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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

BELARUS

URGENT INTERIM OPINION
ON THE CONSTITUTIONAL REFORM

Issued pursuant to Article 14a
of the Venice Commission's Rules of Procedure

on the basis of comments by

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I. Introduction

1. By letter of 26 August 2021, Mr R. Daems, President of the Parliamentary Assembly of the Council of Europe, requested an opinion of the Venice Commission on constitutional reform in Belarus and its compliance with Council of Europe standards.
2. On 27 December 2021 the Belarusian authorities published the draft constitutional amendments (“the draft amendments”) with a view to their public discussion and further adoption by way of referendum in February 2022.
3. On 12 January 2022, the Commission’s Bureau authorised the preparation of an interim Opinion through the urgent procedure, the reason for urgency being that the draft amendments were planned to be adopted by way of referendum in February 2022 and that the Parliamentary Assembly wished to receive the Opinion as early as possible.
4. Mr Nicos Alivizatos (Member, Greece), Mr Philip Dimitrov (Member, Bulgaria), Mr Bertrand Mathieu (Member, Monaco), Mr Vladan Petrov (Member, Serbia) and Mr Kaarlo Tuori (Member, Finland) acted as rapporteurs for this interim Opinion.
5. The Venice Commission sought to organise meetings with the Belarusian authorities, but the authorities declined. Consequently, this interim Opinion has been prepared solely based on the available information, without the input that could have been obtained during such meetings.
6. This interim Opinion was prepared in reliance on an unofficial English translation of the draft amendments. The translation may not accurately reflect the original version on all points.
7. This interim Opinion was drafted on the basis of comments by the rapporteurs. In line with paragraph 10 of the Venice Commission’s Protocol on the preparation of urgent opinions (CDL-AD(2018)019), the draft interim Opinion was transmitted to the authorities of Belarus on 17 February 2022, but they did not provide any comments. The interim Opinion was then issued on 21 February 2022, pursuant to the Venice Commission’s Protocol on the preparation of urgent opinions.

II. Scope

8. This interim Opinion was prepared following an urgent procedure, in a short time and in the absence of meetings with the authorities and with the other stakeholders, despite the attempts of the Venice Commission. Given these constraints, this interim Opinion does not contain a comprehensive analysis of all the draft amendments, the arguments in favour or against these amendments, and of all possible alternative views on the reform. That means that this Opinion should necessarily be seen as an interim one, as a contribution of the Venice Commission to the analysis of the on-going constitutional reform. The Venice Commission is thus ready to revert to the matters discussed in this Opinion at a later stage.

9. For the present interim Opinion, the Commission decided to focus on (a) the amendment process and (b) the distribution of powers under the draft amendments.

10. The Venice Commission will assess the compliance of the constitutional reform in Belarus with Council of Europe standards, bearing in mind that, although Belarus is not a member of the Council of Europe, it is a candidate country for membership of the Council of Europe as well as an associate member of the Venice Commission.

III. Analysis

A. Factual context

1. Earlier constitutional reforms in Belarus

11. The Constitution of Belarus was significantly amended in 1996 and 2004 by way of referendums. In its assessment of the draft constitutional amendments of 1996 proposed by President A. Lukashenko, the Venice Commission observed that those amendments would only distort the balance of powers between the organs of governments, with preponderance of power in the hands of the President.¹ The amendments proposed by the President were nonetheless subsequently adopted and took effect after the referendum.

12. In 2004 the Constitution was amended by another referendum to remove the restriction on the number of consecutive terms which the President could serve. According to the Venice Commission, this only aggravated “the democratic deficit in a country already characterised by excessive powers of the President without adequate checks and balances”.²

2. 2020 Presidential Election in Belarus

13. The Venice Commission reiterates that it is not a fact-finding body and, as such, relies on the information it receives from various sources including, in particular, the domestic authorities, provided that the latter wish to cooperate. In its recent opinion regarding Belarus,³ the Venice Commission made the following factual observations in relation to the 2020 election and the ensuing events:

¹ See Venice Commission, CDL-INF(1996)008, Opinion on the amendments and addenda to the Constitution of the Republic of Belarus as proposed by the President of the Republic and the Agrarian and Communist Groups of parliamentarians.

² See Venice Commission, CDL-AD(2004)029, Opinion on the referendum of 17 October 2004 in Belarus, para. 16.

³ See Venice Commission, CDL-AD(2021)002, Opinion on the compatibility with European standards of certain criminal law provisions used to prosecute peaceful demonstrators and members of the “Coordination Council”.

“13. On 9 August 2020, presidential elections were held in Belarus. The electoral process could not be observed by an OSCE/ODIHR election observation mission due to the Belarusian authorities’ failure to issue a timely invitation. According to the authorities, the incumbent president, Mr A. Lukashenko, was re-elected to a sixth consecutive term in office crediting him with 80% of the vote and the Central Election Commission of Belarus announced him as the winner. Part of the international community rejected the results of these elections, as they were considered to be conducted in flagrant violation of all internationally recognised standards.

