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The Sources of Election Law in the System of Sources of Constitutional Law in the Republic of Belarus

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Belarus is a comparatively young country, which is situated in the geographical center of the European continent. However, the history of statehood on its territory has an eleven-century-long tradition. Although Belorussian lands were mainly a part of different monarchies during recorded history, but elections were quite an important part of its mediaeval bygone days, especially in XVI–XVIII centuries. Of course, these elections were of very narrow democratic nature due to a simple fact: a right to elect representatives belonged exclusively to the nobility class and rich dwellers of towns and cities. As well as, the elections were quite notorious for their corruption and bitter fighting.

After the partition of Rzeczpospolita, Belorussian lands became part of the Russian Empire. During that time, elections were used in order to form bodies of nobility self-governing system. Only after reforms held in Russian Empire in the 60ies of the nineteenth century, the system of local elected organs started to appear. However, on the territory of Belarus, this process was not as fast as on the territory of other parts of the Empire due to the high ratio of political opponents of the Empire (mainly the nobles of local origin, but who identified themselves as Poles and confessed Roman Catholic religion). After Nicolas the Second issued the October Manifest to his people in 1905, the elections as a way and method to form organs influencing internal and external policy of the Empire on the whole country scale became a much more important part of the public life.

Following the October Revolution, elections were also arranged in order to form new organs of state power, but it was just in 1936 when the principle of universal suffrage was finally accepted (before that, large section of the adult citizens was legally barred from any possibility to participate in any elections), and it was just in 1990 when the first alternative elections were held.

After Belarus, Russia and Ukraine created the Commonwealth of Independent States, there were many different elections held in the country: parliamentary elections were arranged in 1995, 2000, 2004, 2008, 2012; presidential elections were conducted in 1994, 2001, 2006, 2010; local elections (direct elections to form a three-tiered system of local councils (Soviets of deputies) were held in 1995, 1999, 2003, 2007, 2010 and 2014. It is necessary to mention also the three national referenda held in Belarus in 1995, 1996, 2004 because they dramatically influenced the electoral system of Belarus. So we may see that in 1994, 1995, 1996, 1999, 2000, 2001, 2003, 2004, 2006, 2007, 2008, 2010, 2012 and in 2014 Belarus was entering into periods of republican popular voting.

Although all these elections were conducted within the constitutional frameworks established by the acting 1994 Constitution but, due to many political (let's honestly say geopolitical) and economic causes, norms regulating election process were far from being stable. Practice of holding elections in Belarus together with practice of referenda have constituted important part of modern Belorussian praxis of constitutionalism with all its failures and success. Election law norms regulate election process, but at the same time are influenced by it. So it seems quite accomplishable to understand some specific features of Belorussian election system through the analysis of the system of sources of election law (both formal and problematic sources).

Theoretical and methodological background to the issue of sources of election law

Belorussian election law in the context of discourse on an electoral system and constitutional order

Before considering in details the quintessence of the election law, it seems essential to clarify some issues of terminology because of the two simple ideas that every academic discourse can exist only within certain language margins, and that it partially changes its quality when it is translated into another foreign language. In Belarusian legal science (which is mostly in Russian), some basic patterns of Soviet legal science are traditionally used and there is a distinc-

tion between objective election law *"izibiratelnoye pravo"* and subjective rights to vote and to be elected. Additionally, it should be pointed out that the word *"pravo"* in Russian language is quite polysemantic and means a right, objective law and correctness. Obviously, that leads to some degree of ambiguity in any legal academic discussion in Russian language. Another peculiarity of post-Soviet legal discourse in Russian language is that the term *"electoral system"* belongs to the group of problematic terminology, because it has two meanings: an extensive one and a narrow one. The broader interpretation came in the wide professional usage after the adoption of the new Soviet Constitution in 1936, which had a chapter titled "The electoral system." This chapter regulated the whole election process. The Belorussian Constitution follows that tradition and includes a similarly named chapter.

The narrow meaning of the term *"electoral system"* is familiar to any constitutional scholar (basically it is either proportional system or plurality system). So we will mainly consider over the broad understanding of the term in question. In its broad meaning, the term "electoral system" describes the mechanism of organizing and holding elections as well as distributing the mandates between the candidates. So the electoral system of the Republic of Belarus is a part of a social reality that together with other elements constructs an existing social order in the Republic of Belarus in a given period of time. And under condition that this social order fully corresponds to the norms of the Constitution, a responsible and independent observer (a scholar, a judge, etc.) may draw a conclusion that there is a constitutional order existing in the country.

