HEINONLINE

DATE DOWNLOADED: Wed Aug 6 12:51:17 2025
SOURCE: Content Downloaded from HeinOnline

Citations:
Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.
Sophie Gallop, Res Judicata and the Exclusive Authority of Post-Soviet Judiciaries: A Case Study of Supervisory Review, Judicial Independence, and Separation of Powers in Belarus, 32 NOTTINGHAM L.J. 39 (2024).

ALWD 7th ed.
Sophie Gallop, Res Judicata and the Exclusive Authority of Post-Soviet Judiciaries: A Case Study of Supervisory Review, Judicial Independence, and Separation of Powers in Belarus, 32 Nottingham L.J. 39 (2024).

APA 7th ed.
Gallop, Sophie. (2024). Res Judicata and the Exclusive Authority of Post-Soviet Judiciaries: Case Study of Supervisory Review, Judicial Independence, and Separation of Powers in Belarus. Nottingham Law Journal, 32, 39-54.

Chicago 17th ed.
Sophie Gallop, "Res Judicata and the Exclusive Authority of Post-Soviet Judiciaries: A Case Study of Supervisory Review, Judicial Independence, and Separation of Powers in Belarus," Nottingham Law Journal 32 (2024): 39-54

McGill Guide 10th ed.
Sophie Gallop, "Res Judicata and the Exclusive Authority of Post-Soviet Judiciaries: A Case Study of Supervisory Review, Judicial Independence, and Separation of Powers in Belarus" (2024) 32 Nottingham LJ 39.

AGLC 4th ed.
Sophie Gallop, 'Res Judicata and the Exclusive Authority of Post-Soviet Judiciaries: A Case Study of Supervisory Review, Judicial Independence, and Separation of Powers in Belarus' (2024) 32 Nottingham Law Journal 39

MLA 9th ed.
Gallop, Sophie. "Res Judicata and the Exclusive Authority of Post-Soviet Judiciaries: A Case Study of Supervisory Review, Judicial Independence, and Separation of Powers in Belarus." Nottingham Law Journal, 32, 2024, pp. 39-54. HeinOnline.

OSCOLA 4th ed.
Sophie Gallop, 'Res Judicata and the Exclusive Authority of Post-Soviet Judiciaries: A Case Study of Supervisory Review, Judicial Independence, and Separation of Powers in Belarus' (2024) 32 Nottingham LJ 39 x Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.
Cite this document
PinCite this document

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and

RES JUDICATA AND THE EXCLUSIVE AUTHORITY OF POST-SOVIET JUDICIARIES: A CASE STUDY OF SUPERVISORY REVIEW, JUDICIAL INDEPENDENCE, AND SEPARATION OF POWERS IN BELARUS

SOPHIE GALLOP

INTRODUCTION

The importance of the separation of powers and judicial independence for the democratic functioning of the State has been underscored for centuries by philosophers and international organisations.[1] With respect to the importance of judicial independence, Montesquieu famously concluded that 'there is no liberty, if the powers of judging be not separated from the legislative and executive'.[2] Effective separation of powers and effective judicial independence are integral to the realisation of liberty in all States, from those countries traditionally considered to be well-established democracies to those States going through democratising reforms.

Despite the widely acknowledged importance of both the separation of powers and an independent judiciary, over recent years there have been numerous notable attacks by respective executive branches on the independence of domestic judiciaries across the World. These attacks are notable because they have taken place both in countries where democratisation is ongoing, and in countries which are generally considered to be settled democracies. In the UK, after the controversial decision in *Miller II*,[3] the Justice Secretary proposed reforms aimed at drastically changing the ability of judges to review governmental decisions,[4] with commentators voicing concerns that these reforms represent efforts to 'clip the courts' wings'.[5] Across the Atlantic in the USA, significant concerns were raised after former President Trump attacked a 'so-called judge' who halted his executive order on immigration, leading to concerns about a possible constitutional crisis in the country.[6] Last year, in Israel the Knesset (the Israeli Parliament) adopted a controversial law dubbed the 'Reasonableness Bill' which strips the Supreme Court of the ability to determine the 'reasonableness' of cabinet and ministerial decisions,[7] the adoption of which has led to public protests and threats of strike action.[8]

Attacks on domestic judiciaries and efforts to limit judicial powers seem to be at this time a global phenomenon at present, and it is phenomenon that the Belarusian judiciary is also experiencing. Concerns about attacks on the independence of the judiciary and on the separation

[1] International Commission of Jurists International Principles on the Independence and the Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1 (International Commission of Jurists 2007) 1, 18; Maurice JC Vile 'The separation of powers' in Jack P Greene and JR Pole (eds) *A Companion to The American Revolution* (Blackwell Publishers 2000) 686; Aristotle *Politics* (CreateSpace Independent Publishing Platform 2015); Jean-Jacques Rosseau *The Social Contract* (Wordsworth Editions 1998); John Locke *Two Treatises of Government 1690* (Cambridge University Press 1988).

[2] Charles de Secondat, Baron de Montesquieu (edited by David Wallace Carrithers) *The Spirit of Laws: A Compendium of the First English Edition* (University of California Press, 1977), Book XI, Chapter 6, 202

[3] *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent); Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41.

[4] House of Commons Library 'Judicial review reform' (*UK Parliament* 2 April 2021) <https://commonslibrary.parliament.uk/judicial-review-reform/> accessed August 24, 2023.

[5] Professor Mark Elliott 'The Judicial Review, Review I: The Reform Agenda and its Potential Scope' (*Public Law for Everyone*, 3rd August 2020) <https://publiclawforeveryone.com/2020/08/03/the-judicial-review-review-i-the-reform-agenda-and-its-potential-scope/> accessed 3 June 2024.

[6] BBC News 'Taking on Trump: Is the US facing a constitutional crisis?' (*BBC* 6 February 2017) <https://www.bbc.co.uk/news/world-us-canada-38881119> accessed August 24, 202.

[7] Hadas Gold, Richard Allen Greene, and Amir Tal 'Israel passed a bill to limit the Supreme Court's power. Here's what comes next' *(CNN,* 24 July 2024) <https://edition.cnn.com/2023/07/24/middleeast/israel-judicial-reforms-vote-explained-mime-intl/index.html> accessed 3 June 2024.

[8] *Ibid.*

of powers have been raised in Belarus for decades, where the President and government have frequently sought to assert their own authority over the Belarusian judicial branch. One area where the ongoing power struggle between the respective branches remains apparent is with respect to the exclusive authority of the Belarusian judiciary. The exclusive authority of a judiciary makes up a fundamental element of both the separation of powers doctrine and of the effective realisation of judicial independence.[9] It demands that the judiciary have 'jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'.[10] In addition, as part of the standard of exclusive authority, judicial decisions should be final and therefore should not be subject to change by a 'non-judicial authority'.[11] However, this aspect of judicial independence and of the separation of powers has been subject to various attacks. As noted above, we have seen such attacks in the UK and in Israel where the Executive branches have sought to remove areas of scrutiny from their respective judicial branches. Attacks on the exclusive authority of the judiciary is particularly problematic in Belarus, where the use of Supervisory Review and other overt forms of interference in judicial rulings routinely undermine the exclusive authority of the Belarusian judicial branch. Supervisory Review is a system whereby judicial decisions that would normally be considered final may be reviewed and overturned by either a court or other body (depending on the country in which the review would take place). This system is discretionary and falls outside of the ordinary appeals process, which (as discussed below) has been subject to criticism from various international human rights bodies. The use of Supervisory Review in Belarus and the impact that this has on the exclusive authority of the Belarusian judiciary has received particular attention from the United Nations Human Rights Committee when it has examined individual submissions alleging a human rights violation against Belarus. It is in those cases that the Human Rights Committee has been able to highlight the inappropriateness of Supervisory Review in modern democracies, and the impact that this has had on the exclusive authority of the Belarusian judiciary.