14. Following the announcement of the election results, opposition candidate Ms Svitlana Tsikhanouskaya called on Mr Aleksandr Lukashenko to start negotiations. A “Coordination Council” was established to provide a temporary institutional partner for a national dialogue process aimed at organising new elections that would be held according to international standards and under ODIHR election observation. A series of peaceful protests were held expressing a desire for democratic change and the respect of fundamental freedoms and human rights.

15. The Belarusian authorities reacted to these protests with an extensive use of force and many protesters, human rights defenders and members of the said “Coordination Council” were arrested. Increasing numbers of demonstrators have been charged under various articles of the Criminal Code, which sometimes entail heavy prison sentences. ...”

14. According to Freedom House, armed riot police and plainclothes officers detained over 32,000 people. Reports of beatings, torture, and other human rights abuses of people in detention have since emerged, and security forces beat, arrested, fined, and in some cases shot Belarusian and foreign journalists covering events.⁴

3. Current constitutional reform

15. On 15 March 2021 the President established a Constitutional Commission⁵ charged with the task of drafting amendments to the Constitution. The Commission was composed of thirty-six members, including representatives of the national parliament, local self-government, academia and civil society and business. In August 2021 one of the members of the Commission unofficially published draft amendments⁶ to the Constitution on the web site of an NGO associated with that member of the Constitutional Commission.

16. In addition to the Constitutional Commission, on 21 October 2021 the President established a Working Group⁷ to assist the Constitutional Commission in the drafting process. The Working Group consisted of experts, and it was managed by the Head of the Presidential Administration. Simultaneously, the authorities commenced a sociological survey as regards the constitutional amendments.

17. On 27 December 2021 the draft amendments were published⁸ on the internet for the purpose of their public discussion. The text initially prepared by the Constitutional Commission (assuming it was the one which was published by one of its members in August 2021) appears to have been substantially changed by the Working Group.

⁴ See Freedom House, *Belarus: Freedom in the World 2021 Country Report* // <https://freedomhouse.org/country/belarus/freedom-world/2021>. See also PACE Resolution 2372 “Human rights violations in Belarus require an international investigation” // <https://pace.coe.int/en/files/29176/html>

⁵ See <https://president.gov.by/ru/documents/ukaz-no-105-ot-16-marta-2021-g>

⁶ See <https://ksds.by/constitution/>

⁷ See <https://president.gov.by/ru/events/vstrecha-s-rabochey-gruppy-po-dorabotke-proekta-novoy-konstitucii-strany>

⁸ See <https://pravo.by/pravovaya-informatsiya/vsenarodnoe-obsuzhdenie-proekta-konstitutsii-respubliki-belarus/>

18. In the absence of any cooperation with the Government, the opposition in exile, acting jointly, prepared their own draft Constitution which they presented and discussed on the internet platform.

19. On 20 January 2022 the President issued a decree providing that the referendum would be held on 27 February 2022.

B. Amendment process

20. The Venice Commission will look at the process of the current constitutional reform from the perspective of the international rule of law standards, stated in particular in the Rule of Law Checklist.⁹ Other relevant standards can be further found in the Revised guidelines on the holding of referendums¹⁰ and also in the Report on constitutional amendment.¹¹

1. Normative basis and democratic legitimacy of referendum

21. The task of drafting the amendments to the Constitution was imposed on the Constitutional Commission assisted by the Working Group. These organs, established by the President, are not mentioned in the current Constitution of Belarus (see Section VIII. The application of the Constitution of the Republic of Belarus and the procedure for amending the constitution, Articles 137-140). On the contrary, Article 138 of the current Constitution refers exclusively to the role of the national parliament in the amendment of the Constitution: *“The issue of amending and supplementing the Constitution shall be considered by the chambers of the Parliament on the initiative of the President ...”* Moreover, a purposive reading of Articles 138 – 140 of the Constitution could suggest that, while the President has a right to initiate the constitutional amendment procedure, the deliberation of the constitutional amendments must be institutionally linked to Parliament with the result that it should be within the competence of Parliament, not the President, to constitute the Constitutional Commission. However, this interpretation does not seem to be supported by the authorities who, apparently, favoured a broad interpretation of the general and rather vague provisions of Article 140 on the referendum procedure dispensing with parliamentary procedure.

22. Indeed, Article 140 of the current Constitution generally provides for the possibility of amending the Constitution by way of referendum: *“The Constitution, laws on amendments and addenda thereto, on the entry into force of the said laws and instruments on the interpretation of the Constitution shall be deemed to have been adopted where no less than two-thirds of the elected deputies of both chambers of the Parliament have voted in favour of them. The Constitution may be amended or supplemented via a referendum. A decision to amend or supplement the Constitution by means of a referendum shall be deemed adopted where a majority of citizens on the electoral roll have voted in favour of it. Sections I, II, IV, VIII of the Constitution may be reconsidered only by means of a referendum.”* According to Article 74, the President may decide on holding a referendum on his own initiative. In this respect, the President’s decree, issued on 20 January 2022, on holding a referendum on constitutional amendments may be considered to meet the formal requirements of the Belarus Constitution.¹²

23. However, the Venice Commission has stressed that the main arena for procedures of constitutional amendment should be the national parliament, as the institution best placed to debate and consider such issues.¹³ As the Commission has observed, in the Venice Commission member States parliamentary adoption of constitutional amendments may or may not be followed

⁹ See Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist.

