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Descent into Authoritarianism: Barriers to Constitutional Rule in Belarus

By ERIC R. REED*

Introduction

The collapse of the Soviet Union has allowed the legal community to observe the creation and early trials of several new constitutions. One notable commentator referred to East-Central Europe as a “constitutional laboratory.”¹ Few expected the rule of law to graft easily onto governments and peoples ruled for decades by authoritarian regimes. As expected, the progress made by these states in the last decade varies. Belarus arguably achieved least, and remains classified generally as a state reverting to authoritarianism.² President and former collective farm manager Alexander Lukashenka’s political abuses deserve some share of blame for this backsliding. However, additional political, social, and judicial factors hinder Belarus’ transition to the rule of law.

This note analyzes Belarus’ failure to reform and its reversion to Soviet-style authoritarianism. It first provides a historical synopsis of Alexander Lukashenka’s election as President and his subsequent consolidation of constitutional power. It then explores the political, social, and judicial barriers to constitutional rule of law in Belarus. Finally, this note concludes that reform is not likely under the current regime, and would remain difficult under a new regime.

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1. Rett R. Ludwikowski, “Mixed” Constitutions – Product of an East-Central European Constitutional Melting Pot, 16 B.U. INT’L L.J. 1, 6 (1998).

2. See Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327, 342-43 (2002).

I. Brief Contemporary History of Belarus: Alexander Lukashenka's Election as President

A. *Election of President Alexander Lukashenka and the 1996 constitutional referendum*

The perceived failure of economic development led to the dismissal and indictment of the reform-minded Belarusian Chairman of Parliament Stanislav Shushkevich in 1994.³ Belarus subsequently held its first presidential election, in which voters elected parliament member and former collective farm manager Alexander Lukashenka, who ran on an anti-corruption platform.⁴ The international community recognized the election as "relatively free and fair."⁵

Lukashenka's relationship with the West floundered almost immediately. By 1995 the American media considered Lukashenka a "progressing paranoiac."⁶ He accused the United States of playing a role in the Soviet Union's breakup and conducting sabotage activities in Belarus.⁷ Belarus' domestic harmony fared little better under the new president. In 1995, Lukashenka suggested introducing direct presidential rule to circumvent his opposition, which he considered "entrenched" in parliament.⁸ The Belarusian parliament appreciated the magnitude of the impending constitutional crisis, and in September 1996 sought to compromise with Lukashenka.⁹ At this time Lukashenka's parliamentary faction planned to increase presidential power through referendum and amendment of the 1994 constitution.¹⁰ The parliament suggested a "Conciliatory Constitutional Commission" as an alternative; the proposed body would decide upon and then present the amendments to the

3. Michael P. Malloy, *Colloquium: Shifting Paradigms: Institutional Roles in a Changing World*, 62 FORDHAM L. REV. 1911, 1926 (1994).

4. Alexander Lukashuk, *Explaining Lukashenko's Hold on Power*, 7 E. EUR. CONST. REV. 43, 44 (1998); Dario Thuburn, *14-Country EU Travel Ban on Belarus Leadership Approved*, WORLD MARKETS ANALYSIS, Nov. 20, 2002, available at LEXIS News (summarizing Lukashenka's background and rise to power).

5. Human Rights Watch, *Background: Republic of Belarus*, at <<http://www.hrw.org/reports/1997/belarus/Belarus-03.htm>> (visited 09/10/04).

6. Yuras Karmanov, *Lukashenko Intends to Introduce Direct Presidential Rule*, SEGODNYA, Nov. 1, 1995, at 3.

7. *Id.*

8. *Id.*

9. Sergie Anisko, *Parliament Makes Move to Settle Conflict with Head of State*, SEGODNYA, Sept. 21, 1996, at 1.

10. *Id.*

parliament – not the voters – for approval.¹¹

The proposed referendum alarmed the EU and United States.¹² Even Russia attempted to broker a deal between Lukashenka and parliament,¹³ and hoped that “the art of political compromise [would] replace the ambitions and confrontations among politicians.”¹⁴ Meanwhile, the word “impeachment” had begun circulating in Belarus, and was the subject of a 10,000-strong democratic rally in Minsk in July 1996.¹⁵ Seven leading political parties decried the proposed constitutional amendments, and accused Lukashenka of attempting to establish a dictatorship through the referendum.¹⁶ On the eve of the referendum a minority of parliament futilely attempted to impeach the president.¹⁷ But it was too late. Belarus held the referendum between November 9 and 24, 1996, with voters ostensibly amending the Belarusian Constitution in what Parliament Chairman Semyon Sharetsky called “a farce and abuse of the people.”¹⁸

B. Subsequent reversion to authoritarianism

Since the Soviet Union’s dissolution, Belarus slid into authoritarianism “after a good start.”¹⁹ Some now describe the current Belarusian government as “the one remaining ultra-authoritarian regime” in Europe.²⁰ The country’s relationship with Western powers deteriorated swiftly in the wake of Lukashenka’s consolidation of power. After the referendum, the Parliamentary Assembly of Europe suspended Belarus’ “specially invited” status over growing human rights abuses.²¹ The

11. *Id.*

12. Phil Reeves, *EU Sounds Alarm at Belarus Showdown*, THE INDEPENDENT (LONDON), Nov. 20, 1996, at 16.

13. Helen Womack, *Belarus Poll Paves Way to Dictatorship*, THE INDEPENDENT (LONDON), Nov. 25, 1996, at 11.

14. See Reeves, *supra* note 12.

15. Anatoly Kozlovich, *How Would You Say “Impeachment” in Belorussian?*, LITERATURNAYA GAZETA, July 31, 1996, No. 31, at 2.

