

The Functioning of the Judicial System in Belarus  
and Its Impact on the Right to a Fair Trial of  
Human Rights Defenders

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## **Table of Contents**

### **Executive summary**

### **Introduction**

#### **PART I. Prosecutors**

1. General remarks
2. Organisation of public prosecution bodies
3. Selection of candidates
4. Nomination/Appointment. Dismissal
  - a. Prosecutor General
  - b. Prosecutors
5. Professional development. Confirmation of qualifications – certification.
6. Disciplinary responsibility of the prosecutors
7. Monitoring of the Public Prosecution Service
8. Specific functions and powers of prosecutor's offices
  - a. Supervision over the implementation of legislation (general supervision)
  - b. Supervision over the implementation of legislation during operative and investigative activities, during pre-trial proceedings, and in the preliminary investigation.
  - c. Supervision over the legality of court decisions
9. Statistics

#### **PART II. Judges**

1. Judiciary structure. Bodies of the community of judges.
2. Selection of candidates
3. Nomination/Appointment
4. Career advancement
5. Disciplinary liability of judges
6. Dismissal
7. Rules of independence
8. Remuneration of judges

#### **PART III. Proceedings**

1. Pre-trial preventive measures
  - a. Detention
  - b. Prevention of leaving the country
2. Trial
  - a. Metal cages
  - b. Openness of court sessions
  - c. Legal representation (disbarment)
  - d. Access to case file
  - e. Hearing of evidence
3. Presumption of innocence: comments from public figures

### **Conclusions**

## Executive summary

Despite the fact that the Constitution of Belarus guarantees the balance of powers within the government's scope of authority, the practical application of these provisions raises concern. Several civil society activists and international organizations, such as the Helsinki Foundation for Human Rights, Netherlands Helsinki Committee and Human Rights Watch, have highlighted the lack of independence of the prosecutor and judiciary from the executive branch in Belarus. The government engages prosecutors and judges to discredit critical voices and uses the criminal justice system as a tool to persecute human rights defenders, journalists and NGOs.

Legislation and legal practice that relate in Belarus to the organisation and functioning of the prosecution organs and the judicial system as well as to the pre-trial and court proceedings raise doubts as to their compliance with the standards of fair trial. The creation, reorganisation and liquidation of public prosecution bodies is effected by the President of Belarus upon a motion from the Prosecutor General. The relevant legislation does not specify any preconditions for such decisions, giving broad, even unlimited discretion to the Prosecutor General.

According to international standards, such as the UN Guidelines on the Role of Prosecutors, public prosecutors must enjoy independence to exercise their duties. However, the system of public prosecution bodies is centralised and is headed by the Prosecutor General. Although the President should nominate the Prosecutor General with the consent of the Council of the Republic, one of the chambers of the Parliament, the nomination process remains in the hands of the President solely, with no participation nor consultation involving any other institution or bodies. Similarly, removal of the Prosecutor General from office actually depends on the President as his decision may be taken not only in several clearly identified situations (committal of an offense established by a final court judgment, inability to perform duties for health reasons, own volition) but also "*on other grounds set out in legislative acts*", what is a broad category subject to extensive interpretation. Other prosecutors and employees of the prosecution bodies are nominated the Prosecutor General acting either in agreement with the President or independently, or upon a motion from heads of structural divisions of prosecutor's offices. Removal of the prosecutors from office can be grounded on reasons that are not precisely defined. No democratically legitimised prosecutorial council or a board of senior prosecutors is involved in the decisions. Analogous structural problems concern the promotion process and disciplinary sanctions which can be imposed by the President or the Prosecutor General. All in all, the prosecution in Belarus lacks the rudimentary guarantees of independence, enabling the executive power to manually steer the prosecution in politically sensitive cases, including those of human rights defenders.

Judges are appointed by the President either upon a proposal of the President of the Supreme Court (judges of general courts) or in consent with the Council of the Republic (judges of the Supreme Court). The relevant legislation does not set out the grounds for refusal to appoint a candidate by the President. In emerging democracies there should exist precise and transparent rules precluding that the nomination decisions would not be influenced by any reasons other than those related to the objective criteria. Moreover, judges of general courts are appointed for a term of five years, and can then be either reappointed for a new term or indefinitely. This mechanism does not safeguard independence and impartiality of the judiciary. Several Human Rights Committee decisions, including the decision in Ales Bialiatsky case, show that the prosecution of human rights defenders lacks evidence to arrest, detain and substantiate the charges against them. Courts usually embrace the prosecution's (written) submissions, which, according to the Committee, limits the judiciary's role to one of mere automatic endorsement of the prosecution's requests.

Disciplinary sanctions are specified by judicial boards in the procedures that meet requirements of procedural justice. On the other hand, boards decisions are merely recommendations. Finally sanctions are imposed, depending on their character, either by President of the Supreme Court and presidents of the courts, or by the President; they are subject to appeal procedures. But the legislation also assumes that there exist situations in which the grounds for sanctions are evident and gives the President a right to impose "*any disciplinary sanction on any judge without instituting disciplinary proceedings*". In such situations only dismissal of a judge can be appealed. Hardly is this procedure compatible with the principle of independence of the judiciary.

Detention as a pre-trial preventive measure is widely implemented, especially towards human rights defenders and journalists; it suffices that a given act is considered serious (grave) what means it is penalised by more than two years of imprisonment. Decisions to apply detention are taken, as a principle, by a person who cannot be considered as a court (judge), i.e. by a functionary in charge of an inquiry or investigation, or by a prosecutor. This practice was held by the UN Committee of Human Rights to constitute a violation of the right to personal freedom and security. Furthermore, the UN Committee also identified other practices that may or must have adverse consequences for the rights of defendants: keeping them in metal cages during court proceedings, and comments by public figures (including the President) and/or State-controlled media on politically and publicly resonant pending cases.

It has also been observed that the right to access to a lawyer can be limited in politically sensitive cases. A number of disbarments of lawyers dealing with human rights defenders cases have been recorded in the last years. Moreover, the access to case file, in order to prepare a proper defence is often severely restricted to defendants and their lawyers.

Both organisation and structural shortcomings in the organisation and functioning of the prosecution and of the court as well as procedural defects widespread in the country affect adversely the rights of human rights defenders to a fair trial.

## Introduction

The separation of powers and a working criminal justice system are two fundamental pillars of democratic society. In particular, a well-functioning, independent judiciary is likely to protect and promote human rights, and to hold the government to account for its wrongdoings. On the other hand, a judicial system that lacks safeguards for judicial independence is less likely to uphold human rights and guarantee state accountability. In that case, the criminal justice system can be easily used to silence critical voices.

The government engages prosecutors and judges to discredit critical voices and uses the criminal justice system as a tool to persecute human rights defenders (HRDs), journalists and NGOs. Reports of trial proceedings, during which the human rights defenders such as Ales Bialiatsky, were tried and sentenced to prison, show that the prosecution of these human rights defenders lacked evidence to arrest, detain and substantiate the charges against them. Courts usually embrace the prosecution's (written) submissions, which, according to the Human Rights Committee limits the judiciary's role to one of mere automatic endorsement of the prosecution's requests.

In practice, the balance of powers, as guaranteed in Belarusian constitution, is abandoned by the government, which exerts significant power over the courts and prosecution. Furthermore, constitutional guarantees, such as protection of the civil rights of HRDs are not respected in practice. This includes fundamental principles, such as the right to a fair trial, particularly the presumption of innocence, the right to judicial review which are enshrined in the Constitution and the procedural laws. Regular prosecutions against HRDs and journalists show that the Belarus judiciary failed to abide by these rules.

This report is devoted to the study of legal regulations and some practical aspects of the exercise of the right to a fair trial in Belarus from the perspective of the system and activities of the public prosecution bodies and courts. The report is based on an analysis of key legislative acts governing the activities of the public prosecution and courts proceedings in the Republic of Belarus (Appendix). This legislation and, in some cases, also the law enforcement practice based on this legislation, is analysed for compliance with international standards and the progressive experience of countries with respect to the activities of the prosecution, the persons carrying out the criminal prosecution, as well as courts. The report reveals important legislative and practical gaps, which hinder the independence of judges and prosecutors provoking, that very often they are used in the hands of politicians, as tools for human rights defenders prosecution.

The following international documents were taken into consideration in this study:

- in respect of the activities of the prosecution:
  - Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990;
  - Recommendation No. Rec. (2009)19 of the Committee of Ministers to the [Council of Europe] Member States on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers of the Council of Europe;
  - Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, developed by the International Association of Prosecutors and approved by the Commission on Crime Prevention and Criminal Justice;<sup>1</sup>
- in respect of the judicial system:

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<sup>1</sup>Resolution 17/2, Commission on Crime Prevention and Criminal Justice, Report on the work of its seventeenth session (30 November 2007 and 14–18 April 2008), E/2008/30 and E/CN.15/2008/22.

- International Covenant on Civil and Political Rights (Article 14), the European Convention on Human Rights (Article 6) and the practice of monitoring bodies of these international treaties – the Human Rights Committee and the European Court of Human Rights;
- Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August – 6 September 1985, and endorsed by the UN General Assembly resolution [40/32](#) of 29 November 1985;
- Bangalore Principles of Judicial Conduct, The Hague, 2002, approved by ECOSOC resolution of 19 May 2006, E/CN.15/2006/20;
- Recommendation No. R (94) 12 of the Committee of Ministers [of the Council of Europe] to Member States on the independence, efficiency and role of judges, 1994;
- Opinion No. 1 (2001) of the Consultative Council of European Judges (CCJE) to the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irrevocability of judges.

The study also draws on documents adopted by the European Commission for Democracy through Law (hereinafter “the Venice Commission”) and, in particular, on the Report on European Standards as regards the Independence of the Judicial system. Part I – The Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12–13 March 2010), Part II – The Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17–18 December 2010).<sup>2</sup> These documents complement and clarify the standards of international organisations, and contain reputable expert opinions and conclusions. In this regard, it is important to note that the Republic of Belarus is an associate member of the Venice Commission.

This report does not offer a review of all pieces of legislation relating to the activities of the public prosecution and courts of the Republic of Belarus. The scope of this report is restricted by the problematic issues occurring in legislation and law enforcement practice that were identified in the research process and that require attention in order to promote reforms needed for the proper organisation of the justice system. It is also worth noting that legislation and law enforcement practice in the Republic of Belarus raise criticism as for their non-compliance with human rights standards what has been confirmed by decisions and resolutions of international review bodies (first of all, UN Human Rights Committee and UN Human Rights Council) and numerous international organisations (among them the Council of Europe and the European Union). Instead of being guarantors of human rights protection, courts and prosecution bodies in Belarus became tools for stifling human rights in the country.

The report will focus on institutional organization of the prosecution and the judiciary, with a particular focus on systemic deficiencies affecting the impartiality and independence. Then, based on exemplary cases of HRDs the report will discuss the fair trial shortcomings and the use of judicial system in order to silence dissident voices.

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<sup>2</sup>CDL-AD(2010)040

## PART I. Prosecutors

According to the United Nations Guidelines on the Role of Prosecutors, public prosecutors must enjoy a degree of independence as is necessary for performing his/her official duties and in particular to be able to act, whatever the interests at stake are, “without unjustified interference” from any other authority, whether executive or legislative.<sup>3</sup> However, the prosecution should account periodically and publicly for its activities as a whole. Such reporting should be based on legal grounds and should serve the public to understand the work of the prosecution. It is an important factor of prosecution accountability.

### 1. General remarks

The public prosecutor’s office oversees the execution and application of laws, exercises criminal prosecutions and carries out investigations, represents the State in the courts. The legal status of public prosecution is laid down in Article 125 of the Constitution of the Republic of Belarus:

“Supervision over the accurate and uniform observance of laws, decrees, orders and other normative acts by ministries and other authorities subordinated to the Council of Ministers, local representative and executive bodies, enterprises, organisations and institutions, public associations, officials and citizens shall rest with the Prosecutor General of the Republic of Belarus and his subordinate prosecutors.

The public prosecution shall supervise the compliance with the law in the investigation of crimes, the compliance with the law of judgments in civil, criminal and administrative cases, in cases stipulated by law, it shall conduct a preliminary investigation, and support public prosecution in courts.”

Article 1 of the Law “On the Public Prosecution of the Republic of Belarus” (hereinafter “the Law on Public Prosecution”) corresponds with that constitutional provision and specifies its content:

*“The Public Prosecution of the Republic of Belarus (hereinafter “the Public Prosecution”) is a unified and centralised system of bodies exercising supervision to ensure strict and uniform implementation of regulatory legal acts on the territory of the Republic of Belarus on behalf of the state, and performing other functions, as laid down in legislative acts.”*

Thus, we can highlight the key features of public prosecution in the Republic of Belarus:

- it is a system of authorities which is unified and centralised;
- it acts on behalf of the state;
- it performs the following tasks (Article 4 of the Law on Public Prosecution):

1) supervising the implementation of normative legal acts by a wide range of people and bodies: executive authorities at the national and local levels, local representative authorities, enterprises, organisations, institutions, officials, citizens and associations of citizens.

2) supervising the implementation of the law when effecting operative and investigative activities, during the investigation of criminal cases (and, in some cases, conducting a preliminary investigation);

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<sup>3</sup>UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

- 3) coordinating the law enforcement activity conducted by government agencies and other organisations engaging in the fight against crime and corruption;
- 4) supporting criminal charges in court;
- 5) participating in the examination of civil and administrative cases;
- 6) supervising the lawfulness of judgments in civil, administrative and criminal cases, as well as supervising adherence to the law during the enforcement of such judgments.

More details on specific functions and powers of the public prosecution are provided in Chapter 8 of this study.

Principles to be adhered to by the public prosecution in its activity (Articles 5–10 of the Law on Public Prosecution) are as follows:

- rule of law;
- equality of all citizens before the law;
- independence of the prosecutor;
- subordination of subordinate prosecutors to superior prosecutors;
- transparency
- mandatory enforceability of prosecutors' requirements.

## 2. Organisation of public prosecution bodies

Pursuant to Article 8 section 2 of the Law on Public Prosecution, *"public prosecution's activities are carried out on the basis of subordination of the subordinated prosecutors to superior prosecutors, including the Prosecutor General of the Republic of Belarus."*

The system of public prosecution bodies corresponds with the administrative and territorial division of the country and has a strict hierarchy of vertical subordination.

Public prosecution offices of districts, of city boroughs, of cities, interregional and related specialised transport prosecutor's offices represent the lower level of the system. Superior to them are public prosecution offices in six regions of Belarus as well as the public prosecution of Minsk. The Prosecutor General's Office of the Republic of Belarus is the central body of the public prosecution system.