¹⁰ See Venice Commission, CDL-AD(2020)031, Revised guidelines on the holding of referendums.

¹¹ See Venice Commission, CDL-AD(2010)001, Report on constitutional amendment.

¹² See in this regard: Venice Commission, CDL-AD(2004)029, Opinion on the referendum of 17 October 2004 in Belarus, para. 11.

¹³ See Venice Commission, CDL-AD(2010)001, Report on constitutional amendment, para. 240.

by a referendum; the latter may strengthen the legitimacy of the amendments by direct involvement of the people in the amendment procedure, provided that the use of referendum complies with the national constitutional system as a whole. It is quite rare that a constitutional amendment may be adopted by a referendum without prior parliamentary approval. This is, however, the case in Belarus. In this respect, the Venice Commission has previously expressed the view that “constitutional amendment procedures allowing for the adoption of constitutional amendments by referendum without prior approval by parliament appear in practice often to be problematic” because “there is a strong risk, in particular in new democracies, that referendums on constitutional amendment are turned into plebiscites on the leadership of the country and that such referendums are used as a means to provide legitimacy to authoritarian tendencies”.¹⁴

24. The Commission has also stressed that when a text is put to the vote at the request of a section of the electorate or an authority other than parliament, parliament must be able to give a non-binding opinion on the text put to the vote.¹⁵

25. In the case of Belarus, it appears that individual representatives of the Parliament were involved in the drafting process through the Constitutional Commission. However, the national parliament as an institution was not involved in the amendment process, which runs counter to the relevant recommendations of the Venice Commission. Moreover, a separate but related and relevant question may arise whether the Belarusian parliament has a democratic capacity to be the bearer of the constitutional reform. Nevertheless, although there may be a question in relation to the democratic composition of Belarusian parliament, in the Commission’s opinion, it should have been involved in the amendment process.

2. Transparency of the drafting process

26. The rule of law requires that the general public should have access to draft legislation and have a meaningful opportunity to provide input.¹⁶ These requirements apply all the more strictly when it comes to revising a constitution. The Venice Commission has previously stressed that constitutional amendments should not be rushed, and “should only be made after extensive, open and free public discussions”,¹⁷ involving “various political forces, non-government organisations and citizens associations, the academia and the media”¹⁸ and providing for an “adequate timeframe”.¹⁹

27. In the present case, the work on the initial draft amendments prepared by the Constitutional Commission was never – at least officially - published, and neither the public, nor the press appear to have had sufficient access to the work being carried out by the Working Group which led to the publication of the finalised text. Between 15 March and 27 December 2021, besides some reports by the President, some members of the Constitutional Commission or the Working Group about the ongoing process which were published in the media,²⁰ the public did not seem to have

¹⁴ Ibid., para. 191; see also Venice Commission, CDL-AD(2016)029, Opinion On The Draft Modifications To The Constitution of Azerbaijan Submitted To The Referendum Of 26 September 2016, paras. 15-16

¹⁵ See Venice Commission, CDL-AD(2020)031, Revised guidelines on the holding of referendums, III.6.

¹⁶ See Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, II.A.5.iv.

¹⁷ See Venice Commission, [CDL-AD\(2004\)030](#), Opinion on the procedure of amending the Constitution of Ukraine, para. 28.

¹⁸ See Venice Commission, CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary, para. 19.

¹⁹ Ibid., para. 18.

²⁰ See, for example, report of 31 March 2021 // <https://www.belta.by/society/view/rabota-konstitutsionnoj-komissii-budet-sistemnoj-tselenapravlennoj-i-rezultativnoj-miklashevich-435101-2021/>; report of 13 May 2021 // <https://president.gov.by/ru/events/vstrecha-s-rukovoditelyami-konstitucionnoy-komissii>; report of 7 July 2021 // <https://sputnik.by/20210707/lukashenko-obsudit-novuyu-konstitutsiyu-s-komissiey-1054505184.html>; report of 28 September 2021 // <https://president.gov.by/ru/events/uchastie-v-rasshirenom-zasedanii-konstitucionnoy-komissii>; report of 4 November 2021 //

comprehensive information about the exact amendment proposals, the detailed discussions which surrounded the preparation of the amendments, nor about who prompted such discussions, if they took place. Nothing suggests therefore that the Constitutional Commission or the Working Group sufficiently allowed for openness in their activities, offering external inputs by all political forces, civil society or private citizens. A certain level of public participation was possible, but only after the draft amendments were published on 27 December 2021. Given these circumstances, the drafting process seems to be in conflict with Article 4 of the Constitution (providing that “*Democracy in the Republic of Belarus is carried out on the basis of a variety of political institutions, ideologies and opinions. ...*”²¹) as well as Article 37 (providing that “*Citizens of the Republic of Belarus have the right to participate in the resolution of state affairs both directly and through freely elected representatives. The direct participation of citizens in the management of the affairs of society and the state is ensured by holding referendums, discussing draft laws, and issues of republican and local importance. ...*”).

