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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**DRAFT JOINT OPINION ON
THE ELECTORAL LEGISLATION
OF THE REPUBLIC OF BELARUS**

by
the Venice Commission
and
OSCE/ODIHR

on the basis of comments by

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TABLE OF CONTENTS

I.	<i>Introduction</i>	3
II.	General Remarks.....	4
III.	Right to Vote.....	5
IV.	Registration of Voters	5
V.	Candidate Registration.....	6
VI.	The Electoral Administration.....	8
VII.	Practice of Early Voting.....	10
VIII.	Role of Independent Observers.....	11
IX.	Electoral Campaigns and Finances	13
X.	Legal Remedies.....	15
XI.	Other Comments on the Electoral Code	15
XII.	Conclusions.....	16

I. Introduction

1. *On 13 April 2006, the Parliamentary Assembly of the Council of Europe adopted Resolution 1496 (2006) entitled “Belarus in the aftermath of the Presidential election of 19 March 2006, based on a report of the Political Affairs Committee (Rapporteur: Mr Andreas Herkel, Estonia, Group of the European People’s Party) (Doc. 10890).*
2. *These documents condemn the undemocratic conduct of the presidential election of 19 March 2006.*
3. *In its resolution, the Parliamentary Assembly calls on the Belarusian authorities to “open a genuine dialogue with relevant international institutions, including the European Commission for Democracy through Law (Venice Commission), with a view to amending the Belarusian Electoral Code to make it consistent with Council of Europe standards, and addressing the malpractice of the administration in electoral matters, well in advance of the next elections” (point 9.5) and “the Assembly invites the Venice Commission to make proposals on how to amend the Belarusian Electoral Code and address the malpractice of the administration in electoral matters, with particular reference to the issues of the role of independent observers, the composition of the electoral commissions and the practice of early voting, if necessary by liaising with the appropriate Belarusian authorities” (point 14).*
4. *The present joint opinion of the Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (ODIHR) was prepared on the basis of comments by Mr Oliver Kask (member, Estonia), Ms Mirjana Lazarova Trajkovska (member, the former Yugoslav Republic of Macedonia) and OSCE/ODIHR expert Mr Jessie Pilgrim.*
5. *This opinion does not intend to address all issues which could arise from the electoral legislation of Belarus. It focuses on the most important ones, and in particular on those underlined by the Parliamentary Assembly in its request.*
6. *This opinion is based on:*
 - *The Electoral Code of Belarus of 11 February 2000, as amended up to 4 January 2003, available on the National Legal Internet Portal of the Republic of Belarus (<http://www.law.by>; CDL-EL(2006)028 - extracts in English);*
 - *The Law on the Central Electoral Commission of the Republic of Belarus of 30 April 1998;*
 - *Documents of the Parliamentary Assembly of the Council of Europe;¹*
 - *The Report on the CLRAE mission to Belarus for the local elections (2-6 April 1999) (CG/BUR (5) 146);*
 - *The Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev);*
 - *The Report on Electoral Law and Electoral Administration in Europe - Synthesis study on recurrent challenges and problematic issues (CDL-AD(2006)018);*
 - *Former opinions of experts of the Venice Commission on the Draft Electoral Code of the Republic of Belarus (CDL(99)66 and CDL(99)67);*
 - *The OSCE/ODIHR Election Observation Mission Final Report on the 19 March 2006 presidential election in Belarus (Warsaw, 7 June 2006);*

¹ Resolution 1496 (2006) and Doc. 10890 (see *supra*); Resolution 1482 (2006), Situation in Belarus on the eve of the presidential elections (adopted by the Assembly on 26 January 2006).

- *The OSCE/ODIHR Election Observation Mission Final Report on Parliamentary Elections in the Republic of Belarus, 17 October 2004 (Warsaw, 9 December 2004);*
- *The OSCE/ODIHR Assessment of the Adopted Electoral Code of the Republic of Belarus and the position of the government of Belarus on the Electoral Code (Warsaw, 25 July 2000);*
- *Other documents of the Venice Commission.*²

II. General Remarks

7. The aim of this opinion is to identify issues of concern in the current text of the Belarusian Electoral Code. Using a comparative method, the Venice Commission and OSCE/ODIHR will propose possible solutions in accordance with the existing international standards and good practices in electoral matters and OSCE election commitments.

8. As noted, this opinion focuses only on the major problems and issues of concern in the Belarusian Electoral Code. Most of the comments, recommendations and conclusions of the OSCE/ODIHR as well as Venice Commission's experts expressed in prior opinions³ remain valid. However, they will not be repeated and the Venice Commission and OSCE/ODIHR strongly recommend for these opinions to also be considered when the Electoral Code is amended. Once issues of concern have been addressed, implementation of legislation will remain fundamental to conducting genuinely democratic elections in Belarus.