Until 1 September 2014, the public prosecution system comprised specialised military prosecutor's offices: the Belarusian military prosecutor's office and the inter-post prosecutor's offices, which engaged in the supervision over the implementation of the law in the Armed Forces of the Republic of Belarus, other troops and military formations of Belarus, and in public authorities where military service is envisaged. Following the Presidential Decree of 26 March 2014, No. 137, the military prosecutor's offices were abolished and their powers were transferred to the Prosecutor General and to territorial prosecutor's offices.

Worth noting is that this reform had a positive impact since the independence of military prosecutor's offices had been previously called into question because they received funding from the Ministry of Defence and employed prosecutors who were in military service.

However, one must notice how the public prosecution system was reorganised. In accordance with Article 16 section 2 of the Law on Public Prosecution, *"the creation, reorganisation and liquidation of*

*public prosecution bodies shall be effected by the President of the Republic of Belarus upon a motion from the Prosecutor General of the Republic of Belarus.”* However, the law does not set out the foundation of such a decision. This creates the opportunity for arbitrary decisions on the part of the President and the Prosecutor General (who reports to the President – see Chapter 7), and both have the right to change the public prosecution system, to create and liquidate special prosecutor’s offices while having an unlimited discretion. In order to avoid possible abuse of such unlimited executive powers, it would be advisable to specify the procedure for the creation, reorganisation and liquidation of prosecution bodies only on the basis of law and, within the limits prescribed by law; it would also be advisable to decide that the Prosecutor General adopts decisions with respect to specific competencies and the organisational structure of these bodies.<sup>4</sup>

Collegial advisory bodies, i.e. boards formed within the Prosecutor General’s Office, the regional prosecutor’s offices and within the prosecutor’s office in Minsk. The board is headed by the director of the respective prosecutor’s office, and is composed of his deputies and other public prosecution employees. Members of regional-level boards are approved by the Prosecutor General and members of the board of the Prosecutor General’s Office are approved by the President. Issues discussed at board meetings include the most important problems relevant to the work of public prosecution which need to be discussed and decided on collectively. The board discusses drafts of the most important orders, directives and instructions of the prosecutors, it hears reports and messages from heads of structural divisions of the prosecutor’s office and subordinate prosecutors. The board also hears reports and explanations from the leaders and other officials of state-level bodies, other organisations and citizens, including individual entrepreneurs, on issues related to the enforcement of legislation (Article 21 of the Law on Public Prosecution).

### **3. Selection of candidates**

In accordance with Article 48 section 1 of the Law on Public Prosecution and paragraph 4 of the Regulation on the Service in Public Prosecution Bodies of the Republic of Belarus (hereinafter “Regulation on Service in Public Prosecution”), *“the post of a public prosecution employee can be assigned to a citizen of the Republic of Belarus who has a university degree in law and has the necessary professional and moral qualities, and meets other requirements prescribed by the law on public service. In exceptional circumstances, the post of a public prosecution employee may be assigned to a citizen who holds a different university degree.”*

Therefore, under this provision, and in view of the general conditions defined in the Law “On the Public Service of the Republic of Belarus” (hereinafter “the Law on Public Service”) (Article 24), the mandatory requirements for the appointment of public prosecution employees are as follows:

- citizenship of the Republic of Belarus;
- knowledge of official languages (Russian and Belarussian);
- education – a degree in law or, in exceptional cases, another university degree;
- necessary moral and professional qualities.

There are qualifications which are required from graduates of higher education institutions who enter the service at public prosecution bodies, approved by force of the Order of the Prosecutor General dated 12 November 2015, No. 37, and by the Minister of Education. That document provides a detailed description of the requirements regarding the level of training, professional knowledge, abilities and skills, moral qualities of a public prosecution employee, which can be viewed as a positive element in terms of how the state determines the required level of training and professional skills of public prosecution employees.

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<sup>4</sup>A similar recommendation was given in the report of the OSCE/ODIHR on the essential legislative acts regulating the activities of the Prosecutor’s Office in the Kyrgyz Republic CRIM-KYR/237/2013 [LH], 18 October 2010.

What seems questionable is the possibility, provided for by the law, of appointing a person without a law degree as a public prosecution employee “in exceptional cases”. Since the work at public prosecution involves the specific knowledge of legal principles and provisions of the law, the lack of legal education may lead to a situation where citizens and representatives of professional associations will question the level of skills represented by a public prosecution employee. Consequently, this may undermine confidence in this person’s actions and decisions. In addition, the vagueness of the phrase ‘in exceptional cases’ creates a wide degree of discretion in appointments to posts of public prosecution employees, where people without a law degree may be appointed to the posts in the Prosecutor General Office (the President), and prosecutors at all levels (Prosecutor General). This may also lead to a situation, where persons close to the executive branch join the prosecution.

Circumstances precluding the service in public prosecution bodies (paragraph 6 of the Regulation on Service in Public Prosecution) are defined as follows:

- having no citizenship of the Republic of Belarus;
- having been found, in the manner prescribed by the law, to have no legal capacity or to have limited legal capacity;
- having been deprived, by the court, of the right to hold posts in public offices for a specified time;
- having criminal record;
- having committed an intentional crime;
- having a disease, confirmed by a report of a medical advisory committee, which is listed on the list of diseases that prevent a person from the execution of official duties, as approved by the Government of the Republic of Belarus;
- being closely related or having a connection to a public prosecution employee, if their service in the prosecution bodies will involve direct subordination or controllability of one person by another;
- refusing to undergo a special check in the prescribed manner, and refusing to undergo a procedure of access to information constituting state secrets, if the performance of official duties at the position applied for is associated with the use of such information;
- other cases set out in legislative acts.

The phrase “other cases set out in legislative acts” allows a broad interpretation of the grounds which prevent people from applying to work at public prosecution, whereas such grounds should be clearly and exhaustively defined in the Law on Public Prosecution.

The process of selection and preliminary training of candidates for the post of public prosecution employees includes a number of procedures: a qualifying examination and practical training – for first-time applicants to public prosecution, and a special check – for all candidates for the post of a public prosecution employee.

A qualifying exam for first-time applicants to the prosecution service is conducted “*with a purpose to establish whether the level of their professional knowledge and skills corresponds with the contemporary requirements associated with the service at the prosecutor's office*” (paragraph of the Regulation on Service in Public Prosecution).

The key principles of the examination procedure, which provide the Prosecutor General broadly defined competence, are specified in the Regulation on Service in Public Prosecution:

*"The qualifying examination is held by a human resources commission of the General Prosecutor's Office (hereinafter – 'the Commission'). Members of the Commission, the procedure and the form of the qualifying exam (exam questions, interview, testing) shall be defined by the Prosecutor General.*

*The questions, which are common to all examinees, shall be developed at the General Prosecutor's Office in cooperation with the Academy of Management affiliated with the President of the Republic of Belarus, the Institute of Retraining and Lifelong Training of Judges, Employees of the Prosecution, Courts and Justice Institutions at the Belarusian State University, and shall be approved by the Prosecutor General.*

*The questions for the qualifying exam shall be prepared with a view to test the basic of knowledge of constitutional law, civil law, civil procedure, commercial law, commercial procedural law, administrative law, administrative procedural law, criminal law, criminal procedural law, penal law, the foundations of public service, including the service at the Prosecutor's Office, the foundations of the governmental personnel policy, the ideology of the Belarusian state, information technology and records management.*

*Based on the results of the qualifying examination, the Commission shall issue a decision on whether the candidate has passed or failed the examination. The decision of the Commission shall remain valid for one year.*

*If the examinee does not agree with the Commission's decision, he is entitled to appeal to the Prosecutor General, and the Prosecutor General shall, in a decision, recommend (or refuse to recommend) a re-sitting of the qualifying exam.*

*A person who has not passed the qualifying examination, including a re-sitting of the examination, shall be entitled to apply to the prosecutor's office for admission to service not earlier than after one year.*

*The fact that an individual has passed a qualifying exam shall not be considered as an unconditional basis for the appointment of that individual to the post of a public prosecution employee.*

*When the post of a public prosecution employee is offered on a competitive basis, a qualifying examination shall precede the competitive procedure"<sup>5</sup> (paragraphs 7-9 of the Regulation on Service in Public Prosecution).*

As can be seen from the rules mentioned above, an important role in the qualifying exam procedure is played by individual decisions adopted by the Prosecutor General: from decisions on the formation of the examination committee and approval of the list of questions, to the role of an appellate instance where the candidates can turn to appeal against the results of the exam.<sup>6</sup> It seems that these powers would be more objectively and effectively exercised by a collegiate body of the public prosecution.

Furthermore, the absence of questions on human rights (recognised by international standards) in the list of disciplines covered by the qualifying examination does not meet the qualification standards set out in the Guidelines on the Role of Prosecutors. Moreover, practice has shown that

<sup>5</sup>No normative legal acts on the procedure to hold such a competition have been published.

<sup>6</sup>According to known data, there were no cases of appeals against the decisions of the human resources committee in 2013–2015. Source: "Zakonnost i pravoporyadok" journal, 2016, issue 1, p.13.

public prosecution employees do not have this knowledge or skills of working with arguments based on the concept of human rights: they do not use this argumentation themselves, and do not take it into account when reviewing appeals and complaints addressed to them, nor do they use this argumentation in dispute with procedural opponents in litigations. This problem stems from the poor quality of education in the field of human rights among the graduates of university law departments and is aggravated by the fact that the legislation (Article 1 of the Law on Public Prosecution) sets out the competence of public prosecution as oversight only over the execution of regulatory legal acts<sup>7</sup> (i.e. acts of domestic legislation in Belarus), which does not entail that prosecutors should be qualified in the field of international human rights standards. The prosecution is not aware of HRD or journalists protection standards and therefore, renders those group more vulnerable to prosecution.

## Internship

During the internship, the intern's business, professional and moral qualities are examined for the purpose of efficient execution of duties at the relevant position in the public prosecution bodies.

An internship includes a three-week training at the *Institute of Retraining and Lifelong Training of Judges, Employees of the Prosecution, Courts and Justice Institutions at the Belarusian State University*, and covers the application of the law in practice in the activities of the public prosecution in accordance with the training curricula approved in consultation with the Prosecutor General; it also covers practical training in one prosecution offices, and is funded from funds allocated for those purposes by public prosecution bodies' (paragraph 10 of the Regulation on Service in Public Prosecution).

Individuals may be admitted to the service in public prosecution bodies without an internship or without the qualifying examination upon a decision adopted by the Prosecutor General where such individuals have previously been in military service or have worked at the Investigation Committee, at the State Committee of Forensic Examinations, internal affairs authorities, bodies and units dealing with emergency situations, bodies dealing with financial investigations within the State Control Committee as officers (middle, senior and top officers), or where such individuals have held public offices in other government bodies (organisations), or have practiced the law as attorneys. In this case, the only condition for the appointment of such individuals shall be that they should have specific experience of working in the said bodies (5 years for the appointment to the general prosecutor's office, 3 years for the appointment for the prosecutor's office of Minsk and the regions). The required experience can be also reduced upon a decision of the Prosecutor General (points 13 and 15 of the Regulation on Service in Public Prosecution).

Such an exception in the process of staff selection for public prosecution can be considered partly justified since people with practical experience related to jurisprudence are not required to re-confirm their skills. However, the assessment of their qualifications and awareness of the ethical foundations involved in the work for the public prosecution can hardly be considered objective and impartial when such assessment is made by the Prosecutor General single-handedly. Taking into account the subordination of the Prosecutor General to the President, again the executive power has important competences in the appointment of prosecution staff.

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<sup>7</sup>A normative legal act is an official document of the established form, adopted (published) within the competence of the authorised state body (an official) or by way of a referendum, in compliance with the procedure set out in the legislation of the Republic of Belarus, containing generally binding rules of conduct, designed for an indefinite number of persons and repeated application (Article 1 of the Law of the Republic of Belarus "On normative legal acts").

## Background check

In accordance with paragraph 5 of the Regulation on Service in Public Prosecution, *“in order to clarify the circumstances that may prevent an individual from entering this service, a special internal background check shall be held.”* The procedure for such checks for the posts of the Prosecutor General, his deputies, prosecutors of regions and of the city of Minsk (all of which are included in the personnel register of the Head of State<sup>8</sup>) is set by the President, whereas the procedure for the remaining prosecutors is defined by the Prosecutor General. A refusal to undergo a background check means that the refusing individual cannot be appointed to work for public prosecution.

A presidential decree<sup>9</sup> set out a regulation governing the procedure for checking candidates to be appointed to respective positions. The Regulation specifies the circumstances to be checked, most of which correspond with the circumstances checked for public service and, in particular, for the prosecution service, as provided by the law (health situation, active legal capacity, lack of criminal record, declaration of income). However, what seems questionable is a criterion defined as *“whether or not the candidate has committed actions posing a threat to the security of the Republic of Belarus.”* This criterion is not sufficiently precise and, accordingly, can be applied arbitrarily and with a view to discriminate against candidates due to their political beliefs. Moreover, it is not clear what kind of professional or moral qualities are to be tested through questions concerning the candidate’s foreign travel and questions on whether the candidate or his (her) close relatives maintain *“non-official contacts with persons permanently residing abroad (except for CIS countries).”*

The legal act issued by the Prosecutor General, which establishes the procedure for background checks of candidates for positions at the public prosecution where such candidates are not included in the personnel register of the Head of State, has not been published.

## 4. Nomination/Appointment. Dismissal

### a. Prosecutor General

Pursuant to Article 126 of the Constitution of the Republic of Belarus, *the unified and centralised system of public prosecution bodies shall be headed by the Prosecutor General, appointed by the President with the consent of the Council of the Republic.*

The Council of Republic of the National Assembly is one of the two chambers of the Belarusian parliament, and its composition is based on the principle of territorial representation. It is composed of 64 members: eight from each region and the city of Minsk, elected at the meetings of deputies to local base-level Councils of Deputies, plus eight members of the Council of the Republic are appointed by the President of the Republic of Belarus (Article 91 section 2 of the Constitution).

It appears that a literal interpretation of the phrase *“with the consent of the Council of the Republic”* from the Constitution implies a prior consent and a consensus reached between the President and the upper house of the Parliament in respect of a candidate for the post of Prosecutor General.

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<sup>8</sup> Decree of the President of the Republic of Belarus of 8 November 2001, No. 644 (version of 23 February 2015) “On approval of the personnel register of the Head of State of the Republic of Belarus”.

<sup>9</sup> Decree of the President of the Republic of Belarus of 2 November 2000, No. 577 (version of 12 January 2012) “On certain measures to improve the work with the staff in the system of public bodies” (together with the “Regulation on the procedure of forming and testing the data on candidates for the posts of, and individuals holding posts included in the personnel register of the Head of State of the Republic of Belarus”).

This interpretation is supported by the provisions set forth in the Regulation of the Council of the Republic<sup>10</sup> (Articles 251–257), providing for procedures to prepare an opinion about a candidate, to discuss a candidate for the post, to refuse an appointment, to hold additional consultations with the President in case the Council of the Republic repeatedly refuses to appoint the candidate.