16. *Id.*

17. Vladimir Kuznechevsky, *Politicians Put the Fat in the Fire; But What About the People?*, ROSSIISKAYA GAZETA, Nov. 21, 1996, at 1, 7.

18. Mikhail Pastukhov, *Presidential Abuse of Powers in Belarus*, 4 PARKER SCH. J. E. EUR. L. 479, 479 (1997).

19. Alkon, *supra* note 2, at 344. See generally Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEM. 5 (2002) (describes and analyzes the inherent challenges in democratization).

20. *A Few Dinosaurs; Serbia, Belarus and Moldova*, WORLD AND I, Dec. 1, 2002, at 26 (available at LEXIS News).

21. Sergei Glotov, *Belorussia Being Driven Away from the Council of Europe*, PRAVDA, Jan. 9, 1997, at 1-2.

European Union Foreign Ministers Council likewise expressed concern over Lukashenka's human rights violations when the Council imposed a mild political and economic blockade on Belarus.²² Since the constitutional referendum, Belarus "has seen an alarming trend towards greater state intervention in religious affairs"²³ and increased subordination of lawyers.²⁴ United States assistance to Belarus dropped 70% between Lukashenka's election in 1994 and the present.²⁵ Belarus' relations with the West hit a new low in 1998, when Lukashenka evicted American, German, British, French, Italian, and IMF officials from the Drozdy diplomatic compound in Minsk.²⁶

II. Barrier One: Lukashenka's Abuses of Power

A. Freedom of speech abuses

Belarusian slander laws restricting speech freedoms predated Lukashenka's rise to power in 1994. In 1992, a state enterprise sued Supreme Soviet (Belarusian parliament) Deputy Evgeniy Novikov, who earlier alleged corruption within the enterprise.²⁷ The court fined Novikov for making the corruption claim and the judge later personally sued Novikov when he criticized the judge's decision.²⁸ Later, an Afghan war veteran, along with relatives of veterans who perished in the war, sued writer Svetlana Aleksievich when a local newspaper published excerpts of her book describing Soviet atrocities in Afghanistan.²⁹ The Belarusian government also sued the Belarusian correspondent for Russian newspaper *Kommersant*.³⁰

Lukashenka's regime further restricted the freedom of the press after coming to power. The government currently owns almost all major newspapers, and most independent newspapers are "relatively small and

22. Anna Baneva, *Europe Declares Cold War on Belarus*, KOMMERSANT-DAILY, Sept. 18, 1997, at 4.

23. Alexander Vashkevich, *The Relationship of Church and State in Belarus: Legal Regulation and Practice*, 2003 BYUL. REV. 681, 708 (2003).

24. Human Rights Watch, *Republic of Belarus: The Subordination of Lawyers*, at <www.hrw.org/reports/1997/belarus/Belarus-07.htm> (visited 09/10/04).

25. U.S. Department of State, *Background Note: Belarus*, at <www.state.gov/t/pa/ei/bgn/5371.htm> (visited 09/10/04).

26. *Id.*; see Lukashuk, *supra* note 4.

27. RETT A. LUDWICKOWSKI, CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE 100 (1996).

28. *Id.*

29. *Id.*

30. *Id.*

lack adequate funding.”³¹ The same is true in broadcast media.³² Lukashenka’s attitude towards media is summed up by his statement that he “supports a free press as long as it is responsible and helps [his] presidency.”³³ In the months before the 1996 referendum, Lukashenka excluded political opponents from using the government-run media while simultaneously using it himself.³⁴

A renewed crackdown on independent media in Belarus occurred during the 2001 presidential election. Before the election, the government confiscated an independent newspaper’s publishing equipment, detained those distributing opposition newspapers, and arrested pro-opposition protestors.³⁵ Authorities also seized hundreds of thousands of copies of two other independent newspapers and shut down an entire printing house.³⁶ Circulation of a pro-Lukashenka newspaper increased dramatically and was distributed free of charge just prior to election day.³⁷ Lukashenka “dominated the [2001 presidential] campaign” using state-run media³⁸ and garnered a reported 76% of the vote.³⁹

Slander laws written into the amended constitution continue to arm the regime with an anti-media weapon. A media law enacted in 1997 prohibits publishing “information damaging the honor and dignity of government officials whose status has been established by the constitution.”⁴⁰ In 2002,

31. *Id.* at 100-01.