9. Elections held in conformity with the principles of the European electoral heritage are a prerequisite of democracy. The rights to elect and to be elected are universally recognised political rights in all significant international documents. From the last Final Reports of OSCE/ODIHR Election Observation Missions in particular, it is obvious that a number of problems can be identified in the existing Belarusian Electoral Code.

10. In particular, the Electoral Code does not reflect the political pluralism required by OSCE commitments as it grants substantial, unchecked, and monopolistic control of all election processes to the ruling party of the executive branch of government. Nor does the Electoral Code provide minimum guarantees for access to media, adequate campaign funding, and sufficient time to campaign, thereby failing to ensure that parties and candidates are free to present their views and qualifications and voters are able to learn and discuss contestants' views and qualifications.⁴ Further, the Electoral Code establishes broad limitations on the rights to free speech, expression, and association, resulting in censorship of political views and silencing those who seek to engage in political discourse. Finally, the Electoral Code provides for disproportionate sanctions for legal violations that restrict voters and candidates' rights.

² For example CDL-AD(2003)014 Opinion on the Draft Law on the National Assembly of the Republic of Belarus, CDL-AD(2005)036 Declaration of Principles for International Election Observation and Code of Good Conduct for International Election Observers and Pledge to Accompany the Code of Good Conduct for International Observers prepared by the United Nations Electoral Assistance Division (UNEAD), The National Democratic Institute for International Affairs (NDI), and The Carter Center (TCC) on 7 July 2005, endorsed by the Council for Democratic Elections at its 14th meeting in Venice on 20 October 2005, and the Venice Commission at its 64th plenary session in Venice on 21-22 October 2005.

³ The OSCE/ODIHR Assessment of the Adopted Electoral Code of the Republic of Belarus and the Position of the Government of Belarus on the Electoral Code (Warsaw, 25 July 2000); CDL(99)66 and CDL(99)67.

⁴ See Paragraph 7.7 of the OSCE 1990 Copenhagen Document.

11. In any democracy, voters must fully trust electoral administration and the results announced. Therefore, work of the electoral administration in a transparent and independent manner and fully in accordance with the law is as important as the harmonisation of the legislation with international standards. In this respect, the role of independent observers is of crucial importance for overcoming any suspicions in regard to all steps of the electoral process.

12. Although many problems result from implementation of the law contrary to the principles of the European electoral heritage, a number of shortcomings of the electoral process in Belarus originate from legislation itself. Both the Venice Commission and OSCE/ODIHR consider this a matter of priority, which should be addressed without further delay.

III. Right to Vote

13. Article 4.1 of the Electoral Code states that "...persons kept by a court verdict in a place of deprivation of liberty do not participate in elections, referendums. Persons in relation to whom, according to an order established by the criminal procedural legislation, the measure of preventing punishment - custody was taken do not take part in voting." This article of the Code is in accordance with the Constitution of the Republic of Belarus, but it is not in accordance with the international standards and European practice.

14. First, Article 4.1 deprives persons in preventive custody from the right to vote, which is contrary to the principle of presumption of innocence. Moreover, it could be a means of manipulation: supporters of opposition candidates could be taken into custody at the time of elections in order to deprive them of their right to vote.

15. Moreover, deprivation of voting rights should not be applied to all persons kept by court verdict in places of detention, regardless of the nature of the underlying crime. Denial of suffrage should only be possible when a person has been convicted of committing a crime of such a serious nature that forfeiture of suffrage rights is indeed proportionate to the crime committed. The European Court of Human Rights took a decision in this sense in 2004.⁵

IV. Registration of Voters

16. According to Article 38 of the Constitution of the Republic of Belarus⁶ "Citizens of the Republic of Belarus shall have the right to vote freely and to be elected to state bodies on the basis of universal, equal, direct or indirect suffrage by secret ballot." Article 64.1 of the Constitution states that "The elections of deputies and other persons elected to state office by the people shall be universal: citizens of the Republic of Belarus who have reached the age of 18 shall be eligible to vote." From this perspective, a number of comments can be made on the way the registration is regulated by the present Electoral Code.

⁵ *Hirst (2) v. United Kingdom* judgment of 30 June 2004. See also the Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, I.1.1d.

⁶ *Constitutions of Europe* (Texts Collected by the Council of Europe Venice Commission) Volume I, Martinus Nijhoff Publishers, Leiden/Boston, 2004.