This paper will examine the crucial role that exclusive authority plays in both the separation of powers model and in the independence of the judiciary, noting its importance as a component part of these doctrines and in its own right as part of an effective judicial system. In this respect, this paper fills a gap in current academic discourse by identifying and exploring the fundamental role that the exclusive authority of the judiciary plays in democratic government, and examining the role it plays in post-Soviet countries, in particular in Belarus. It will analyse the context and effect of Supervisory Review on the exclusive authority of the judiciary with particular attention to the human rights context, building on analysis previously only undertaken in the NGO context. Finally, the paper will address the effect that Supervisory Review has had on individual complaints to international human rights bodies. This section will serve to highlight the undermining effect that Supervisory Review has on the exclusive authority of the judiciary, which in turn compromises the separation of powers and independence of the Belarusian judiciary. The section will also address the apparent unwillingness of the Belarusian government to reform Supervisory Review procedures and affirm the exclusive authority of the judiciary over judicial matters. In particular, with respect to the response of the Belarusian government, the danger of this unwillingness will be highlighted in the context of a refusal to cooperate with the Human Rights Committee.

[9] See detailed discussion of this in Part II 'Exclusive Authority: At the Intersection of Judicial independence and the separation of powers'.

[10] UN Congress on the Prevention of Crime and the Treatment of Offenders 'Basic Principles on the Independence of the Judiciary: UNGA Res 40/32 and 40/146' (endorsed 29 November 1985) UN Doc A/CONF.121/22/Rev.1, Principle 3 states 'The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'.

[11] International Commission of Jurists (n1), 22.

EXCLUSIVE AUTHORITY: AT THE INTERSECTION OF JUDICIAL INDEPENDENCE AND THE SEPARATION OF POWERS

Defining exclusive authority

The importance of ensuring the exclusive authority of the judiciary has been recognised in numerous international and regional documents which address the fundamental right to a hearing before an independent and impartial judiciary.[12]

The exclusive authority of the judiciary demands that the judicial branch of government have exclusive jurisdiction over all issues of a judicial nature,[13] without unwarranted interference from the executive or legislative branches in that jurisdiction.[14] As part of that exclusive authority the judiciary must be afforded absolute authority over the determinations of law,[15] appeals processes,[16] and the ability to review legislation to ensure its compatibility with any relevant constitutional or international legal obligations.[17] Within the doctrine of exclusive authority, the principle of *res judiciata* plays an important role. The principle of *res judicata* demands that there should be no review of a 'final and binding decision or judgment merely for the purpose of obtaining a rehearing and a fresh determination of the same issue'.[18] On that basis, a judgment that has been definitively settled should not be subject to change or alteration to ensure the finality of the judicial decision.[19]

Exclusive authority, the separation of powers, and judicial independence

Whilst the exclusive authority of the judiciary is important in its own right, it also forms a fundamental part of separation of powers and of judicial independence. As an essential element of the separation of powers doctrine, exclusive authority requires that the judicial branch is free to operate within the judicial sphere free from interference from other branches of government.[20] Whilst the doctrine of the separation of powers was discussed by

[12] International Bar Association 'IBA Minimum Standards of Judicial independence, adopted 1982' (*International Bar Association*, 1982) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29> accessed 17 February 2021, Standard 8 states: 'Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration'; UN Congress on the Prevention of Crime and the Treatment of Offenders 'Basic Principles on the Independence of the Judiciary' (n10), Principle 3 states 'The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law', and Principle 4 states 'There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authority of sentences imposed by the judiciary, in accordance with the law'; Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (Adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in Beijing in 1995 and adopted by the LAWAISA Council in 2001, Principle 33 states 'The Judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'; The Principles and the Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Adopted as part of the African Commission's activity report at 2nd Summit and meeting of heads of state of the African Union held in Maputo from 4–12 July 2003, Principle 4(c) states 'the judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for decision is within the competence of a judicial body as defined by law'.

[13] International Commission of Jurists International Principles on the Independence and the Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1 (n1), 18.

[14] UN Congress on the Prevention of Crime and the Treatment of Offenders Basic Principles on the Independence of the Judiciary (n10).

[15] International Commission of Jurists International Principles on the Independence and the Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1 (n1), 22.

[16] UN Congress on the Prevention of Crime and the Treatment of Offenders Basic Principles on the Independence of the Judiciary (n10), Value 4.

[17] Commonwealth Secretary-General 'Commonwealth (Latimer House) Principles on the Three Branches of Government' (*The Commonwealth* 19 June 1998) <https://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf> accessed August 17, 2021, Principle (I)(1); American Bar Association Rule of Law Initiative 'Judicial Reform Index for Armenia: December 2012' (*American Bar Association*, December 2012) <https://www.americanbar.org/content/dam/aba/directories/roli/armenia/armenia_jri_vol_iv_english_12_2012.authcheckdam.pdf>, 21–26.

[18] *Prosecutor v Karadžić* (Judgment) IT-95–5/18 (18 June 2016), 4.

[19] William Pomeranz 'Supervisory Review and the Finality of Judgments under Russian Law' 34(1) Review of Central and East European Law (20099) 15, 17.

[20] John Ferejohn 'Independent Judges, Dependent Judiciary: Explaining Judicial independence' (1998–1999) 72 Southern California Law Review 353, 355.

Aristotle,[21] Rousseau,[22] and Locke,[23] it was most famously explored in Montesquieu's *The Spirit of the Laws*. In this thesis, Montesquieu argued that for democratic governance to be realised, the legislative, executive, and judicial branches of the State must remain independent and distinct from one another.[24] In practice, therefore, the separation of powers doctrine requires that each organ of the State have distinct authority over their respective government function to ensure an effective system of checks and balances between each branch;[25] this demands that domestic judiciaries are afforded exclusive authority over judicial matters. Similarly, with respect to judicial independence, exclusive authority is also fundamental. To reach a truly independent decision, the judicial branch must be certain of their exclusive authority over judicial matters. In turn the judicial branch should be certain of the finality of their decision, and thereby be able to act without fear of a decision being changed or altered by another branch,[26] which in turn helps to ensure that the independence of individual judges is effectively protected.[27] It introduces a sense of 'social responsibility' that membership of the judiciary conveys onto individual judges[28] and helps to engender respect for judicial decisions.[29] The appearance of independence and impartiality in decision-making endowed by awarding exclusive authority to the judiciary, helps to ensure 'a considerable measure of respect and confidence to the inquiry process'.[30]

Therefore, both the separation of powers and the doctrine of judicial independence rely on the exclusive authority of the judiciary, and the exclusive authority of the judiciary operates in tandem as a foundational requirement for both. With respect to the relationship between judicial independence and the separation of powers, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the independence on judges and lawyers have both concluded that

> '(t)he separation of powers and executive respect for such separation is *sine qua non* for an independent and impartial judiciary to function effectively'.[31]

Judicial independence is therefore an integral element of the separation of powers doctrine.[32] To achieve effective separation of powers in practice, the judicial branch must provide an essential check on the power of the legislative and executive branches of government in order to prevent corruption and despotism.[33] In turn, the judiciary must be afforded exclusive authority to make adjudications of law, without interference from the legislative and executive branches.[34]

[21] Aristotle (n1).

[22] Jean-Jacques Rosseau (n1).

[23] Locke (n1).

[24] Montesquieu (n2), 202; See generally Edward H Levi 'Some Aspects of separation of powers' (1976) 76(3) Columbia Law Review 371–391.

[25] Montesquieu (n2), 202–203.

[26] UN Congress on the Prevention of Crime and the Treatment of Offenders Basic Principles on the Independence of the Judiciary (n10), Principles 3 and 4.

[27] Shimon Shetreet 'Judicial independence and accountability: core values in liberal democracies' in H.P. Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press 2011) 3, 16.

[28] *Ibid.*

[29] Patrick Monahan and Byron Shaw 'The impact of Extra-Judicial Service on the Canadian judiciary: the need for reform' in H.P. Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press 2011) 428, 447.

[30] *Ibid*, 447.

[31] UNCHR 'Report of Special Rapporteurs on the Situation of Human Rights in Nigeria' (1997) UN Doc E/CN.4/1997/62 Add.1, para 71.

[32] Judge J Clifford Wallace 'Resolving Judicial Corruption while Preserving Judicial independence: Comparative Perspectives' (1998) 28(2) California Western International Law Journal 341, 343.

