) (art. 58) and thus punishable, what in some sense conflicted with the prohibition on forced labour under international law.

⁷⁴ It is worth noting that the soviet and post-soviet legal doctrine has preferred to consider “supervision” to be a weaker tool comparing to “control”: while a “supervising” body can only point at certain imperfections without directly interfering into the supervised activity, a “controlling” body has more powers in this respect, because “control” implies the possibility of correcting the revealed imperfections. See G. Vasilevich, *supra* note 11.

Belarus, as it will help us see the starting point and observe the dynamics of the further evolution of the phenomenon.

The Committee would consist of eleven members – specialists in the field of politics or law - all elected by the Supreme Council (the Parliament).⁷⁵ Such mechanism of forming the Committee would obviously make this body subordinated to the legislative branch of power. At the same time, the eligibility of non-lawyers (“specialists in the field of politics”) for membership in the Committee makes it possible to doubt about the purely legal designation of the institution in question, as the political element was clearly indicated.

Talking about the competence of the Committee of Constitutional Supervision, this institution was granted the following three powers. Firstly, at its own initiative or at the Parliament’s request it could deliver opinions on constitutionality of drafts of parliamentary acts and send its opinions to the Parliament. Secondly, the Committee was assigned to monitor conformity of acts of the Government and of local administrative bodies with the Constitution and other laws of the BSSR. Thirdly, it could provide opinions on the conformity of acts of other state bodies and public organisations with the Constitution and laws of the BSSR (at its own initiative or at the proposal of the Parliament, the Parliament’s Chairperson or the permanent parliamentary commissions).⁷⁶

As we can see, the Committee was not entitled to scrutinise the conformity of normative acts with binding international law, including such international human rights instruments as the ICCPR and the ICESCR, to both of which the former BSSR was a State Party. This essentially limited the potential ability of the Committee to refer to internationally recognised human rights standards and, where appropriate, to interpret the national bill of rights more extensively.

The second striking observation: acts of the Parliament were clearly put out of the scope of the Committee’s supervision. The only exception was the possibility for the Committee to comment on constitutionality of drafts of parliamentary acts. This enabled the institution of constitutional supervision to point only at the potential legislative mistakes, which could in theory⁷⁷ prevent the adoption of unconstitutional acts, including those violating human rights. At the same time, the already existing parliamentary legislation was presumed to be infallible and in full compliance with constitutional human rights provisions.

As for subordinated legislation, if the Committee revealed the lack of correspondence of a normative act with the Constitution or other laws, it could communicate its opinion to the body that had adopted such an act, so

⁷⁵ The 1978 Constitution of the BSSR, *supra* note 72 , art. 112, para. 1. The Parliament of the BSSR was officially called the Supreme Council (Soviet). Further in the text we will be using both “the Supreme Council” and “the Parliament” when referring to the legislative branch of power in the former BSSR.

⁷⁶ The 1978 Constitution of the BSSR, *supra* note 72, art. 112, para. 4.

⁷⁷ We are talking only about the theoretical effect here, because we failed to find any indications of the Parliament being constitutionally obliged to take the Committee’s opinion into consideration. In the absence of any mechanisms prescribed to this end, it makes sense to presume that critical notes by the Committee, if any at all addressed to the Supreme Council, could be easily ignored by the legislators.

that the contradictions could be lifted voluntarily; meanwhile, the suspicious normative act was automatically suspended, in full or in contradicting part.⁷⁸ However, there was no concrete mechanism to force the bodies in charge to bring their unconstitutional acts in compliance with the Constitution and other laws in case they disagreed with the Committee's views or simply ignored the critical opinion. The only thing the Committee was empowered to do in such a case was "to propose the Parliament or the Government to abolish within their competence those [normative] acts that are not in conformity with the Constitution or other laws of the BSSR".⁷⁹

Thus, the competence of the Committee of Constitutional Supervision was rather restricted. Firstly, the institution in question could deal with subordinated normative acts only. Secondly, it was not empowered to abolish any unconstitutional acts, but could just solicit before the Parliament or the Government for their abolishment. It was also obvious that the Committee was totally subordinated to the legislature: it was elected by the Parliament; it was not empowered to question constitutionality of legislative acts, except for on the draft stage of their existence. Quite symbolically, Article 112 of the Constitution – the one regulating the competence of the Committee – was put in the Constitution's Chapter 12 "The Supreme Council of the BSSR", right among other provisions regulating the competence of the Parliament. Due to all the mentioned facts, the Committee of Constitutional Supervision could be seen as a watchdog at the Parliament's service rather than a full-weight guardian of the rule of law and the respect for human rights and freedoms.

Of course, the Constitution provided some formal guarantees of independence and impartiality: "the Committee's members were independent and subordinated only to the Constitution of the BSSR"⁸⁰ and they "were not allowed at the same time to work for bodies, whose acts were subject to supervision by the Committee".⁸¹ However, considering the fact that the Parliament's acts were not subject to the Committee's supervision and that the Committee could consist of specialists in the field of politics, it would not be surprising if the Parliament would elect only parliamentarians to be members of this nominally independent institution, thus devaluating any independence clauses.

It goes without saying that the Committee of Constitutional Supervision – a body in such a depending position and with such limited competence – was unlikely to become an active leader in improving the human rights situation by guaranteeing the proper implementation of recognised human rights standards. Even if there would be enough willingness and courage to bring the legislation and practice in compliance with constitutional human rights provisions (subjective factor), there still remained such objective obstacles as the fragility of the status and the lack of sufficient powers. Being able to deliver rather advisory opinions than truly binding decisions, this body had little chance to cause any considerable changes for the better. Besides, we cannot exclude the possibility of the

⁷⁸ The 1978 Constitution of the BSSR, *supra* note 72, art. 112, para. 5.

⁷⁹ *Ibid.*, art. 112, para. 6.

⁸⁰ *Ibid.*, art. 112, para. 3.

⁸¹ *Ibid.*, art. 112, para. 2.

Committee of Constitutional Supervision to be used by the Parliament for legitimisation of the most dogmatic provisions of the 1978 Constitution, which would impede, rather than catalyse, the possible progressive reforms of the outdated soviet machinery.

Of course, there could also be an optimistic scenario, like in socialist Poland, where the establishment of the Constitutional Tribunal “did not change the face of the system”, but “did, however, introduce a new quality into the system” and, despite “all political, legal and constitutional limitations ... allowed for a completely new insight into law and created a chance for the stepwise changing of the face of the system”.⁸²

In any event, the Belarusian Committee of Constitutional Supervision was not created – the fact that provides a clear evidence of the lack of respect towards constitutional provisions in the soviet period of Belarusian history. Having no possibility to know for sure whether the introduction of the institution in question could be a progressive step, we nevertheless commend at least the appearance of the very idea of creating such a body. Below we will see how this idea was further elaborated.

3.2 The 1992 Judicial Reform and Its Contribution to the Evolution of Constitutional Control in Belarus

On 23 April 1992, the Parliament of the already independent Belarus adopted the Conception of the Reform of the System of Justice⁸³ (hereinafter, the 1992 Conception). According to the document’s Preamble, this reform was primarily aimed at “creation of a legal system that would be capable of maintaining the proper functioning of the rule of law; building a self-sustainable and independent judicial system as the main guarantor of human rights and freedoms...”.⁸⁴

Importantly, the 1992 Conception reaffirmed the need to create an institution of constitutional control - it provided that a “special place in the judicial system of Belarus should be given to the Constitutional Court”.⁸⁵ Thus, the not yet created institution of constitutional control got promoted: the status of the Parliament’s appendage was replaced by the position within the judicial system, which automatically implied more independence and impartiality for the Court. Besides, unlike in the older model of constitutional supervision, whereby the Parliament and its acts had been granted almost unlimited immunity from supervision by the Committee, the

⁸² M. Mazurkiewicz, *The Role of the Constitutional Tribunal in Creating the Principles of a Democratic State, Ruled by Law, in the Transition Process*, part I, <www.concourt.am/armenian/con_right/2.24-2004/mazurkiewicz.htm>, visited on 26 April 2010.

⁸³ *Conception of the Reform of the System of Justice*, adopted by the Enactment of the Supreme Council of the Republic of Belarus of 23 April 1992, No. 1611-XII, “On the Conception of the Reform of the System of Justice”, <arc.pravoby.info/documents/part7/aktf7709.htm>, visited on 20 April 2011.

⁸⁴ *Ibid.*, Preamble, para. 3.

⁸⁵ *Ibid.*, regulation 2.3.7, para. 1.

1992 Conception's model of constitutional control gave the Constitutional Court "the right to decide on constitutionality of acts of any state body"⁸⁶, with no exceptions provided. The mentioned developments gave reasons to hope that the institution in question would be self-sustainable and self-confident enough to play a visible role in the maintenance of the rule of law and in particular in the field of promotion and protection of human rights and freedoms.

The mission of the Court, according to the Conception, was to "maintain the conformity of laws and other normative acts with the Constitution and international obligations of the Republic of Belarus".⁸⁷ This was another very important novelty: the country's international obligations, including those under ratified human rights instruments, were ranked on a par with the national Constitution. Any other normative acts, delivered by whatever branch of power, had to be in strict conformity with the Basic Law and international norms binding for Belarus, and the role of the Constitutional Court was to maintain such conformity.

The 1992 Conception also marked the transformation of constitutional supervision into genuine constitutional control: unlike the Committee of Constitutional Supervision under the earlier model, the Constitutional Court was now empowered to interfere and correct the revealed imperfections. If the Court found a normative act in conflict with the Constitution or international obligations of Belarus, such act lost its force, fully or in the contradicting part.⁸⁸ Hence, there was no longer need to solicit before any other bodies to stop unconstitutional practices and nullify the legislation conflicting with human rights standards – the Court itself got "the teeth". This gives grounds to talk about the creation of a full-weight *control*, not just the weak *supervision*, as provided by the earlier model.

A few words have to be said about the procedure for withdrawing unconstitutional normative acts, mainly about the moment for depriving such acts of their legal force. The Conception prescribed that normative acts, declared unconstitutional, got nullified as of the date of the Constitutional Court's judgment to this end⁸⁹. However, this rule had two exceptions.

The first exception – a bit conservative one – slightly privileged acts of the Parliament and the President. A judgment, by means of which certain parliamentary or presidential acts were declared unconstitutional, could not directly nullify these acts, but just "suspended their operation"⁹⁰, while the Parliament or the President could "within a period of two months consider the Constitutional Court's judgment in substance" and present their objections and reject the Court's findings. Nevertheless, the Court had its final word and could unilaterally "announce the unconstitutional acts null and void, starting from the date of their suspension"⁹¹ - that is, from the date of the initial judgment recognising unconstitutionality of normative acts.

⁸⁶ *Ibid.*, regulation 2.3.7, para. 3.

⁸⁷ *Ibid.*, regulation 2.3.7, para. 1.

⁸⁸ *Ibid.*, regulation 2.3.7, paras. 7-10.

⁸⁹ *Ibid.*, regulation 2.3.7, para. 10.

⁹⁰ *Ibid.*, regulation 2.3.7, para. 7.

⁹¹ *Ibid.*, regulation 2.3.7, para. 8.

Thus, despite the elements of conservatism inherited from the soviet model of constitutional supervision, justice could not be hindered in the end. The only inconvenience could be posed by the risk of the Constitutional Court's getting involved in unnecessary correspondence and lose its time on these bureaucratic procedures.

The second exception – a more progressive one – directly concerned the Court's mission in the sphere of human rights and freedoms. Unlike human rights-neutral unconstitutional acts that could be invalidated only from the moment of the Court's respective judgment, “[a]cts, declared by the Court unconstitutional as violating human rights and freedoms, should be considered as having no force, in full or in part, starting from the date of their adoption”.⁹² This was a huge step forward: the provision in question clearly recognised the prioritised place of human rights standards within the national legal system and expressly affirmed that the Constitutional Court was competent to clear the legal field from normative acts infringing human rights and freedoms. Besides, the novelty at stake bore an important preventive implication, as it explicitly excluded the possibility of any “amnesty” for the long lasting human rights violations and, besides, enabled victims of human rights violations to call for justice and have their rights restored also long time after violations took place.

At the same time, the 1992 Conception foresaw some limitations for the Constitutional Court to use its powers for the benefit of maintenance of the rule of law and protection of human rights and freedoms. Unlike the Committee of Constitutional Supervision, the Constitutional Court under the 1992 Conception was not allowed to act at its own initiative, but could try cases only following a formal request by any of empowered subjects - “organs and officials that possessed the capacity to initiate laws”.⁹³

By the moment the Conception was drafted the post-soviet Constitution of Belarus had not yet been adopted, so it is impossible to know for sure the list of subjects of legislative initiative that by the virtue of this status could also initiate proceedings at the Constitutional Court. However, given the importance of the goals that constitutional justice has in the sphere of human rights, the circle of subjects empowered to resort to the mechanism of constitutional control had to be much broader than the list of subjects of initiation of law creation. And in fact it was: the 1992 Conception provided that “any court [of law], if it in the course of trying a case comes to a conclusion that the act to be applied is in conflict with the Constitution or international obligations of Belarus”,⁹⁴ could bring its doubts to the Constitutional Court.

This was a breakthrough provision. Giving such an opportunity to courts of all levels was a very progressive step, especially in the context of dealing with unconstitutional legislation impeding the full realisation of human rights and freedoms. Who if not courts of law deal with such issues on a daily basis? Certainly, the right of courts, notwithstanding their place within the hierarchical judicial system, to directly bring before the Constitutional Court any doubts on constitutionality of normative acts could

⁹² *Ibid.*, regulation 2.3.7, para. 9.

⁹³ *Ibid.*, regulation 2.3.7, para. 6.

⁹⁴ *Ibid.*

be a true engine of bringing the Belarusian legal system in line with both national and international human rights standards.

Of course, the model of constitutional control, as foreseen in the 1992 Conception of the Reform of the System of Justice, was not perfect: it did not contain any guarantees of independence of the Constitutional Court's members, nor did it specify any mechanisms of enforcement of the Court's decisions. Nevertheless, the document certainly contained very important positive novelties: firstly, the institution of constitutional control was granted a place within the judicial system and could be no longer perceived as the servant to the Parliament; secondly, the perception of constitutional control as a mechanism of improving the human rights "climate" in the country was expressly confirmed; thirdly, the institution of constitutional control received more powers to be effective in the field of human rights.

Undoubtedly, the 1992 Conception contributed to the development of ideas on constitutional control and it is this improved model that became a basis for the creation of the Constitutional Court in 1994. Below follows a brief summary of human rights implications of the new Constitution of the Republic of Belarus and an overview of the status and competence of the created Constitutional Court.

4 The Birth of Constitutional Control in Belarus

4.1 The 1994 Constitution of Belarus and Its Human Rights Implications

The post-soviet Constitution of independent Belarus - the 1994 Constitution⁹⁵ - was adopted on 15 March 1994 and came into force on 30 March. Anna Milenkova, an expert of the Venice Commission, described this Constitution as “a typically post-communist basic law, marking a first step in the transition towards democratic government and free civil society” that “combined elements of the soviet system and ideas and principles characteristic of contemporary constitutional democracy”.⁹⁶

Being able to compare this Basic Law with the preceding ones, domestic experts sounded more optimistic. For instance, G. Vasilevich criticised the preceding Belarusian Constitutions for “non-reflection of the most important international human rights instruments’ provisions” and for “declarative nature of many constitutional norms that did not have direct and immediate effect in practice and not always enjoyed the actual supremacy over the subordinated legislation”.⁹⁷ In contrast, as the scholar notes with appreciation, the new Basic Law was “of non-ideological nature”, it “established the equality between an individual and the State and set their mutual obligations” and foresaw “the direct effect of constitutional norms”.⁹⁸

Undoubtedly, the 1994 Constitution was clearly a more advanced document in setting human rights standards: it stipulated that “[t]he individual, his rights, freedoms and guarantees for their attainment manifest the supreme goal and value of society and the State. The State shall bear responsibility towards the citizen to create the conditions for the free and dignified development of his identity”.⁹⁹ The new 1994 Constitution

⁹⁵ Constitution of the Republic of Belarus [the 1994 Constitution], adopted on 15 March 1994, <www.pravo.by/lawhistory/konst_1994.htm>, visited on 12 April 2009. The English version of the Basic Law, but with considerable amendments introduced, *inter alia*, by the 1996 Referendum, can be found at <www.belarus.net/costitut/constitution_e.htm>, visited on 12 April 2009.

⁹⁶ A. Milenkova, Venice Commission, *Opinion on the Conformity of the Belarus Laws on the Supreme Soviet and the President of the Republic with the Belarus Constitution*, section I, CDL (1995) 075e-restr, 14 November 1995, <[www.venice.coe.int/docs/1995/CDL\(1995\)075-e.asp](http://www.venice.coe.int/docs/1995/CDL(1995)075-e.asp)>, visited on 15 April 2009.

⁹⁷ G. Vasilevich, *The Scientific and Practical Commentary on the Constitution of the Republic of Belarus* [Васильевич Г. Научно-практический комментарий к Конституции Республики Беларусь], chapter “Constitutional Development of the Republic of Belarus”, section “First Constitutions of the BSSR”, <www.lawbelarus.com/repub2008/sub15/text15614/index.htm>, visited on 20 April 2010.

⁹⁸ *Ibid.*, chapter “Constitutional Development of the Republic of Belarus”, section “Constitution of the Republic of Belarus”.

⁹⁹ The 1994 Constitution, *supra* note 95, art. 2.

contained an extensive bill of rights (section II of the Constitution), drafted in full compliance with both ICCPR and ICESCR. G. Vasilevich estimates that “[a]round 50 per cent of the Constitution’s articles were devoted to rights and freedoms”.¹⁰⁰

Besides directly setting national human rights standards, the new Basic Law intended to create more favourable legislative preconditions for the further development of these standards: “[t]he Republic of Belarus shall recognise the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles”.¹⁰¹ This being so, the Belarusian Government was urged to follow the new developments in international human rights law and adhere to the constantly broadening range of standards in this area.

Therefore, the 1994 Constitution appeared to be a much more human rights-oriented document. It only remained to turn the Basic Law into a direct and primary regulator of social relations, so that constitutional human rights provisions could directly guide the authorities in their activities on replacing the soviet authoritarian regime by a democracy governed by the rule of law and having due respect for human rights and freedoms. Only through the proper and consistent enforcement of the Constitution’s progressive provisions the breakthrough on paper could be followed by an adequate progress in reality.

G. Vasilevich correctly notes that “the further development of human rights provisions, filling them with new content and setting guarantees [of their realisation] was the duty of all state bodies, including courts of law. Efforts shall be primarily focused on the soonest possible meeting of international standards in the field of implementation of inalienable human rights”.¹⁰² Needless to remind, the primary responsibility to this end had to be born by the Constitutional Court.

4.2 The Debut of the Constitutional Court of Belarus: Stage 1 (1994 – 1996)

The creation of the Constitutional Court of Belarus was envisaged in the 1994 Constitution. However, as we have witnessed, the analogous requirement of the 1978 Constitution had been ignored, so there remained fears that the story would be repeated and that the birth of the national institution of constitutional control would be again postponed for undetermined time. Fortunately, a special guarantee was stipulated in the Law, putting the Constitution into force: “in order to maintain the unconditional application of the adopted Constitution the Constitutional Court of the Republic of Belarus shall be created within the term of one month”.¹⁰³ This time, the promise was kept and the institution of constitutional control was formed on 27 April 1994.

¹⁰⁰ G. Vasilevich, *supra* note 98.

¹⁰¹ The 1994 Constitution, *supra* note 95, art. 8.

¹⁰² G. Vasilevich, *supra* note 98.

¹⁰³ The Law of the Republic of Belarus “*On the Order of Giving Effect to the Constitution of the Republic of Belarus*”, N 2876-XII, adopted on 15 March 1994.

The 1994 Constitution's provisions, regulating the status and capacity of the national institution of constitutional control, were the result of the long-lasting debate. Let us have a closer look at the created Constitutional Court.

4.2.1 Nature and Composition of the Constitutional Court and Guarantees of Its Independence

As can be seen from the name of the institution in question – “Constitutional Court” – the idea of the judicial nature of constitutional control, as had been laid down in the 1992 Conception of the Reform of the System of Justice, seemed to have been upheld. However, it was not fully so. The constitutional chapter, devoted to the status of the Constitutional Court (Chapter 6), was situated in Section VI of the Basic Law “State Control and Supervision” (together with the provisions on the Procurator’s Office and the Chamber of Financial Control). While the chapter on courts of law was put into a totally different part of the Basic Law – Section IV “The Legislative, Executive and Judicial Branches of Power”. Thus, the Constitutional Court was in fact separated off the judicial system of Belarus, so calling this institution “a court” was rather a formality. A. Vashkevich and M. Pastukhou suggest that by structuring the Constitution in such a manner the legislator could have set its mind on “underlining the special status of the Constitutional Court within the system of state bodies”¹⁰⁴ and eventually enabling this institution to be a true guarantor of the principle of separation of power.

The created Constitutional Court was composed of 11 members, all elected by the Parliament, for the term of 11 years.¹⁰⁵ As we see, the legislative branch of power had the monopoly over the formation of the institution of constitutional control, which could give rise to critique as to the real independence of constitutional control from the Parliament. To become a member of the Court one was required to be a qualified expert in the field of law¹⁰⁶, which can be seen as a clearly de-politicising factor (in contrast with the Committee of Constitutional Supervision of 1989, which could be also open for specialists in the field of politics). Developing the

¹⁰⁴ A. Vashkevich, M. Pastukhou, ‘The Constitutional Court and the Constitutional Crisis of 1996’ [Вашкевіч А., Пастухоў М. Канстытуцыйны суд і канстытуцыйны крызис 1996 г.], in V. Bulgakau (ed.), *The Political System in Belarus and Presidential Elections of 2001. The Compilation of Analytical Articles* [Беларуская палітычна сістэма і прэзыдэнцкія выбары 2001 г. Зборнік аналітычных артыкулаў, рэд. В. Булгакава] (Wschodnioeuropejskie Centrum Demokratyczne, Warsaw, 2001), section “History”, <www.kamunikat.fontel.net/www/knizki/palityka/systema/systema_02_vaszkiewicz.htm>, visited on 15 April 2009.

¹⁰⁵ The use in the text of the Constitution of the term “member” in contrast with the terms “judge” or “justice” is another indicator of the fact that the word “court”, present in the name of the Belarusian institute of constitutional control, was not necessarily sufficient to determine the institution’s judicial nature. At the same time, neither the subordinate legislation nor the literature strictly avoided the use of the term “judge” instead of the constitutionally prescribed “member”.

¹⁰⁶ The 1994 Constitution, *supra* note 95, art. 126, para. 1.

constitutional provisions, the Law “On the Constitutional Court of The Republic of Belarus” (hereinafter, the 1994 Law on the Constitutional Court) set an additional requirement that candidates for the position of a judge at the institution of constitutional control were of “high moral standing”.¹⁰⁷

The 1994 Constitution set an age limit for the Constitutional Court’s members: persons over 60 were not entitled to hold the position.¹⁰⁸ It is difficult to find any clear explanations for this age limit. Maybe, it was planned to avoid the stagnation of the Court’s staff and bring the new generations of lawyers on board. During the communist time, very few relatively young people had had access to high-ranking positions, so the set age limit probably aimed at counter-balancing this harmful practice of the past.

Members of the Constitutional Court were forbidden “to have business or practice any other paid activity, except for academic work or scientific research”.¹⁰⁹ Besides, these officials were not allowed to combine their work at the Constitutional Court neither with mandates of deputies of the Parliament nor with membership of any political party or any other association pursuing political aims”.¹¹⁰ Apparently, these norms also meant to preclude the Court’s members from having political or any other bias.

The 1994 Constitution specifically stated that any “[d]irect or indirect influence on the Constitutional Court or its members in connection with their exercising constitutional control shall be impermissible and shall involve liability in accordance with law”.¹¹¹ This guarantee of independence of the Court and its members was complemented by constitutional immunity clauses: Article 131 of the Constitution forbid “to start any criminal prosecution against persons elected to the Constitutional Court, to arrest them or otherwise restrict their personal liberty without the consent of the Supreme Council, unless they were caught on the scene of crime”. The Constitution further prescribed that “[a] criminal case against a member of the Constitutional Court could be started [only] by the Procurator-General on the consent of the Supreme Council”.¹¹² It is worth noting here, that the mentioned guarantees of immunity foreseen for the Constitutional Court’s members were comparable to the ones enjoyed by the deputies of the Parliament.¹¹³

Apart from the mentioned constitutional provisions, the Court’s members’ guarantees of independence were further elaborated in Article 25 of the 1994 Law on the Constitutional Court (as amended per 3 March 1995). In particular, it formulated such additional guarantees of independence as irremovability of judges; equality of their rights; the established procedure of suspension and withdrawal of judges; their right to

¹⁰⁷ Law of the Republic of Belarus *“On the Constitutional Court of the Republic of Belarus”* of 30 March 1994 (N 2914-XII) [the 1994 Law on the Constitutional Court], published electronically in the legal database “Consultant”, art. 14.

¹⁰⁸ The 1994 Constitution, *supra* note 95, art. 126, para. 1.

¹⁰⁹ *Ibid.*, art. 126, para. 2.

¹¹⁰ The 1994 Law on the Constitutional Court, *supra* note 107, art. 16.

¹¹¹ The 1994 Constitution, *supra* note 95, art. 126, para. 4.

¹¹² *Ibid.*, art. 131.

¹¹³ *Ibid.*, art. 93.

resignation; endowment, social welfare and guarantees of personal security according to the judges' high status.¹¹⁴ Besides, Article 25 of the Law in question foresaw quite generous benefits. In particular, the amount of remuneration of the Chairperson and judges of the Court was equal to the ones of the Speaker and Vice-Speakers of the Parliament correspondingly; judges were entitled to accommodation in Minsk (if they were in need of the one) and had guaranteed employment after ending of their mandate.¹¹⁵

At the same time, there remained some ambiguity as to the grounds for pre-term withdrawal of the Court's members, who could be removed from office, *inter alia*, "for actions, discrediting the Constitutional Court".¹¹⁶ According to A. Vashkevich and M. Pastukhou, "such a vague formulation of this ground potentially allowed, in certain circumstances, to misuse it against politically undesirable judges", especially in the light of the fact that there was no "clear procedure on withdrawal of judges".¹¹⁷

4.2.2 Initiation of Constitutional Control

The Constitutional Court's primary function was to maintain the conformity of any normative legal act with the national Constitution and international obligations binding for Belarus. As a rule, constitutional control had to be initiated at the request by one of the empowered subjects listed in the Constitution: the President, the Speaker of the Parliament, any of the Parliament's permanent committees, a group of at least 70 deputies of the Parliament (out of total 260), the Supreme Court, the Supreme Economic Court and the Procurator-General.¹¹⁸

This circle of empowered subjects was not broad enough. For instance, it did not include the Cabinet of Ministers – the Government of the Republic of Belarus. Besides, questions could be raised with regard to accessibility of constitutional justice to ordinary courts of law. According to Article 112 of the Basic Law, "[i]f, during the hearing of a specific case, a court [of law] concludes that an enforceable enactment is contrary to the Constitution, it shall make a ruling in accordance with the Constitution and raise, under the established procedure, the issue of whether the enforceable enactment in question should be deemed unconstitutional".¹¹⁹

Therefore, the 1994 Constitution upheld the 1992 Conception's intention to enable strong working connections between ordinary courts of law and the Constitutional Court, but in a more restrictive manner. The phrase "under the established procedure", according to A. Vashkevich and M. Pastukhou, meant that only "chairpersons of ... [courts of law] had the right to request that the Supreme Court brought proposals to the Constitutional Court concerning constitutionality of normative acts".¹²⁰

¹¹⁴ The 1994 Law on the Constitutional Court, *supra* note 107, art. 25, para. 1.

¹¹⁵ *Ibid.*, art. 25, paras. 2 - 5.

¹¹⁶ *Ibid.*, art. 18, para. 6.

¹¹⁷ A. Vashkevich, M. Pastukhou, *supra* note 104, section "The Order of Formation of the Constitutional Court and the Legal Status of Its Judges".

¹¹⁸ The 1994 Constitution, *supra* note 95, art. 127, para. 1.

¹¹⁹ *Ibid.*, art. 112, para. 2.

¹²⁰ A. Vashkevich, M. Pastukhou, *supra* note 104, section "The Competence of the Constitutional Court".

Thus, ordinary judges, as well as low- and middle-ranking courts of law in general, could not approach the Constitutional Court directly, but had to pass their well-founded doubts as to constitutionality of normative acts through the hierarchical chain of the system of justice. As a result, the mechanism laid down in Article 112 of the Constitution seemed to be too complicated for ordinary courts of law to use - and constitutional justice remained feasibly accessible to the highest courts only.

The 1994 Constitution did not foresee constitutional complaint - the right of individuals or groups of individuals to seek constitutional justice directly. At the same time, Article 6 of the 1994 Law on the Constitutional Court foresaw that “[o]ther state bodies, public associations and also citizens shall apply to the bodies or persons empowered to submit an application for review of constitutionality of an enactment”.¹²¹ The quoted provision gave individuals, groups of individuals and non-government organisations a theoretical possibility to reach the Constitutional Court indirectly - through the empowered state bodies and officials. We are talking about ‘a theoretical possibility’ here, because complainants would have to present more than convincing arguments in order to overcome the inherent reluctance of state bodies, empowered to initiate constitutional control, to convey human rights issues to the Constitutional Court.

In general, given the comparatively narrow circle of subjects, empowered to initiate constitutional control and in the light of the absence of a feasibly working mechanism of constitutional complaint, there was risk that human rights issues would not be brought to the Constitutional Court’s attention on a regular basis. However, this risk was diminished by the following counter-balance: “[t]he Constitutional Court had the right to consider, *at its own discretion*, the conformity of normative acts by any state body, public association with the Constitution, laws, international treaties ratified by the Republic of Belarus”.¹²²

It is difficult to determine whether it was appropriate to entitle the Constitutional Court with the right to perform constitutional control at its own initiative. A. Vashkevich and M. Pastukhou refer to “[f]oreign experts ... [who] expressed their concerns because the right in question gave grounds to doubt in neutrality and political impartiality of the Court”. Namely, A. Blankagel warned that the power to unilaterally initiate constitutional control “would provoke the Court to practice [excessive] judicial activism, prevent it from exercising its primary function and undermine the perception ... of the institution in question as a court”.¹²³

On the other hand, the following three circumstances had persuaded the Constitution’s authors to entitle the Constitutional Court with the power to start cases at its own discretion:

“Firstly, the experience of the Committee of Constitutional Supervision of the USSR, which had the same power, was taken into consideration. Secondly, the idea was that the Constitutional Court would very carefully use

¹²¹ The 1994 Law on the Constitutional Court, *supra* note 107, art. 6.