17. The Code of Good Practice in Electoral Matters states clearly that electoral registers must be permanent and that there must be regular up-dates, at least once a year. Where voters are not registered automatically, registration must be possible over a relatively long period.⁷

18. The Code of Good Practice in Electoral Matters stipulates also that the electoral registers must be published and there should be an administrative procedure - subject to judicial control - or a judicial procedure enabling voters to have erroneous entries corrected or, if they are not on the register, to have their names included.⁸ Sufficient time should be allowed for public scrutiny, appeals, decisions and revisions. Amendment to the registers on Election Day can lead to abuse and should not be necessary if sufficient time is allowed for prior consideration and amendment of the registers.⁹

19. A permanent, country-wide register of all voters would minimize threats and suspicions of possible double registration or non-registration of voters. Amendment of the Electoral Code to require the establishment of a permanent Central Register of Voters would be a positive development. Further, since the present Code does not make clear how the voter registers are compiled, the administrative procedure and the process of evidencing a voter's right to be included on register must be clearly prescribed in the Code. There should also be an administrative procedure allowing for the registration of the non-registered voters. This procedure must be subject to a judicial control.

V. Candidate Registration

20. The rights of citizens to stand for office and be elected without unreasonable restrictions is a widely acknowledged universal human rights principle.¹⁰ The Electoral Code of Belarus does not provide adequate protection of candidate rights, and on the contrary, contains several limitations on and obstacles to candidacy.

21. Articles 47 and 49 permit the cancellation of candidate registration based on various legal violations. The sanction of cancellation of registration is disproportionate, in light of the conduct in these articles that can be a basis for cancellation.¹¹ The possibility to cancel a candidate's registration should be limited to the situation where a candidate does not possess the legal requirements for candidacy (age, citizenship, residency).

22. Article 68 provides broad grounds for cancellation of a candidate's registration, including providing data on the candidate's income and property statement "that does not

⁷ CDL-AD(2002)023rev, point I.1.2.ii.

⁸ CDL-AD(2002)023rev, point I.1.2.

⁹ Cf. CDL-AD(2002)023rev, point I.1.2.iv *in fine*.

¹⁰ See, e.g., Article 25 of the International Covenant on Civil and Political Rights.

¹¹ Paragraph 24 of the 1990 OSCE Copenhagen Document provides that "The participating States will ensure that the exercise of all the human rights and fundamental freedoms set out above will not be subject to any restrictions except those which are provided by law and are consistent with their obligations under international law, in particular the International Covenant on Civil and Political Rights, and with their international commitments, in particular the Universal Declaration of Human Rights. These restrictions have the character of exceptions. The participating States will ensure that these restrictions are not abused and are not applied in an arbitrary manner, but in such a way that the effective exercise of these rights is ensured. Any restrictions on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law."

correspond to reality”. This phrase is vague, subject to abuse, and can be applied in a politically motivated and biased manner.

23. The first paragraph in Article 70 allows a political party or labour collective to “cancel” its decision on the nomination of a candidate if done no later than three days prior to election day. There is no justification for a political party or other nominating body to have the power to revoke a nomination. Once it has made its decision, the nominating body should abide with the consequences. Otherwise, the opportunity is created to bring undue pressure and control over a candidate by threatening to revoke the candidate’s nomination.

24. Articles 61, 65, 66, 67, and 68, regulating the number of signatures required for candidate registration and verification of signatures, are unreasonable and require improvement.

25. Articles 65 and 68 require a candidate for President to obtain 100,000 signatures for registration and a candidate for deputy to obtain 1,000 signatures. Past voter registration numbers released by the Central Commission indicate that there are approximately 7 million voters in Belarus. Based on the number of voters and the number of electoral districts, the current signature requirements are excessive for each of these candidacies. The Code of Good Practice in Electoral Matters suggests that the number of signatures required should not exceed one percent of the constituency population.¹²

26. Articles 61 and 67, regulating verification of signatures, permit a small number of invalid signatures to invalidate registration.¹³ These articles also provide that a single invalid signature or single signature obtained in a manner contrary to law can result in the cancellation of candidacy. Such provisions serve no legitimate purpose and create the opportunity for disqualification based on political motives. These articles should also be expanded to provide greater details on the verification process, and should clearly state “how” lists are selected for random verification and what quantum of proof is necessary to establish that a signature is invalid. Analysis of recent experience and best practice indicate that a credible process of signature verification would include the verification of all signatures submitted by potential candidates unless the verification has revealed the minimum number of verified signatures required for registration.¹⁴

27. Articles 62 and 66 of the Electoral Code condition the right of a political party to stand a candidate in an electoral district on the party having “an organizational structure” physically within the “territory of the respective electoral district”. This requirement represents an excessive regulation of political parties and creates unwarranted obstacles to candidacy. Any registered political party should have the right to stand a candidate in any electoral district provided the candidate and party satisfy other legitimate requirements for registration.

¹² CDL-AD(2002)023rev, point I.1.3.ii.