32. *Id.* at 101.

33. *Id.*

34. See Reeves, *supra* note 12.

35. See Ethan Burger, *The Recognition of Governments Under International Law: The Challenge of the Belarusian Presidential Election of September 9, 2001 for the United States*, 35 GEO. WASH. INT’L. L. REV. 107, 120-121 (2003); Peter Baker & Susan B. Glasser, *President Claims Victory in Belarus: Protestors Say Election Was Rigged*, WASH. POST, Sept. 10, 2001, at A13.

36. *Constitutional Watch: Belarus*, 10 E. EUR. CONST. R. 4, 6 (2001).

37. See Belarusian Association of Journalists, *The Daily Update on Media Situation in Belarus Ahead of Presidential Elections: Government Newspaper Campaigns to Re-Elect Lukashenka*, at <<http://www.baj.ru/indexe.htm>>, select Archives “2001” then “Sept. 5, 2001” (visited 09/16/04); see also Burger, *supra* note 35; *Constitutional Watch: Belarus*, *supra*, note 36.

38. *Constitutional Watch: Belarus*, *supra*, note 36 at p. 5.

39. Office for Democratic Institutions and Human Rights, *Republic of Belarus Presidential Election: OSCE/ODIHR Limited Election Observation Mission Final Report* [hereinafter “OSCE Final Report”], at 5-6, at <http://www.osce.org/documents/odhr/2001/10/1237_en.pdf> (visited 09/16/04).

40. Freedom House, *Nations in Transit, 1999-2000, Report on Belarus* (Adrian Karatnycky, Alexander Motyl & Aili Piano, eds.), at <http://www.freedomhouse.org/pdf_docs/research/nitransit/belarus.PDF> at 120 (visited 09/16/04).

a court found the editor-in-chief of independent weekly newspaper *Pahonya* and one of its journalists guilty of slandering President Lukashenka.⁴¹ Both were sentenced to forced labor under police supervision.⁴² Only months later, opposition newspaper *Nasha Svaboda* suffered “a huge financial blow” when it lost a libel suit brought by a government official.⁴³ The court fined the newspaper \$55,000 and the writer \$2,700 – a significant sum considering Belarus’ median monthly income is approximately \$200.⁴⁴

B. Electoral abuses

Once voting on the 1996 constitutional referendum commenced, the media considered the result a “foregone conclusion.”⁴⁵ Lukashenka dismissed Viktor Gonchar, Chairman of the Central Commission on Elections and National Referendums, just two weeks before the referendum and after Gonchar had complained of irregularities among the thousands of absentee ballots already cast.⁴⁶ In the two weeks between Gonchar’s removal and the election, the president’s armed guard barricaded the Central Commission.⁴⁷ Claims of egregious voter fraud and violations of absentee ballot procedure naturally followed,⁴⁸ and cast doubt on the legitimacy of the amended constitution and the governmental changes made in accordance with the new constitution.⁴⁹

The post-referendum electoral legal framework now suffers from strong pro-incumbency bias, as evidenced by the 2001 presidential election. Several presidential decrees severely restricted the rights of other candidates in this election; essentially, the president could and did create many of the rules in the election in which he participated.⁵⁰ For example, political parties, trade unions, and other organizations needed government permission to organize a demonstration with an expected attendance over

41. *Constitutional Watch: Belarus*, 11 E. EUR. CONST. R. 4, 6 (Summer 2002).

42. *Id.*

43. *Id.*

44. See Nations in Transit, *supra*, note 40 at p. 136; see generally World Bank Country Brief, Belarus, at <<http://www.worldbank.org.by/>> (visited 09/16/04).

45. See Reeves, *supra* note 12.

46. Pastukhov, *supra* note 18 at 480. See also Reeves, *supra* note 12.

47. Pastukhov, *supra* note 18 at 480.

48. *Id.*

49. *Id.* at 381.

50. *Constitutional Watch: Belarus*, *supra* note 36, at p. 5. See also Electoral Code of the Republic of Belarus, available at <<http://mail.ncpi.gov.by:8081/vybory/eng/legal/code.htm>> (visited 09/16/04).

1,000.⁵¹ Lukashenka threw several other obstacles in the way of opposition candidates in the 2001 election. Each candidate received approximately \$12,500 in state funding, and could not use additional funds other than those distributed to each equally from a common election fund.⁵² Official campaigning lasted only twenty-five days, and consisted of few organized events actually including the candidates.⁵³ These obstacles proved insurmountable to the opposition, especially when combined with the president's media control. The OSCE's official report of the 2001 election highlighted several flaws in the electoral process.⁵⁴ The report observed a campaign environment that intimidated opposition activists, domestic observation organizations, and independent media.⁵⁵ The report also criticized the legislative framework that hampered independence of the election administration and the integrity of vote tabulation.⁵⁶

