

COMMENTS ON THE AMENDMENTS AND ADDENDA TO THE CONSTITUTION OF THE REPUBLIC OF BELARUS AS PROPOSED BY THE PRESIDENT OF THE REPUBLIC

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I

These comments refer to the proposal by the President of Belarus for amendments and addenda to the 1994 Constitution, as it has been published and received by the Venice Commission from the President of the Supreme Council of Belarus; further additions or changes are not taken into account. The Commission is available to provide other comments or opinions concerning any new project, as well as any new version of the one now examined.

II

The Presidential proposal on amendment and addenda to the Constitution, which is supposed to be submitted to a national Referendum on 7 November 1996, possibly after having been amended in the meantime, aims at introducing a radical change in the form of government, creating de facto a new Constitution: at least this seems to be the intention of the proposers, even if the wording of the text is not completely clear (there are actually some references to a "1994 Constitution", together with some mention of a "present Constitution", which seems to be a new document, due to the result of the popular referendum).

III

The first important element is the institution of a second Chamber: according to Article 90 of the project, Parliament will be composed of two Chambers: the House of Representatives and the Senate.

Article 95 states that the Houses shall be summoned for two regular sessions a year, for a maximum of 170 days: thus, the legislative bodies cannot independently organise their activity, and are not allowed to sit in permanent sessions; this fact will weaken their effectiveness, especially if we consider that with the introduction of a second Chamber, the law-making procedure (Article 100) becomes longer.

Moreover, the President of the Republic is entitled to appoint one-third of the members of the Senate (art. 91); the said right given to the President creates a serious distortion in a system which should be ruled by the principle of separation of powers. The weight of the Senators appointed by the President will be fully appreciated as regards the procedure of "impeachment". As regards the remaining two-thirds of the Senate, the presidential proposal suggests an indirect ballot: the Senators will be elected at sessions of local councils of the basic level of each of the regions and the city of Minsk.

As stated by Article 88 of the proposal, the decision concerning the dismissal of the President, either because of incapacity due to illness to exercise his duties, or determined by his supposed liability for high treason or other crime, shall be adopted with a three-quarter majority of the Senators (and two thirds of the Deputies). So, the consent of at least a part of the Senators appointed by the President is needed.

The same happens as regards the amendments or addenda to the Constitution, which need the consent of 3/4 of the members of both Chambers (art.140): furthermore, the motions to amend and supplement the Constitution, shall be considered by the Chambers on Presidential initiative or that of at least 150,000 citizens, but cannot be considered on the initiative of a member of Parliament.

The strengthening of Presidential power becomes more evident by considering the composition of the Constitutional Court: according to the proposal of amendment (art. 116), the President will have the right to appoint 5 judges and the Chairman of the Court (on a total number of 12 judges). What is striking is that the Constitutional Court is entitled to decide whether the Parliamentary Chambers regularly and flagrantly violate the Constitution; should this be stated, the President would have the right to dissolve both Chambers.

The power of dissolution can also be used by the President to impose his authority on Parliament pending the procedure of appointment of the Prime Minister. According to the said project, the President of the Republic (Article 84) appoints, with the consent of the House of Representatives, the Prime Minister, and takes decisions on the resignation of the Government and its members. The Chamber has to take a decision within two weeks of the nomination of the Prime Minister and, above all, if the House of Representatives rejects the nomination of the Prime Minister twice, the President of the Republic is entitled to dissolve the Chamber and to call a new election (art. 106). While such provisions can also be found in other democratic constitutions, together with all the other prerogatives of the President they contribute in the draft to a clear imbalance between presidential and parliamentary powers.

The Government is entrusted with the executive power, but is accountable both to the President and to the Parliament: this is a typical characteristic of a semi-presidential system, with the only difference being that in the Western European system there are some rules which aim at maintaining a certain balance between the President and the Parliament; such rules cannot be found in the proposal examined, for the President has an evident preponderance on the legislative body.

Even with reference to the law-making procedure this preponderance appears: the Parliament is entitled to legislate on determined subjects (Article 97, paragraph 2), but apart from those, the President and the government shall issue edicts, orders and ordinances which have a binding force within the territory of the Republic of Belarus.

The power of Presidential veto is also reinforced, because when the Head of State does not agree with a text of the law, he can request a new deliberation, and to overcome the veto the text must be approved both by the House of Representatives and the Senate, with a majority of two-thirds of the members (art. 100). In this the model of the United States is followed where there are however no appointed senators and there is a clear separation of powers in other respects.

It is equally significant to underline that the President shall appoint the Chairman and the members of the Supreme Court, the Chairman and the members of the Board of the National Bank and, more importantly, the Procurator General, with the consent of the sole Senate (which is in part composed, as previously said, of members appointed by the Head of the State). These provisions are not consistent with the affirmation stated by article 6 of the proposal, according to which the State power in the Republic of Belarus shall be exercised on the basis of its separation into legislative, executive and judicial power.

IV

The Presidential proposal introduces some changes also in other sections of the present Constitution.

One such example is provided by Article 74, which allows the President to call a national referendum on his own initiative (whereas, in the Constitution now in force, the question of holding a referendum must be considered by the Supreme Council).

Another important change is that the Procurator General becomes accountable to the President and no longer to the Parliament (Art. 127). This is problematic since Art. 125 of the Constitution fully maintains the Soviet model of Prokuratura, making it (and not the courts) the main organ of control of legality.

V

The presidential proposal also includes final and transitory provisions.

It is stated that the new text, once adopted, will come into force on the day of its publication; but, in the meantime, an important provision (art. 143) allows the President to take part in the formation of the new legislative organs, stating that the House of Representatives, as well as the Senate, will be formed among the deputies of the former Supreme Council, following a non-determined procedure, requiring agreement between the President and the Supreme Council. This puts the Head of the State in a very strong position, because he also has the right of dissolution of Parliament: as a consequence, his proposals of allocation of the former members of the Supreme Council into the two new Chambers will, in all probability, be accepted.

By contrast, following adoption of the new Constitution, the President will automatically get a full new term of office without new elections (Art. 144). All other bodies, such as the Constitutional Court, will have to be re-established according to the new constitutional rules (Art. 196). During the transitional period there will therefore be no checks and balances on the presidential power.

VI

The "core" of the Presidential proposal is determined by a complete revision of the form of government: the Constitution now in force has established a system in which there is a slight preponderance of the Parliamentary Assembly, but, as a whole, the President holds some useful instruments to carry on his policy, and cannot be defined as a "hostage" of the Supreme Council.

The proposed amendments, on the other hand, seriously alter the now existing balance, putting the Parliament in a state of impotence, making it difficult to exercise the legislative function and, above all, to control the activity of the President and the Executive. While this applies already in "normal" times, during the transitory period the imbalance of powers definitely endangers the correct functioning of the democratic institutions.