¹²² The 1994 Constitution, *supra* note 95, art. 127, para. 2.

¹²³ A. Vashkevich, M. Pastukhou, *supra* note 104, section “The Competence of the Constitutional Court”.

this right and only for occasions, when there would be a need to decide on constitutionality of acts restricting constitutional rights and freedoms. Thirdly, the institution of constitutional control was a new phenomenon in the political and legal system of Belarus and some deputies believed that the presence of the power in question would increase the empowered subjects' willingness to voluntarily bring cases before the Court and thus make it busy. [Besides,] the Court was expected to start cases at its own initiative only at the beginning stage of its activity".¹²⁴

In our opinion, the Constitutional Court's power to initiate constitutional control was rather commendable than not, at least in the context of the institution's human rights mandate. The accurate use of this power could eliminate the Court's dependence on the supply of human rights issues by the rather narrow circle of empowered state bodies and officials and could compensate the potential passivity thereof. Besides, the empowered subjects received an additional stimulus to communicate human rights cases to the institution of constitutional control without waiting until the Court initiated the proceeding at its own discretion.

4.2.3 The Constitutional Court's Key Powers, Relevant to Its Human Rights Mission

Under the 1994 Constitution, the primary mandate of the Constitutional Court was to conduct, following requests from the empowered subjects or at its own initiative, subsequent (*a posteriori*) constitutional control over the subordinated legislation and withdraw normative acts found unconstitutional, that is contradicting the national Constitution or in breach of international obligations of Belarus. What was new in the constitutional text comparing to the preceding documents containing norms-ideas on Belarusian constitutional control, was a more straightforward approach with regard to the destiny of unconstitutional normative acts: the Constitutional Court could directly invalidate them in full or partially.¹²⁵ Thus, the 1994 Constitution lifted the obligation of the Constitutional Court to communicate to the President or the Parliament its findings as to unconstitutionality of the legislation adopted by these subjects.

Importantly, all normative acts got equally subordinated to the Constitution and binding international law: constitutional justice became blind in causing the same legal consequences – inevitable invalidation - for any unconstitutional act, irrespective of its place within the legal hierarchy. At the same time, the Constitutional Court was granted considerable flexibility in adjudicating on the exact moment for unconstitutional acts to lose their legal force.¹²⁶ Hence, the institution of constitutional control got the possibility to conduct the process of renovation of the legal system in a constructive and cautious manner and employ, when appropriate, rather evolutionary than revolutionary methods to this end. Guided by strategical thinking, the Constitutional Court could declare the invalidation of some

¹²⁴ *Ibid.*

¹²⁵ The 1994 Constitution, *supra* note 95, art. 128, paras. 2-3.

¹²⁶ *Ibid.*, art. 128, paras. 2-3.

unconstitutional normative acts with a delay while immediately addressing more urgent issues.

It goes without saying that the response to the challenges of the time and setting priorities had to be accompanied by taking into account the specific economic and political circumstances of Belarus in the period of transition, so that to avoid a possible legal “vacuum” or unnecessary political tenses. At the same time, the legislation that violated human rights and freedoms could not benefit from the mentioned indulgence, as the 1994 Constitution explicitly reiterated one of the 1992 Conception’s most progressive norms: “an act that the Court declared unconstitutional for the reasons of its negatively affecting human rights and freedoms is considered invalid, in full or in contradicting part, starting from the moment of its adoption”.¹²⁷

The cited provision made it impossible for the Constitutional Court to have mercy on normative acts and separate norms hindering the full enjoyment of human rights and freedoms. Importantly, the possibility to retroactively invalidate defect legislation enabled victims of human rights violations to have their rights restored. It could also have a strong preventive and disciplinary effect: state officials and bodies would think twice before deliberately adopting a normative act, shady in terms of its conformity with existing human rights standards.

According to Article 129 of the Basic Law, “[j]udgments of the Constitutional Court were final and there was no possibility to appeal or object against them”.¹²⁸ On the one hand, this provision strengthened the status of the Constitutional Court and, to a certain extent, protected this institution from getting involved in political bargaining and unnecessary discussions that usually follow the adoption of extremely unpopular, in the view of the authorities, decisions. On the other hand, incontestability of the Court’s decisions implied higher responsibility in the course of conducting constitutional control, as there was no room for a mistake.

In addition to the function of withdrawing unconstitutional acts, the Constitutional Court possessed also other powers that were relevant to this institution’s human rights mission. For instance, Article 130 of the 1994 Constitution empowered the Constitutional Court “to approach the Parliament with certain proposals on amending the Constitution, on adopting new laws or amending the existing ones”, whereby “[s]uch proposals were mandatory for the Supreme Council to consider”.¹²⁹ In our opinion, this power could be an important tool for gradually improving the level of harmonisation of the legislation with the national and international bills of rights. Thus, not only could the Court react to existing human rights violations by invalidating unconstitutional acts (the function of a “negative” legislator), but also could it promote the development of the national legislation in the human rights-friendly manner (“positive” legislator). Besides, the provision in question also paved the avenue for the Court to lobby the sooner national implementation, including on constitutional level, of the latest developments in the area of international human rights law.

¹²⁷ *Ibid.*, art. 128, para. 1.

¹²⁸ *Ibid.*, art. 129.

¹²⁹ *Ibid.*, art. 130.

The mission of the Court to improve the legislation and practices and to promote their full compliance with the Constitution and its bill of rights could also be realised, in a more comprehensive way, through the Constitutional Court's annual messages to the Supreme Council and the President of the Republic of Belarus. This power was absent in the 1994 Constitution, but was foreseen in the 1994 Law on the Constitutional Court: the institution of constitutional control was entitled to conduct “[t]he analysis of the state of constitutional legality presented in the form of a message of the Constitutional Court to the President ... and the Supreme Council”.¹³⁰ This power to produce annual messages on the state of constitutional legality was worth commending: according to G. Vasilevich, such “messages ... can be considered as [additional] source of constitutional law, where legal ideas are expressed and legal categories are elaborated ...”.¹³¹ These documents, however, had to be “based on the studied and considered materials”¹³², which could preclude the Court from relying on alternative views on the human rights situation in Belarus, contained in foreign or international reports or jurisprudence of international organisations, among other sources.

It is worth highlighting that granting the Constitutional Court the right to produce annual messages on the state of constitutional legality was an example of broadening the competence of the Court through unconstitutional legislation. Article 132 of the 1994 Constitution provided that “[t]he competence, organisation and order of procedure of the Constitutional Court is specified in the law”,¹³³ which gave grounds for doctrinal assumptions that the Court's status could be strengthened in the legislation on constitutional control without the need to amend the Constitution. The Constitutional Court's entitlement to address the Parliament and the President with annual messages proved to be a practical confirmation of such assumptions.

In order to verify whether the Court needed and in fact deserved to possess broader powers it is important to look at the institution's human rights activity at the initial stage of its existence.

4.3 Human Rights Jurisprudence of the Constitutional Court at Stage 1

As we can see from the preceding paragraph, the created Constitutional Court of Belarus possessed very promising potential for positively affecting both the legislation and practices in the sphere of human rights and freedoms and improving the human rights situation in the country. However, the institution in question did not hurry to use its powers to the

¹³⁰ The 1994 Law on the Constitutional Court, *supra* note 107, art. 36, para. 4.

¹³¹ G. Vasilevich, *Creation of a Modern National Legal System is the Primary Interest of the State and the Citizens* [Васильевич Г. Создание современной национальной правовой системы – важнейший интерес государства и граждан], <www.lawbelarus.com/repub2008/sub15/text15987.htm>, visited on 13 August 2009.

¹³² The 1994 Law on the Constitutional Court, *supra* note 107, art. 44.

¹³³ The 1994 Constitution, *supra* note 95, art. 132.

full extent: during the first five month of its existence (April – August 1994) the Constitutional Court adopted only one single decision – its own Rules of Procedure.

Nowadays it is difficult to find out the reasons for such passivity of the Court. Maybe, the institution of constitutional control was reluctant to initiate cases at its discretion without giving the empowered subjects a chance to bring issues. Maybe, the judges themselves simply did not know how to start? As Judge K. Kenik admitted in an interview, “as well as, maybe, the majority of my colleagues, in the very beginning I had a very indefinite understanding of what the Constitutional Court was as the institution of constitutional control, because this institution was new to our country”.¹³⁴ Another reason could be the desperate disorder of the legal system that made the Court use the first five months for prioritising rather than acting.

In any event, such Court’s passivity cannot be explained by the fact that the legislation was perfect and there was no need to undertake efforts on bringing improvements in the human rights field. In fact, there were things to do - this can be clearly illustrated by the early case-law of the Court, as presented below.

The first Court’s Judgment¹³⁵ was delivered on 23 September 1994. Symbolically, it was a clearly human rights issue. The case concerned some articles of the Labour Code (the Code had been in force since the soviet times), which allowed employers to unilaterally dissolve contracts with those employees, who had achieved the general retirement age of 60 years for men and 55 year for women respectively.

When deciding this case, the Court deeply analysed human rights provisions of the national Constitution, mainly on prohibition of discrimination and equality before the law and on the right to work, but also referred to relevant international human rights instruments. Namely, the Court cited articles on prohibition of discrimination and on the right to work as set forth in the UNDHR and the ICESCR. Moreover, in order to sound more convincing, the institution of constitutional control quite extensively referred to several ILO Conventions and Recommendations on discrimination, on conditions for elderly workers and on termination of employment at employer’s initiative (mainly, the ILO Conventions¹³⁶ No. 111 and No. 158 and Recommendations No. 111, No. 162 and No. 166).

Interestingly, the institution of constitutional control was not limited to relying on legal arguments solely. It found that the norms in question also “were contrary to the rules of *morality*, related to the formation of

¹³⁴ K. Kenik, ‘One Needs to Keep Going in Order to Finish the Journey’ [Кеник. К. Дорогу осилит идущий], an interview, 1 *Justice of Belarus* (2002), article No.5.

¹³⁵ *On Constitutionality of the Norms of the Labour Code, Allowing for Dissolution of Working Agreements with Workers of Retirement Age*, 23 September 1994, the Constitutional Court of the Republic of Belarus, Judgment (№ 3-1/94), <www.kc.gov.by/ru/main.aspx?guid=11893>, visited on 16 April 2009.

¹³⁶ Importantly, one of the named ILO conventions (the ILO Convention No. 158) was not even binding for Belarus at the time of the adoption of the Judgment. See the relevant ILO webpage for details on the status of ratifications by Belarus: <webfusion.ilo.org/public/db/standards/normes/appl/appl-byCtry.cfm?ctychoice=1660&lang=EN&hdroff=1>, visited on 3 May 2010

respectful attitude towards the older people: all people at the age of 60 (men) and 55(women) were under threat of such dismissal. This prevented the creation of a democratic social state as manifested in Article 1 of the Constitution”.

Against the presented legal and moral background, the Constitutional Court found the Labour Code’s norms under consideration to be in obvious contradiction with both the national and international human rights law, because these norms legitimised “forced retirement” without providing any reasoning and disregarding the desire of workers, their abilities and qualification. As a result, the norms allowing for unilateral dismissal of people of the retirement age were declared null and void.

At the same time, the Court failed to be as straight-forward when deciding on the date of invalidation of these unconstitutional rules. On the one hand, there was an express constitutional requirement¹³⁷ that the law violating human rights shall be invalidated from the very date of its adoption – as if it has never existed. On the other hand, the Court felt reluctant to disqualify the rules, enacted long before the 1994 Constitution came into force and before the Court itself was created. Hence, the norms on forced retirement were invalidated starting from the date of the delivery of the Judgment.

Two weeks after the first decision, the Court delivered another judgment concerning human rights and freedoms. Again started at the Court’s own initiative, this case¹³⁸ focused on a local act by the Minsk City Executive Council that regulated the admission of students to the capital city’s vocational schools and prescribed that mainly graduates of Minsk schools had this privilege to receive vocational education in the city. The capital’s vocational schools were also open for persons from the surrounding areas, provided that these students had a possibility not to live in Minsk during their studies. Meanwhile, according to the local act under review, persons coming from other regions of Belarus had almost no chance to receive vocational education in Minsk.

Having referred to relevant constitutional human rights provisions that guaranteed, *inter alia*, the accessibility of vocational education free of charge, as well as to pertinent norms of the ICESCR and the CRC, the Court found a violation of the right to education, as the norms of the local normative act under review put unnecessary limits on the constitutional right to vocational education by diminishing the accessibility of such education and denying the freedom of choice. The issue of equality was also at stake, as young persons from other Belarusian regions were put in unequal position comparing to dwellers of the capital and the surroundings, because some professions could be learned only in Minsk.

In our opinion, to strengthen its argumentation, the Court could also make use of Article 30 of the Constitution and of the relevant provisions of

¹³⁷ The 1994 Constitution, *supra* note 95, art. 128, para.1.

¹³⁸ *On Constitutionality of the Enactment of the City Executive Council of Minsk “On the Order of Admission to Vocational Educational Establishments of Graduates of Schools, Situated in Minsk and in the Surrounding Areas”*, 10 October 1994, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-3/94), www.kc.gov.by/ru/main.aspx?guid=11873, visited on 16 April 2009.

the UNDHR and the ICCPR that guaranteed the freedom of movement within the territory of the State. In any event, the norms, denying persons equal access to the vocational establishments of Minsk, were declared contradicting to the Constitution and therefore invalidated. This time the Constitutional Court was fully consistent with the Basic Law's requirements: the unconstitutional norms were invalidated as of the date of their adoption – 19 May 1994.

Another case – the Court's Judgment of 24 October 1994¹³⁹ – concerned the issue of the rule of law and had several human rights implications. The Court was to test constitutionality of a provision of the Code of Administrative Offences (hereinafter, the Administrative Code), that empowered the authorities of regions and Minsk to introduce liability for non-execution of their local acts and to formulate new specific offences, other than those codified for the whole territory of the Republic. Besides inventing territory-specific offences, for the commitment of which individuals faced administrative punishment only within a respective territory, regional authorities could also increase penalties for Administrative Code's offences beyond the maximal limitations stipulated therein.

In this regard, the Constitutional Court reminded that the Parliament was the only legislative body in the country, so regional authorities were not allowed to bear the function of *de facto* amending the Administrative Code. The existence of different legal orders in different regions could not be acceptable in a unitarian State like Belarus. Besides, the Court established a violation of the equality clause of the Constitution, because there existed different punishments in different regions for the same offences, and regional authorities had an unlimited power to consider specific deeds as offences. The Court also found a violation of the constitutional right to receive complete, reliable and timely information: being published only in local media sources, such regional authorities' acts, introducing territory-specific offences or increasing penalties for the existing ones, could not be known to individuals coming from other regions.

Having established the mentioned contradictions between the Administrative Code provisions and the Constitution, the Court declared the norms in question to be unconstitutional and invalidated them starting from 1 December 1994. And again: we can witness the Court's inconsistency in adjudicating on the time of invalidation of unconstitutional provisions: these Administrative Code's norms should have been nullified from the moment of their adoption, for they clearly violated human rights and freedoms. On the contrary, the Constitutional Court's judgment, delivered on 24 October 1994, even postponed these norms' invalidation for more than a month and allowed the unconstitutional practices to continue during this time. Thus, the institution of constitutional control held a less strict position than it was obliged to. The Supreme Council (the Parliament), did not hurry to demonstrate its *bona fide*: the Administrative Code's unconstitutional

¹³⁹ *On Constitutionality of Article 5 of the Code of Administrative Offences*, 24 October 1994, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-5/94), <www.kc.gov.by/ru/main.aspx?guid=11853>, visited on 16 April 2009.

provisions were not amended before the very last day allowed for that by the Constitutional Court.

On another occasion¹⁴⁰, however, the Parliament showed more willingness to bring its legislation in accordance with the Constitution. On 1 September 1994, the Court initiated a proceeding on constitutionality of labour law regulations that limited by two years the time period, within which illegally dismissed employees could claim for compensation. Such time limitation could allegedly infringe labour rights, stipulated in the Constitution and in international human rights law. But before the Court decided the case in substance (it was at the stage of preparation for the trial on this issue), the Parliament had voluntarily nullified these potentially unconstitutional norms. Thus, the legislators chose to be on the safe side and escaped the possible critique by the Court. Satisfied with this gesture, the institution of constitutional control ended the proceeding.

The Constitutional Court's first decision¹⁴¹, dealing with political rights and freedoms, was delivered on 21 November 1994. The case concerned an amendment to a law, regulating the organisation of local government and self-government in Belarus. This amendment foresaw, among other things, the dissolution of organs of self-government of the primary territorial level, such as local communities of districts in towns, small towns and villages.

This novelty was strongly opposed by the Constitutional Court as the measure in question could restrict a number of political rights of the smaller territorial units' dwellers - namely the right to take part in the conduct of local public affairs - and could curtail their possibility to affect the solution of local daily problems. It is worth mentioning that the Constitutional Court based this conclusion not only on the national Constitution's norms and principles, but also referred to international law. In particular, it quoted the Preamble and Articles 3 and 4 of the European Charter of Local Self-Government, adopted by the Council of Europe and not binding for Belarus.

Unfortunately, the above reviewed Judgment proved to have little preventive effect: in 1995, another attempt to close down organs of self-government of the primary territorial level was undertaken, this time by the President. As a result, the Constitutional Court in its Judgment of 11 December 1995¹⁴² had to come back to this issue and reiterate its position

¹⁴⁰ *On Ending the Procedure on Constitutionality of the Norms of Labour Law Limiting the Time Framework for Compensation of Forced Absence from Work and Satisfaction of Other Monetary Claims by Workers in Case of Illegal Dismissal*, 14 December 1994, the Constitutional Court of the Republic of Belarus, Resolution (No. P-9/94), <www.kc.gov.by/main.aspx?guid=11813>, visited on 16 April 2009.

¹⁴¹ *On Conformity with the Constitution of the Law of 6 October 1994 "On Amendment of the Law of the Republic of Belarus "On Local Self-Government and Local Economies in the Republic of Belarus"*, 21 November 1994, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-8/94), <www.kc.gov.by/ru/main.aspx?guid=11823>, visited on 16 April 2009.

¹⁴² *On Conformity with the Constitution and Laws of the Republic of Belarus of the Edicts of the President of the Republic of Belarus of 19 September 1995 No. 383 "On Conduct of the Reform of Organs of Local Government and Self-Government", of 27 November 1995 No. 481 "On Adoption of the Template Structure of Local Administrations in Districts of Towns" and of 30 November 1995 No. 485 "On Amendment of the Temporary Statute of Local Administration"*, 11 December 1995, the Constitutional Court of the Republic of

on unconstitutionality of any measures to dissolve local self-government of primary level.

On 19 December 1994, the Court delivered the year's last human rights Judgment¹⁴³ that concerned the incorrect implementation in the national criminal legislation of Article 27 of the Constitution ("[n]o person shall be compelled to be a witness against himself, members of his family or close relatives; evidence obtained in violation of law shall have no legal force"), as well as of relevant international human rights provisions. Namely, the Criminal Code contained too high privileges (exemption from prosecution for misprision and false testimony in the course of criminal proceedings) for close relatives of suspected criminals.

According to the Court, the constitutional norm in question was interpreted over-broadly and allowed people to actively hinder justice and stay unpunished simply on the ground that they were close relatives to suspected criminals. This was a disproportionately high privilege, which could not be reconciled with the principle of equality of all persons before the law, as stipulated in the national Constitution and in such international instruments as the UNDHR and the ICCPR. At the same time, while close relatives enjoyed too many privileges, family members were forgotten to be mentioned at all, despite express constitutional requirements.

Thus, the Court revealed the inconsistency of the criminal legislation under review with a number of constitutional norms and principles: on the one hand, over-broad privileges were given to those people who did not deserve them; on the other hand, the Criminal Code's norms denied other important guarantees. As a result, the Parliament was ordered to shift such inconsistency and collisions and to bring the Criminal Code in full compliance with relevant human rights provisions.

Besides a number of binding decisions (judgments), the Court produced two important resolutions, containing human rights-related recommendations. In Resolution of 7 November 1994¹⁴⁴, the Court expressed its concerns with regard to the weak legislative guarantees on compensation of damage to victims of human rights violations in Belarus. According to the Court, such guarantees, initially provided in Article 21 of the Constitution, did not enjoy adequate elaboration in the subordinated legislation. When arguing for its position, the Court referred to relevant international standards in the sphere of compensation, namely to Article 9 of the ICCPR, that foresaw the enforceable right to compensation for victims of unlawful arrest or detention. Interestingly, the Court also referred to pertinent non-binding international sources¹⁴⁵ and foreign practices¹⁴⁶. As a

Belarus, Judgment (No. 3-25/95), <www.kc.gov.by/ru/main.aspx?guid=11653>, visited on 16 April 2009.

¹⁴³ *On Constitutionality of the Notice to Article 177 of the Criminal Code of the Republic of Belarus*, 19 December 1994, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-10/94), <www.kc.gov.by/ru/main.aspx?guid=11803>, visited on 16 April 2009.

¹⁴⁴ *On Improvement of the Legislation Regulating the Compensation of Damage Caused by Illegal Actions*, 7 November 1994, the Constitutional Court of the Republic of Belarus, Resolution (No. P-6/94), <www.kc.gov.by/main.aspx?guid=11843>, visited on 16 April 2009.

¹⁴⁵ The Constitutional Court drew attention to the 1983 European Convention on the Compensation of Victims of Violent Crimes (despite the fact that Belarus has never been a

result, the institution of constitutional control criticised the lack of compliance of the national legislation with the mentioned international standards in the sphere of compensation and urged the Parliament to improve the situation.

It is worth noting that this was one of the Court's earliest attempts to refer to international "soft law". Such a commendable gesture clearly demonstrated the institution's willingness to transfer remarkable international developments and foreign best practices into the national legal reality.

The other Resolution¹⁴⁷, delivered just two days later, contained very important conclusions on the problem of improper publication of legislation. The Court expressed its concerns regarding the pernicious practices, whereby acts containing provisions affecting human rights, freedoms or duties of individuals, obtained legal force without being published or otherwise promulgated. The Court was especially disturbed by some instances of punishing individuals for committing something "illegal", despite this "illegality" having never been established in a published act. Such practices led to the deprivation of individuals and legal persons of a chance to fully enjoy their rights and freedoms and to be protected by the Constitution, but contributed to arbitrariness by certain officials. In the light of the above-mentioned findings, the Court recommended that the highest state organs improved their legislation in the area and maintained the obedience of others by this legislation, in order to avoid human rights violations due to improper enactment of legally binding prescriptions.

In 1995, political tensions between the President and the Parliament started, which considerably affected the activities of the Constitutional Court. Instead of dealing with human rights issues as earlier, the Court was forced to concentrate more on political questions that the empowered subjects brought to it. Most of these cases were not human rights relevant, as they often concerned disputes as to the status or actions of various political bodies and officials. However, it is still possible to identify several decisions of human rights relevance.

For example, the case of 4 April 1995¹⁴⁸, initiated by a group of deputies of the Parliament, dealt with the alleged monopoly of the executive

Member State of the Council of Europe) and to the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

¹⁴⁶ Reference to the positive experience from the United States of America and England was made.

¹⁴⁷ *On Application in the Republic of Belarus of Normative Acts of State Bodies that Had Not Been Published or Otherwise Promulgated in Accordance with Law*, 9 November 1994, the Constitutional Court of the Republic of Belarus, Resolution (No. P-7/94), <www.kc.gov.by/main.aspx?guid=11833>, visited on 24 April 2009.

¹⁴⁸ *On Conformity with the Constitution of the Edict of the President of the Republic of Belarus of 4 August 1994 No. 19 "On Creation of the Office of Presidential Affairs" in Part of Handing over the Publishing House "The Belarusian House of Press" under the Jurisdiction of the Office of Presidential Affairs, of the Edicts of the President of the Republic of Belarus of 5 August 1994 No. 27 "On the Creation of the State National Tele-Radio Broadcasting Company of the Republic of Belarus" and of 28 September 1994 No. 128 "The Competence of the "State National Tele-Radio Broadcasting Company of the Republic of Belarus"*, 14 April 1995, the Constitutional Court of the Republic of Belarus,

branch of power over the mass media, which was in violation of Article 33 of the Constitution, prohibiting such monopolisation. The Court established a violation only in part. It ruled that it was inappropriate that the National Broadcasting Company, subordinated to the President, could simultaneously act in two capacities – as a central executive organ in the sphere of mass media and as a media company. Such combination, according to the Court, could lead to excessive domination of the company in question at the media market, in breach of the constitutional prohibition to monopolise the mass media, be it by the State, by public associations or by individuals.

On 27 October 1995, the Court decided a case¹⁴⁹ of more relevance to human rights, although not fully without any political context. The case was initiated by the Speaker of the Parliament, who complained about a presidential edict that prescribed to all organisations, both private and public, to replace employment agreements of unlimited duration with certain categories of employees (for example, with those that had reached the retirement age) by agreements for a fixed period. The employees' refusal to sign the fixed term agreements led to termination of employment.

The Court paid special attention to the fact that the provisions in question had become operative on the date of the adoption of the presidential edict, despite the express prohibition to validate normative acts affecting rights, freedoms and duties of individuals prior to the publication (or other form of promulgation) of such acts. The Constitutional Court also reminded that the Constitution guaranteed the right to work and the right to social welfare and protected individuals from discrimination, including on the ground of age. The institution of constitutional control also referred to relevant provisions of international human rights law, contained in the UDHR and the ICESCR, as well as in the ILO Convention No. 158 (non-binding for Belarus) and the ILO Recommendation No. 162. However, instead of exploring whether the inadequate limitations had been set on the realisation of these rights, the Court based its decision on the fact that the President had exceeded its powers by undertaking functions of a legislator. This was enough to declare certain provisions of the reviewed presidential edict unconstitutional and invalid starting from the date of the adoption of the edict in question.

While welcoming the invalidation of the edict's provisions, contradicting to the bill of rights, it is worth criticising the way the Court came to the conclusion: despite citing relevant national and international human rights provisions, the Court refused to employ the human rights based reasoning, but seemed to have decided the case only from the perspective of distribution of power. Such approach could cast doubt on the absence of bias of the Court and could create food for thinking that in the *ceteris paribus* situation, the parliamentary acts, although to a similar extent

Judgment (No. 3-12/95), <www.kc.gov.by/main.aspx?guid=11783>, visited on 24 April 2009.

¹⁴⁹ *On Conformity with the Constitution and Laws of the Republic of Belarus of the Edict of the President of the Republic of Belarus of 1 September 1995 No. 350 “On Some Questions Concerning the Regulation of Labour Activity and Social Welfare of Citizens”*, 27 October 1995, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-18/95), <www.kc.gov.by/main.aspx?guid=11723>, visited on 14 April 2009.

incompatible with constitutional human rights provisions, would be tolerated, as long as there was no formal defect in the law creation process.

Another case¹⁵⁰ dealing with both human rights and politics was decided on 8 November 1995. Again, the proceeding was initiated following a complaint by the Parliament's Speaker and again constitutionality of a presidential act was challenged. The presidential edict under review had suspended the activity of two specific trade unions (para. 1) and further ordered the Procurator-General to petition for the prohibition of their activities (para. 2). Moreover, the edict had established that the participation of political parties, trade unions or other associations in strikes would lead to prohibition of these entities (para. 3), while para. 4 of the edict suspended the immunities enjoyed by deputies of the Parliament and by members of local representative bodies.

Having referred to relevant international provisions on the freedom of association, contained in the UDHR, ICCPR and in the ILO Convention No. 87, as well as to the national legislation that possessed hierarchical supremacy over acts of the President, the Court found all the above mentioned provisions of the presidential edict to lack compliance with the Constitution and laws of the Republic of Belarus, and thus null and void as of the date of adoption of the act under review. The President was again found to have exceeded his powers.

On 19 April 1996, following the motion by the Procurator-General, the Constitutional Court considered a case¹⁵¹, dealing with the problem of denying certain categories of individuals a possibility to protect their labour rights in an independent and unbiased court of law. As a result of the proceeding, some norms of the national labour legislation, limiting the right to access justice and breaching the right to equality before the law, were found incompatible with the Constitution. The Constitutional Court based its findings not only on national constitutional provisions, but also took account of international standards set in the ILO Convention No. 111 and Recommendation No. 111.

On 28 May 1996, the Court produced a Judgment¹⁵² on the right to social security, where it declared unconstitutional the legal norms that prescribed the suspension of the payment of pensions to individuals in

¹⁵⁰ *On Conformity with the Constitution and Laws of the Republic of Belarus of the Edict of the President of the Republic of Belarus of 21 August 1995 No. 336 "On Some Measures Aimed at the Maintenance of the Stability and Legal Order in the Republic of Belarus"*, 8 November 1995, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-22/95), <www.kc.gov.by/main.aspx?guid=11683>, visited on 18 April 2009.

¹⁵¹ *On Conformity with the Constitution of Paragraph 2 of Article 2, of Paragraph 3 of Article 214 of the Labour Code of the Republic of Belarus, of Paragraph 1 of the Enactment of the Plenum of the Supreme Court of the Republic of Belarus of 17 June 1994 No.4 "On Some Questions of Judicial Application of Labour Legislation to Solving Legal Disputes"*, 19 April 1996, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-33/96), <www.kc.gov.by/main.aspx?guid=11553>, visited on 18 April 2009.

¹⁵² *On Conformity with the Constitution of the Republic of Belarus of Article 88 of the Law of the Republic of Belarus "On Pension Security" and of Article 56 of the Law of the Republic of Belarus "On Pension Security of the Military Servants, of Command and Ordinary Officers of the Interior"*, 28 May 1996, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-36/96), <www.kc.gov.by/main.aspx?guid=11523>, visited on 10 May 2009.

detention or serving a sentence of imprisonment. The Court established that such deprivation of pension amounted to an additional punishment and also put defendants of imprisoned pensioners under unfavourable conditions. These unconstitutional norms were declared null and void as of 1 June 1996. This was yet another example of the Court's reluctance or inability to nullify unconstitutional norms starting from the day of their enactment.

The Judgment of 25 June 1996¹⁵³ represents the first instance of the Constitutional Court protecting the right to housing. The Court stated that the physical absence of tenants (over the period of six months) at their address of residence could not lead to deprivation of housing rights with the further transfer of the released accommodation to other persons in demand. Such practices would violate the right to housing, the freedom of movement, as well as the equality principle and the prohibition of discrimination. To declare the provision in question unconstitutional and null and void, it was enough for the Court to rely on relevant national constitutional provisions only.

Two months later, the Court delivered another Judgment¹⁵⁴, concerning, among others, the right to housing. The institution of constitutional control had to check constitutionality of the national legislation prescribing that only citizens, who were permanently residing in Belarus, were entitled to purchase accommodation on the territory of the country. The acts under consideration also forbid the sale of accommodation to citizens residing outside the locality, where the accommodation was situated.