Based on this simple example, it is possible to notice that an electoral system interacts and interferes with the category of *"constitutional order"*, which is one of the most fundamental gnoseological categories of the Belorussian constitutional science. One should keep in mind that there are two basic understandings of that category. One is axiologically neutral, and it implies that, as far as there is a written constitution in a country, it is possible to discuss about its constitutional order. Another understanding is a value-oriented one, and, in its turn, means that the values guaranteed in a national constitution should follow the pattern of Anglo-Saxon (liberal, classical) constitutionalism. The first gnoseological approach let us evaluate and classify potentially endless types of constitutional orders. And provided that norms of a constitution reflect a particular ideology, we can say that a formal constitutional order of a country belongs to a specific type. The second approach implies an existence of some standards and as such formulates boundaries.

As far as the notion of an electoral system in any logical sense is a part of a corresponding notion of constitutional order, all mentioned above is true for the notion of electoral system. One may find out electoral systems, which are called

"electoral systems" but, due to influence of some other factors (not necessary malevolent), are on purpose designed not to reflect the will of people to a full possible degree. Such an understanding of electoral systems is part of axiologically neutral (or it is better to say super-variable) understanding of constitutional order. Some systems may theoretically be designed to a maximum representation of the people's will and, in this case, such a view of an electoral system will be a part of a value-oriented understanding of the constitutional order.

One may say the value-oriented notion of an electoral system is a very good one, because it looks much more democratic. However, we believe that such a way of thinking is a bit radical and even naïve. Democracy is a much more complicated notion than simple notion of electoral democracy. The purpose of democracy is to organize human life in the society to the most possible degree of comfort. The electoral democracy does not exist for electoral democracy's sake, but for the sake of a more broader phenomenon.

The problem of integrated understanding of an electoral system gets even more complicated if taking into consideration the particular fact that, at the very end, it is not the values and written norms that does matter. On contrary, the degree to which they are real does actual matter. That is to say, the existence of legal relations, which forms a constitutional order (and electoral system as its part); or, using other words, the practical realization of constitutional norms (electoral norms) does substantially matter.

Next question which can be naturally arisen is what legal and extra-legal elements prevent the realization of the electoral norms. So finally, we inevitably come to the discussion about sources of electoral law in its broadest (not formal legal sense). We believe that all these multifaceted understandings of factors should be taking into serious consideration while evaluating, creating, reforming an electoral system. However, for a legal expert, legal scholar, of course, the most interesting objects of research are such sources of election law, which are both formal and legal, that is to say, containing legal norms. Why is it like that? It is very simple: an electoral system may be called legal and even constitutional only if it follows the rules established in the national electoral legislation. In Belarus, different types of normative legal acts can be perceived as formal sources of electoral law, but a deeper analysis reveals that some other types of forms of law also can be discovered.

In this paper, we will demonstrate that the election law of Belarus should be seen de facto or possibly even called as *"election-referenda law"* and can be viewed as a set of rules created or supported by the Belorussian state (the latter implies that not mere legal normative acts are de facto the sources of election law in Belarus) regulating the holding of elections and referenda mechanism of realization of the objectively guaranteed subjective right to participate in govern-

ing the state affairs by the means of exercising a right to vote or (and) a right to be elected to the state offices in order to uphold the constitutional order in the Republic of Belarus.

Different aspects of the notion of the source of election law

A problem of sources of election law is not less complicated than a more general problem of sources of law. It seems proper to state that the realistic approach to the problem is not to try to find the final solution which will be absolutely true. The most sober approach is to admit that, in this case, fruitful practical and theoretical discussion is more useful than any final solution. It has been already mentioned that in this paper we are to analyze the formal sources of election law, but the term "source of law" has many other meanings.

If to pay attention to the fact that Belarusian election law is a product of the state (and vice versa the state is the final source of election law) we may understand clearer that the election law serves the interest of the state. And even if we admit the principle that the state sovereignty is inferior to and is based on the popular sovereignty, but simultaneously these two sovereignties exist in a certain conflictual correlation in every country. It leads to the fact that forms of law always will protect and guarantee the individual rights to vote and to be elected only to the degree at which they do not threaten the existence of the state.

If we consider the material conditions of the Belorussian society, political system, peculiarities of the state regime as sources of Belorussian election law, we may get deeper understanding why the formal hierarchy of legal normative acts is sometimes fractured with some additional unexpected legal and political elements.

