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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT ELECTORAL CODE OF THE REPUBLIC OF BELARUS

Comments by Professor Richard Rose (expert of the Commission)

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TO: VENICE COMMISSION, COUNCIL OF EUROPE

Expertise

BELARUS DRAFT ELECTION LAW
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GENERAL OBSERVATIONS

An election law should be evaluated in two ways: in terms of the text as it appears on paper, and in terms of the context in which it operates. The former is a precise, technical exercise, but it is also abstract: it does not tell us anything about the problems that the law should address. For example, without knowing the context, it would not be possible to understand election laws in Northern Ireland by contrast with Great Britain. It is particularly important to consider the context in countries where free competitive elections have not yet become the normal practice.

The history of Belarus illustrates the need to consider election procedures in context, since for seven decades it was part of the Soviet Union, a political system in which elections were not free or competitive. Since the collapse of the Soviet Union and the creation of an independent Belarus, the practice of governance, including election procedures, raises questions about the extent to which the normal practice of competition between a multiplicity of parties, some in opposition to government and some pro-government, has been fully institutionalized. It is therefore to be welcomed that in his letter of 23rd September 1999, Mr. V.N. Fisenko, head of the Permanent Delegation of the Republic of Belarus to the OSCE, states the country's intention of 'moving towards the holding of democratic parliamentary and presidential elections'. The following comments are offered in the spirit of strengthening success in achieving that goal.

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STRATEGIC ISSUES

1. The case for proportional representation in electing representative assemblies in Belarus. At present, Belarus has a presidential system of government, as the President is directly elected and has considerable executive authority. The draft law proposes that the winning candidate for this post should have more than half the popular votes cast, and authorizes a second round runoff election if an absolute majority is not achieved in the first ballot. A similar procedure is used in the Fifth French Republic, and given a constitutional commitment to a popularly elected chief executive, acceptable in the Belarus context.

A presidential election is a first-past-the-post ballot because only one person can fill this office, making the result inherently disproportional. Elections to Parliament may be held by first-past-the-post too, as in Britain, but this introduces a significant degree of disproportionality in the relationship of votes to seats. It usually "manufactures" a majority in Parliament for a party with a minority of the total popular vote. The justification for doing so is that this makes for strong government, since the leader of a disciplined party with an absolute majority becomes Prime Minister and is not restricted in actions by the need to gain consensus from coalition partners nor threatened by defeat in Parliament. The argument can be challenged on theoretical and normative grounds, and empirically, the Parliaments in the great majority of European Union countries are elected by proportional representation.

Given a very strong President in Belarus, the proposal to elect members of the Chamber of Representatives from single-member districts can be questioned on the grounds that it would "unbalance" the relationship between the executive and the legislature, which ought to hold the executive to account but could not easily do so insofar as the President can dominate a party with an absolute majority. In the context of Belarus, the priority should be to strengthen the Chamber's capacity to act as a check on the executive--since the Chamber can represent a variety of parties, whereas the President necessarily can only represent one party or bloc of the electorate.

The requirement for a second-round runoff election in the current draft law does not assure anything like proportional representation for voters' preferences. Consider the hypothetical example in Table 1 of the distribution of votes in six single-member districts.

Table 1 Risk of mis-representation in a multi-party first-past-the-post system

		Govt party	*Opposition* (percentages)				*Winner*
		G	A	B	C	D	
i	Ist round	40	30	15	5	10	
	2nd round	55	45				G
ii	Ist round	28	40	25	2	5	
	2nd round	53	47				G
iii	Ist round	35	30	20	5	10	
	2nd round	55	45				G
iv	Ist round	60	10	5	5	20	G
v.	Ist round	35	25	10	28	2	
	2nd round	45			55		C
	Total share						
Ist round Votes		40	27	15	9	9	
2nd round Seats		80	0	0	20	0	

The hypothetical example shows how arbitrary the award of seats can be, since winning a seat depends on a fine balance between one's own vote and how the vote is split amongst opponents; and that a party with two-fifths of the popular vote or less can win a constitutional majority, that is, enough seats to rewrite the constitution.