According to the Court, the rules under consideration were incompliant with the prohibition of discrimination and with the right to property and infringed the freedom of movement and the freedom to choose one's place of residence, as recognised in the national and international bills of rights. To come to this conclusion, the Court implicitly weighed the mentioned rights and freedoms, on the one side, with the right to housing on the other. It found that the overall shortage of accommodation in the country (the impossibility of some individuals to enjoy their right to housing) could not set limitations on the enjoyment by other individuals of their right to property and the freedom of movement.

This Judgment was not implemented by the relevant authorities, so the Ministry of Justice requested the Court to provide an official interpretation of what it had meant by its Judgment of 27 June 1996. Such interpretation was given in the Resolution of 25 March 1997¹⁵⁵, where the Court basically

¹⁵³ *On Conformity with the Constitution of Article 70 of the Housing Code of the Republic of Belarus*, 25 June 1996, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-38/96), <www.kc.gov.by/main.aspx?guid=11503>, visited on 20 May 2009.

¹⁵⁴ *On Conformity with the Constitution and Laws of the Republic of Belarus of the Enactment of the Supreme Council of 11 June 1993 “On the Order of Sale of Flats (Houses) in the Republic of Belarus” and of the Temporary Regulation “On the Order of Sale of Flats (Houses) in the Republic of Belarus”, Approved through the Enactment of the Council of Ministers of 31 August 1993 No. 589*”, 27 June 1996, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-39/96), <www.kc.gov.by/main.aspx?guid=11493>, visited on 15 May 2009.

¹⁵⁵ *On Interpretation of the Judgment of the Constitutional Court of the Republic of Belarus of 27 June 1996 “On Conformity with the Constitution and Laws of the Republic of Belarus*

reiterated its findings, but this time sounded not as straightforward. For instance, the Court noted that certain limitations on the purchase of accommodation in the capital city Minsk could be set in the legislation. Thus, the Court in fact amended its own earlier Judgment by ruling that the capital city's special status could justify restrictions on a number of fundamental rights.

The above presented compilation of cases shows the level of attention that the Belarusian Constitutional Court paid to the human rights problematics during the first stage of its existence. Let us conduct a general evaluation of the Constitutional Court's capacity at this period and see if the Court's activity in the field of human rights lived up to our expectations.

4.4 Evaluation of the Capacity and Human Rights Activity of the Created Constitutional Court

As we can see, the 1994 Constitution of independent Belarus absorbed practically all progressive ideas, contained in the preceding attempts to establish the national institution of constitutional control. The created Constitutional Court was empowered to conduct control over conformity of any normative act not only with the national Constitution, but also with international obligations of the Republic of Belarus, including those under binding international human rights instruments. Importantly, the Court got the right to directly invalidate the legislation found unconstitutional. In addition, the power to appeal to the highest state organs with proposals to introduce legislative changes and the right to evaluate the state of constitutional legality became additional tools at the Court's disposal to influence the human rights situation in Belarus.

The 1994 Constitution foresaw some guarantees of independence for the institution of constitutional control and its members, such as the prohibition of any external pressure and influence on the Court's activity and the members' immunities against criminal prosecution, while some additional guarantees were envisaged in the 1994 Law on the Constitutional Court. There was some disbalance, however, in the way the Constitutional Court was formed: all members were elected by the Parliament with no participation of other branches of power in the process.

Some critique could also be expressed with regard to the relatively narrow circle of subjects, empowered to initiate constitutional control, and the lack of feasible access of courts of law and ordinary citizens to the mechanism under consideration. However, these imperfections could be to a certain extent neutralised by the Court's power to initiate cases at its own discretion, provided this power was used carefully.

*of the Enactment of the Supreme Council of 11 June 1993 “On the Order of Sale of Flats (Houses) in the Republic of Belarus” and of the Temporary Regulation “On the Order of Sale of Flats (Houses) in the Republic of Belarus”, Approved through the Enactment of the Council of Ministers of 31 August 1993 No. 589”, 25 March 1997, the Constitutional Court of the Republic of Belarus, Resolution (No. P-55/97),
<www.kc.gov.by/main.aspx?guid=11343>, visited on 15 May 2009.*

In general, the model of constitutional control under the 1994 Constitution not only absorbed, but also significantly elaborated and complemented, the total majority of positive achievements of the previous documents on the matter. Nevertheless, there still was room for strengthening the Constitutional Court's status: A. Vashkevich and M. Pastukhou characterised the institution's general competence as "considerably narrower comparing to constitutional courts in the majority of European States", because "[t]he Court was not empowered ... to provide [official] interpretation of the Constitution, to consider constitutional complaints from citizens".¹⁵⁶ Hence, there were grounds to expect the further progressive development of the capacity of the national institution of constitutional control with a view to enable the effective accomplishment of the Court's mission in the field of protection and promotion of human rights and freedoms.

Turning to the Court's activity during the first stage of its existence, considerable part of its jurisprudence dealt with human rights issues. According to A. Vashkevich and M. Pastukhou, "[f]or the first time in the domestic history of constitutionalism, a state organ demonstrated its commitment to serve the Constitution and protect human rights and freedoms of a citizen and a human being".¹⁵⁷ Importantly, the overwhelming majority of decisions, produced by the institution of constitutional control during the period under consideration, were legally binding judgments (see Table 1 in Supplement). The majority of human rights decisions contained references to international human rights law, sometimes also to documents that were not binding for Belarus. However, in doing so the Court did not refer to international and foreign sources that would contain interpretation of international human rights standards.

Symbolically, the Constitutional Court itself initiated a big number of human rights cases, especially in the beginning (see Table 2 in Supplement). The empowered subjects started using their right, or carrying out their obligation, to refer cases to the Constitutional Court only after 1995, but the majority of these motions had political background and they were very seldom of direct relevance to human rights and freedoms. Therefore, in the absence of willingness of the empowered subjects to raise human rights issues, basically, it was the Court alone that was driving the process of refining the national legal system from normative acts and separate regulations impeding the full realisation of human rights and freedoms.

We have to admit that, generally speaking, the Constitutional Court of the first composition failed to pay attention to the whole variety of human rights problems: firstly, because in the time of political tensions the Constitutional Court's attention was persistently distracted to political issues. Secondly, the institution of constitutional control seems to have sacrificed its willingness to be more active in the field of human rights in exchange of preserving its fragile legitimacy.

Besides, in the process of deciding human rights cases the Constitutional Court sometimes allowed itself too much conservatism and

¹⁵⁶ A. Vashkevich, M. Pastukhou, *supra* note 104, section "The Competence of the Constitutional Court".

¹⁵⁷ *Ibid.*, section "The Analysis of Some Judgments of the Court of the First Composition".

acted with some extra precaution. For example, on some occasions the institution of constitutional control was not sufficiently strict about the time of invalidation of unconstitutional normative acts or based its findings on the revealed defects of the norm creation process rather than on the substance of unconstitutional provisions violating human rights.

The explanation to the mentioned and other imperfections of constitutional control lies in the circumstances, in which this mechanism operated. Of course, it would be too ambitious to expect an easy start for the Constitutional Court that, according to a metaphorical observation by G. Vasilevich, “was born in wedlock, [but] did not receive any “inheritance” in the sense of the case-law from the Committee of Constitutional Supervision and [therefore] had to create traditions of control activity by itself”.¹⁵⁸

Nevertheless, notwithstanding the absence of the fundament to rely on, the created institution of constitutional control showed rather promising results in pioneering positive changes of the national legislation and practices. According to A. Vashkevich and M. Pastukhou, “already in the first years of its activity the Court defined its place in the political system of the society”¹⁵⁹ and “made a considerable contribution to the cause of the realisation of constitutional rights and freedoms”.¹⁶⁰ This opinion is difficult to disagree with, even despite all imperfections of constitutional control at the initial stage.

The belief was alive that the named shortcomings would be overcome in future, with gaining experience, self-confidence, political weight and authority. Below follows a review and evaluation of the further developments in the Court’s competence and jurisprudence.

¹⁵⁸ G. Vasilevich, *supra* note 3, chapter 1, para. 2.

¹⁵⁹ A. Vashkevich, M. Pastukhou, *supra* note 104, section “History”.

¹⁶⁰ *Ibid.*, section “The Analysis of Some Judgments of the Court of the First Composition”.

5 Constitutional Amendment of 1996 and the New Face of Constitutional Control

One step forwards - two steps back.
Vladimir Lenin

5.1 Constitutional Crisis of 1996 and Amendment of the 1994 Constitution

In 1996, President Lukashenka, declared his intention to hold a referendum aimed at substantial amending of the 1994 Constitution. In fact, the President proposed a totally new Constitution that foresaw dramatic redistribution of powers of the main political actors. And it was not surprising that the proposed amendments seriously affected the status of the Constitutional Court.

President Lukashenka had reasons to dislike the Court. According to A. Vashkevich and M. Pastukhou, this official was the “main violator of the Constitution of the Republic of Belarus”, as “his edicts often replaced existing laws and infringed constitutional rights and freedoms of citizens”. As a result, “[b]y November 1996, the Constitutional Court had declared 17 presidential edicts ... to be unconstitutional (fully or in part)”.¹⁶¹

The distinctive feature of the created Constitutional Court, as we know, was its power to start cases at its own discretion, without a request from the empowered subjects. A. Vashkevich and M. Pastukhou observed, that “especially in the beginning of its activity, the Constitutional Court quite frequently used its right to initiate cases on its own, which created grounds for accusing the Court of “legal activism” and, undoubtedly, was one of the reasons that inspired Lukashenka to declare the constitutional reform”.¹⁶² Besides, the President saw a certain political threat posed by the institution of constitutional control: according to Article 104 of the 1994 Constitution, following “the initiation by 70 deputies of the Supreme Council of an impeachment procedure against the President ... the Constitutional Court provided its expert advice on whether the President had violated the Constitution”.¹⁶³ And such an impeachment procedure had been actually initiated in autumn 1996...

In these circumstances, President Lukashenka had a natural desire to gain more control over the Constitutional Court. Below follows an overview of the constitutional amendments affecting the institution of constitutional control.

¹⁶¹ A. Vashkevich, M. Pastukhou, *supra* note 104, section “History”.

¹⁶² *Ibid.*, section “The Competence of the Constitutional Court”.

¹⁶³ The 1994 Constitution, *supra* note 95, art. 104.

5.2 The Changed Status of the Constitutional Court Following the 1996 Reform: Stage 2 (1997 – 2008)

One of general changes introduced by the 1996 Reform was the more solid confirmation of the judicial nature of the Constitutional Court. In contrast with the preceding constitutional text, where the regulations on the Constitutional Court consisted of eight articles placed in a separate section, the new Constitution (hereinafter, the 1996 Constitution¹⁶⁴) incorporated only one article (Article 116), placed in the end of Chapter 6 “Courts”.

Such reconfiguration gave grounds for some optimistic comments by M. Russel: “[w]hatever may have been the intention of this change, a positive result ... is that it has enabled the Constitutional Court to identify a wider jurisdiction than that conferred on it by Article 116 in decisions made by it in relation to Article 60”.¹⁶⁵ This Article 60 guaranteed the access to judicial protection of ones rights and freedoms, and M. Russel hoped that attributing the Constitutional Court to the judicial system automatically meant the possibility of using this institution as a mechanism of judicial protection of human rights and freedoms. In other words, the scholar was optimistic in that the judicial nature of the Constitutional Court implied its possibility, if not responsibility, to receive and address individual complaints.

Talking about substantial novelties, introduced in the amended Basic Law and aimed at altering the status of the institution of constitutional control and the conditions of its operation, such novelties can be divided in the following two blocks. Firstly, different regulations concerning the composition of the Constitutional Court and its judges’ immunities appeared. Secondly, the circle of subjects entitled to initiate constitutional control was considerably changed.

5.2.1 Changes Related to the Constitutional Court’s Composition and Guarantees of Independence

We need to recall that under the 1994 Constitution the institution of constitutional control was composed of 11 members, all appointed by the Parliament. In contrast, the 1996 Constitution prescribed that the

¹⁶⁴ Constitution of the Republic of Belarus [the 1996 Constitution], adopted on 15 March 1994 (as amended by the republican referendum on 24 November 1996), art. 116, para. 2, <www.kc.gov.by/en/main.aspx?guid=13235>, visited on 12 April 2009. The term “the 1996 Constitution” is used only for convenience, because formally it was not a separate Constitution, but still the 1994 Constitution. By using a different term we not only distinguish the two documents, but also underline the common opinion that the scale of amendments to the 1994 Constitution was broad enough to give grounds to consider that *de facto* a new Basic Law was adopted in 1996.

¹⁶⁵ M. Russel, *The Separation of Powers and the Republic of Belarus*, p. 4, <[www.venice.coe.int/docs/2003/CDL-JU\(2003\)023-e.pdf](http://www.venice.coe.int/docs/2003/CDL-JU(2003)023-e.pdf)>, visited on 1 May 2010.

Constitutional Court was formed of 12 judges.¹⁶⁶ The term of their mandate – 11 years – remained unchanged, but the age limit was extended by 70 years.¹⁶⁷

Under the 1996 Constitution, the Constitutional Court had to be formed in a significantly different manner: “[s]ix judges of the Constitutional Court shall be appointed by the President of the Republic of Belarus and six elected by the Council of the Republic” and “[t]he Chairperson of the Constitutional Court shall be appointed by the President with the consent of the Council of the Republic”¹⁶⁸, the Council of the Republic being the upper house of the yet a two-chamber-Parliament. Thus, unlike under the previous models of constitutional control where, as we remember, staffing of the Constitutional Court was conducted exclusively by the legislature, under the 1996 Constitution the Parliament lost this monopolistic privilege.

In general, it is worth welcoming the participation of two branches of power (the President and the upper house of the Parliament) in the formation of the institution of constitutional control. However, some doubts remain as to the real balance. First of all, we need to bear in mind Article 91 of the Constitution: “[e]ight members of the Council of the Republic [out of 64 members in total] shall be appointed by the President of the Republic of Belarus”.¹⁶⁹ Therefore, the President appoints one eights of the upper house and has a group of inherently loyal deputies within this body.

Even more alarming is the fact that under the 1996 Constitution the President received a power¹⁷⁰ to unilaterally dismiss (without any consent from the Parliament needed) the Chairperson or any other judge of the Court, including those elected by the legislature. The mentioned President’s power to unilaterally withdraw judges could be seen as a strong tool of indirect influence on the Court’s activity and considerably devaluated the seeming pluralism of the process of staffing the institution of constitutional control.

As for guarantees of the Court’s independence, the 1996 Constitution no longer contained the previous formula, according to which any “[d]irect or indirect influence on the Constitutional Court or its members in connection with their exercising constitutional control shall be impermissible and shall involve liability in accordance with law”.¹⁷¹ Instead, the amended Basic Law referred us to a more general formula of Article 110: “[i]n administering justice judges shall be independent and subordinate to law alone. Any interference in judges' activities in the administration of justice shall be impermissible and liable to legal action”.¹⁷² In fact, this later formula was in the 1994 text and was initially designed for judges of ordinary courts of law, so the 1996 Constitution simply extrapolated it also on the Constitutional Court’s judges. To M. Russel, this new formula

¹⁶⁶ The 1996 Constitution, *supra* note 164, art. 116, para. 2.

¹⁶⁷ *Ibid.*, art. 116, para. 3.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, art. 91, para. 2.

¹⁷⁰ *Ibid.*, art. 84, para. 11.

¹⁷¹ The 1994 Constitution, *supra* note 95, art. 126, para. 4.

¹⁷² The 1996 Constitution, *supra* note 164, art. 110.

“[c]ertainly ... seems less comprehensive than the special protection which was given to the Constitutional Court by the 1994 Constitution but deleted by the 1996 text”.¹⁷³ Indeed, the term ‘interference’ may be narrower than the earlier formula ‘direct or indirect influence’.

In general, M. Russel finds that “[t]he deletion of that very positive provision [prohibiting direct or indirect influence on the Constitutional Court or its members] 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 [Constitutional Court’s] judges to decisions of the legislature which could adversely affect their salaries or other conditions of office...”¹⁷⁴ Indeed, the Constitutional Court’s judges’ guarantees of independence did not appear in the text of the 1996 Constitution. On the contrary, even the under-constitutional legislation on constitutional control – the Law “On the Constitutional Court of the Republic of Belarus” (as amended on 6 February 1997 and on 7 July 1997, hereinafter the 1997 Law on the Constitutional Court)¹⁷⁵ contained less comprehensive regulations in this regard, comparing to the 1994 Law on the Constitutional Court. Namely, Article 25 of the 1997 Law referred only to material guarantees of independence, which were decided by the President and could not be lower than the ones of judges of ordinary courts of law.¹⁷⁶ In this regard, A. Vashkevich and M. Pastukhov regret that “in terms of financial maintenance they [Constitutional Court’s judges] appeared at the same level as judges of ordinary courts of law”¹⁷⁷, which is considerably less generous comparing to the previous regulations on the matter.

As for immunities, enjoyed by the Court’s judges, they were deleted from the constitutional text and remained only in the 1997 Law on the Constitutional Court¹⁷⁸. Therefore, the judges’ immunities lost their high constitutional status, but were stipulated only in the under-constitutional legislation and, therefore, could be altered more easily (given that the procedure of amending the Constitution would be more complicated by definition).

If to compare the texts of this law and the 1994 Constitution, we see that the substance of immunities remained practically unchanged, except for the only difference: now it was the President, who was entitled to give consent to “criminal prosecution, arrest or other forms of deprivation of liberty with regard to judges of the Constitutional Court”.¹⁷⁹ It can be seen as a lower guarantee with higher risk of arbitrariness, given that now a single person took the decision, while under the previous text the immunity of the Court’s judges could be lifted only by the Parliament as a collective organ.

¹⁷³ M. Russel, *supra* note 165, p. 5.

¹⁷⁴ Ibid.

¹⁷⁵ Law of the Republic of Belarus “*On the Constitutional Court of the Republic of Belarus*” of 30 March 1994, No. 2914-XII (as amended per 7 July 1997) [the 1997 Law on the Constitutional Court], published electronically in the legal database “Consultant”.

¹⁷⁶ *Ibid.*, art. 25.

¹⁷⁷ A. Vashkevich, M. Pastukhov, *supra* note 104, section “Changes of the Legal Status of the Constitutional Court under the New Version of the Constitution”

¹⁷⁸ The 1997 Law on the Constitutional Court, *supra* note 175, art. 23.

¹⁷⁹ *Ibid.*, art. 23, paras. 2,3.

Now let us look at the block of novelties concerning the procedure of initiation of constitutional control.

5.2.2 Changes Related to the Procedure of Initiation of Constitutional Control

The second block of changes affected the procedure of initiating constitutional control - the 1996 Reform introduced absolutely new rules of in this regard. On the one hand, the Constitutional Court got deprived of its right to start cases at its own discretion and, simultaneously, the circle of subjects empowered to initiate constitutional control was narrowed down. On the other hand, the mechanism of access of non-empowered subjects to constitutional justice slightly improved during the stage under review. Let us take a closer look at these innovations.

5.2.2.1 Deprivation of the Constitutional Court of the Power to Initiate Cases at Its Own Discretion

One of the major and expected consequences of the constitutional reform of 1996 was the deprivation of the Constitutional Court of its earlier power to review cases at its own initiative. Many Belarusian scholars found this step justifiable. For instance, V. Podgrusha welcomed the fact that “[a]t present the Court is neither blamed for having political interest and bias, nor can [the responsibility for] the state of constitutional legality be attributed to [the institution in question]”.¹⁸⁰

According to G. Vasilevich, the deprivation of the Constitutional Court of its right to start cases at its own discretion brought the Belarusian model of constitutional control in line with common European practices, where “institutions of constitutional control usually do not have such a right, because there always exists temptation ... to interfere in this or that [political] conflict”.¹⁸¹ This scholar is of the opinion that “the Constitutional Court [of the first composition] had failed to reasonably use its power to initiate the proceeding at its own discretion”,¹⁸² because, according to his estimations, “in 1995 and 1996 every third and every second case respectively was initiated at the Constitutional Court’s discretion”.¹⁸³ Moreover, G. Vasilevich had a fear that the principle of adversarity of judicial procedure was in jeopardy, because in cases initiated by the institution of constitutional control “the ‘adversarity’ was between the Court and the organ that had adopted the [challenged] normative act”.¹⁸⁴

¹⁸⁰ V. Podgrusha, *Issues of Constitutional Control in the Republic of Belarus*, [Подгруша Б. Вопросы конституционного правосудия в Республике Беларусь], <concourt.am/armenian/con_right/4-10-2000/Podgrusha.htm>, visited on 26 April 2010.

¹⁸¹ G. Vasilevich, *supra* note 97, chapter “Constitutional Development of the Republic of Belarus”, section “The Experience of Application of the New Constitution”.

¹⁸² *Ibid.*

¹⁸³ G. Vasilevich, *The Constitutional Court of the Republic of Belarus* [Василевич Г. Конституционный Суд Республики Беларусь], section II, <www.concourt.am/hr/ccl/vestnik/t6.htm>, visited on 14 April 2009.

¹⁸⁴ *Ibid.*

It is difficult to neglect the importance of the principle of adversarity in a judicial proceeding. Nor can one totally exclude the possibility of the Constitutional Court having predetermined bias in some cases that it had reviewed at its own initiative during the period of 1994 - 1996. However, it is incorrect to ascertain that the institution of constitutional control used its power arbitrarily. Firstly, it is difficult to imagine that the Constitutional Court spontaneously selected human rights issues to be examined: the majority must have been brought to the Court's attention by citizens or other non-empowered subjects (see Table 1 in Supplement).

Secondly, we need to remember that human rights cases are specific in that their fair resolution is beneficial for all. One can hardly find grounds to blame the Court for pursuing its own political or whatever other interest when trying human rights cases: in fact, normative acts of both the legislative and the executive branches of power, if they violated human rights and freedoms, were recognised unconstitutional without any discrimination whatsoever. No scholar ever questioned the significance of the Court's human rights impact at the first stage of its existence (1994 - 1996), when the institution of constitutional control had possessed the possibility to intervene in instances of obvious conflict of unconstitutional normative acts with existing human rights standards and did so at its own discretion, which resulted in the delivery of a considerable number of binding judgements in the field of human rights.

It goes without saying that the deprivation of the Constitutional Court of its power to initiate cases could have a serious detrimental affect on the institution's mission of improving the human rights situation in Belarus. Since the 1996 Reform, the level of the Constitutional Court's engagement with human rights issues has become dependent on the eagerness of the empowered state officials and bodies to actively seek constitutional justice. A very risky dependence - given the fact that any finding of a violation of human rights is a decision against the State, which naturally undermines the motivation of the empowered subjects, irrespectively of their political affiliation, to supply the Court with human rights issues. The latter fear is even more valid in the light of the fact that the 1996 Constitution listed a narrower circle of subjects, empowered to initiate constitutional control.

5.2.2.2 Narrowing the Circle of Subjects Empowered to Initiate Constitutional Control

The 1996 Constitution named only six subjects that were entitled to seek constitutional control: the President, each house of the Parliament, the Supreme Court, the Supreme Economic Court and the Council of Ministers.¹⁸⁵ Comparing to the previous constitutional arrangements, the 1996 Constitution added a new subject of initiation – the Council of Ministers (the Government). At the same time, the Procurator-General and parliamentary officials and structures (the Speaker of the Parliament, the Parliament's permanent committees, a group of 70 parliamentarians), who under the 1994 Constitution had been among the subjects empowered to invoke the Constitutional Court, were now deprived of such power. As a

¹⁸⁵ The 1996 Constitution, *supra* note 164, art. 116, para. 4.

result, the potential of the executive branch of power to seek constitutional justice considerably increased, mainly at the expense of the legislature.

In part of narrowing the list of empowered subjects, the 1996 Reform did not earn unanimous praise from scholars. Having compared the practice of initiating constitutional control before and after the 1996 Reform, V. Podgrusha, for instance, admitted that “the amendment of the constitutional norm [enlisting the circle of subjects empowered to initiate constitutional control] was not circumspect enough”.¹⁸⁶ Indeed, it was illogical to deprive the Procurator-General of the right to address the Constitutional Court. According to the Constitution, this official and his office “shall be entrusted to supervise the strict and unified implementation of the [legislation]”,¹⁸⁷ that is to maintain the rule of law in general and constitutional legality in particular. Therefore, the closer interaction between the Procurator's Office and the Constitutional Court would rather be welcomed than circumcised. For V. Podgrusha, “[t]he necessity of restoring the Procurator-General's right to initiate constitutional control is so obvious that it should not be subject to any discussion”.¹⁸⁸

G. Vasilevich also finds it prudent to give back the Procurator-General the right to request examination of normative acts by the Constitutional Court, at least in the light of the fact that “the Procurator's Office often serves as the first institution where citizens seek protection of their rights”.¹⁸⁹

Since 1996, the Constitutional Court itself has undertaken a number of attempts to convince the legislator of the necessity to re-empower the Procurator-General with the right to seek constitutional justice. For instance, in its Message on the State of Constitutional Legality in the Republic of Belarus in 1997, the Constitutional Court stressed that “there would be a good reason to amend [the relevant acts of legislation] ... according to which the Procurator-General of the Republic of Belarus would be entitled to propose the examination of constitutionality of those normative acts, the application of which, in his opinion, infringed or violated constitutional rights of human beings and citizens or created obstacles to their realisation”.¹⁹⁰ The Court sounded similar calls also in its Messages on the

¹⁸⁶ V. Podgrusha, *supra* note 180.

¹⁸⁷ The 1996 Constitution, *supra* note 164, art. 125.

¹⁸⁸ V. Podgrusha, *supra* note 180.

¹⁸⁹ G. Vasilevich, *The Activity of the Constitutional Court of the Republic of Belarus Related to Protection of Citizens' Rights and Freedoms* [Василевич Г. Деятельность Конституционного Суда Республики Беларусь по защите прав и свобод граждан], <www.evolutio.info/index.php?option=com_content&task=view&id=258&Itemid=49>, visited on 14 April 2009.

¹⁹⁰ *Message on the State of Constitutional Legality in the Republic of Belarus in 1997*, section II, 11 February 1998, the Constitutional Court of the Republic of Belarus, Resolution (No. P-62/98), <www.kc.gov.by/main.aspx?guid=11283>, visited on 20 February 2011.

State of Constitutional Legality in the Republic of Belarus in 2000¹⁹¹, 2001¹⁹² and 2006¹⁹³. However, these calls have never been heard.

Similar critiques, but so far at the academic level only, attracted the exclusion of the Speaker of the Parliament, the Parliament's permanent committees, and a group of 70 parliamentarians from the list of subjects empowered to seek constitutional control. As regrets M. Russel, "under the 1996 text the only opportunity which the Parliament now has of invoking the Court is through a majority of either House". The scholar considers it as "a serious diminution of the democratic process because it prevents a minority of members of Parliament from seeking a ruling from the Court, and [it is] ... minorities ... who are most in need of the protection of the courts".¹⁹⁴

Indeed, the post-reform threshold, whereby only a house of the Parliament by the majority of votes was empowered to seek constitutional justice, seems to be too high. It is especially true for cases, where it is an act of the Parliament that attracts certain doubts as to its constitutionality (if the house voted to pass a law, there is relatively little chance that it will later vote to bring this law to scrutiny of the Constitutional Court). In this context, it would be more prudent to empower every parliamentarian to approach the Court, or at least, as V. Podgrusha proposes, "a group of deputies (for example, 30 persons), who would be able to challenge laws they voted against (or refrained from vote) due to doubts of these laws' constitutionality". For this scholar it would be as logical to keep the possibility for the Parliament's permanent committees to initiate constitutional justice, as it would enable such committees "to control, through the direct interaction with the Constitutional Court, the state of constitutional legality within their branch of legislation".¹⁹⁵

The need to extend the Parliament's cooperation with the Constitutional Court is supported also by G. Vasilevich, who argues that "[o]ne of the most important indicators of a democratic and accessible constitutional control is the right ... of the Parliamentary minority, for instance, of one fifth or one third of the Parliament (or its houses) to approach the Constitutional Court".¹⁹⁶ In any event, there would be no harm if the procedure, by which parliamentarians or parliamentary structures could seek constitutional justice, would be simpler than it currently is. In the aftermath of the 1996 Reform, the executive branch of power, namely the President and the Government, have enjoyed considerably higher potential

¹⁹¹ *Message on the State of Constitutional Legality in the Republic of Belarus in 2000*, section II, 22 January 2001, the Constitutional Court of the Republic of Belarus, Resolution (No. P-105/2001), <www.kc.gov.by/main.aspx?guid=3963>, visited on 20 February 2011.

¹⁹² *Message on the State of Constitutional Legality in the Republic of Belarus in 2001*, section II, 12 February 2002, the Constitutional Court of the Republic of Belarus, Resolution (No. P-138/2002), <www.kc.gov.by/main.aspx?guid=10543>, visited on 20 February 2011.

¹⁹³ *Message on the State of Constitutional Legality in the Republic of Belarus in 2006*, 11 January 2007, the Constitutional Court of the Republic of Belarus, Resolution (No. P-198/2007), <www.kc.gov.by/main.aspx?guid=9843>, visited on 20 February 2011.

¹⁹⁴ M. Russel, *supra* note 165, p. 6.

¹⁹⁵ V. Podgrusha, *supra* note 180.

¹⁹⁶ G. Vasilevich, *supra* note 11.

of approaching the Constitutional Court, although statistically it is the executive that produce the biggest part of the legislation and, therefore, it is their acts that are more likely to be in conflict with constitutional and international human rights standards.

Against a background of considerable changes related to the circle of subjects empowered to initiate constitutional control (favouring the executive branch and considerably restricting a number of other political actors), the 1996 Reform changed nothing with regard to accessibility of constitutional control to the judicial branch of power. Only the Supreme Court and the Supreme Economic Court still had the right to directly address the Constitutional Court, while all other courts of law had to pass their requests through a number of levels within the judicial system - up to the very top of the hierarchy.

5.2.2.3 Accessibility of Constitutional Control to Individuals and Other Non-Empowered Subjects

In general, the 1996 Reform's novelties concerning the circle of subjects entitled to initiate constitutional control were not of progressive nature, as they, according to A. Vashkevich and M. Pastukhou, excluded those subjects that "had earlier been most active in approaching [the Court]".¹⁹⁷ In combination with the deprivation of the Constitutional Court of the right to start cases at its own initiative, these changes could mean a gap within the "cases-supply-chain", which could in turn lead to the Court's inability to address human rights problems existing in Belarus.

Luckily, an important modification of the Constitutional Court's capacity at the second stage of its existence took place, this modification improving the accessibility of constitutional justice to individuals and other non-empowered subjects. Actually, this novelty was not foreseen by the 1996 Reform, but must have logically flowed from this reform's deprivation of the Constitutional Court of its earlier power to start cases at its own initiative. So that is how it all started.

