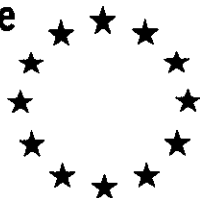


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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**COMMENTS**

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

**I.**

**THE PRESIDENT OF THE REPUBLIC**

**II.**

**THE AGRARIAN AND COMMUNIST GROUPS  
OF PARLIAMENTARIANS**

by

**Mr Kestutis LAPINSKAS**  
**(Lithuania)**

## **COMMENTS**

**on the draft Laws on amendment and addenda  
to the Constitution of the Republic of Belarus,  
submitted by President A.Lukashenka  
and a group of the members of Parliament**

**by Kęstutis LAPINSKAS (Lithuania)**

### **I. The Draft of the Amendments of the Constitution, submitted by President A.Lukashenka**

1. The draft amendments to the Constitution, submitted by A.Lukashenka, the president of the Republic of Belarus, to referendum, suggests to alter 1/3 of articles of the Constitution adopted in 1994. However, regarding the real volume of the Constitution, the suggested changes constitute half of the entire volume of the Constitution. The suggestions vary, they affect many sections, such as "Principles of The Constitutional System", "The individual, Society and the State" and even order to amend the Constitution. However, most of changes are foreseen in sections on defining principles of the organisation of State authorities and their status. Therefore, we will try to investigate in short these sections of the draft, aiming to find out whether they meet the main principles of modern democratic state: separation of powers, representation of nation and the principles of democracy.

2. We can infer the main points of the changes from the structural changes. In the valid Constitution section IV is titled "The Legislative, Executive and Judicial Power" (the same order is used to arrange respective sections), while the draft holds a different order of powers: "President, Parliament, Government, Court of Law".

In the very beginning of the draft section 3 ("President") it is attempted to give a new conception of the institution of President. The Article 95 in the valid Constitution (1994) holds a conventional formulation, that "The President of the Republic of Belarus is Head of State and the Executive", while the draft article 79 holds:

"The President of the Republic of Belarus is Head of State, a guarantor of the Constitution of the Republic of Belarus, of human and civil rights and freedoms.

President shall personify the unity of the people, guarantee the realisation of the main trends of the domestic and foreign policy, represent the Republic of Belarus in relations with other States and international organisations. President shall take measures to protect the sovereignty of the Republic of Belarus, its national security and territorial integrity, he/she shall secure political and economic stability, succession and interaction of the bodies of State power, shall mediate between the bodies of State power, between the State and the society."

In this case it is difficult to talk about a logical conception of institution, it can only be stated that it is more like an attempt to attach more importance to this institution, to raise it above other powers. At the same time it is doubtful

whether it meets the principle of separation of powers, formulated in the Constitution in article 6.

3. The draft holds practically unrestricted, uncontrolled rights for the President to establish, abolish and reorganise the bodies of State, starting with the Presidential Administration and ending with consultative advisory and other bodies at the President.. According to the suggestion of the Prime Minister, he/she also defines Governmental structure.

Powers of another group - to appoint supreme officials of the state - is of similar volume. Namely, the President appoints the heads of the bodies of public administration and determines their status, appoints other officials envisaged the law, forms and heads the National Security Council, appoints and dismiss the secretary of State of the said council. The President has at his/her command the formation of Government as well: appoints the Prime Minister (with the consent of the House of Representatives), his/her assistants, ministers and other members of Government, takes decision on the resignation of the Government or its members. It is noteworthy, that the President shall be entitled on his/her own initiative, a decision on Government resignation and to dismiss from office any member of the Government.

The powers of the President on personal questions are not limited by the officials of executive power institutions. The draft Constitution envisages, that the President shall directly participate forming the parliament: he/she shall be entitled to appoint one third of the senators. His/her prerogatives include the formation of almost all judge corps: the President appoints the Chairman of the Constitutional Court and its 5 members (the Senate elects other 6 judges), appoints, on the consent of the Senate, the Chairman and the members of the Supreme Court, appoints at his/her own discretion all other judges of the Republic. The president appoint and dismiss the Chairman of the Committee for State Control, appoints, on the consent of the Senate, the Procurator General, the Chairman and the members of the Board of the National bank. The President is also entitled to dismiss the Chairman of the Supreme Court, the Procurator General, the Chairman and members of the Board of the National bank, on notification of the Senate.

The Constitution in force resolves the said questions in a much more balanced way. Meanwhile, in this case the power balance and the counterbalance is not discussed.

4. The relations of the President of the Republic with the parliament are worthy of separate consideration. Beside the ordinary State Head prerogatives (to announce ordinary and extraordinary elections of the House of Parliament, dismiss the Houses of Parliament in cases envisaged in the Constitution, appeal to the Parliament with announcements, sign or veto Laws adopted by the Parliament), the draft envisages special powers of the President concerning the Parliament. First, the President participates directly forming the Higher House - he/she appoints one third of the members of Senate (senators). Second, the draft Constitution directly establishes, that the President "has the right to participate in the session of the Parliament and its bodies, to appear any time before them with a speech or information". Third, the President issues

not only edicts and orders which have binding force within the entire territory of the Republic, but also decrees having the force of a law. The draft envisages, that the Parliament shall delegate Presidential powers to issue the said decrees by a special law. However, there is envisaged, that "on grounds of exceptional necessity and urgency, President may, on his/her own initiative or on the Government proposal, issue temporary decrees having force of a law." The above mentioned provisions of the draft scarcely conform to the principle of the separation of powers, namely - with the restrictions of functions of legislative and executive powers.

