



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 6 October 2004

Opinion no. 314/2004

Restricted
CDL(2004)072
Engl. Only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION
ON THE REFERENDUM OF 17 OCTOBER 2004
IN BELARUS

On the basis of comments by

Mr Sergio BARTOLE (Substitute member, Italy)
Mr Matthew RUSSELL (Expert, Ireland)

Introduction

1. By letter dated 4 October 2004 the President of the Parliamentary Assembly asked the Venice Commission to give an opinion on the compatibility of the planned referendum in Belarus with Council of Europe standards. He asked for the opinion to be given as a matter of urgency at the next plenary session of the Commission on 8 to 9 October 2004.

2. The referendum in Belarus was called by the President of Belarus, Alexander Lukashenko, by decree issued on 7 September 2004. It will take place on 17 October 2004. The single question submitted to the voters reads as follows:

“Do you allow the first President of the Republic of Belarus Alexander Grigoryevich Lukashenko to participate in the presidential election as a candidate for the post of the President of the Republic of Belarus and do you accept Part 1 of Article 81 of the Constitution of the Republic of Belarus in the wording that follows: “The President shall be elected directly by the people of the Republic of Belarus for a term of five years by universal, free, equal, direct and secret ballot?”

3. *Mr Sergio Bartole and Mr Matthew Russell were appointed to act as reporting members on this issue. The present opinion, based on their comments was adopted by the Commission at its ...*

The wording of the referendum question

4. The proposal submitted to referendum is open to a number of very serious objections. When analysing it, it has first of all to be taken into account that, although formally only a single question to be answered “yes” or “no” is put to the people, in reality there are two quite distinct questions:

a) Should the present President of Belarus, Mr Lukashenko, be allowed to take part in the forthcoming presidential elections in Belarus (although he is already in his second term of office and the Constitution of Belarus explicitly prohibits any person from serving more than two terms as President)?;

b) Should Art. 81 of the Constitution of Belarus be amended by deleting the sentence that the same person may not be President for more than two terms?

5. This combination in a single question of two distinct issues, one relating to an individual situation and one proposing a constitutional amendment, is in contradiction with the principles of *unity of form* and *unity of content* as set forth for example in the *Guidelines for Constitutional Referendums at National Level*, adopted by the Venice Commission in July 2001 (CDL-Inf(2001)10, at II.C). Although two questions are put to the voters, they are not allowed to give a separate and distinct answer to each of these questions but have to reply in a uniform way. The appropriate opportunity for the electorate to indicate whether it supports a political leader is at a parliamentary or presidential election, and not in the context of an amendment to the Constitution. Inevitably the linkage of principle with personality confuses the issue, and will inhibit impartial consideration by the Belarusian voters of the important principle which is at issue. It is open to doubt whether this way of wording a referendum question is compatible with Art. 114 of the Electoral Code of Belarus according to which *“The question (draft decision)*

offered for the referendum shall be worded by the initiative group in a clear and definite manner so that it shall be possible to give an unambiguous answer to such question.” This provision, which appears in an article of the Electoral Code applicable to referendums on the basis of popular initiatives, has as its purpose to protect the exercise of the freedom of the vote of the electorate and therefore has to be equally applied to referendums called by the President.

6. The actual wording of the question is moreover most disingenuous. Indeed, it would be difficult to create a wording which is more opaque as to what is at issue. The question to be put to the voter (most of whom are unlikely to be familiar with the present wording of Article 81) does not state the provision which is to be deleted from the Constitution, nor does it even refer to the fact that a provision in the existing Constitution is to be altered. The President’s address which accompanied the Decree is similarly lacking in frankness. The present regime’s intolerance of criticism, and the continuing restrictions on the media and on freedom of speech in the Republic, make it highly improbable that a balanced assessment of the proposed amendment will be available to the electorate before the referendum.

The question relating to the electoral position of Mr Lukashenko

7. Art. 78 of the Constitution of Belarus leaves it to the law to determine *“the list of issues that may not be put to a referendum”*. Art. 112 of the Electoral Code of the Republic of Belarus provides:

“The following questions shall not be submitted to the republican referendum:

...

any questions pertaining to election and dismissal of the President of the Republic of Belarus and appointment (election or dismissal) of officials whose appointment (election or dismissal) is within the competence of the President of the Republic of Belarus and the Chambers of the National Assembly of the Republic of Belarus; ...”

The question concerning the possibility for Mr Lukashenko to again be candidate in the forthcoming elections is in direct and clear contravention of this law. It can therefore not be decided by referendum. Even if Parliament were now, at the eleventh hour, to amend the electoral code so as to meet the President’s wishes, the action of the President in ordering the referendum at a time when it was illegal to do so demonstrated a contempt for Parliament and for the rule of law on the part of the President.

8. Moreover, the question aims at introducing a personal privilege for a single person and therefore conflicts with the principle of equality as set forth in Art. 22 of the Belarus Constitution *“all shall be equal before the law and entitled without discrimination to equal protection of their rights and legitimate interests”*.