[33] Maria Dakolias and Kim Thachuk 'Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform' (2000) 18 Wisconsin International Law Journal 353, 360.

[34] *Ibid.*

The importance of the separation of powers, judicial independence, and exclusive authority in the democratic model

The separation of powers model and the doctrine of judicial independence have been heralded as fundamental aspects of modern society. The separation of powers doctrine has long been cited as one of the cornerstones of a democratic society, integral to the full and proper functioning of State powers.[35] The separation of powers model originated in ancient Greece,[36] and the concept has since evolved throughout the centuries, emerging as a widely accepted facet of the democratic model.[37] Similarly, the importance of judicial independence in the functioning of democratic government has been emphasised repeatedly over the centuries. The same importance attached to the right to appear before an independent and impartial tribunal by Socrates,[38] the Magna Carta,[39] and Coke[40] continues to be expressed today by international organisations including the United Nations,[41] the Council of Europe,[42] and World Bank.[43] The United Nations believed that judicial independence was so integral to proper state governance that it declared that it would be a 'human rights priority' in 1996.[44] Within the context of industrial and sustainable economic development the World Bank,[45] the International Monetary Fund,[46] and the European Bank for Reconstruction and Development[47] have all emphasised the crucial role that judicial independence and judicial impartiality play in securing a stable and reliable domestic market. A number of civil society organisations and international non-governmental organisations have also established various projects that seek to set and monitor judicial independence standards. In particular the American Bar Association set up the Rule of Law Initiative to monitor judicial independence standards across the globe, noting that 'countries that lack the rule of law very often fail to meet the most basic needs of their populations'.[48] The Office for Security and Cooperation in Europe through the Office for Democracy and Human Rights established the Kyiv Recommendations in 2010, noting that judicial independence is 'an indispensable element of the right to due process, the rule

[35] International Commission of Jurists International Principles on the Independence and the Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1 (n1), 18.

[36] Vile (n1), 686.

[37] *Ibid*, 689.

[38] Justice Steven H David 'Four Things: Socrates and the Indiana Judiciary' (2013) 46(4) Indiana Law Review 871, 871.

[39] Magna Carta (1297), Chapter 39.

[40] John Hostettler *Sir Edward Coke: A Force for Freedom* (Barry Rose Law Publishers 1997) 129.

[41] United Nations 'The Independence of the Judiciary: a Human Rights Priority' (*United Nations*, 2016) <http://www.un.org/rights/dpi1837e.htm> accessed 15 August 2023.

[42] Council of Europe 'Council of Europe Plan of Action on Strengthening Judicial independence and Impartiality, CM(2016)36 final' (*Council of Europe*, 2016) <https://rm.coe.int/1680700285> accessed 22 May 2024.

[43] Legal Vice Presidency of The World Bank 'Legal and Judicial reform: Strategic Directions' (*The World Bank*, January 2003) <http://documents.worldbank.org/curated/en/218071468779992785/pdf/269160Legal0101e0also0250780SCODE09.pdf> accessed 3 June 2024, 2.

[44] United Nations 'The Independence of the Judiciary: A Human Rights Priority' (n41).

[45] Legal Vice Presidency of The World Bank (n43) 2; *see generally* James H Anderson and Cheryl W. Gray 'Transforming Judicial System in Europe and Central Asia' (World Bank, ABCDE Conference January 2006) <http://www1.worldbank.org/publicsector/anticorrupt/feb06course/transforming%20Judicial%20Systems%20in%20ECA.pdf> accessed 3 June 2024; Rudolf V. Van Puymbroeck Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century (*The World Bank* 2001) <https://openknowledge.worldbank.org/bitstream/handle/10986/13960/multi0page.pdf?sequence=1&isAllowed=y accessed> 3 June 2024.

[46] World and Economic Financial Surveys *Regional Economic Outlook: Europe Hitting Its Stride* (International Monetary Fund 2017) 39.

[47] The European Bank for Reconstruction and Development (EBRD) has particularly emphasised the importance of judicial independence within the context of Rule of Law. Within the EBRD 'Law in Transition' project, judicial reform to secure judicial independence was identified as one of the three foundations of the rule of law, alongside education and advocacy. See Emmanuel Maurice and others 'Law in Transition: Ten Years of Legal Transition' (*European Bank for Reconstruction and Redevelopment*, 2002) <http://www.ebrd.com/downloads/research/law/lit022.pdf> accessed 22 May 2024, 5; 59–60.

[48] The American Bar Association 'Rule of Law Initiative: About Us' (*American Bar Association*, 2024) <https://www.americanbar.org/advocacy/rule_of_law/about/> accessed 3 June 2024.

of law, and democracy'.[49] More recently, in 2016, the Council of Europe established the 'Plan of Action of Strengthening Judicial independence and Impartiality' which notes that judicial independence and judicial impartiality 'is of primordial importance'[50] and that it is of the utmost importance that such independence and impartiality exists 'in fact and is secured by law'.[51]

As a foundational element of both the separation of powers and of an independent judicial system, the realisation of the exclusive authority of the judiciary is subsequently crucial to achieving *de facto* democratic standards. Without the exclusive authority of the judiciary both the separation of powers and judicial independence cannot be realised, and without these, democracy is undermined.

CONTEXTUALISING EXCLUSIVE AUTHORITY IN BELARUS

Unfortunately, whilst the importance of the exclusive authority of the judiciary is apparent, in practice in Belarus it continues to be routinely undermined. The continued interference in the jurisdiction of the Belarusian judiciary comes in part as a result of the legacy of the USSR. This legacy can be seen in other former Soviet States, where ongoing interference with the domestic judicial branch continues to undermine judicial independence in Ukraine,[52] Azerbaijan,[53] Tajikistan,[54] Uzbekistan,[55] and Kazakhstan.[56] However, it is noteworthy that in Belarus the lack of separation of powers and judicial independence is particularly extreme, even in comparison to the country's other former Soviet counterparts.

Exclusive authority in the Soviet Union

Reform efforts with respect to the exclusive authority of the Belarusian judiciary were built on rocky foundations. Whilst Soviet law and the Constitution ostensibly ensured that the judiciary would have exclusive authority over judicial matters, in practice the judiciary had very limited jurisdiction instead often operating at the will of the executive branch. The exclusive authority of the judiciary was provided for under the Soviet Constitution. According to Article 160, no person should be convicted of a crime other than by a judgment of the court, in accordance with the law.[57] These sentiments were reiterated in other Soviet legal instruments, which stressed that all State organs should 'be obliged to fulfil the demand and ordinances of judges'[58] including the 'prompt . . . answering . . . [of] inquiries' from

[49] Office for Democratic Institutions and Human Rights 'ODIHR and Judicial independence: The Kyiv Recommendations' (Organization for Security and Co-operation in Europe, 2014) <https://www.osce.org/odihr/109880?download=true> accessed 15 May 2024, 1.

[50] Council of Europe *Plan of Action* (n42), 7.

[51] *Ibid.*

[52] International Commission of Jurists 'UN ICJ calls on Ukraine to ensure security of lawyers and judicial independence' (*International Commission of Jurists* 2021) <https://www.icj.org/at-un-icj-calls-on-ukraine-to-ensure-security-of-lawyers-and-judicial-independence/> accessed 3 June 2024.

[53] Parliamentary Assembly of the Council of Europe 'The functioning of democratic institutions in Azerbaijan' (*PACE*, 2017), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24024&lang=en> accessed 3 June 2024.

[54] International Commission of Jurists 'Neither Check nor Balance: The Judiciary in Tajikistan. ICJ Mission Report December 2020' (*ICJ* December 2020) <https://www.icj.org/wp-content/uploads/2020/12/Neither-Check-nor-Balance_Tajikisan_MR_ENG.pdf> accessed 3 June 2024.

[55] Diego García-Sayán 'Preliminary Observations on the Official Visit to Uzbekistan (19–25 September 2019)' (*OHCHR* 26 September 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25043&LangID=E> accessed 3 June 2024.