¹³ Articles 61 and 67 require denial of candidacy where the percentage of invalid signatures upon checking at least 20 % of signatures has reached 15 per cent. The process stated is: “If the number of inauthentic electors’ signatures as found out during verification constituted more than 15 per cent of the number of signatures verified, another 15 per cent of electors signatures from the number of signatures required for registration of a candidate for deputies shall be verified. In case when the summary number of inauthentic electors’ signatures found during verifications constitutes more than 15 per cent of the total number of the signatures verified in the signature lists, a further verification of the signatures in the signature lists shall be terminated.”

¹⁴ CDL-AD(2002)023rev, point I.1.3.ii.

28. The Electoral Code makes no provision for the possibility of a candidate to correct a defect in documents. Candidates should not be denied registration based on a defect in documents where the defect can be corrected in a timely manner. Additionally, inaccuracies in candidate registration documents can be used to de-register a candidate during the campaign, even after formal registration. Other reasons for de-registration have centered on violations during the campaign (see "Electoral Campaigns and Finances").

VI. The Electoral Administration

1. Composition of electoral commissions

29. The composition as well as the functioning of the electoral commissions (the electoral administration) are crucial for the conduct of genuinely democratic elections.

30. According to Article 26.3 of the Electoral Code of Belarus, "the Central Commission is a permanent body, it is a legal person, has its seal with the image of the State emblem of the Republic of Belarus, with its name, and an account in the bank". The formation and organisation of the work of the Central Commission is determined by the Law of the Republic of Belarus "on the Central Commission of the Republic of Belarus for Elections and Holding of Republican Referendums."

31. In the Code of Good Practice in Electoral Matters (II.3.1.a.), the Venice Commission has proclaimed that an impartial body must be in charge of applying electoral law and that the Central Electoral Commission must be permanent in nature. "Where there is no longstanding tradition of administrative authorities' independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level".¹⁵

32. Unfortunately, the legal guarantees of independence are not always fully respected in practice.¹⁶ The risk is the highest when most or all members are appointed by politicians from the majority in power. A pluralistic representation that includes a strong presence of members appointed by opposition representatives is crucial in order to avoid the likely potential for manipulations.

33. According to the Law on the Central Commission of the Republic of Belarus on Holding Elections and Republican Referenda, six members of the Central Commission are to be appointed by the President of the Republic of Belarus and six members are to be elected by the Council of the Republic of the National Assembly of the Republic of Belarus. Candidatures to the staff of the Central Commission are to be recommended correspondingly to the President of the Republic of Belarus and the Council of the Republic of the National Assembly of the Republic of Belarus by the combined representation of presidiums of Oblast and Minsk City Councils of Deputies and Oblast and Minsk State Executive Committees.

34. The Chairman of the Central Commission is to be appointed by the President of the Republic of Belarus with the consent of the Council of the Republic of the National Assembly of the Republic of Belarus among the members of the Central Commission. The Vice-Chairman and the Secretary of the Central Commission are to be elected among the

¹⁵ CDL-AD(2002)023rev, point II.3.1.b.

¹⁶ CDL-AD(2006)018 (Report on Electoral Law and Electoral Administration in Europe), point 22.

members of the commission during its first meeting. Candidatures for the election for the position of the Vice-Chairman and the Secretary of the Central Electoral Commission are to be introduced by the Chairman of the Central Electoral Commission. The candidature of the Vice-Chairman is to be preliminarily submitted for the approval of the President of the Republic of Belarus.

35. This procedure does not allow candidates from the opposition to be appointed to the commission nor does it provide the members of the commission to be politically independent. Consideration could be given to amending the law to provide for the members to be nominated by political parties in a balanced manner. The same suggestions are applicable to the staff members. No consent of the President or the Parliament should be needed.

36. According to the same act, the Chairman, Vice-Chairman, Secretary, and members of the Central Commission can be relieved of the post before expiry of their powers by the President of the Republic of Belarus with notification of the Council of the Republic of the National Assembly of the Republic of Belarus when conducting actions which discredit the Central Commission.

37. Such a provision is vague and may lead to abuses. Furthermore, there is no certain provision on who should decide on whether the member has conducted such actions. In order to ensure the independence of the electoral commission, such a sanction should be possible only by a decision of an independent court in case of precisely defined and serious violations of the law.

38. Article 36 of the Electoral Code provides for the possibility to recall a member of the commission. This provision should be interpreted as applying only in case of violation of the Code or systematic non-implementation of a member's obligations (Article 36.3). Even if the risk of abuses is smaller than in the case of direct intervention of the Head of State mentioned in the previous paragraphs, the remarks about the conditions to be followed for a dismissal are valid in this case too. Such decisions should be issued in writing and open to legal appeal.

