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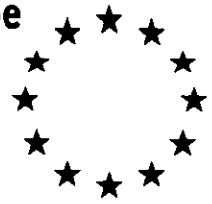

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

COMMENTS

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

by Mr Matthew RUSSELL
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AMENDMENTS TO THE CONSTITUTION OF BELARUS PROPOSED BY THE PRESIDENT OF THE REPUBLIC

[Note: **The observations which follow are based upon an English translation of the text provided by**]

Article 7:
The proposed wording "there shall be established the principle of the supremacy of law" is not an improvement on the clear and mandatory wording of the existing text. The deletion of the statement - which every citizen can understand and value - that the State and its bodies and officials "shall be bound by the law" is undesirable.

Article 16:
The prohibition of religious organisations which are harmful to morals (whose morals?) is somewhat questionable.

Article 21:
It may prove economically imprudent to give the rights specified in the proposed third paragraph. Would an undertaking by the State not to deprive citizens unjustly of these benefits be sufficient?

Article 32:
The proposal is a useful one.

Article 34:
Great care will be required in drafting the restrictive legislation envisaged by this proposal so as to avoid the possibility of abuse and protect fundamental freedom of expression.

Article 44:
The promise that the State will protect the savings of its citizens may be unwise since necessary taxation arrangements or devaluation may contravene this.

Article 48:
A less precisely worded provision regarding the grant of housing may be more prudent in view of economic realities.

Article 74:
The main changes proposed are (i) that in place of the existing right of 70 (out of 260) deputies to initiate a referendum, a total of 2/5 ths of the members of each House will be required; and (ii) that in place of the existing similar right of 450,000 voters from throughout the Republic, this total must include 50,000 from each region and from Minsk. (Effectively, the President's right to require a referendum remains the same.)

While these changes would reduce the likelihood of a referendum other than one called by the President it cannot be said that the 2/5 ths requirement is excessive, despite the fact that the President appoints one-third of the senate, since referenda should only be called on matters

of public importance. As for the proposed 'spread' of citizens, it may be said to enable those in region X to exercise a veto over the wishes of the majority in the rest of the country to hold a referendum, and this is a greater objection than the objection which can be made of the existing system, namely, that the outcome of a national referendum may be contrary to the wishes of the voters of region X.

Article 112:
The reason for the proposed deletion of "laws" from this Article is not understood. It is not practicable to make detailed provision for the administration of justice in a Constitution alone, and it would be wrong in principle for the administration of justice to be subjected to regulatory provisions which are other than laws enacted in the ordinary way by Parliament, especially if such provisions were to be made by an Executive organ; such a situation would seriously impair the independence - and the perceived independence - of the judiciary which is essential in a democracy. [It is assumed that under the legal order of Belarus "ensuing regulatory enactments" are something less than laws and are made by some organ other than Parliament]

As regards the proposed exclusion from the courts' jurisdiction of the power to find a regulatory enactment to be in conflict with the law, it is important that the courts (or the superior courts, at least) should have the power to declare such enactments to be ultra vires the law and therefore invalid and of no effect, even if they are not in conflict with the Constitution itself, because no citizen should be bound by a regulatory enactment which is contrary to the law. Such a power is vested in the Constitutional Court by Article 128 of the existing Constitution. It is not entirely clear whether the wording of the proposed Article 116 confers this power on the Constitutional Court. See also Article 137, supra.

Article 116:
Some of the proposed changes in the position of the Constitutional Court give rise to serious concern. It is essential that this court be, and be seen to be, totally independent of the President and of all other organs of State. The proposal that six of the judges should henceforth be appointed by the President rather than by Parliament is disturbing, particularly in view of the increase in the court's numbers from 11 to 12 which can produce an equality in voting which is undesirable in itself and may (the proposal does not deal with this) envisage the president of the court having a casting vote, thus giving the nominees of the President of the Republic an absolute majority. If this is intended, then the situation is even more undesirable.

Whatever may be the intention of the drafters of this proposal, it would seem to be inevitable that the result of this significant alteration in the balance of the court will be to create the perception that the independence of the court has been compromised, and the judgements of such a court are less likely to be regarded by the public with the respect which is given to judgements from a court which is believed to be impartial and apolitical. It is difficult to see how the court can remain untouched by political controversy when it has the function of deciding whether the parliamentary chambers "regularly and flagrantly" violate the Constitution. The conferring of such a function upon the court makes the proposed manner of its composition especially undesirable.

The unsatisfactory nature of the new arrangement is compounded by the deletion of the prohibition which is in the existing Article 126 of direct or indirect pressure on the court.

Is there any difference in intended meaning between "determined by the law" (in the existing Article 132) and "stipulated by law" in the proposed Article 116 (last sentence)? The change from the existing "administration and activities" (of the Constitutional Court) to the proposed "staff structure and activities procedures" would be an improvement if it increased the independence of the court.

Article 127:
Is there a difference intended in meaning between the proposal that the Procurator General and his subordinates be "guided by legislation" and the provision in the existing Article 135 that they be "guided only by the law"? The significant alteration proposed in his position (he is to be accountable to the President rather than to Parliament as at present) is an obvious strengthening of executive power over an officer who should be seen to exercise his constitutional control over executive agencies with complete independence.

Articles 129-131
The proposed transfer of the appointment and accountability of the Committee of State Control from Parliament to the President makes it necessary that the Constitutional Court should have jurisdiction to deal with any breaches of the Constitution or of the law by the Committee.

Article 137
The first two paragraphs of this proposed Article are an improvement on the existing Article 146 in that they specifically make decrees and edicts subject to the Constitution.

However, the third paragraph is a cause of very considerable concern. Whatever its intention, its wording seems clearly to provide that a decree or an edict which is issued otherwise than on the authority of a law and which is contrary to the law will take priority over the law. As already pointed out above, no citizen should be subject to a decree or edict which is contrary to the law; such a situation would be completely contrary to the rule of law and would amount to arbitrary rule.

Article 138:
The proposed removal of the right of members of Parliament (whatever minimum number might be stipulated) to suggest amendments of the Constitution is open to serious question.

As regards the removal of that right from the Supreme Court, there are clearly arguments that can be made in favour of this proposal (e.g. that no court should be involved in political issues) and against it (e.g. that the court would be in a position, from experience, to identify technical or non-contentious imperfections in the text of the Constitution).

Article 140:
The proposed increase from two-thirds to three-quarters of the membership of each House of Parliament as the requirement for an amendment of the Constitution, allied to the power proposed to be given to the President of the Republic (Article 91) to appoint one-third of the members of the Senate, means that the President has effectively a veto over any amendment of the Constitution. This is undesirable.

The third paragraph of this proposal states that certain important sections of the Constitution, once they have been passed by a referendum (which would include the referendum planned

for November, 1996) cannot be "reconsidered" by Parliament. If this is intended to prevent Parliament, at any time in the future, from proposing a referendum under Article 74 to amend those sections, it is unwise because it prevents a response that may be required by altered circumstances and it is undesirable because it deprives the people of the opportunity to change their minds.

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In my opinion the proposed constitutional amendments, taken as a whole, amount to a legally undesirable concentration of power in the President of the Republic and compromises the balance as regards the other organs in the State which is required in a democratic nation.

Dublin
October 1996