However, all the presidential decrees issued since 1996 to appoint Prosecutors General (when the President received the power to make such appointments through amendments to the Constitution) contain the following wording: *"to designate, with subsequent coordination with the Council of the Republic of the National Assembly."*

Therefore, in practice, the Prosecutor General is appointed single-handedly by the President, without any prior consent from the Parliament, not to mention any public consultation that would build confidence in the appointment of the Prosecutor General among the public and professional associations.

The term of office of the Prosecutor General is not specified either in the Constitution or in the Law on Public Prosecution. Moreover, it is also not specified that the Prosecutor General should stay in the office until his retirement.

According to the general conditions of service for all public prosecution employees, including the Prosecutor General, a contract is signed with the Prosecutor General for a period from one to five years (Article 48 section 3 of the Law on Public Prosecution, paragraph 14 of the Regulation on Service in Public Prosecution).

The Law on Public Prosecution (Article 18, section 3) provides that *"The Prosecutor General of the Republic of Belarus may be removed from his office by the President of the Republic of Belarus, with a notice given to the Council of the Republic of the National Assembly of the Republic of Belarus, in the case where the Prosecutor General has committed an offense established by a final court judgment, due to the inability to perform his duties for health reasons, on his own volition and on other grounds set out in legislative acts."*

Therefore, the President has the authority to remove the Prosecutor General from his office without any prior consultation with anyone. The phrase *"on other grounds set out in legislative acts"* opens up the list of grounds for the removal of Prosecutor General from his office. Since, in accordance with Article 63 of the Law on Public Prosecution, *"the service in the public prosecution bodies is terminated on the grounds stipulated by the legislation on public service and in the labour legislation,"* the Prosecutor General can be dismissed on grounds such as expiration of his contract or other grounds. This indicates the absence of a guarantee of stability at the office of Prosecutor General which, as a consequence, undermines the independence of Prosecutor General's activities.

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<sup>10</sup>Resolution of the Council of the Republic of the National Assembly of the Republic of Belarus of 19 December 2008, No. 57-CP4/1 (version of 23 June 2015) "On the Rules of the Council of the Republic of the National Assembly of the Republic of Belarus".

Thus, the procedure of appointment and dismissal of the Prosecutor General in Belarus is fully controlled by the President, and it is not hedged with guarantees of transparency and public scrutiny. The aforementioned legislation puts the Prosecutor General in a position of dependence on the President, which creates the risk that the Prosecutor General will act to accommodate the President's political will rather than solely on the basis of law. Under such circumstances, the principle of independence of the Prosecutor General and of subordinate prosecutors, as laid down in the Constitution (Article 127), is illusory. This in turn have an impact on the political motives behind prosecutors decisions in respect of proceedings against HRDs or journalists.

This legislation contravenes the recommendations of the Venice Commission

- Regarding the procedure to appoint the Prosecutor General:

*"It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non-political expertise should be involved in the selection process. However, it is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government."*<sup>11</sup>

- Regarding the procedure to remove the Prosecutor General from the office:

*"The grounds for such dismissal would have to be prescribed by law. (...) The Venice Commission would prefer to go even further by providing the grounds for a possible dismissal in the Constitution itself. Moreover, there should be a mandatory requirement that before any decision is taken, an expert body has to give an opinion whether there are sufficient grounds for dismissal."*<sup>12</sup>

## **b. Prosecutors**

Pursuant to Article 126 section 2 of the Constitution, lower-level prosecutors shall be appointed by the Prosecutor General.

The Prosecutor General appoints and dismisses the following:

- deputies of the Prosecutor General of the Republic of Belarus, prosecutors of the regions, prosecutors of the city of Minsk – in agreement with the President of the Republic of Belarus;
- public prosecution employees at the Prosecutor General's Office prosecutors – single-handedly;
- deputy heads and heads of structural divisions of prosecutor's offices in the regions and in the city of Minsk, heads of district (city) and inter-district prosecutor's offices and their

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<sup>11</sup> Opinion on the Regulatory Concept of the Constitution of the Republic of Hungary. Emphasis added, CDL(1995)073rev., chapter 11.

<sup>12</sup> Opinion on the Draft Law of Ukraine amending the Constitutional Provisions on the Procuracy. Emphasis added, CDL-AD(2006)029, paragraph 34.

deputies – upon a motion from, respectively, the prosecutor of the region, the prosecutor of the city of Minsk (Article 23 section 2 of the Law on Public Prosecution.)

Prosecutors of regions and of the city of Minsk appoint and dismiss public prosecution employees in prosecutor's offices in regions, the city of Minsk, districts, boroughs, cities/towns, inter-district and equivalent specialised transport prosecutor's offices (Article 24 section 3 of the Law on Public Prosecution). It seems that such a system of appointments made single-handedly poses the risk of biased decisions and even corruption.

Individuals who enter the service at public prosecution bodies sign a contract for a period from one to five years (Article 48 section of the Law on Public Prosecution, paragraph 14 of the Regulation).

Public prosecution employees can be dismissed on grounds specified in the Law on Public Prosecution, including a dismissal as a disciplinary sanction (Article 55 section 2 of the Law on Public Prosecution), and on the grounds stipulated by the legislation on public service and by the labour law (Article 63 of the Law on Public Prosecution). Thus, legislative acts provide for a wide range of grounds for dismissal for public prosecution employees. Based on the labour law, a dismissal may follow the expiry of the contract, without any reasons being stated on why the contract is not extended or a new contract is not signed.

It seems that this uncertainty about the duration and terms of service poses a risk that public prosecution employees may act and make decisions not solely on the basis of law but, instead, with a view to the opinions of a superior prosecutor who is empowered to decide on their continued appointment. In practice, it is common to see situations where public prosecution employees, especially when supervising the preliminary investigation or pressing charges in court, do not even hide the fact that the procedural decisions in the case are not their own but made upon their superiors' instructions.

The Venice Commission made the following recommendation regarding the procedure for the appointment of prosecutors:

"In order to prepare the appointment of qualified prosecutors expert input will be useful. This can be done ideally in the framework of an independent body like a democratically legitimised Prosecutorial Council or a board of senior prosecutors, whose experience will allow them to propose appropriate candidates for appointment. Such a body could act upon a recommendation from the Prosecutor General with the body having the right to refuse to appoint a person but only for good reason."<sup>13</sup>

## **5. Professional development. Confirmation of qualifications – certification.**

In accordance with Article 57 of the Law on Public Prosecution, "*professional development is the official responsibility of a public prosecution employee. The results of professional development and retraining of a public prosecution employee are taken into account for the purposes of promotion.*"

Professional development of public prosecution employees is carried out at the *Institute of Retraining and Lifelong Training of Judges, Employees of the Prosecution, Courts and Justice Institutions at the Belarusian State University* (hereinafter – "the Institute") and at other educational

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<sup>13</sup>Report on European Standards as regards the Independence of the Judicial system: Part II – The Prosecution Service. CDL-AD(2010)040.

and research institutions. The Institute is a public institution of education, and it operates a collective elected body: the Scientific Council. The strategic issues of the Institute's activity are determined by the Supervisory Board, composed of representatives of the Constitutional Court, Supreme Court, Ministry of Justice, General Prosecutor's Office and the Belarusian State University.

The professional development course at the Institute covers 84 to 100 contract hours and ends with a written term paper. The programme design takes into account the specialisations of public prosecution employees and includes the foundations of ethics and psychology of work at public prosecution.<sup>14</sup> These programmes' content have not been published but, as far as we can judge from practice, they do not include classes devoted to human rights.

In addition, professional development can be effected by obtaining additional education. For example, in 2015, the Academy of Management of the Republic of Belarus introduced a new specialisation for ongoing training of public prosecution employees, entitled 'Public administration and public prosecutor's supervision', where extramural education takes 1 year and 10 months.

Once in every three years of service at public prosecution bodies, public prosecution employees undergo certification "*with the purpose to provide objective assessment of their practical activities, the level of professional qualifications, legal culture and to identify their further prospects in the service*" (Article 52 section 1 of the Law on Public Prosecution).

The certification is carried out by a certification committee, which is appointed at the relevant prosecutor's office where a given employee is in service.<sup>15</sup> The certification of deputies of the Prosecutor General of the Republic of Belarus, the prosecutors of regions and of the city of Minsk and equivalent prosecutors is carried out by the Certification Committee affiliated with the President.<sup>16</sup>

The Certification Committee carries out the certification in the presence of the public prosecution employee being certified and, based on the certification results, adopts one of the following decisions:

- the employee is fit for the post;
- the employee is not fully fit for the post, and the certification is deferred for one year, provided that the recommendations of the certification committee are followed;
- the employee is not fit for post.

The Committee's decision has an advisory character. The final decision on the results of the certification is adopted by the prosecutor who has the powers of appointment and dismissal, whereas the decision in respect of the Prosecutor General is adopted by the President.

## 6. Disciplinary responsibility of the prosecutors

The issues of disciplinary responsibility of public prosecution employees are regulated by Article 55 of the Law on Public Prosecution and by the Regulation on Service in Public Prosecution (paragraphs 52–56).

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<sup>14</sup>Л. Зайцева [L. Zaytseva]. Повышение квалификации прокурорских работников в Республике Беларусь [Improvement of qualifications of public prosecution employees in the Republic of Belarus].//Законность и правопорядок [Zakonnost i pravoporyadok]. 2009. No. 3.

<sup>15</sup>The procedure of certification is established by the Regulations on Service in the public prosecution bodies.

<sup>16</sup>The procedure of certification for those persons is established by the Decree of the President of the Republic of Belarus of 14 March 2005, No. 122 (version of 11 February 2016) "On conducting the certification of executives of state authorities and other organisations whose positions are included in the personnel register of the Head of State of the Republic of Belarus".

Grounds for disciplinary responsibility (as set out in paragraph 52 of the Regulation on Service in Public Prosecution) are:

- non-performance or improper performance of responsibilities assigned to the public prosecution employee upon his fault, abuse of power;
- failure to comply with the restrictions associated with the service at the public prosecution bodies, as laid down in the Constitution of the Republic of Belarus, other legislative acts and this Regulation;
- breach of discipline, actions discrediting the title of a public prosecution employee, incompatible with the service at public prosecution bodies.

Types of disciplinary penalties (laid down in paragraph 53 of the Regulation on Service in Public Prosecution) are as follows:

- comment;
- rebuke;
- warning of insufficient fitness for the service;
- reduction in the rank for a term of up to six months;
- demotion for a period of up to six months;
- deprivation of breastplate of public prosecution bodies;
- dismissal from the post;
- dismissal from the post with deprivation of rank.

The right to apply disciplinary sanctions, depending on the type of such sanction, is vested in the head of the public prosecution body where the public prosecution employee works, and also with the head of the higher-level public prosecution body (this is regulated in detail in Article 55 of the Law on Public Prosecution). When choosing a disciplinary sanction, factors to be taken into account include the severity of the disciplinary offense, the circumstances under which it was committed, the previous service history and the behaviour of the employee in the service at public prosecution bodies. The disciplinary sanction in the form of a demotion in rank, assigned by the President of the Republic of Belarus, is imposed by the President of the Republic of Belarus upon a motion from the Prosecutor General whereas in other cases it is imposed by the Prosecutor General upon a motion from his deputies, prosecutors of regions and of the city of Minsk.

The disciplinary sanction procedure includes a written explanation to be submitted by the employee. If necessary, an official check is ordered and carried out. A decision as to which specific disciplinary sanction to apply is taken by the relevant head of the public prosecution body, who issues an order to impose a disciplinary sanction.

Thus, the process of disciplinary liability of public prosecutors corresponds with the hierarchical structure of the public prosecution bodies, where the application of disciplinary measures is initiated by superiors. However, the above-described procedure for handling disciplinary cases is not consistent with the principle of fairness of the proceedings laid down in the Guidelines on the Role of Prosecutors because this procedure: (1) does not give the person being held liable the right to be heard orally and to present arguments and evidence in his/her defence; (2) the decision is made single-handedly by the head of the public prosecution body without consulting any collegial body, which poses the risk of non-objective, biased decisions.

The Law on Public Prosecution (Article 56) provides for the right of public prosecution employees to appeal against a decision adopted in their cases and imposing a disciplinary sanction. The appeal may be filed with a higher-level prosecution body (a higher-level head of a public prosecution body) and (or) with the court. Nothing is known about the practice of filing such appeals.

## 7. Monitoring of the public prosecution service

Pursuant to the Constitution (Article 127) and the Law on Public Prosecution (Article 18 section 2), *"the Prosecutor General of the Republic of Belarus shall be accountable to the President of the Republic of Belarus in his activity."* Lower-level prosecutors are accountable to higher-level prosecutors, including the Prosecutor General (Article 8 section 2 of the Law on Public Prosecution).

Considering these provisions, as well as the procedure for the appointment and dismissal of the Prosecutor General and subordinate public prosecutors (Section 4 of this study), we can say that the public prosecution bodies in Belarus represent a system of strict subordination, accountable only to the President. No instruments of public control over the activities of the public prosecution bodies have been provided for in the legislation.

The Prosecutor General of the Republic of Belarus is not required to present any reports to the Parliament or any other public reports. From time to time, official sources and the media publish information about the reports of the Prosecutor General to the President, which shows that those meetings are used to determine priorities, discuss optimisation of public prosecution's activities etc.<sup>17</sup> In addition, the President often publicly expresses demands to "arrest", "put in prison" or to "handcuff"<sup>18</sup> specific individuals or groups of persons, which indicates that it is the President who issues instructions to initiate criminal proceedings. It is a well-known fact that some criminal cases that have earned social resonance are "under the President's control". This means that investigators and prosecution officials report to the President on the progress of the investigation and the litigation, and receive instructions from him.

Thus, the President exercises control not only over the general activities of public prosecution bodies, but also over procedural actions and decisions in individual cases, which does not comply with the principle of prosecutors' independence in the exercise of their powers or with the principle of non-interference in prosecutors' activities, as enshrined in the Law on Public Prosecution (Article 8).

## 8. Specific functions and powers of prosecutor's offices

### a. Supervision over the implementation of legislation (general supervision)

Pursuant to the Constitution (Article 125) and the Law on Public Prosecution (Article 1), one of the basic functions of public prosecution is to *"exercise supervision to ensure strict and uniform observance of laws, decrees, ordinances and other normative acts by ministries and other bodies subordinate to the Council of Ministers, by local representative and executive bodies, enterprises, organisations and institutions, public associations, officials and citizens."*

This legal provision implies that public prosecution bodies oversee only those public authorities that are subordinated to the government whereas the scope of prosecutors' supervision does not cover the chambers of the Parliament, the Government, the President or the Constitutional Court. On the other hand, the activity of enterprises (regardless of ownership status), organisations, public associations and citizens may be subject to prosecutorial supervision.