[56] Malika Tukmadiyeva 'Kazakhstan: Freedom House Report 2018' (*Freedom House*, 2018) <https://freedomhouse.org/sites/default/files/NiT2018_Kazakhstan.pdf> accessed 3 June 2024.

[57] Constitution (Fundamental Rules) of the Union of the Soviet Socialist Republics (as amended 1991) Article 160.

[58] Fundamental Principles on Court Organization of the USSR and the Union Republics (1924) Article 10; Fundamental Principles on Court Organization additionally included Articles protecting judges from "interference in concrete cases" (Article 4) which would entail criminal responsibility (Article 5). These provisions were reiterated in Law of the USSR: On the Status of Judges (1989) (No. 9 item 223) Article 5(2) which prohibited 'influencing of any kind of judges . . .'.

judges to other branches.[59] This exclusive authority was, however, not realised in practice. In contradiction to the principles established in the Constitution, in reality the Communist Party exercised power over all aspects of Soviet life, including the courts.[60] This meant that the Communist Party exerted authority over the judicial branch ensuring that judges adhered to Communist values when passing judgments.[61] Frequently aspects of cases or entire trials, including questions of guilt or innocence, were decided prior to trial, and appearances in court were simply to determine appropriate sentences.[62] This resulted in a situation where it was not judges passing judgment but instead local Communist leaders; the consequence being that the exclusive authority over judicial matters was effectively appropriated from the judicial branch. Even in instances where judges were initially awarded authority over a case, where a decision was not met with approval from the executive branch, then those members would simply not abide by the judgment.[63] In practice, this had a significant impact on both members of the judiciary and public confidence in the Soviet justice system. The failure to realise the exclusive authority of the judicial branch had the effect of demoralising its members, who were made acutely aware of the fact that in practice the Soviet judiciary possessed no real authority.[64] In addition, the public had very little respect for the Soviet judiciary and was suspicious of the judicial branch and the motives behind judicial decisions.[65]

Exclusive authority in modern day Belarus

Given the Soviet legacy, reform efforts to secure separation of powers and the independence of the judiciary in newly established States after the fall of the Soviet Union faced a significant uphill struggle. Whilst all former Soviet States built those reform efforts with a very similar historic context, some of those countries, including Belarus, have had notable failures in comparison to other former Soviet States in their judicial reform efforts. In part, factors external to the government have operated to undermine judicial reforms in Belarus. With respect to efforts to secure separation of powers and judicial independence and impartiality in the country, the Special Rapporteur on the Independence of Judges and Lawyers has emphasised the transitional nature of the country, its economic deprivation, and the effects the Chernobyl disaster have had on democratisation efforts in Belarus.[66] However, many of the failures are due to ongoing efforts from the Belarusian government to undermine the exclusive authority of the domestic judiciary.

In Belarus, legislative reforms provide for the exclusive authority of the Belarusian judiciary. Article 38 of the Law on the Constitutional Court of the Republic of Belarus confirms that decisions of the Constitutional Court are final and will not be subject to appeal or protest.[67] This principle is confirmed in the Code on Judicial System and Status of Judges.[68] Both

[59] *Ibid.*

[60] Peter Costea 'The Legal System and the Judiciary in the Marxist-Leninist Regimes of the Third World' (1990) 16(3) Review of Socialist Law 225, 253.

[61] *Ibid.*

[62] Peter H Solomon Jr 'The Role of the Defense in the USSR: The Politics of Judicial Reform under Gorbachev' (1988–1989) 31 Criminal Law Review Quarterly 76, 79; see generally N Dolapchiev 'Law and Human Rights in Bulgaria' (1953) 29(1) International Affairs 59–68.

[63] Scott P Boylan 'The Status of Judicial Reform in Russia' (1998) 13(5) American University International Law Review 1327, 1334.

[64] See generally *Ibid.*

[65] *Ibid*, 1327.

[66] UNHCR 'Civil and Political rights, including questions of: Independence of the judiciary, administration of justice, impunity: Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted in accordance with Commission resolution 2000/42: Addendum, Report on the Mission to Belarus' (8 February 2001) UN Doc E/CN.4/2001/65/Add.1) para 100.

[67] Law of the Republic of Belarus on the Constitutional Court of the Republic of Belarus (1994 as amended in 2005), Chapter III Rules of Procedure Before the Constitutional Court, Article 38.

[68] Code of the Republic of Belarus on Judicial System and Status of Judges, Chapter Two: Constitutional Court of the Republic of Belarus, Article 24.

also confirm that judgments of the Constitutional Court enter into force from the day of adoption of judgment, unless specified otherwise.[69] Despite these legislative provisions, the Belarusian executive branch has routinely ignored the authority of the judicial branch to make legal determinations with respect to Belarusian law and the Belarusian Constitution,[70] and therefore these reforms have not been implemented nor respected in practice.

The lack of respect for the exclusive authority of the Belarusian judiciary was particularly apparent in 1996 during a significant constitutional referendum. The referendum addressed a number of constitutional issues, including a vote which permitted amendments to the constitution. The amendments under the referendum granted President Lukashenko significantly greater powers, including the ability to replace an apparently uncooperative Parliament, to increase the Presidential term, and limit the power of the Constitutional Court.[71] After the referendum the Constitutional Court determined the referendum was merely advisory and consultative,[72] and held that the amendments granted under the referendum would amount to a new constitution, and would therefore be in violation of Article 149 of the Belarusian Constitution.[73]

Despite this judgment, which according to the Constitution and domestic law of Belarus should have been final, the Belarusian government treated the result of the referendum as binding.[74] In the build-up to the decision around the constitutionality of the referendum, there were significant indications from the executive branch that there was only one acceptable decision that the Constitutional Court could reach. President Lukashenko purportedly went as far as threatening to 'take measures' and 'defend the Belarusian people' if the Court found the referendum to be unconstitutional.[75] After the decision that the referendum was not binding, President Lukashenko issued a decree which annulled the decision of the Constitutional Court and personally declared the referendum to be binding on the Belarusian government.[76] The UN High Commissioner for Human Rights condemned the decision of the Belarusian President highlighting that the 'nullification'[77] of the decision amounted to an 'interference with the judicial process'[78] and a contravention of the UN Basic Principles of the Judiciary.[79] The judiciary itself also responded. In protest to this unwarranted interference in the exclusive authority of the judiciary, a number of judges of the Constitutional Court resigned.[80] In retaliation, the President forced one of the remaining judges from the office of the Constitutional Court by a Presidential edict.[81] In this instance both the exclusive authority of the judiciary and the principle of *res judicata* were violated, compromising both the separation of powers and the independence of the judiciary in Belarus.

The exclusive authority of the judiciary in the country has also been undermined by the establishment of the inter-departmental commission. The commission was set up so that the government could monitor on-going cases before the judiciary, a move that the UN Special

[69] *Ibid*; Law of the Republic of Belarus on the Constitutional Court (n67), Article 38.

[70] UNHCR 'Civil and Political rights, including questions of: Independence of the judiciary: Report on the Mission to Belarus' (n66), paras 13–14.

[71] Human Rights Watch 'Belarus: Background' (Human Rights Watch, 2000) <https://www.hrw.org/reports/1999/belarus/Belrus99-04.htm> accessed 3 June 2024.

[72] UNHCR 'Civil and Political rights, including questions of: Independence of the judiciary: Report on the Mission to Belarus' (n66), paras 21–4.

[73] *Ibid*, para 21.

[74] *Ibid*.

[75] *Ibid*.

[76] *Ibid*.

[77] *Ibid*, para 104.

[78] *Ibid*.

[79] *Ibid*, paras 104–105.

[80] *Ibid*, para 24.

[81] *Ibid*.