In its Message on the State of Constitutional Legality in the Republic of Belarus in 1997, the Constitutional Court referred to Article 40 of the Constitution, containing the right to address personal or collective appeals to state bodies and the corresponding obligation of state bodies to examine such appeals and provide substantive responses thereto. Being itself a state body, the Constitutional Court was also obliged to consider and address all individual complaints it received. However, having no right to start cases at its discretion, the institution of constitutional control had to use other forms of handling individual complaints: applicants received clarifications on the substance of their claims, while a number of issues were further passed to relevant state bodies.¹⁹⁸

Later, in its Resolution of 17 March 1998 "On the Work of the Constitutional Court of the Republic of Belarus on Citizens' Appeals Lodged with the Court during the Year 1997", the institution of

¹⁹⁷ A. Vashkevich, M. Pastukhou, *supra* note 104, section "Changes of the Legal Status of the Constitutional Court under the New Version of the Constitution"

¹⁹⁸ *Message on the State of Constitutional Legality in the Republic of Belarus in 1997*, *supra* note 190, section II.

constitutional control stressed the need to “consider the work with citizens’ appeals as an important direction of the Court’s activity that enables the full enjoyment by citizens of their constitutional rights and freedoms, [helps] to reveal [normative] acts constitutionality of which needs verification, to improve the legislation, to maintain the legality in law creation and law enforcement”.¹⁹⁹ The Court’s willingness “to improve citizens’ ability to protect their rights and freedoms” was so strong that this institution, according to G. Vasilevich, “sent in a proposal to get empowered to initiate the proceeding … when requests [to conduct constitutional control] emanated from citizens, whose rights and freedoms in a concrete case had been violated, and under the condition of the exhaustion of all other means of legal protection”.²⁰⁰

However, the legislator did not seem to rush implementing the Constitutional Court’s aspirations concerning the introduction of the full-weight mechanism of constitutional complaint. In this situation, the Constitutional Court chose quite a proactive solution: as of 1999, it started addressing some well-founded individual complaints in the form of non-binding resolutions (in contrast with binding judgments, delivered following formal motions by the empowered subjects).

It is worth noting that this Court’s “improvisation” had no legal basis, other than the above quoted Article 40 of the Constitution. It was only on 11 June 2001 that the Court, “[a]iming at fuller realisation of certain provisions of the Constitution, at further development of constitutional justice...”²⁰¹, supplemented its own Rules of Procedure with Article 43-1, providing that “[a]ppeals of other subjects to the Constitutional Court ... may be examined, at the Constitutional Court’s discretion, in the oral or written proceeding...”.²⁰²

In general, the self-announced competence of the Constitutional Court (probably the only instance of “positive usurpation” of power by the institution in question) to address individual complaints resulting in the delivery of non-binding resolutions was a huge step forward. However, the Constitutional Court could have gone further: instead of acting in accordance with Article 40 of the Constitution (appeals to a state body), the institution of constitutional control could have referred to a more specific and pertinent Article 60 of the Constitution (the right to judicial protection of ones rights and freedoms). With reference to the mentioned constitutional norm, A. Kochanskaya stresses that “[b]ecause the actual Constitution qualifies the Constitutional Court as part of the judicial system, the citizens’ right to judicial protection should [automatically] include the right to direct appeals to the Constitutional Court”.²⁰³

¹⁹⁹ *On the Work of the Constitutional Court of the Republic of Belarus on Citizens’ Appeals Lodged with the Court during the Year 1997*, para. 2, 17 March 1998, the Constitutional Court of the Republic of Belarus, Resolution (No. P-63/98),

<www.kc.gov.by/ru/main.aspx?guid=11273>, visited on 19 May 2009.

²⁰⁰ G. Vasilevich, *supra* note 183, section V.

²⁰¹ *On Supplementing the Rules of Procedure of the Constitutional Court*, Preamble , 11 June 2001, the Constitutional Court of the Republic of Belarus, Resolution (No. P-117/2001), <www.kc.gov.by/ru/main.aspx?guid=10753>, visited on 19 May 2009.

²⁰² *Ibid.*, para. 1.

²⁰³ A. Kochanskaya, *supra* note 12.

This opinion is fully shared by A. Lukashov, who is also convinced that the judicial nature of the Belarusian institution of constitutional control predetermines the fact that “the rights of citizens to seek judicial protection include also the right to appeal to the Constitutional Court in cases, when decisions by state organs and officials violate constitutional rights and freedoms”.²⁰⁴ Unfortunately, the Court did not dare to go that far.

In any event, the recognition of access of individuals and other non-empowered subjects to constitutional control - restricted constitutional complaint mechanism - served as at least some compensation for the deprivation of the Court of its earlier right to start cases at its own discretion. Moreover, this novelty could also crack down the common reluctance of the empowered subjects and induce them to bring human rights issues at the Court’s attention.

As we see, the 1996 Reform resulted in the considerable change of the Constitutional Court’s capacity. Now let us see if these changes affected the institution’s actual engagement in solving problems in the field of human rights.

5.3 Human Rights Jurisprudence of the Constitutional Court at Stage 2

5.3.1 Binding Judgments in the Field of Human Rights

Obviously, the 1996 Reform petrified the Belarusian institution of constitutional control: again, as in the very beginning, it needed some time to recover consciousness and it took seven months before the recomposed Constitutional Court started delivering human rights-related decisions.

One case²⁰⁵, initiated by the Supreme Court, concerned the issue of retrospective force of normative acts in the domain of criminal liability. The Constitutional Court had to decide on constitutionality of a law that contained amendments to the Criminal Code, which decriminalised certain deeds or reduced punishments for certain crimes, thus creating more favourable conditions for individuals accused of such crimes. However, the Parliament specifically denied the application of the more favourable criminal law to cases of individuals, who had been convicted before the amendments took effect.

²⁰⁴ A. Lukashov, *The Constitutional Court of the Republic of Belarus: Protection of Citizen’s Rights and Lawful Interests* [Лукашов А. Конституционный Суд Республики Беларусь: защита прав и законных интересов граждан], www.lawbelarus.com/repub2008/sub31/text31805.htm, visited on 10 March 2009.

²⁰⁵ *On Conformity with the Constitution and the International Covenant on Civil and Political Rights of Paragraph 3 of Section III “Concluding Regulations” of the Law of 17 May 1997 “On Amending the Code of Criminal Procedure and the Criminal Code of the Republic of Belarus”,* 9 July 1997, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-57/97), www.kc.gov.by/main.aspx?guid=11323, visited on 17 May 2009.

Having considered the case, the Constitutional Court found such restriction to be incompliant with Article 15 of the ICCPR and with respective provisions of the national Constitution. The mere fact that the amending law decriminalised certain deeds while reducing punishments for others automatically meant the entitlement of individuals, already convicted for the mentioned crimes, to have their cases revised.

A series of the Constitutional Court's cases, initiated by the President, concerned the right to judicial protection of rights and freedoms, as laid down in Article 60 of the Constitution and binding international human rights instruments. In one²⁰⁶ of these cases, the Court had to examine constitutionality of Article 246 of the Administrative Code, which stipulated that a person could appeal against such measures as administrative detention, personal searches, inspection of belongings and confiscation of belongings and documents either to a higher administrative body (official) or to a public prosecutor. Thus, there was no reference to the possibility of testing the lawfulness of the listed administrative measures before a court of law.

Having analysed relevant provisions of the Constitution and international human rights instruments, mainly the UDHR and the ICCPR, the Court considered that unlawful application of the named administrative measures could lead to violation of individual rights and freedoms as guaranteed in the national Constitution and recognised internationally, such as the right to personal inviolability and dignity and non-interference with one's private life. Therefore, in the Court's opinion, it was important to ensure that these measures could be appealed against in a court of law.

Concerning the prescribed procedure for appealing to a higher body (official) or a public prosecutor, as laid down in Article 246 of the Administrative Code, the Court did not find it to be an improper guarantee of the realisation of individual rights and freedoms, as it was only designed to quickly remedy any violations. However, it was disturbing that the norm in question had practically excluded the possibility for an individual to lodge a complaint with a court of law. This fact allowed the institution of constitutional control to conclude that Article 246 of the Administrative Code lacked conformity with human rights standards set in the Constitution and in binding international human rights law, insofar as the provision in question restricted the right to access justice and prevented individuals from protecting their constitutional rights and freedoms by a competent and impartial court of law.

The second²⁰⁷ case from the series concerned certain provisions of Article 267 of the Administrative Code that laid down a rule, in accordance

²⁰⁶ *On Conformity with the Constitution of the Republic of Belarus of Article 246 of the Code of Administrative Offences of the Republic of Belarus*, 19 June 1998, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-66/98), www.kc.gov.by/main.aspx?guid=11243, visited on 17 May 2009.

²⁰⁷ *On Conformity with the Constitution of the Republic of Belarus of Article 267 of the Code of Administrative Offences of the Republic of Belarus, of Paragraph 2 of the Enactment of the Plenum of the Supreme Court of the Republic of Belarus of 20 September 1990 No. 7 "On the Policies of the Review by Courts of the Republic of Belarus of Complaints about Actions of Bodies and Officials in Connection with the Imposition of Administrative Penalties"*, 24 June 1998, the Constitutional Court of the Republic of

to which imposed administrative penalties could be challenged either before a higher administrative body (official) or before a court of law. The practice of application of the provisions in question showed that the resort of individuals to the former option (non-judicial appellation), excluded the possibility to appeal against administrative penalties through the system of justice. Moreover, some other provisions of Article 267 of the Administrative Code contained no reference to the possibility of judicial review of imposed administrative penalties.

In regard to these provisions, the Constitutional Court noted that the right to judicial protection was one of universally acknowledged principles and norms of international law and, therefore, individuals were in all cases entitled to lodge a complaint with a court of law. As a result, the Administrative Code's provisions under review were found to be at variance with both the national Constitution and relevant norms of the UDHR and the ICCPR and nullified as of the date of the delivery of the Court's Judgment.

Besides, the Constitutional Court requested the Parliament to deal with all other similar legislative imperfections. Importantly, it ruled that before necessary amendments took effect, the provision of Article 60 of the Constitution that guaranteed the possibility to protect one's rights and freedoms by a competent, independent and impartial court of law had to be applied directly. The latter formulation seemed to pursue two aims. On the one hand, this was a message to the legislature preventing a possible delay in amending the unconstitutional norms. On the other hand, it oriented law enforcement agents to apply constitutional provisions in the first place, while all other regulations had to be applied only in part that did not contradict to the Basic Law.

The third case²⁰⁸ dealt with the right to justice in the framework of criminal proceedings. Under review was Article 209 of the Code of Criminal Procedure that set the order of dismissing criminal cases at the stage of preliminary (pre-trial) criminal investigation. According to the norm, it was only a public prosecutor to whom accused persons or other participants of criminal proceedings could address appellations against the investigator's decision to dismiss a criminal case.

The Constitutional Court established that the dismissal of a criminal case seriously affected rights and interests of both parties of the criminal proceedings. Therefore, it was very important that such decision could be subject to judicial scrutiny. However, the stipulated right to appeal to a public prosecutor was perceived as the only way of challenging the investigators' decisions of the kind.

Against this background, the Court found that Article 209 of the Code of Criminal Procedure failed to foresee a possibility of a judicial review of the investigator's decision to dismiss a criminal case, and was in this part incompliant with Article 60 of the Constitution, as well as with Articles 8

Belarus, Judgment (No. 3-67/98), <www.kc.gov.by/main.aspx?guid=11233>, visited on 19 May 2009.

²⁰⁸ *On Conformity with the Constitution of the Republic of Belarus and International Treaties of Paragraph Six of Article 209 of the Code of Criminal Procedure of the Republic of Belarus*, 13 May 1999, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-78/99), <www.kc.gov.by/main.aspx?guid=11133>, visited on 20 May 2009.

and 10 of the UDHR and Article 14 of the ICCPR. The Court ordered the Parliament to amend and supplement the Code of Criminal Procedure, so as to secure the realisation of the constitutional right of citizens to judicial appeal against a ruling dismissing a criminal case.

The above-summarised Judgment was officially interpreted by the Judgment of 17 April 2000²⁰⁹. The Court reiterated that the provision of Article 60 of the Constitution enjoyed direct application. That is why the Court's findings in the Judgment of 13 May 1999 were valid not only after the delivery of this ruling, but from the date when the national Constitution of the Republic of Belarus came into force on 30 May 1994. Therefore, the Court restored rights of all those persons who had been for years denied a possibility to appeal against the dismissal of their criminal cases at the stage of preliminary (pre-trial) investigation.

This was a very important notion by the Court, which enabled individuals to realise their rights also with regard to issues that had arisen before the Constitutional Court declared the provisions, impeding the realisation of these rights, unconstitutional and null and void. At the same time, it is not clear why this positive standing would not be extrapolated on all other cases where unconstitutional legislation manifestly ignored the constitutional bill of rights, while law enforcement agents had an expressed reluctance to give a priority to national and international human rights standards.

The right to judicial protection was not the only issue in focus of the Constitutional Court's binding jurisprudence. A number of cases, also initiated by the President, focused on imperfections of the national legislation in the sphere of criminal procedure. In its Judgment of 23 July 1998²¹⁰, dealing with the minimum standards of criminal procedure, the Court considered constitutionality of certain provisions of Article 66 of the Code of Criminal Procedure that prohibited interrogation as witness of close relatives and family members of a person, accused of a crime.

Having analysed relevant national and international provisions, the Court held that close relatives and family members of suspected or accused persons or defendants could not be forced to give evidence or testify against themselves or against the suspected or accused persons to whom they were related. But neither the Constitution, nor the ICCPR prohibited such witnesses to give evidence, if they voluntarily wished to do so. The Court came to a conclusion that the prohibition on interrogation of family members and close relatives, contained in Article 66 of the Code of Criminal Procedure, restrictively affected the suspected or accused persons' right to defend, because the mentioned prohibition also prevented family

²⁰⁹ *On Interpretation of the Judgment of the Constitutional Court of the Republic of Belarus of 13 May 1999 "On Conformity with the Constitution of the Republic of Belarus and International Treaties of Paragraph Six of Article 209 of the Code of Criminal Procedure of the Republic of Belarus"*, 17 April 2000, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-96/2000), <www.kc.gov.by/main.aspx?guid=10953>, visited on 20 May 2009.

²¹⁰ *On Conformity with the Constitution of the Republic of Belarus of Paragraph 3 of Part Two of Article 66 of the Code of Criminal Procedure of the Republic of Belarus*, 23 July 1998, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-70/98), <www.kc.gov.by/main.aspx?guid=11203>, visited on 25 May 2009.

members and close relatives from providing evidence *in favour* of the defendant, which could eventually lead towards acquitting or reducing criminal responsibility. As a result, the Court declared the provision under review unconstitutional and null and void as of the date of this norm's taking legal effect. Meanwhile, the Court criticised law enforcement agents for applying this unconstitutional rule without bringing the issue to the Constitutional Court.

Another case²¹¹ in the field of criminal procedure was delivered on 1 December 1998. The Court examined constitutionality of Article 92 of the Code of Criminal Procedure, which allowed to extend the detention period of accused persons at the stage of preliminary criminal investigation by the time needed for such detainees and their lawyer to familiarise themselves with the case-file. This prolongation was not taken into account in the calculation of the number of days spent in detention, so accused persons could *de facto* be exposed to detention longer than one and a half year – the maximal allowed detention period at the stage of preliminary criminal investigation. In general, accused persons appeared before a difficult choice: to stay in detention longer, but to conduct more comprehensive familiarisation with the case-file and achieve better quality of preparation for defence or to sacrifice the thoroughness of such preparation for the sake of having a sooner court trial.

According to the Court, the analysis of the Code's norms and the practice of their application showed that sometimes it took considerably long time for an accused and his or her lawyer to familiarise themselves with the case-file. This happened due to objective reasons, such as the big volumes of documents or the entitlement of other participants of criminal proceedings to familiarise themselves with the case-file. The Court stressed that legislative measures could be taken with a view to optimise the process of familiarisation with the case-file, whereby the right to thorough preparation to defence and the entitlement to trial within reasonable time would be guaranteed at the same time. To this end, some approaches from other European States were proposed as a possible solution.

But more serious concerns were expressed by the Court with regard to another aspect of the problem. Having referred to relevant provisions of the Constitution, of the ICCPR and of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by UN General Assembly Resolution of 9 December 1988, the Court noted that detention of accused persons during the period of familiarisation with the case-file had to be carried out in accordance with law and on the basis of a decision by a court of law or another competent authority. However, under the reviewed provisions of the Code of Criminal Procedure, the period of pre-trial detention for the purpose of familiarisation with the case-file was prolonged without a relevant decision by a competent authority, which was in itself a violation of the commonly recognised standards, but also led to inability of accused persons to challenge the restriction of their liberty. As a

²¹¹ *On Conformity with the Constitution of the Republic of Belarus of Paragraph Five of Article 92 of the Code of Criminal Procedure of the Republic of Belarus*, 1 December 1998, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-73/98), www.kc.gov.by/main.aspx?guid=11173, visited on 25 May 2009.

result, the institution of constitutional control found the Code's provision allowing to prolong detention period for the purpose of familiarisation with the case-file beyond the set maximum time-limit and without a decision by a competent authority to be lacking conformity with standards set in the national Constitution and relevant international human rights instruments.

On 11 December 1998, the Court produced the third Judgment²¹² dealing with provisions of the Code of Criminal Procedure. This time it was Article 404 that dealt with the formalities to be observed in the pre-trial preparation of criminal cases. The norm under review required that courts of law ruled, based on case materials received from investigating bodies, on whether the judicial stage of criminal proceedings could be initiated. Meanwhile, courts were entrusted with the task of formulating charges against accused persons.

The Constitutional Court noted that the task of a court of law to formulate charges against an accused person could be regarded as a predetermination of the guilt of such person, which would almost inevitably lead to a guilty verdict, because judges would feel bound by their own decision start trying this or that criminal case. According to the institution of constitutional control, the independence and impartiality of justice could be observed only if courts of law tried criminal cases on the basis of charges already laid by other competent authorities and provided that all other important principles, such as adversary of proceedings and the equality of parties involved in a trial, were respected.

Having turned to standards of justice set in the national Constitution, as well as in the UDHR, the ICCPR and the ECOSOC Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary, the Court found the reviewed provisions of the Code of Criminal Procedure unconstitutional and ordered the Parliament to amend this norm by 1 July 1999. As we see, the Constitutional Court gave the Parliament quite a lot of time (slightly more than half a year) to update the unconstitutional legislation. This can be considered as unnecessary luxury given that any application of the unconstitutional provision at hand led to obvious violation of human rights.

Besides adjudicating on the realisation of access to justice and remedying various imperfections in the sphere of criminal procedure (the two series of binding rulings reviewed above), the institution of constitutional control also paid attention to a number of other human rights issues. In its Judgment of 26 June 1998²¹³, following a request by the President, the institution of constitutional control examined constitutionality of Article 116 of the Matrimonial and Family Code that provided for adoption of a child without parental consent and outside judicial proceedings. The Court established that both the national Constitution and

²¹² *On Conformity with the Constitution of the Republic of Belarus of Paragraph Three of Article 404 of the Code of Criminal Procedure of the Republic of Belarus*, 11 December 1998, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-74/98), <www.kc.gov.by/main.aspx?guid=11163>, visited on 26 May 2009.

²¹³ *On Conformity with the Constitution of the Republic of Belarus of Paragraph Two of Article 116 of the Matrimonial and Family Code of the Republic of Belarus*, 26 June 1998, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-68/98), <www.kc.gov.by/main.aspx?guid=11223>, visited on 25 May 2009.

the CRC required that the separation of children without the consent of parents or persons *in loco parentis* could only occur on the basis of judicial proceedings. The Court ruled that the extra-judicial procedures of adoption, contained in the Matrimonial and Family Code, were against the order established by Article 32 of the Constitution and also lacked compliance with Articles 23 and 24 of the ICCPR and Article 9 of the CRC.

On 1 June 1999, the Court examined another case²¹⁴, initiated by the President. The case concerned the conformity with the Constitution and international legal instruments of Article 182 of the Administrative Code, according to which it was an administrative offence to employ persons without a registered residence in the locality of employment. The Court concluded that such legislation restricted the right to work, violated the principle of equality of all citizens before the law, and put persons in unequal position depending on their status (possession of registered residence). The norm under consideration also prevented citizens from realising their right to conclude labour contracts freely, while employers were limited in their possibilities to select an employee with necessary capabilities and educational and professional background.

As a result, the Court held that the provisions of the Administrative Code under which individuals were subject to administrative penalties for employing citizens, not registered as residents in the locality of their employment, were in conflict with the national Constitution and the labour legislation, as well as with the UDHR, ICESCR and the ILO Conventions No. 111 and No. 122. This norm was declared null and void as of the date of initiation of the proceeding, that is from 14 April 1999. As we can see, the Court again²¹⁵ showed its reluctance to scrutinise whether a violation of the freedom of movement took place - as in many other instances, the Court demonstrated its inconsistency in adjudicating on the date of invalidation of unconstitutional acts and practices.

In its Judgment of 2 June 1999²¹⁶, following a motion from the Council of Republic, the Constitutional Court had to decide whether it was appropriate to put the realisation of the right to housing (through privatisation of housing facilities (rooms) in flats occupied by several tenants) in dependence from other tenants' consent to such privatisation. According to the legislation under the Court's scrutiny, without such consent of their housemates individuals could not formalise (by means of privatisation) their property rights on the rooms they owned. Having looked

²¹⁴ *On Conformity with the Constitution of the Republic of Belarus and International Treaties of Paragraph One of Article 182 of the Code of Administrative Offences of the Republic of Belarus*, 1 June 1999, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-79/99), <www.kc.gov.by/main.aspx?guid=11123>, visited on 27 May 2009.

²¹⁵ As we recall, in a similar case that concerned the limitations on the entitlement to vocational training on the territory of Minsk (*see* Judgment No. of 10 October 1994 No. 3-3/94, *supra* note 138), the Court also refrained from making use of arguing for violation of the freedom of movement.

²¹⁶ *On Conformity with the Constitution of the Republic of Belarus of Paragraph Two of Article 5 of the Law of the Republic of Belarus "On Privatisation of Housing"*, 2 June 1999, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-80/99), <www.kc.gov.by/main.aspx?guid=11113>, visited on 28 May 2009.

into the case, the Court found that the legislator had no right to make the realisation of the right to privatisation of one tenant dependent on the subjective discretion of other tenants. The challenged rule was therefore found to be in conflict with relevant constitutional human rights provisions and declared unconstitutional from the date of the adoption of the Court's Judgment.

On 23 June 1999²¹⁷, the Court examined a case, initiated by the President, who questioned the conformity with the Constitution and international instruments of certain provisions of the Code of Civil Procedure that excluded the possibility to challenge decisions by the Supreme Court, when it decided cases as a court of first instance. Thus, the Supreme Court's decisions could not be appealed against and became binding immediately after their proclamation.

When examining this case, the Constitutional Court found that provisions of the Constitution, as well as certain universally acknowledged provisions of international law – namely, Articles 8 and 29 of the UDHR and Articles 2, 14 and 26 of the ICCPR – bound the State to secure not only citizens' access to justice and equality before the law, but also the full exercise of the right to fair, competent and effective judicial protection. In the Court's opinion, the latter entailed the right to appeal against courts' rulings.

The analysis of the challenged provisions of the Code of Civil Procedure showed that where the Supreme Court acted as a court of first instance, its rulings were subject to no appeal. Hence, neither the constitutional guarantee of equality of all persons before the law, nor the procedural guarantees of the realisation of the right to appeal against court decisions were properly secured, which was unacceptable. As a result, the Constitutional Court requested that the Parliament observed human rights standards, envisaged in the Constitution and international instruments, and considered strengthening the procedural guarantees under the Code of Civil Procedure by providing for appeals against judicial rulings of the Supreme Court, acting as the court of first instance.

A very interesting case²¹⁸ concerning the right to move freely, to leave the country and to return to it without hindrance was heard by the Constitutional Court on 27 September 2002. The case was initiated by the

²¹⁷ *On Conformity with the Constitution of the Republic of Belarus and International Treaties of Paragraph Two of Article 207, Paragraph One of Article 268, Paragraph One of Article 269 and Paragraph One of Article 291 of the Code of Civil Procedure of the Republic of Belarus*, 23 June 1999, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-81/99), <www.kc.gov.by/main.aspx?guid=11103>, visited on 28 May 2009.

²¹⁸ *On Conformity with the Constitution of the Republic of Belarus of Paragraph Two of Article 6 of the Law of the Republic of Belarus “On the Procedures Governing the Departure from and Entry into the Republic of Belarus of Citizens of the Republic of Belarus”, of Paragraph 13 of the Rules on Processing Documents Enabling Citizens of the Republic of Belarus to Depart Abroad, of Subparagraph 25.1 of Paragraph 25 of the Instruction on the Order of Processing the Passport of a Citizen of the Republic of Belarus for Departure Abroad, in Relation to Laying down the Five-Year Term of Validity of the Compulsory Authorization in the Passport of a Citizen of the Republic of Belarus*, 27 September 2002, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-146/2002), <www.kc.gov.by/main.aspx?guid=10463>, visited on 29 May 2009.

House of Representatives of the Parliament requesting to verify constitutionality of the national legislation that required that an authorisation (a stamp) valid for the period of maximum five years was inserted in passports of citizens of Belarus before they could temporarily leave the country's territory.

The mentioned requirement was officially justified by a legitimate aim - to prevent the departure of criminals and other categories of persons, whose right to leave the country could be legitimately restricted. At the same time, the existence of the requirement at hand could also be considered from the point of the State's interest to fill up the national budget, as the procedure of seeking an authorisation to leave the country (*de facto*: an exit visa) imposed a financial duty on every applicant for such authorisation.

Having considered the merits of the case, the Court found that the legislation in question infringed rights of the absolute majority of law-obedient citizens, who were not subject to any limitations on their right to depart. It was disproportionate to make them bear additional obligations in order to enjoy their right to leave their country just for the sake of enabling the authorities to control the departure of those few persons, whose right to leave the country was limited. This is especially true in the light of the fact that, as the Court established, the use of the exit visa was not efficient, as it could not timely prevent the departure of persons with legitimately restricted freedom of movement: the annulment of already issued authorisations could take months.

In the light of the listed findings, the Court suggested that the national civil passport that met relevant international standards could be used for travel abroad without the insertion of an authorisation. For this reason the Court instructed the Council of Ministers and other state bodies competent to resolve the above-mentioned issues to take all appropriate measures in order to maintain (by 31 December 2005 at the latest) the full realisation of the constitutional right to leave the country.

Thus, the Government was generously given more than three years to abolish the burdensome requirement for individuals to receive exit visas and thus facilitate the realisation of the right to leave the country. However, "due to the lack of financial support", as it claimed, the Council of Ministers failed to execute the Constitutional Court's Judgment of 27 September 2002 that had declared unconstitutionality of the authorisation in passports permitting citizens to travel abroad. In this situation, the Court was requested to extend the time period for execution of the Judgment in question.

This request was satisfied by the Constitutional Court's Judgment of 4 October 2005²¹⁹. Having taken into account both interests of the State and

²¹⁹ *On Realisation of the Judgment of the Constitutional Court of 27 September 2002 "On Conformity with the Constitution of the Republic of Belarus of Paragraph Two of Article 6 of the Law of the Republic of Belarus "On the Procedures Governing the Departure from and Entry into the Republic of Belarus of Citizens of the Republic of Belarus", of Paragraph 13 of the Rules on Processing Documents Enabling Citizens of the Republic of Belarus to Depart Abroad, of Subparagraph 25.1 of Paragraph 25 of the Instruction on the Order of Processing the Passport of a Citizen of the Republic of Belarus for Departure Abroad, in Relation to Laying down the Five-Year Term of Validity of the Compulsory Authorization in the Passport of a Citizen of the Republic of Belarus"*, 4 October 2005, the

individuals, the Constitutional Court decided to extend the time period for the execution of its 2002 Judgment until the creation of the automatic system of registration of persons with legitimately restricted ability to leave Belarus. The Court kindly asked the Council of Ministers to ensure, as quickly as possible, the constitutional right to freedom of movement.

It is worth noting that to ensure the constitutional right in question would cost the Government only 5 million USD – this is the sum of money needed to build an electronic system that would enable the control over crossing the national border without a need to require stamping passports with an exit visa. A. Zaitsev counted that “the duties that citizens already paid for their permissions to leave the country would be more than enough to cover the necessary costs”.²²⁰ Thus, the only likely conclusion that can be drawn: it was not the “financial difficulties” that prevented the Government from facilitating the freedom of movement - rather, it was the fear to lose the income from citizens who had to pay for their annual exit visas. In this context, it is at least strange that the Constitutional Court took the Government’s side. The exit visas were abolished only in 2007.

The last landmark human rights Judgement²²¹ was delivered by the Court on 11 March 2004. In its request, the initiator of constitutional proceeding - the House of Representatives of the Parliament - asked the Constitutional Court to decide on conformity with the Constitution and binding international human rights treaties of the Criminal Code’s norms providing for the application of the death penalty.

Having referred to Article 24 of the Constitution proclaiming the temporary (“until its abolition”) and exceptional nature of the death penalty, the Constitutional Court found that the Criminal Code’s norms in question were unconstitutional in that they did not contain any indication concerning the temporary nature of the punishment in question. This was the only revealed incompliance of the Criminal Code’s provisions under review with standards set in the national Constitution and binding international human rights instruments. As a result, the Parliament was requested to amend the Criminal Code by stipulating the temporary character of the capital punishment, which was a rather technical difference.

Constitutional Court of the Republic of Belarus, Judgment (No. 3-189/2005),
<www.kc.gov.by/main.aspx?guid=10033>, visited on 30 May 2009.

²²⁰ Only in the course of 2004, at least 350.000 citizens requested an exit visa in their passports, with one year of such permit to leave the country costing around 15 USD and, accordingly, 75 USD for a five-year-permit. Thus, it was likely that already one year’s income the budget received in the form of duties for the proceeding of these illegitimate exit visas would be enough to build the necessary infrastructure and make it possible to abolish the unconstitutional practices in future. However, the Government kept violating the citizens’ freedom of movement for more than three years and still dared to claim “financial difficulties” in the end. See A. Zaitsev, *Want to Visit Paris? – Ask the Permission from the State!* [Зайцев А. Хочешь в Париж? Спроси разрешения у государства!], <www.news.tut.by/58577.html>, visited on 15 April 2010.

²²¹ *On Conformity with the Constitution of the Republic of Belarus and International Treaties of the Republic of Belarus of the Provisions of the Criminal Code of the Republic of Belarus that Envisaged the Application of the Death Penalty as a Punishment*, 11 March 2004, the Constitutional Court of the Republic of Belarus, Judgment (No. 3-171/2004), <www.kc.gov.by/main.aspx?guid=10213>, visited on 10 March 2010.