C. Centralization of power

The 1996 constitutional referendum and subsequent amendments greatly expanded executive powers in the Belarusian government. The amendments created a bilateral parliament in which the president appoints eight, or one-sixth, of the senators.⁵⁷ The amendments also gave the president the right to dissolve the legislative chamber – essentially, the power to eliminate the representative assembly and rule through a subordinated Senate.⁵⁸ The president now must approve the initiation of all laws that “may reduce state resources, or increase expenditures,”⁵⁹ and perhaps most significantly, may now issue binding decrees and regulations without outside approval.⁶⁰ The president appoints and recalls all ministers, with only the Prime Minister's appointment requiring parliament's approval.⁶¹ The 1996 amendments created such intense conflict within the Belarus Constitutional Court that several of the judges resigned.⁶² When Lukashenka swore in judges for the new Constitutional

51. *Id.*

52. *Id.*

53. *Id.*

54. *OSCE Final Report, supra* note 39, at 1-2; *see also* Burger, *supra* note 35, at 126.

55. *Id.*

56. *Id.*

57. BELR. CONST. arts. 90, 91, available at <http://www.president.gov.by/eng/map2/state/const/> (visited 09/16/04).

58. *See* art. 93; *see also* Ludwickowski, *supra* note 1, at 39.

59. *See* art. 99.

60. *See* arts. 85, 101; *see also* Ludwickowski, *supra* note 1, at 39.

61. *See* art. 106.

62. Bill Bowring, *Politics Versus the Rule of Law in the Work of the Russian*

Court in March 1997, only four of eleven served on the pre-referendum court.⁶³

D. Abuse of the decree power

Before the 1996 referendum the Constitutional Court took issue with Lukashenka's use of rule by decree, which was fast becoming the president's "chief form of regulation."⁶⁴ The court pronounced four decrees unconstitutional in 1996; most concerned civil rights and liberties.⁶⁵ The new version of the Constitution expressly granted the President power to issue such binding decrees. Former Constitutional Court judge Mikhail Pastukhov regards this power as "nothing other than the abuse of power of office."⁶⁶ Pastukhov also contends that rule by decree violates article 6 of the Belarus Constitution, which "establishes the principle of separation of powers into legislative, executive, and judicial branches."⁶⁷ Lukashenka went on to pass more than ten decrees in the first half of 1997,⁶⁸ and used several decrees to create obstacles for opposition candidates during the 2001 presidential election.⁶⁹ The president now uses this power for nearly every purpose he sees fit; recent uses include reorganizing a newspaper's editorial board⁷⁰ and reducing the number of representatives in city government.⁷¹ Presidential Decree 40 allows confiscation of one's property if merely suspected of "harming the state"; "harm" is not defined.⁷² An OSCE observer notes that many "temporary" decrees stay in effect for many years.⁷³

E. Lukashenka and the future of constitutional rule in Belarus

President Lukashenka's attitude toward the Belarusian constitution sets a dangerous precedent for future presidential administrations. His willingness – even eagerness – to amend the document betrays his attitude

Constitutional Court, in THE RULE OF LAW IN CENTRAL EUROPE 257, 262 (Jiří Přibáň and James Young, eds., 1999).

63. *Id.*

64. Pashtukhov, *supra* note 18, at 489.

65. *Id.*

66. *Id.* at 492.

67. *Id.*

68. *Id.* at 493.

69. See Burger, *supra* note 35.

70. Pahtukhov, *supra* note 18, at 489.

71. *Id.* at 490.

72. *Constitution Watch: Belarus*, 9 E. EUR. CONST. R. 4, 6 (2000).

73. *Id.*

that the constitution is little more than a tool to serve his political ends. His continued use of presidential decree shows that he views himself as the ultimate source of law in Belarus. Looking at the broad and diverse areas in which Lukashenka has issued such decrees – from elections to city government and media censorship – he appears to place no limit on this power. Lukashenka’s method of rule effectively ignores the role of the judiciary and parliament. He openly displays his indifference to those concepts enumerated in the Belarus constitution that impede his wielding complete control over every aspect of government and society – namely, the separation of powers. This paves the way for increased centralization of executive authority and solidifies Belarus’ notoriety as Europe’s last remaining autocracy.

The outlook for political reform and recession of executive power is not optimistic. As leader of a state still in its constitutional and political infancy, Lukashenka has molded Belarus’ government into a frightening pseudo-legal structure that gives lip service to democratic institutions such as free speech and elections. The danger lies in the fact that his regime is not quite illegal enough.⁷⁴ Belarusians elected the president legitimately in 1994, and although the 2001 election was flawed in many respects and heavily criticized, most data show Lukashenka indeed won the most votes, even if by a smaller margin than he claimed.⁷⁵

Lukashenka’s control of the media, the Central Election Commission, and the legal framework of elections all but guarantee his regime’s “victory” in any future elections or referendums. This may allow him to change any aspect of the constitution in the executive’s favor with the appearance of voter approval. For these reasons, Alexander Lukashenka presents the largest barrier to the advancement of constitutional rule in Belarus. Little hope for reform exists under his regime, as illustrated by its disregard of enumerated constitutional principles, manipulation of legitimate institutions, and willingness to sidestep the legislative process through presidential decree. Unfortunately, the population of Belarus has provided Lukashenka with little incentive to change this course until recently.