Rapporteur on the Independence of Judges and Lawyers characterised as a further 'unwarranted interference in the judicial process'.[82] The 'monitoring' and oversight over judicial functions presents a significant interference with the separation of powers, the independence of the judiciary, and with the exclusive authority of the Belarusian judiciary. Whilst drafting the Bangalore Principles on the Independence of the Judiciary, the committee noted the importance of ensuring that a judiciary be free from 'dictates of the executive government'.[83] OSCE reported that judicial behaviour may have been further indirectly influenced by the presence of representatives of the Ministry of Interior, the Belarusian Special Forces (the SpetsNaz), and, reportedly, members of the KGB at trials.[84] OSCE noted that in a number of instances SpetsNaz officials seemed to be taping trials and filming members of the public entering the public gallery.[85] It concluded that the consistent 'overt presence'[86] of members of the executive branch in courtrooms should be understood as at least intimidation, 'if not outright interference'[87] by the executive in the exclusive authority of the judiciary over the judicial process.

The exclusive authority of the Belarusian judiciary has therefore faced significant threat from the President and the Belarusian executive branch. However, there has been very little effort to conceal this continued interference from the Belarusian public or from the international community. Instead, the President has purportedly been quite open about efforts to interfere with the Belarusian judiciary and its decision-making. In fact, President Lukashenko was reported to have claimed that when he

> takes a criminal case under his control, he bears responsibility for it, for the investigation and, it would be wrong to deny it, for the outcome of the judicial proceedings.[88]

SUPERVISORY REVIEW IN BELARUS AND BEYOND

Alongside the instances of interference in the Belarusian judiciary noted above, another significant impediment to the exclusive authority of the judiciary is the continued use of the Supervisory Review procedure within the Belarusian justice system. Whilst efforts to undermine the separation of powers in Belarus are often seemingly in contravention of domestic law,[89] in the case of Supervisory Review the ongoing interference in the jurisdiction in the judiciary is an interference permitted by Belarusian law.

Supervisory Review originated in the Soviet Union, where the procuracy was granted wide ranging supervisory powers over the Soviet legal system and over the administration of justice,[90] awarded on the basis that it was the role of the procuracy to 'supervise' the Soviet courts.[91] The procuracy was a Soviet institution that exercised 'supreme oversight'

[82] *Ibid*, para 109.

[83] United Nations Office on Drugs and Crime 'Commentary on the Bangalore Principles of Judicial Conduct' (*United Nations*, 2007) <https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf>, accessed 3 June 2024.

[84] Office for Democratic Institutions and Human Rights (ODIHR) 'Report Trial Monitoring in Belarus (March-July 2011)' (*OSCE* March-July 2011) <http://www.osce.org/odihr/84873?download=true> accessed 3 June 2024, para 14.

[85] *Ibid*, para 99.

[86] *Ibid.*

[87] *Ibid.*

[88] *Ibid*, para 39.

[89] See for example, Law on the Constitutional Court of the Republic of Belarus (as amended in 2005), Chapter III: Rules of Procedure before the Constitutional Court, Article 38; Code of the Republic of Belarus on Judicial System and Status of Judges, Chapter Two: Constitutional Court of the Republic of Belarus, Article 24.

[90] William Pomeranz 'Supervisory Review and the Finality of Judgments under Russian Law' 34(1) Review of Central and East European Law (20099) 15, 17.

[91] Kirill Koroteev and Sergey Golubok, 'Judgment of the Russian Constitutional Court on Supervisory Review in Civil Proceedings: Denial of Justice, Denial of Europe', 7(3) Human Rights Law Review (2007) 619, 619.

over the legality of acts of Soviet political, judicial, and administrative organs'.[92] As part of this oversight, the procuracy undertook the role of the prosecutor, and held responsibility for enforcing criminal law in the Soviet Union.[93] Under this umbrella of 'supreme oversight' Supervisory Review granted the Procuracy, alongside the Soviet Supreme Court, the right to overturn judicial decisions otherwise considered to be final.[94] The Procuracy or Supreme Court could intervene if it was considered that there had been a misapplication of the law.[95] The practice of Supervisory Review was inherited by former Soviet States including Belarus,[96] Kazakhstan,[97] Kyrgyzstan,[98] and Russia.[99]

In both Kazakhstan[100] and Kyrgyzstan[101] the Supervisory Review procedures lie with the Supreme Court, which has supervisory jurisdiction and review powers over judgments of the cassation and appellate courts.[102] To request a review of a prior judicial decision before the Supreme Court of Kazakhstan, the appellant must obtain leave from the Supreme Court.[103] In Kyrgyzstan the Supreme Court of Kyrgyz Republic has the power to review the verdicts of primary and appellate courts when there has been an application from a convicted defendant, or a petition from a prosecutor.[104] In Russia,[105] the power of Supervisory Review permits parties to civil proceedings to challenge an otherwise final judgment in the event that the challenge is within one year of the decision taking effect.[106] The power to overturn an otherwise final judicial decision lies with the Presidium of the Supreme Court of the Russian Federation, which will exercise the extraordinary review procedure in the event that relevant criteria have been fulfilled.[107]

The use of Supervisory Review has attracted significant criticism from various international and regional human rights bodies. The European Court of Human Rights has noted that the use of the Supervisory Review undermines standards of the rule of law by frustrating the finality of the judicial judgments.[108] The Court further condemned the continued use of Supervisory Review, noting that it undermines the principle of *res judicata* by giving the parties a fresh determination of a case when a judgment has already come into force.[109] As noted above, *res judicata* describes a matter that has already been finally adjudicated by a

[92] Stephen C. Thaman 'Reform of the Procuracy and Bar in Russia' 3(1) Parker School Journal of Eastern European Law (1996) 1, 1.

[93] *Ibid*, 2.

[94] Pomeranz (n90) 16.

[95] *Ibid*, 29.

[96] Prosecutor General's Office of the Republic of Belarus 'Tasks and Functions' (*Belarusian Government* 2018) <http://www.prokuratura.gov.by/en/about/zadachi-i-funktsii/> accessed 16 September 2018.

[97] International Monetary Fund 'The Republic of Kazakhstan: Financial System Stability Assessment – IMF Country Report No. 14/258' (*International Monetary Fund* 2014) <https://www.imf.org/external/pubs/ft/scr/2014/cr14258.pdf>, accessed 3 June 2024, 28.

[98] International Federation for Human Rights (FIDH) 'Input into the EU-Kyrgyzstan Human Rights Dialogue in a Context of a Rapidly Deteriorating Situation' (*FIDH*, 23 May 2017) <https://www.fidh.org/IMG/pdf/20170523_eu-kyrgyzstan_note_final.pdf> accessed 3 June 2024, 6.

[99] Koroteev and Golubok (n91), 91.

[100] International Federation for Human Rights 'Input into the EU-Kyrgyzstan Human Rights Dialogue in a Context of a Rapidly Deteriorating Situation' (n98).

[101] Scott Newton The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis (Constitutional System of the World) (Bloomsbury 2017) 203.

[102] *Ibid.*

[103] International Federation for Human Rights 'Input into the EU-Kyrgyzstan Human Rights Dialogue in a Context of a Rapidly Deteriorating Situation' (n98).

[104] The Criminal Procedure Code of the Kyrgyz Republic No. 62 (1999, as amended up to Law No. 162 of 28 July 2017) Section XI: Review of Res Judicata Verdicts, Rulings and Resolutions of Courts, Chapter 42: Review of Res Judicata Verdicts, Rulings and Resolutions of Courts Pursuant to the Procedure for Review, Article 376.

[105] For an excellent overview of Supervisory Review in the Russian Federation please refer to Koroteev and Golubok (n91).

[106] Koroteev and Golubok (n91), 625.

[107] *Ibid.*

[108] *Ryabykh v Russia* App no 52854/99 (ECtHR, 24 July 2003).