Proportional representation can avoid the above risks. It is need not give a party twice as many seats as its share of votes; it tends to be roughly proportional in the distribution of seats between parties with similar shares of the vote; and it thus ensures that a vote in the representative chamber on amending the constitution would require the support of more than one party.

There are a multiplicity of forms of proportional representation that could be adopted. Points to note in considering alternatives include:

a. A link between individual candidates and districts could be secured by adopting the German system of electing half the Bundestag members from single-member districts and half from party lists that allocate compensating seats by proportional representation.

b. The Irish system of Single Transferable Vote completely avoids the concentration of power in party machines that results from a closed-list proportional representation ballot. The power of a party caucus to control representatives by manipulating the party list can also be reduced by adopting one or another form of an open list system, in which voters have an opportunity to vary the ordering of the party caucus or are positively required to indicate their first choice candidate when endorsing a list.

c. The threshold for a party qualifying for a share of seats in the Parliament should be set low for the first election, say, 2.5 percent, and then rise at successive elections to 3.5 percent and then 5 percent, to enable parties to test their popularity initially--and then give parties that initially just manage to clear the threshold an incentive to combine, so that the total number of parties in the Parliament becomes manageable. Historically, this was done in the Federal Republic of Germany, while the Russian Federation's decision to start with a 5 percent threshold has produced the most disproportional system of proportional representation on record.

2. <u>The case against recall elections</u>. This institution is not normally used in established democracies; an elected representative is guaranteed a right to sit in Parliament for its full term. This is deemed desirable in order to protect representatives from intimidation by the executive and/or extra-parliamentary interest groups. In some countries there are exceptional provisions for removing an individual from office for conviction on a major criminal charge (e.g. treason, murder, etc.). However, in countries where the independence of the justice and court system is not well established, there are good grounds for granting representatives immunity from prosecution during their term of office, and this practice has been adopted in successor states of the Soviet Union. A Chamber may ostracize or censure an errant representative; impeachment and expulsion from a representative assembly normally requires a much more than majority vote and is extremely rare.

The independence of elected representatives is also protected when an MP elected as a member of one party is allowed to change parties or become an independent during the life of a Parliament. Even in a closed list proportional representation system, where the party organization may claim the representative was "placed" on the list to represent the party, leaving the party does not normally force resignation from Parliament. Belarus gives an elective representative this freedom.

Where recall elections are possible by law, such as the American state of California, they are rarely used. Dissatisfaction must rise to a very high level to secure

sufficient signatures on a petition for a recall election, and higher still for a representative to be voted out of office. The groups in the best position to do so are not "citizen" groups but well organized and monied interest groups. Moreover, by threatening to organize a recall petition, groups can often intimidate a representative without actually having to deliver on their threat.

In the context of Belarus, where a variety of difficulties are faced by opposition parties and politicians, some of which are referred to in Mr. Fisenko's letter of transmission, there is a strong argument to remove the provision for recall elections from the draft law in order to safeguard elected representatives from intimidation or harassment.

3. The referendum problem: Who writes the question? Whereas the election of a representative Assembly or a first-round presidential ballot offers voters a choice between a plurality of parties and candidates, a referendum offers the bluntest of choices: voting for or against one specific proposal. The procedure for formulating the question to be voted on is therefore of central importance. Whereas Members of Parliament can amend a draft legislative bill, in a referendum it is impossible for voters to alter the text of the proposal on the ballot paper.

In countries with well established civil society institutions, petitions can be organized for holding a referendum on a specified question, as happens frequently in Switzerland or in California. But California shows that provisions requiring substantial effort to put a proposal to a referendum vote result in only well-financed organizations, with millions of dollars to spend in collecting signatures being able to petition for a referendum.

In the case of Belarus, the requirement for a citizen initiative for referendum to have not less than 450,000 signatures (Article 113), that is, about 6.2 percent of the registered electorate. This will make it very difficult for civil institutions independent of government to Initiate a referendum on a question of their choice.

