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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**DRAFT ELECTORAL CODE
OF THE REPUBLIC OF BELARUS**

**Comments by Mr Hans Birchler
(expert of the Commission)**

Mr. G. Buquicchio
Secretary of the Venice Commission
Council of Europe

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FRANCE

Zurich, October 30, 1999

Expertise on the Draft Electoral Code of Belarus

Dear Sir,

I herewith submit my assessment within the agreed time.

My biggest problem was to separate a strictly legal view on the wording of the draft and my genuine mistrust towards all kind of governmental administration – despite (or may be because) of my 25 years as a civil servant.

I hope sincerely that my remarks will be a useful contribution for a new electoral code of Belarus and at the same time for successful democratic elections in the near future.

Yours faithfully



Hans Birchler

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1. General Remarks

Regular fair and free elections are a decisive part of a democratic society. The voters / citizens shall decide directly or indirectly about the persons or political parties who shall lead and administrate the country for a limited period of time in the immediate future.

The electoral law/code regulates the procedure how to conduct elections and hereby how to transform technically the political will of the voters into practical results.

The electoral law/code alone can not guarantee democracy by its provisions; it is only one of the tools (certainly an important one) in the hands of the people in charge to build or to maintain democracy in a country.

Elections are not limited to the process of casting the votes on election-day. Elections start already in an early stage of the political activities in a country, e. g. with the founding of different political parties, with media informing all around the year the voters independently from the government, with the registration of the eligible citizens as voters in accordance with the constitution, with the definition of the electoral districts in a fair manner, with the registration of political parties and candidates etc. Furthermore the conduct of the real campaign immediately before election-day usually needs also some legal guidelines. Election-day of course is then the event of the whole process, which is mostly visible to the public in the country as well as abroad when the voters all over the country are casting their ballots. After election-day the count of the ballots and the elaboration, verification and publication of the results are of highest importance. Finally the implementation of the results is **the** decisive step on the way to transform results into practical reality even though this last step generally is not regulated in an electoral law but is part of the constitutional legislation of a country.

(In my assessment I will follow the sequence of events in the electoral process as described above rather than the sequence of the chapters and articles of the draft code. I think it is a better way to understand the whole process and to focus possible gaps or shortcomings).

The electoral law/code has also to include - beside all the rules on technical procedures - provisions helping to avoid any kind of fraud including the legal rights for appeals and complaints by the voters and candidates and other participants in the elections against decisions concerning their respective rights. Voters must trust the results of elections if they should trust their government. If there are any doubts or

suspicions in respect of any step of the electoral process, it is very difficult to gain the trust of the people into the state institutions and the government itself. Therefore an independent legal control, the right to appeal decisions of the administration, second instances within the system of the electoral commissions are therefore inalienable. The possibility of an international observation by recognized and experienced organisations (e.g. ODIHR) of the entire electoral process should also be guaranteed by law.

2. Overall Assessment

Bearing in mind that there is no perfect law and that improvements are always possible; bearing also in mind, that even the best law is always only as good as the people who apply it,

I consider

the draft electoral code of the Republic of Belarus - as presented to the Venice Commission by the Government of the Republic - complete and practicable.

The draft code reflects thoroughly and exclusively a majoritarian electoral system, what is a possible and acceptable solution, but one has to be aware of the fact that majoritarian electoral systems – as a general rule – are clearly in support of the respective current government and favour stability of the political *status quo*, impeding at the same time political changes, while a proportional system favours smaller political parties or minorities and therefore also changes of the *status quo*. It is mainly a political and not a legal question, which of the two basic principles (both of them can be formed in a democratic way) shall apply in a country. I therefore do not argue on this issue.

Nevertheless there are three major objections in respect of the content and one general remark in respect of the form of the draft code (minor objections and remarks to specific articles will be made in the following chapters) :

Registration of the Voters

As I understand the wording of the draft, a country-wide registry of all voters does not exist and is not foreseen to be created. It is not clear from where the committees mentioned in Article 19 get the lists which they have to handover to the precinct commissions and how (based on which data) these lists were produced. The provisions in the draft code guarantee the right of the individual citizen to be

registered as a voter (Article 21). Not guaranteed is an efficient control of possible double-registration and the exclusion of a registration of so-called 'dead souls'. Only a complete general and country-wide registry of all voters allows a serious cross-checking of the different voters lists. Such registry must be accessible not only to the authorities but also – if not to every single citizen – so at least to e.g. representatives of the political parties and international observers. Since a registry of all persons residing in the Republic seems to exist it should not be a problem too big to create an additional data-base of all eligible citizens and the place where they are entitled to exercise their voting rights.