[109] *Vardanyan and Nanushyan v Armenia* App no 8001/07 (ECtHR, 27 October 2016).

competent court, and therefore demands that a matter should not be available to be re-litigated by the parties again.[110] The European Court of Human Rights has noted that the crucial role that *res judicata* plays in ensuring legal certainty,[111] by ensuring that a settled matter is not relitigated, and a prior decision is not nullified or amended. On that basis, the Court has concluded that the use of Supervisory Review operates to undermine legal certainty, in violation of the right to a fair trial.[112]

In a similar vein, the Human Rights Committee has consistently resolved that Supervisory Review proceedings do not constitute an effective remedy that must be exhausted for the purpose of Article 5(2) of the Optional Protocol to the International Covenant on Civil and Political Rights,[113] citing a number of reasons. The first criticism is that of the substantive nature of Supervisory Review. The Human Rights Committee has criticised the extraordinary nature of the remedy,[114] noting that it is only available under domestic legal systems in exceptionally limited instances.[115] The Committee has particularly condemned the discretionary nature of the remedy, concluding that the Supervisory Review mechanism cannot be seen to offer a reasonable prospect of success for the complainant,[116] given that the complainant has no automatic right to leave to appeal and that neither the courts nor the prosecutorial office are under an obligation to review the appeal.[117] Even when applicants are able to engage with Supervisory Review, the Human Rights Committee has queried the success rate of applications made under Supervisory Review. In particular, the Committee has noted that even in cases where the state has provided statistics regarding the success rate of applications before the Supervisory Review procedure,[118] generally information about the success rate of applications with respect to specific human rights abuses has not been forthcoming.[119] Finally, the Committee has criticised the procedural nature of Supervisory Review. Like the European Court of Human Rights, the Human Rights Committee has noted that such a remedy would have the force of *res judicata* against decisions that have already entered into force,[120] further precluding it from being considered an effective remedy.[121] In sum, the Human Rights Committee has concluded that the failure to seek or utilise Supervisory Review does not mean that domestic remedies have not been exhausted on the basis that Supervisory Review is ordinarily unavailable to applicants, that there is a lack of clarity with respect to its success rate even when it is accessible, and that the procedural nature of Supervisory Review undermines the finality of judicial decisions.

[110] *Ibid.*

[111] *Ibid*, at [64] – [71]; *Brumărescu v. Romania* App no 28342/95 (ECtHR, 28 October 1999).

[112] *Ibid*, at [71].

[113] *Alekseev v Russian Federation* (25 October 2013) Communication No 1873/2009 CCPR/C/109/D/1873/2009; *Koktish v Belarus* (26 August 2014) Communication No 1985/2010 CCPR/C/111/D/1985/2010 para 7.3.

[114] *Basarevsky and Rybchenko v Belarus* (14 July 2016) Communication No 2108/2011 and 2109/2011 CCPR/C/117/D/2108/2011-CCPR/C/117/D/2109/2011.

[115] *Ibid.*

[116] *Gelazauskas v Lithuania* (17 March 2003) Communication No 836/1998 CCPR/C/77/D/836/1998 para 7.4; *Sekerko v Belarus* (28 October 2013) Communication No 1851/2008 CCPR/C/109/D/1851/2008 para 8.3; *Protsko and Tolchin v Belarus* (1 November 2013) Communication No 1920/2009 CCPR/C/109/D/1919–1920/2009 para 6.5; *Schumilin v Belarus* (23 July 2012) Communication No 1784/2008 CCPR/C/105/D/1784/2008 para 8.3; *P.L. v Belarus* (26 July 2011) Communication No 1814/2008 CCPR/C/102/D/1814/2008 para 6.2.

[117] *Gelazauskas v Lithuania* (n116) para 7.4; *Sekerko v Belarus* (n116) para 8.3; *Protsko and Tolchin v Belarus* (n116) para 6.5; *Schumilin v Belarus* (n116) para 8.3; *P.L. v Belarus* (n116) para 6.2.

[118] Often States fail to provide the relevant statistical data. See *Sudalenko v Belarus* (3 May 2012) Communication No 1750/2008 CCPR/C/104/D/1750/2008. However, in *Evzrezov v Belarus* (14 July 2016) Communication No 2101/2011 CCPR/C/117/D/2101/2011, the Belarusian government claimed that of the 4,565 appeals filed under the supervisory review procedure in 2011 239 were upheld (a successful appeal rate of around 5.24%).

[119] *Evzrezov v Belarus* (n118).

[120] The matter having already been adjudicated by a competent court should not be available to be further pursued by the same parties. The European Court of Human Rights have raised similar objections to the *res judicata* nature of administrative and judicial Supervisory Review procedures to appeal decisions that should be 'irreversible'. See ECtHR *Vardanyan and Nanushyan v Armenia* (n109).

[121] *Evzrezov v Belarus* (n118).

Whilst Supervisory Review has been condemned generally by both the European Court of Human Rights and the United Nations Human Rights Committee, in Belarus the use of this Review is even more controversial. This is because the use of Supervisory Review in Belarus has additional factors which means that it not only undermines the principle of *res judicata,* but also contravenes the separation of powers doctrine, the independence of the judiciary, and the exclusive authority of the Belarusian judiciary. This is because in Belarus, the power of Supervisory Review lies with the Prosecutor General's Office, rather than with the courts. The power of Supervisory Review was awarded to the Prosecutor's Office on the basis that this Office was tasked with ensuring the rule of law,[122] and ensuring the 'congruence of court rulings with the law'.[123] The powers of Supervisory Review supposedly therefore allows the Prosecutor's Office to receive and consider appeals against court judgments, and to determine whether those judgments comply with Belarusian law.[124] As a result, Supervisory Review in Belarus undermines the exclusive authority of the judiciary to make determinations regarding judicial matters, as the power of Supervisory Review lies with the Prosecutor's Office. This in turn undermines the separation of powers in the country, by granting the executive branch power to interfere in judicial matters, and also undermines the independence of the Belarusian courts, by subjecting their decisions to external validation.

SUPERVISORY REVIEW – HERE TO STAY? ARGUMENTS ABOUT SUPERVISORY REVIEW IN BELARUS BEFORE THE HUMAN RIGHTS COMMITTEE

Despite clear jurisprudence on the issue of Supervisory Review from international human rights bodies and the problems that Supervisory Review presents to the domestic judiciaries in affected States, it seems that governments are unwilling to reform this practice. In fact some former Soviet States, including Belarus, have repeatedly argued that Supervisory Review is a domestic remedy that must be exhausted before a complaint can be admitted before a human rights body.[125] The Belarusian government, particularly, has utilised this challenge

[122] Law of the Republic of Belarus On the Prosecution Service of the Republic of Belarus No 220-Z (2007) Article 4.

[123] Prosecutor General's Office of the Republic of Belarus 'Tasks and Functions' (n96).