<sup>17</sup>See, for instance, [http://president.gov.by/ru/news\\_ru/view/aleksandr-lukashenko-prinjal-s-dokladom-generalnogo-prokurora-belarusi-aleksandra-konjuka-8745/](http://president.gov.by/ru/news_ru/view/aleksandr-lukashenko-prinjal-s-dokladom-generalnogo-prokurora-belarusi-aleksandra-konjuka-8745/); [http://president.gov.by/ru/news\\_ru/view/vstrecha-s-generalnym-prokurorom-aleksandrom-konjukom-10837/](http://president.gov.by/ru/news_ru/view/vstrecha-s-generalnym-prokurorom-aleksandrom-konjukom-10837/)

<sup>18</sup>See, for instance, <http://finance.tut.by/news485773.html>

When exercising these powers, the prosecutor has the right to freely enter the premises and other facilities of public bodies and other organisations; to receive documents and information from them; to receive clarifications from officials and citizens. If violations of the law have been revealed, the prosecutor takes appropriate response measures: he may require the abolition of legal acts and decisions adopted by public bodies, other organisations and officials; require that violations of the law are eliminated, together with their causes and conditions; issue a decision to institute criminal proceedings or disciplinary proceedings; approach the court with statements (actions) in order to protect the rights and legitimate interests of citizens and organisations, and to protect public and state interests (Article 27 of the Law on Public Prosecution).

Therefore, the public prosecution bodies in the Republic of Belarus have broad supervisory powers, which is typical for the 'supervision-oriented' model of public prosecution, inherited by the countries of the former USSR, and does not correspond with the modern concept of public prosecution, which should be limited mainly to the enforcement of criminal law. The "supervision-oriented" model has been repeatedly criticised by international organisations<sup>19</sup> and the Venice Commission,<sup>20</sup> warning against excessive powers of public prosecution, which, in effect, turn it into the 'fourth unaccountable power'<sup>21</sup>.

In this context, there are concerns about the prosecutors' powers to access premises and documents, and to obtain clarifications in the absence of appropriate procedural safeguards in the law against undue interference in people's private lives or in citizens' business activity (in particular, without the requirement to obtain a court order).

In addition, a question arises as to the efficacy of supervisory checks performed by prosecutors when they are unrelated to the decision on a possible initiation of criminal prosecution but, instead, are related to other spheres, including economic and business activities. Such checks actually duplicate the functions of numerous specialised inspection authorities.

It also seems that the European practice does not know such function of the prosecutor's office as general supervision "over the observance of state-guaranteed rights and freedoms enshrined in the Constitution of the Republic of Belarus, in legislative acts and international obligations of the Republic of Belarus" (Article 7 of the Law on Public Prosecution) or the related powers whereby the prosecutor may approach the court with statements (actions) to protect the rights and legitimate interests of citizens and public interests (Article 27 of the Law on Public Prosecution). Indeed, if a public prosecutor who, by definition, acts on behalf of the state, now assumes the role of protecting the rights violated by a public authority, such prosecutor may be in obvious conflict of interest, and will not be able to act effectively. For this reason, in democratic countries, this prerogative is vested in the national institutions protecting the human rights, something which does not exist in Belarus.

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<sup>19</sup>See, e.g., OSCE / ODIHR Opinion on the primary legislation governing the prosecution bodies of the Kyrgyz Republic. Warsaw, 18 October 2013 CRIM-KYR/237/2013 [LH].

<sup>20</sup>See, e.g., Opinion of the Venice Commission on the Federal Law on the Prosecutor's Office of the Russian Federation (Opinion no. 340/2005, adopted at its 63th plenary session of the Venice Commission on 10–11 June 2005), Opinion of the Venice Commission on the draft law on the Prosecutor's Office of Moldova (Opinion no. 473/2008, adopted by the Venice Commission at its 75th plenary session 13–14 June 2008). See also the Opinion of the Venice Commission on the draft law on the Prosecutor's Office of Ukraine (Opinion no. 667/2012, adopted at its 92th plenary session of the Venice Commission on 12–13 October 2012).

<sup>21</sup>European Commission for Democracy through Law (Venice Commission). Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service. Strasbourg, 3 January 2011. CDL-ad(2010)040.

A similar solution that exists in Ukraine has been criticised in an opinion prepared by the Venice Commission: *“The general protection of human rights is not an appropriate sphere of activity for the prosecutor’s office. It should be better realised by an ombudsman than by the prosecutor’s office.”*<sup>22</sup>

**b. Supervision over the implementation of legislation during operative and investigative activities<sup>23</sup>, during pre-trial proceedings, and in the preliminary investigation.**

The prosecutors’ function to supervise operative and investigative activities (conspiratorial activities of the militia, state security services, etc.), the conduct of pre-investigation checks and the preliminary investigation corresponds to the role given to prosecutors in many countries.

In carrying out this function, prosecutors have the right to inspect materials and documents of the case; to sanction (grant a written permission to) actions and activities in cases stipulated by the law; to prolong the duration of operative-and-investigative activities, the initial inquiry and the preliminary investigation; to give written instructions; to resolve complaints; to make demands regarding the elimination of violations of legislation; to cancel illegal decisions adopted by subordinates; to instigate and terminate criminal proceedings; to take over a criminal investigation and to conduct an investigation; to send the case to court and to exercise other powers stipulated by the law (Article 29 of the Law on Public Prosecution, Article 34 of the Criminal Procedure Code).

What draws attention among these powers, most of which are usual and justifiable for the function of public prosecutors, is the prosecutor’s right to give assent to actions carried out by bodies conducting operative-and-investigative activities and bodies involved in preliminary investigation.

Therefore, when operative-and-investigative activities are being conducted, the head of the relevant public prosecution body or his deputy authorises: inquiries about information which constitutes banking, medical, commercial and other secrets protected by the law; inspection of living premises and other property legally owned by citizens, premises, facilities, vehicles, other structures or territories of an organisation, where such activities are conducted secretly and involve penetration in the absence of the owner, holder or user; observation with the use of means for secret recording of information as well as other means installed in the housing premises or in other property legally owned by citizens, in premises, buildings, structures, vehicles, other structures or territories of an organisation; auditory control; control in telecommunication networks; monitoring of mail; operational experiments (Article 19 of the Law on Operative-and-investigative Activities).

During pre-investigation checks and preliminary investigations, the head of the respective prosecutor’s office or his deputy give assent to: the use of preventive measures in the form of detention, house arrest, bail (or they use these measures themselves); conduct a search, an inspection of home or other legal property; to the seizure of property in the housing premises or in other legal possession, seizure of postal messages, telegraph messages and other messages; to issue a demand to provide information and to the seizure of documents containing state secrets or other secrets protected by law; to the tapping and recording of conversations in technical communication channels and other conversations; to the removal of a corpse from the place of burial (exhumation); to the placement of a suspect or the accused, who are not detained, in a

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<sup>22</sup>Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor. CDL-AD(2009)048, adopted by the Venice Commission at its 79th Plenary Session (Venice, 12–13 June 2009), emphasis added.

<sup>23</sup>According to Article 1 of the Law “On operative-and-investigative activities”, operational-and-investigative activities are activities carried out by public authorities in compliance with the rule of conspiracy, publicly and privately, aimed at protecting the life, health, rights, freedoms and legitimate interests of citizens of the Republic of Belarus, foreign citizens, stateless persons (hereinafter, unless otherwise specified, “citizens”), the rights and legitimate interests of organisations, and property against criminal attacks, and aimed at ensuring the security of the society and the state.

psychiatric hospital; to the dismissal of the suspect or the accused from their duties in the manner prescribed by this Code (Article 34 of the Criminal Procedure Code).

The foregoing shows that the production of information and evidence, combined with the limitation of citizens' rights and freedoms, which, in accordance with the standards (e.g. Article 9 section 3 of the International Covenant on Civil and Political Rights) and the practice of democratic states, should be under judicial control, is carried out in the Republic of Belarus upon a sanction (or decision) of the prosecutor, not the court.

Such legislative regulations and practice have been reviewed and criticised by international bodies. For instance, the UN Human Rights Committee repeatedly held that the fact that the decision to detain was made by the prosecutor constituted a violation of Article 9 section 3 of the Covenant. The Committee's legal position is expressed as follows: "From the legal point of view, the public prosecutor cannot be considered an objective and impartial entity and be treated as an official who, by law, has the right to exercise judicial power' within the meaning of Article 9 section 3".<sup>24</sup>

A similar position was expressed in an opinion of the Venice Commission:

"In any case, prosecutor's actions which affect human rights, like search or detention, have to remain under the control of judges. In some countries a "prosecutorial bias" seems to lead to a quasi-automatic approval of all such requests from the prosecutors. This is a danger not only for the human rights of the persons concerned but for the independence of the Judiciary as a whole."<sup>25</sup>

In principle, the legislation provides for the opportunity of subsequent judicial review of the legality and validity of the arrest, detention, house arrest or prolongation of detention, house arrest and forcible placement in a psychiatric hospital, where the procedure is specified in the Criminal Procedure Code (Articles 143–147). However, the practice of the last two decades does not know any cases where such a decision would have been revoked by the court. This makes this process inefficient and shows that the powers of the prosecutor actually have an advantage over those of the judiciary.

As for the possibility of judicial review over other decisions adopted by investigative bodies which have been authorised by the prosecutor, the Criminal Procedure Code does not establish the procedure of appeal against such decisions. However, in 2001, the Constitutional Court issued a decision where it stated that, despite the existing gap in the Criminal Procedure Code, citizens have the right to appeal against investigators' decisions not only to the prosecutor, but also to the court in order to protect their fundamental rights and freedoms guaranteed by the Constitution.<sup>26</sup>

One should also pay attention to the powers of the prosecutor to address complaints against decisions and actions of the subordinate prosecutor, investigator, body of inquiry and the person conducting the inquiry (Article 34 of the CPC). This right is in competition with the powers of the

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<sup>24</sup>See, e.g., Communication no. 1100/2002 Bandazheuski against Belarus, Views adopted on 28 March 2006; Communication no. 1178/2003 Smantser against Belarus, Views adopted on 17 November 2008; Communication no. 2165/2012 Bialiatski against Belarus, Views adopted on 24 October 2014.

<sup>25</sup>European Commission for Democracy through Law (Venice Commission). Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service. Strasbourg, 3 January 2011. CDL-ad(2010)040.

<sup>26</sup>Decision of the Constitutional Court of the Republic of Belarus of 3 April 2001, No. P-112/2001 "On the right of citizens to go to court in matters arising in connection with criminal procedure relations".

head of an investigative unit to resolve appeals against decisions and actions of investigators and the lower-level chief of an investigative unit (Article 35 of the CPC). As a result, in recent years, the prevailing practice has been that appeals against the actions of investigators, lodged with the prosecutor, were forwarded by the prosecutor for decision to the head of the investigative unit, i.e. to the body whose actions were being appealed against. This indicates that the prosecutors have been removed from exercising the functions of proper control over the investigation of crimes.

The fact that the public prosecution fulfils the function of referring a criminal case to the court also raises questions in the light of the standard whereby individuals who carry out criminal prosecution should adhere to the standard of objectivity and impartiality. Thus, according to the Criminal Procedure Code (Chapter 31), after a preliminary investigation a criminal case is referred to the prosecutor, who decides on a number of issues, including the presence of signs of crime, proof of criminal charges, correct classification of the act under the criminal law, the integrity and objectivity of the investigation, and compliance with criminal procedural law during the investigation. After that, if the prosecutor agrees with the results of the investigation, he will refer the case to court. At the same time, the prosecutor must adopt this decision within no more than five days, or, alternatively, within no more than fifteen days in complex, multi-step cases. It is doubtful if this period is sufficient for a thorough examination of the aforementioned issues and for relevant decisions. In practice, the mechanism in question leads to quasi-automated approval of the results of preliminary investigation by prosecutors.

Furthermore, a specific problem may arise when supporting public charges. With the existing hierarchy of investigative bodies and public prosecution bodies, the supervision over the preliminary investigation carried out by the republican authorities of the Investigative Committee and the Committee of State Security rests with the office of the Prosecutor General; the supervision over preliminary investigations carried out by regional investigative authorities and authorities of the city of Minsk rests with the regional prosecutor's office and that of the city of Minsk; the supervision over preliminary investigations carried out by the investigating authorities at the district level rests with the district prosecutor's offices. Accordingly, the case is referred to court by the head (or deputy head) of the prosecutor's office of the same level which exercises supervision. On the other hand, public prosecution in court may be entrusted to prosecutors from a lower-level prosecutor's office. As described in chapters 4 and 6 of this study, the existing order of appointment, dismissal and disciplinary responsibility of public prosecution employees means that subordinate prosecutors are dependent on the heads of superior prosecutor's offices. Therefore, one cannot expect them to demonstrate procedural autonomy in deciding whether or not to support charges in court based on the circumstances determined directly in the court proceedings, if the proof of criminal charges has been previously confirmed by a senior prosecutor who referred the case to court. And this is what actually happens in practice in most cases. The following statistics for the first half of 2015 are known: the courts of the Republic examined 21,215 criminal cases, including 17,170 cases with the participation of a public prosecutor. And charges were dropped in only 6 (six!) cases.<sup>27</sup>

### **c. Supervision over the legality of court decisions**

In accordance with Article 32 of the Law on Public Prosecution, the supervision of judicial decisions for compliance with the law, as well as supervision of compliance with the law during the implementation of judicial decisions is aimed at establishing the legality of sentences, *decisions, rulings and orders of courts (judges) in criminal cases, civil cases, cases connected with business and other economic activity, cases of administrative offenses, as well as the legality of legal acts and*

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<sup>27</sup>"Zakonnost i pravoporyadok" [Law and legal order] journal, 2915, issue 3, p.5 – The results of the work of public prosecution bodies for the 1st half of 2015 and the main guidelines for the improvement of the effectiveness of prosecutorial supervision.

*decisions (actions) adopted by authorities and officials who execute court decisions and other acts to be executed.*

Under the rules of procedural law, within 10 days after the proclamation of the judgment by a court of first instance (a verdict in a criminal case, a decision in a civil case, a resolution in an administrative case), the prosecutor may file a protest, which provides the basis for a revision of the judicial decision at a higher court before its entry into force. At this stage,<sup>28</sup> the prosecutor—if he participated in the proceedings at first instance—works on par with the other parties who have the right to appeal against the judgment and, thus, initiate a review by a higher court.

However, the heads of public prosecution bodies and their deputies have the authority to file a protest against a court verdict in a criminal case (Article 370 of the CPC) and against a court decision in a civil case (Article 399 CPC) even if they did not participate in the proceedings at the court of first instance.