To avoid any kind of allegations in respect of engineering the voters lists I recommend a Central Voters Register managed by the Central Commission.

Recalling Deputies of the Chamber of Representatives or a Deputy of a Local Council of Deputies (SECTION VIII).

I was surprised already on the occasion of an earlier visit to the Republic of Belarus how highly the provisions on this issue are rated in the Republic. In accordance with the draft code all possible candidates for all kind of office are checked with a big scrutiny. One should expect therefore that only in really extraordinary cases a candidate will turn out later to be unqualified to fulfil his or her duties and a recall of an elected dignitary needs to be considered. The experience in other countries also proves, that only in rare cases elected dignitaries are recalled or impeached. The 'regular' way is that a dignitary whose conduct seems not to be appropriate prefers to resign voluntarily before an official procedure is opened. Notwithstanding this 'common rule' : in the systems I know it is always the responsibility of the body which such a dignitary is a member of, to act against this member.

Beside this practical reasons I have serious reservations against the proposed procedures. At first sight it may look logical and very democratic to recall an elected dignitary from his office by the same electorate which originally delegated him or her to the respective office. In fact it is simply a populist measure which is weakening the authority of the parliament. A parliament and its members should be free to fulfil their duties respecting the constitution and the law in accordance with their conscience and without the permanent risk and threat to be sacked because somebody of his or her electorate is not satisfied with his or her performance in the parliament. For the time of the limited period of a legislature a parliament and its members must deserve also some independence. It is up to the voters when the term of office of the government and parliament has expired to reconsider the nomination of a member for a new term or not.

Finally – and this is the decisive point - the main legal ground for a recalling a deputy in the draft code (Article 129: ‘...who has not justified the trust of the voters.....’) is too vague to deserve to be called a ‘legal’ ground.

I recommend therefore to reconsider the entire SECTION VIII (Procedure of Recalling a Deputy of the Chamber of Representatives or a Deputy of a Local Council of Deputies) as well as at least part of SECTION IX (Procedures of Recalling Members of the Council of the Republic) of the draft code.

Complaints and Appeals

The provisions on this issues can be found in almost all Sections of the draft, which is normal and correct. However it would be helpful for future users – namely legal laymen - if all the respective provisions would be compiled in a specific Section even there might be the risk of redundant articles.

Rules of Procedure

There is a high number of Articles exclusively regulating technical details without any political impact. Most of them could be compiled in separate ‘Rules of Procedure’. The first result of such a measure would be a code which is more lean and easier to read and understand. An additional asset would be the fact that in the future updating and modifying these details would become feasible without a compulsory and expensive amendment of the code. My experience proves that many of those technical regulations need to be adjusted due to new facts or circumstances after every election.

3. Pre- Election Phase

3.1. Electoral Districts (Section II, Chapter 3)

The provisions in the draft code are clear, the rule (Article 15, para 6) that the deviation from the average number of registered voters in one district should not exceed 10% is important. 10 % seems to me a maximum.

The competence to form the districts lays by the Commission (Article 16) – without any possibility to appeal this decision. I suggest to add at least the possibility of a reconsideration by the commission on request by e.g. political parties or other participants involved in the elections. Also the authorities of an Oblast or a town could be interested, which electoral district their community should belong to.

The forming of Polling Stations is well regulated. The minimum number of 20 voters per Polling Stations seem rather small; there might be practical (geographical) reasons for such a solution, I am not aware of. If there is no justification for such a small number I would recommend a minimum number of 100 voters for practical reasons (it is difficult to speak of a secret vote when there are only 20 ballot-papers in the box!) and economical reasons as well.

Special Polling Stations for specific groups of voters in hospitals etc. are very 'user-friendly' but also always a source of fraud and mistrust. They should be restricted to very few cases. Also special Polling Stations in military units are not recommendable for the same reasons. To avoid even the attempt to influence the free will of the individual voter who is living in the hierarchy of a military unit, soldiers and officers should get the possibility to exercise their voting rights in a civilian Polling Station, either in the Polling Station nearest to their barracks or in their home town. (Article 17, para 3).