[124] *Ibid.*

[125] *Akmatov v Kyrgyzstan* (29 October 2015) Communication No 2052/2011 CCPR/C/WG/115/DR/2052/2011; *Quliyev v Azerbaijan* (16 October 2014) Communication 1972/2010 CCPR/C/112/D/1972/2010; *K.A. v Belarus* (3 November 2016) Communication No 2112/2011 CCPR/C/118/D/2112/2011; *Poplavny and Sudalenko v Belarus* (3 November 2016) Communication No 2139/2012 CCPR/C/118/D/2139/2012; *Misnikov v Belarus* (14 July 2016) Communication No 2093/2011 CCPR/C/117/D/2093/2011; *Basarevsky and Rybchenko v Belarus* (14 July 2016) Communication No 2108/2011 and 2109/2011 CCPR/C/117/D/2108/2011-CCPR/C/117/D/2109/2011; *Levinov v Belarus* (14 July 2016) Communication No 2082/2011 CCPR/C/102/D/1812/2008; *Korol v Belarus* (14 July 2016) Communication No 2089/2011 CCPR/C/117/D/*2089/2011; Evzrezov v Belarus* (n118); *Bakur v Belarus* (15 July 2015) Communication No 1902/2009 CCPR/C/114/D/1902/2009; *P.L. v Belarus* (26 July 2011) Communication No 1814/2008 CCPR/C/102/D/1814/2008; *Krasovskaya and Krasovskaya v Belarus* (26 March 2012) Communication No 1820/2008 CCPR/C/104/D/1820/2008; *Valentin Evrezov, Vladimir Nepomnyaschikh, Vasiliy Polyakov, Valery Rybchenko v Belarus* (10 October 2014) Communication No 1999/2010 CCPR/C/112/D/1999/2010; *Praded v Belarus* (10 October 2014) Communication No 2029/2011 CCPR/C/112/D/2029/2011; *Kalyakin and others v Belarus* (10 October 2014) Communication No 2153/2012 CCPR/C/112/D/2153/2012; *Stambrovsky v Belarus* (24 October 2010) Communication No 1987/2010 CCPR/C/112/D/1987/2010; *Nepomnyaschikh v Belarus* (10 October 2014) Communication No 2156/2012 CCPR/C/112/D/2156/2012; *Pinchuk v Belarus* (24 October 2014) Communication No 2165/2012 CCPR/C/112/D/2165/2012; *Mukhtar v Kazakhstan* (6 November 2015) Communication No 2304/2013 CCPR/C/115/D/2304/2013; *Abdussamatov v Kazakhstan* (18 January 2012) Communication No 444/2010 CAT/C/47/D/444/2010; *E.Z. v Kazakhstan* (1 April 2015) Communication 1855/2008 CCPR/C/113/D/1855/2008; *Leven v Kazakhstan* (21 October 2014) Communication No 2131/2012 CCPR/C/112/D/2131/2012; *Khuseynova and Butaeva v Tajikistan* (20 October 2008) Communication Nos 1263/2004 and 1264/2004 CCPR/C/94/D/1263–1264/2004; *Karimov and Nurastov v Tajikistan* (27 March 2007) Communication Nos 1108/2002 and 1121/2002 **CCPR/C/89/D/1108&1121/2002;** *Ashurov v Tajikistan* (20 March 2007) Communication 1348/2005 **CCPR/C/89/D/1348/2005;** *Yakupova v Uzbekistan* (3 April 2008) Communication No 1205/2003 CCPR/C/92/D/1205/2003; *Sharifova and Burkhonov v Tajikistan* (1 April 2008) Communication Nos 1209,1231/2003 and 1241/2004 CCPR/C/92/D/1209,1231/2003&1241/2004; *Sattorova v Tajikistan* (30 March 2009) Communication No 1200/2003 CCPR/C/95/D/1200/2003; *Lyashkevich v Uzbekistan* (11 May 2010) Communication No 1552/2007 CCPR/C/98/D/1552/2007; *Umarova v Uzbekistan* (3 November 2010) Communication No 1449/2006 CCPR/C/100/D/1449/2006; *Iskiyaev v Uzbekistan* (20 March 2009) Communication No 1418/2005 CCPR/C/95/D/1418/2005; *Salikh v Uzbekistan* (30 March 2009) Communication No 1382/2005 CCPR/C/95/D/1382/2005.

consistently before various UN human rights bodies, routinely challenging the admissibility of individual complaints by noting that the complainants 'did not appeal under the Supervisory Review proceedings to the Prosecutor's Office'.[126] In this respect, the Belarusian government is not alone, and the Kazakh government have similarly routinely disputed the admissibility of complaints to UN human rights bodies, arguing that complainants have not exhausted domestic remedies as they have neglected to file 'a request for a Supervisory Review of [their] final conviction'.[127] In comparison, however, the Kyrgyz and Russian governments which also have systems of Supervisory Review, have utilised this objection far more sparingly, only occasionally challenging cases for admissibility on the basis that the claimant has not sought Supervisory Review of the case before the regional courts.[128]

Despite established jurisprudence from the Human Rights Committee on Supervisory Review concluding that this individual complainants do not have to engage with Supervisory Review in order to exhaust domestic remedies, given the issues with the system noted above, the Belarusian government have failed to acknowledge this precedent.[129] Instead, the Belarusian government have continued to challenge the admissibility of claims before the Human Rights Committee and other human rights bodies on the basis of a failure by the complainant to initiate Supervisory Review proceedings. Belarus has been particularly unequivocal in its stance, and the Belarusian government has regularly challenged the Human Rights Committee's jurisprudence on the issue. In doing so, the Belarusian government has not only continued to undermine the separation of powers, judicial independence, and the exclusive authority of the judiciary within the country but has also asserted itself as having a competence greater than that of the Human Rights Committee.

As part of the Belarusian governments continued intractable position around Supervisory Review, it has claimed that any decisions undertaken by the Committee where the complainant has not utilised the Supervisory Review procedure will amount to 'illegally registered communications'.[130] It has further claimed that where the Committee reaches a decision in such an instance, that decision will be considered by the Belarusian government to be 'invalid'.[131] To support this assertion, Belarusian representatives have claimed that Belarus is under no obligation under the Optional Protocol to recognise the Human Rights Committee's rules of procedures nor its interpretation of the provisions contained within the Optional Protocol.[132] In particular, the Belarus government has concluded that it is under no obligation to accept or recognise the practice of the Human Rights Committee, the Committee's methods of work, or the Committee's case law, given that these are not part of the Optional Protocol.[133] As a consequence, the Belarusian government has concluded that if any communication is, in its view, registered in violation of Article 2[134] and Article 5(2)(b)[135] of the Optional

[126] *K.A. v Belarus* (n125), para 4.1.

[127] *Mukhtar v Kazakhstan* (n125).

[128] *Akmatov v Kyrgyzstan* (n125).

[129] *K.A. v Belarus* (n125); *Poplavny and Sudalenko v Belarus* (n125); *Mismikov v Belarus* (n125); *Levinov v Belarus* (n125); *Korol v Belarus* (n125); *V.L. v Belarus* (30 March 2016) Communication No 1984/2010 Communication No 2084/2011 CCPR/C/WG/116/DR/2084/2011; *P.L. v Belarus* (n116); *Govsha, Syritsa and Mezyak v Belarus* (27 July 2012) Communication No 1790/2008 CCPR/C/105/D/1790/2008; *Bakur v Belarus* (n125); *Evzrezov v Belarus* (n118); *Pugach v Belarus* (15 July 2015) Communication No 1984/2010 CCPR/C/114/D/1984/2010; *Sudalenko v Belarus* (n118); *Evrezov, Nepomnyaschikh, Polyakov, Rybchenko v Belarus*; *Praded v Belarus*; *Kalyakin and others v Belarus*; *Stambrovsky v Belarus*; *Nepomnyaschikh v Belarus*; *Basarevsky and Rybchenko v Belarus* (n125); *S.V. v Belarus* (30 March 2016) Communication No 2047/2011 CCPR/C/WG/116/DR/2047/2011; *E.V. v Belarus* (30 October 2014) Communication No 1989/2010 CCPR/C/112/D/1989/2010; *E.Z. v Kazakhstan* (n125).

[130] *K.A. v Belarus* (n125), para 4.1.

[131] *Ibid.*

[132] *Ibid.*

[133] *Mismikov v Belarus* (n125), para 6.

[134] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 2.

[135] *Ibid*, Article 5(2)(b).

Protocol, then it would be viewed by Belarus as 'incompatible' with the Optional Protocol, and any decisions taken by the Human Rights Committee will considered by the Belarusian government as 'invalid'.[136]

With respect to those decisions, the Belarusian government has stated that any conclusion the Human Rights Committee may make on those unjustly registered communications[137] will be 'rejected [by the Belarusian government] without observations on admissibility or the merits'[138] given that there are 'no legal grounds for the state party to consider those communications'.[139] Therefore, in those instances, the Belarusian government has concluded that any such decision 'will be considered legally invalid'.[140]

This position is despite the fact that when it became a part to the Optional Protocol to the ICCPR, the Belarusian government acknowledged that it recognised the competence of the Human Rights Committee under Article 1 of the Optional Protocol to

> receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any rights set forth in the Covenant.[141]

The declaration by the Belarusian government that it will refuse to recognise the competence of the Human Rights Committee in such instances has been met with criticism from the Human Rights Committee. The Human Rights Committee concluded that implicit in the State's adherence to the Optional Protocol is

> an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications and, after examination thereof, to forward its views to the state party and to the individual.[142]

In particular, the Human Rights Committee has made it clear that the competence to determine whether a case is admissible before the Committee lies with the Committee, rather than the respondent State,[143] and that any decision by the Belarusian government to refuse to accept the Human Rights Committee's determination would be in violation of the State party's obligations under Optional Protocol.[144]