74. See generally Burger, *supra* note 35.

75. *Id.* at 124-25.

III. Barrier Two: Social Factors and the Rule of Law

A. *Social attitudes toward the rule of law in the Soviet Union and Belarus*

1. *Constitutional law in the Soviet Union and Belarus*

No precedent exists for the transition from communist totalitarianism to democracy.⁷⁶ One must recognize the unique challenges faced by states in the former Soviet Union when analyzing Belarus' struggles in constitutional law. Seventy-five years of direct Soviet rule imprinted socialist legal paradigms deeply into the minds and institutions of Belarus.

In Soviet constitutional law, legal theorists considered legislation the sole source of law.⁷⁷ Soviet constitutions created a concentrated power structure designed to serve "the unconstrained rule of the Communist parties."⁷⁸ Parliament theoretically held immense power,⁷⁹ but in reality this power was centralized far from the people. First, elections were not free, and opposition political parties banned.⁸⁰ Second, Socialist constitutions transferred parliament's powers to "President's councils" or state councils that also exercised executive powers.⁸¹ Thus, the separation of powers in post-Socialist states may be a hard pill to swallow for officials who ruled, and for people who were governed, for decades without such structure.⁸²

Traditional modern Eastern European constitutional law lacks "natural" or "higher law," which formed the basis of classical constitutions such as the United States Constitution.⁸³ Higher law doctrine placed certain "inviolable principles" above any man-made order.⁸⁴ The Post-Soviet states instead have adhered to a "rechtsstaat," or positive man-made

76. Joanna Regulska, *Self-Governance or Central Control? Rewriting Constitutions in Central and Eastern Europe*, in CONSTITUTION MAKING IN EASTERN EUROPE 133, 149 (A.E. Dick Howard, ed., 1993).

77. Ludwickowski, *supra* note 27, at 39-40.

78. Péter Paczolay, *Traditional Elements in the Constitutions of Central and East European Democracies*, in THE RULE OF LAW AFTER COMMUNISM 109, 118 (Martin Krygier and Adam Czarnota, eds., 1999).

79. *Id.*

80. *Id.*

81. *Id.*

82. Ludwickowski, *supra* at note 27, at 201.

83. Grażyna Skąpska, *Between "Civil Society" and "Europe": Post-Classical Constitutionalism after the Collapse of Communism in a Socio-Legal Perspective*, in THE RULE OF LAW IN CENTRAL EUROPE, *supra* note 62, at 212-13.

84. *Id.* at 212.

system of law while forming their constitutions.⁸⁵ In a positive system, fundamental concepts such as human rights flow from the commands of a supreme sovereign,⁸⁶ and not from a natural order or “God-given” right. This may indicate that the populations of these nations are more vulnerable to authoritarian rule, where rights are defined by the state and where individuals see their rights subordinated to society’s interests.

Constitutions served a different purpose during communist rule in the former Soviet Union and Eastern Bloc. Communist regimes adopted constitutions but typically ignored their principles.⁸⁷ Socialist constitutions generally provided laundry lists of rights, but not causes of action that an individual could claim against the state.⁸⁸ The state used constitutions primarily to maintain order and legitimize communist rule, and not to protect individual freedoms.⁸⁹ Central and Eastern European constitutions, modeled after the Soviet blueprint, instead imposed duties, not freedoms, on individuals and rejected distinctions between public and private realms.⁹⁰ The concentration of power and the subordination of lower powers to higher ones replaced separation of powers.⁹¹ Rewriting socialist constitutions today thus involves introducing a hitherto absent democratic principle – providing individual freedoms and rights separate from the state.

Lukashenka’s reluctance to welcome a shift to the rule of law is not surprising. He is a “former Communist functionary in the classic mould” who uses a Soviet-style economic system, and who wishes to again merge with Russia.⁹² He now wants his regime to assume the sovereign role once held by the communist party; in essence, to replace one authoritarian regime with another. Lukashenka’s willingness to modify and even ignore the Belarusian constitution only conforms to the centralized tradition in which he and his colleagues thrived during Soviet times. This poses a question: is it possible for Belarus to divorce itself from nearly a century of Soviet constitutional ideology? Besides Lukashenka, can the people and

85. *Id.*

86. *Id.*

87. Regulska, *supra* note 76, at 133.

88. Ludwickowski, *supra* note 27, at 39-40.

89. Regulska, *supra* note 76, at 133.

90. *Id.* at 134.

91. *Id.*

92. *Iron-man Lukashenko Stands Strong at Home Despite Europe Travel Snub*, AGENCE FRANCE PRESS, Nov. 19, 2002; *See also Lukashenko Defends Russia-Belarus Union After Putin Criticism*, AGENCE FRANCE PRESS, June 18, 2002; *Proposed Merger Between Russia and Belarus Not Received Well by Belarus President*, (National Public Radio: Morning Edition, Aug. 16, 2002), available at LEXIS News.

government of Belarus learn to view constitutions not as conduits for government control, but as a guard of individual freedoms?