After examination of the case by way of appeal (criminal proceedings) or cassation (civil procedure), the judgment—if not cancelled—becomes legally binding and can be appealed against by the parties or protested against by the prosecutor in the supervisory review.<sup>29</sup> Moreover, a complaint may be filed by the parties to the court chairman (or deputy chairman) or the head (deputy head) of a prosecutor's office of the relevant level (Prosecutor General, prosecutor of the region or of the city of Minsk), and it is exactly those people who decide on whether to initiate proceedings in supervisory judicial court or to refuse such proceedings. In this case, the prosecutor acts not as a party in the case, but as a person who makes a decision on the revision of a judicial decision. Moreover, the head (or deputy head) of the respective public prosecution body may, on his own initiative, challenge the case even when the judicial decision has already entered into force, he may suspend execution of the decision and bring a supervisory protest, and may do so without any complaint from a party to the case.

Thus, certain officials within the public prosecution system in the Republic of Belarus are endowed with the power to monitor the legality of judicial decisions and to reopen cases already adjudicated by courts, which may, in fact, be regarded as a kind of control over the judiciary.

The following statistics for the first half of 2015 are known:

- protests filed by prosecutors under the supervisory procedure in criminal cases were satisfied in 82% cases;
- 64.4% of civil cases, which were cancelled under the supervisory procedure, were cancelled following protests filed by prosecutors.

With regard to the functions performed by public prosecution in respect of judicial decisions, the Venice Commission expressed the following position: "*Judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal.*"<sup>30</sup>

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<sup>28</sup>The stage of examination of complaints and protests against court judgments that have not entered into force is called "the appeal proceedings" in the criminal procedure (Chapter XX of the Criminal Procedure Code), in civil procedure this stage is called "cassation proceedings" (Chapter 32 of the Civil Procedure Code), in the administrative procedure this is called appeal and challenging of the decision in the case of an administrative offense (chapter 12 of the Procedural and Executive Code on Administrative Offences).

<sup>29</sup>The procedure for the proceedings under a supervisory procedure is regulated in Chapter XXII of the Criminal Procedure Code, and Chapter 33 of the Civil Procedure Code.

<sup>30</sup>European Commission for Democracy through Law (Venice Commission). Report on European Standards as Regards the Independence of the Judicial System: Part II CDL-AD(2010)004, paragraph 82.13.

The high number of successful protests constitutes a proof of the fact that the court proceedings are prosecution driven and that courts in most of the cases follow the prosecution argumentation.

## 9. Statistics

No official comprehensive statistics on the organisation of the public prosecution activities or the work of public prosecution bodies have been found.<sup>31</sup> The official periodical publication of the prosecutor's offices entitled "Zakonnost i pravoporyadok" ("Law and legal order") publishes reviews based on materials submitted by boards of the Prosecutor General's office, summing up the results for specific years or half-year periods. They include figures on the overall situation with crime, the number of crimes, some data on prosecutors' participation in court and on challenged court rulings, the number of checks conducted, etc. Some statistical information can be found in articles published in this magazine by public prosecution employees. However, these data are fragmented and do not show a complete and systemic picture of the work of public prosecution that could be used as a basis to form an opinion or draw informed conclusions.

## PART II. Judges

The principle of the independence and impartiality of the judiciary is guaranteed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, as well as the UN Basic Principles on the Independence of Judiciary<sup>32</sup> and is an essential precondition to exercise the right to a fair trial efficiently. As the two notions "independent and impartial" are closely interconnected, the Human Rights Committee ruled that the two requirements are to be considered together when assessing the fairness of proceedings<sup>33</sup>. Additionally, the Venice Commission published two reports on the main principles of the independence of judges and prosecutors in 2010<sup>35</sup>.

### 1. Judiciary structure. Bodies of the community of judges.

The judicial system of the Republic of Belarus is composed of:

- the Constitutional Court of the Republic of Belarus – a judicial review body controlling the constitutionality of normative legal acts in the country, exercising judicial power through constitutional proceedings;
- general courts – their system is based on the principle of territoriality and specialisation and consists of:
  - the Supreme Court;
  - regional courts (Minsk city court), economic courts of regions (the city of Minsk);
  - district (city) courts.

The judicial system assumed this shape following the 2014 reform, carried out on the basis of the Presidential Decree "On the improvement of the judicial system of the Republic of Belarus" of 29 November 2013. By force of the decree:

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<sup>31</sup>The study covered the official website of the Prosecutor General of the Republic of Belarus <http://www.prokuratura.gov.by/> and the official printed periodic publication (journal) of the public prosecution bodies entitled "Zakon i pravoporyadok" [Law and legal order].

<sup>32</sup> UN Basic Principles on the Independence of the Judiciary adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>33</sup>Communication No. 263/1987, M. Gonzalez del Río v. Peru (Views adopted on 28 October 1992), in UN doc. GAOR, A/48/40 (vol. II), p. 20, para. 5.2.

- starting from 1 January 2014, general and economic courts were combined into a unified system, headed by the Supreme Court;<sup>34</sup>
- courts of military jurisdiction were liquidated starting from 1 July 2014;<sup>35</sup>
- the role of the Ministry of Justice in cases of disciplinary liability of judges was cancelled;
- the powers in the sphere of organisational, logistical and personnel support for the activities of courts of general jurisdiction, as well as organisational and logistical support of the community of judges were transferred from the Ministry of Justice to the Supreme Court.

One must recognise the progressive nature of the reform that increases the degree of independence of the judiciary from the executive power. However, a question arises in connection with the fact that the structure of the judicial system, established in the Code of the Republic of Belarus on the Judicial System and the Status of Judges (hereinafter "the Code"),<sup>36</sup> was changed by a legal issued by the President. So far, no amendments have been made to the Code, so it is not clear whether the Ministry of Justice still holds certain powers, i.e. the powers in the area of recruitment to the post of a judge, participation in the examination committee holding the qualifying examination, the preparation of special training conditions for candidates for judges, or participation in the appointment of judges. However, since the Presidential Decree deprived the Ministry of Justice of its powers in the area of *personnel support and organisational support* of the courts, the present study is based on the assumption that these functions have been abolished.

The community of judges of the Republic of Belarus consists of the judges of the Constitutional Court of the Republic of Belarus, judges of courts of general jurisdiction as well as retired judges.

The community of judges has the following bodies:

- the Congress of Judges of the Republic of Belarus;
- the Republican Council of Judges;
- the conferences of judges of regional (Minsk city) courts and economic courts in the regions (the city of Minsk);
- the Supreme Qualification Board of Judges of the Supreme Court of the Republic of Belarus;
- qualification boards of judges of regional (Minsk city) courts and economic courts in the regions (the city of Minsk).

The Supreme Qualification Board of Judges is elected by the Plenum of the Supreme Court from among the Supreme Court judges, government officials, academic lawyers, and other legal experts; it is elected for a term of four years and consists of eleven members.<sup>37</sup> Its powers include:

- certification of the Supreme Court judges (except for the President of the Supreme Court), chairmen of the regional (Minsk city) courts, of the economic courts of regions (city of Minsk) and deputy chairmen of these courts, members of the Supreme Qualification Board of the Supreme Court judges, qualification boards of judges of regional (Minsk city)

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<sup>34</sup>Before the reform, there were general courts of the district level and the regional level, as well as military courts, including interpost courts and the Belarusian Military Court, headed by the Supreme Court, as well as economic courts headed by the Supreme Economic Court.

<sup>35</sup>Before the reform, the military courts were financed from the funds of the Ministry of Defence, and the judges of the military courts had the rank of military officers.

<sup>36</sup>The Code of the Republic of Belarus (a codified normative legal act) is an act of law that provides full systemic regulation of a certain area of social relations (Article 2 of the Law "On normative legal acts"). Codes have a greater legal force in relation to other acts of law (Article 10 of the Law "On normative legal acts").

<sup>37</sup> At present, the Supreme Qualifications Board for judges consists of 9 judges, one representative of the Presidential Administration and one scholar: deputy dean of the law faculty of the Belarusian State University - [http://court.by/justice\\_cooperation/Higher\\_Qualification\\_Collegium/sostav/](http://court.by/justice_cooperation/Higher_Qualification_Collegium/sostav/)

- courts and the economic courts of regions (city of Minsk), as well as the implementation of disciplinary proceedings in respect of those judges;
- examination of complaints against decisions adopted by qualification boards of judges of regional (Minsk city), courts and the economic courts of regions (city of Minsk);
- the exercise of other powers stipulated by the legislation for the Qualification Board of the Supreme Court judges.

The qualification boards of judges are elected by conferences of judges of the respective regional (Minsk city) courts and the economic courts of regions (city of Minsk) from among the judges of these courts, government officials, academic lawyers and other legal experts; they are elected for a term of four years and consist of eleven members. Their powers include:

- certification and implementation of disciplinary proceedings against judges of the regional (Minsk city) courts, the economic courts of regions (city of Minsk) (except for chairmen, deputy chairmen and members of qualification boards for judges of these courts), chairmen, deputy chairmen and judges of district (city) courts;
- the exercise of other powers stipulated by the legislation for the qualification boards of judges from regional (Minsk city) courts and economic courts of regions (city of Minsk).

## 2. Selection of candidates

The Code provides for the following essential requirements towards candidates for the position of a judge (Article 94):

- citizenship of the Republic of Belarus;
- minimum age: 25 years;
- a law degree;
- a certain minimum length of service (for all candidates: at least three years of work experience in the specialisation, for candidates for judges of higher courts and for chairmen and deputy chairmen of courts: work experience as a judge of 3 or 5 years);
- knowledge of the official languages (Russian and Belarusian).

The following individuals may not be candidates for the post of judges and, accordingly, may not be appointed as judges:

- individuals who have committed a discrediting offense;
- individuals found guilty of a crime or offence by a final court verdict;
- individuals who, for health reasons, are unable to perform the duties of a judge, which is confirmed by a medical report;
- individuals who have been recognised as having limited legal capacity or no legal capacity, as determined in a final court judgment.

The procedure which precedes the appointment of judges comprises the following steps: the candidate must pass the qualifying exam, must be admitted as a candidate for the post of a judge and must undergo a special preparatory programme.

The qualifying examination *“is carried out in order to assess the level of professional knowledge and skills of persons applying for the post of a judge, their business, moral and psychological qualities”* (Article 96 of the Code).

The examination is conducted by the examination committee at the Supreme Court, composed of the most qualified judges and other legal experts, approved by the President of the Supreme Court. The candidates for the post of a judge are selected and presented to the examination committee by the Supreme Court. The result of the qualifying examination is valid for two years.

The programme of the qualifying examination as well as the qualification requirements to be used by the committee as a basis to determine the knowledge and skills, the business, moral and psychological qualities of the candidates are not published. Therefore, it is difficult to ascertain how clearly the criteria for the qualifications and qualities for candidates for judges have been defined.

An individual may be admitted as a candidate to the post of a judge by the competent qualification board of judges on the basis of statements made by the person who has successfully passed the qualifying examination (Article 97 of the Code).

The Board evaluates the business qualities and moral qualities of the applicant and performs the functions of a competition committee. Following the review, the Board makes a decision to either register the candidate as a judge or to refuse registration. The grounds for refusal are not stated in the legislation.

Special preparation for the post of a judge includes training for up to one year in an educational institution, combined with an internship at one of the country's courts, which has a vacancy for a judge, under the supervision of a judge designated accordingly by the President of the Supreme Court of the Republic of Belarus (Article 98 of the Code).

A candidate may be exempted from the special preparation for the post of a judge if such a candidate has experience of working for at least three years in a legal profession in the bodies subordinated to the Ministry of Justice of the Republic of Belarus, in the courts, the bar, the public prosecution bodies, internal affairs bodies, the Investigative Committee of the Republic of Belarus. Such an exemption is granted upon a decision of the Supreme Court of the Republic of Belarus.

Thus, a decisive role in the selection process for the post of judge is played by members of the judiciary, which is in line with international standards. However, it appears that in the absence of clear criteria enshrined in the law with regard to business qualities and moral qualities, and in the absence of legally defined grounds for refusal to register a candidate for a judge, a person who applies for the post of a judge is put in a state of uncertainty as to the requirements that he/she is expected to meet. In addition, the programmes related to the qualifying examination and the internship have not been published, which leaves an open question as to the degree of qualifications required of candidates for the post of a judge, including qualifications in the field of international human rights standards. These problems indicate insufficient transparency and insufficient opportunities for public scrutiny over the recruitment process applied to judges.

### **3. Nomination/Appointment**

Judges of general courts are appointed by the President upon a proposal from the President of the Supreme Court (Article 99 of the Code, including the provisions of the Presidential Decree "On the improvement of the judicial system of the Republic of Belarus" of 29 November 2013). Judges of the Supreme Court are appointed upon consent from the Council of the Republic.

Initially, judges of general courts are appointed for a term of five years, and can then be either reappointed for a new term or indefinitely, until they reach the limit of stay in government service, i.e. the age of 65 years. Judges who have reached that age and occupy public posts, and who are included in the personnel register of the Head of State (the President of the Supreme Court, his deputies, judges of the Supreme Court, chairmen of regional courts and courts of the city of

Minsk<sup>38</sup>), may, with their consent, be left in public service in accordance with the procedure established by the President of the Republic of Belarus.

Thus, the President plays a decisive role in the appointment of judges. However, the law does not set out the grounds for refusal to appoint a candidate selected by the bodies of the community of judges and presented by the President of the Supreme Court, nor does it set out the procedure for resolving disputes in the event of such refusal. This creates the risk that the President may make a final decision arbitrarily, taking into account the degree of the candidate's commitment to the current authorities.

The above, as well as the President's discretion in establishing a five-year term of office of a judge at the initial appointment and re-appointments, puts judges in a position where they are forced to see their future or current professional activity in the perspective of the President's decision to either appoint them or refuse to appoint them, which violates the principle of independence of the judiciary.

Recommendation No. R (94) 12 of the Committee of Ministers [of the Council of Europe] to Member States on the independence, efficiency and role of judges indicates:

*"[...]where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria."*

The position adopted by the Venice Commission on this issue is more categorical:

*"45. In older democracies, the executive power has sometimes a decisive influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because these powers are restrained by legal culture and traditions, which have grown over a long time."*

*46. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse, and therefore, at least in these countries, explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges."*<sup>39</sup>

As regards the term of office of judges, the Venice Commission holds:

*"Venice Commission strongly recommends that ordinary judges be appointed permanently until retirement. Probationary periods for judges in office are problematic from the point of view of independence."*<sup>40</sup>

#### **4. Career advancement**

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<sup>38</sup>Decree of the President of the Republic of Belarus of 8 November 2001, No. 644 (version of 23 February 2015) "On approval of the personnel register of the Head of State of the Republic of Belarus".

<sup>39</sup>CDL-AD(2007)028.

