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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW ON THE NATIONAL ASSEMBLY OF THE REPUBLIC OF BELARUS

Adopted by the Venice Commission at its 56th Plenary Session (Venice, 17-18 October 2003)

on the basis of comments by

Mr Olivier Dutheillet de Lamothe (Member, France)
Mr Giorgio Malinverni (Member, Switzerland)
Mr Luan Omari (Member, Albania)

I. Introduction

1. In a letter dated 22 May 2003, Mr. V. Konoplev, Deputy Speaker of the House of Representatives of the National Assembly of the Republic of Belarus, asked the Venice Commission to examine the draft law on "The National Assembly of the Republic of Belarus".

2. Members of the Commission worked from a French translation of the draft law (see CDL (2003) 53).

3. Three members of the Commission, Mr O. Dutheillet de Lamothe, Mr G. Malinverni and Mr L. Omari, were appointed as rapporteurs and made comments on the draft (see CDL (2003) 73, 72 and 71 respectively). The present opinion, adopted by the Commission at its 56th plenary session on 17-18 October 2003, is based on these comments.

II. Introductory remarks

4. The draft law on "The National Assembly of the Republic of Belarus" (hereinafter referred to as "the draft law" or "the draft") draws extensively on the provisions of the Belarus Constitution. Some of what the Commission has to say about this draft will therefore apply to the Constitution as well.

5. It is important to bear in mind that back in 1996, the Commission gave an opinion on the draft amendments to the 1994 Belarus Constitution (the basic points of the presidential draft revision were subsequently approved by a republic-wide referendum on 24 November 1996) and was highly critical of the bicameral system which the constitutional revision sought to introduce, mainly because of the clearly dominant role assigned to the President and the executive in general, in relation to Parliament, without any of system of checks and balances (see CDL-INF (1996) 8, para 12-24).

III. Substantive comments

6. The draft law effectively reinforces the constitutionally-derived concentration of power in the hands of the President of the Republic, to the detriment of the legislature.

7. It will be observed, for example, that the President of the Republic has a say in the composition of the Assembly (Article 3, para 3 – "Composition of the National Assembly"), whereas it is a basic principle of democracy that Parliament be made up entirely of members elected by the people. That eight members of Parliament or of one of its chambers should be appointed by the President of the Republic is a breach of democratic standards therefore.

8. The President of the Republic also has the power to interfere in the exercise of legislative power.

9. Article 11 of the draft defines the framework for a delegation of legislative power from the National Assembly to the President, enabling him to issue legally binding decrees for a given period and in a given area. The prohibition which prevents Parliament from legislating in the particular area where legislative power has been delegated (final paragraph of Article 11 of the draft) is unacceptable. While delegating legislative authority for a specific purpose and fixed period of time might be permissible in principle, such practices cannot be allowed to deprive

Parliament of any possibility of legislative action: Parliament must be free to legislate within the scope of its powers at all times and on all matters.

10. Any temporary decrees issued by the President of the Republic will enjoy enhanced status, moreover, in that the Assembly can repeal them only by a qualified majority of two thirds of the members of each chamber (Article 12 of the draft), ie the majority normally required for approving or amending the Constitution.

11. As far as legislative initiative is concerned, as noted by the Venice Commission in its study on the Constitution, Parliament is largely deprived of this right. Like Article 99 of the Constitution, Article 47 of the draft law requires presidential approval for any draft law which reduces state revenues or increases expenditure. Even though many western constitutions limit the scope for parliamentary initiative in budgetary matters, the need to obtain the approval of the President of the Republic for every single draft law that has financial implications amounts to an undue restriction of parliamentary autonomy.

12. There is no question, either, that the bulk of legislative activity occurs at the instigation of the President and the government. The draft law greatly reinforces this tendency in the procedures governing amendments, as described in Articles 45, 52 and 54. The consent of the author of a draft law is required for any amendment other than a technical one. Under Article 54 of the draft, furthermore, all amendments must be approved by the National Centre for Legislative Activity operating under the authority of the President of the Republic. Members of Parliament are thus deprived of the freedom of amendment.