2. *Social-historical barriers to the rule of law*

Cultural pessimism philosophy suggests post-communist societies “lack important cultural prerequisites” for liberal achievements,⁹³ such as the rule of law. These factors make these states “inhospitable to grafts of constitutionalism, democracy, or anything else it is from the West that seems desirable in, but absent, from the East.”⁹⁴ Such factors include a poorly developed middle class and a lack of legality, democracy, and tolerance.⁹⁵ The presence of these factors may determine the ease of a state’s transfer to constitutionalism.

For example, Poland’s largely successful transition to constitutional democracy may stem from the state’s respected constitutional tradition, which dates back to the Middle Ages.⁹⁶ Hungary also has a long constitutional history dating back to the “Golden Bull” royal edict that assured liberties similar to those in the Magna Carta.⁹⁷ Hungary’s post-Soviet constitutional court is active and influential, and “proved to be the most dominant element in the development of state law in Hungary.”⁹⁸ The former Czechoslovakia is another example of successful transition. It attempted to build a democratic constitutional system between the two world wars, but the Soviet Union stifled its efforts after the Second World War.⁹⁹

The repulsion of communism from Poland, Hungary, and Czechoslovakia thus involved a return to their pre-existing Western-style constitutional traditions. Belarus has no such constitutional tradition to guide its transition. Russia occupied the above nations only after the Second World War; Russia occupied Belarus, however, for much longer, beginning in the 18th century.¹⁰⁰ Belarus declared independence in 1918, only to be “forcibly absorbed” into the Soviet Union by the Bolsheviks

93. See Martin Krygier, *Institutional Optimism, Cultural Pessimism and the Rule of Law*, in THE RULE OF LAW AFTER COMMUNISM, *supra* note 78, at 86.

94. *Id.*

95. *Id.*

96. Paczolay, *supra* note 78, at 114.

97. *Id.*

98. Vilmos Sós, *The Paradigm of Constitutionalism: The Hungarian Experience*, in THE RULE OF LAW AFTER COMMUNISM, *supra* note 78, at 137-38.

99. Paczolay, *supra* note 78, at 114.

100. U.S. Department of State, *supra* at note 25.

soon thereafter.¹⁰¹ The only break in Russian occupation until 1990 occurred during the Second World War, when the Nazis occupied the country.¹⁰²

In the words of Martin Krygier, “not everything one does is determined by the environment . . . [o]n the other hand, it is difficult to walk away.”¹⁰³ For the rule of law to succeed, the “people must *care* about what the law says” and not “merely comply resentfully” when they fear punishment.¹⁰⁴ The failure of Belarus to establish a constitutional democracy is thus not surprising. Centuries of monarchy, followed by communism, accustomed the Belarusian people to authoritarian regimes, making the state particularly vulnerable to Lukashenka’s bald assertions of executive power. No constitutional tradition guides Belarus during these crucial decades after independence from the Soviet Union. Thus, constitutional democracy will prove difficult to establish, if not impossible, in Belarus and other former Soviet Union states.

3. Is Lukashenka entirely to blame?

At first glance one is tempted to blame Lukashenka exclusively for Belarus’ reversion to authoritarianism. There remains little doubt that the president, since his regime took power in 1994, has greatly increased executive authority at the expense of the court and parliament, and curtailed civil rights. Yet despite his abuses and the faltering economy, Lukashenka retains at least passive support among many Belarusians.¹⁰⁵ In the 2001 election, even an opponent’s tally gave the president 46.7% of the vote.¹⁰⁶ Other sources claim Lukashenka enjoys the “unwavering support” of approximately 40% of the population.¹⁰⁷ Indeed, public perception of the rule of law has changed little since independence; the majority of Belarusians “still maintain the old Soviet approach to law: the boss is always right, the law stands alone, and so does life itself.”¹⁰⁸

B. Constitutional Origins: East vs. West

The historical context of constitution formation in post-communist Europe differed significantly from that in which the classical constitutions

101. *Id.*

102. *Id.*

103. Krygier, *supra* note 93, at 89.

104. *Id.*

105. Burger, *supra* note 35, at 133.

106. *Id.* at 123.

107. Lukashuk, *supra* note 4, at 43.

108. *Id.* at 45.

formed.¹⁰⁹ Economic interests such as fair taxes, tariffs, customs duties, and property rights served as the impetus for constitutional formation in France and the United States, and for the establishment of a constitutional order in Great Britain.¹¹⁰ The “civil society” interests behind the classical revolutions focused on economic freedoms and promoted a strong, but limited government to protect these freedoms.¹¹¹ In contrast, moral concerns dominated the “peaceful revolutions” in former Soviet Union states such as Belarus.¹¹² Reformers prioritized civil liberties and social welfare rights during initial constitutional formation; although most post-communist constitutions eventually included free market principles, these principles were included for theoretical and not pragmatic reasons.¹¹³