But the tangible value of this Judgment is in the Court's expressing its views as to the question of the abolition of the death penalty. The institution of constitutional control held that the decision whether to abolish the capital punishment or not could be affected by many factors, inclusive of the State's history and traditions, the evolution of the legislation and the crime rate. The Court admitted that the society favoured²²² the preservation of the capital punishment. However, according to the Court, the Republic of Belarus could not ignore the world tendency – the growing international commitment to refrain from the use of the punishment in question.

Having studied the development of the national criminal legislation and the practice of application of the death penalty, the Constitutional Court held that Belarus had come close to the abolition of this punishment or to a moratorium on its application. Through the whole text of its Judgment the Court consistently argued for the preservation of this trend. However, due to the fact that Belarus was neither a Member State of the Council of Europe, nor was it bound by the Second Optional Protocol to the ICCPR, the Constitutional Court found no legal grounds to declare unconstitutionality of existence and application of the death penalty. The decision on the need to abolish this punishment belonged to the competence of the President or the Parliament.

Although the Judgment of 11 March 2004 did not lead to the abolition of the capital punishment, this Court's decision can be marked for containing a precious compilation of arguments in favour of the abolition of the death penalty, these arguments being accompanied with and supported by quite extensive references to relevant international standards and trends. Importantly, the institution of constitutional control recognised that the results of the 1996 Referendum could not preclude the relevant authorities from abolishing the capital punishment; on the contrary, the Constitution foresaw the abolition of the death penalty by pointing at its temporary character, so it was the State's obligation to move in this direction.

As can be seen from the provided compilation of the Constitutional Court's binding decisions, the institution of constitutional control had a possibility to express its views on a number of important human rights issues, and these views were rather critical on most occasions. However, it was not only the Court's binding judgments that affected the human rights situation in Belarus at this stage – it is also worth noting a number of non-binding resolutions, adopted at the Court's initiative in the absence of motions from the subjects empowered to initiate constitutional control.

5.3.2 Non-binding Resolutions in the Field of Human Rights

As we see, during the first several years the recomposed Constitutional Court was busy with producing binding decisions in the field of human

²²² The Court referred to the results of the 1996 Referendum, where around 80 per cent of voters allegedly expressed their support to the application of the death penalty. We are using the term “allegedly”, because the international community have not recognised the results of the Referendum in question.

rights. The first non-binding resolutions dealing with human rights issues started appearing only in 1999.

On 24 June 1999, the Constitutional Court started considering a series of cases concerning financial access to justice. One²²³ of such cases was inspired by individuals who complained about the high level of duties they had to pay to bring a civil suit: ten per cent of the value of the suit was too much to afford, which impeded the realisation of the constitutional right to access justice. The Constitutional Court supported this argumentation and observed that the legislator had failed to use a well-balanced approach in setting the level of the duties to be paid. For instance, the Constitutional Court found that the differential practice, whereby individuals-entrepreneurs and legal persons had to pay considerably less when approaching an economic court (from one to five per cent of the value of the suit), was a violation of the right to equality. As a result, the institution of constitutional control requested the Government to reconsider the existing duty rates with a view to ensure equal access to justice for all.

The Constitutional Court followed this line in its following cases, where it recommended to undertake measures of positive discrimination in order to enable everyone to seek judicial protection of their rights. In its Resolution of 15 January 2002²²⁴, the Court observed that foreign citizens and stateless persons seeking asylum on the territory of Belarus were unable in practice to realise their right to judicial protection by challenging unfavourable decisions regarding their applications before a court of law. This conclusion was arrived at by comparing, on the one hand, the rate of the duty that individuals (both citizens and non-citizens) had to pay to challenge the public authorities' decisions before a court of law (5 minimal salaries) and, on the other hand, the amount of financial assistance that asylum-seekers could obtain from the State. As the latter was not enough to cover the former, the institution of constitutional control recommended the Government to reconsider the duty rates and introduce privileges for asylum-seekers by reducing the fees they had to pay to appeal against unfavourable decisions by the public authorities.

In another case²²⁵ on the matter the Court, having considered a complaint of a retired person, observed with regret that the existing duty rates were often excessively burdensome for individuals, who had to pay more than 50 per cent of their earnings if they wished to challenge the public authorities' decisions before a court of law. As a result, the Court recommended to set reduced duty rates for certain categories of individuals (the retired, the disabled, etc.), whose poor financial situation did not allow

²²³ *On Improvement of the Legislation Related to State Duties*, 24 June 1999, the Constitutional Court of the Republic of Belarus, Resolution (No. P-84/99), <www.kc.gov.by/main.aspx?guid=11073>, visited on 10 March 2010.

²²⁴ *On Payment of State Duties by Persons Who Appeal to Courts against the Refusal to Register Their Application for Refugee Status or against the Refusal to Recognise Them as Refugees*, 15 January 2002, the Constitutional Court of the Republic of Belarus, Resolution (No. P-136/2002), <www.kc.gov.by/main.aspx?guid=10563>, visited on 10 March 2010.

²²⁵ *On Proposals to Amend the Legislation and Practice of Its Application*, 8 December 2004, the Constitutional Court of the Republic of Belarus, Resolution (No. II-115/2004), published electronically in the law-database "Consultant Plus", last updated on 24 November 2008.

them to seek judicial protection of their rights. In the opinion of the Constitutional Court, high rates of the duty impeded the restoration of violated rights, as the failure to pay it often led to refusal by courts of law to consider cases.

Unlike in the previously mentioned decisions on the matter of expensiveness of access to justice, in its Resolution of 1 December 2003²²⁶ the Court aimed at affecting the practice of application of the legislation rather than changing the legislation itself. It observed that persons serving a prison sentence had low paying capacity, so in a number of instances these individuals could not afford to pay the duty for filing a supervision complaint. The institution of constitutional control noted that the exemption of persons serving a prison sentence from paying the duty was not prohibited by the legislation - on the contrary, such practice had to be further developed, as it contributed to the full realisation by prisoners of their right to seek judicial revision of sentences.

Another block of the Constitutional Court's non-binding decisions was aimed at securing the right to legal assistance. One such case²²⁷ was examined on 13 December 1999, following a complaint by the Republican Collegium of Advocates that expressed its concerns regarding the denial of access of advocates to suspected persons held in custody prior to charges raised against them.

Having considered this case, the Court came to a conclusion that suspected persons had, on a level with all other detained persons, the right to obtain legal assistance at any time and such legal assistance had to be provided within the sight, but not within the hearing, of law enforcement officials. When building its argumentation, the Constitutional Court extensively referred not only to the national Constitution, but also to relevant international standards, elaborated under the auspices of the UN, namely the ICCPR (Article 14), the 1990 Basic Principles on the Role of Lawyers (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Principles 11, 17 and 18) and the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Article 8).

In its Resolution of 5 October 2000²²⁸, the Constitutional Court reiterated the importance of the right to legal assistance and established that

²²⁶ *On Securing the Right of Convicted Persons Serving a Prison Sentence to Review of Their Cases in Supervisory Proceeding*, 1 December 2003, the Constitutional Court of the Republic of Belarus, Resolution (No. P-165/2003),
<www.kc.gov.by/main.aspx?guid=10273>, visited on 10 March 2010.

²²⁷ *On Some Questions Regarding the Maintenance of the Constitutional Right of Citizens to Legal Assistance in Criminal Proceedings*, 13 December 1999, the Constitutional Court of the Republic of Belarus, Resolution (No. P-91/99),
<www.kc.gov.by/main.aspx?guid=11003>, visited on 10 March 2010.

²²⁸ *On Practice of Application of Resolutions of the Constitutional Court of 2 July 1999 "On Some Questions of Legal Representation in Courts in Civil Cases", of 13 December 1999 "On Some Questions Regarding the Maintenance of the Constitutional Right of Citizens to Legal Assistance in Criminal Proceedings", of 4 July 2000 "On Some Questions Regarding the Provision of Legal Assistance to Convicted Persons" in Relation to the Realisation of Provisions of Article 62 of the Constitution*, 5 October 2000, the Constitutional Court of the Republic of Belarus, Resolution (No. P-103/2000),
<www.kc.gov.by/main.aspx?guid=10883>, visited on 10 March 2010.

such assistance had to be provided primarily by persons who possessed necessary legal knowledge and who carried out their activities on professional basis. Importantly, apart from citing relevant UN standards, the Court also referred to some European regional instruments, containing the requirements to be met by lawyers providing legal assistance: the 1978 Council of Europe Resolution No. 78 (8) on Legal Aid and Advice and the 1987 European Prison Rules No. R (87) 3. Thus, the recomposed Court kept the commendable tradition of referring to regional European human rights standards, despite their non-binding nature in relation to Belarus.

In April 2001, the Court continued the series of cases concerning the facilitation of access to justice, but this time resulting in the delivery of non-binding resolutions (started at the Court's initiative in the absence of motions from subjects empowered to initiate constitutional control). In its Resolution of 2 April 2001²²⁹, the Court reminded that Article 60 of the Constitution guaranteed the protection of everyone's rights and freedoms by a competent and impartial court of law and this standard enjoyed broad recognition at international level, both globally and regionally. However, as the Court established, the Belarusian legislation, when setting the procedures for appeals against penalties imposed on inmates by administrations of penitentiary institutions, did not mention the right to appeal to a court of law. The Constitutional Court, therefore, proposed to specify the possibility of judicial appeals against the application of penalties in prisons. Before the necessary amendments were adopted, courts of law were obliged to accept complaints from inmates on the ground of the constitutional Article 60, given its direct effect.

Apparently, this decision was ignored by both the legislature (no amendments were adopted) and the judicial branch of power (courts of law kept refusing to apply Article 60 of the Constitution directly). In this situation, the Court had to produce two more resolutions on the same subject. In the Resolution of 15 July 2002²³⁰, the Constitutional Court reiterated its findings on the matter and emphasised that courts of law bore responsibility for violating rights of imprisoned persons by rejecting their appeals. Article 60 of the Constitution had to be applied directly and the existing lacunas in the under-constitutional legislation could not justify the passivity of courts of law.

In its Resolution of 24 December 2002²³¹, the Constitutional Court was disturbed by the fact that ordinary courts' judges continued to ignore appeals of imprisoned persons - in violation of relevant national and

²²⁹ *On the Right of Convicted Persons, Serving a Prison Sentence, to Judicial Appeal against Penalties Imposed on Them*, 2 April 2001, the Constitutional Court of the Republic of Belarus, Resolution (No. P-111/2001), <www.kc.gov.by/main.aspx?guid=10813>, visited on 10 March 2010.

²³⁰ *On Securing the Constitutional Right of Convicted Persons, Serving a Prison Sentence, to Judicial Appeal against Penalties Imposed on Them*, 15 July 2002, the Constitutional Court of the Republic of Belarus, Resolution (No. P-144/2002), <www.kc.gov.by/main.aspx?guid=10483>, visited on 10 March 2010.

²³¹ *On Constitutional Guarantees of the Right of Convicted Persons, Serving a Prison Sentence, to Judicial Appeal against Penalties Imposed on Them*, 24 December 2002, the Constitutional Court of the Republic of Belarus, Resolution (No. P-152/2002), <www.kc.gov.by/main.aspx?guid=10403>, visited on 10 March 2010.

international human rights standards that had direct effect, as had been confirmed in a number of the Court's previous judgements and resolutions. The institution of constitutional control highlighted that convicted persons serving a prison sentence, who had previously been unlawfully denied access to courts of law, still had the right to judicial protection and the statute of limitation was not applicable to such cases.

The Resolution of 3 April 2001²³² also dealt with the right to seek justice, but this time in the sphere of criminal procedure. Despite the delivery of several binding judgements²³³ by the Constitutional Court, the Code of Criminal Procedure still remained imperfect, as it did not contain the possibility of judicial appeals against all actions and decisions of bodies and officials conducting preliminary criminal investigation. Such an approach was found to be in conflict with Article 60 of the Constitution guaranteeing the protection of rights and freedoms by a competent and impartial court of law, as well as with a number of international legal instruments securing the right to an effective judicial remedy, such as the UDHR and the ICCPR. The Constitutional Court also referred to the Preamble of the non-binding 1978 Council of Europe Resolution 78 (8) on Legal Aid and Advice, where the right of access to justice and to a fair hearing, as guaranteed under Article 6 of the European Convention on Human Rights, was considered an essential feature of any democratic society.

As a result of this case, the Constitutional Court requested that the Parliament amended and supplemented the legislation governing criminal procedure in order to secure therein the right to judicial appeal against actions and decisions of bodies and officials conducting preliminary (pre-trial) criminal investigation and specify the procedure for such judicial protection.

The Court followed the same line in its Resolution of 3 November 2003²³⁴, where it found that the absence of the right to appeal against decisions of bodies or officials conducting preliminary criminal investigation to terminate the proceeding due to the expiry of limitation periods violated the fundamental right to access courts, as guaranteed by the Constitution, the UDHR and the ICCPR.

The only instance where the Constitutional Court dealt with the right to seek judicial protection in any field, other than criminal procedure or penitentiary regulations, was the Court's Resolution of 5 April 2007²³⁵. The Court took note of the fact that written warnings concerning alleged

²³² *On the Right of Citizens to Appeal to Courts of Law on Matters Related to Criminal Procedure*, 3 April 2001, the Constitutional Court of the Republic of Belarus, Resolution (No. P-112/2001), <www.kc.gov.by/main.aspx?guid=10803>, visited on 10 March 2010.

²³³ See Chapter 5.3.1

²³⁴ *On Guarantees for Accused Persons, in Respect to Whom the Preliminary Investigation is Terminated due to the Expiry of Limitation Periods*, 3 November 2003, the Constitutional Court of the Republic of Belarus, Resolution (No. P-161/2003), <www.kc.gov.by/main.aspx?guid=10313>, visited on 10 March 2010.

²³⁵ *On the Right to Judicial Appeal against the Written Warning about the Violation of the Law by a Religious Organisation*, 5 April 2007, the Constitutional Court of the Republic of Belarus, Resolution (No. P-199/2007), <www.kc.gov.by/main.aspx?guid=9853>, visited on 10 March 2010.

violation of the legislation by a religious organisation could lead to unfavourable consequences for such organisation, including the suspension of its activities with further possible termination. In the light of the above-mentioned finding and having referred to its earlier jurisprudence and its Messages on the State of Constitutional Legality in the Republic of Belarus, the Constitutional Court reminded of the direct effect of Article 60 of the Constitution and stressed that the right to judicial protection was applicable not only to individuals, but also to legal persons.

The Constitutional Court repeatedly paid attention to some imperfections of amnesty laws and the practice of their application. Among its decisions in this field can be named the Resolution of 17 November 2000²³⁶, where the Court held that amnesty laws had to be applicable also to those convicted persons, with regard to whom guilty verdicts had not yet become final and binding, because courts of law failed to timely examine appeals or challenges against such verdicts. Such delays often happened for reasons beyond the control of convicted persons, therefore, their deprivation of the right to a reduction of sentence, just because amnesty laws applied only to cases where verdicts had come into force, constituted an infringement of the principle of equality. The Court was disturbed by instances, where convicted persons had to abandon their right to appeal against the respective guilty verdict just for the sake of having their case in force by the time of the adoption of an amnesty law making such persons eligible for a reduction of their sentence. The Court called for setting specific regulations to speed up the appellation procedure, as well as to consider extending the application of current and future amnesty laws to those convicted persons, whose verdicts came into force with a delay.

These findings were confirmed by the Court's Resolution of 11 January 2002²³⁷. In this case, similar to the preceding one, the Court ruled that persons, with respect to whom criminal sentences had become final on the date of entry into force of the respective amnesty law, had the right to amnesty even in cases, where those verdicts were later subject to review in supervisory proceedings. The Court specifically referred to its position expressed in the above-reviewed Resolution of 17 November 2000 and noted that the effect of future amnesty laws could be extended also to persons, who had committed crimes before the entry into force of these amnesty laws, but whose sentences had not yet become final. As we see, the Court made its standing even stronger this time, as it urged to extend the applicability of the right to amnesty to any case, where sentences had not become final.

²³⁶ *On the Right to Amnesty for those Convicted Persons, Whose Verdicts Have Not Come into Force for the Reason of Their BeingAppealed*, 17 November 2000, the Constitutional Court of the Republic of Belarus, Resolution (No. P-104/2000),

<www.kc.gov.by/main.aspx?guid=10873>, visited on 10 March 2010.

²³⁷ *On the Right to Amnesty for those Convicted Persons, Whose Verdicts Have Come into Force, but Were Reviewed in Supervisory Proceedings*, 11 January 2002, the Constitutional Court of the Republic of Belarus, Resolution (No. P-135/2002),

<www.kc.gov.by/main.aspx?guid=10573>, visited on 10 March 2010.

In its Resolution of 24 June 2005²³⁸, the Constitutional Court again paid attention to the problem of narrow application of amnesty laws. The Supreme Court and the Procurator-General were requested to apply the law in a uniform manner and ensure the entitlement to amnesty also of those convicted persons, with respect to whom initial guilty verdicts had been reconsidered and new guilty verdicts came into force after the ending of the period allowing for amnesty. The Court was of the opinion that such persons were entitled to have their sentences reduced, as their right to amnesty took effect simultaneously with the settlement of the initial guilty verdict.

The institution of constitutional control continued considering cases with regard to the rule of retroactivity of the less harsh criminal legislation, but this time constitutional control resulted in the delivery of non-binding decisions. In its Resolution of 21 October 2003²³⁹, the Constitutional Court, in response to complaints by prisoners, examined the problem of non-application of the rule of retroactivity of criminal law. The Court established that the alteration of the criminal legislation in the direction of mitigation of criminal liability for certain crimes had to lead to procedural revision of all cases on the crimes concerned, in accordance with the standards set in Article 104 of the national Constitution and Article 15 of the ICCPR. The Court also held that restricting the application of the retroactivity rule to a certain category of verdicts breached the principles of fairness and constitutional legality, as well as the principle of equality of all before the law. In its Resolution of 10 March 2005²⁴⁰, the Court had to reiterate its findings following a complaint from an individual, who had been denied the right to have his case revised in accordance with the retroactivity rule.

Apart from repeatedly deciding cases in the mentioned problematic zones – the right to legal aid, the legislative and financial constraints on the right to seek justice and the restricted entitlement to amnesty – the Constitutional Court also considered a number of single cases dealing with separate human rights issues.

The Constitutional Court's Resolution of 26 May 2000²⁴¹ was devoted to the issue of conscientious objections to military service. In this case, brought to the Court by the Deputy Head of the Administration of the President of the Republic of Belarus and by the Chairperson of the Belarusian Helsinki Committee, the Court ruled that Belarusian citizens were entitled to have the right to undertake alternative service instead of

²³⁸ *On Proposals Regarding the Application of the Legislation on Amnesty*, 24 June 2005, the Constitutional Court of the Republic of Belarus, Resolution (No. P-186/2005), <www.kc.gov.by/main.aspx?guid=10063>, visited on 10 March 2010.

²³⁹ *On Grounds for Revision of Verdicts in Accordance with the Rule of Retroactivity of Criminal Law*, 21 October 2003, the Constitutional Court of the Republic of Belarus, Resolution (No. P-160/2003), <www.kc.gov.by/main.aspx?guid=10323>, visited on 10 March 2010.

²⁴⁰ *On Sending Case Materials to Courts to Decide on the Application of the Retroactivity Rule with Regard to the Less Harsh Criminal Law*, 10 March 2005, the Constitutional Court of the Republic of Belarus, Resolution (No. II-127/2005), published electronically in the law-database "Consultant Plus", last updated on 24 November 2008.

²⁴¹ *On Some Questions Regarding the Realisation of Article 57 of the Constitution of the Republic of Belarus*, 26 May 2000, the Constitutional Court of the Republic of Belarus, Resolution (No. P-98/2000), <www.kc.gov.by/main.aspx?guid=10933>, visited on 10 March 2010.

military service, in particular on the basis of their religious beliefs. This conclusion was drawn from the national Constitution, as well as from internationally recognised legal standards, envisaged in the UDHR and the ICCPR. Also, the Court referred to Paragraph 18 of the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (CSCE) that had reiterated the right of everyone to have conscientious objections to military service and for this reason urged the States to consider introducing various forms of alternative service.

Having recognised the right of Belarusian citizens to undertake alternative service on the basis of their religious beliefs, the Court requested the Parliament to secure this right by means of the immediate adoption of a law on alternative service or by amending and supplementing the existing legislation. The Parliament was heavily criticised for not having done so within the two years after the Constitution came into force – the set time limit for adapting the old legislation to the 1994 Constitution's standards (Article 4 of the Law “On the Order of Giving Effect to the Constitution of the Republic of Belarus”). The Constitutional Court also broadly criticised

ordinary courts of law that kept considering criminal cases concerning the evasion of military service, including for the reason of conscientious objections, without referring the issue to the Constitutional Court, notwithstanding the constitutional requirement to do so (Article 112 of the Constitution).

On 18 July 2001, the Constitutional Court considered a case²⁴² concerning the issue of “forced retirement”²⁴³, but this time in relation to public servants. The Constitutional Court decided that work within the state machinery was of specific nature and the legislation could contain certain limitations and peculiarities, such as the possibility of termination of employment of public servants for the reason of their reaching the age of retirement. Having analysed relevant Constitutional provisions, as well as international labour standards, stipulated in the UDHR, ICESCR, the ILO Conventions No. 111 and No. 158 and the ILO Recommendations No. 162 and No. 119, the Court failed to find the challenged norms of the national legislation to be unconstitutional. It nevertheless recommended the Parliament to foresee in the new legislation the higher level of guarantees enjoyed by public servants in the sphere of termination of their employment, based on the ground of reaching the age of retirement.

On 4 December 2003, the Constitutional Court adopted a Resolution²⁴⁴ that paid attention to the problem of a less privileged position

²⁴² *On Constitutionality of Article 21 of the Law of the Republic of Belarus “On the Basic Aspects of Service in the Machinery of State” and of Paragraph 12 of the Enactment of the Plenum of the Supreme Court of the Republic of Belarus of 19 March 2001 No. 2 “On Some Questions Related to Application of Labour Legislation by Courts”,* 18 July 2001, the Constitutional Court of the Republic of Belarus, Resolution (No. P-127/2001), www.kc.gov.by/main.aspx?guid=10653, visited on 10 March 2010.

²⁴³ See Judgment of 23 September 1994, *supra* note 135.

²⁴⁴ *On the Use of the Belarusian and Russian Languages in the Spheres of Service, Circulation of Plastic Banking Cards and in the System of the State Social Insurance,* 4 December 2003, the Constitutional Court of the Republic of Belarus, Resolution (No. II-

of the Belarusian language in comparison with the Russian language. The Constitutional Court shared concerns of an NGO that had brought this issue regarding the factual discrimination of the Belarusian language in various spheres, despite the constitutionally declared equality of these languages and their bearers, and recommended the Parliament to amend the legislation with a view to secure the factual equality between these two national languages. The question of the language equality was again discussed in the case of 28 August 2007²⁴⁵, where the Constitutional Court recommended the Government to use also the Belarusian language versions of forms for centralised testing (papers for entrance examinations to universities), in order to facilitate the equality speakers of both official languages.

In its Resolution of 27 May 2004²⁴⁶, the Constitutional Court considered its first case concerning the right to security of residence. The rule complained about before the Court allowed officials, responsible for supervising the use of energy, unimpeded access to the relevant equipment at any time.

The Constitutional Court emphasised that Article 29 of the Basic Law provided the right to security of residence, which was in essence the guarantee of the human right to private life. This right, however, could be restricted in accordance with Article 23 of the Constitution, but only with a view to protect other values, such as the need to maintain the national security and public order, to protect the morality and health of the population or rights and freedoms of others. In this regard, the Court ruled that the relevant public officials could have access to places of private residence only in emergency situations, threatening people's life. In all other occasions they needed consent from the owners.

A considerable number of cases, reviewed by the Constitutional Court throughout its existence, dealt with the issue of lawfulness of taxes, especially local taxes introduced in various municipalities. However, only one case among the Court's tax-related jurisprudence is interesting from a human rights perspective. In its Resolution of 12 May 2005²⁴⁷, the Court had to decide whether it was lawful to tax monetary compensations for moral damage.

The Constitutional Court noted with appreciation that the national legislation contained legal norms regulating compensation for moral damage, the rate of such compensation applied by courts of law on a case-by-case basis. At the same time, there was no uniformity with regard to

91/2003), published electronically in the law-database "Consultant Plus", last updated on 24 November 2008.

²⁴⁵ *On Production of Forms of Central Testing in Belarusian Language*, 28 August 2007, the Constitutional Court of the Republic of Belarus, Resolution (No. П-218/2007), published electronically in the law-database "Consultant Plus", last updated on 24 November 2008.

²⁴⁶ *On Securing the Constitutional Right of Citizens to Security of Residence*, 27 May 2004, the Constitutional Court of the Republic of Belarus, Resolution (No. П-101/2004), published electronically in the law-database "Consultant Plus", last updated on 24 November 2008.

²⁴⁷ *On Taxation of Compensation for Moral Damage*, 12 May 2005, the Constitutional Court of the Republic of Belarus, Resolution (No. Р-185/2005), <www.kc.gov.by/main.aspx?guid=10073>, visited on 10 March 2010.

taxation of sums of monetary compensation for moral damage: some types of compensation were exempted from taxation, while others were perceived as income and thus subject to taxation.

The Court criticised the distinction between taxable and non-taxable compensation and noted that the purpose of compensation for moral damage was not to make profit, but to pay individuals for their moral and physical suffering. Finally, it recommended the Parliament to eliminate the ambiguity of the relevant legislation.

The Constitutional Court's Resolution of 14 July 2005²⁴⁸ concerned the issue of equality of individuals in their access to social security. The Court observed that individual entrepreneurs (self-employed workers), albeit their contributing to the state social insurance funds on a level with other employees by means of paying compulsory insurance premiums, did not enjoy the same conditions with regard to the amount and the procedure of calculation and payment of temporary disability allowances. The Court concluded that all individuals were entitled to have equal access to social benefits, irrespective of their occupation, and recommended the Government to ensure the factual equality of individuals.

The first Constitutional Court's Resolution²⁴⁹, dealing with environmental issues, was delivered on 26 August 2005. In their collective complaint citizens questioned the legality of placing petroleum stations close to dwelling areas without asking the opinion of the dwellers of such areas.

The Court reminded that the Constitution of the Republic of Belarus guaranteed the right to a conducive environment and to compensation for loss or damage caused by the violation of this right (Article 46). According to Article 34, citizens were guaranteed the right to receive, store and disseminate complete, reliable and timely information on the state of the environment. Moreover, the national legislation and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, ratified by Belarus, contained the requirements to inform citizens and involve them in public discussions on environmental matters. The institution of constitutional control requested that the Ministry of Nature and Environmental Protection ensured the fulfilment of these requirements.

In its case of 11 May 2006²⁵⁰, the Constitutional Court, following the request from the Security Council of the Republic of Belarus, had to decide on whether the completion of work on rehabilitation of victims of political repressions (repressions that had occurred during the soviet times) implied

²⁴⁸ *On Improvement of the Legislation on Temporary Disability Payments*, 14 July 2005, the Constitutional Court of the Republic of Belarus, Resolution (No. P-187/2005), <www.kc.gov.by/main.aspx?guid=10053>, visited on 10 March 2010.

²⁴⁹ *On Measures to Protect Citizens' Constitutional Rights and Freedoms in the Environmental Field*, 26 August 2005, the Constitutional Court of the Republic of Belarus, Resolution (No. II-141/2005), published electronically in the law-database "Consultant Plus", last updated on 24 November 2008.

²⁵⁰ *On the Right of Citizens – Victims of Political Repressions – to Indemnity and Payment of Compensations*, 11 May 2006, the Constitutional Court of the Republic of Belarus, Resolution (No. II-188/2006), published electronically in the law-database "Consultant Plus", last updated on 24 November 2008.

the ending of the obligation of the Republic of Belarus to compensate the damage caused to victims of these mass human rights violations of the past.

The Constitutional Court referred to the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law that noted the importance of redressing human rights violations by adequate, effective and prompt reparation from the State. Having further analysed the existing national legislation, the Constitutional Court concluded that the specified time-framework for completion of work on rehabilitation of victims of political repressions had to be considered as guidance for the authorities. It was the time-framework, within which the relevant authorities were invited to conduct large-scale work on rehabilitation of victims of political repressions. However, the expiration of this period did not exclude the right of victims to indemnity and to compensations, based on the Constitution and the existing legislation. Consequently, all cases of refusal by the authorities to pay compensations to citizens, motivated by the completion of work on rehabilitation of victims of political repressions, had to be deemed unlawful and violating constitutional rights of citizens.

In its case of 4 October 2006²⁵¹, the Constitutional Court yet again paid attention to the problem of the proper promulgation of the legislation. The Court observed with regret that there was no definitive and uniform approach towards the adoption and promulgation of technical legislation, although this legislation was enforceable and the breach of its regulations sometimes entailed criminal or administrative responsibility. The Constitutional Court therefore reiterated the entitlement of individuals to have a possibility to familiarise themselves with the content of technical legislation.

5.4 Evaluation of the Capacity and Human Rights Activity of the Constitutional Court at Stage 2

According to A. Vashkevich and M. Pastukhou, “the status of the Court and its members has changed dramatically in the new text of the Basic Law”.²⁵² Indeed, the 1996 Reform did considerably affect the Constitutional Court’s capacity.

Firstly, serious modifications were introduced in relation to the mechanism of formation of the institution of constitutional control and guarantees of its independence. As we remember, the Parliament lost its earlier monopoly on electing the Court’s judges, while the President’s possibility to participate in the process of staffing the Constitutional Court considerably increased. In fact, it is possible to ascertain that the President

²⁵¹ *On Technical Legislation*, 4 October 2006, the Constitutional Court of the Republic of Belarus, Resolution (No. P-196/2006), <www.kc.gov.by/ru/main.aspx?guid=9983>, visited on 10 March 2010.

²⁵² A. Vashkevich, M. Pastukhou, *supra* note 104, section “Changes of the Legal Status of the Constitutional Court under the New Version of the Constitution”.

received a lion's share of control over the process of formation of the institution of constitutional control.

Similar concerns can be expressed with regard to the guarantees of independence of the Court and its judges: many of those were excluded from the Constitution's text, while what retained in the 1997 Law on the Constitutional Court was less comprehensive. According to A. Vashkevich and M. Pastukhou, “[the amendments] narrow the guarantees of independence of judges and put the Constitutional Court and its members in dependence from one person's will”.²⁵³ Indeed, following the 1996 Reform, the President received quite a number of tools to influence the judges' conduct: the Head of State got empowered to dismiss the Constitutional Court's judges, he could lift their immunity against criminal prosecution and had the monopolistic power to decide on the remuneration package and other economic and social guarantees they were entitled to. Such concentration in one person's hands of tools to influence the Court's judges may indeed cast doubt on real independence of the institution of constitutional control from the executive branch of power, and from the President in particular.

