COMMENTS ON THE AMENDMENTS AND ADDENDA TO THE CONSTITUTION OF THE REPUBLIC OF BELARUS AS PROPOSED BY THE PRESIDENT OF THE REPUBLIC

by Mr Sergio BARTOLE
(Italy)

I am dealing with the questions submitted to the Venice Commission following the order of the request signed by Mr. Sharetskiy, Chairman of the Supreme Council of the Republic of Belarus, October 9th, 1996.

a) It is a difficult task distinguishing a new constitution from a variant of a constitution which is still in force and was (or should) be amended. One can adopt substantive criteria looking at the fundamental principles of the new text and comparing them with those of the previous text: if the differences are substantial, the conclusion could be drawn that we are in the presence of a new constitution. But what does the expression "substantive differences" mean? Opinions can differ according to the adopted yardstick. In the case which we are dealing with, it is evident that the proposed amendments of the first two sections have the purpose of emphasising the social nature of the Republic of Belarus and providing for a great deal of State intervention in the economy. But we cannot say that if the amendments were adopted, Belarus would become a socialist State. Perhaps it would instead be easier defining the new text as a new constitution, if the proposed amendments of the organisation of the State were approved. But even from this point of view one could say that changes in the relations between the top bodies of the State do not imply the passage from the old Constitution to a new Constitution. Moreover, we have to keep in mind that the Constitution of the Republic of Belarus which is today in force and has to be complied with by the President and the Parliament, does not limit the extent of changes that can be brought about by constitutional amendments. Therefore we do not have legal criteria according to which we could distinguish between "substantial differences" and differences which are not substantial.

My guess is that we have to look at the formal procedure which the President has chosen and at his real intention which underpins this choice. The President has the intention of submitting his draft directly to the people while following an extraconstitutional procedure. In some way we can say that he pursues the exit from the legal order which is presently in force, and the passage to a new legal order, which should be based on a direct and explicit vote of the people. This is the reason why he does not comply with the constitutional provisions concerning the revision of the Constitution (articles 146-149). He submitted the text to the Supreme Council but he does not ask for a vote of this assembly. He wants to call a referendum without leaving this decision to the Supreme Council which art. 83.1 entrusts with this task. Even if the President were able to have his extra-constitutional body, the so-called Assembly of the Belarusian people, meeting October 19th, 1996, approve his initiative, this initiative should be considered as adopted not in conformity with the Constitution. Pretending to call a referendum directly, without asking a parliamentary decision according to art. 83.1 of the Constitution, the President does not comply with the Constitution while it is his duty to abide by it (art. 99). He is envisaging the coming of a new legal order based on his will of calling a people's decision without the consent of the Parliament.

This conclusion does not mean that a referendum will not be called about the revision of the Constitution which is presently in force. According to the decision of the Supreme Council of calling a referendum (not on November 7th, 1996, as decided by the President but on November 24th, 1996), there will be a referendum called in conformity with the second alinea of art. 149 of the Constitution. A decision of the Supreme Council will be the basis for the calling of the referendum and this is a procedure which complies with the rules of the Constitution. The President cannot object that art. 149 does not entrust a specific State body with the task of calling the referendum: he cannot justify his own initiative by pretending to exercise a power which is not given to another State body because the competence of the Supreme Council in this field is based on art 83.1 and has a general nature.

The referendum called by the Supreme Council will be in conformity with the Constitution. It will be a referendum aimed at passing amendments and addenda to the Constitution. The result will not be a new Constitution from the formal point of view even if the amendments and addenda submitted to the people imply a great deal of change in the Belarusian constitutional order. Actually the project prepared by the agrarian and communist MP's aims at deeply modifying the Constitution and introducing a system of government in some way similar to the socialist system of government without substantially changing chapters 1,2 and 3 of the Constitution itself. But the request by President Sharetskiy I am dealing with at the moment concerns the presidential draft only.

b) can the proposed changes be considered as of a democratic character?
Notwithstanding the retention of the adhesion to the principle of the separation of State power into legislative, executive and judicial power(s), it is evident that the amendments are aimed at increasing the power of the President and of the bodies which are strictly connected with him, that is the government, the Senate, the Procurator, the Committee of State Control and the Constitutional Court.