Effectively, a Referendum is likely to be called only on the initiative of the two Houses of Parliament and the approval of the President (Article 113)--and this means that the only questions that could be put to the vote would be those written and approved by the government of the day. Moreover, while the conditions laid down for the phrasing of the question and for acceptance or rejection of the question by the Ministry of Justice and the Prosecution Department (Article 114) are not unreasonable in a country with a historically strong independent judiciary, in Belarus they might give

cause for dispute. Given the history of 'state-controlled print and electronic mass media', to which Mr. Fisenko refers in his letter, the only circumstances in which a referendum is likely to be called is a "plebiscite" in which the electorate is invited to legitimate a course of action on which the government is already set. The statutory Referendum procedures would thus not encourage a meaningful popular consultation. Given the unfortunate history of plebiscites (for example, votes--and boycotts of votes--in the Republics of the Soviet Union in its final period, and the Yeltsin referendum in spring, 1993) it would be prudential to remove all authorizations of a referendum from this law.

If the referendum articles were retained, one should look very carefully at the clause in Article 112, in view of discussions of the possibility of changes in the relationship between the Republic of Belarus and the Russian Federation. The English-language translation says that the 'issues which lead to violation of the territorial integrity of the Republic of Belarus' shall not be submitted to a republican referendum.

While each of the difficulties outlined above may not necessarily come to pass, the purpose of writing an election law is to guard against possible abuses actually occurring, which would frustrate the Commission's task of promoting democracy through law.

COMMENTS ON DETAILS IN THE TEXT

*Article 4. The English translation of the final sentence--a reference to denying the vote to persons kept in custody--is unclear in English. The original text should be examined to see whether or not it is in accord with normal European practices.

*Article 15. The number of members of the Chamber of Representatives, 110, averages about one member per 65,000 electors. The median figure in advanced industrial democracies is one member for about 31,000 electors, as in Austria. Thus, the introduction of a mixed proportional representation/ single member system could increase the number of representatives elected to the Chamber of Deputies could easily be raised to between 150 or 200 without creating any abnormalities.

*Article 17. A polling station with as few as 20 electors (and perhaps a dozen voting) is hardly a guarantee of a secret ballot. A desirable minimum would be 250 electors--and 150 at an absolute minimum.

*Article 18. It is unusual to authorize military unit commanders to organize polling stations. In the context of Belarus, it would be more appropriate to stipulate the

opposite, that is, voting should only be allowed outside of military installations or, at the least, conducted by civilians on military installations and that soldiers who appear at a polling station in military order (e.g. being marched there by an officer) should be forthwith disqualified and the officer reported.

The OSCE report on the 10 December 1995 election also criticised the use of mobile election boxes in ways inconsistent with electoral law. In view of opportunities that these offer for manipulation of votes and undue influence, it would be better to forbid their use, even if this marginally lowered turnout.

Any votes cast at military bases and beyond the Republic of Belarus should be separately tabulated and the results reported separately, e.g. by base and by foreign embassy, and provisions stipulated in the law about how the results filed from such polling places may be challenged.

*International Observation. It is in the interest of the citizens and government of Belarus that elections be seen to be conducted freely and fairly. Therefore, explicit authorization of international observation and links, as in Articles 13 and 33.20 are to be welcomed and additional references might be added as and where appropriate.

*Time allowed for response to Commission queries, etc. Article 38 stipulates three days, very short notice for response, This should be rephrased to allow for three or better five working days from delivery of publication or notification of Commission actions.

*Article 39. Reference to "assist mass media in explaining the content of the question proposed for the referendum". Such a clause could easily be used to justify propaganda for one side. Delete here and elsewhere. The appropriate clause for the mass media is one that requires the media, especially broadcasting, to allocate proportionate broadcasting time to different parties, opposition as well as government, according to a precise formula, for which there are a variety of models.

*Article 46. Whilst some established democracies do have laws restricting the publication of opinion polls shortly before election day, there are good libertarian reasons for objecting to this. Restrictions on freedom of speech can even more be questioned in a post-Soviet Union context. In Belarus, there are reputable polling organizations. Hence, the clause could be repealed in toto or at least the restriction should be reduced to three days.

*Article 47. Prohibition of "insults or slander". This invites censorship, and the final

sentence of the first paragraph, which prohibits publication of materials concerning national, social, racial or religious intergroup relations, however well intentioned, explicitly authorizes censorship. The danger of censorship is heightened by the fact that anyone found to have violated a rather vague prohibition will lose their right to be registered as a candidate.