In Belarus, the triple concept of law is quite popular. From that point of view, law is the dynamic unity of objective written law, legal consciousness and legal relations. That factor may contribute to the additional complexity of the hierarchy of normative acts, because written laws and legal consciousness may be influenced by different external factors or (and) by the same factors but to a different degree.

The system of formal sources of election law

Based on the theory of systems, we can suppose that the parts forming the whole exert influence on the whole system, but at the same time it is important to keep in mind that the system functions with its own vector and logic of development, influences its components and makes them to follow its needs. Such a relation is both dynamic and controversial. For the discourse's sake, we assume that

all meanings of the term "source of election law" constitute one system and the formal sources of law are only a part of it. Apparently all other elements of the system exert influence on the formal sources of election law, but to some degree are influenced by them too. So, analyzing the formal sources of election law, we may understand how the idea of popular sovereignty finds its way in Belarus, how the Belorussian democracy works.

Traditionally, electoral legislation in Belarus is viewed as a part of constitutional legislation, and, correspondingly, election law is classified as a sub-branch of constitutional law (constitutional branch of law). In Russian language legal science, there are some views which argue that the election legislation should be classified as a separate branch of legislation. Another problem is how to understand which norms constitute the body of that sub-branch of law. If to examine the main formal sources of election law of the Republic of Belarus (the Constitution and the Electoral code) we may find out that the norms regulating the holding of elections are mainly put together with norms regulating the holding of referenda. So, technically, there is a reason to claim that Belorussian election law should be called Election-referenda law. We believe that such an approach is a quite positive one, because both referenda and elections have one strategic task to let citizens participate in managing the state through voting procedure.

Another specific problem of the interpretation of the systematization of the electoral legislation in the Republic of Belarus is the institution of deputy revocation. Some scholars claim that this legal body of norms is in contradiction with the idea of election and as such norms regulating the revocation procedure cannot constitute a part of election law. This brief account about the Belorussian academic discussion (and to some degree post-Soviet legal academic discussion) let us understand that election law in Belarus de facto represents the combination of constitutional normative institutes of election law, referendum law, revocation law. It is a de-facto election-referenda sub-branch of the constitutional law, and we even may say it is a legal sub-branch regulating direct mandatory democracy.

The system of traditionally accepted formal sources of constitutional law regulating the electoral system in Belarus, from the point of view of Belorussian legal terminology, can be divided into two large groups: acts of legislation (it includes the Constitution of the Republic of Belarus, all types of laws of the Republic of Belarus adopted by the national parliament and legal normative acts of the President of the Republic of Belarus) and a group of secondary legislation. This simple view is a bit problematic, considering that there is another body of legal instruments, which normatively exerts influence on the functioning of the electoral system and affects the realization of the right to vote (to elect) and to be elected.

Subsystem of traditionally accepted formal legal sources of election law in Belarus

Constitution as the foundation of the electoral system in the Republic of Belarus

The first chapter of the third section of the national Constitution specifically regulates the foundation of the electoral system in the Republic of Belarus. Some norms regulating specific relations can also be found in other parts of the Constitution.

Article 64 of the Constitution stipulates that elections of deputies and "other persons elected to state offices by the people" shall be general. Citizens of the Republic of Belarus over the age of 18 are entitled to vote. It also should be mentioned that presently in Belarus the term "other persons elected to state offices by the people" refers only to the position of the President of the Republic of Belarus. Currently just deputies of different level local Councils and Lower House of the National Parliament are elected by the people of the Republic. However, it should be mentioned that constitutional status of the Belorussian President includes his power to establish direct election of the heads of local governments if he/she wants so.

The second paragraph of the national Constitution stipulates the principles of the constitutional responsibility for the citizens of the Republic of Belarus with regard to participating in the electoral process. Two groups of Belorussian citizens are barred to participate in election in any capacity (or at least in capacity of voters and candidates): 1) citizens who are declared incapable by the court; 2) citizens who are kept in confinement in accordance with a court sentence. We can see very interesting phenomena when such a phrasing of the Constitution led to the situation when Criminal Code of Belarus de facto served as an act of interpretation of the Constitution. According to the Criminal Code of the Republic of Belarus "keeping in confinement" and "arrest" are two different types of punishment. And it led to the situation that people who are subject to arrest of this type are eligible to participate in elections. It is possible that it was not a real desire of the legislators and happened quite accidentally. The text of this norm appears in a logical contradiction with the next norm in the same paragraph which curtailed a right of "persons in respect of whom detention, as a measure of restraint, is selected under the procedure established by the criminal procedural legislation" to vote.