<sup>40</sup>Report on European Standards as regards the Independence of the Judicial system: Part I –The Independence of Judges. CDL-AD(2010)040.

In the case of judges, career advancement consists in being appointed as a chairman of a court, being appointed to a higher court, or receiving a higher rank. These factors determine the status of judges and their income. In accordance with Article 105 of the Code on the Judicial System and the Status of Judges, a promotion to a higher position or a rank is based on the results of certification carried out by the relevant qualification board. The decision of the board has the status of a recommendation.

The appointment of judges to the position of the chairman of a court, the advancement, demotion or deprivation of a rank is effected by the President of the Republic upon a proposal from the President of the Supreme Court (Article 109 of the Code), which means that the career advancement of judges is also fully under the President's control.

## 5. Disciplinary liability of judges

Pursuant to Article 111 of the Code, the following are the grounds for bringing a judge to disciplinary liability:

- breach of the law in administering justice;
- a violation of the Code of Honour of the Judges of the Republic of Belarus;
- failure to comply with internal work rules, or other official misconduct.

Article 112 of the Code defines the types of disciplinary sanctions. Those are:

- comment;
- rebuke;
- warning of insufficient fitness for the service;
- reduction in the rank of a judge for a term of up to six months;
- dismissal from the post.

When imposing disciplinary sanctions, the following are taken into account: the nature of the violation and its consequences, the severity of the misconduct, the personality of the judge, and the degree of his/her guilt. The disciplinary procedure includes the initiation of the procedure, examination of the case, and adoption of a decision.

The right to initiate disciplinary proceedings (as set out in paragraph 6 of Presidential Decree "On the improvement of the judicial system") is vested in:

- the President of the Republic of Belarus – in respect of all judges;
- the President of the Supreme Court – in respect of all judges of courts of general jurisdiction;
- the chairmen of regional courts (Minsk city courts), the economic courts of regions (city of Minsk) – in respect of judges of the respective regional (Minsk city) courts, district (city) courts, and the economic courts of regions (city of Minsk).

The disciplinary proceedings are carried out by the relevant qualification board. Before the examination of the case, a member of the board may be instructed by the chairman to carry out an additional check. The participation of the judge in the exercise of disciplinary proceedings is mandatory. The proceedings are conducted with the participation of the person who has instituted the proceedings or the representative of such person. Other judges may also be present when the case is being examined (Articles 116 and 117 of the Code).

Based on the results of disciplinary proceedings, the qualification board adopts a decision which has the status of a recommendation, stating that it had found grounds for:

- imposing disciplinary sanctions in the form of a comment, rebuke, or a warning of insufficient fitness for the service;
- reducing the qualification rank of the judge for a period of up to six months;
- dismissing the judge;
- terminating the disciplinary proceedings (Article 118 of the Code).

On the basis of the decision of the qualification board, the final decision is adopted by the following (Article 119 of the Code):

- the President of the Supreme Court, chairmen of regional courts and Minsk city courts – regarding the imposition of a disciplinary sanction in the form of a comment, rebuke, or a warning of insufficient fitness for the service;
- the President – regarding the imposition of a disciplinary sanction in the form of a reduction in the qualification rank of a judge for up to six months, or dismissal of a judge from office.

Decisions made by the chairman of a regional court or a court of the city of Minsk imposing a disciplinary sanction may be appealed against to the President of the Supreme Court, and if the sanction has been imposed by the President of the Supreme Court then it can be appealed against to the Presidium of the Supreme Court (Article 121 of the Code).

The procedure for appealing against decisions of the President (except for dismissal of a judge from office) is not defined. Accordingly, such decisions are not subject to appeal.

The Code also contains a provision (Article 122) which is worth quoting here: *"In the presence of the grounds provided for in this Code, the President of the Republic of Belarus may impose any disciplinary sanction on any judge without instituting disciplinary proceedings. The judge may provide explanations regarding the disciplinary offence he/she has committed."*

Thus, it is obvious that the procedure for disciplinary liability is affected by significant shortcomings, which undermine the independence of judges:

- The law does not sufficiently clearly define the grounds of disciplinary liability. Blurred wording such as "breach of the law in administering justice", "other official misconduct" allows broad and arbitrary interpretations;
- The disciplinary proceedings are conducted by a judicial self-government body and contain elements of procedural fairness, i.e. the right to defend oneself in person, adversarial nature, transparency within the community of the judges, yet they do not end with final decision but only a recommendation;
- The final decision on the imposition of a disciplinary sanction is adopted single-handedly by chairmen of relevant courts and by the President;
- In cases where the President adopts a decision to impose a disciplinary sanction (other than termination of powers, see the next section of this study), this decision is not subject to appeal;
- The President has the right to impose a sanction on any judge without disciplinary proceedings. Moreover, the Code formulates the provision that presumes that the judge has, indeed, committed a disciplinary offence: "The judge may provide explanations regarding the disciplinary offence he/she committed."

For these reasons, the procedure for the disciplinary liability of judges cannot be considered fair to adhering to the principle of independence of judges.

## 6. Dismissal

Grounds for the termination of office of judges are provided for in Article 12 of the Code. They can be divided into the following:

- Circumstances depending on the judge's own will: termination of powers on their own accord; judge's refusal to be transferred to another court in connection with the liquidation of the court or reduction of the number of judges; appointment (election) to another position or transfer to another job;
- The emergence of circumstances preventing the judge from performing his/her responsibilities or from remaining in office: termination of citizenship of the Republic of Belarus as a result of the renunciation of citizenship or loss of citizenship; the entry into force of a court decision recognising the judge as having limited legal capacity or no legal capacity; the judge being recognised, in accordance with the established procedure, as unemployable or as incapable of serving as a judge for health reasons for a long time (at least one year), which is confirmed by a medical report; the judge achieving the age limit defined for public service;
- The circumstances resulting from culpable conduct of the judge: engaging in activities incompatible with the office of a judge; failure to comply with the restrictions associated with public service; systematic official misconduct (being brought to disciplinary liability more than two times within one year); gross violation of official duties; an offense which is incompatible with the status of a person in civil service;<sup>41</sup> the entry into force of a criminal conviction against the judge;
- Expiration of the term of judicial office.

In addition, the procedure of termination of powers of a judge may be initiated on the basis of certification results if the qualification committee has decided that the judge is not fit for the office and has issued a request to release the judge from his/her duties (Article 105 of the Code). The procedure of early termination of a judge's powers may be initiated by the same persons who have the right to initiate disciplinary proceedings, i.e. the President and the chairmen of superior courts. The decision on early termination of powers is adopted by the President upon a proposal from the President of the Supreme Court. The President and the judges of the Constitutional Court, the President and the judges of the Supreme Court are dismissed by the President of the Republic of Belarus with a notice to the Council of the Republic (Article 84 of the Constitution).

The official duties of a judge are terminated on the day when the relevant decision adopted by the President of the Republic of Belarus enters into force or on the date specified in the said decision. The decision to terminate the powers of a judge may be appealed against to the Supreme Court of the Republic of Belarus within one month from the date when the relevant decision of the President of the Republic of Belarus entered into force.

## 7. Rules of independence

Article 110 of the Constitution of the Republic of Belarus provides: *"When administering justice, judges shall be independent and are subject only to the law. Any interference in the work of judges in administering justice is inadmissible and punishable by law."*

The Code on the Judicial System and the Status of Judges (Article 85) provides that the independence of judges is ensured by the following:

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<sup>41</sup>For disciplinary liability – see chapter 5 of this study.

- procedure of their appointment;
- suspension and termination of office;
- immunity;
- procedure for dealing with cases and issues;
- secrecy of the meetings in making judgments and the prohibition to requests the disclosure of such secrecy;
- liability for contempt of court or interference in its activities
- other guarantees corresponding to the status of judges
- appropriate organisational and technical conditions for the operation of the courts.

The procedure of appointment and termination of office of judges is discussed in chapters 3 and 7 of this study. The immunity of judges applies to their domicile, office, means of transport and means of communication, correspondence, property and documents used by judges.

Initiation of criminal proceedings against a judge, bringing a judge as a defendant, detention and any other deprivation of personal liberty is done under special circumstances – upon a decision adopted by the head of the relevant authority (Prosecutor General, the Chairman of the Investigative Committee, the Chairman of the State Security Committee), with prior consent of the person who had appointed him/her (Articles 468–2, 468–3 of the Criminal Procedure Code of the Republic of Belarus), i.e. the President. At the same time, a decision to suspend the powers of a judge is adopted.

After the proceedings have been initiated and charges against a judge have been brought at court, the criminal case is investigated in the normal way, except that actions restricting the rights and freedoms are taken with the approval of the Prosecutor General rather than his subordinates. In this sense, it is worth recalling that similar actions in the Republic of Belarus are carried out not under a judicial decision but with approval from the heads or deputy heads of the respective levels of public prosecution in respect of all citizens.

Criminal cases against judges fall within the exclusive jurisdiction of the Supreme Court of the Republic of Belarus (Article 269 of the Criminal Procedure Code). This provision could be seen as a special guarantee for judges if it were not for the fact that the verdicts of the Supreme Court are not subject to appellate review (Article 370 section 5 of the Criminal Procedure Code). In other words, judges are denied the right to appeal against a verdict pronounced against them, which undermines their rights in comparison with the rights of other citizens, whose cases are examined by lower-level courts.

Administrative law establishes liability for contempt of court, i.e. for failing to appear in court, for disobeying the order of the judge in the process, for violation of order during the court session, for other acts that show an obvious disregard for the court. They are punishable with a fine or arrest of up to 15 days.<sup>42</sup>

Criminal law provides punishment for violence against judges and their families with the purpose of obstructing the lawful activities of a judge or coercion to change the nature of that activity or out of revenge for the administration of justice by those judges, for a threat against a judge, for intervention in the resolution of the case, for an insult to the judge in connection with him/her administering justice.<sup>43</sup>

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<sup>42</sup> Article 24.1 of the Code of the Republic of Belarus on Administrative Offences.

<sup>43</sup> Articles 388–391 of the Criminal Code of the Republic of Belarus.

Other guarantees include the rule provided for in Article 86 of the Code, namely that 'a judge cannot be transferred to another *position or to another court without personal consent. The powers of a judge may not be suspended or terminated except in the manner and on the grounds established by this Code.*'

Also, a special law has been adopted<sup>44</sup> which establishes measures for state protection, applicable in the case of threats of infringement on life, health and property of the aforementioned individuals in connection with the official duties of judges and their families.

However, despite the fact that the safeguards against interference in the adoption of decisions by judges are established in the legislation, the most serious problem in practice is the absence of actual independence of the courts, which, as shown in the previous chapters, stems from the lack of their institutional independence. This is especially noticeable in the examination of criminal cases. Judges, especially the ones in lower courts, do not hide the fact that their function in decision-making is reduced only to determining the punishment within the indictment presented by the preliminary investigation body and supported by the prosecutor (with some minor adjustments). The above statements are confirmed by statistics. For example, in the first half of 2015 the courts of the Republic examined 21,617 criminal cases and only 36 defendants were acquitted, which is 0.15% of the number of persons against whom proceedings were held.<sup>45</sup>

In addition, when courts examine criminal cases with a political background, or cases that are 'under the President's control' (in those cases, the presumption of innocence is usually absent at the moment of instigation, when the President has already expressed his opinion that the accused 'should be jailed', 'handcuffed' etc.) it is obvious that the judge does not make his/her own decision, and the verdict is discussed at least in the court of a higher level (this is clear from the unofficial statements made by judges themselves, their assistants, and prosecutors).

## 8. Remuneration of judges

The questions of compensation of judges as civil servants are regulated by the Law "On the public service in the Republic of Belarus.

In accordance with the Law on Public Service (Article 48 section 1), the salaries of civil servants consist of basic salary, bonuses for the rank of civil servants, bonuses for length of service, bonuses and other payments stipulated by the legislation.

The salaries of civil servants appointed to public offices by the President of the Republic of Belarus are established by the President of the Republic of Belarus or a body authorised by the President (Article 48 section 12 of the Law on Public Service). According to the Constitution (Article 84), the President appoints the President of the Constitutional Court and the President of the Supreme Court, judges of the Supreme Court and six of the twelve judges of the Constitutional Court.

The amounts of base salaries of the Vice-President of the Constitutional Court of the Republic of Belarus, vice-presidents of the Supreme Court of the Republic of Belarus, as well as the judges of the Constitutional Court of the Republic of Belarus, the Supreme Court of the Republic of Belarus are set respectively at 90 percent and 85 percent of the base salary of the President of the

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<sup>44</sup>Law of the Republic of Belarus of 13 December 1999, No. 340-Z "On state protection of judges, officials of law enforcement and regulatory (supervisory) authorities, employees of state security authorities".

<sup>45</sup>"Zakonnost i pravoporyadok" [Law and order] journal, 2915, issue 3, p.5 – The results of the work of public prosecution bodies for the 1st half of 2015 and the main guidelines for the improvement of the effectiveness of prosecutorial supervision.

Constitutional Court of the Republic of Belarus, the President of the Supreme Court of the Republic of Belarus and of the Supreme Economic Court of the Republic of Belarus, as established by the President of the Republic of Belarus.

The amounts of base salaries of judges in the courts of the Republic of Belarus are established in accordance with their respective positions as a percentage of the base salaries of, respectively, the President of the Supreme Court of the Republic of Belarus, and the President of the Supreme Economic Court of the Republic of Belarus, such percentages being established by the President of the Republic of Belarus (Article 48 sections 4 and 5 of the Law on Public Service).

Allowances assigned for the rank of the civil servant and the conditions of their payment are determined by the President of the Republic of Belarus. The Presidential Decree of 3 April 2008, No. 195, 'On some social and legal guarantees for military personnel, judges and public prosecution employees,' sets a number of benefits for judges, such as the right to free privatisation of residential premises on condition of having 20 years of service as a judge, the right to improve one's living conditions in an extraordinary manner.

The information on specific amounts of remuneration received by judges cannot be found in the public domain. However, judging by how this remuneration is structured, its amount initially depends on the President and is no different from the remuneration of other public officials. According to information known from informal dialogue with judges and observations of their living standard, their income (although it corresponds to the average level of income in the country) does not allow to call them 'wealthy people'. Therefore, the procedure and the level of material security of judges does not create conditions for their independence.