13. The law does not, however, reproduce the curbs contained in Article 97 para 2 of the Constitution, whose wording was found to be ambiguous by the Venice Commission (see CDL-INF (1996) 8, para 17) and appears to increase the Chambers' legislative powers in this particular area.

14. The approval of the President of the Republic is also required for tabling any draft law whose provisions would run counter to the temporary decrees issued by the President and which have not been repealed by Parliament (Article 50 – "Procedure for presenting draft laws before the House of Representatives").

15. Where he disagrees with the text of a law that has been passed, the President of the Republic can refer it to the House of Representatives, stating his objections, which can only be dismissed by a majority of two thirds of the members of that chamber (Article 67 – "Review by the Chambers of the National Assembly of laws referred by the President of the Republic of Belarus together with his objections"). The review procedure here, as provided in Article 68 ("Review by the Chambers of the National Assembly of objections lodged by the President of the Republic of Belarus concerning certain statutory provisions") is complicated. It appears, too, that before even the two Chambers reach a decision, the contested law can be signed by the President and enter into force: the law that would come into force, then, would be a version, in which the objections being examined by the Chambers would be chopped-down, which seems rather paradoxical.

16. Finally, the right of legislative initiative of members of Parliament with regard to laws is not mentioned in Article 10 on "The legislative powers of the Chambers of the National Assembly", even though Article 99 of the Constitution refers to it. Some clarification of the wording of Article 10 would be needed.

17. The President of the Republic can also influence the term of office of the two Chambers. Like the Constitution (Articles 94 and 106), the draft law gives the President the power to dissolve the House of Representatives if the latter twice rejects the presidential nominee for the post of Prime Minister (final paragraph of Article 24), or if Parliament refuses to give a vote of confidence in the government (final paragraph of Article 26). A more appropriate response in such circumstances would be for the government to resign.

18. With regard to dismissal of the President of the Republic, the procedure as laid down in Article 13 of the draft law ("Review by the Chambers of the National Assembly of matters relating to the early termination of office of the President of the Republic of Belarus and his dismissal") is unacceptable in that it is extremely short and apt to reinforce the "irremovable" status of the head of state. For as observed by the Commission in paragraph 45 of its opinion on the Constitution, the procedure must be initiated by the Council of the Republic (8 of whose 64 members will have been appointed by the President) by a qualified majority of two thirds of the members (Article 88 of the Constitution).

19. Other factors further exacerbate the weakness of the legislature.

20. Regrettably, the right to initiate a revision of the Constitution is vested only in the President of the Republic and 150,000 citizens, and not in Parliament itself.

21. Legislative activity is not facilitated by the requirement laid down in Article 7 of the draft which, like the Constitution, demands that the National Assembly normally take its decisions by a majority of the members of each chamber, and not by a simple majority (ie majority of those present if there is a quorum).

22. The requirement for a 2/3 qualified majority (Article 7, para 8) in order to adopt the Constitution or laws amending the Constitution, is understandable; less justifiable is the insistence on the same majority for "laws implementing the laws amending the Constitution" or "laws interpreting the Constitution".

23. Parliamentary Committees of Inquiry receive no specific mention, not even in Article 96 of the draft, which deals with temporary committees of the National Assembly Chambers. The fact that no specific provision is made for committees of this kind, which are one of the key features of parliamentary activity in any democratic country, is a deficiency which is liable to hamper the operation of the National Assembly.

24. On the subject of parliamentary immunity, the draft law (Articles 29 and 38), like the Constitution (Article 102, para 2) requires the consent of the National Assembly (House of Representatives or Council of the Republic) to arrest a member of either Chamber, but not in order to institute criminal proceedings against that member. This is a serious violation of the principle of parliamentary immunity, in that the decision on whether to prosecute is left entirely to the discretion of the Procurator General, who is appointed by the President of the Republic.

25. As far as restricting the role of the House of Representatives is concerned, the Venice Commission, in its opinion on the constitutional amendments, had already criticised the fact that the two Assemblies did not enjoy the same powers, to the detriment of the House of Representatives. The draft law reinforces this tendency.