The Constitution of the Republic of Belarus stipulates that the right to be elected a deputy of the Lower House of the National Assembly belongs to citizens over 21 and the right to be elected to the office of the President of Belarus belongs to citizens over 35 years old.

Article 65 of the Constitution establishes a principle of free elections, and the Constitution explicitly clarifies that it means a voter shall decide personally whether to take part in elections and for whom to vote. One of the leading constitutional scholars of Belarus Professor Gregory V. Vasilevich even considers that this is of much broader meaning and refers to the organization of the whole electoral process. So Belarus belongs to the group of the countries which do not support mandatory participation in the election (in Europe there some countries, which introduce a principle of mandatory voting). Some observers consider that this principle with regard to a decision to participate in voting or not is very problematic and that some group of citizens are forced to participate in voting. Traditionally, in Soviet period elections were officially viewed as a socially advantageous and responsible type of behaviour. It is logical that holding election is a quite expensive thing and refusing to participate in voting can be seen as a not beneficial action for the society. In media, there were some alarming reports that students and citizens who worked for organizations financed from the state budget were forced to participate in voting. Here we see a classical example between social understanding of what is good for the society and the requirements of the Constitution that oblige any subject not to force citizens to participate in voting. It is worthy to explain that forcing the participation in voting is a crime according to the Belorussian legislation.

We think that a more fundamental factor, which contributes to the publication in newspapers about such a type of behaviour, is the legal requirement that some types of elections in Belarus can be valid only under the condition that more than a half of all possible electors participated in voting.

In the recent history of Belarus, there was a good example when, due to phenomena of electoral absenteeism, national election of the thirteenth Supreme Council (the Parliament before the constitutional reform of 1996) in 1995 de facto failed. It eventually caused the most serious constitutional crises in the history of Belarus in 1996.

One of the most fundamental principles stipulated by the Constitution is that the preparation and holding of elections shall be open and public. Usually Belorussian election commissions and observers from the countries CIS support the opinion that elections in Belarus are held on the basis of this principle, but representatives from the countries of the EU claim that they are not.

An interesting legal technique is used in the Belarusian Constitution when regulating the principle of equal elections. The Constitution only stipulates that voters must have an equal number of votes. So it is technically possible to adopt a law and entitle every citizen to two or more votes which he/she can use. However, it is only a possibility: now every citizen is entitled to one ballot.

The Constitution stipulates that candidates who want to be elected to state offices shall take part in elections on an equal basis. It is one of the most discussed

issues (mostly politically motivated). It is very difficult in practice to separate one person as a candidate to the state office and his other social roles. In the current situation, the normative principle guaranteeing the equality of the candidates regulates also the financing of the candidates and influences the norm of the Article 70: "expenditures for preparation and holding of elections shall be covered by the State within the limits of the funds assigned for this purpose. In instances determined by the law, expenditures for preparation and holding of elections may be covered at the expense of funds of public associations, enterprises, institutions, organisations and citizens." Whether this norm should guarantee absolute financial equality of the candidates, or it should be applied only to their interactions with organ of the State is a matter of discussion.

Article 67 sets that elections of deputies shall be direct: deputies shall be elected by citizens directly. At the same time, the Constitution is neutral with regard to the type of the electoral system (plurality system or a proportional one). That question is regulated by the Electoral code.

Voting in elections shall be secret: control over expression of the will of voters during voting is prohibited.

One of the most peculiar norms of the Constitution of Belarus is the norm entitling different subjects to nomination of candidates to the position of deputies. Public associations, work collectives and citizens have the right to nominate candidates for deputies. Many observers believe that entitling work collectives to nominate candidates is a relic of the Soviet period. We believe that this norm is the reflection of political influence of the managers of the enterprises.

According to the Belorussian Constitution, electoral commissions are to ensure holding of elections.

Norms of other parts of the Constitution regulate the procedure of electoral process and entitle President of the Republic of Belarus under certain condition to call regular and extraordinary elections to the House of Representatives, the Council of the Republic and local representative bodies. Elections for a new composition of the Houses of the Parliament shall be called no later than four months and held no later than 30 days prior to the expiration of the powers of the current Houses. Extraordinary elections for the Houses of the Parliament shall be held within three months from the day of the premature termination of the powers of the Houses of Parliament.