39. Lower electoral commissions are elected by competent authorities by the majority of votes cast. This does not allow equitable representation of ruling parties and opposition, and leads even to excluding opposition from any representation in the electoral commissions. The solution could be to allow political parties to appoint the members of the commissions in a balanced manner. In previous elections, members of lower electoral commissions have frequently been from the same institution, and often in hierarchical employment relationships, compounding the lack of a balance and independence.¹⁷

40. The nomination procedure of members to the electoral commissions provides that some members may be elected in the meetings of labour collectives (Article 35). Such a method is not in accordance with democratic principles as labour collective nominees are not necessarily independent nor politically representative. Further, there is no requirement that the nominees satisfy legal conditions for membership on an election commission.

¹⁷ See OSCE/ODIHR Election Observation Mission Final Report on Parliamentary Elections 2004 of Republic of Belarus (Warsaw), page 5.

2. Powers and functioning of electoral commissions

41. It is important that the powers and responsibilities of each commission are clearly determined by the law. It would be suitable to include them in the Electoral Code rather than in a separate piece of legislation.

42. An important standard under which electoral commissions should organise their work are the principles of transparency and accountability. Transparency of the work of the commissions at all levels should be strengthened by guaranteeing free access to journalists, representatives of candidates and independent observers to all formal as well as informal meetings of the commissions.

43. According to Article 33 of the Electoral Code, the Central Commission "shall give explanations of this legislation for the purpose of its uniform use and address when required, subjects that have the right of legislative initiative with proposals on interpretation of the present Code and other acts of legislation of the Republic of Belarus on elections, ..." Such a power does not seem to be of an administrative nature, but to give the possibility for the Central Commission to initiate legislation. This could be contrary to the principle of separation of powers. It is true that the Central Commission may notice legislative shortcomings when applying the law, but it should mention such problems in activity reports submitted to the legislative and executive branches of government.

44. On other aspects, on the contrary, the role of the Central Commission, as developed in detail in the special law on the Central Commission, should be broader; it should, for example, include the duty to organise the training of lower electoral commissions. The duty to define the procedure of use of state mass media in the election campaign is too vague (see Article 4.8 of the Law on the Central Commission). The commission should have the right to decide in individual cases about the violation of the principle of equality in the mass media.

3. Powers of political institutions

45. The powers of the President of the Republic in electoral matters are too broad. The President shall determine organisational measures for securing the holding of elections according to Article 22 of the Electoral Code. Such measures should be determined instead by electoral commissions.

46. According to Article 24 of the Electoral Code, the local government institutions have to organise the meetings of candidates, allocate space for the meetings, designate in the territory of polling stations places for location of printed propaganda materials, etc. It is suggested to avoid giving any rights or duties directly related to the elections to the state or local government institutions. Political parties should organise their own electoral campaigns and the organisation of the elections should fully belong to independent electoral commissions. In the first case, the rule of separation of state and political parties is violated and, in the second case, the rule of independence of the institutions organising elections is violated.

VII. Practice of Early Voting

47. According to Article 53 of the Electoral Code "the voter or the participant in the referendum who has no opportunity to be present at his living place on the day of elections or

of the referendum shall have the right, not earlier than five days before the elections or the referendum and in conditions excluding control over the expression of his will, to fill the ballot paper in the room of the precinct commission and to cast it into a sealed separate ballot box for voters and participants in the referendum who will be absent from their living place on the day of the holding of elections or referendum. Official confirmation of causes preventing the voter or the participant in the referendum to come to the voting premises on the day of elections or referendum shall not be required. Advance voting shall be performed from 10 till 14 hours on working days and from 16 till 19 on days-off in the presence of not less than two members of the precinct commission. In receiving a ballot paper the participant in the referendum shall sign in person the list of citizens who have the right to take part in the elections or the referendum and shall specify the date of advance voting. Advance voting shall be performed in conformity with the requirements of this Code."

48. The regulation of early voting in accordance with Article 53 of the Electoral Code should be improved in order to enhance confidence of both voters and candidates. The presence of only two members of the electoral commission, without any requirement concerning their appointment, may lead to a number of abuses.

49. Moreover, the Electoral Code does not provide any clear mechanisms for securely keeping the ballot boxes after the early voting has started. As observers have noted that many violations may take place at that time, it is recommended to provide specific regulations for enhancing the integrity of the ballot with regard to early voting, including the security of the ballot boxes and a daily official record of the number of voters recorded each day to be integrated into the final polling station protocol. Problems may arise if the room where the ballot box is held can be accessed by state institutions or political parties. Instead of securing the ballot boxes for early voting in polling stations when not in use, it may be better for them to be secured by delivering them to the Central Commission, which could count the early votes itself on a district by district basis.

50. In order to properly regulate the cases of early voting, such a procedure should be available only in specific, motivated cases and by prior request.