Secondly, the 1996 Reform introduced major changes with regard to the procedure of initiation of constitutional control: the Constitutional Court was deprived of its earlier power to start cases at its own discretion and became considerably dependent on supply of cases from the empowered subjects. At the same time, the circle of such subjects was further narrowed: the Procurator-General and some structures of the Parliament could no longer address the Court.

Of course, not all changes were detrimental. The amendments to the Constitution brought at least one positive change – the confirmation of the judicial nature of constitutional control by placing respective regulations into the constitutional chapter dealing with the national judicial system. This gave grounds to expect that the institution of constitutional control would use its judicial status to receive and address (in the form of legally binding decisions) individual complaints in accordance with Article 60 of the Constitution (the right to access justice). However, the Court was not ready to “usurp” this function. Instead, it quite proactively expressed its commitment to deal with at least some appeals from individuals and other non-empowered subjects by addressing such complaints in accordance with Article 40 of the Constitution (the right to appeal to state bodies).

This form of activity of the institution of constitutional control could not be seen as a satisfactory substitution of the full-weight constitutional complaint mechanism, especially due to the absence of a clear and transparent procedure. Indeed, it was unknown what issues were raised by individuals and what criteria the Court used to decide on the “admissibility” of such issues. Besides, because such form of constitutional control resulted only in the delivery of non-binding resolutions, its significance could not be overestimated. Nevertheless, the Court's attempt to react to the growing number of individual appeals (see Table 3 in Supplement) is worth praising.

²⁵³ *Ibid.*

Coming back to the 1996 Reform's amendments, they certainly weakened the status of the Constitutional Court and its judges. According to observations by A. Vashkevich and M. Pastukhou, “[a]s a result [of the 1996 Reform], the Constitutional Court that used to be an active and independent institution of constitutional control turned into a legal establishment, dependent on the President and his structures ... and deprived of any initiative and own opinion”.²⁵⁴

Nevertheless, the detrimental affects of the 1996 Reform appeared with a delay – during several beginning years the Constitutional Court of second composition continued its human rights activity and a number of binding human rights judgments were produced during the period under consideration. This became possible due to quite active initiation of cases by the President in 1998 – 1999: during the period between June 1998 and June 1999 the President initiated nine cases with strong human rights implications. In contrast, only two clearly human rights cases were initiated by the House of Representatives (the lower house of the Parliament), while the Supreme Court and the Council of Republic (the upper house of the Parliament) initiated only one case each (see Table 1 in Supplement). Therefore, in the course of one year, the President initiated more than twice as many human rights cases as did all other subjects of initiation (taken together) during 12 years of the stage under consideration.

We have to acknowledge that at least until the beginning of the 2000's the Constitutional Court remained quite active in the field of human rights and freedoms. Following requests from the empowered bodies and officials - the President in the first place – the Court adopted a number of binding human rights judgments that strengthened the belief that constitutional justice was still alive and could continue improving the human rights situation. Commendably, the institution in question kept the tradition of providing references to international legal sources in the field of human rights. However, as well as in its earlier jurisprudence, the Court did not go any further than citing relevant international human rights provisions. This created an impression that the Court's primary aim was to give its decisions more weight rather than to look at and learn from quite a variety of interpretations of human rights standards.

Turning to other imperfections, the national institution of constitutional control inherited from its predecessor some conservatism and inconsistency in adjudicating on the time of invalidation of unconstitutional legislation. Besides, the lion's share of binding human rights judgments either concerned the issue of access to justice or dealt with imperfections of the national legislation on criminal procedure. In general, there could be much more diversity as to the range of human rights issues, the resolution of which was entrusted to the authority of the Constitutional Court.

Very soon (after 1999), the Constitutional Court started running out of its “fuel” - requests from the empowered subjects questioning constitutionality of normative acts affecting the realisation of human rights and freedoms (see Table 1 in Supplement). The number of binding decisions produced by the Court was decreasing rapidly and none have been delivered

²⁵⁴ *Ibid.*

since 2007. Meanwhile, the decrease in binding decisions was accompanied by an increase in the delivery of non-binding resolutions – due to the Court’s self-announced power to examine some issues following requests from individuals and other non-empowered subjects. This Court’s activity compensated, at least in part, the fading away interest of the empowered political subjects to employ the mechanism of constitutional control for resolving human rights problems.

A number of non-binding resolutions dealt with human rights problems, and given that the authorities generally took into account the Court’s recommendations, this form of constitutional control is worth praising. Nevertheless, the devaluation of the Court’s significance became obvious, as this institution had to rely on the relevant authorities’ good will to accept the Court’s conclusions and follow its recommendations. Apparently, the authorities were not always ready to execute the Court’s non-binding resolutions – otherwise the institution of constitutional control would not have to come back to the same issues repeatedly.

The majority of the Court’s non-binding resolutions lacked “sharpness”: they often concerned rather specific problems affecting relatively limited categories of persons - the series of decisions on the entitlement to amnesty being an illustrative example. The scope of human rights issues, raised in the Constitutional Court’s jurisprudence, could be much broader. In fact, one could get an impression that the Constitutional Court became very selective about what issues it could get onboard. For instance, in the aftermath of the 1996 Reform the President’s normative acts practically stopped being subject of constitutional review. Similarly, the exercise of political rights also appeared to be out of scope of constitutional justice. The institution of constitutional control seemed to be still committed to protect and promote human rights in Belarus, but provided that such commitment would not put at risk the fragile status of the Court and the well-being of its judges.

In general, during the stage under consideration the Constitutional Court demonstrated different levels of engagement in solving human rights problems (see Table 1 in Supplement). The period of intensive production of binding human rights decisions in the late 1990’s was followed by the period when in the absence of requests from the empowered subjects the Court produced a number of non-binding resolutions. Gradually, the negative novelties of the 1996 Reform took their toll: by the end of the second stage of its existence, the Court’s involvement in addressing human rights issues became rather modest in terms of both quantity and quality.

With the Court producing fewer human rights decisions and their content becoming less and less valuable from a human rights perspective, an impression started appearing that, with some exceptions, constitutional control was turning into an imitation. In these circumstances, high hopes could be dwelled on the reform of the national mechanism of constitutional control that took place in June 2008 (hereinafter, the 2008 Reform). Let us take a closer look at the novelties introduced and evaluate their effect.

6 The Latest Development of Constitutional Justice in Belarus

6.1 The Extension of the Court's Capacity: Stage 3 (2008 – present)

In the course of the year 2007, a feeling was in the air that the existing mechanism of constitutional control in Belarus would see changes. In October 2007, the Parliament's lower house - the House of Representatives - was already considering the draft of the Law "On Constitutional Proceeding". However, there could be no hopes that this act would strengthen the status of the Constitutional Court. A. Arkhipov, the Chairperson of the Parliament's Permanent Committee on Legislation and Judicial Issues, specifically underlined that "the draft law would not reflect the extension of the Constitutional Court's powers ... [as] the fixation of these novelties would require the amendment of the Constitution". Paradoxically, but this very parliamentarian further noted that "the decision to extend the Constitutional Court's capacity could be taken by the Head of State".²⁵⁵ In other words, the Parliament could change the status of the institution of constitutional control only through amendment of the Constitution, while the same initiative by the President would not have to meet this formality.

In any event, the President did not mind conducting another reform of the mechanism of constitutional control: on 19 February 2008, he underlined "the necessity to enhance constitutional control in Belarus and make it more effective".²⁵⁶ A few weeks later, on 3 March 2008, the President made another hint about the coming changes: "the Constitutional Court needs additional charge ... so that the best lawyers of the country could be fully used for the benefit of the people".²⁵⁷

On 26 May 2008, the President was already discussing concrete plans of extending the capacity of the Constitutional Court, but called for acting

²⁵⁵ F. Stefanovich, 'A New Law on Constitutional Proceeding is Being Prepared in Belarus' [Степанович Ф. В Беларуси готовится новый закон о конституционном судопроизводстве], *The Business Newspaper*, section "Society", <www.bdg.by/news/society/778.html>, visited on 25 June 2010.

²⁵⁶ See Press Relations Service of the President of the Republic of Belarus, *Constitutional Control and Procurator's Supervision Have a Common Aim* [Пресс-служба Президента Республики Беларусь. Конституционный контроль и прокурорский надзор имеют общую цель], <www.president.gov.by/press51212.html#doc>, visited on 25 June 2010.

²⁵⁷ Informational Agency "Interfax – West", *A. Lukashenka Thinks Possible to Grant Additional Powers to the Constitutional Court* [Информационное агентство "Интерфакс-Запад". А. Лукашенко считает возможным наделение Конституционного суда дополнительными полномочиями], <www.interfax.by/news/belarus/40718>, visited on 25 June 2010.

“carefully and delicately”, so that “to avoid destroying the existing balance not only of the judicial system, but also of the state power in general”.²⁵⁸ One month later, on 26 June 2008, the Presidential Decree “On Some Measures to Improve the Activity of the Constitutional Court of the Republic of Belarus”²⁵⁹ (hereinafter, the 2008 Decree) was issued. This document provided the Constitutional Court with the following additional powers.

Firstly, the institution of constitutional control got empowered to conduct “obligatory preliminary control” over constitutionality of all laws, passed by the Parliament, but “before their signing by the President of the Republic of Belarus”. Such preliminary constitutional control had to be conducted “within five days from the date of submitting the law to the Constitutional Court”²⁶⁰, which could put excessive time pressure on the Court and negatively affect the quality of scrutiny.

Although one can generally welcome this idea to introduce preliminary constitutional control, especially in the light of its potential to prevent the enactment of unconstitutional laws violating human rights and freedoms, some questions can still be raised in this regard. First of all, it is unclear why only acts of the legislature were made subject to preliminary constitutional control. Secondly, concerns can be raised with regard to potential consequences of confirming constitutionality of those laws that have not yet taken legal effect and thus lack any record of being applied. Sometimes it is only in the course of application that a law’s unconstitutionality can be noticed, so there is a danger that the Constitutional Court’s judges, who possess no supernatural gift of predicting the future but clearly feel the time pressure put on them, may mistakenly confirm constitutionality of also a problematic from a human rights perspective law – and this mistake may be more difficult to correct. Although the 2008 Decree specifically stresses that “[t]he examination of constitutionality of laws by the Constitutional Court [in the form of preliminary constitutional control] shall not impede the examination of constitutionality of these laws in the procedure of the subsequent control after their coming into force”²⁶¹, we have no doubt that it would require additional motivation on the part of the Constitutional Court’s judges to overcome their own conclusions given at the stage of preliminary constitutional control.

The second power, added to the Constitutional Court’s capacity and similar to the first one, was to “state the position about constitutionality of international treaties – before signing by the President of the normative legal acts on expressing consent ... to obligation of these international

²⁵⁸ Informational Agency “Interfax – West”, *A. Lukashenka Thinks Possible to Grant Additional Powers to the Constitutional Court (updated)* [Информационное агентство “Интерфакс-Запад”. А. Лукашенко считает возможным наделение Конституционного суда дополнительными полномочиями (обновлено)], <www.interfax.by/news/belarus/40741>, visited on 25 June 2010.

²⁵⁹ Decree of the President of the Republic of Belarus “On Some Measures to Improve the Activity of the Constitutional Court of the Republic of Belarus”, 26 June 2008, No. 14, <www.kc.gov.by/en/main.aspx?guid=13215>, visited on 25 June 2010.

²⁶⁰ *Ibid.*, para. 1.1.

²⁶¹ *Ibid.*, para. 5.

treaties”.²⁶² This power was not compulsory, but could be realised on request of the President. Again, the time pressure factor was there: “[t]he Constitutional Court ... shall make a decision within five days from the date of filing therewith the motion of the President ... unless otherwise specified by the President...”.²⁶³

The 2008 Decree remained silent concerning the weight given to the Constitutional Court’s conclusions as to unconstitutionality of laws to be signed and international treaties to be approved by the President. According to Articles 87⁶ and 87⁷ of the Constitutional Court’s Rules of Procedure as amended per 7 October 2009 (hereinafter, the 2009 Rules of Procedure of the Court), the Court’s opinion would be expressed, as a rule, in the form of a non-binding resolution.²⁶⁴

The realisation of the third additional power, whereby the Court got entitled to make “on the instructions of the President ... an official interpretation of decrees and edicts of the President ... regarding constitutional rights, freedoms and duties of the citizens”²⁶⁵, had different consequences: the Decree stipulated that such “official interpretation ... shall be binding upon state bodies and other organisations, officials and citizens”.²⁶⁶

Fourthly, on request of the Presidium of the Council of the Republic (the Presidium of the upper house of the Parliament), the Constitutional Court got entitled to “make a decision on the existence of the facts of systematic or flagrant violation of legislative requirements by a local Council of Deputies”.²⁶⁷ Thus, the earlier Constitutional Court’s function to be an opinion-provider in the mechanism of dissolution of the houses of the Parliament “due to systematic and gross violation of the Constitution”²⁶⁸ was extrapolated also on local representative bodies.

The fifth power that the Constitutional Court received was to state, on request of the President, the Government or either house of the Parliament, “its opinion on the documents adopted (enacted) by foreign [S]tates, international organisations and (or) their bodies and affecting the interests of the Republic of Belarus to the extent concerning conformity thereof to the universally acknowledged principles and norms of international law”.²⁶⁹ In accordance with article 87¹⁰ of the 2009 Rules of Procedure, the Constitutional Court was limited “to establish the conformity or lack of conformity of the documents, enlisted in the request, with the universally recognised principles and norms of international law”.²⁷⁰

²⁶² *Ibid.*, para. 1.2.

²⁶³ *Ibid.*, para. 1.2.

²⁶⁴ Rules of Procedure of the Constitutional Court of the Republic of Belarus, adopted on 18 September 1997 № P-58/97 (as amended per 7 October 2009) [the 2009 Rules of Procedure of the Court], art. 87⁶ and 87⁷, <www.kc.gov.by/main.aspx?guid=9545>, visited on 20 April 2010.

²⁶⁵ The 2008 Decree, *supra* note 259, para. 1.3.

²⁶⁶ *Ibid.*, para. 4.

²⁶⁷ *Ibid.*, para. 1.4.

²⁶⁸ The 1996 Constitution, *supra* note 164, art. 94, para.2.

²⁶⁹ The 2008 Decree, *supra* note 259, para. 1.5.

²⁷⁰ The 2009 Rules of Procedure of the Court, *supra* note 264, art. 87¹⁰.

It is difficult to know for sure what idea was behind this task, but one might suggest that the Constitutional Court could be thereby used as a weapon against the critique expressed by the international community in connection with the human rights situation in Belarus. In any event, by commenting on external decisions, the Constitutional Court would not be able to affect the domestic legislation and practice of its application; rather its attention would be drawn away from domestic human rights problems.

In addition, the 2008 Decree empowered judges of the Belarusian institution of constitutional control to examine, following the President's instructions, "constitutionality of the directions defined by the Head of State in norm creating and law enforcement practice of courts, law-enforcement and other state bodies".²⁷¹ It is worth noting that the later power concerned not the Constitutional Court as a whole, but its separate judges.

In general, the Presidential Decree under consideration did extend the Constitutional Court's capacity, however, a number of questions can be raised. For example, valid suspicions can be expressed with regard to the Constitutional Court's powers to conduct obligatory preliminary constitutional control – namely to decide on constitutionality of laws and international treaties to be signed or approved by the President. Already in 2001, A. Vashkevich and M. Pastukhou drew attention, with reference to the President's words, to the fact that "judges of the Constitutional Court ... had made preliminary examination of drafts, as well as had been involved in drafting laws", which in these scholars' view was "in violation of the Constitution and the Law on the Constitutional Court, none of which foresaw preliminary constitutional control".²⁷² If this is true, the 2008 Decree only legally foresaw the powers that the Constitutional Court had already used (allegedly unlawfully) in practice.

Another striking feature of the Decree in question is that most of the additional powers granted to the Constitutional Court could be realised only following a request by the President. This seems to have turned the institution of constitutional control into a personal advisory body to the President and created the possibility to misuse the Court for legitimisation of the President's political decisions, including those potentially in conflict with national and international human rights standards.

Now let us see whether the extension of the Court's powers led to any improvement of the institution's ability to be an efficient guardian of human rights and freedoms.

²⁷¹ The 2008 Decree, *supra* note 259, para. 2.

²⁷² A. Vashkevich, M. Pastukhou, *supra* note 104, section "Changes of the Status of the Constitutional Court in Accordance with the New Edition of the Constitution".

6.2 Human Rights Jurisprudence of the Constitutional Court at Stage 3

6.2.1 Traditional Jurisprudence

It is important to note at the outset that soon after the Constitutional Court's competence was extended by introduction of obligatory preliminary constitutional control, this latter form of activity became dominating and quickly overshadowed the others. As a result, during the post-reform period the Constitutional Court has produced very few decisions in the framework of subsequent (*a posteriori*) constitutional control, however, some of those few are still worth mentioning.

On 29 December 2008, the Constitutional Court decided a case²⁷³ concerning the possibility of setting longer terms within which the imposition of administrative penalties was allowed. As a rule, an offender can be subject to administrative liability within two months from the moment of commitment of an administrative offence or – in case of long-lasting offences - within two months from the moment when the offender's illegal activity was revealed. As an exception from this rule, longer statutes of limitation (three years and six months respectively) were set with regard to a number of categories of administrative offences, namely in the sphere of financial relations, taxation, etc. However, the legislator left this list open by stating that longer statutes of limitations could also apply to other offences in the area of economic relations.

This later norm attracted sharp critique by the Constitutional Court that argued that the formulation lacked certainty: practically any administrative offence could be qualified in the context of economic relations, which could in turn lead to arbitrariness and unreasonably excessive application of longer statutes of limitation. Therefore, the Constitutional Court proposed to set an exhaustive list of offences with regard to which longer statutes of limitation applied.

On 26 March 2009, the Court adopted three Resolutions²⁷⁴, in which it requested the Government (the Council of Ministers) and both houses of the Parliament (the House of Representatives and the Council of the Republic) to amend their respective Rules of Procedure in order to facilitate the effective transmission of individual complaints to the Constitutional Court

²⁷³ *On Application of Longer Statutes of Limitation for Imposition of Administrative Punishments*, 29 December 2008, the Constitutional Court of the Republic of Belarus, Resolution (No. P-312/2008), <www.kc.gov.by/main.aspx?guid=3513>, visited on 16 May 2010.

²⁷⁴ *On Rules of Procedure of the House of Representatives of the National Assembly of the Republic of Belarus*, 26 March 2009, the Constitutional Court of the Republic of Belarus, Resolution (No. P-317/2009), <www.kc.gov.by/main.aspx?guid=13443>, visited on 16 May 2010; *On Rules of Procedure of the Council of the Republic of the National Assembly of the Republic of Belarus*, 26 March 2009, the Constitutional Court of the Republic of Belarus, Resolution (No. P-318/2009), <www.kc.gov.by/main.aspx?guid=13433>, visited on 16 May 2010; *On Rules of Procedure of the Council of Ministers of the Republic of Belarus*, 26 March 2009, the Constitutional Court of the Republic of Belarus, Resolution (No. P-319/2009), <www.kc.gov.by/main.aspx?guid=13423>, visited on 16 May 2010.

(as we know, in Belarus individuals cannot seek constitutional justice directly, but can approach the Constitutional Court through the empowered subjects of initiation, including the above-listed organs).

The institution of constitutional control reminded the mentioned subjects of initiation that the right of individuals to approach constitutional justice by means of state organs corresponded with the obligation of the latter to give such requests a due consideration and, when appropriate, to initiate constitutional control. However, having reviewed the Rules of Procedure of the Government and each of the Parliament's houses, the Constitutional Court failed to find any clear procedure for such initiation. Nor did the normative acts under review contain any clear regulations on how these organs could seek constitutional justice at their own initiative.

In the Constitutional Court's opinion, this lacuna posed an obstacle to the full realisation of human rights and freedoms and could in general threaten the effective maintenance of the proper level of constitutional legality in Belarus. Therefore, the institution of constitutional control proposed that the Government and the houses of the Parliament brought their Rules of Procedure in line with the Constitution in setting the effective mechanisms of forwarding requests to the Constitutional Court, both at these organs' own initiative and following the due consideration of well-founded individual complaints.

On 17 July 2009, the Court delivered a Resolution²⁷⁵ concerning the issue of equal rights in the sphere of labour relations. The question before the Court was whether it was lawful for employers to indicate in job advertisements that candidates for vacant positions had to meet certain expectations as to their age or gender.

Having referred to relevant international instruments in the sphere of labour rights, such as the ICESCR and the UDHR, as well as the ILO Convention concerning Discrimination in Respect of Employment and Occupation No. 111, the institution of constitutional control underlined that discrimination in employment was unacceptable since it hindered the right to work as the mean of self-realisation of an individual. In the Court's opinion, it was illegal for employers to extensively use in their job advertisements conditions on age, place of residence and other conditions with no relevance to the applicants' qualification or specifics of the vacant position. Such requirements were discriminatory and could give rise to violation of a number of citizens' constitutional rights, such as the right to work, the right to move freely and choose their place of residence, the right to equality and non-discrimination on the ground of gender, etc. As a result, legislative solutions had to be sought to discourage employers from introducing discriminatory conditions in their job advertisements.

The Court also noted that Article 14 of the Labour Code of the Republic of Belarus contained an exhaustive list of prohibited grounds for discrimination that omitted any reference to age and place of residence. In the Court's opinion, such omission, together with the exhaustiveness of the list of grounds, could create favourable environment for discrimination and

²⁷⁵ *On Maintenance of Equal Rights of Citizens in the Sphere of Labour*, 17 July 2009, the Constitutional Court of the Republic of Belarus, Resolution (No. P-360/2009), www.kc.gov.by/main.aspx?guid=15303, visited on 16 May 2010.

hindered the full exercise of the constitutional right to work. As a result, the institution of constitutional control proposed to eliminate the named legislative gap.

The Court's next important Resolution²⁷⁶, delivered on 23 March 2010, also dealt with employment relations, but this time had focus on post-employment situations. The Constitutional Court paid attention to the problem of differential treatment of various categories of unemployed persons, based on the circumstances of how these persons became unemployed. For example, unemployed persons, whose employment had been terminated by mutual consent with the employer, could be either denied any welfare payment at all or received a considerably lower amount of it comparing to some other categories of unemployed persons.

Having considered the relevant legislation setting the mechanisms of distribution of welfare payments, the Court found such mechanisms to be lacking compliance with the principles of equality and social justice. The institution of constitutional control argued that many cases of the so-called voluntary termination of employment could in fact have a good reason, such as the poor health condition of the former employee or the systematic breach of labour standards by the employer. In the light of these observations, the Constitutional Court proposed the subjects of law creation to amend the provisions of the legislation that foresaw the unfounded differential treatment of individuals in violation of the fundamental principles of justice and equality of all before the law.

The latest human rights oriented case²⁷⁷, considered by the Constitutional Court in the framework of subsequent constitutional control, concerned the already traditional issue of accessibility of justice to persons placed in detention facilities. The Court recalled that soon after its two Resolutions²⁷⁸ on the issue were delivered in 2002, the Parliament amended the legislation and foresaw the possibility for detainees to challenge penalties imposed on them before a court of law. Nevertheless, no procedure for such judicial appeals was ever prescribed.

Having reiterated the importance to facilitate the full realisation of the right of all persons, inclusive of detainees, to access justice, the Constitutional Court ordered the subjects of law creation to foresee in the respective procedural legislation a clear procedure for judicial appeals against penalties imposed in detention facilities.

²⁷⁶ *On Equal Guarantees for Exercise of the Right of Citizens to Protection from Unemployment*, 23 March 2010, the Constitutional Court of the Republic of Belarus, Resolution (No. P-432/2010), <www.kc.gov.by/ru/main.aspx?guid=18483>, visited on 16 May 2010.

²⁷⁷ *On the Procedure for Realisation by Individuals, Sentenced to Arrest, Imprisonment or Life Imprisonment, as well as by Individuals Held in Detention or Administratively Arrested, of Judicial Appeal against Penalties Imposed on Them*, 27 May 2010, the Constitutional Court of the Republic of Belarus, Resolution (No. P-450/2010), <www.kc.gov.by/main.aspx?guid=20173>, visited on 16 May 2010.

²⁷⁸ See *supra* note 230 and *supra* note 231.

6.2.2 The Court’s Jurisprudence in the Framework of Obligatory Preliminary Constitutional Control

As has already been mentioned, the newly introduced obligation to conduct preliminary constitutional control of laws, adopted by the Parliament but not yet signed by the President, almost fully substituted the Constitutional Court’s traditional function – subsequent control over conformity of the legislation with the national Constitution and legally binding international treaties. Let us briefly review the most interesting cases of this category.

On 7 July 2009, the Constitutional Court adopted a Resolution²⁷⁹ dealing with the legislative framework set for exiting and entering the territory of Belarus by its citizens, where the Court commented on a provision, foreseeing the possibility of temporary restriction of the rights of citizens to leave the territory of Belarus. This provision was found to be in line with Article 23 of the Constitution, listing grounds for the restriction of individual rights and freedoms) and Article 12 of the ICCPR, as long as the foreseen restriction was aimed at protecting national security, public order, public morals or health or rights and freedoms of others. According to the Constitutional Court, it was legitimate to restrict the freedom of movement of those persons, among others, who were aware of state secrets or who bore non-executed obligations before other subjects of legal relations.

Therefore, the institution of constitutional control confirmed that the grounds for restricting the individual right to exit the territory of Belarus, as listed in the law under review, were in line with the restriction clauses of the Constitution and the ICCPR. However, the Court failed to see the ambiguity of the formulations of some of such grounds. In fact, the non-execution of quite simple daily obligations (for example, to pay the speeding fine) was already a ground to preclude the realisation of the freedom of movement. In our view, it would be consistent if the Constitutional Court would request more specific formulations or call for applying the proportionality test when restricting the individual right at stake. In any event, the institution of constitutional control could and should have turned to the 1997 Concluding Observations by the Human Rights Committee, where this treaty body characterised the restrictions in question as “unreasonable”, “vaguely defined and open to wide interpretation by the authorities and therefore susceptible of abuse”.²⁸⁰

²⁷⁹ *On Conformity with the Constitution of the Republic of Belarus of the Law of the Republic of Belarus “On the Order of Exiting the Republic of Belarus and Entering in the Republic of Belarus of Citizens of the Republic of Belarus”*, 7 July 2009, the Constitutional Court of the Republic of Belarus, Resolution (No. P-353/2009), www.kc.gov.by/ru/main.aspx?guid=15553, visited on 16 May 2010.

²⁸⁰ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Belarus*, 19 November 1997 (CCPR/C/79/Add.86), para. 12, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/2de558868877380802565530050ac48?Open document](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2de558868877380802565530050ac48?Open document), visited on 5 May 2011.

When commenting in its Resolution of 23 December 2009²⁸¹ on some novelties in the national tax legislation, the Constitutional Court paid attention to the provision of the Taxation Code that granted fiscal officials unimpeded access to homes and other premises of suspected tax-offenders (subject to sanction from the Procurator's Office). Besides, these officials were empowered to examine (at their own discretion, with no sanction necessary) the body and personal belongings of individuals, suspected to have committed a tax offence.

The Constitutional Court emphasised the fundamental nature of the rights to personal security and to security of residence, but noted that these rights could be subject to restrictions in the light of the duty of individuals to pay taxes and other obligatory payments. As simple as that: the duty to pay taxes justified the restriction of the rights in question, and as well as in the above-reviewed Resolution of 7 July 2009, the Court did not see any need to make use of the proportionality test.

Despite rather primitive argumentation, employed in the case in question, the Court failed to change or advance its position one year later. In its Resolution of 11 October 2010²⁸², dealing *inter alia* with the rights to personal security and to security of residence *vis-à-vis* the obligation to pay taxes, the Court did not elaborate on why these fundamental rights could be so easily overstepped by tax officials.

In this context, it is worth recalling the Court's 2004 Resolution "On Securing the Constitutional Right of Citizens to Security of Residence"²⁸³, where the Constitutional Court stated that public officials, responsible for supervising the use of energy, could have unimpeded access to the relevant equipment only in "emergencies, threatening people's life". As we see, somehow it is not necessary for fiscal officials to meet this threshold.

In its Resolution of 24 December 2009²⁸⁴, the Constitutional Court presented a bit more extensive argumentation as to the question of legitimate restrictions on the realisation of constitutional rights. In this case, the institution of constitutional control dealt with the norm that foresaw compulsory dactyloscopic registration (collecting fingerprints) of all persons

²⁸¹ *On Conformity with the Constitution of the Republic of Belarus of the Law of the Republic of Belarus "On Giving Effect to the Special Section of the Taxation Code of the Republic of Belarus, on Amendments and Addenda to the General Section of the Taxation Code of the Republic of Belarus and on the Lapse of Certain Legislative Acts of the Republic of Belarus and Their Separate Provisions Regulating Taxation"*, 23 December 2009, the Constitutional Court of the Republic of Belarus, Resolution (No. P-412/2009), <www.kc.gov.by/main.aspx?guid=17703>, visited on 16 May 2010.

²⁸² *On Conformity with the Constitution of the Republic of Belarus of the Law of the Republic of Belarus "On Amendments and Addenda to the Taxation Code of the Republic of Belarus"*, 11 October 2010, the Constitutional Court of the Republic of Belarus, Resolution (No. P-494/2010), <www.kc.gov.by/main.aspx?guid=21003>, visited on 6 March 2011.

²⁸³ See *On Securing the Constitutional Right of Citizens to Security of Residence*, *supra* note 246.

²⁸⁴ *On Conformity with the Constitution of the Republic of Belarus of the Law of the Republic of Belarus "On Amendments and Addenda to the Law of the Republic of Belarus "On National Dactyloscopic Registration"*, 24 December 2009, the Constitutional Court of the Republic of Belarus, Resolution (No. P-415/2009), <www.kc.gov.by/main.aspx?guid=17733>, visited on 16 May 2010.

liable for military service. The norm under review prescribed the creation of a fingerprint database encompassing quite a large category of individuals - around 2.5 million persons, mostly males in the age between 20 and 55²⁸⁵, which is more than the quarter of the whole country's population!

In the process of assessing whether the planned mass fingerprint collection infringed any individual rights and freedoms the Constitutional Court simply quoted Article 57 of the Constitution (the duty of military service). It further noted that persons liable for military service had a specific status, and therefore, it was acceptable to restrict their rights, which would be not disproportional in the light of Article 23 of the Constitution (restrictions on constitutional rights and freedoms). However, the Court failed to provide any clarity as to the connection between collecting fingerprints from the quarter of the Belarusian population and the 'significant constitutional values', such as the need to maintain the national security and public order, to protect the morality and health of the population or rights and freedoms of others.