28. The drafting process therefore does not seem to meet the criterion of transparency which the legitimacy of constitutional amendment requires.

3. Free public debate

29. In the Report on constitutional amendment, the Venice Commission stressed that properly conducted amendment procedures, allowing time for public and institutional debate, may contribute significantly to the legitimacy and sense of ownership of the constitution and to the development and consolidation of democratic constitutional traditions. Referring to its country-specific opinions, the Commission highlighted that a duly, open, informed and timely involvement of all political forces and civil society in the process of reform can strongly contribute to achieving consensus and securing the success of the constitutional revision even if this inevitably takes time and effort, and that for this to happen States’ positive obligations to ensure unhindered exercise of freedom of peaceful assembly, freedom of expression, as well as a fair, adequate and extensive broadcasting of the arguments by the media are equally relevant.²²

30. The Venice Commission reiterates that democratic referendums are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of movement inside the country, freedom of assembly and freedom of association for political purposes.²³ If in a functioning democracy sovereignty rests with the people, and it is open to them to decide to give themselves a basic law in whatever terms they wish, this proposition pre-supposes a choice that is arrived at by the people following full public debate during which all points of view may be freely expressed and there are no restrictions on the media.²⁴

31. In this regard the Revised guidelines on the holding of referendums provide that in public radio and television broadcasts on the referendum campaign, equal access must be ensured to the proposal’s supporters and opponents;²⁵ balanced coverage must be guaranteed to the proposal’s supporters and opponents in other public mass media broadcasts, especially news broadcasts;²⁶

<https://www.belta.by/president/view/lukashenko-predstavili-novyj-proekt-konstitutsii-belarusi-467839-2021/>; report of 23 December 2021 // <https://president.gov.by/ru/events/soveshchanie-s-chlenami-komissii-i-rabochey-gruppy-po-voprosam-izmeneniya-konstitucii> .

²¹ It has to be noted that the new wording of Article 4 proposed by the authorities would limit the principle of ideological pluralism, as it would specify that “*Democracy in the Republic of Belarus is carried out on the basis of ideology of Belarusian State as well as variety of political institutions and opinions. ...*”

²² See Venice Commission, CDL-AD(2010)001, Report on constitutional amendment, paras. 204-205.

²³ See Venice Commission, CDL-AD(2020)031, Revised guidelines on the holding of referendums, II.2

²⁴ See Venice Commission, CDL-AD(2004)029, Opinion on the referendum of 17 October 2004 in Belarus, para. 14.

²⁵ See Venice Commission, CDL-AD(2020)031, Revised guidelines on the holding of referendums, I.2.2.b.

²⁶ Ibid., I.2.2.c

there should be available a balanced presentation not only of the viewpoint of the executive and legislative authorities or persons sharing their viewpoint, but also of the opposing one.²⁷

32. Formally, the public consultation process on the draft amendments which appears to be ongoing allows the population to express an opinion on the proposed amendments. According to the official website *pravo.by*, during the period of public discussion the text of the draft amendments was viewed almost 230,000 times and downloaded for viewing on mobile devices more than 10,000 times. During the time dedicated for public discussion, almost 9,000 opinions were expressed, of which 99.25% were in favour of the proposed amendments.²⁸ The fact remains, however, that a large part of the opposition, considered as "enemies" by the government in power,²⁹ has not been given the opportunity to participate in this process. In addition, there appears to be no guarantee that the results of the popular consultation will be taken into consideration, given that the process is not being managed by a truly independent body.

33. Moreover, it cannot be overlooked that the constitutional process at issue has taken place in the aftermath of the August 2020 presidential elections ending with disputed results, and the ensuing imprisonment of opposition politicians and crack-down of oppositional political forces and civil society. It is difficult to see how in this political context the amendment process could ensure "a duly, open, informed and timely involvement of all political forces and civil society"; "unhindered exercise of freedom of peaceful assembly, freedom of expression"; or "a fair, adequate and extensive broadcasting of the arguments by the media", including the opposing viewpoints.

34. In this context it is not surprising that the opposition in exile resorted to developing its own draft Constitution. It remains unclear how the opposition tried to put their draft into the official constitutional amendment channels. However, the fact remains that there was an obvious absence of any attempt at cooperation and dialogue between the government and the opposition in exile. In such circumstances, the constitutional reform process has not met the minimum standard of inclusiveness.