## PART III. Proceedings

A number of cases set in Belarus proves how the country's judiciary and the criminal justice system serve as a "tool of persecution" of HRDs. The significant control over the judiciary, as described earlier, has led to a judiciary that is increasingly engaged to discredit critical voices through politically motivated convictions and charges. While monitoring trials of HRDs numerous violations of basic procedural guarantees, in particular the right to a fair trial, were observed, which raises serious doubts with regard to fundamental principles of due process. Furthermore, some practices, such as the use of metal cages in trials against HRDs, amount to a humiliating and degrading treatment. This report identifies key malpractices of Belarusian prosecutors and judges. In view of politically sensitive cases (such as cases involving HRDs), judicial independence is ignored in Belarus and judges are enormously responsive to political authorities. Generally, one can say that a criminal trial against a HRD can be regarded as a foregone conclusion that appears to be a "real" trial but has none of its substance. Judges align themselves with the motions of prosecutors and issue judgements which strongly resemble the prosecution's written submissions and approve trial transcripts that bear no resemblance to the actual course of proceedings. Politically motivated proceedings against HRDs have been criticized by various international organizations, such as the UN, stating that criminal proceedings are instituted without a legitimate basis and without efficiently exercising the right to judicial review. On 24 September 2014 the UN Human Rights Committee officially recognized that the Republic of Belarus violated the rights of Ales Bialiatski, President of Human Rights Centre "Viasna" and FIDH Vice President. The Committee recognized violations of Article 9 (the right to liberty and security of the person), Article 14 (the right to justice and a fair trial), and Article 22 (freedom of association) of the International Covenant on Civil and Political Rights<sup>46</sup>.

### 1. Pre-trial preventive measures

#### a. Detention

Detention is a pre-trial preventive measure, i.e. one of the measures (and the most restrictive one) applied in criminal proceedings to persons suspected or accused of a crime, in order to prevent them from committing new crimes or taking actions that impede the criminal proceedings, and also to ensure the execution of sentence (Article 116 of the Criminal Procedure Code, hereinafter: 'CPC').

As with all other pre-trial preventive measures, the CPC establishes the grounds of application of detention i.e. the presence of sufficient evidence to believe that the suspect or the accused might:

- escape from the investigation and trial;
- prevent the preliminary investigation of the criminal case or examination of the case by court, also through illegal influence on the persons involved in criminal proceedings, concealment or falsification of materials relevant to the case, failure to appear without good reason when called by the body which conducts the criminal proceedings;
- commit a socially dangerous act, as provided for in criminal law;
- oppose the execution of the sentence (Article 117).

As a rule, detention is implemented in any case of the prosecution where the law prescribes a penalty of more than two years.

The persons suspected or accused of committing grave or especially grave crimes against the peace and security of mankind or the state, a war crime, a crime involving the encroachment on human

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<sup>46</sup> Natalya Pinchuk v. Belarus, Human Rights Committee, Communication No. 2165/2012, UN. Doc. CCPR/C/112/D/2165/2012 (2014).

life and health, the pre-trial preventive measure in the form of detention can be applied only on the basis of the gravity of the crime (Article 126 CPC).

House arrest can be applied as a pre-trial preventive measure and it also involves actual deprivation of liberty in cases where its application is coupled with a ban on leaving the home, either completely or at certain times.

The decision to apply either detention or house arrest can be adopted by the following: the person conducting the inquiry, the investigator, the Chairman of the Investigative Committee of the Republic of Belarus, the Chairman of the State Security Committee of the Republic of Belarus, or persons performing their duties, the prosecutor (during the preliminary investigation) and a judge (court) can apply it at the stage of judicial trial. If the decision is made by the body of inquiry or by the investigator, measure must be sanctioned by the public prosecutor (Article 119 CPC).

The maximum period of detention and house arrest during the preliminary investigation is initially set for two months, but it can be occasionally extended when allowed by a prosecutor (deputy prosecutor) of the relevant levels up to six months, with an extension of up to eighteen months in cases of charges of a grave or an especially grave crime. Once the case has been received by the court, the court may extend the term of detention or house arrest monthly, up to a maximum of six months from the date of receipt of the case before the verdict, with an extension of up to twelve months in cases of charges of a grave or an especially grave crime. At the stage of an appeal, the detention period can be extended by up to three more months, with an extension of up to six months in cases of charges of a grave or an especially grave crime.

Detention can be extended over the maximum limits by the Chairman of the Supreme Court, for a period necessary for the accused to get acquainted with the case file at the end of the preliminary investigation, or for a period necessary to complete the trial at court. If the verdict is overturned and the case is sent for a new trial, the period of detention runs without regard to the time previously spent in detention.<sup>47</sup>

When speaking of the law enforcement practice, it can be argued that the pre-trial preventive measure in the form of detention is widely used, and the overwhelming number of cases are those where charges concern a grave or an especially grave crime. In complicated, multi-step cases, the accused may be detained for up to two or more years before the sentence comes into force. At the same time, the decisions made by the prosecuting authority or the court regarding detention or extension of detention hardly ever describe any specific evidence that the accused might hide, any influence he/she might exert on the investigation and court examination of the case or any probability he/she might commit a new crime. In other words, those decisions are poorly reasoned.

The decision to apply a pre-trial preventive measure in the form of detention and house arrest can be appealed against in court (Articles 143–147 CPC) but, in the practice of the last two decades, no cases are known where such a decision would have been quashed by the court, which is indicative of the ineffectiveness of this procedure.

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<sup>47</sup>The terms and procedure for their extension are regulated by Article 127 of the Criminal Procedure Code.

The above-described procedures do not meet the international standards associated with the right to liberty and security of person. In its views rendered in cases against Belarus, the UN Human Rights Committee recognised the violation of Article 9 of the International Covenant on Civil and Political Rights in the fact that decisions to apply detention are taken by a person who does not have judicial authority,<sup>48</sup> as well as in the fact that such decisions can be made solely on the grounds of the gravity of the charges, and that decisions to apply detention do not contain any reasons justifying that detention is needed, reasonable or proportionate.<sup>49</sup>

According to the results of consideration of individual communications from Ales Bialiatski's spouse Natalia Pinchuk UN Human Rights Committee concluded: «[t]he Committee notes the author's allegations regarding the pre-trial detention of her husband, including that the decision of 5 August 2011 regarding his remand in custody had been taken by a prosecutor rather than by a judge, and that this decision and the decisions of the court that reviewed the detention order did not contain any reasoning as to the necessity, reasonableness and proportionality of the custodial measure. The Committee further notes the author's allegation that article 126.1 of the Criminal Procedure Code allows custodial placement solely on the basis of the seriousness of the offence and that, accordingly, her husband's detention was arbitrary. In the absence of a reply from the State party on these issues, the Committee finds that the above allegations should be given due weight, and that the facts described disclose several violations of the author's husband's right to liberty of person as guaranteed by article 9 of the Covenant».

#### **b. Prevention of leaving the country**

Other measures, not involving deprivation of liberty, may also be applied as pre-trial preventive measures, i.e. a written pledge not to leave [the country] and to behave properly; personal surety; transfer of the person with a military serviceman status under the supervision of the commander of the military unit; the transfer of a minor into supervision; pledge or house arrest (Article 116 CPC).

In addition, if there are reasonable grounds to believe that the suspect or the accused who is not in detention could avoid participation in the investigation or trial, or avoid appearance by summons without valid reasons, leaving the territory of the Republic of Belarus, then the body of inquiry, the investigator, the prosecutor and the court have the right to impose a temporary restriction on the right to leave of the Republic of Belarus. Under this measure, the suspect or the accused is prohibited from leaving the Republic of Belarus (Article 132–1 of the CPC).

On the basis of a decision (statement) made by the body of inquiry, investigator, prosecutor or judge (court), the data of such a person are included in the database of citizens whose right to leave the Republic of Belarus has been temporarily restricted. This decision is enforced by the border service of the Republic of Belarus at the border checkpoints (Article 10 of the Law of the Republic of Belarus dated 20 September 2009, No. 49-Z 'On the procedure of exit into the Republic of Belarus and entry into the Republic of Belarus for citizens of the Republic of Belarus'). Therefore, during the preliminary investigation, the restriction of the right to leave the country is imposed under an extrajudicial procedure.

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<sup>48</sup>See, e.g., Message no. 1100/2002 Bandazheuski against Belarus, Views adopted on 28 March 2006; Message no. 1178/2003 Smantser against Belarus, Views adopted on 17 November 2008; Message no. 2165/2012 Bialiatski against Belarus, Views adopted on 24 October 2014.

<sup>49</sup>Communication no. 2165/2012 Bialiatski against Belarus, Views adopted on 24 October 2014.

The Law on the procedure of exit into the Republic of Belarus and entry into the Republic of Belarus for citizens of the Republic of Belarus (Article 23) states that the appeal against such decisions is made under the procedure defined in the CPC, which means that the investigator's decision may be appealed against to the prosecutor and the head of the investigative unit, whereas the prosecutor's decisions may be appealed against to a higher-level prosecutor, and the court's decisions may be appealed against to a higher-level court.

An example of unreasonable restrictions of freedom of movement can be the case against Russian human rights defender Maria Rymar. On 7 July, 2016 she was detained in the Minsk airport after she criticized the idea of personal search. On the same day, on the basis of charges of deliberately false information on danger (part 1 of article 340 of Criminal Code of Belarus), a criminal case was instituted against her. After 11 days in custody, Maria Rymar was released on bail. Later on, she appealed to the investigative body with the notification about leaving Belarus in order to meet with her family, two young children and to have tests on cancer. On the next day an investigator issued a travel ban which prevented her of leaving the Republic of Belarus. An appeal against these restrictive measures to prosecutor and court did not succeed. As a result, for more than three months when investigation and trial were pending, Maria Rymar was not able to leave Belarus even for a short time and during those periods when the investigative and judicial actions were not conducted.<sup>50</sup>

## 2. Trial

### a. Metal cages

In cases where the defendants are in detention, metal cages are used in Belarusian courts to keep those people in the courtroom; the accused are handcuffed when being taken to and out of the courtroom. This practice has been existing for about 20 years.

In cases against Belarus, the Human Rights Committee has stated on many occasions that this practice contradicts the presumption of innocence.<sup>51</sup>

In the Ales Bialiatski's case UN Human Rights Committee came to the following conclusions: «the Committee notes the author's claim that the presumption of innocence was violated with regard to her husband, because the State-owned newspapers and television channels disseminated reports proclaiming his guilt before his verdict had been confirmed on appeal; because the President of the country made a public statement, clearly indicating his position regarding the guilt of the author's husband; and because throughout the court proceedings the author's husband was brought to court and taken back to the detention facility in handcuffs and was kept in a cage in the courtroom, which was also broadcasted on the State media. In the absence of a reply from the State party on these issues, the Committee finds that the above allegations should be given due weight, and that the facts described disclose a violation of the presumption of innocence with regard to the author's husband. Consequently, the Committee finds that article 14, paragraph 2, of the Covenant has been violated in the present case».

In recent years, there has been a tendency to replace metal cages with glass barriers: the kind, which has been already installed at the Minsk regional court and the Supreme Court.<sup>52</sup>

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<sup>50</sup>See, e.g., <https://charter97.org/ru/news/2016/10/7/226179/>

<sup>51</sup>See, e.g., Communication no. 2017/2010 Andrei Burdykov. Belarus, Views adopted on 15 July 2015, Message no. 2013/2010 Oleg Grishkovtsov against Belarus, Views adopted on 1 April 2015; Communication no. 2120/2011 Lyubov Kovaleva, Tatiana Kozyar and Vladislav Kovalev against Belarus, Views adopted on 29 October 2012; Message no. 2165/2012 Bialiatski against Belarus, Views adopted on 24 October 2014.

<sup>52</sup>See, e.g., photo at <http://news.tut.by/economics/486052.html>

## **b. Openness of court sessions**

The Constitution of the Republic of Belarus provides:

*"Article 114. Proceedings in all courts shall be open. Cases can be in a closed court session only in cases determined by law, in compliance with all rules of legal procedure."*

A similar provision is contained in the procedural codes.

However, the practice knows numerous instances when audience was not permitted at officially open court sessions and people who conducted audio-recording of trials were removed from the courtroom, etc.

On 20 December 2013, the Plenum of the Supreme Court of the Republic of Belarus adopted Resolution No. 11 "On ensuring transparency in the administration of justice and the dissemination of information on the activities of the courts".

There are reasonable opinions that 'the emergence of that resolution may be in no small measure connected with the long-lasting and consistent efforts of Belarusian human rights defenders in the sphere of trial monitoring', when the violation of the open court sitting principle was complained against, and negative practices were brought to light, and such practices became the subject of discussion at the Supreme Court.<sup>53</sup>

The aforementioned resolution of the Supreme Court clarifies the ways to ensure transparency of court proceedings: creating conditions for access of the audience to the courtroom; enabling the recording of court hearings (audio recordings can be taken without obtaining anyone's prior consent); holding closed hearings only on the grounds provided by law and under a reasoned decision of the court, etc.

Thus, the legal conditions for the implementation of the principle of openness of judicial proceedings in Belarus have been created. The observance of this principle depends on judges' awareness of their responsibility to ensure the adherence to this principle and on their commitment to the culture of transparent litigation.

## **c. Legal representation**

The Constitution of the Republic of Belarus holds in Article 62 that:

*"Everyone has the right to legal assistance in order to exercise and protect their rights and freedoms, including the right to use the assistance of lawyers and other representatives at any time in court, before other public bodies, local government bodies, enterprises, institutions, organisations, public associations and in relations with officials and citizens. Legal aid is provided from public funds in cases stipulated by law. It shall be prohibited to counteract the rendering of legal assistance in the Republic of Belarus."*

In Belarus, the professional protection of the rights and interests of clients in criminal and civil cases, cases arising from business (economic) disputes and cases of administrative offenses in

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<sup>53</sup>See, e.g., <http://www.lawtrend.org/social-actions/postanovlenie-verhovnogo-suda-o-glasnosti-eto-shag-vperyod>

general and economic courts, bodies responsible for criminal or administrative process is carried out only by lawyers (Article 26 section 2 of the Law 'On the Bar and Legal Practice in the Republic of Belarus'). Thus, since the law of 6 April 2012 entered into force, it established the so-called 'monopoly' of lawyers (attorneys) in the sphere of professional protection and representation of clients.

The following conditions have been formulated for individuals who want to become an attorney in Belarus. Such a person:

- is a citizen of the Republic of Belarus;
- holds a law degree;
- has passed an internship in relevant bodies;
- has passed the qualifying examination;
- has received a special permit (license) to practice as an attorney;
- is a member of the territorial bar association (Article 7 of the Law on the Bar and Legal Practice).