26. The times allowed in Article 25 of the draft for the Prime Minister to submit his programme to the House of Representatives, serve to reduce the role of this Chamber, since it cannot hear the said report until two months after the Prime Minister has been appointed, which is a very long time, particularly if the Chamber is not in session, in which case the period does not begin to run until the start of the following session. In its previous opinion, moreover, the Venice Commission had criticised the fact that the schedule of sessions laid down in the Constitution made it impossible for the competent assemblies to organise their work in an independent manner (seer CDL (1996) 8, para 21).

27. On the subject of parliamentary review of the government's programme, Article 19 of the draft states that the Chambers of the Assembly may take cognisance of information provided orally by the Prime Minister only after the President of the Republic has given his approval, which is a clear and unacceptable restriction of their powers as representative bodies.

28. The draft law reinforces this tendency in that Article 28, for example, states that the House of Representatives may obtain information on the implementation of the main aspects of foreign and domestic policy only "within the scope of its powers".

29. As regards the possibility of applying to the Constitutional Court by the Chambers of the National Assembly, the fact that the final paragraph of Article 18 ("Application to the Constitutional Court of the Republic of Belarus by the Chambers of the National Assembly") requires a majority of votes in the relevant Chamber has the practical effect of depriving the opposition parties – who, by definition, are in minority – of this power, when in fact it is the opposition who would normally have most cause to apply to the Constitutional Court. Steps must be taken to enable applications to be made to the Constitutional Court at the request of, say, one third or one quarter of the members.

30. The Commission further observes that like the Constitution, the draft law contains provisions which fail to respect the traditional notion of separation of executive, legislative and judicial powers.

31. The fact that the President of the Republic or his government can attend sittings of the Chambers, including private ones, and can address the meeting at will, represents a violation of the principle of separation of powers in a presidential system.

32. The possibility afforded the Constitutional Court, under Article 5 para 2 of the draft law, of finding that Parliament has committed a systematic and flagrant breach of the Constitution, resulting in early termination of office of the House of Representatives, is liable to cause conflict between the various state bodies.

33. With regard to the composition of the Constitutional Court, the Commission had criticised (see CDL-INF (96) 8, para 25) the preponderant political weight of presidential appointees. This preponderance is exacerbated by the system of open voting for securing Council of the Republic approval for the appointment of the Chairman of the Constitutional Court, as provided in Article 31 of the draft ("Council of the Republic approval of the appointment of officials by the President of the Republic"), whereas the six Constitutional Court judges appointed by the Council of the Republic are elected by secret ballot, under Article 32 ("Election by the Council of the Republic of judges of the Constitutional Court of Belarus and members of the Central Commission of the Republic of Belarus responsible for elections and organising referendums at national level").

34. The interference by the National Assembly and more specifically the Council of the Republic in matters which come under the jurisdiction of local authorities amounts to a violation of the principle of separation of powers and is detrimental to effective local self-government.

35. Article 21 of the draft ("Other powers vested in the Chambers of the National Assembly") under which the Chambers are to participate in the drafting of monetary policy and the running of local authorities by lending assistance to local elected councils and local executive bodies, is liable to undermine local authorities' autonomy. Likewise, the provisions enabling the Council of the Republic to overrule decisions taken by local elected councils (Article 34) or to dissolve such councils (Article 35 – "Adoption by the Council of the Republic of a decision in favour of dissolving local elected councils") constitute an oversight function which is normally performed by the government, under the ultimate supervision of the courts.

IV. Drafting comments

36. The draft law is extremely long and detailed (it contains 103 articles and amounts to 71 pages in the French version (see CDL (2003) 53)).

37. This lengthiness is partly due to the fact that many of the articles reproduce the rather detailed provisions of the Constitution of 24 November 1996, and not just the provisions of Section IV, Chapter 4 ("The Parliament – the National Assembly") but also the provisions contained in other chapters of the Constitution not directly related to the activities of the National Assembly, such as Chapter 2 on "Referendums", Chapter 3 on "The President of the Republic", Chapter 5 on "The government – the Council of Ministers" or Chapter 6 on "The courts".