Constitution also empowers the Lower House (the House of Representatives) to call presidential election. However, the regulation is rather tricky: Presidential elections shall be called by the House of Representatives no later than five months and shall be held no later than two months prior to the expiration of the term of office of the previous President. So, strictly speaking, there is an obvious contradiction between a five-year term of Belorussian presidency and a power

of the Lower House to call an election any time it wants without naming them as extraordinary. Once this norm was used, and the second presidential term of Mr. Lukashenko was several months shorter than he was originally entitled by the Constitution[1].

So we may see, the Constitution of the Republic of Belarus enshrines all main principles and requirements to a modern electoral system and at the same time it uses some interesting legal mechanisms.

Laws of the Republic of Belarus as forms of election law

The Constitution of the Republic of Belarus often specifies that many details of the electoral system must be regulated by the laws. Usually this term in the text of Constitution refers to the different types of laws of the Republic of Belarus. There are two basic types of laws of the Republic of Belarus (the third type is a programming law): the Codes of the Republic of Belarus and laws of the Republic of Belarus. In the case of collision, the norms of the Code usually take precedence over the norms of the laws of the Republic of Belarus. One of the peculiarities of the legislation system of Belarus is its relative instability with numerous laws adopted and amended every year. Another specific feature is the tendency to codification.

The pivotal element of the system of formal sources of election law of the Republic of Belarus is the Electoral Code of the Republic of Belarus adopted in February, 2000. Seventeen laws of the Republic of Belarus lost legal force after this Code took legal effect. The original wording of the Code was seriously altered with five amendments to the Code. The last amendment was adopted in 2011.

This Code systematically and entirely regulates relations arising when preparing and holding elections of the President of the Republic of Belarus, elections and recall of deputies of the House of Representatives of the National Assembly of the Republic of Belarus, of members of the Council of the Republic of the National Assembly of the Republic of Belarus, of deputies of local Councils of Deputies of the Republic of Belarus, as well as while preparing and holding a referendum (popular vote). It must be noted that theoretically it is possible to adopt a law of the Republic of Belarus, which is not incorporated in this Code, may act separately and has a superior legal force, but a legislator wisely prefers not to do it in order not to destroy the systematic regulation of the electoral relations.

The role of the Electoral code with regard to regulation of the parliamentary and local elections is more significant because the Constitution does not stipulate

[1] Constitution of the Republic of Belarus of 1994 (with changes and additions adopted at the republican referenda of November 24, 1996 and of October 17, 2004) [Digital resource], Mode of access: http://president.gov.by/en/press19329.html#doc, 20.06.2012.

any particular type of the electoral system. Before an election is held the country is divided into 110 election circuits according to the quantity of seats in the Lower House of the National Parliament. Simple majority vote principle is used in the first round. Voting is considered valid if over 50 per cent of eligible voters participated in the polls. Candidates who receive over 50 per cent of votes win. If none of the candidates get 50 per cent of votes, the second round of election between the two leading candidates is held. Run-off elections are valid if more than 25 per cent of voters on the electoral list participated. That is a fundamental difference between parliamentary and presidential elections. The constitutional requirement to the presidential election to be considered as valid in both first and second rounds is the participation of simple majority of all possible voters.

In the case of local elections since 2006, the Code has stipulated that the principle of relative majority shall be used in order to determine a winner[2].

Normative legal acts of the President as sources of election law

The legal acts of the head of the state in Belarus are very important in the hierarchy of legal acts, since Belarus in 1996 have chosen presidentialism instead of parliamentarism. The President of the Republic of Belarus issues orders (*ukaz*) to call elections to the House of Representatives and to local councils. However, also the President has a power to adopt special extraordinary decrees (*decret*). Practically, this type of legislation has a superior legal force even to the majority of codes of the Republic of Belarus. It should be mentioned that after the constitutional reform of 1996, the second type of presidential decrees played a very important role in the regulation of the electoral process. For example, the double-tiered mechanism of elections to the Council of the Republic (the Upper House) was originally regulated by means of a presidential decree. At the moment the factual role of the presidential acts in regulating the electoral process is relatively insignificant.