Since attorneys are called to ensure the right to legal assistance, and the right to protection in the event of a criminal prosecution, the effectiveness in the exercise of this right largely depends on the attorneys' opportunities to carry out their activities independently, in an environment which is free from threats, hindrance, intimidation or improper interference. In recent years, Belarusian and international experts conducted a research and prepared reports on issues related to the independence of the bar as an institution and independence of each lawyer individually, as well as to specific questions associated with attorneys performing their functions, the right to protection in Belarus, and the examination of the national legislation and practices in this field for conformity with international standards.<sup>54</sup>

It seems appropriate to restrict the content of this report to the presentation of institutional issues affecting the bar and attorneys' independent exercise of their duties. In accordance with Article 38 of the Law on the Bar and Legal Practice, and other provisions of that law, the executive authority of the state, i.e. the Ministry of Justice, is endowed with wide powers which indicate its dominant role in relation to the bar, namely:

- to issue, suspend or terminate the license for attorney practice based on the decision of the Qualification Committee established by the Ministry of Justice, where attorneys do not represent the majority in that Committee;
- to file a motion to bring an attorney to disciplinary responsibility, and the Minister of Justice has the right to initiate disciplinary proceedings against an attorney;
- to issue normative legal acts regulating the activities of the bar, including the Principles of Professional Ethics;
- to agree on the election of the chairman and deputy chairman of the National Bar Association;
- to make proposals to the regional bar associations regarding candidates running in the election of the chairmen of those associations;
- to submit motions regarding an early termination of term of office of the chairman of board to be examined by the general meeting (conference) of lawyers, and in the case it

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<sup>54</sup>Legal analysis of the systemic problems in the field of protection of rights of persons subject to criminal (administrative) persecution in Belarus. Section 2. Legal analysis of typical violations of the right to protection as an element of the right to a fair trial. Available from: <<http://humanrightshouse.org/noop/file.php?id=19933&d=vgdruqcsrtopg>>; The Bar of Belarus. Events in 2010–2012: Facts and commentaries. Available from: <[http://eurobelarus.info/news/society/2012/06/06/\\_2010\\_2012.html](http://eurobelarus.info/news/society/2012/06/06/_2010_2012.html)>; Commentary on the Law of the Republic of Belarus 'On the Bar and Legal Practice'. Available from: <[https://spring96.org/files/misc/advokat\\_itoh.pdf](https://spring96.org/files/misc/advokat_itoh.pdf)>; Human Rights Lawyers at Risk: <<http://humanrightshouse.org/Articles/21175.html>>

considers the refusal to satisfy such a submission unfounded: to terminate the powers of the chairman of the association;

- to suspend decisions made by attorneys' self-government bodies if it considers them inconsistent with the law or adopted in violation of the established order, and to make motions to the bar associations requesting the cancellation of such decisions;
- to monitor compliance with the law among lawyers, bar associations and legal practices;
- to receive information related to the implementation of attorneys' activities from lawyers, associations, attorneys, legal practices, government agencies and other organisations; etc.

In 2011 the Ministry of Justice disbarred 5 Belarusian lawyers defending former presidential candidates and activists who took part in protests against the election results on 19 December, 2010.<sup>55</sup>

The aforementioned powers are set out in the legislation and used in practice, which goes against the principle of independence of attorneys and the bar which the basis of international standards for attorneys and professional associations of attorneys. Accordingly, the right to defence and to legal assistance provided by lawyers is not properly secured in Belarus.

#### **d. Access to case file**

As a general rule, evidence gathered by the body conducting a preliminary investigation in the course of the investigation is presented to the accused and his/her defence counsel after the completion of the investigation (Article 257 CPC). Only from this point onwards (which may occur one year or more after the beginning of the investigation), the defence party becomes familiar with the evidence of the charges. Moreover, although the accused and his/her defence counsel have the right to prescribe any amount of information from the case file, they may not copy materials of interest from the criminal case unless it has been permitted by the investigator (Article 257 section 2). As clear grounds justifying the prohibition on copying of the file materials are not defined, this provision still permits the (fairly common) practice whereby the investigator arbitrarily and unreasonably denies the defence the right to copy the case file (while a case file may consist of multiple volumes). This is an obstacle to effective assessment of evidence and the exercise of defence at the stage when the preliminary investigation has been completed.

An even more significant problem occurs when the prosecution uses evidence consisting of materials gathered through operative-and-investigative activity; in other words, materials which were gathered through activities carried out in conspiracy, publicly and privately. Operative-and-investigative measures include operational monitoring, operational inspection of housing and other legally owned property, auditory control, control in telecommunication networks, control of postal messages (Article 18 of the Law on Operative-and-investigative Activity), i.e. activities which limit citizens' rights to secrecy of their private life. It should be recalled that the conduct of such activities in Belarus is authorised by the prosecutor (Article 19 of the Law on Operative-and-investigative Activity) and is not subject to any judicial control.

Information about operative-and-investigative activities, including the grounds and the procedure for undertaking such activities, and information on the results of such activities, is accumulated in the operative records. The elements which can be extracted from such operative records and used

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<sup>55</sup> See, e.g., Concluding Observations of the Committee against Torture: Belarus, adopted on the 47th session - CAT/C/BLR/CO/4, paragraph 12.

in a criminal case are restricted to reports on operative-and-investigative measures, specifying the final outcome. The defence is allowed to read those reports in the criminal case file.

However, in order to verify whether such measures have been conducted with due justification, and whether their duration and the degree of interference in private life was complied with, and whether the law was complied with during such activities, i.e. in order to verify and validate the use of such results as evidence, it is necessary for the defence and the accused to read and assess such materials that accompany the conduct of operative-and-investigative measures (i.e. the decision to implement such measures, reports, instructions for the person who collaborates with the body conducting operative-and-investigative activity, etc.). However, the law provides that such materials can only be provided to a criminal prosecution body or the court (Article 50 of the Law on Operative-and-investigative Activities) which verify and assess those materials 'in compliance with the rules of secret proceedings'.<sup>56</sup> In practice, the situation described above means that these materials can be studied only by the investigation body or by the court in a closed procedure, without any participation of the defence, and what is attached to the case file is a memorandum prepared by those bodies regarding the validity of such measures and the absence of violations of the law in the source of such operative-and-investigative measures. The defence has no possibility to verify or challenge the findings presented in such a memorandum.

It seems that this procedure, where a portion of materials underpinning the indictment is classified, creates space for violations of the right to a fair trial, and more specifically, the right of the accused to have adequate facilities to prepare his/her defence and the right to adversarial proceedings.

#### **e. Hearing of evidence**

##### ***Submission of evidence***

The court receives the case well in advance of the trial and gets acquainted, before the hearing, with all the evidence gathered during the preliminary investigation, that is, with the evidence underpinning the indictment (Article 277 CPC).

During the hearing at the court of first instance, the evidence is presented by the prosecution: a public prosecutor or a private prosecutor (the latter in cases of private prosecution); prior to the trial, the prosecutors provide the court with the evidence which, in their view, confirms that the person is guilty of committing the offence or crime (Article 325 of the CPC). As a rule, this evidence has been gathered during the preliminary investigation. Moreover, the public prosecutor single-handedly determines the scope of evidence available in the case which will be examined in court. The evidence is heard by the court without a preliminary assessment of their relevance or admissibility.

In addition, the prosecutor may also present additional evidence directly in court. And this is the only situation where the court decides whether such evidence should be attached and examined as evidence, and the opinion of defence is taken into account in this situation.

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<sup>56</sup> For instance, paragraph 23 of the Instruction on the procedure of registration and presentation by operational units of internal affairs authorities of materials obtained in the course of operative-and-investigative activity, to be used in criminal proceedings, as approved by the Ministry of Internal Affairs of the Republic of Belarus of 29 September 2005, No. 307 (any authority conducting operative-and-investigative activity adopts similar instructions of its own).

The defence presents evidence by filing motions requesting that its documents are attached to the case and examined, requesting that the court should request the necessary information or summon and examine witnesses, and requesting other actions (inspections, examinations, etc.). After considering these motions, taking into account the prosecutor's views, the court decides whether or not this evidence is necessary for adjudicating the case.

Thus, the prosecution and defence are in an unequal position during the process of presenting evidence to the court. In practice, this is exacerbated by the fact that the court has more confidence in the evidence presented by the prosecution and the defence has fewer opportunities to obtain various kinds of information (evidence).

Ales Bialiatski's case demonstrated a good example of violation of the principle of equality of arms. During the hearing the prosecution side presented evidences in support of its position, which later on became a basis for the court decision. At the same time, the court rejected a defence motion, which were aimed at the reclamation of materials from a foreign country in order to refute the evidences presented by the prosecutor, as the defence lawyers did not have the appropriate capacity and power to receive mentioned above materials by themselves.<sup>57</sup>

### ***Announcement of the testimony of victims and witnesses***

In accordance with Article 33 section 1 of the CPC, statements made by the victim and the witness in the pre-trial proceedings may be read during the hearing either at the discretion of the court or at the request of the parties in the following situations:

1. when there are significant contradictions between such testimony and the testimony given at the court hearing;
2. when the victim or a witness is absent from the courtroom for reasons excluding the possibility of their appearance;
3. when the victim or a witness is exempted from appearing in court as a security measure.

The application of this provision in practice raises the following issues:

1. The reading of written (recorded) testimony when there are important contradictions vis-à-vis the testimony given in court is, in practice, often used by the prosecution and even by the court to 'return' a witness to his/her testimony given during the pre-trial proceedings despite the fact that the witness describes the circumstances differently in court. In this case, it turns out that the testimony given during the preliminary investigation is given more weight, and the defence, which had no possibility to question witnesses during the investigation, is at a disadvantage, which violates the principle of equality of the parties in the proceedings.
2. The reasons for exempting a witness or a victim from appearing at the hearing are often interpreted by courts broadly: courts read the testimony of no-show witnesses and use it to make their conclusions. Objections raised by the defence are not decisive in such cases. The aforementioned practice has a negative impact on the exercise of the accused's right to question the persons testifying against him/her.
3. The reading of the testimony of witnesses and victims who are exempted from the requirement to appear in court is often accompanied by a measure of confidentiality of their identity, i.e. the idea is to disclose the evidence from 'anonymous witnesses'. This completely eliminates the possibility for the defence not only to question such witnesses, but also to assess their testimony properly, which also creates a threat to the right of the accused to interrogate persons testifying against him/her or to have those witnesses examined by the defence.

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<sup>57</sup> See. e.g., <http://belhelcom.org/ru/node/14701>

## Presumption of innocence: comments from public figures

The principle of the presumption of innocence is enshrined at the constitutional level (Article 26 of the Constitution of the Republic of Belarus) and at the legislative level (Article 16 of the Criminal Procedure Code of the Republic of Belarus): *'The accused shall be presumed innocent until his guilt in committing a crime is proven in a procedure prescribed by law, and until it is established by a final court verdict. The accused shall not be not obliged to prove his innocence. A body of criminal prosecution or the court shall have no right to place the burden of proof on the accused. Doubts about the validity of the charges shall be interpreted in favour of the accused.'*

However, in cases which have political or public resonance both the government-controlled mass media and government officials often express statements that undermine this principle. This practice has been repeatedly declared illegal by the Human Rights Committee in a number of cases reviewed against Belarus.<sup>58</sup>

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<sup>58</sup>See, e.g., Message no. 2017/2010 Andrei Burdykov. Belarus, Views adopted on 15 July 2015, Message no. 2013/2010 Oleg Grishkovtsov against Belarus, Views adopted on 1 April 2015; Message no. 2120/2011 Lyubov Kovaleva, Tatiana Kozyar and Vladislav Kovalev against Belarus, Views adopted on 29 October 2012; Message no. 2165/2012; Bialiatski against Belarus, Views adopted on 24 October 2014.

## Conclusions

Overall, Belarus political authorities use the country's criminal justice system to persecute HRDs. In particular, the judiciary is heavily undermined by the executive branch, which controls its appointment and promotion process. The international community, including Venice Commission, condemned Belorussia's judicial systems as corrupt and dependent on the President, which repeatedly fails to undertake adequate reforms to improve the status quo of the judiciary.

The UN Human Rights Committee on several occasions, including in the communication made on the basis of Ales Bialiatski's spouse Natalia Pinchuk condemned the arbitrariness of the HRD detention and the lack of real judicial control over prosecution decisions to apply the pre-trial detention.

Severe violations of the right to a fair trial could be observed at all stages of criminal proceedings in Belarus, such as judges copying the written submissions of the prosecution and violating the equality of arms, by relying only on prosecution evidence. Moreover, HRDs suffered from degrading treatment in courtrooms, which included metal cages and public statements by public officials aiming to diminish the authority of the accused and discredit them in the public.

The lack of separation of powers and the powerful role of the executive branch is visible not only through the many convictions of HRDs, resulting in heavy prison sentences but also through a single administrative decision made by the President in releasing those prisoners. The unexpected release of Ales Bialiatski on 21 June 2014 can serve as an illustration.

## Appendix

Constitution of the Republic of Belarus of 1994 (with amendments and additions adopted at national referendums of 24 November 1996 and 17 October 2004)

Code of the Republic of Belarus of 29 June 2006, No. 139-3 (version dated 4 January 2014) "Code of the Republic of Belarus on the Judicial System and the Status of Judges"

Law of the Republic of Belarus of 8 May 2007, No. 220-3 (version dated 10 July 2012) "On the Public Prosecution of the Republic of Belarus"

Decree of the President of the Republic of Belarus of 29 November 2013, No. 6 "On the improvement of the judicial system of the Republic of Belarus"

Order of the President of the Republic of Belarus of 27 March 2008, No. 181 (version dated 23 February 2015) "On approving the Regulation on Service in Public Prosecution of the Republic of Belarus"

Law of the Republic of Belarus of 14 June 2003, No. 204-3 (version dated 15 July 2015) "On the public service in the Republic of Belarus"

Law of the Republic of Belarus of 13 December 1999, No. 340-3 'On state protection of judges, officials of local administration enforcement authorities and inspection (supervision) authorities, employees of the national security authority'

Decree of the President of the Republic of Belarus of 2 November 2000, No. 577 (version dated 12 January 2012) "On certain measures to improve the work with the staff in the system of public bodies" (together with the "Regulation on the procedure of forming and testing the data on candidates for the posts of, and individuals holding posts included in the personnel register of the Head of State of the Republic of Belarus")

Code of the Republic of Belarus of 16 July 1999, No. 295-3 (version dated 5 January 2016) "Criminal Procedure Code of the Republic of Belarus" (with amendments and additions in force since 4 April 2016)

Code of the Republic of Belarus of 11 January 1999, No. 238-3 (version dated 5 January 2016) "Code of Civil Procedure of the Republic of Belarus"

Code of the Republic of Belarus of 21 April 2003, No. 194-3 (version dated 4 January 2016) "Code of the Republic of Belarus on Administrative Offences"

Code of the Republic of Belarus of 20 December 2006, No. 194-3 (version dated 4 January 2016) "Procedural and Executive Code of the Republic of Belarus on Administrative Offences"

Code of the Republic of Belarus of 9 July 1999, No. 275-3 (version dated 5 January 2016) "Criminal Code of the Republic of Belarus"

Law of the Republic of Belarus of 15 July 2015, No. 307-3 "On operative-and-investigative activities"

Law of the Republic of Belarus of 30 December 2011, No. 334-3 (version dated 29 December 2012) "On the Bar and Legal Practice in the Republic of Belarus"