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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 AGRARIAN AND COMMUNIST GROUPS
OF PARLIAMENTARIANS

by

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ADDENDUM to the opinion on the belarusian crisis by prof. Sergio Bartole, University of Trieste, concerning the amendments and the addenda to the Constitution of the Republic of Belarus submitted by some groups of the belarusian Parliament.

While the proposed amendments concerning the Sections I, II, and III of the Constitution don't imply substantial changes of the structure and of the content of the constitutional provisions and restrict their impact to the use of the russian language (art. 17), to the right of equal access to the public offices (art. 39), to the competence of the legislator in the fields of property and dwelling (artt. 43 and 49) and to the matter of referenda (art. 74), the other parts of the parliamentary proposal are aimed at extensively changing the system of government of the Republic of Belarus.

The main purpose of the project is the substitution of Chairman of the Supreme Council for the President of the Republic as " the highest official of the Republic " (art. 82). This solution is strictly connected with an enlargement not only of the functions of the Chairman himself, but also of the functions of the Supreme Council. The ideas underlying this solution resemble the ideas which supported the constitutional doctrines and orders of the socialist regimes. The Supreme Council should be established as the central body of the State organization, irrespective of the constitutional independence of the other powers of the State and of the autonomy of the local government institutions.

It should not depend on the proposal of other State bodies in the appointment of the members of the Constitutional Court, of the Supreme Court and of the Supreme Economic Court of the Republic, of the Board of managers of the National Bank, of the Supervisory Authority of the Republic, and of the general Procurator. It should be entrusted with the power of setting up and dissolving ministries of the Republic, and of vetoing not only " instruction by the Chairman of the Supreme Council, presidium thereof, as well as resolution and instructions of the Cabinet ", but also " resolutions passed by Coun-

cils of local deputies in cases when they are inconsistent with the Republican Constitution and laws ". Keeping the legislative functions and the political competences (for the determination of the priorities in foreign, military and domestic policy) which it still have, the Supreme Council will become the highest power of the State, set up at the top of a pyramid of elective assemblies, the exercise of whose functions it is allowed to check, while adopting decisions which should prevail on the decision of the other public authorities.

From this point of view we can say that the proposal does not comply with the principle of the separation of powers, which would imply that only the the bodies of the judiciary were entrusted with the task of checking the conformity to the Constitution and to the laws of the acts of the executive State bodies and of the local government councils. Moreover the Cabinet is deprived of its powers of self-organization and should be dependent on the decisions of the Supreme Council as far as the setting up and the dissolution of the Ministries is concerned. The functioning of all State constitutional institutions should rely on the decision of the Supreme Council concerning their memberships, which could not have those qualities of independence and neutrality that their functions require and are insured in the western democracies by the participation of more than one State body to the procedure of their nomination and election (or appointment).

Moreover other breaches of the principle of the separation of powers can be found in art. 83 which lists the functions of the Chairman of the Supreme Council. The Chairman is entrusted with functions which have evident executive nature: for instance, he " represents the country in the relations with organisations and bodiesabroad " and " conducts negotiations and signs international treaties ". But at the same time he shall chair the Assembly which has the task of " ratifying ...the international treaties to which the Republic of Belarus is a party " (art. 79, 14). There is an evident contradiction between the two quoted provisions as far as it is unthinkable

that the same person could exercise executive functions and chair the body which has the competence of checking and approving the conduct of the executive bodies. At the same time, being the Chairman a part of the Supreme Council, he is not allowed to ask to the Supreme Council itself a new discussion about the statutes submitted to him for the promulgation: in this way the belarus system of government is deprived of an important factor of constitutional guarantee which is present where the highest office of the State is separated from the parliamentary offices.

Moreover art. 83, 9, provides for a dependence of the judiciary on the Chairman of the Parliament who is in charge of the appointment of the " judges of the regional city and district courts as well judges of the regional and city economic courts ". Because the Constitution is silent about the procedure of the selection of the judges and does not provide for any limitation of the powers of the Chairman in this matter, it is evident that the principle of the separation of powers is not complied with.

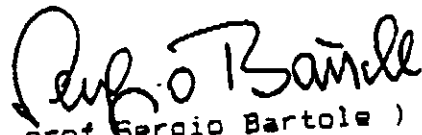
The ambiguous nature of the office of the Chairman can easily realized reading art. 83, 3, according to which he " reports at least once a year to the Supreme Council on the situation in the Republic and on the most important issues of home and foreign affairs ". This is a competence which should be entrusted to a politically active office which is in charge of the executive functions. The Chairman of a parliamentary assembly should be a neutral office entrusted with the task of insuring the correct and impartial functioning of the assembly itself, and - therefore - the equal protection and implementation of the rights of the members of the House.

At the same time the interpenetration of the two offices of Chairman of the Supreme Council and of highest official of the State deprive the Republic of an authority competent to provide for the dissolution of the Parliament when the assembly is not able to solve political crisis or express a governing majority. The choice made by the draft is the clear product of a body which is unable to choose between a parliamentary government and a presidential or semipresiden-

tial government because it is afraid of the political dangers implied by the election of a Chief of the State. But in this way it cannot give to the constitutional system an institution charged with the guarantee of the functioning of the system itself and of the observance of the Constitution (which all the parliamentary systems have), on one side, and, on the other side, it refuses the advent of a President who should be the holder of executive functions and an official clearly separated from the Parliament which has to have the task of checking the activity of the executive bodies of the State.

All the design of the parliamentary project is - therefore - extremely dangerous. The modern democracy does not refuse the " gouvernement d'assemblée " < in radice >, but it requires that its constitutional arrangements have to offer the guarantees which are missing in the draft. We cannot say that this draft is a well based and trustful alternative to the presidential project.

Trieste, October 23rd, 1996


(Prof Sergio Bartole)