38. The function of the law, however, is to supplement the constitutional provisions, and not to repeat, or refer to, them: it is for the Constitution to refer to the law, and not the other way around. Neither the verbatim reproduction of constitutional provisions nor the practice of referring to these provisions (as frequently observed in the draft law: see Article 3 on the composition of the National Assembly which states that members of the House of Representatives are to be elected "according to the methods prescribed by the Constitution" or that the procedure for electing the Council of the Republic "shall be prescribed by the Constitution", Article 7 according to which "the legal effect of decisions taken by the Chambers of the National Assembly shall be determined by the Constitution", or Article 9 according to which the activities of the Chambers are to be "prescribed by the Constitution") serves any useful purpose therefore and both ought to be avoided.

39. Where reference *is* made to the Constitution, it would be preferable to cite the relevant provisions.

40. The length of the draft is also due to the fact that it goes into a great deal of detail which would be more properly dealt with in the Assemblies' rules of procedure.

41. Such is the case, for example, with Article 8 "Forms of activity of the Chambers of the National Assembly", Article 48 "Draft laws to be considered as a matter of urgency", Article 53 "First reading of draft laws by the House of Representatives" and Article 54 "Preparation of draft laws with a view to their second reading by the House of Representatives", Article 67 "Review by the Chambers of the National Assembly of laws referred by the President of the

Republic of Belarus together with his objections", Article 72 "Decrees passed by the House of Representatives", Articles 89, 90 and 91 on the operating procedures of the Council of the House of Representatives and the Presidium of the Council of the Republic, Articles 94, 95 and 96 on the functioning of the committees of the National Assembly Chambers, Article 97 on participation by the National Assembly Chambers in international co-operation, and finally Article 99 "Logistics, social protection and financing of the activities of the National Assembly", Article 100 "Official missions abroad" and Article 101 "Honorary diploma of the National Assembly".

42. Very little, indeed, is left to the discretion of the Chambers when it comes to adopting their rules of procedure (Article 103, para 2 of the draft sets a six-month time-limit for bringing these rules "into line" with the draft). Their activities, including their schedules, are prescribed by law, and in some cases derive from the Constitution itself (see Article 95 of the Constitution). The fact that the Chambers are prevented from independently organising their work serves to reinforce the subordinate status of Parliament in relation to the President (see paragraph 26 above).

43. Lengthy and detailed though it is, the draft sometimes lacks the kind of clear definitions that would make it easier to understand the concepts used (such as the "laws" and "decrees" mentioned in Article 7 of the draft, with no explanation as to what these instruments are).

44. The draft also lacks clarity in places. It is not until well into the text, for example, that we discover whether or not the bicameral system is an egalitarian one: Article 7 on "Decisions of the Chambers of the National Assembly – Legal effect of the said decisions" provides no clues in this respect. Likewise, it is impossible to say from reading Articles 14 ("Review by the Chambers of the National Assembly of matters relating to the holding of referendums") and 15 ("Hearing by the Chambers of the National Assembly of addresses of the President of the Republic to Parliament") when the Chambers hold joint sessions and when they sit separately.

V. Conclusions

45. Insofar as the draft law on the National Assembly was drawn up on the basis of the 1994 Constitution of the Republic of Belarus, as amended by referendum on 27 November 1996, the Venice Commission can but repeat the criticisms that it made in its opinion adopted on 15-16 November 1996.

46. The present law not only reinforces the already observed tendency to over-concentrate power in the hands of the President of the Republic, it also provides in meticulous detail for presidential or executive interference at every stage of the existence, the exercise of power and the operation of the legislature.

47. In addition to enshrining an executive and a President of the Republic whose presence – and power – extend, in particular, into every area of parliamentary life, the law also serves to greatly reduce not only the autonomy of the legislature, but its competencies and activities as well.

48. The presence, too, of additional provisions that defy traditional notions of the separation of executive, legislative and judicial powers indicates a scant regard for the basic rules of democracy that are part of the European constitutional heritage.

49. From a technical point of view, the Commission considers that the lengthy and at times excessively detailed nature of the draft is not conducive to clarity. Repetition of constitutional provisions and references to the latter should be avoided. The organisational details of the Chambers' activities would be better dealt with by the Chambers themselves, in their rules of procedure.