C. Distribution of powers in the constitutional amendments

1. President of the Republic

35. In its assessment of the draft constitutional amendments of 1996 which subsequently were adopted by way of referendum, the Venice Commission criticised the provisions conferring vast powers on the President of the Republic. The Commission observed that "an excessive concentration of State powers can make even the best provisions for the protection of human rights useless, if there is a lack of an effective system of checks and balances between the institutional organs. It is therefore also dangerous for human rights that the presidential draft does not respect the principle of separation of powers, giving the Head of State too many prerogatives, and depriving the parliamentary assemblies of the possibility of working as a real counterweight".³⁰ The influence of the President appeared preponderant not only regarding the national parliament;³¹ but also

²⁷ Ibid., I. 3.1.e.

²⁸ See <https://pravo.by/novosti/novosti-pravo-by/2022/january/68340/>

²⁹ See the statement by the President on 18 January 2022, accessible: <https://president.gov.by/ru/events/soveshchanie-po-itogam-vsenedrobnogo-obsuzhdeniya-proekta-izmeneniy-konstitucii>

³⁰ See Venice Commission, CDL-INF(96)8, Opinion on the amendments and addenda to the Constitution of the Republic of Belarus as proposed by the President of the Republic and the Agrarian and Communist Groups of parliamentarians, para. 11.

³¹ Ibid., paras. 12-24.

regarding the other State bodies, including the government³² and the justice system,³³ accompanied by a very weak impeachment procedure.³⁴

36. The draft amendments provide that the normative powers of the President are limited by the requirement of compliance with the parliamentary laws (draft Article 85). The provisions relating to the delegation of legislative power to the President have been removed (deletion of Article 101). These are positive elements.

37. However, the criticism presented in 1996 still holds. The proposed amendments allow the current President to remain in the centre of the State power and his personal position appears to be strengthened even further, given that some proposed amendments present individually-tailored rules and safeguards aimed at preserving the current state of affairs (discussed below under the present title and the next title devoted to the All-Belarusian People's Assembly).

38. In the Belarusian context, the draft amendments do not alter the preponderance of the position of the President vis-à-vis the government and the two chambers of the national parliament. There remains decisive dependence of the government on the President, who, for instance, appoints the Prime Minister (though with the prior consent of the House of Representatives) and the other ministers; s/he can on his/her own initiative dismiss the Government, which is "accountable" to him/her; and s/he can revoke the acts of Government. The President retains control over Parliament which remains a weak institution that can be dismissed by the President on broad grounds. Furthermore, the President calls referendums on the initiative of other constitutional bodies or on his/her own initiative; may declare a state of emergency on broad grounds; and introduce martial law. If for some, though by no means all, of these provisions parallels may be found in Western constitutions, in these constitutions there exist effective checks and balances that are absent in the constitutional system of Belarus.

39. The new qualifications for the candidates for President include a vague requirement for the absence of "a residence permit or other document from a foreign State entitling to benefits and other advantages" (draft Article 80). In practice, this wording would allow to exclude from the electoral process a citizen who has worked abroad for a few years. Moreover, it is most likely to exclude from the electoral process the opponents who are currently in exile abroad.

40. It is noteworthy that the reintroduction of the limitation of the President's terms to two periods (draft Article 81), which existed in similar wording before the constitutional amendments of 2004, would only apply after the next elections (draft Article 143 § 2) and would therefore not be applicable immediately to the sitting President.

41. The procedure for the resignation of the President is redesigned, involving now the All-Belarusian People's Assembly, the House of Representatives or a group of citizens, and the decision is taken by the All-Belarusian People's Assembly, after the opinion of the Constitutional Court (draft Article 88).

42. As regards the immunity enjoyed by the President (draft Article 89), it will continue to apply after the expiry of the President's term. This solution may be justified solely in respect of acts committed in the exercise of his functions, while a general immunity after the exercise of the functions is an individually tailored protection which finds no justification in the principle of separation of powers.

43. Former Presidents would be members of both the All-Belarusian People's Assembly (draft Article 89-2) and the Council of the Republic (the upper House of Parliament) (draft Article 91),

³² Ibid., paras. 27-30.

³³ Ibid., paras. 25-26, 33-34.

³⁴ Ibid., paras. 45-47.

which creates confusion as regards the separation of powers, especially when it concerns the latter mandate, which is for life. Moreover, the individual rule that the current President of the Republic would be allowed to hold simultaneously the post of Chairman of the All-Belarusian People's Assembly (see draft Article 144) only aggravates the lack of real separation of powers and indicates the further concentration of powers in the hands of one person.

2. All-Belarusian People's Assembly

44. Probably the most important innovation of the draft amendments is the formalisation of the All-Belarusian People's Assembly ("the ABPA") at the constitutional level.³⁵ According to the proposed amendments, the ABPA will be considered as the highest representative body. It will determine the strategic directions of the development of society and the State, and ensure the inviolability of the constitutional system (draft Article 89-1).