3. 2. Voters Registry (Section II, Chapter 5)

I refer to my comments under Chapter 2.

The drafted rules from the level of the Polling Station up to the districts level are good. Unclear to me is the way how the voter will be 'familiarized' with the list (Article 21).

3. 3. Electoral Commissions

Responsibility and legal power of the electoral commissions on all levels, specifically of the Central Commission are extremely big. At the same time they enjoy – at least formally – a far-going independence including a special budget (Article 26).

(The appointment of the members of the Central Commission as well as the internal organization of the Central Commission are regulated in a separate law, which I do not know. This issue is therefore not part of this assessment. I anticipate – since the Central Commission is almost almighty – that this law meets the criteria of a democratic formation of such an important body.)

The electoral commissions on lower levels are appointed by governmental authorities, i. e. 'the executive committees of the respective unit'; furthermore the committees are entitled to delegate additional members on their own. (Article 35, last para). This is of course a possible way how to appoint such commissions, but the influence of the government and the administration is enormous – and therefore suspect. A clear

provision which guarantees the independence of the commissions from the appointing authorities immediately after the appointment would be recommendable. Also a clear regulation of a possible objection and complaint against the composition of a commission, which could be submitted to a court and not a governmental office is recommendable and should be seriously considered.

The list of competencies of the Central Commission is long. It includes beside all the necessary administrative and technical tasks also the competence to decide as a last instance complaints and appeals against decisions of lower level electoral commissions (Article 33, para 17). This competence is a very important part of the entire electoral process in respect of its credibility. It is doubtful whether the Central Commission, which certainly will be considered by the public a governmental body, can fulfil this task in a satisfying manner. An independent body or a chamber of the Supreme Court would probably meet the expectations of the - national and international - public much better.

3. 4. Political Parties

The draft code refers to '*political parties*' only connected to the terms '*other associations and labour collectives of organizations...*' This might be an effect of the history of the Republic, where political parties were not of great importance. Nevertheless political parties are inevitable in a modern European-style democracy. Political parties are the organizations which represent the different groups of voters with similar interests and similar opinions on certain politically relevant issues and enable these groups to express their opinion and raise their voice to defend their rights in the public. Therefore political parties are an essential part of the political culture and the political life of a modern democracy. There is still room for other associations and organizations to play a role in the political life. In strict legal terms it is not necessary to regulate the existence and the rights of political parties in a law as long as they are recognized and respected. In countries which traditionally do not know a variety of different political parties I consider it highly recommendable to recognize the importance, legality of political parties and their rights e.g. in respect of elections and referendums by law.

3. 5. Registration of Candidates

Nomination and Registration of candidates for the different offices on all levels is extensively regulated in the draft code, altogether it seems to be a rather complicated procedure.

One point I consider worthwhile to mention: In the process to verify the signatures (the same rules you find in all respective provisions on the different levels of elections

and for the referendum) only 10% of the signatures shall be really checked. In the case that one percent of the total turns out to be invalid the list as a whole has to be considered invalid. Such a rule is not justified and not acceptable. My experience is that even in Switzerland up to 10 % of signatures are invalid for similar reasons as described in Article 61 (double signature, not residing in the respective district etc.) My suggestion therefore is that the required number of signatures can be exceeded for up to 10% and that the lists have to be checked entirely. With the present method as foreseen in the draft code it would be too easy to 'invalidate' a list of a political opponent by a relatively small number of 'invalid' signatures intentionally provided by representatives of a different party.

3. 6. Campaign (Section IV)

The regulations on this issue are good. However one must be aware that candidates running for a political office are becoming very innovative in circumventing rules and laws specially in respect of financing their campaign or gaining time in mass medias. A certain flexibility and generosity must be expected also on the side of the electoral commissions and observers. A complete legislation on this matter covering all possible ways and means to campaign is simply not possible.

4. Election Day

4.1. Polling Stations

The organisation of the electoral procedure inside the polling station is well regulated. I did not find any rules regulating the possible role of local and/or international observers inside the polling station.

4. 2. Observers

The presence of independent local and international observers inside the polling stations needs to be regulated to avoid problems on Election- day (who is entitled to be there, how many persons at the same time, no right to interfere etc.)