Ironically, but by the time the Constitutional Court considered the case in question (that is before the legislation passing preliminary constitutional control came into force), the police had already collected fingerprints from around 1.5 million male citizens²⁸⁶, despite attempts of the national human rights NGOs, such as the Belarusian Helsinki Committee, to question the lawfulness of this mass fingerprinting of the population.

The next Constitutional Court's decision, containing observations notable from a human rights perspective, was the Resolution of 28 December 2009²⁸⁷, dealing with the recent legislative innovations aimed at tackling the criminality in Belarus. These innovations broadened the powers of subjects acting in the sphere of criminal procedure. For instance, the law under review foresaw that the Minister of the Interior, the Chief of the KGB (Committee for State Security) and the Deputy Chief of the Committee of State Control got empowered to issue, at their own discretion, an arrest warrant and use other measures restricting rights and freedoms of participants of criminal proceedings. Prior to the amendments in question, any deprivation of liberty in the course of criminal procedure had been subject to compulsory sanction by the Procurator's Office exclusively.

With regard to the empowerment of the broader circle of subjects to interfere with the right to personal liberty, the Constitutional Court noted that this innovation was justified as an attempt to curtail criminality. However, it underlined the fact that international standards oriented the national legal systems to put the question of deprivation of liberty in the

²⁸⁵ Anonymous, *Belarusians Liable for Military Service Will Have to Pass Compulsory Dactyloscopy* [Без автора. Военнообязанные в Беларуси должны будут пройти обязательную дактилоскопию], <www.news.open.by/country/15352>, visited on 15 April 2010.

²⁸⁶ *Ibid.*

²⁸⁷ *On Conformity with the Constitution of the Republic of Belarus of the Law of the Republic of Belarus "On Amendments and Addenda to Some Laws of the Republic of Belarus on the Issue of Reinforcement of Efforts against Criminality"*, 28 December 2009, the Constitutional Court of the Republic of Belarus, Resolution (No. P-423/2009), <www.kc.gov.by/main.aspx?guid=17813>, visited on 16 May 2010.

framework of criminal procedure to the exclusive competence of courts of law.

In another case²⁸⁸ concerning the broadening of powers in the sphere of criminal procedure, the Court had to assess, *inter alia*, the empowerment of the Minister of the Interior, the Chief of the KGB and the Deputy Chief of the Committee of State Control to sanction the removal of suspected persons from their office.

The institution of constitutional control paid attention to the fact that the application of this measure was not subject to judicial appeal. In this regard, the Constitutional Court stressed that the removal of a suspected person from his office entailed consequences that went beyond the relations in the framework of criminal procedure: this measure seriously affected the right to work, personal honour, dignity and business reputation of an individual. Therefore, it was crucial that everyone removed from his or her office in the framework of criminal procedure could challenge this measure before a court of law. This approach would be in line with Article 60 of the Constitution, as well as with the relevant international standards as enshrined in the UDHR and ICCPR.

Quite surprisingly, this fair observation did not lead to any consequences: despite the absence of the right to judicial appeal against the procedural removal of suspects from their office, the Court refrained from declaring the law under review to be unconstitutional in this part.

In its Resolution of 29 April 2010²⁸⁹, the Constitutional Court commended one legislative novelty, humanising the attitude towards sentenced persons kept under conditions of advanced isolation. According to the new rule, such prisoners got entitled to make phone calls in cases of exceptional emergency, such as death or life-threatening disease of a relative or a natural disaster causing hard material consequences to sentenced persons and their families. The Constitutional Court specifically praised the fact that the mentioned novelty had roots in the 1955 Standard Minimum Rules for the Treatment of Prisoners, the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and other international normative regulators in the sphere of execution of punishments.

The Constitutional Court's last *a priori* case²⁹⁰, worth our attention in terms of its human rights implications, was delivered on 4 June 2010. When

²⁸⁸ *On Conformity with the Constitution of the Republic of Belarus of the Law of the Republic of Belarus “On Amendments and Addenda to the Code of Criminal Procedure of the Republic of Belarus”*, 29 April 2010, the Constitutional Court of the Republic of Belarus, Resolution (No. P-445/2010), <www.kc.gov.by/ru/main.aspx?guid=19823>, visited on 16 May 2010.

²⁸⁹ *On Conformity with the Constitution of the Republic of Belarus of the Law of the Republic of Belarus “On Amendments and Addenda to Some Codes of the Republic of Belarus on the Issue of Improving the Order of Execution of Punishments”*, 29 April 2010, the Constitutional Court of the Republic of Belarus, Resolution (No. P-444/2010), <www.kc.gov.by/main.aspx?guid=19813>, visited on 16 May 2010.

²⁹⁰ *On Conformity with the Constitution of the Republic of Belarus of the Law of the Republic of Belarus “On Amendments and Addenda to Some Laws of the Republic of Belarus Dealing with the Issue of Prevention of Money Laundering and Funding Terrorism”*, 4 June 2010, the Constitutional Court of the Republic of Belarus, Resolution (No. P-451/2010), <www.kc.gov.by/main.aspx?guid=20263>, visited on 16 May 2010.

commenting on some legislative innovations aimed at preventing legalisation of illegal profits and funding terrorism, the Constitutional Court noted that some of the measures foreseen in the new legislation set restrictions on rights and freedoms of individuals. For instance, the strengthened control over financial operations and the possibility to suspend the suspicious ones could lead to interference with the rights to private life, security of correspondence, the right to property and personal honour and dignity, among some others. However, the Constitutional Court admitted that the need to tackle serious criminal activities justified the interference with the mentioned rights and freedoms of individuals.

Notably, this time the Court spent more time on arguing for the possibility to impose restrictions, when necessary: unlike in its previous preliminary control decisions dealing with limitations on the realisation of human rights and freedoms, in the present case the institution of constitutional control commendably referred to the need of strict observation of the principle of proportionality when reconciling the imposed restrictions with the legitimate aim they pursued.

6.3 Evaluation of the Extended Capacity and Human Rights Activity of the Constitutional Court at Stage 3

We have already admitted that the 2008 Decree extended the capacity of the Belarusian Constitutional Court, as it provided the institution of constitutional control with some additional powers, the most important of which and yet the only one actually used so far, was the obligation to conduct preliminary constitutional control of laws, adopted by the Parliament and awaiting a signature by the President. With no prejudice against the importance of preliminary examination of constitutional legality of normative acts and the preventive role of *a priori* constitutional control, it is still important to flag some aspects that need clarification.

Firstly, it is difficult to understand why preliminary constitutional control was designed to deal only with laws. The Belarusian legislature cannot be considered as an active contributor to the production of normative acts: the Parliament adopts very few laws comparing to the intensity of law creation by the President and the Government. Every year the President alone adopts thousands of normative acts, many of them (decrees and edicts) having higher legal force comparing to laws. Why would the President's norm creation be immune from preliminary constitutional control?

Secondly, it is not clear why preliminary constitutional control over laws should be obligatory. Nowadays, the Parliament's legislation very seldom deals with human rights issues. The majority of laws either serve as an instrument of ratification of international treaties, primarily in the sphere of international economic relations (44 such ratification laws in 2009²⁹¹ and

²⁹¹ See *Message on the State of Constitutional Legality in the Republic of Belarus in 2009*, section I, 26 January 2010, the Constitutional Court of the Republic of Belarus, Resolution (No. P-430/2010), <www.kc.gov.by/main.aspx?guid=18013>, visited on 20 February 2011.

80 in 2010²⁹², out of 104 and 129 in total, correspondingly²⁹³), or aim at amending – very often just technically - the already existing laws. Therefore, making preliminary constitutional control compulsory with regard to all laws, including manifestly irrelevant from a human rights perspective, does not contribute to the increase of the Constitutional Court's engagement in improving the human rights situation, but rather diverts the institution in question from fulfilling this important mission.

We have already noticed the significant drop in the delivery of the Court's legally binding decisions (judgments) during the stage “2”, compensated by some increase in adoption of non-binding resolutions. However, even the latter rather weak tool at the Court's disposal almost lost its significance after the 2008 “extension” of the institution's capacity: having received the power to test constitutionality of laws prior to their signature by the President, the Constitutional Court almost stopped addressing human rights issues.

If to look at the statistical numbers of 2009²⁹⁴, the Court's traditional decisions aimed at evaluation of the already existing legislation in the form of *a posteriori* constitutional control (ten resolutions) represented less than ten percent of the total number of 114 decisions delivered by the Constitutional Court in 2009. The 2010's statistical disbalance²⁹⁵ is even more striking: only four ‘traditional’ resolutions *vis-à-vis* 129 decisions in the framework of obligatory preliminary constitutional control (see Table 1 in Supplement).

It is also interesting to look at the dynamics of the Court's work during the calendar year. During some months, it keeps silence and produces no decisions at all, while during others tens of decisions are delivered, the total majority of which are adopted in the framework of obligatory preliminary constitutional control. Nowadays, the schedule of the Court's activity explicitly coincides with the parliamentary sessions. In this regard, concerns may be raised as to the quality of preliminary constitutional control, given the fact that the Court is forced to conduct its decision making within rather tight time limit.

It is worth underlying that so far none of the legislative acts, passing *a priori* constitutional control, have been declared unconstitutional. As already flagged, at present the Parliament adopts not so many laws that are dealing with human rights issues, but even those few human rights related legal innovations have not attracted any strong criticism by the Court. On the contrary, on some occasions²⁹⁶, for instance in its Resolutions of 23

²⁹² See *Message on the State of Constitutional Legality in the Republic of Belarus in 2010*, section I, 25 January 2011, the Constitutional Court of the Republic of Belarus, Resolution (No. P-565/2011), <www.kc.gov.by/main.aspx?guid=22913>, visited on 20 February 2011.

²⁹³ See *Message on the State of Constitutional Legality in the Republic of Belarus in 2009*, *supra* note 291, section I, and *Message on the State of Constitutional Legality in the Republic of Belarus in 2010*, *supra* note 292, section I.

²⁹⁴ *Message on the State of Constitutional Legality in the Republic of Belarus in 2009*, *supra* note 291, section I and III.

²⁹⁵ *Message on the State of Constitutional Legality in the Republic of Belarus in 2010*, *supra* note 292, section I and III.

²⁹⁶ See *On Conformity with the Constitution of the Republic of Belarus of the Law of the Republic of Belarus “On Giving Effect to the Special Section of the Taxation Code of the*

December 2009 and 29 April 2010, the Constitutional Court stated very mild position and thereby overstepped its own earlier jurisprudence.

In general, the 2008 Reform was not supposed to lead to dramatic change of the status of the institution of constitutional control, as it foresaw only additional powers without affecting any other features of the mechanism of constitutional justice. However, it did change the Court's activity. The new power to conduct preliminary constitutional control, although rather dubious in terms of its potential to have a positive impact on the human rights situation, certainly became a routine for the Constitutional Court: it occupied the main place within the institution's activity and practically replaced the traditional forms of the Court's involvement in promotion and protection of human rights and freedoms.

Having looked at the development of the Belarusian Constitutional Court's capacity and its decreasing commitment to and engagement in bringing the national legal system in line with national and international human rights standards, let us shortly review the developments of the human rights situation in Belarus as seen by various structures within the UN human rights system. It would be useful to confront such verified concerns about imperfections of the Belarusian national legislation with the Constitutional Court's jurisprudence, in order to see if any of these concerns have been subject of constitutional control.

Republic of Belarus, on Amendments and Addenda to the General Section of the Taxation Code of the Republic of Belarus and on the Lapse of Certain Legislative Acts of the Republic of Belarus and Their Separate Provisions Regulating Taxation" (supra note 281) and *On Conformity with the Constitution of the Republic of Belarus of the Law of the Republic of Belarus "On Amendments and Addenda to the Code of Criminal Procedure of the Republic of Belarus"* (supra note 288).

7 The Human Rights Situation in Belarus

It is axiomatic that there is no single State in the world, where all international human rights obligations would be fully and unconditionally observed and where human rights standards set forth in the national constitution would be always duly respected and followed. Correspondingly, there exists no State, which would be immune from incidents of human rights violations. Various States, however, stand at different levels in terms of how self-critically they look at the domestic human rights situation and to what extent they are willing to, or ready for, making efforts to implement national and international human rights standards - not only on paper, but also in reality.

Talking about the Republic of Belarus, it is worth mentioning, at the outset, that this State failed to earn a positive reputation of having strong human rights commitments. At least in the context of Europe, Belarus demonstrates one of the worst results in this respect and has been strongly criticised by various international organisations (both at the global and regional level), as well as by international human rights NGOs and separate States.

For the purposes of the present research, it is important to provide an overview of the problematic zones of the Belarusian national legislation, as highlighted by a number of structures within the United Nations human rights system - by treaty bodies and various special procedures mandate holders of the former Commission on Human Rights and its successor - the Human Rights Council. As we will see, quite a large number of Belarusian normative acts attracted critical notions from the international community.

One of the earliest pieces of criticism can be found in the 1996 Concluding Observations²⁹⁷ of the Committee on Economic, Social and Cultural Rights (hereinafter, the CESCR). This treaty body was “disturbed at the legal status of trade unions in Belarus: the shortcomings of the legislation regulating their activities and the existence of certain legislative provisions which restrict freedom of association”.²⁹⁸ It further urged the Government “to update the legislation governing the freedom of activity of trade unions” and adopt “the legislation on the right to strikes” in line with relevant international standards.²⁹⁹

An impressively broad list of legislative imperfections was verified and highlighted in the 1997 Concluding Observations³⁰⁰ of the Human Rights Committee (hereinafter, the HRC). Namely, with regard to the

²⁹⁷ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belarus*, 2 December 1996 (E/C.12/1/Add.7/Rev.1),

<[www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.7.Rev.1.En](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.7.Rev.1.En)>, visited on 5 May 2011.

²⁹⁸ *Ibid.*, para. 17.

²⁹⁹ *Ibid.*, para. 22.

³⁰⁰ *Concluding Observations of the Human Rights Committee: Belarus*, *supra* note 280.

capital punishment, the Human Rights Committee noted with concern that “the number of crimes for which the death penalty is applicable under the Criminal Code is still very high, and that [presidential] decrees defining new crimes punishable by death, such as [the] Presidential Decree No. 21 of 21 October 1997, have recently been enacted”. Besides, the HRC was “also concerned at the secrecy surrounding the procedures relating to the death penalty at all stages” and consequently recommended that “a thorough review of relevant legislation and decrees be undertaken to ensure their compliance with the Covenant [on Civil and Political Rights]”.³⁰¹

Turning to imperfections in the field of criminal procedure, the Human Rights Committee noted with concern that “pre-trial detention may last up to 18 months, and that the competence to decide upon the continuance of pre-trial detention lies with the Procurator and not with a judge, which is incompatible with [A]rticle 9, paragraph 3, of the [ICCPR]”.³⁰²

With respect to the freedom of movement and the right to choose one’s residence, the Human Rights Committee “reiterated [its previously expressed] concerns … in regard to the retention of the Propiska (residents’ permit) system used under the previous [soviet] regime”. It also expressed “concern about the number of unreasonable restrictions imposed by law… on the freedom of citizens to leave the country, some of them being vaguely defined and open to wide interpretation by the authorities and therefore susceptible of abuse, such as possession of [s]tate secrets, refusal to discharge obligations, or ongoing proceedings in case of a civil suit”.³⁰³

The HRC also criticised the state of judicial independence: in its view, “the procedures relating to tenure, disciplining and dismissal of judges at all levels do not comply with the principle of independence and impartiality of the judiciary”.³⁰⁴ Besides, the treaty body in question referred to the Presidential Decree on the Activities of Lawyers and Notaries of 3 May 1997, “which gives competence to the Ministry of Justice for licensing lawyers and obliges them, in order to be able to practise, to be members of a centralized Collegium controlled by the Ministry, thus undermining the independence of lawyers”.³⁰⁵

Having referred to “reports of arbitrary infringements of the right to privacy, in particular of abuses by the authorities in regard to wire-tapping and house searches”, the Committee expressed concerns regarding the fact that “under article 20 of the Law on Investigative Activities, decisions on the legality of such activities are in the competence of the General Procurator, without a court review”.³⁰⁶

Among other issues that attracted the Human Rights Committee’s attention was the absence of legislative provisions “exempting conscientious

³⁰¹ *Ibid.*, para. 8.

³⁰² *Ibid.*, para. 10.

³⁰³ *Ibid.*, para. 12.

³⁰⁴ *Ibid.*, para. 13.

³⁰⁵ *Ibid.*, para. 14.

³⁰⁶ *Ibid.*, para. 15.

objectors from compulsory military service and providing for alternative civil service of equivalent length".³⁰⁷

Besides, the HRC expressed its "deep concern about the numerous and serious infringements of the right to freedom of expression", due to the State's monopoly in this sphere, which "effectively exposes the media to strong political pressure and undermines its independence", but also due to "many restrictions imposed on the media, in particular the vaguely defined offences".³⁰⁸

The Human Rights Committee expressed similarly critical observations also with regard to the freedom of assembly that was subject to "severe restrictions ... which are not in compliance with the Covenant ... [such as those established in the Presidential] Decree No. 5 of 5 March 1997".³⁰⁹ With respect to the freedom of association, the treaty body in question paid attention to "the difficulties arising from the registration procedures to which non-governmental organizations and trade unions are subjected".³¹⁰

Undoubtedly, the list of these verified legislative imperfections was not exhaustive and the scope of burning human rights issues could be extended. However, since 1997, the Government of Belarus has not submitted any new periodic reports for consideration by the Human Rights Committee nor by the Committee on the Economic, Social and Cultural Rights, thus depriving these principle treaty bodies of the chance to monitor the situation of human rights in Belarus. In these circumstances, some other treaty bodies had to take over.

Namely, in its 2000 Concluding Observations³¹¹, the Committee against Torture expressed general concern about "[t]he deterioration of the human rights situation in Belarus ... including persistent abrogations of the right to freedom of expression, such as limitations of the independence of the press, and of the right to peaceful assembly".³¹² This treaty body also referred to "[t]he lack of an independent procuracy, in particular as the Procurator has the competence to exercise oversight on the appropriateness of the duration of pre-trial detention",³¹³ "[t]he lack of an independent judiciary"³¹⁴ and the legislation, which "restricts the independence of lawyers".³¹⁵ With respect to the death penalty, the Committee against Torture noted the "lack of transparency about those being held on death row and the reported refusal to return the bodies of those executed to their

³⁰⁷ *Ibid.*, para. 16.

³⁰⁸ *Ibid.*, para. 17.

³⁰⁹ *Ibid.*, para. 18.

³¹⁰ *Ibid.*, para. 19.

³¹¹ Committee Against Torture, *Concluding Observations of the Committee against Torture*, 20 November 2000 (A/56/44(SUPP)), <www.daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/436/26/PDF/G0143626.pdf>, visited on 5 May 2011.

³¹² *Ibid.*, para. 45(a).

³¹³ *Ibid.*, para. 45 (d).

³¹⁴ *Ibid.*, para. 45 (f).

³¹⁵ *Ibid.*, para. 45 (g).

relatives, inhibiting any investigation into charges of torture or ill-treatment in prison".³¹⁶

The situation of human rights in Belarus left a rather negative impression also on the Committee on the Rights of the Child. In its 2002 Concluding Observations³¹⁷, this treaty body drew attention to the fact that "non-governmental organizations are subjected to difficult procedures for registration and that foreign funding in particular is restricted, which may limit their effectiveness and independence"³¹⁸. Besides, this treaty body generally referred to limitations "on the full implementation of the rights to freedom of expression, freedom of association and peaceful assembly and access to appropriate information".³¹⁹

In its most recent Concluding Observations on Belarus³²⁰, the Committee on the Rights of the Child reiterated its conclusions and recommendations³²¹ on both above-mentioned issues. In addition, it referred to "restrictions on the freedom of religion, including the freedom to worship or assemble in connection with a religion or belief..."³²² and expressed concerns about the fact that "the principle of the best interests of the child is not systematically reflected in the State party's legislation"³²³, referring to a law and a presidential decree as examples.

Many of critical notions, expressed by the Human Rights Committee and other treaty bodies, were reaffirmed by special procedures mandate holders of the UN Commission on Human Rights. Namely, in his Report of 19 December 1997³²⁴, Mr. Abid Hussain, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression looked at the Belarusian legislation³²⁵, pertinent to or having a direct impact on the exercise of the right to freedom of opinion and expression and highlighted doubts about some normative acts' compliance with human rights standards. For instance, with respect to the media, the Special Rapporteur observed that "the overall legal environment ... is marked by a certain degree of uncertainty due, on the one hand, to the lack of precision of certain provisions in the Law on the Press and, on the other hand, to the

³¹⁶ *Ibid.*, para. 45 (i).

³¹⁷ Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child*, 13 June 2002 (CRC/C/15/Add.180), <www.daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/435/33/PDF/G0243533.pdf>, visited on 5 May 2011.

³¹⁸ *Ibid.*, paras. 22-23.

³¹⁹ *Ibid.*, paras. 33-34.

³²⁰ Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child*, 8 April 2011 (CRC/C/BLR/CO/3-4), <www.daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/420/73/PDF/G1142073.pdf>, visited on 5 May 2011.

³²¹ *Ibid.*, paras. 23-24,35-36.

³²² *Ibid.*, para. 37.

³²³ *Ibid.*, paras. 29, 42.

³²⁴ UN Commission on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Abid Hussain, Submitted Pursuant to the Commission Resolution 1997/27*, 19 December 1997 (E/CN.4/1998/40/Add.1), Addendum: Report on the Mission of the Special Rapporteur to the Republic of Belarus,

<www.unhcr.org/refworld/docid/3ae6b0ea4.html>, visited on 5 May 2011.

³²⁵ See *ibid.*, paras. 14-25.

fact that the responsibility for overseeing the observance of this law lies with the State Committee on the Press, a governmental organ ... [having] ... broad discretion to issue warnings to the press".³²⁶

The Enactment of the Council of Ministers No. 218 of 18 March 1997, establishing prohibitions and restrictions on the transport of items over the customs border of Belarus, was another example of a dubious normative act, for "its provisions regarding the import and export of certain printed and audiovisual material ... [could seriously limit] the freedom of the press to write freely and [constitute] a restriction on the free flow of information regardless of frontiers, guaranteed by [A]rticle 19 of the [ICCPR]".³²⁷

Mr. Abid Hussain was also disturbed by "the restrictions imposed on the conduct of meetings, rallies, street processions, demonstrations and picketing by [the 1997 Presidential] Decree No. 5[, where] ... some provisions ... provide ample opportunity for interference with the right to freedom of assembly as well as freedom of expression by the authorities". In the Special Rapporteur's view, "this decree in practice prevents the full enjoyment of the right to freedom of assembly, which is intimately linked to, and thus impedes, the full enjoyment of the right to freedom of opinion and expression".³²⁸

A few years later, Mr. Dato' Param Cumaraswamy, the Special Rapporteur on the independence of judges and lawyers, when reporting³²⁹ on his mission to Belarus, was "greatly concerned about the non-compliance of many Belarusian laws with international norms and the seeming impunity by which these norms are violated".³³⁰ He further referred to "one particularly worrying example of the use of the President's power to issue temporary decrees" – namely the "Presidential Decree No. 40 of 23 November 1999 on "Measures regarding harm carried out against the State" [that] allows for the confiscation of property in cases of suspicion by the President of harm committed against the State by an individual or legal entity". In the Special Rapporteur's opinion, such "[c]onfiscation of property without a court decision is in violation of [A]rticle 44 of the Constitution and international human rights norms".³³¹

Further concerns with regard to the Belarusian national legislation were expressed in the Report³³² of the Special Representative of Secretary-

³²⁶ *Ibid.*, para. 35

³²⁷ *Ibid.*, para. 40.

³²⁸ *Ibid.*, para. 71.

³²⁹ UN Commission on Human Rights, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy, Submitted in Accordance with the Commission Resolution 2000/42*, 8 February 2001 (E/CN.4/2001/65/Add.1), Addendum: Report on the Mission to Belarus, <[www.unhchr.ch/Huridocda/Huridoca.nsf/0/571f50b9b848e6e8c1256a2300526b5c/\\$FILE/G0111054.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/571f50b9b848e6e8c1256a2300526b5c/$FILE/G0111054.pdf)>, visited on 5 May 2011.

³³⁰ *Ibid.*, para. 93.

³³¹ *Ibid.*, para. 94.

³³² UN Commission on Human Rights, *Report Submitted by Ms. Hina Jilani, the Special Representative of the Secretary-General on Human Rights Defenders, Pursuant to the Commission on Human Rights Resolution 2000/61*, 27 February 2002 (E/CN.4/2002/106), Annex, <[www.unhchr.ch/Huridocda/Huridoca.nsf/0/e816b20139e397e6c1256b9e00477e18/\\$FILE/G0211122.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e816b20139e397e6c1256b9e00477e18/$FILE/G0211122.pdf)>, visited on 5 May 2011.

General on human rights defenders, Ms. Hina Jilani. Namely, the Special Representative drew attention to allegations that “human rights organizations, like all other associations, are subject to a system of official warnings, which may result in their official closure by the Ministry of Justice” and the accompanying fears that “official warnings may permit the Belarusian authorities to interfere in the internal affairs of the organizations”.³³³

Ms. Hina Jilani also referred to two presidential decrees – the Decree of 14 March 2001, “which reportedly prohibits the use of foreign funding for pro-democracy purposes” and the Decree of 11 May 2001, “which imposes new restrictions on the right of freedom of assembly”.³³⁴

Another Special Procedure’s report – the Report³³⁵ of the Working Group on Arbitrary Detention – also serves as a rich source of information with regard to problematic zones of the Belarusian national legislation in terms of its conformity with the national Constitution and internationally recognised human rights standards. According to the Working Group, the first matter of concern was that “[d]uring the whole period of pre-trial detention, persons deprived of their liberty are under the total control of the investigators and prosecutors ... [and] the decision to keep a person in detention or to extend the period of his or her detention is taken not by a judge ... but by the public prosecutor”.³³⁶ Such “lack of effective judicial oversight could lead to arbitrary detention”.³³⁷

Secondly, the Working Group noted “with concern that the procedures relating to tenure, disciplinary matters and dismissal of judges at all levels do not comply with the principle of independence and impartiality of the judiciary”.³³⁸ The regulations of the Presidential Decree No. 12 of 3 May 1997 also became subject of concerns, for they “imply restrictions to access and practice of the legal profession”.³³⁹

Thirdly, the harsh system of pre-trial detention attracted the Working Group’s attention, because the practice, whereby “[a] person who is supposed to be innocent until convicted is kept in more severe conditions than a person who is serving his sentence after conviction [seriously undermines] the presumption of innocence...”.³⁴⁰

Fourthly, the Working Group took note of “cases of persons who, exercising their right to assembly, demonstration, freedom of opinion and expression or disseminating information in a peaceful manner, were arrested and detained for short periods and charged with administrative offences ... [or even] charged with criminal offences and convicted to longer periods of

³³³ *Ibid.*, Annex, para. 31

³³⁴ *Ibid.*, Annex, para. 32

³³⁵ UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, 25 November 2004, (E/CN.4/2005/6/Add.3), Addendum: Mission to Belarus, <www.daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/166/25/PDF/G0416625.pdf>, visited on 5 May 2011.

³³⁶ *Ibid.*, para. 39.

³³⁷ *Ibid.*, para. 41.

³³⁸ *Ibid.*, para. 44.

³³⁹ *Ibid.*, para. 45.

³⁴⁰ *Ibid.*, para. 53.

deprivation of liberty”.³⁴¹ Meanwhile, some of the relevant Criminal Code’s provisions “are defined in wide and imprecise terms and leave room for the criminalization of conduct protected by international law”.³⁴²

Last but not least, the Working Group was “concerned that administrative detention could be misused to circumvent the legal time limit on detention without charges”³⁴³, which was especially disturbing in the light of the fact that administrative detention “is not preceded by a public and adversarial procedure and does not guarantee a fair trial as defined by [A]rticle 14 of the [ICCPR]”.³⁴⁴

Against the background of the reviewed findings, among others, the Working Group addressed the Government with a number of recommendations³⁴⁵, implying the amendment of the national legislation in order to maintain its conformity with constitutional and international human rights standards.

A broad range of legislative imperfections were observed in the Report of 18 March 2005³⁴⁶ (hereinafter, the 2005 Report), submitted by the Special Rapporteur on the situation of human rights in Belarus, Mr. Adrian Severin. Below follows a review of some matters of concern as flagged by the named special procedure.

First of all, the Special Rapporteur noted with regret that “Belarus is the last remaining country in Europe ... that still uses the death penalty”.³⁴⁷ The Rapporteur’s grave concern was not that this punishment remained in Belarus, but that “its practice [had] a potential link with other human rights violations, such as abuses of the right to a fair trial and of torture and ill-treatment used to extract confessions”³⁴⁸, but also in the light of “the current practice of carrying out executions and burying the bodies of executed prisoners in secret without informing their families, which causes them immense suffering. This de facto punishment of executed prisoners’ families has no grounds in international human rights standards...”.³⁴⁹

Turning to the issue of independence of judges and lawyers, the Special Rapporteur referred to the Presidential Decree No. 12 of 1997, “which had introduced significant restrictions on the independence of the legal profession and ... remains a key source of concern”, because, *inter alia*, it “prevents [lawyers] from creating independent professional associations, and limits the right to legal defence in criminal proceedings”.³⁵⁰

When commenting on the realisation of the freedom of expression, the mandate holder referred “to the requirement [for Belarusian periodicals] ...

³⁴¹ *Ibid.*, para. 58.

³⁴² *Ibid.*, para. 59.

³⁴³ *Ibid.*, para. 63.

³⁴⁴ *Ibid.*, para. 64.

³⁴⁵ *Ibid.*, paras. 82-89.

³⁴⁶ UN Commission on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights in Belarus, Adrian Severin*, 18 March 2005 (E/CN.4/2005/35), <www.unher.org/refworld/pfdid/42d66e980.pdf>, visited on 5 May 2011.

³⁴⁷ *Ibid.*, para. 15.

³⁴⁸ *Ibid.*, para. 16.

³⁴⁹ *Ibid.*, para. 17.