45. The competence of the ABPA is defined broadly and will include such powers as: (1) approving the main directions of domestic and foreign policy, military doctrine, the concept of national security; (2) approving the programs of socio-economic development of the Republic of Belarus; (3) hearing the Prime Minister on the implementation of the program of socio-economic development of the Republic of Belarus; (4) proposing amendments and additions to the Constitution; (5) proposing the republican referendums to be held; (6) considering the question of the legitimacy of elections; (7) deciding on the removal of the President from office in case of systematic or gross violation of the Constitution by him or the commission of high treason or another serious crime; (8) introducing a state of emergency or martial law in the territory of the Republic of Belarus if there are grounds provided for by the Constitution and in the event of inaction of the President on these issues; the introduction of a state of emergency or martial law shall be considered by the ABPA on the initiative of the Presidium of the ABPA or the Council of the Republic; (9) on the proposal of the President, previously agreed with the Presidium of the ABPA: (a) electing the Chairman, Deputy Chairman and judges of the Constitutional Court and dismissing them from office on the grounds provided for by law; (b) electing the Chairman, Deputy Chairman and judges of the Supreme Court and dismissing them from office on the grounds provided for by law; (c) electing the Chairman and members of the Central Election Commission and dismissing them from office on the grounds provided for by law; (10) on the proposal of the President, deciding on the possibility of sending military personnel, employees of paramilitary organisations, other persons outside the Republic of Belarus to participate in ensuring collective security and activities to maintain international peace and security; (11) determining public holidays; (12) awarding the President with State awards, as well as proposing persons for awarding them State awards; (13) giving binding instructions to State bodies and officials, receiving information from State bodies and officials, exercising other powers established by the Constitution and laws necessary for the implementation of the constitutional functions assigned to it (draft Article 89-3).

46. The ABPA will include the President of the Republic, former President(s), representatives of the executive, legislative and judicial branches, and representatives of civil society (whose mode of election is not specified). The ABPA will elect its Chairman. As noted above, draft Article 144 specifies that the President of the Republic who holds this office on the date of entry into force of the amendments to the Constitution may be elected Chairman of the ABPA. Such an individually tailored rule is questionable in principle.

³⁵ On several occasions such Assemblies have been held by the Belarusian Government. It was claimed that the Assemblies included representatives of all sectors of Belarusian society that were brought together to determine certain strategic matters and Belarus' priorities for the next years. The first Assembly was held in October 1996, a few weeks before the constitutional referendum aimed at resolving a political crisis. The second Assembly took place in May 2001, the third in March 2006, the fourth in 2010, the fifth in 2016, and the sixth in 2021. Members of the Belarusian opposition have criticised the Assemblies for allegedly being propaganda events organised to demonstrate support to the Government.

47. The amendments do not say anything about the manner of electing the members of the ABPA, leaving open a substantial risk of abuse. At the same time the overall number of the members of the ABPA can be as high as 1,200 (draft Article 89-2) which may raise questions about the functionality of such a body in carrying out the executive functions assigned to it. The efficiency and meaningful participation of each member of the ABPA may be furthermore questioned in the light of another draft provision (draft Article 89-2) stating that a member of the ABPA takes part in the work of the ABPA without interruption from labour (official) activity.

48. Against the background of such a large body whose members are not fully available, the role of the Presidium of the ABPA would become decisive at the operational level (draft Article 89-2), while its jurisdiction and powers have neither been specified, nor limited. Nor has its composition been determined, while the President of the Republic, who it is only logical to assume would be likely to become the Chairman of the ABPA, would certainly sit on it – and probably preside over it. Indeed, an individual rule has been proposed that the current President of Republic would be allowed to hold simultaneously the post of Chairman of the ABPA.

49. As regards the functions of the ABPA, while part of them are consultative, some of them have a significant decision-making nature, including the election and dismissal of members of the constitutional court, judges of the supreme court, the central electoral commission, the commitment of military forces outside the territory and the issuing of binding instructions to State bodies and officials. Appointment to the above positions is made upon the "proposal of the President, previously agreed with the Presidium", while the issue of a possible lack of agreement on this point is not addressed, and the Presidium will very likely be controlled by the President.

50. Some of the powers of the ABPA are not clearly defined. For instance, the ABPA would have "the right to consider the question of the legitimacy of elections". However, it remains unclear what exactly its powers regarding elections would be and how these powers would correlate with those of the Central Electoral Commission.

51. The possibility of giving binding instructions to State bodies and officials is likely to conflict with governmental powers and responsibilities in this area. Furthermore, the power of the ABPA to annul all legal acts and other decisions, except for the acts of judicial bodies (draft Article 89-5), encroaches on the jurisdiction and powers of the other State bodies.

52. To the extent that the ABPA may be substituted in the exercise of all its powers by a small collegial body, its Presidium, whose composition is not specified but would certainly comprise the President who would likely chair it, it appears that the Presidium of the ABPA would constitute a sort of "parallel government", which would function in parallel to the cabinet and to the elected parliament and, if necessary in the eyes of the President, substitute for them.

53. The above considerations suggest that the ABPA would become a plethoric body entailing a strong fusion and concentration of powers. It is difficult to see the logic behind such an institution, except as a tool of power and, above all, of control for the current President of the Republic which makes it incompatible with the democratic values enshrined by the Council of Europe.