The ordinary civil code, not the election law, should deal with slander or insults. If "anti-racist" legislation is to be adopted, this should be in a separate statute independent of the election law and subject to careful scrutiny to ensure that it is not a means of introducing censorship by the back door.

*Articles 49 and 75. Together, these clauses make it possible to deprive a candidate whose criticisms of the President or another deputy are deemed an "insult" of the right to stand for office. Insults are an everyday part of the democratic debate, and cannot be legislated against without either restricting free speech and/or giving the government in power the authority to throw off the ballot candidates who threaten its hold on power.

*Art 49. In view of the detailed attention given other matters, it seems odd that the "liabilities" referred to for violations of the code are not included within this law. This should be done here rather than leave the door open for dispute or abuse later on.

*Article 57. What makes one a "born citizen of the Republic of Belarus"--and who is disqualified by this phrase? If the clause simply refers to anyone who was formerly a citizen of the Soviet Union and has lived in Belarus at least ten years before the election, this is reasonable. But given boundary changes consequent to the Second World War, place of birth is in this context an awkward basis for citizenship--and this is also the case given movement in and out of the Russian Federation, Ukraine, etc. in the days of the USSR. A ten-year clause means that anyone who moved to Belarus after the break up of the Soviet Union could not be a candidate until 2002.

*Article 60. The requirement of 100,000 signatures for nomination for the president is approximately 1.4 percent of the registered electorate of Belarus. In the Russian Federation the percentage of signatures required is approximately 1.0 percent. Given the onerous requirements for collecting signatures, the number of signatures should be reduced to 50,000. If candidates were given an alternative, posting a deposit of about $100,000, to be refunded on polling 5 percent of the vote in the first round, this should discourage frivolous candidates and avoid endless disputes about signatures on petitions.

*Article 61. Whilst no one would want to tolerate forgeries, some penalties seem disproportionate to the violation. E.g. disqualification from standing for the presidency

or disqualifying the whole list from a town or region if one percent are ruled invalid. See also the lengthy list of grounds in Article 67 for declaring nominating signatures invalid. And also Article 73. A more reasonable penalty would be to rule out of counting all the signatures within the smallest area within which forgeries were found, or all the signatures collected by individuals who had been found to have an unacceptable level of forgeries.

*Article 65. The requirement of 1000 signatures to stand for the Chamber of Representatives in a district of perhaps 60,000 voters seems unnecessarily onerous. I would recommend reducing this to one percent of the registered electorate in the constituency in question or--if multi-member districts were introduced--then one percent of the district's electorate divided by the number of seats there.

*Article 68, paragraph 6. To disqualify a candidate for statements that "do not correspond to the reality" assumes consensus about what is "reality" in Belarus. This phrase should be amended to state that if statements made to establish qualification as a candidate are false (e.g. lied about age to become eligible) then disqualification follows. If a candidate claims academic qualifications s/he lacks, let the electoral debate deal with that.

*Article 80 et seq. The requirement of 50 percent turnout in a run-off election to make it valid should be dropped. It encourages boycott on political grounds as a way of a party without a majority invalidating the result, and/or voter fatigue can reduce turnout. It also raises the prospect of being unable to elect anyone through a long series of ballots. Consider the hypothetical example in Table 2.

Table 2: The Impact of Boycott on Turnout: a Hypothetical Example

	Ist round		2nd round	
	% electorate	% vote	% elect'te	% vote
Non-voters	40	-	58%	-
Candidate A	24	40	24	57
Candidate B	18	30	18	43
Candidate C	12	20	boycott	0
Candidate D	6	10	boycott	0
Turnout	60%		42%	

The need for a second round of voting could be eliminated by adopting the Alternative Vote used in Australia, in which voters number in order their choice of candidates. By a process of transfers, second and subsequent preferences for

candidates with the fewest votes are counted until such point that one candidate has gained the first (or subsequent) preferences of more than half those casting valid votes. This could reduce voter fatigue at Chamber of Representatives elections. I would not recommend it for the presidency, as the issues are so important that a straight second-round choice between two front-runners is preferable.

*Article 121. If referendums are to be allowed, then it is certainly reasonable to require that more than half the electors take part for majority endorsement of a proposal to become valid, and the same would be true for a recall election (article 141).

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