For example, the 1994 Belarusian constitution enshrined the right to retraining when unemployed,¹¹⁴ the right of workers to vacation,¹¹⁵ and the right to free health care.¹¹⁶ Despite ostensibly protecting property rights,¹¹⁷ the Belarusian constitution conforms to the post-communist pattern of emphasizing the moral obligations of government over pragmatic economic concerns. Commentators noted that drafts of the constitution contained no preferences towards either a market economy or a socialist model.¹¹⁸

The author does not suggest that Belarus and other post-communist states should not have emphasized human rights during forming their constitutions, or imply disingenuous drafting or morally flawed constitutional construction by Belarusian reformers. Rather, the author only claims Belarus lacked a component crucial to the success of the classical constitutions. Although deserving protection, social welfare rights may not provide a complete, pragmatic foundation upon which to build constitutions and governments.

The concept of judicial review in the United States serves as an example of the complex and long legitimization process needed to protect social welfare rights. The formation of the United States and the success of judicial review is widely regarded as rooted in the economic and political elite’s acceptance of judicial review “as a minor cost” of protecting the

109. Skapska, *supra* note 83, at 210.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 211.

114. BELR. CONST. art. 41.

115. *Id.* at art. 43; *see* Pastukhov, *supra* note 18, at 484.

116. *Id.* at art. 45.

117. *Id.* at art. 44.

118. Ludwickowski, *supra* note 27, at 97.

division of power.¹¹⁹ In fact, almost all cases reviewed by the United States Supreme Court in its formative years involved protecting free trade.¹²⁰ The Court's service of these interests for a century and a half built the legitimacy needed to advance civil rights during the New Deal and Warren court era.¹²¹

Thus, promoting civil rights and protecting against authoritarianism in Belarus may require more than expressing these principles in a written document, and then trusting those in power to implement the principles. The document and its enforcing entity must build legitimacy by serving vested societal interests such as free trade. Belarusian civil society lacks such cohesive interests after centuries of Russian imperial domination and a further seventy-five years of authoritarian socialism. Hopes for basic livelihood and civil liberties will not likely provide the practical impetus necessary to foster a legitimate Western-style constitutional legal framework.

IV. Barrier Three: Cultural and Structural Flaws in the Belarusian Judicial System

A. Court culture and the Soviet Union's judicial legacy

As Section III. A. discussed above, Soviet constitutions maintained a highly centralized power structure lacking the separation of powers present in most Western governments. In Soviet systems, special councils within parliament interpreted a constitution designed to maximize the power of the Communist party.¹²² Judicial review was mostly incompatible with traditional Soviet legal theory, which considered judicial review a manipulative instrument of big capital.¹²³ However, these systems generally began warming to the concept of judicial review as early as the 1950's, especially in the area of administrative action challenges, but "the role of judicial review as an instrument for protection of constitutional rights of individuals was largely symbolic."¹²⁴ In the Soviet Union, the 1977 constitution permitted resorting to courts, but the practice "was rarely

119. Martin Shapiro, *The Success of Judicial Review*, in CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 193, 206 (Sally J. Kenney, William Reisinger & John C. Reitz, eds., 1999).

120. *Id.*

121. *Id.*

122. Paczolay, *supra* note 78, at 118. See also Section IV. A., *infra*.

123. Ludwickowski, *supra* note 27, at 39-40.

124. *Id.* at 41-42.

exercised” because the document did not specifically state when review was permitted.¹²⁵ The right to judicial review was, in practice, reserved to the Presidium of the Supreme Soviet – a practice Ludwickowski refers to as “internal” constitutional review.¹²⁶

Current Russian commentators commonly feel post-Soviet judicial systems lack “legal orientations that support the rule of law.”¹²⁷ Most Belarusian judges have continued to serve under Lukashenka’s regime “with little if any embarrassment,” and have retained an “instinctual subservience” to the Soviet “the boss is always right” approach to law.¹²⁸

B. Belarusian courts’ lack of independence

Throughout Soviet history both high and low-level political authorities could influence important court cases. As Reisinger states, “when the stakes were high, the legal system was not independent and neutral.”¹²⁹ Mikhail Gorbachev frequently spoke out against political interference with the courts and established a commission to review constitutionality of legislation.¹³⁰ Positive treatment of judicial review did not come easily to the Soviet legal community.¹³¹ Communist party organs generally vetted judges at all levels.¹³²

The 1994 Belarusian constitution guarantees a “competent, independent, and impartial” court, and the 1996 constitution states something similar.¹³³ Furthermore, the constitution enshrines the subordination of the courts to the law. However, one commentator feels that many current Belarusian judges have forgotten about their judicial duty, and are now subordinated not to the law, but to the president.¹³⁴ Judges are dependent on the President’s vertical command, as Lukashenka reserves the right to appoint and remove judges, and also controls the financial and material support given to courthouses.¹³⁵ In addition, judges must pass a five-year probationary period after approval, leaving them

125. *Id.*

126. *Id.* at 211-12.