51. The use of mobile ballot boxes (at the living place of the voter) is provided for by Article 54 of the Code for voters who are not able to go to the polling station. Mobile voting may take place on the basis of a written or an oral request, which can be made as late as two hours before the close of polling stations on Election Day. It must be underlined that, according to the Code of Good Practice in Electoral Matters, "mobile ballot boxes should only be allowed under strict conditions, avoiding all risks of fraud".¹⁸ Experience shows that this has not been the case in Belarus. Although it is not excluded in democratic countries to follow special voting procedures also on the basis of oral requests, the use of mobile ballot boxes should be strictly regulated. At a minimum, the requests should be made in written form with signatures and prior to election day in order to avoid malpractice and illegal activities.

VIII. Role of Independent Observers

52. The open and transparent conduct of electoral commissions is important for the full respect of the decisions of the electoral administration. The publicity of sessions and the

¹⁸ CDL-AD(2002)023rev, point I.3.2.vi.

immediate and accessible publication of the decisions enhance confidence in the electoral administration.

53. The Code of Good Practice in Electoral Matters stresses the importance of both national and international observation by stating:

“a. Both national and international observers should be given the widest possible opportunity to participate in an election observation exercise.

b. Observation must not be confined to the election day itself, but must include the registration period of candidates and, if necessary, of electors, as well as the electoral campaign. It must make it possible to determine whether irregularities occurred before, during or after the elections. It must always be possible during vote counting.

c. The places where observers are not entitled to be present should be clearly specified by law.

d. Observation should cover respect by the authorities of their duty of neutrality.”¹⁹

54. In summary, an important step towards respecting the principle of transparency is the participation of national and international observers in the entire process of elections, which should be given by the Electoral Code the widest possible opportunity to participate in an election observation exercise. Observers enhance transparency in the electoral process and should provide an impartial assessment, vis-à-vis OSCE Commitments and Council of Europe’s standards, of the proceedings to the government, citizens and international community.

55. The right of observers to attend all meetings of the commissions at all levels, to observe the election activities at any time, to obtain copies of protocols, tabulations, minutes and other documents at all levels must be guaranteed by the Electoral Code and fully respected in practice. It is fundamental that observers may remain present until the verification and public announcement of the final results.

56. The rights of and limitations on international observers are regulated in Article 13 of the Electoral Code. The possibility to only passively watch or ask questions of members of electoral commissions does not allow observers to fully engage in observation necessary for formulation of justified conclusions. The Code forbids observers from creating any obstacles to the normal work of the commissions. This limitation is too vague and gives a basis for unjustifiable restrictions. The right of the Central Commission to deprive an observer of his or her accreditation can also be misused, as generally all problems can be solved by other means. Restricting participation in meetings or rallies should be abolished, as the mere presence to observe could be interpreted as “participation”.

57. Article 13 also prohibits an observer to “be present next to ballot-issuing desks, polling booths or ballot boxes”. This provision is not precisely drafted and can be applied to limit effective observation. Observers must be “present” sufficiently “next to” in order to observe. Indeed, this provision has been applied in past elections to prevent both domestic and international observers from engaging in effective observation, particularly during the vote

¹⁹ CDL-AD(2002)023rev, point II.3.2.

count.²⁰

58. In previous elections in Belarus, rights of international observers have been further constrained by the authorities. During the last presidential election, a number of international observers were denied visas. Other observers were prevented from observing the vote count or tabulation processes. Such problems are not a matter of legislation, but should be avoided by the proper application of laws.

IX. Electoral Campaigns and Finances

59. There are shortcomings in the articles regulating the electoral campaign and campaign finances. In general the Electoral Code does not provide minimum guarantees to ensure presentation of political views during an election campaign. The Code does not provide minimum guarantees for access to media, adequate campaign funding, and sufficient time to campaign, thereby failing to ensure that parties and candidates are free to present their views and qualifications and voters are able to learn and discuss contestants' views and qualifications.

60. Article 48 of the Electoral Code provides that the electoral campaign is financed exclusively from the state budget. Neither this article nor any other article in the Code establishes the requirement that a specific monetary amount must be provided to electoral contestants. Private donations can only be made to the state budget, to be equally distributed between candidates. The limitation on private donations, coupled with the lack of a guarantee for timely access to a minimum amount of state funds, means that candidates and political parties have no ensured mechanism for communicating political messages. Conversely, the Electoral Code fails to ensure that voters are able to learn of contestants' views and qualifications. The Code should be amended to provide minimum guarantees for the provision of political information and views by electoral contestants to voters.

61. Article 33(8) of the Electoral Code requires the Central Commission to "define the procedure of use of state mass media in the election campaign". Neither this article nor any other article in the Code establishes the requirement that a specific minimum amount of airtime must be provided to electoral contestants on state television and radio.

62. The deadlines for calling elections and candidate registration, when coupled with the deadlines for appeal of a denial of candidate registration and a decision on the appeal, can prevent a candidate from commencing the candidate's campaign until the eve of the election. Problems with deadlines stated in the Code have been observed in past elections as candidate registration for some candidates has been delayed until two weeks before election day.²¹ All deadlines should be amended as necessary to ensure that all candidates can compete on a fair basis.