5. Post-Election Phase

5.1. The Count and the Verification of the Results

The provisions on these issues are sufficient and reasonable. I miss an article on how the voting material has to be stored after the election day. A possible solution could be

to keep all the material including all the ballots sealed until the last appeal or complaint is dissolved. After that – immediately or within a short period of time - all the ballots have to be destroyed and the minutes archived.

5.2. Recalls

See my remarks in Chapter 2.

6. Complaints / Appeals

I did not have the time to check thoroughly all the different possibilities of appeals and complaints. As I saw there is for most of the cases generally only one sole instance for appeals and complaints and only within the hierarchy of the election commissions. Highest and last instance is the Central Commission. The only exception I found is in Article 67, where it is stipulated that complaints against rejections for registration can be submitted to the Supreme Court.

As explained above, the composition and nomination of the electoral commissions is entirely controlled by the government. An independent court or administrative body as a last instance for complaints and appeals in all matters connected to elections and referendums could help destroying the doubts in respect of the independence of the electoral commissions. A special Chamber of the Constitutional Court or another Court could be tasked. (See also 3.3. above).

I could not find general rules on the form how complaints have to be submitted and to whom, in what time etc. May be they can be found in a different law. In such a case a reference to this law would be helpful.

For all these reasons I come to the conclusion as mentioned already in Chapter 2 that it would be certainly worthwhile to invest some additional time in drafting a specific section of this code on the issue ‘Appeals and Complaints’.

7. The Referendum (Section VII)

The entire issue of the Referendum could also be regulated in a specific law, what would emphasize the importance of this excellent democratic legal instrument. The matter itself is of course related to the electoral procedures; it is therefore not wrong to subordinate it to the electoral code.

Also here a bigger part of the provisions belongs to the type of ‘Rules of Procedures’.

Over all Section VII is complete.

One point however needs to be revised: The very general way the issues offered to the Referendum (Article 112) are defined is not satisfying. What does ‘... *utmost importance pertaining to the state and public life of the Republic of Belarus...*’ mean in legal and practical terms? The following negative catalogue in the same Article, which excludes some specific issues from the Referendum is also not sufficient for a clear interpretation. Article 112 needs to be revised.

A possible solution could be a definition in the sense that only issues which need to be regulated in a law or in the constitution (including amendments of existing laws and the constitution) can be issue of a referendum. A clearer definition also for the Referendums on the local level is necessary (Article 126 ff).

In the current form Article 112 is absolutely arbitrary. It leaves it up to the Ministry of Justice and the Prosecution Department (Article 114, para 6) to decide as first and last instance what can be an issue of a Referendum or not.

Also here (Article 116) the rule that 1% invalid signatures is leading automatically to the invalidity of the entire Referendum applies what is not justified and finally reduces the value of the institute ‘Referendum’ itself. (*See also remarks under 3.5.*)

8. Recommendations

The draft code as presented is not very easy to read. This might be caused partly by the fact that it had to be translated. Nevertheless an editorial revision to delete redundancies and eventually the decision to compile all the technical and administrative provisions without political impact in a separate Section ‘Rules of Procedures’ would definitely help to improve the ‘design’ of the code.

The sections on recalling deputies need to be reconsidered and revised.

The complex issue of appeals and complaints could be improved. An independent body or tasking the regular courts with these highly legal problems would be a decisive step towards more credibility.

In the section on the Referendum the issues accepted for a Referendum need a better, i. e. unequivocal definition.

A central Voters Registry would also help to increase the credibility of the entire electoral process.

9. Final Remarks

All my comments and recommendations to improve the electoral code can be subordinated under the title 'Credibility'.

Credibility is the only thing that counts in elections. The authorities in any country must avoid as well as possible even the slightest ground for suspicions or allegations in respect of the correctness of the electoral process. Transparency on all levels and a wide range of possible scrutiny on all levels and stages of the electoral process may help to raise the trust of the public. Independent and credible bodies to decide on appeals and complaints are therefore inevitable. The presence of international observers can also increase the credibility of the institutions.

The most critical issues are probably how the electoral districts are defined, the registry of voters and candidates, access to the media during the campaign and of course the count.

The draft electoral code as presented can certainly be used for reasonably fair elections; amendments as suggested would help to increase the credibility of the process.

Zurich, October 30, 1999



Hans Birchler