5. The untimely dissolution of the Parliament is usually practised in the states having the form of parliamentary government. Meanwhile, presidential republics (the USA, for example) do not apply the said mechanism. Therefore, the fact, that Belarus, claiming to be, according to the Constitution, a state with a strict presidential government model, envisages the untimely termination of the powers of the House of Parliament, seems surprising. However, the attention should be paid to the grounds of the Parliament dissolution. The first group of them may be called the conflicts of the Parliament with the Government, namely: when the House of Representatives expresses the vote of confidence to the Government or fails to approve the appointment of a Prime Minister twice. A wide and unrestricted rule like that practically paralyses the parliamentary control of the Government activity and prevents the Parliament from a more efficient formation of the Government. Even more interesting and original is another grounds: "the powers of the House of Representatives or that of the Senate may also be early terminated based on the Constitutional Court judgement in the event of systematic and flagrant violations of the Constitution by the Houses of Parliament." Thus, in this case, in fact it goes already that the parliament activities are controlled, and it is foreseen to commission a legal institution to supervise this control. By no means this type of control contradicts the principles of public representation and those of general parliamentarism.

In the aforesaid cases the decision concerning the termination of the powers of the Parliament is taken by the President of the Republic. The President, having early terminated the powers of one House, is entitled to do so with the other House, too. The draft Constitution in this case does not require any legal basis for this.

6. This draft essentially provides for instituting of "hard", centralised power system in the state. It is a pyramid at the top of which there is the President who in fact has unlimited powers: he has the final decision in forming the Government, he confirms its structure and changes its composition in an unrestricted manner; he is entitled to preside over the Government sittings as well as to abolish Government acts; he establishes all bodies of state governing, he appoints their heads and establishes their status, he appoints other officials; either directly or through his established bodies he supervises how local self-government bodies and local governments follow laws; he has the right to suspend decisions of local councils and to abolish acts of local executive bodies in the case that they contradict laws. When speaking of

constituting of state governing in Belarus, the fact should be noted that there exist two central bodies of governing: the Office of the President and the Government. According to the valid 1994 Constitution of Belarus, the Cabinet of Ministers is even held a supplement of the Office of the President (...a Cabinet of ministers attached to the Office of the President shall be established - see Article 106), whereas the status of the Government is very briefly spoken of in the chapter devoted to the President. In this respect, the draft Constitution is different. It contains a new chapter entitled "Government, the Cabinet of Ministers of the Republic of Belarus". Besides, it contains three articles having the same numeration (106-108) as in the valid Constitution, however, their content is different and their volume is broader. It is established in Article 106 that executive power in the Republic of Belarus is vested in Government, the Cabinet of Ministers, which is the central body of public administration; for its activity, Government shall be accountable to the President and responsible to the Parliament. However, the provisions where the competence of Government is defined do not avoid duplicating with the competence of the President or even with that of Parliament. In addition, the draft Constitution lessens the influence of the Parliament to the forming of the Government as much as possible (actually, it is limited only to the debates on the nomination of the Prime Minister), whereas the implementation of parliamentary control over the Government is linked with early termination of the powers of the Parliament. On the other hand, the draft Constitution provides with the unlimited right of the President to discharge the Government or substitute any of its members.

Thus, executive power dominates in the draft once again, as well as the attempt to strengthen it by all means. No attention is paid to the balance of powers and mechanism of counterbalance and the powers' control for each other.

7. One of the most notable changes of supreme institutions of powers is the establishment of the Parliament - the National Assembly which consists of two Houses - instead of the Supreme Council which consisted of only one House. Of course, it could be discussed whether a unitary and comparatively small state needs a two house parliament, whether it will accelerate the legal system reform, whether it has, in this particular case, any advantages if compared to the one house parliament, etc. However, doubtless to say, choice of the parliamentary structure is an uncontested right of choice of every state and its citizens. Thus we shall limit ourselves with a short comparison of the existing status of the parliament to the proposed reform of the parliament.

One of the positive aspects of the reform is the diminishing of the deputies' number by almost a half. However, even partial refusal to form the Parliament by the way of elections (i.e. by establishing that one third of senators shall be appointed by the President) may not be held valid because this contradicts principles of democracy.

The draft Constitution provides that the powers of the parliament shall be shortened from 5 to 4 years. It establishes precise time regarding summonses of 2 sessions per year and their maximal duration (the first one must last no more than 80 days, the second one - no more than 90 days). Regardless of short time duration of both sessions, the draft restricts the possibility to

summon extraordinary sessions: they may be summoned only in case of urgent necessity, this may be demanded only by the President or at least two thirds of complete membership of each of the Houses, these sessions must be provided for a definite issue on the agenda. And the provision that extraordinary sessions shall be opened and closed by the agency of Presidential edicts sounds odd, indeed. It can hardly be compatible with the independence of parliament and the status of the institution representing the nation.