54. In conclusion, the Venice Commission is of the view that the draft amendments which will be submitted to referendum on 27 February 2022 fail to correct the strong unbalance of powers which already exists under the current Constitution and indeed will aggravate it. They therefore fall short of the democratic minimum standards of the European constitutional heritage.

3. The other constitutional organs (Parliament, Constitutional Court, Central Election Commission etc.)

55. As regards the status of the other State organs, there are no substantial changes which deserve to be specifically assessed within the scope of the present interim Opinion, especially having regard

to the central role of the President of the Republic. In particular, regrettably, no progress has been made to guarantee the principle of the rule of law: there still the lack of an independent institution protecting the independence of the judiciary and there remains a Soviet-style Prokuratura.

D. Alternative views on the constitutional reform

56. The Venice Commission has not had the possibility of travelling to Belarus and meeting not only with the authorities but also with the opposition, the State institutions, or the civil society. The situation of insecurity and repression which is prevailing in the country,³⁶ together with the lack of pluralistic media and a series of measures attacking freedom of speech³⁷ have prevented contacts and exchanges of views with interlocutors from inside Belarus. It is therefore not possible to say whether there are alternative views on constitutional reform and what these views are. It was suggested by the authorities, and indeed appears from the dedicated website (see above) that numerous citizens have been posting their observations and suggestions on the draft amendments through a dedicated platform. However, there is no indication, nor was it argued, that the opposition has been consulted or invited to express its view on the amendments. Nor that independent NGOs have been consulted. No one inside Belarus is campaigning against the adoption of these constitutional amendments through the referendum. Against the background of the prevailing situation of insecurity and crackdown, it is plausible that it is so for fear of reprisals.

57. As noted above, the situation of crackdown on political opposition in the country has prompted part of such opposition to leave Belarus ; in the absence of any dialogue with the authorities, they developed their own proposal for a new constitution³⁸ through a process of public outreach through the internet which, however, has not been integrated into the official constitutional amendment process.

58. In the current context of excessive presidential powers behind and over the parliament, this draft constitution appears to represent a more balanced view on the principle of the separation of powers. Among the political branches, preference is given to a parliamentary regime, with the President, however, still retaining some relevant powers. The normative competence of Parliament is particularly broad, and parliamentarians have extensive oversight powers. Furthermore, Parliament appoints the Prime Minister, on the proposal of the President, and Parliament has the ultimate right to appoint the Prime Minister in case of disagreement with the President. In accordance with the rules of the parliamentary system, the Government is accountable to the Parliament. Parliament also appoints, on the proposal of the President, the Attorney General, on the proposal of various bodies, the members of the Constitutional Court, the Chairman of the Board of Directors of the Central Bank, the Ombudsman. With regard to appointments, particularly those concerning independent bodies, some time could be necessary before the system works smoothly, given that the existing situation is characterised by the lack of structured political parties.

59. The government has the legislative initiative, together with parliamentarians and citizens. Its regulatory power is not defined. It is accountable to Parliament. From this point of view, the

³⁶ See, for example, Human Rights Watch, *Belarus: Crackdown on Political Activists, Journalists* // <https://www.hrw.org/news/2020/07/30/belarus-crackdown-political-activists-journalists>; Amnesty International, *Belarus 2020* // <https://www.amnesty.org/en/location/europe-and-central-asia/belarus/report-belarus>; Freedom House, *Belarus: Freedom in the World 2021 Country Report* // <https://freedomhouse.org/country/belarus/freedom-world/2021>.

³⁷ See, for example, Amnesty International, *Belarus: Blocking leading online media outlet is a brazen attack on freedom of expression* // <https://www.amnesty.org/en/latest/news/2021/05/belarus-blocking-leading-online-media-outlet-is-a-brazen-attack-on-freedom-of-expression/>; Human Rights Watch, *Belarusian Authorities "Liquidate" Leading Media Freedom Organization* // <https://www.hrw.org/news/2021/08/30/belarusian-authorities-liquidate-leading-media-freedom-organization>; Freedom House, *Belarus: Freedom on the Net 2021 Country Report* // <https://freedomhouse.org/country/belarus/freedom-net/2021>

³⁸ See <https://narodnaja.com/>

"constructive no-confidence" procedure acquires special importance. The President's powers are quite extensive but subject to important checks and balances. Indeed, the President is elected by universal suffrage, which gives him a strong legitimacy, but the so-called exclusive powers are exercised on the proposal of another body or consist of a power of proposal. The President's powers and responsibilities in relation to defence and security policy with regard to the supreme commander of the armed forces and the conferring of the highest military ranks are in competition with those of the government, and in international matters they compete with those of Parliament. However, the President has the power to lead the Security Council. It is notable that the President can be held accountable before Parliament. This responsibility, which can result in impeachment, is not directly political, but the rather vague terms of the provisions stipulating the grounds on which this responsibility can be engaged can lead to a form of political responsibility, duplicating that of the government. It should be noted, however, that the Constitutional Court will have to rule on the decision of Parliament. The judicial system is committed to respecting the independence and impartiality of judges. The Constitutional Court having broad competence in the area of constitutional review, it may be necessary to provide for a filtering system.