63. In the recent presidential election, some campaign events and demonstrations were prevented before the elections. Such rallies and demonstrations are essential for the respect of freedoms of speech and assembly, which are preconditions for democratic elections.²²

²⁰ See OSCE/ODIHR Election Observation Mission Final Report on Presidential Election 2006 of Republic of Belarus (Warsaw), page 7.

²¹ See OSCE/ODIHR Technical Assessment Mission Final Report on Parliamentary Elections of Republic of Belarus, 15 and 29 October 2000 (Warsaw), page 9.

²² CDL-AD(2002)023rev, point II.1.

Frequently the Law on Mass Events was cited to limit election-related meetings and rallies. In such campaign-related matters, the Electoral Code should have precedence. Any other legislation should be amended in order to be put in conformity with the Code and make clear that the provisions of the Code apply to any campaign events and demonstrations linked to the electoral process.

64. It is of vital importance for democratic elections that public funds are not misused by leading political parties and that state institutions do not engage in election campaigning or propaganda. In order to avoid these possibilities, the law should regulate the use of public resources and funding during elections and campaigns in greater detail. It would be advisable to provide a sufficient level of funding to political parties on an annual basis and not only at the occasion of the elections. It is essential to avoid any decisions concerning the funding of candidates to be taken before the elections in individual cases. There should be a separate legislation concerning the funding of political parties, which could exclude any specific public financing for the campaign itself.

65. The Electoral Code provides broad limitations on the right to free speech, expression, and association, resulting in censorship of political views and silencing those who seek to engage in political discourse. This silencing of political opinion hampers the development of political pluralism necessary for a democracy.

66. Article 47 prohibits campaign materials from containing “insults or slander in relation to official persons of the Republic of Belarus and other candidates”. A candidate who violates Article 47 can have his or her registration cancelled. Article 49 allows a person to be prosecuted for spreading false data defaming a candidate. Outside the context of a political campaign, a government may limit freedom of expression in order to protect the reputation or rights of others.²³ However, in the context of a political campaign, a law for the protection of the reputation or rights of others cannot be applied to limit, diminish, or suppress a person’s right to free political expression and speech.²⁴ These articles have been used to de-register a number of candidates in previous elections.

67. Article 49 of the Electoral Code states that a person who “publicly appeals for boycott of elections, referendum or voting for recall of a deputy or a member of the Council of the Republic shall also be brought to liability.” This provision is too broad and limits the right of free speech and expression. Unlike an election day campaign silence period, which prohibits agitation for a particular candidate, this prohibition silences individuals who are voicing a political opinion on one of the rights granted by Article 66 of the Constitution of Belarus – whether to “take part in elections”. Article 49 also imposes liability on candidates for violations committed by supporters. Liability should not be placed on a candidate based on the conduct of a third party over which the candidate has no control.

²³ See, e.g., Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

²⁴ See, e.g., *Oberschlick v. Austria*, Application No. 11662/85, European Court of Human Rights (23 May 1991); *Lopes Gomes Da Silva v. Portugal*, Application No. 37698/97 European Court of Human Rights (28 September 2000); *Bowman v. The United Kingdom*, Application No. 24839/94, European Court of Human Rights (19 February 1998); *Incal v. Turkey*, Application No. 22678/93, European Court of Human Rights (9 June 1998).

68. The final paragraph of Article 46 prohibits the publication, within 10 days before elections, of “opinion poll results connected with the elections, referendum or prognosis of their results.” Such a period of prohibition on opinion polls should be shortened.

X. Legal Remedies

69. The Electoral Code must include provisions on legal remedies that are in accordance with international standards and good practice in electoral matters. The legal rights for complaints and appeals by the candidates, by the voters and other participants in elections against the decisions concerning their rights must be precisely prescribed and guaranteed by the Code.

70. No concrete provisions could be found in the legislation of Belarus concerning the complaints against decisions of electoral commissions. The regulation stipulating that higher electoral commissions decide over the claims and complaints received concerning the work of other electoral commissions is not sufficient (see for example Article 33.17 of the Code). A transparent procedure, with adequate deadlines and requiring substantive reasons for decisions, should be provided. There should be the possibility to order an effective remedy, including the authority to declare the results null and void in case of serious violations. These decisions should be subject to judicial review by the appropriate court or courts.

71. Consistent with the Code of Good Practice in Electoral Matters and accepted international principles, the appeal procedure must be simple and devoid of formalism, in particular concerning the admissibility of appeals. Deadlines for filing and deciding should be reasonable. The appeal body must have authority to annul elections where irregularities may have affected the allocation of a mandate or determination of the winner in an executive office election.²⁵ The decisions made on appeals must be reasoned. This means that both the administrative bodies and the courts must act expeditiously within deadlines, make concise but reasoned decisions, and build a stable administrative and court practice.