1) One could say that the "Presidency's complex" is entrusted with functions of control and that the governing bodies are free in choosing the main trends of the internal and foreign policy of the state. But this would not be true, because the government is a component part of this "complex": the President "shall be entitled, on his/her own initiative, to take decisions on government resignation and to dismiss from office any member of the Government (art. 106 of the draft). The Government itself shall be accountable to the President and responsible to the Parliament, the expression "accountable" probably meaning that the government is more dependent on the decisions of the Chief of the State than on those of the Parliament.

2) One third of the members of the Senate shall be appointed by the President (art. 91, second alinea, of the draft), election being limited to the deputies (art. 68 of the draft) with an evident violation of art. 3 of the draft. There is a connection between these rules and the large powers which are entrusted to the Senate in giving its consent to the major appointments made by the President, electing half of the membership of the Constitutional Court and considering the presidential edicts on the introduction of the state of emergency. Only the Senate is allowed to deliberate on the accusation of high treason or other crimes levelled against the President (art. 97 of the draft).

   The Senate is empowered with the task of cancelling the decisions of the local councils which are not in conformity with the legislation: therefore it is on the top of a pyramid of elected assemblies which is a reminder of the organisation of the elected assemblies adopted by the socialist regimes (art. 122 of the draft in combination with art. 98.5 of the draft).

3) The Procurator and the Committee of State control should be independent but, on one side, the Procurator is appointed (with the consent of the Senate) by the President and is accountable to him. While, on the other side, the Committee is established by the President, who appoints its chairman also.

4) Apparently, the Constitutional Court is no more a separated body but is a component part of the judiciary (see the final chapter of the third section of the draft). Because its members are appointed by the President and by the Senate on an equal basis, there is the evident danger that its membership will be controlled by the entourage of the President. Moreover only a restricted number of State Bodies are allowed to complain before the constitutional court about the conformity of laws, decrees and edicts, acts of the State's bodies with the Constitution.

5) Therefore it is easy to understand the reason why in the draft, the rules concerning the Parliament appear after those concerning the President

(see Section IV of the draft). The President is allowed to issue edicts and orders which have binding force within all the State's territory, but he has also the power of adopting temporary decrees having the force of law which have to be submitted for the consideration of the Houses of the Parliament and "remain in force, unless the Houses abrogate them", no deadline being established. (art.101, last alinea) Even the acts of the government can be repealed by the President without the explicit requirement of any justification (art. 84.23 of the draft). We have - therefore - two examples of explicit violation of the principle of the separation of powers.

c) The third question has an evident political meaning but there are some legal implications which deserve our attention.

The draft adopts the principle of continuity for the President only: the incumbent President will keep his place exercising the powers provided for him by the new Constitution if this draft is approved by the people. Nothing is explicitly said with regard to the other bodies of the State: probably the draft - in contradiction with the provisions concerning the President - adopts the principle of discontinuity (cf. art. 146). All other State's bodies will have to be renewed because they are doomed to be cancelled in their present composition. Only the members of the Supreme Council will preserve their position if they adhere to a trade-off with the President. According to art. 143 of the draft they will be assigned, on one side, to the House of Representatives and, on the other side, to the Senate on the basis of an agreement which has to be reached with the President. In the Senate, the members of the Supreme Council will be joined by the members appointed by the President. If the agreement is not reached, the President will be allowed to dissolve the Supreme Council.

It is evident that this part of the draft can be criticized from many points of view:

- it provides for a membership of the two chambers which will not have an electoral legitimacy. Even if the present members of the Supreme Council adhere to the trade-off, their distribution between the two chambers will not have an electoral basis.

- There is an evident difference of treatment between the Presidency and other State bodies, especially with regard to the principle of continuity.

- the Republic of Belarus will not have any legal guarantee during the transition.

The whole design shows the intention of the President of creating a regime of personal power, blackmailing the Supreme Council and obliging its members to yield under his pressure if they want to keep their seats. In the text of the draft human rights, fundamental freedom the principles of the representative government and the rule of law are proclaimed but the President apparently does not have the intention of complying with them in the future.

Trieste, October 14th, 1996

Prof. Sergio Bartole