³⁵⁰ *Ibid.*, para. 33.

to obtain a licence ... to distribute newspapers by subscription...”³⁵¹, while “[t]he circulation of foreign print media is restricted by a regulation of the Ministry of Information that requires the Ministry’s prior permission for the distribution of each newspaper”, which “has reportedly severely restricted the availability of a number of leading foreign newspapers in the country”.³⁵²

With regard to the freedom of association, Mr. Adrian Severin paid attention to “numerous reports concerning restrictions imposed by State organs on individual human rights defenders and NGOs for which they work ... most of the restrictions ... [being] in apparent contravention of international human rights standards concerning human rights defenders...”.³⁵³ More specifically, the mandate holder referred to “[a] legal provision introduced in 1999” (most probably the Presidential Decree No. 2 of 26 January 1999 is meant here) that “strictly regulates the registration, functioning and funding of NGOs, giving rise to concerns about the excessively cumbersome nature of registration procedures, which grants wide powers to the authorities to deny registration or close down organizations and effectively restricts the ability of NGOs to provide legal assistance and representation to citizens in civil trials”.³⁵⁴

Among other problematic normative acts affecting the freedom of association the Special Rapporteur named the Presidential Decree No. 13 of 15 April 2003 that restricted the right of “citizens’ associations to represent defendants in courts in accordance with their respective statutes”³⁵⁵ and the Presidential Decree No. 24 of 28 November 2003 that was “reportedly used to ensure strict control over foreign financial assistance to NGOs, and prohibits foreign funding to educational and any activities the Government deems “political”.³⁵⁶

The Special Rapporteur also commented on “[t]he new compulsory system of short-term contractual employment (most frequently for periods of up to one year) introduced in all [s]tate companies in 2004 that reportedly offers opportunities for intimidation and harassment of human rights activists and politically active individuals at a previously unprecedented level”³⁵⁷ and also “has reportedly been used as a means of applying pressure on members of independent unions and other politically active workers”.³⁵⁸

Lastly, the mandate holder referred to reported prohibition on “[p]rivate religious practices such as home Bible study groups or “home churches”, which means that “[t]here is a restrictive permit system in place for the holding of religious ceremonies by communities that do not own their premises, and religious meetings or singing religious songs in public places are banned”.³⁵⁹

³⁵¹ *Ibid.*, para. 39.

³⁵² *Ibid.*, para. 40.

³⁵³ *Ibid.*, para. 43.

³⁵⁴ *Ibid.*, para. 45.

³⁵⁵ *Ibid.*, para. 48.

³⁵⁶ *Ibid.*, para. 49.

³⁵⁷ *Ibid.*, para. 50.

³⁵⁸ *Ibid.*, para. 56.

³⁵⁹ *Ibid.*, para. 58.

Based on his observations, the Special Rapporteur formulated a number of recommendations³⁶⁰, aimed at removing the named legislative obstacles to the full realisation of human rights and freedoms. However, the Special Rapporteur's mission was not yet over and his mandate to observe the situation of human rights in Belarus was extended twice, which resulted in the delivery of new reports on the issue in 2006 and 2007.

In his second Report³⁶¹, submitted on 16 January 2006 (hereinafter, the 2006 Report), the Special Rapporteur noted that “[t]he conclusions reached ... in his first report ... were fully confirmed during the second term of his mandate ... [and therefore] continue to be valid and should be considered an integral part of the present report”.³⁶² Meanwhile, new grounds for concern appeared. Let us take a closer look at the 2006 Report's additional references to normative acts hindering the full realisation of human rights and freedoms in Belarus.

Addressing the situation of the realisation of the freedom of opinion and expression and the freedom of the media, the Special Rapporteur observed that “a number of articles of the Belarusian Criminal Code are used by the authorities to suppress the lawful exercise of the right to freedom of expression: [A]rticles 188 (defamation), 189 (insult), 367 (defamation of the President), 368 (insult to the President) and 369 (insult to a government official)”, some of these crimes foreseeing rather harsh sentences: “[d]efamation and insult through the media are prosecuted under [A]rticles 188 and 189 with imprisonment up to two years” and “[d]efamation of the President is punished with imprisonment up to five years”.³⁶³

One of normative acts having an impact on the realisation of the freedom of the press was the Presidential Edict No. 247 of 31 May 2005, “providing that non-State media could no longer use the words ‘national’ and ‘Belarusian’ in their titles” and imposing an obligation to “re-register with a new name within a period [of] three months, or [otherwise they] would become illegal”. In the Special Rapporteur's view, “[t]he re-registration was also intended to confuse the readers of independent periodicals and make it difficult for them to find their preferred publications at newsstands or in subscription catalogues”.³⁶⁴

Mr. Adrian Severin also referred to the Enactment of the Council of Ministers of 8 November 2005 that represented an attempt “to assume the virtual monopoly of public opinion” by obliging “independent institutes wishing to hold opinion polls on electoral matters and on the country's political situation and to publish their results ... [to] request a legal accreditation with the Commission on Public Opinion Polls of the Belarusian Academy of Science...”.³⁶⁵

³⁶⁰ See *ibid.*, paras. 82, 93 – 96, 99, 100.

³⁶¹ UN Commission on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights in Belarus, Adrian Severin*, 16 January 2006 (E/CN.4/2006/36), <www.unher.org/refworld/pfdid/441182040.pdf>, visited on 5 May 2011.

³⁶² *Ibid.*, para. 81.

³⁶³ *Ibid.*, para. 31.

³⁶⁴ *Ibid.*, para. 33.

³⁶⁵ *Ibid.*, para. 39.

Turning to the freedom of assembly, the Special Rapporteur noted that “the organization of demonstrations is restricted by the [L]aw “On [M]ass [E]vents”, amended in 2003 to allow the repression of unauthorized private meetings, and by the Code of Administrative Offences”.³⁶⁶

On the freedom of association that was hampered by “[s]everal administrative requirements”, the Special Rapporteur referred to the 1999 Presidential Decree No. 2 “that, *inter alia*, allowed the authorities to “close down an organization after issuing two successive “warnings” for the breach of even minor administrative rules”, as well as to the Law No. 213-3 of 26 June 2003 that “allows courts [of law] to close down an organization for one single violation of the legislation on public meetings”.³⁶⁷

Furthermore, the mandate holder drew attention to the 2005 amendments to the Law “On Public Associations” that were “imposing additional reporting requirements to civil society organizations and unions” and allowing that “registered NGOs can also be suspended for up to six months by court decision or even liquidated for any violation of the rules on “mass events” or for reception of foreign aid”. Similarly, Mr. Adrian Severin criticised the revision of the Law “On Political Parties”, “allowing for suspension to up to six months of political parties by the Supreme Court ... and prohibiting foreign funding to political parties”.³⁶⁸

The Special Rapporteur failed to see any improvements in the legislative framework for the use of funding by the civil society. On the contrary, he referred to the Presidential Edict No. 300 of 1 July 2005 that “restricted financial support from Belarusian organizations and donors” and to the Presidential Edict No. 382 of 17 August 2005 that “furthermore prohibited the use of foreign funding for [a number of aims] ... and imposed the official registration to “public discussion” events (workshops, seminars), organized with foreign support”.³⁶⁹

The Special Rapporteur also expressed concerns with regard to the “amendments to the Criminal Code and the Code of Criminal Procedure [adopted in December 2005], imposing heavier sanctions for “discrediting the Republic of Belarus”, which includes providing “false information to a foreign State or international organizations...”. In the Special Rapporteur’s opinion, “[a]mong a number of other negative consequences, these provisions will prevent Belarusian human rights defenders from communicating with United Nations special procedures”.³⁷⁰

In relation to the freedom of religion, the Special Rapporteur observed that the 2002 Law “On Religion” “restricts the ability of religious organizations to conduct religious education, requires all religious groups to receive government approval to distribute literature, prohibits foreigners from leading religious organizations and imposes registration ... for all religious communities”. The mandate holder was of the view that “[t]he

³⁶⁶ *Ibid.*, para. 40.

³⁶⁷ *Ibid.*, para. 40.

³⁶⁸ *Ibid.*, para. 44.

³⁶⁹ *Ibid.*, para. 45.

³⁷⁰ *Ibid.*, para. 51.

denial of registration of a religious organization is in breach of international human rights standards”.³⁷¹

Finally, the Special Rapporteur turned to imperfections in the sphere of education and observed that the adopted “[e]ducational contents infringe [A]rticle 13 of the [ICESCR] ... by integrating compulsory courses on State ideology ... in the curricula of universities and colleges”. Mr. Adrian Severin also raised concerns about the Education Ministry’s “circular “On Measures of Non-Admittance of any Involvement of Pupils and Students in Unlawful Political Activities”, which includes expulsion from educational institutions”.³⁷²

The 2007 Report³⁷³ contained no new references to deficient legislation in terms of human rights, in addition to those expressed in the Special Rapporteur’s 2005 and 2006 Reports, but contained an extensive compilation of facts of alleged human rights violations in Belarus, committed by means of application of the rather controversial national legislation.

Coming back to the Special Rapporteur’s concerns expressed with regard to the situation of human rights in Belarus and about incompliance of a number of normative acts’ provisions with constitutional and international human rights standards, it is worth noting that many such concerns were also shared by other special procedures of the Commission on Human Rights. Namely, The Special Representative of the Secretary-General on human rights defenders, Ms Hina Jilani, in the Addendum to her Report of 2006³⁷⁴ provided an insight into the legislative imperfections, negatively affecting the realisation of the freedom of expression³⁷⁵, freedom of assembly³⁷⁶ and freedom of association³⁷⁷. She consequently established “a serious deterioration in the environment for the functioning of human rights defenders in the past six years, particularly for the freedom of association. Action based on peaceful political beliefs and critical statements about the human rights situation has, reportedly, become almost impossible”.³⁷⁸

Concerns in relation to the 2005 amendments to the Criminal Code and the Code of Criminal Procedure of the Republic of Belarus, foreseeing criminalisation of a number of activities, were expressed in the Report³⁷⁹ of

³⁷¹ *Ibid.*, para. 53.

³⁷² *Ibid.*, para. 65.

³⁷³ UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Belarus, Adrian Severin*, 15 January 2007 (A/HRC/4/16), <www.daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/101/97/PDF/G0710197.pdf>, visited on 5 May 2011.

³⁷⁴ UN Commission on Human Rights, *Report Submitted by the Special Representative of the Secretary-General on Human Rights Defenders, Hina Jilani*, 6 March 2006 (E/CN.4/2006/95/Add.5), Addendum: Compilation of Developments in the area of Human Rights Defenders, <www.daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/122/53/PDF/G0612253.pdf>, visited on 5 May 2011.

³⁷⁵ *Ibid.*, paras. 191 – 192, 203.

³⁷⁶ *Ibid.*, paras. 193, 206.

³⁷⁷ *Ibid.*, paras. 194 – 196, 204.

³⁷⁸ *Ibid.*, para. 200.

³⁷⁹ UN Commission on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. Ambeyi Ligabo*, 27 March 2006 (E/CN.4/2006/55/Add.1), Addendum: Summary of Cases Transmitted to

the Special Rapporteur on the right to freedom of opinion and expression, Mr. Ambeyi Ligabo. Concerning the mentioned controversial novelties, the Special Rapporteur shared the opinion of the above-reviewed special procedures and remained “gravely concerned that … such amendments may further reduce the possibility for independent human rights organizations and the media to work in a free and democratic environment”.³⁸⁰

In her Report³⁸¹ to the sixty-second session of the Commission on Human Rights, the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir, also raised concerns with regard to imperfections of the Belarusian national legislation, namely the restrictions in the form of obligatory registration of religious communities. She observed that “[w]ithout state re-registration, it was reportedly legally impossible for religious communities to meet for worship, or to engage in other religious activities”³⁸² and emphasised in this regard that “the right to freedom of religion [should not be] limited to members of registered religious communities”.³⁸³ Besides, the Special Rapporteur took notes of the reports that “the State monitors, restricts and prevents the activity of religious communities [also] in several other ways”.³⁸⁴

More recently, the human rights situation in Belarus was scrutinised at the UN Human Rights Council 15th session in the course of the Universal Periodic Review procedure. As a result, the Report of the Working Group on the Universal Periodic Review of Belarus³⁸⁵ contains quite an extensive list of recommendations³⁸⁶, urging the Government to bring the national legislation in line with international human rights standards.

The provided review of international comments with regard to conformity of the national legislation of the Republic of Belarus with constitutional and international human rights standards indicates quite a large number of critical notions. Importantly, such criticism was often shared and reaffirmed by multiple international bodies and mandate holders, which proves that it could not always be without grounds.

The overwhelming majority of critical notions concerned the realisation of the freedom of expression, the freedom of assembly and the freedom of association. This being said, practically all normative acts referred to by international human rights mechanisms as violating human rights and freedoms or restricting the realisation thereof, could and should have been subject of constitutional control. It would be logical to expect that

Governments and Replies Received, <www.daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/121/12/PDF/G0612112.pdf>, visited on 5 May 2011.

³⁸⁰ *Ibid.*, paras. 78, 86.

³⁸¹ UN Commission on Human Rights, *Report of the Special Rapporteur on Freedom of Religion or Belief, Ms. Asma Jahangir*, 27 March 2006 (E/CN.4/2006/5/Add.1), Addendum: Summary of Cases Transmitted to Governments and Replies Received, <www.daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/121/25/PDF/G0612125.pdf>, visited on 5 May 2011.

³⁸² *Ibid.*, para. 44.

³⁸³ *Ibid.*, para. 51.

³⁸⁴ *Ibid.*, para. 44.

³⁸⁵ UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Belarus*, 21 June 2010 (A/HRC/15/16), <www.daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/145/21/PDF/G1014521.pdf>, visited on 5 May 2011.

³⁸⁶ *Ibid.*, paras. 97.3, 98.8 – 98.12, 98.27 - 98.31, 98.34, 98.35.

the Constitutional Court would increasingly pay attention to cases dealing with such issues as the realisation of the freedom of expression, the freedom of assembly and the freedom of association. However, as we recall, the post-1996 Constitutional Court has never addressed any issues of the kind.

In fact, it is only in the sphere of criminal and administrative procedure that international criticism of the national legislation crosses at the Court's actual commitment to overcome national legal imperfections. However, the extent of such coincidence of attention is far from being high enough.

Another interesting observation: on many occasions, especially at the early stage, it was normative acts coming from the executive branch of power, in particular from the President, that attracted steady international criticism. However, as of 1996, presidential normative acts have *de facto* been practically immune from the mechanism of constitutional justice.

The explanation to the two mentioned discrepancies can be quite simple: either the international human rights mechanisms have been deeply mistaken about the situation of human rights in Belarus, or the Constitutional Court has been failing to play its role as an active guarantor of human rights and freedoms. Unfortunately, the later assumption seems to be more credible.

8 Conclusions

In the process of the current research, we have established, with respect to post-communist societies transiting to the rule of law and democracy, that it is never enough just to set a legal framework favourable for the realisation of human rights and freedoms. Rather, the primary task should be to make human rights standards, set in the national constitution and in binding international human rights instruments applicable. In this regard, young post-communist democracies are confronted by a number of challenges. Firstly, these societies suffer from the lack of the general perception (both on the part of state bodies and officials and of the population in general) that the national constitution can be directly applicable. Secondly, the generally low level of legal conscience and legal culture, accompanied by widespread reluctance to be aware of and resort to human rights standards, precludes the prompt transformation of these standards from abstract and declarative ideas into an efficient regulator of social relations.

As has been indicated, in these circumstances, the role of the mechanism of constitutional control cannot be overestimated. Alongside with, and by means of, the traditional tasks of institutions of constitutional control – to bring the domestic legislation in line with the national and international bills of rights and maintain the constitution as a living instrument – constitutional courts have a strong potential to contribute to the positive development of the legal conscience and legal culture in the society. Institutions in question have to play a significant enlightening role, targeting both the state machinery and the broadest possible groups of the population, and maintain the sufficient level of trust in the rather unfamiliar values of democracy, the rule of law and the respect for human dignity, human rights and freedoms.

In order to succeed, the mechanism of constitutional control should meet a number of prerequisites. Firstly, institutions of constitutional control should be granted balanced powers: while too weak institutions of constitutional control simply lack the adequate tools, necessary for their operation, excessively powerful constitutional control risks losing its legitimacy, which will inevitably undermine the efficiency. In any event, control over constitutionality of normative acts should result in the delivery of legally binding decisions, especially in the sphere of human rights.

Secondly, it is of tremendous importance that the highest standards of independence of the constitutional court, as well as of its members, are legally envisaged and duly implemented in practice. A dependent institution of constitutional control has no chance to become an effective contributor to the improvement of the situation of human rights in a young democracy. In this regard, a fair mechanism of the court's composition has to be envisaged, as well as the prohibition of any interference with its activity and the protectability of judges from any external pressure, so that the institution of constitutional control could become a fair and impartial arbiter between the State and its citizens.

Thirdly, the mechanism of constitutional control should broadly interact and cooperate with both the state machinery and the civil society. In the first place, this means that the institution in question should be able to receive and address concerns coming from the broadest possible range of subjects, representing the whole diversity of political interests. From a human rights perspective, it is especially important to maintain unimpeded access of individuals and non-governmental organisations to the mechanism under consideration.

Fourthly, given the delicacy of the period of transition and the fragility of the values of democracy, the rule of law and the respect for human rights and freedoms in the context of young post-communist States, it is highly desirable that the institution of constitutional control acts with the adequate level of precaution. It can be justified that some conservatism is practised at initial stage, but simultaneously with gaining weight and authority, as well as experience and self-confidence, the constitutional courts' standing should gradually become strict and thoroughgoing, especially with regard to clearly human rights cases. At the same time, given the lack of experience of applying and promoting human rights standards, it is equally important that the mechanism of constitutional control broadly resorts to relevant international and foreign sources, such as international human rights norms and documents containing guidelines on how to correctly interpret and apply these norms.

Having provided this general theoretical sketching of the young post-soviet democracies' mechanism of constitutional control, namely concerning its role as a promoter and protector of human rights and freedoms and the prerequisites for its efficiency in the conditions of large-scale political, economic and social transformations, we turned to practical questions of creation of an effective human rights oriented constitutional control in Belarus.

It took several years for the legislator to determine the basic features of this mechanism, and during these years, a few rather different conceptions appeared. Under the earliest model, the establishment of the Committee of Constitutional Supervision was envisaged, this organ being subordinated to the Parliament and having neither explicitly provided mandate in the field of human rights, nor any sufficient powers to become an effective promoter of modern and civilised patterns of relations between individuals and the State. Under the second model, outlined in the 1992 Conception of the Reform of the System of Justice, the future institution of constitutional control was seen as part of the judiciary and was expected to play a significant role in maintaining the constitutional legality and ensuring the full realisation of human rights and freedoms.

In general, there was a clear tendency of movement from rather weak and decorative to more composed and pragmatic constitutional control. As a result, by the time the Belarusian Constitutional Court was created in 1994, there remained little doubt as to the need of establishing a strong and independent institution of constitutional control with a profound ability to promote and protect human rights and freedoms by means of addressing existing legislative imperfections.

The created Constitutional Court did not betray these high expectations: it appeared to be a self-sufficient institution having quite broad powers and protected by constitutionally envisaged guarantees of independence. The Court's power to initiate cases at its own discretion allowed this institution to review the legislation, deficient from a human rights perspective, without waiting for the procedure to be initiated by the empowered subjects. Although not without shortcomings (under the 1994 model, constitutional control was not feasibly accessible neither to individuals, nor to courts of law), the established Constitutional Court had everything what it needed to fulfil its human rights mission. As a result, already in the first year it adopted a number of legally binding decisions that aimed at protection of human rights and freedoms. It looked like the wheel of constitutional justice started turning - slowly but confidently – when the Court ruled out a number of unconstitutional legal provisions, impeding the full realisation of human rights and freedoms. Importantly, this jurisprudence was delivered in the form of binding judgments and contained quite extensive references to provisions of international human rights law, including those that were not binding to Belarus.

It would be incorrect to idealise the created institution of constitutional control. The Constitutional Court was too slow to start its human rights activity and the frequency of examination of cases, as well as the spectrum of reviewed issues, could be more impressive. Besides, the Court, at times, acted in a self-restrained and even conservative manner. Nevertheless, the institution's sincere commitment to human rights and freedoms was out of question, which was demonstrated in the jurisprudence and expressed in annual messages on the state of constitutional legality. Therefore, one could legitimately expect that the Court would gradually reach the desired level of speed and efficiency and, following an increase in trust afforded to it by the Belarusian society, would lead to tangible and steady improvement of the human rights situation in the country.

But unfortunately, the history took the wrong turn. In 1995 and 1996 - the period of political tensions between the President and the Parliament - the Constitutional Court found itself between the two "fires" and was forced to devote more and more attention to resolving various political disputes concerning the separation of power, issues of political legitimacy and accusations of abuse of powers. This undesirable, but hardly avoidable, Court's political engagement was done at the expense of the institution's human rights-related activity – and resulted in a decrease of human rights decisions delivered. Thus, the constitutional crisis considerably undermined the Constitutional Court's ability to carry out its mission of a guarantor of human rights and freedoms.

The crisis ended only after the broad constitutional reform was conducted in November 1996. This reform foresaw dramatic changes of the status of the Constitutional Court, especially affecting the institution's independence and the procedure of initiation of constitutional control. As for the former, different mechanisms were foreseen with regard to the formation of the institution in question: the President got entitled to play a bigger role in this process. The prohibition of interference with the Court's activities, as well as guarantees of independence of the Court's judges, were

deleted from the constitutional text. Another controversial novelty was the empowerment of the President to unilaterally dismiss judges of the Constitutional Court.

As for the procedure of initiation of constitutional control, the Court was deprived of its earlier power to examine cases at its own discretion, which made the institution in question dependent on the steady supply of human rights issues by state bodies and officials empowered to initiate constitutional control. However, the circle of such empowered subjects was considerably narrowed.

All these changes subsequently affected the level of the Constitutional Court's engagement in the sphere of protection and promotion of human rights and freedoms. It did not happen immediately: during the first several years the Constitutional Court of second composition was addressed by the empowered subjects, especially by the President, on quite a regular basis. Following such motions, that reached their peak in 1998 and 1999, a number of binding human rights decisions were delivered. However, since then the situation has been worsening. As a result, the Constitutional Court has produced no single binding decision since 2007, with the last judgment clearly dealing with human rights and freedoms dating back to 2004.

The Court's inability to produce binding human rights judgments, due to the reluctance of the empowered subjects to initiate proceedings, was partly compensated by the increasing delivery of non-binding resolutions. This became possible due to the acquisition by the Court of the self-announced power to examine individual complaints in accordance with Article 40 of the Constitution. However, the figures of non-binding resolutions, clearly dealing with human rights, remained quite modest, while the substance of such decisions did not seem to be promising, either.

The situation worsened even more after the 2008 Reform of the mechanism of constitutional control. As a result of this reform, the Constitutional Court's status remained practically unchanged, except that the institution in question received a number of additional powers. In particular, it got entitled to conduct obligatory preliminary examination of constitutionality of all laws, adopted by the Parliament but prior to their being signed by the President. The conduct of obligatory preliminary control - the only new power that has so far been used by the Court - practically blocked the last surviving form of the Court's human rights activity – addressing individual complaints in the form of non-binding resolutions.

Against this background, it is possible to conclude that the intensity of the Court's engagement in promotion and protection of human rights has been decreasing. However, this tendency cannot be explained by the fact that the situation of human rights in Belarus has been simultaneously improving and that the national legislation has become enough favourable for the full realisation of human rights and freedoms. On the contrary, concerns with regard to the human rights situation in general, and imperfections of the legislative framework in particular, have been regularly and increasingly expressed by various international human rights mechanisms, such as the treaty bodies and the special procedures mandate holders of the former UN Committee on Human Rights and subsequently the UN Human Rights Council.

The majority of these concerns have repeatedly been expressed with regard to the freedom of expression, including the freedom of the media, the freedom of association, the freedom of assembly and the freedom of religion. At the same time, these are exactly the spheres where the Constitutional Court has been only scarcely active or not active at all. This discrepancy allows us to conclude that the national institution of constitutional control, despite having a great potential of being a driving force of improving the situation of human rights in Belarus, has been steadily failing to do so.

There are both objective and subjective reasons for such failure. Talking about the former, we have to pay attention to the objectively unfavourable legal framework for the operation of the national institution of constitutional control. In this sense, none of the initially formulated prerequisites for an effective constitutional control have been met. Namely, serious doubts can be expressed with regard to the balanced set of powers accorded to the Constitutional Court. Especially, following the 2008 Reform, when the institution in question received some additional powers, the realisation of which has been rather drawing the Court away from solving human rights problems than helping in this regard. Obligatory preliminary constitutional control of laws, representing a routine rather than a challenge, proves to be a self-explanatory example.

The changes with regard to guarantees of independence of the Constitutional Court and its judges, introduced by the 1996 Reform, have also had their detrimental effect. The broad possibilities of the President to participate in staffing of the Constitutional Court, both through the direct appointment of at least six of the Court's judges, including the Chairperson, and because of the President's power to dismiss any judge, must have inevitably been influencing the level of the judges' loyalty towards the executive branch of power. This is especially true in the absence of constitutionally provided immunities and other guarantees of judicial independence and in the light of the fact that it is the President who determines the financial maintenance of the Court and decides on what social benefits the Court's judges should be entitled to. That is why it is not surprising that since 1997 no presidential normative acts, reportedly violating or restricting human rights and freedoms, have been subject to scrutiny by the Court.

Similarly negative comments can be made also on the Constitutional Court's interaction and cooperation with other state bodies and officials: the narrow circle of subjects of initiation of constitutional control and the retaining absence of feasible procedures for ordinary courts of law to refer cases to the Court's attention, as well as the prevailing reluctance of the mentioned subjects to seek constitutional control, negatively affect the supply of human rights issues. This problem is accompanied by the absence of the right of individuals to directly approach the institution of constitutional control and the impossibility of the Court to start cases at its own discretion.

The listed objective reasons demonstrate a symbiotic unity with subjective obstacles, hampering the active standing of the Constitutional Court in relation to its mission of promotion and protection of human rights

and freedoms. Nothing prevents the national institution of constitutional control from addressing more individual complaints with its non-binding resolutions or to provide a more extensive argumentation as to conformity of legal provisions in laws, examined in the framework of obligatory preliminary constitutional control, with nationally and internationally recognised human rights standards. Besides, the present-day-Constitutional Court could have been more critical when commenting on the state of constitutional legality in its annual messages. The Court's failure to be active and effective in either of the listed domains serves as evidence of rather low commitment (comparing to earlier periods) of the contemporary institution of constitutional control to positively affect the situation of human rights in Belarus.

In conclusion, it is worth reiterating our finding that the Belarusian mechanism of constitutional control has been steadily degrading: its role in maintaining the adherence of Belarus to its national and international human rights commitments has declined dramatically. In these circumstances, effective solutions need to be sought in order to curtail and overcome this negative tendency.

9 Supplement: Statistics

Table 1. Figures on the Constitutional Court's Decisions at Different Stages

Stage of Activity	Year	Legally Binding Judgments; of them – dealing with human rights* (in brackets)	Non-binding Resolutions; of them – dealing with human rights* (in brackets)	Compulsory Preliminary Constitutional Control Resolutions; of them – dealing with human rights* (in brackets)	Total Number of Decisions; of them – dealing with human rights* (in brackets)
Stage 1(1994 - 1996)	1994	6 (5)	3 (2)	-	9 (7)
	1995	17 (4)	2 (0)	-	19 (4)
	1996	12 (4)	0 (0)	-	12 (4)
Stage 2 (1997 – 2008)	1997	4 (1)	1 (1)	-	5 (2)
	1998	11 (6)	0 (0)	-	11 (6)
	1999	7 (4)	8 (2)	-	15 (6)
	2000	3 (1)	9 (3)	-	12 (4)
	2001	2 (0)	26 (3)	-	28 (3)
	2002	2 (1)	16 (4)	-	18 (5)
	2003	1 (0)	12 (4)	-	13 (4)
	2004	4 (1)	15 (2)	-	19 (3)
	2005	1 (1)	31 (5)	-	32 (6)
	2006	2 (0)	19 (2)	-	21 (2)
Stage 3 (2009 – 2010)	2007	1 (0)	18 (2)	-	19 (2)
	2008**	0 (0)	5 (1)	-	5 (1)
Stage 3 (2009 – 2010)	2009	0 (0)	10 (1)	104 (4)	114 (5)
	2010	0 (0)	3 (2)	129 (2)	132 (4)

* For the purposes of this table, under decisions dealing with human rights only those ones are understood and counted that have been reflected in the respective jurisprudence sections of the paper.

** Given that the first decisions in the framework of obligatory preliminary constitutional control were delivered by the Constitutional Court only in 2009, it is not incorrect to relate the whole year of 2008 (but not only its prior-reform part) to the stage “2” of the Court’s existence.

Table 2. Figures on Initiation of Binding Human Rights* Decisions at Different Stages

Year	The Constitutional Court	The President	The Parliament, its structures and officials	The Council of Ministers	The highest Courts	The Procurator-General
1994	4	0	1	Not empowered	0	0
1995	0	0	4	Not empowered	0	1
1996	3	0	0	Not empowered	0	0
1997	Not empowered	0	0	0	1	Not empowered
1998	Not empowered	6	0	0	0	Not empowered
1999	Not empowered	3	1	0	0	Not empowered
2000	Not empowered	0	0	0	0	Not empowered
2001	Not empowered	0	0	0	0	Not empowered
2002	Not empowered	0	1	0	0	Not empowered
2003	Not empowered	0	0	0	0	Not empowered
2004	Not empowered	0	1	0	0	Not empowered
2005	Not empowered	0	0	1	0	Not empowered
2006	Not empowered	0	0	0	0	Not empowered
2007	Not empowered	0	0	0	0	Not empowered
2008	Not empowered	0	0	0	0	Not empowered
2009	Not empowered	0	0	0	0	Not empowered
2010	Not empowered	0	0	0	0	Not empowered

* For the purposes of this table, under decisions dealing with human rights only those ones are understood and counted that have been reflected in the respective jurisprudence sections of the paper.

Table 3. Dynamics* of Individual Appeals as Confronted with the Figures on Non-Binding Resolutions

Stage of Activity	Year	Written Individual Appeals	Non-binding Resolutions; of them – dealing with human rights** (in brackets)
Stage 1(1994 - 1996)	1994	approx. 300	3 (2)
	1995	approx. 800	2 (0)
	1996	No figures	0 (0)
Stage 2 (1997 – 2008)	1997	386	1 (1)
	1998	approx. 800	0 (0)
	1999	899	8 (2)
	2000	approx. 700	9 (3)
	2001	approx. 1500	26 (3)
	2002	approx. 1300	16 (4)
	2003	1638	12 (4)
	2004	No figures	15 (2)
	2005	No figures	31 (5)
	2006	2148	19 (2)
	2007	1214	18 (2)
	2008***	No figures	5 (1)
Stage 3 (2009 – 2010)	2009	1217	10 (1)
	2010	1138	3 (2)

* The figures on the quantity of individual complaints have been taken from Messages on the state of constitutional legality. No figures on individual appeals are available for the years 1996 and 2008, while with regard to the years 2004 and 2005 it is known that the Court was addressed by approx. 5.000 and 6.000 persons (respectively), some of appeals being collective.

** For the purposes of this table, under decisions dealing with human rights only those ones are understood and counted that have been reflected in the respective jurisprudence sections of the paper.

*** Given that the first decisions in the framework of obligatory preliminary constitutional control were delivered by the Constitutional Court only in 2009, it is not incorrect to relate the whole year of 2008 (but not only its prior-reform part) to the stage “2” of the Court’s existence.

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