XI. Other Comments on the Electoral Code

1. Size of polling stations

72. According to Article 17.2, "Precincts are formed with the number of not less than 20 and not more than 3000 voters, participants of the referendum". A number of 20 voters is small and does not guarantee secret voting.²⁶ At the same time, the number of 3000 voters in one precinct is large and there is no guarantee that all voters will have the chance to vote on election day. Article 17.2 should be amended to reflect more reasonable minimum and maximum numbers of voters in a polling station.

2. Vote by servicemen

73. According to the Code of Good Practice in Electoral Matters, *"Where servicemen cannot return home on polling day, they should preferably be registered at polling stations near*

²⁵ CDL-AD(2002)023rev, point II.3.3.b, c, g; see also CDL-EL(2005)050, Report on "Legal remedies in the electoral processes in the Republic of Macedonia" by Mrs Mirjana Lazarova Trajkovska, presented at the 3rd Conference of Global Electoral Organizations organised by the ACEEEO on the theme "Legal Remedies in the Electoral Processes-Standards of Electronic Voting" (Siofok, Hungary, 14-17 September 2005).

²⁶ See already CDL(99)66.

*their barracks. Details of the servicemen concerned are sent by the local command to the municipal authorities who then enter the names in the electoral list. The one exception to this rule is when the barracks are too far from the nearest polling station. Within the military units, special commissions should be set up to supervise the pre-election period, in order to prevent the risk of superior officers' imposing or ordering certain political choices. Where servicemen are responsible for the security of a polling station, they may be allowed to cast their vote there, but for their constituency of residence."*²⁷

74. Article 19.3 of the Code allows for the organisation of specific polling stations for servicemen. It results from the above that this should apply only when the barracks are too far from the nearest polling station, in order to avoid any manipulation by the military hierarchy. Article 19.3 should be accordingly amended.

XII. Conclusions

75. The Venice Commission and OSCE/ODIHR note that the most serious problems identified during previous reviews of the electoral legislation of Belarus persist. Therefore, the current text of the Electoral Code of Republic of Belarus should be amended in accordance with international standards and OSCE election commitments in advance of future elections.

76. The most important items which require improvement are listed below.

77. The establishment of a central register of voters would be an important step. It is of crucial importance to define how this register will be updated, who will be able to have access to it, when and how.

78. The right to vote should be given to persons in preventive custody and to those sentenced for less serious offenses.

79. The election administration has a central role in preparing and conducting legitimate, fair and unbiased elections. Electoral commissions should be composed in a balanced way and not be under the strong influence of the executive. Their work must be transparent. There must be a possibility to appeal the decisions of the election commissions to a court of law.

80. More generally, the role of the executive branch of government as well as of other state or local political bodies in the electoral process should be limited.

81. Rights of candidates should be ensured, and unreasonable obstacles to candidacy should be removed. Sanctions for violation of the legislation should be made proportional to the violations, in order to enhance protection of voters' and candidates' rights. Articles relating to the verification of signatures should be improved and expanded to prevent a situation where a small number of invalid signatures is used as the basis for invalidating registration, and to provide greater details on the verification process.

82. Early voting and the use of mobile ballot boxes as conducted up to now has led to a number of abuses, and should be regulated in an accountable and transparent manner. These

²⁷ Explanatory Report, para 41.

alternative voting procedures should be available only on the basis of a motivated request and safeguards to prevent fraud should be incorporated.

83. The limited role of international and domestic observers stipulated by the Electoral Code gives ground for serious concerns about transparency in the work of the election administration. The principle of transparency is among the most important principles in election legislation, as well as in practice.

84. Electoral campaign and financing should be ensured in a balanced way and, in particular, restrictions to the freedom of speech and freedom of assembly (including demonstrations) should be removed.

85. The decisions of the administrative bodies and of the courts must be clear, precise, unambiguous, reasoned on the basis of facts and coherent, in order to provide legal stability. Clear provisions should apply to appeals against decisions of electoral commissions. Transparency of the work of administrative bodies and courts, which decide upon complaints and appeals, is of special importance for fair and democratic elections.

86. However, it must also be noted that a major shortcoming in the conduct of the elections in Belarus has been in the implementation of the electoral legislation. Good faith implementation of the electoral legislation and the will to hold a genuinely democratic and competitive vote remain crucial for the elections to be in conformity with the standards of the European electoral heritage including OSCE commitments.

87. The Venice Commission and OSCE/ODIHR hope that the authorities are ready to address these problems in order to bring Belarus towards complying with the principles of democracy, human rights and the rule of law. They are ready to provide Belarus with all needed support in its democratisation process.