127. William M. Reisinger, *Legal Orientations in Post-Soviet Russia*, in CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 172, at 179-80 (Sally J. Kenney, William M. Reisinger & John C. Reitz, eds., 1999).

128. Lukashuk, *supra* note 4, at 45.

129. Reisinger, *supra* note 127, at 175.

130. *Id.*

131. *Id.*

132. *Id.* at 174.

133. Pastukhov, *supra* note 18, at 493.

134. *Id.* at 494.

135. *Id.* at 496.

uncertain of their future.¹³⁶ Judges “have largely ceased to be organs of justice” because of these factors.¹³⁷ Turnover rates show the politicization of the judiciary; as of 2000, forty percent of judges had held office for less than three years.¹³⁸

Belarus’ highest court – the Constitutional Court – has also changed in reaction to Lukashenka’s expanding judicial control. Judges enjoy not lifetime tenure, but eleven-year terms.¹³⁹ The President now recommends six of twelve judges and also the court’s chair - who then recommends the other six judges to parliament.¹⁴⁰ A United Nations Special Rapporteur on the Independence of Judges and Lawyers concluded, “the Constitutional Court cannot possibly be seen as independent of the executive.”¹⁴¹

Lack of judicial independence removes a major obstacle from Lukashenka’s continued push for complete authoritarian rule. His wide use of presidential decrees and nearly complete control over the judiciary means the separation of powers is little healthier in Belarus than under communist rule. Thus, all that has changed is the pretext for authoritarianism. However, Lukashenka’s regime is perhaps more dubious. Where Soviet leaders oppressed their people under the pretext of communism, Lukashenka’s regime oppresses beneath a façade of democracy.

Promoting the judiciary’s independence will require fundamental changes in the current political and legal systems, over which Lukashenka presently holds absolute control. The National Congress of Democratic Forces in Belarus, convened in Minsk in 1997, declared the only way out of the legal crisis is restoring the 1994 Constitution.¹⁴² The Congress also outlined three steps needed to dismantle authoritarianism in Belarus.¹⁴³ First, parliamentary elections must be held in the electoral districts prohibited by Lukashenka in 1996.¹⁴⁴ Second, the constitution must be revised “on the basis of procedures contained within it,” and using the recommendations of a constitutional commission appointed by

136. *Constitution Watch: Belarus*, *supra* note 72, at 6.

137. Pastukhov, *supra* note 18, at 496.

138. *Constitution Watch: Belarus*, *supra* note 72, at 6.

139. Rett A. Ludwickowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT’L COMP. L. 1, 24 (2000).

140. *Constitution Watch: Belarus*, *supra* note 72, at 6.

141. *Id.*

142. Pastukhov, *supra* note 18, at 496-97.

143. *Id.* at 497.

144. *Id.*

parliament.¹⁴⁵ Third, Belarus must hold new parliamentary and presidential elections based on new electoral laws passed by the new parliament.¹⁴⁶ Pastukhov considers the Congress' recommendations "an intelligent and civilized way out of the legal crisis . . . after the enactment of the 'presidential' constitution."¹⁴⁷

Conclusion

Constitutional law and democracy cannot flourish under the regime of Alexander Lukashenka. In the first decade of his leadership, Lukashenka showed a clear intent to establish a supreme executive, and blatantly subordinated the parliament, courts, and constitution to his rule. His willingness to ignore and change the constitution betrays his hostility towards the rule of law and cooperative governance. The president's control over the media and political machine all but ensure the victory of his chosen successor and continued authoritarianism. His suppression of the free press and opposition candidates in the 2001 presidential election sets a dangerous precedent during the formative years of Belarus' post-communist period.

Belarus voters' passive support of Lukashenka – despite his oppressive leadership - and Belarus' long history of monarchic and authoritarian rule present the next largest barriers to the rule of law. Indifference and compliance give Lukashenka just enough legitimacy to justify his election victories and pass referendums – which in turn allow him to amend the constitution. However, recent polls show Lukashenka's support may be waning.¹⁴⁸ Continued economic deterioration of Lukashenka's Soviet-style economic model may provide Belarusians with the impetus to remove him or reject his successor. In addition, the president's 2001 reelection means he can no longer blame his enemies for his failings – in essence, he will be "[held] hostage to his victory."¹⁴⁹

But a question remains even if a new regime replaces Lukashenka's: is it already too late for the rule of law in Belarus? Former Belarus Constitutional Court Judge Mikhail Pastukhov, as quoted earlier, believes restoring the 1994 Constitution and the pre-referendum 13th Supreme Soviet is necessary for reform. But would a new executive willingly concede power back to the judiciary and parliament in the tussle of

145. *Id.*

146. *Id.*

147. *Id.*

148. Thuburn, *supra* note 4.

149. Burger, *supra* note 35, at 154-55.

realpolitik? Such reform would require enormous restraint and political foresight. Lukashenka has stalled reform by tainting the early stages of Belarusian independence with cynicism and political opportunism. But deeper than Lukashenka's damage lies the real challenge: overcoming centuries of authoritarian influence on every aspect of Belarusian government and society.

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