Normative legal acts of organs of central administration as sources of electoral law

Among all organs of the central administration the central role belongs to the Central Commission on election and holding referenda. The Constitution also stipulates that a system of election commissions shall be created in Belarus. The Central Commission is formed by the Upper House of the Parliament and the

[2] Electoral Code of the Republic of Belarus February 11, 2000 No 370-Z [Amended as of January 4, 2010]. [Digital resource], Mode of access: http://law.by/main.aspx?guid=3871&p0=Hk0000370ee, 20.06.2012.

President of the Republic of Belarus. It has a power to interpret the norms of the Electoral Code of the Republic of Belarus as well as issue some acts of secondary legislation. It also has a duty to resolve some types of electoral disputes. Its actions and acts may be challenged in the Supreme Court of the Republic of Belarus, and its normative legal acts may be reviewed in the Constitutional Court of the Republic of Belarus.

Problematic sources of election law

The challenge of acts of organs of constitutional control

The Constitutional Court of the Republic of Belarus is a national organ of specialized constitutional control in the Republic of Belarus. The activity of the Belorussian Constitutional Court influences seriously almost all stages of the law-making process in the Republic of Belarus. The Constitutional Court of the Republic of Belarus is authorized to issue different types of decisions. Even so, the only one type of decisions of the Constitutional Court of the Republic of Belarus which is unanimously accepted as a formal source of law is the Conclusion of the Constitutional Court of the Republic of Belarus. This type of rulings of the Constitutional Court of the Republic of Belarus is only inferior to the Constitution of the Republic of Belarus in the system of hierarchy of legal acts. However, there are other important types of decisions made by the Constitutional Court of the Republic of Belarus: an annual address of the Constitutional Court to the President of the Republic and Parliament and decisions of the Constitutional Court, decisions (rulings) of the Constitutional Court of the Republic of Belarus made in the process of preliminary constitutional review.

As a rule following every election year, the Constitutional Court of the Republic of Belarus expresses its opinion about the election held in Belarus and points out to the importance of elections for the legitimacy of the state. The role of an annual address of the Constitutional Court of the Republic of Belarus has mainly informative, programming, ideological, analytical and doctrinal legal functions. As for the place of the decisions (rulings) of the Constitutional Court of the Republic of Belarus in the hierarchy of the legal acts of the Republic of Belarus, there is a serious academic and political discussion on the legal consequences of this type of decisions. Many Justices of the Constitutional Court consider that all decisions of the Constitutional court are obligatory, have legal force and must be executed. This claim is based on the provision of the 1994 Constitution which points out that the decisions of all courts of the Republic of Belarus are mandatory. Opponents consider that this norm is not applied to all types of decisions

of the Constitutional Court of the Republic of Belarus. If finally the supporters of the first point of view are correct so it means that this type of decisions (rulings) is a legal and normative one and has a very high place in the normative hierarchy. In the case that the second opinion is true, this type of decisions of the Constitutional Court of the Republic of Belarus is a kind of doctrinal source of election law with no place in the normative hierarchy of the sources of election law of the Republic of Belarus.

Prior to the presidential election in 2001 there was an interesting case heard in the Constitutional Court of the Republic of Belarus with regard to the right of citizens of Belarus to be elected to the position of the President of the Republic of Belarus. Article 80 of the Constitution stipulates that any citizen of the Republic of Belarus by birth at least 35 years of age who is eligible to vote and has been resident in the Republic of Belarus for at least ten years to the elections may be elected as a President of the Republic of Belarus. An initiative group applied to the Central Commission on election and holding referenda to register Mr. Zenon Pozniak (chairman of the Belorussian Popular Front, one of 15 registered political parties in the Republic of Belarus, which is considered to be as a radical nationalistic conservative right party by many observers) as a possible candidate to the presidential office in Belarus. The Central Commission was well informed that after the constitutional referenda in 1996 Mr. Pozniak left the country and resided in the USA where he was granted political asylum. So de facto he was absent in the country for 5 years prior to the 2001 presidential election. The Constitutional Court of the Republic of Belarus decided that, due to the facts that Mr. Pozniak never expressed his wish to leave the country in order to stay permanently abroad, considered that he was forced to stay abroad and wished to participate in the political life of Belarus, he had to be considered eligible to be a presidential candidate in Belarus as the constitutional prohibition had to be applied only to citizens who explicitly expressed their will to live permanently abroad. The Central Commission on elections and holding referenda accepted this ruling of the Constitutional Court and registered Mr. Pozniak's initiative group[3].