60. The choice of characteristics prevailing in parliamentary systems can be justified even if in the current situation it is to be expected that it will take some time – in a country with a presidential tradition and a weak political structure – for the transition to a parliamentary regime to be fully achievable and for the smooth functioning of the democratic institutions to take place.

61. The text introduces a judicial council with appropriate powers of appointment and dismissal, and a Constitutional Court whose powers and composition are in line with the Venice Commission's recommendations.

IV. Conclusions

62. This interim Opinion was prepared following an urgent procedure, in a short timeframe and in the absence of meetings with the authorities, despite the attempts of the Venice Commission, or with the opposition, State institutions and civil society in Belarus. Given these constraints, the interim Opinion does not contain a comprehensive analysis of all changes proposed to the constitutional text. It has, in particular, left aside the issues connected with the guarantees of human rights in the Belarusian Constitution, although they raise serious concerns in the light of European standards. That means that this interim Opinion should necessarily be seen simply as a contribution of the Venice Commission to the analysis of the on-going constitutional reform.

63. For the purpose of the present Opinion, the Commission decided to focus on (a) the amendment process and (b) the distribution of powers under the draft amendments.

64. As regards the amendment procedure conducted by the authorities, the Venice Commission has noted a number of problematic issues. It is regrettable in the first place that, although an interpretation of the current Constitution may allow it, the draft amendments were put to referendum directly, without any involvement of Parliament, which the Commission has previously found to carry the strong risk that the constitutional referendum is turned into a plebiscite on the leadership of the country and is used as a means to provide legitimacy for authoritarian tendencies. Further, the drafting process does not seem to have met the criterion of transparency which the legitimacy of constitutional amendment requires. In addition, after the draft amendments were published and open for public consultation, nothing suggests that the opposition has been able to express its views, nor that the other stakeholders and civil society have been able to do so in a meaningful way. This has upset the requirement of inclusiveness which a democratic constitutional process should enshrine.

65. Moreover, it cannot be overlooked that the constitutional process at issue has taken place in the aftermath of the August 2020 presidential elections ending with disputed results, and the ensuing pressure on oppositional political forces and civil society. It is difficult to see how in this

context of insecurity and repression, with the lack of pluralistic media and a series of measures attacking freedom of speech, the amendment process could ensure such European standards as “a duly, open, informed and timely involvement of all political forces and civil society”; “unhindered exercise of freedom of peaceful assembly, freedom of expression”; or “a fair, adequate and extensive broadcasting of the arguments by the media”, including the opposing viewpoints.

66. With regard to the balance of powers, despite introducing certain restrictions on the powers of the President, the draft amendments allow the current President to remain at the centre of the State power and his personal position appears to be even further strengthened, given that amendments include individually tailored rules and safeguards aimed at preserving the current state of affairs. Moreover, the new qualifications for the presidential candidates would effectively exclude opponents abroad from the electoral process. The limitation of the President’s terms to two periods would apply only after the next elections. Broadly formulated immunity enjoyed by the President would continue to apply after the expiry of the President’s term.

67. The draft amendments would enshrine in the Constitution and define the All-Belarusian People’s Assembly (the ABPA) as the highest representative body. A high number of ABPA members (whose manner of election has not been specified) raises questions about the capacity of such a body to fulfil the extensive executive functions assigned to it. In these circumstances, the role of the ABPA Presidium, the composition of which is undetermined but will certainly comprise the President, will inevitably become decisive at the operational level; and yet, its jurisdiction and powers have neither been specified, nor limited.

68. In addition, some functions of the ABPA are unclear, notably the right of the ABPA to consider “the question of the legitimacy of elections”. At the same time, the power of the ABPA to give binding instructions to State bodies and officials and its power to annul all legal acts and other decisions, except for the acts of judicial bodies, encroach on the competences of the other State bodies. It appears that the Presidium of the ABPA would constitute a sort of “parallel government”, which would function in parallel to the cabinet and to the elected Parliament and, if necessary in the eyes of the President, substitute for them. In sum, it is difficult to see the logic behind such an institution, except as a tool for retaining power and, above all, of control for the current President of the Republic, which makes it incompatible with the democratic values enshrined by the Council of Europe.

69. In conclusion, the Venice Commission is of the view that the draft amendments which will be submitted to referendum on 27 February 2022 fail to correct the strong unbalance of powers which already exists under the current Constitution and indeed may even aggravate it.

70. If the proposed institutional changes are therefore globally to be assessed negatively, this does not mean that constitutional reform in Belarus is neither necessary, nor desirable. On the contrary, the Venice Commission invites the authorities to undertake a constitutional reform which would correct the current unbalance of powers and introduce appropriate checks and balances, including with respect to the procedure of amending the Constitution, in line with international standards.

71. The Venice Commission will carry out a thorough review of the constitutional amendments if and after they are approved by referendum. The Commission remains at the disposal of the Belarusian authorities and the Parliamentary Assembly for further assistance.