8. The draft attempts to delimit the competence of both Houses of the Parliament, therefore only two issues which are commonly solved by them were left: legislation and the procedure of impeachment for the President. Generally speaking, it is possible to hold that the draft seeks to limit, to restrict the powers of the parliament. For instance, now only the President will be able to adopt the decision to announce a referendum; even the powers in legislation are restricted by precisely defining issues which must be regulated by laws (see item 2 of Article 97). It is possible to consider that the given list of competence issues is final because the draft contains a consolidated provision that the House of Representatives (and, correspondingly, the Senate) "may take decisions on other issues provided that this is envisaged by the Constitution" (see Articles 97 and 98). There exist other provisions which restrain the will of the law-maker, viz., regarding the submitting for debates of draft laws connected with financial issues only the consent of the President (or the Government); the right of the President to move motions on the urgent consideration of a draft law (in that case the Parliament must deliberate on the draft within 10 days); the right of the President to demand that the parliament shall take decisions by putting the entire draft which has been moved by the President or the Government to vote; the provision that a draft law shall become a law since it has been passed by the majority of the complete membership of each of the Houses; a very high quorum limit of House sittings - not less than two thirds of the complete membership of each of the House, etc.

It is impossible to assert that the aforementioned restrictions of the powers and activities of the parliament are progress in representative democracy. Neither can all this be called an attempt to seek the balance of powers.

## **II. Draft Law on amendments and addenda to the Constitution submitted by a group of members of Parliament of the Republic of Belarus**

1. The draft law on amendments and addenda to the Constitution submitted by a group of members of Parliament is at least half the size of the Presidential draft. The most important points are as follows:

1) it is proposed to renounce a separate section on referendum (leaving an Article on referendum in the draft);

2) it is proposed to renounce section 4 in the Constitution, titled "The President of the Republic of Belarus";

3) it is proposed to add "Cabinet of Ministers" as section 5;

4) it is proposed to change and to supplement norms regulating the status of the Parliament;

5) it is proposed to change partly the status of the Constitutional Court.

We shall discuss in short some of the mentioned proposals.

2. Together with the proposal to refuse the institution of the President, the draft holds proposals to transfer the functions of the head of State to the Chairperson of the Parliament/the Supreme Council. Therefore, article 82 says:

"The Chairperson of the Supreme Council shall be the highest official of the Republic representing it while dealing with other countries. The Chairperson of the Supreme Council of the Republic of Belarus shall be elected by secret ballot from among the deputies for a term of 5 years and no more than for two consecutive terms.

The Chairperson of the Supreme Council is answerable to the Supreme Council. In case the Chairperson violates the Republic Constitution, he/she can be recalled by the decision of at least two-thirds (173) deputies."

The powers of the Chairperson of the Parliament are extended accordingly. He is given the right to sign laws, at least once a year to make a report in the Parliament on the state in the republic and the most important issues of internal and foreign affairs, to carry on negotiations and sign international treaties, appoint regional and lower court judges. The state representation function in the valid Constitution is provided for the Chairperson of the Parliament (i.e., now this function is divided between the President of the Republic and the Chairperson of the Parliament). So, the draft provides only minimal (so to say symbolic) powers of the head of state for the Chairperson of the Parliament. It should be stated, however, that elimination of the institution of the head of state does not correspond to the conception of European democratic state, and can only be regarded as reverting to the "soviet" model of state mechanism.

3. It is provided in the draft to partly change powers of the Parliament, i.e. to add new ones (although the number of paragraphs has remained the same-19). New powers include: to appoint the Prime Minister, approve the appointments for the Cabinet of Ministers and the program of its activities, set up and dissolve ministries of the Republic, abrogate instructions by the Chairman of the Supreme Council and the President, and acts of the Cabinet of Ministers, abrogate resolutions passed by local councils. These, as well as

other powers (i.e. these provided in the valid Constitution) are called exceptional jurisdiction of the Supreme Council. The transfer of most of the

mentioned powers to the Parliament is related to the provided elimination of the Presidential institution. However, the transfer of the right to abrogate acts from the executive ( that of the Cabinet of Ministers) to the legislative branch hardly goes with the principle of separation of powers.

4. As has been mentioned above, the draft holds a new section 5, titled "The Cabinet of Ministers". The valid Constitution provides that the executive is concentrated in the hands of the President, and the Government is treated as an appendage to the Presidential Administration (refer to Article 106 in the Constitution). The draft declares the Cabinet of Ministers to be the supreme executive and administrative body of state power, which shall bear responsibility before the Parliament and shall report to it. The draft provides for ordinary (routine) Government jurisdiction, parliamentary control over activity of the Government.

So, these draft regulations do not cause much concern about whether they meet the principles of democratic state structure of powers. Essentially the same can be said about changes in the Constitutional Court Status.

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A handwritten signature in cursive script, appearing to be "M. J. ...", written in dark ink.