The challenge of custom

There is an opinion that electoral process is very complicated and politicized so there is no good reason to tightly regulate it in details, and it should be kept

[3] Decision of the Constitutional Court of the Republic of Belarus from the 15 of June, 2001 No D-120/2001 On legal position of the Constitutional Court concerning the notion "citizen of the Republic of Belarus who has been resident in the Republic of Belarus" which is used in Article 80 of the Constitution of the Republic of Belarus [Digital resource], Mode of access: http://www.kc.gov.by/en/main.aspx?guid=4923, 20.06.2012.

enough room for political customs. Furthermore, it should be taken into consideration that historically many norms firstly appeared in customs and only after that they were incorporated in the national electoral legislation. Political customs, political practice, customary interpretations of norms of election legislations are important factors, which influence the stability of the electoral system. However, here we would like to mainly concentrate on a quite interesting issue that let us assume there is at least one constitutional legitimate custom recognized by the Belorussian state. The question involves the complex of legal interaction connections between the national Constitution, some international treaties as well as the Electoral code of the Republic of Belarus.

According to the Constitution of the Republic of Belarus, only citizens of the Republic of Belarus are directly entitled to the right to vote. However, the Article 11 of the 1994 Constitution stipulates that foreign nationals and stateless persons in the territory of Belarus shall enjoy the rights and freedoms and execute duties on equal terms with citizens of the Republic of Belarus, unless otherwise specified by the Constitution, laws and treaties. Since the 1995 referendum, the Republic of Belarus conducts the policy of integration with Russian Federation. The Electoral code of the Republic of Belarus entitled citizens of the Russian Federation who permanently resided in the Republic of Belarus to take part in elections of deputies of local Councils of Deputies *in conformity with a treaty of the Republic of Belarus and the Russian Federation*. The article 18 of the Treaty establishing the Union of Russia and Belarus permitted citizens of the Union (the citizens of Russia and Belarus) to do that. So Russian citizens permanently residing in Belarus obtained the right to be elected as deputies of the local councils, as a part of their status as the citizens of Union of Russia and Belarus.

Following the fact that the Integration of Russian Federation and Belarus entered the new higher level, the New Union State of Russia and Belarus was created and a new treaty on creation of the Union State of Russia and Belarus (the 1999 Treaty) was adopted. The latter one cancelled the previous treaty on Union of Russia and Belarus (the 1997 Treaty), but for some unclear reasons the new treaty did not mention about the rights of citizens of the Union State of Russia and Belarus to participate in the local elections of the countries. However, Russian citizens did continue to participate in the local elections in Belarus and currently there are several deputies in different local councils of the Republic of Belarus who do not hold citizenship of Belarus. So we may conclude that, in spite of the fact that the formal source of the norm entitling Russian citizens to the right to take part in the local elections in Belarus (the 1997 Treaty) lost its validity (treaty was cancelled with another treaty established), but due to political factors and tradition, the norm has still been applied. And the Belorussian state apparently tolerates it, or, at least, it seems that the Central Commission on

elections and holding referenda tries to interpret obvious reference rule as a rule which has a direct effect.

The problem of authorizing foreigners to participate in local elections can be viewed from a more fundamental perspective. According to the theoretical approach, local Councils of Deputies are viewed as organs exercising the state power in the Republic of Belarus (from this point of view Belarus follows the Soviet pattern; it is the same also in China and all Local people's congresses are organs of state power). According to the Constitution "the people shall be the sole source of state power and the bearer of sovereignty in the Republic of Belarus." The word "people" here means all citizens. To permit foreigners to participate in the elections implies to violate this logical construction (we do not claim there is a violation of the Constitution as a legal document, we just say that we believe that there is a logical theoretical inconsistency in the text of the Constitution as it also serves as an ideological and academic document) as it practically means that state power originates not from "people of Belarus" in legal understanding of the term, but from the people in the sociological understanding of the term, that is to say, from the population of Belarus. It seems worthy to mention that this problem does not appear in Russia, because local councils in Russia are seen as organs of municipal power and different from the organs of state power[4].

Decisions of referenda as sources of election law

We do not have a task to make a review of the Belorussian legislation on referenda in this chapter. Instead, we want to focus on the analysis about how the republican referenda influenced the electoral system in the Republic of Belarus.