Nonetheless, in numerous communications between 2010 and 2016, the Belarusian government has continued to declare that it will decline to recognise the competence of communications that it deems should be held to be inadmissible due to the failure to exhaust domestic remedies. In particular, the Belarusian government has refused to recognise the Human Rights Committee's determination that the Supervisory Review procedure does not constitute an effective remedy that individuals are obliged to exhaust.[145] Instead the Belarusian government has repeatedly responded to communications to the Human Rights Committee in the following vein:

> The State party expresses its utmost concern over the fact that the Committee systematically violates responsibilities entrusted to it in accordance with the Optional Protocol, by registering and considering individual communications from persons who have not exhausted domestic remedies . . . The State party submits that in the spirit of good faith adherence to the Optional Protocol, it uses its right to not recognize Views adopted as a result of the Committee's unlawful

[136] *K.A. v Belarus* (n125), para 4.2.
[137] *E.V. v Belarus* (n125).
[138] *Misnikov v Belarus* (n125).
[139] *E.V. v Belarus* (n125).
[140] *Ibid.*
[141] *K.A. v Belarus* (n125), para 4.2.
[142] *Ibid*, para 5.2.
[143] *Ibid.*
[144] *Ibid.*
[145] *Sudalenko v Belarus* (n118); *E.V. v Belarus* (n125).

> actions. By exceeding its powers granted by the Covenant and its Optional Protocol, broadly interpreting its mandate and baselessly adopting the functions and powers of an international judicial body, the Committee undermines its own credibility and contradicts the goals of the Covenant and the Optional Protocol.[146]

The decision by members of the Belarusian government to challenge the competence of the Human Rights Committee to examine communications that have not engaged the Supervisory Review process in Belarus presents a two-pronged issue.

Primarily, the steadfast position of the Belarusian government in the face of clear criticism from human rights bodies[147] shows a clear indication that reforms to the Supervisory Review system in the country are not likely to be forthcoming in the near future. Instead, the government of Belarus continues to demonstrate a flagrant disregard for *de facto separation of powers*, judicial independence, and the exclusive authority of the judiciary in the country.

Secondly, the unilateral claim that the Human Rights Committee does not have the competence to examine communications where the author has not engaged the Supervisory Review process, demonstrates an unwillingness by the Belarusian government to engage with important international oversight over human rights and democratic standards in the country. This position may have far reaching consequences for human rights standards within Belarus, particularly in the modern context of human rights standards in Belarus.

CONCLUSION

The situation in Belarus raises issues of a domestic, regional, and international nature. On a purely domestic basis, the ongoing use of the Supervisory Review process in Belarus undermines the principle of *res judicata* in the country and challenges the exclusive authority of the Belarusian judiciary. Perhaps of even greater concern is the fact that this power lies with the Procuracy, giving the executive branch the power to undermine judicial decisions, thereby undermining the separation of powers and the independence of the Belarusian judiciary. In a perfect World, the Belarusian government would be seeking reforms to abolish Supervisory Review to strengthen the domestic judiciary. These reforms would need to be two-fold and would demand both legislative and practical changes. Primarily, legislative reforms would need to be introduced to abolish the practice of Supervisory Review in Belarus, and new laws introduced to ensure that questions of legality and rule of law are exclusively within the jurisdiction of the judicial branch. In addition, longer term changes in practice would also be necessary, in order to properly embed a culture of exclusive authority and judicial independence within the legal community.

On a regional basis, the use of Supervisory Review remains relatively commonplace in former Soviet States, in spite of various rulings from international human rights bodies. In fact, whilst the reaction of the Belarusian government to the oversight of the Human Rights Committee has been extreme, it is far from the only former Soviet State to challenge international jurisprudence with respect to Supervisory Review. In fact, Kazakhstan, Kyrgyzstan, and Uzbekistan have all challenged the admissibility of communications to the Human Rights Committee on the basis that domestic remedies were not exhausted after the applicant failed to utilise Supervisory Review.[148] Despite the fall of the Soviet Union over 20 years ago,

[146] *Rybchenko v Belarus* (17 October 2018) Communication No 2266/2013 CCPR/C/124/D/2266/2013, paras 6.1 and 6.3.

[147] *Ryabykh v Russia* (n108); *Alekseev v Russian Federation* (n113); *Koktish v Belarus* (n113) para 7.3.

[148] *Akmatov v Kyrgyzstan* (29 October 2015) Communication No 2052/2011 CCPR/C/WG/115/DR/2052/2011; *Quliyev v Azerbaijan* (16 October 2014) Communication 1972/2010 CCPR/C/112/D/1972/2010; *Mukhtar v Kazakhstan* (6 November 2015) Communication No 2304/2013 CCPR/C/115/D/2304/2013; *Abdussamatov v Kazakhstan* (n1494); *E.Z. v Kazakhstan* (1 April 2015) Communication 1855/2008 CCPR/C/113/D/1855/2008; *Leven v Kazakhstan* (21 October 2014) Communication No 2131/2012

the Soviet hangover of Supervisory Review continues to cause international tension before United Nations human rights bodies and continues to undermine domestic judiciaries across the region. In each of these countries reform is necessary to ensure appropriate judicial independence and certainty.

Finally, on an international basis, Supervisory Review at the hands of the Procuracy is symptomatic of a Worldwide issue. Across the globe we are seeing attacks on the independence of domestic judiciaries and attempts by governments to consolidate power in the executive branch. Whilst Belarus is notable in that the interference is one prescribed by domestic law, efforts to amend domestic law to increase executive influence over respective judiciaries are ongoing throughout Europe, in former Soviet States and beyond. In Romania 'justice laws' passed between 2018 and 2019 have granted significant powers to the Office of the Prosecutor General to investigate 'offences' committed within the judiciary, a move that the Venice Commission, GRECO, and the Council of Europe condemned as threatening the independence of the judiciary in the country.[149] Similarly, in Turkey, constitutional changes to the selection and promotion of judges have granted the President significantly greater power over the makeup of the judiciary.[150] This has attracted similar concerns about threats to the separation of powers and independence of the judiciary in the country, with the Venice Commission noting that these changes 'enhanced executive control over the judiciary (and) . . . weaken an already inadequate system of judicial oversight of the executive'.[151]

Belarus therefore serves as a stark and timely warning to the international community of how embedded executive influence over the judicial branch can become if domestic law does not effectively protect separation of powers, judicial independence, and the exclusive authority of the domestic judiciary.

CCPR/C/112/D/2131/2012; *Khuseynova and Butaeva v Tajikistan* (n1535); *Karimov and Nurastov v Tajikistan* (27 March 2007) Communication Nos 1108/2002 and 1121/2002 **CCPR/C/89/D/1108&1121/2002**; *Ashurov v Tajikistan* (n1535); *Yakupova v Uzbekistan* (3 April 2008) Communication No 1205/2003 CCPR/C/92/D/1205/2003; *Sharifova and Burkhonov v Tajikistan* (1 April 2008) Communication Nos 1209,1231/2003 and 1241/2004 CCPR/C/92/D/1209,1231/2003&1241/2004; *Sattorova v Tajikistan* (n1535); *Lyashkevich v Uzbekistan* (11 May 2010) Communication No 1552/2007 CCPR/C/98/D/1552/2007; *Umarova v Uzbekistan* (3 November 2010) Communication No 1449/2006 CCPR/C/100/D/1449/2006; *Iskiyaev v Uzbekistan* (20 March 2009) Communication No 1418/2005 CCPR/C/95/D/1418/2005; *Salikh v Uzbekistan* (30 March 2009) Communication No 1382/2005 CCPR/C/95/D/1382/2005.

[149] Dunja Mijatovic 'Commissioner for Human Rights of the Council of Europe: Report Following Her Visit to Romania from 12–16 November 2018' (*Council of Europe*, 28 February 2019) <https://rm.coe.int/report-on-the-visit-to-romania-from-12-to-16-november-2018-by-dunja-mi/1680925d71> at 24.

[150] *Ibid*, 15–7.

[151] European Commission for Democracy Through Law (Venice Commission) 'Turkey: Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017' (*Council of Europe*, 13 March 2017) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)005-e> at para 129.