9. In addition, a referendum cannot exempt the organs and institutions of the state from complying with the Constitution before the entry into force of the respective constitutional amendment. This results clearly from Art. 137 of the Constitution according to which *“the Constitution shall have the supreme legal force. Laws, decrees, ordinances and other instruments of state bodies shall be promulgated on the basis of, and in accordance with the Constitution of Belarus”*.

10. Finally, it is striking that the President does not hesitate to use the prerogatives of his high office to advance a purely personal cause. The conflict of interests is obvious. His oath of office under Art. 83 of the constitution obliges him to serve the interests of the people of Belarus and not to use his position to advance personal interests.

The question concerning the constitutional amendment

11. According to Art. 140 of the Constitution “*the Constitution may be amended or supplemented via a referendum. ... Sections I, II, IV, VIII of the Constitution may be reconsidered only by means of a referendum.*” A referendum is therefore in principle the correct way to amend Art. 81 of the Constitution (which appears in Chapter IV).

12. However, the specific constitutional amendment pursued by this referendum seems highly undesirable. The effect of the amendment, if passed, will be to remove any restriction on the number of consecutive terms which a President may serve. Thus, there would be no constitutional bar on Mr. Lukashenko, who is aged 50, continuing indefinitely in office. In those democracies where the president exercises important functions of State, a system of constitutional checks and balances ensures that he or she cannot exercise arbitrary power while in office, and in any event the term of office is limited. The constitutions of democratic countries with presidential systems of government, as are to be found in particular in Latin America, either prohibit the immediate re-election of an incumbent President or at least limit it to one further term, as is the case in the Constitution presently in force in Belarus. Even democracies where the President’s functions are largely ceremonial limit the possibility of continuous terms of office. The undesirability of unlimited terms for the president is recognised in the new democracies (e.g. the Republics of Albania, Armenia, South Africa, Lithuania, Poland, Russia, Ukraine, etc. etc.) as well as in the old.

13. In Belarus, where the balance of powers between the organs of government is distorted, and there is a preponderance of power in the hands of the President¹, it is particularly undesirable that a system should be created in which the imbalance of powers is effectively institutionalised in the person of the present incumbent.

The free exercise of the vote by the people of Belarus

14. 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. In this context the Commission cannot ignore the situation that exists in Belarus, where there are serious deficiencies in the freedoms which are normal in a democratic society, particularly freedom of expression. In Belarus there is constant and well-documented intimidation and harassment of members of the opposition, public associations and human rights groups. The United Nations Commission on Human Rights in April 2003, and the Parliamentary Assembly of the Council of Europe in April 2004, found it necessary to call for an independent investigation into the forced

¹ See the opinion of the Venice Commission on the constitutional amendments introduced by referendum on the initiative of President Lukashenko in 1996 appearing in document CDL-Inf (1996)008.

disappearance of a number of persons and the alleged involvement of law enforcement officials in those disappearances and in covering them up. No such investigation has taken place.

15. Article 140 of the Constitution of the Republic of Belarus stipulates that an amendment to the Constitution by referendum requires the votes of a majority of the citizens on the electoral roll. Since a total of 25 nationwide polls during the past two years on the issue of a third term for President Lukashenko are stated to have shown an average of 52% opposed to the idea (and in no case below 47% opposed), with only one poll showing over 30% in favour,² it is to be anticipated that the full resources of the State will be utilised to achieve a vote in favour of the proposal.

16. In this connection it may be recalled that the report of the OSCE/ODIHR Observation Mission on the presidential election held in September 2001, while noting a number of positive features in Belarus, in particular as regards the democratic awareness of the people, concluded that the election process failed to meet the OSCE commitments for democratic elections formulated in the 1990 Copenhagen Document and the Council of Europe standards. The mission found that during the months leading up to polling day conditions in Belarus were such that the election could not meet the requirements for a free, fair, equal, transparent and accountable election. In June of this year a Needs Assessment Mission of the OSCE/ODIHR visited Belarus. It found considerable unease and distrust among representatives of the opposition and civil society regarding the electoral process for the coming parliamentary elections. The importance of the referendum for the President personally, contributes to concern as to whether the referendum will be really free and fair.

Conclusions

17. As set forth above, the question submitted to referendum meets with a number of objections, in particular:

- It is partly in direct contradiction with the electoral law;
- It mixes an illicit privilege for a single person with a issue of great general importance;
- Its adoption would further aggravate the democratic deficit in a country already characterised by excessive powers of the President without adequate checks and balances;
- There are legitimate concerns as to whether a free and fair vote will be possible.

18. Some, but by no means all, of these concerns and objections could easily have been avoided if the President had limited the referendum to the constitutional issue, declaring his candidacy for a third term of office thereafter. That he has not done so, introducing in addition an obviously illegal personal element into the referendum question, shows an approach to the functioning of the state in direct contradiction with European democratic standards. The actions of the President of Belarus seem based on the assumption that a plebiscitarian vote of confidence of the people in his person would release him from any obligation to abide by the constitutional and legal rules in force in his country.

² Alex Znatkevich, *Transitions Online*, 15 September 2004