The issue of systematization of the election law in the Republic of Belarus with regard to the possibility and expediency of including the norms on holding referenda in the sub-branch of election law of the constitutional law branch of the Republic of Belarus was mentioned in the very beginning of the article. But at the same time, it is worthy to examine how the decisions of the referenda held in the Republic of Belarus can influence the practical realization of rights to elect and to be elected by the citizens of the Republic of Belarus. One of the most controversial and epochal moments in the recent history of the Republic of Belarus was a national referendum held in October 1996. The decisions of the referendum shaped the current political system of the Republic of Belarus.

The new wording of the Constitution was adopted by this referendum. This new wording led to the changes of the constitutional framework of the electoral

[4] Договор о Союзе Беларуси и России (подписан в г. Москве 02.04.1997) [Digital resource], Mode of access: http://www.soyuz.by/ru/?guid=10441, 20.06.2012.

system. And if to understand the term "source of law" in a broad sense we can draw a conclusion that the referendum is one of the most important sources of election law in Belarus. But the issue is to decide whether the decisions of the referendum are independent forms of the election law in Belarus or not. This problem occurs because of the mechanism of realization of the decisions adopted on the referendum and because of the dubious status of the decisions of referenda in the hierarchy of the normative legal acts.

The peculiarity of the 1996 Belorussian referendum was that the majority of citizens of the Republic of Belarus refused to vote in favour of the proposal to hold direct elections of the heads of organs of local government. As the result of this decision up to now the chairmen of executive committees of regions, districts and towns (they are often erroneously called "mayors" and "governors" in Belarus; it represents interesting phenomena of disrespect to the national legal terminology) are appointed by the President of the Republic of Belarus with the consent of the local Councils of Deputies. This particular decision of the 1996 nation-wide referendum was a consultative one, but it still influences the discussion of the possibility of holding direct elections in the Republic of Belarus. Also it revealed political immaturity of the electors and problems of functioning of institutes of direct and indirect democracy in the Republic of Belarus as well as not enough ability to rational self-organization. The latter is a fundamental principle of the democracy concept.

Other interesting consequences of the 1996 referendum were the decision to prolong de facto the term of the President with 5 more years and let him to form the new chamber of Parliament from the part of deputies elected to the previous parliament (the Supreme Soviet of the Republic of Belarus) without holding new elections. These decisions implied that the majority of Belorussian citizens did not see elections as a way to solve political disputes.

The third referendum hold in Belarus in 2004 was also concerned with electoral issues. The new amendment to the Constitution was adopted. According to it, the norm prohibiting for one citizen to be elected to the office of the President of the Republic more than two times was repealed.

It seems justified to state that the decision adopted by a referendum may influence the election law in two ways:

1) even consultative referendum should be taken into consideration as a regulative instrument at least until holding the next general elections (presidential or parliamentary). Otherwise referendum may lose any justification. The concept of democracy presumes that the nation has a theoretically possible ability to take reasonable decision concerning the governing the state affair. In the country, that claims to follow the principle of democratic state, the will of people formally expressed must be paramount. It is better to view any

consultative decision adopted on referendum as a provisional constitutional norm;

2) binding decision of the national referenda can be in fact viewed as a form of election law, because the mandatory decision implies the duty of another organ to make some necessary actions, for example to issue a corresponding normative legal act, which should be in absolute compliance with the decision of referenda.

Conclusion

The elections held in the Republic of Belarus constitute the important part of its political system with the presidential election traditionally attracting attention of international observers and media.

Due to the fact that Belarus belongs to the Continental legal family (or it is better to say the East Slavonic legal family), different types of legal normative acts are the main formal sources of election legislation.

The two main formal sources are the Constitution of the Republic of Belarus and the Electoral Code of the Republic of Belarus. At the same time the normative regulative potential of the norms in the Electoral code can be decreased because the President of the Republic can issue special normative Decrees, which may regulate the electoral system of the Republic of Belarus. As well as he may issue documents of political nature (annual presidential address), and legal programming documents (directives of the President), which have a potential to influence the electoral system in Belarus. However, now the role of presidential normative acts in regulation of the electoral system is relatively low.

The interpretive and norm-creating powers of the Constitutional Court and Central Commission on election and holding national referenda can also influence the pyramid of legal normative acts.

Abstract

Constitutional law forms positive legal aspect of constitutionalism. Election law is often seen as a sub-branch of the constitutional law and, at the same time, embodies (to a different degree) ideas of democracy. Correlation between democracy and constitutionalism is one of the most debating questions in contemporary legal science. It seems worth examining how this controversy exerts influence on the system of sources of election law as a part of a bigger system of constitutional law in the case of the Republic of Belarus.

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