

Memorandum

Re: Analysis on the draft law "On making amendments and addenda to several laws of the Republic of Belarus on elections and referenda, and invalidation of the "Act on the Central Commission of Belarus for Elections and National Referenda"

From: Society for Comparative Legal Studies

Date: December 2009-January 2010

Introduction

The Draft Law "On making amendments and addenda to several laws of the Republic of Belarus on elections and referenda" and the subsequent invalidation of the "Act on the Central Commission of Belarus for Elections and National Referenda" was introduced in the House of Representatives of the Republic of Belarus on November 24, 2009 by the President of the Republic of Belarus. It was reviewed during the first reading on November 30, 2009 and was planned to pass after the second reading on December 10, 2010. This analysis was prepared by the Minsk based legal think tank the Society for Comparative Legal Studies to cover the most important trends in the electoral legislation the change in legislation brings along with its impact on the electoral process.

Findings

For the first time in the history of sovereign Belarus a draft law takes into consideration suggestions of the OSCE / ODIHR, the Belarusian expert community and civil society in the country.

Changes and additions touched more than a third of all articles of the Electoral Code, while a number of additional articles were introduced. The significant changes are the following:

- formation of electoral commissions, with the exception of the Central Commission, so that at least one third of them were representatives of political parties and public associations;
- simplifying the procedures for nomination of presidential candidates, candidates for the House of Representatives and the local councils of deputies, both by collecting signatures, and from political parties;
- change in conditions to conduct the election campaigns both indoors and outdoors (compared with 2006);
- permission of non-state financing of election campaigns for presidential candidates and candidates for deputies of the House of Representatives by establishing their own election funds;
- elections of local councils of deputies by the majority system in one round without having the threshold of voter turnout required for the recognition of the elections to be valid;
- further codification of election laws by including "the Act On the Central Commission of Belarus for Elections and National Referenda" in the Electoral Code of the Republic of Belarus, as well as the provisions of the decrees of the President about the members of the Central Commission for Elections and Referenda with an advisory vote and to declare income and property of candidates for President of the Republic of Belarus and their close relatives. The last is important, since the draft law and the subject of legislative initiative came to the understanding that temporary statutory acts of the Head of State can

not regulate an electoral legal relationship, especially in cases where the latter is one of the parties to the electoral process.

Conclusion

The draft law presented in the parliament can become a foundation for a more democratic electoral campaign in Belarus if relevant practice of its application is provided. Although significantly simplified the procedures for candidates nominating and their registration, the draft the principles of counting, summing up the elections and monitor the electoral process is not addressed. Additionally, the proposed rule of law is still not specific enough and leaves an opportunity for individual choice, not only for electoral commissions, but also to the authorities, giving the latter authority to organize and conduct elections.

On a general note, the authorities are one of the parties to the electoral process, interested in preserving the political alignment of forces in the country. Giving them significant power does not comply with the constitutional principle of equality of rights and in practice may again lead to elections that are inconsistent with the principles of true freedom and justice.

Detailed Findings

1. Electoral Commission:

The procedure of formation and empowerment of the Central Commission of Belarus for Elections and National Referenda (Central Committee) had been moved from the relevant law to the Electoral Code with minor amendments and with the subsequent cancellation of the Law on the Central Commission. This would provide a greater codification of the electoral legislation of Belarus.

The Central Commission receives an additional authority for the preparation of elections, as it has been doing this de-facto for over 10 years. Furthermore, the possibility to address the issues related to action (in Belarusian understanding, inaction as well) of lower election commissions was excluded from the powers of the Central Commission. Now the Central Commission will consider only decisions of these commissions, which significantly reduces the legal conditions for the appeal of illegal actions (inaction) of lower election commissions, and in many cases makes it impossible.

A new Article 33¹ "The members of the Central Commission with an advisory vote" was introduced in the Electoral Code. It was transferred almost unchanged from the provisions of Presidential Decree on members of the Central Commission with an advisory vote, passed before the parliamentary elections in 2000, 2004 and 2008. In addition, the right to nominate members with an advisory vote was given to presidential candidates.

It should be noted that the powers of these members are not sufficient for full public control over the activities of the Central Commission and are substantially less than powers of similar members of the authority in Russia (for instance, the most important duties of the control and obtaining copies of the Central Commission of Elections are excluded).

The Procedure for nomination of representatives to the electoral commission was modified.

For example, the requirement to have lower-level institutional structures for political parties for nominating their representatives to the commission is annulled. This provision will greatly facilitate the procedure for nominating representatives to election commissions for those political parties whose statutes makes no provision for mandatory availability of its subordinate structures (Regional - District (city) - the primary organization), as well as the nomination of candidates

for all district electoral commissions on elections of deputies of regional councils and territorial election commissions in the areas of Minsk, who exercise the powers of regional commissions. However, the law established the right of nomination to the regional commission only for regional organizational structures, and in the district (city) - the district (city) – for organizational structures. Taking into consideration the small amount of party organizational structures in Belarus, the main method of nomination will be collecting signatures of voters. Retained provisions of the Act on the nomination of party representatives in the village, rural territorial and precinct commissions practically feasible – only governing bodies of city (in cities under district jurisdiction), the organizational structures of political parties, public associations and meetings of primary organizations can nominate the candidates, but not all political parties in Belarus have them.

The conditions for nomination of representatives to election commissions by the work teams of organizations and citizens through the collection of signatures were made easier. Now the right to nominate will be given to organizations and their units which consist of not less than 10 people. According to this, for the nomination from the citizens 10 signatures are needed as well (previously for the nomination to the committee (not urban but for cities of regional subordination), village, rural territorial and precinct election commissions 30 signatures were needed).

The draft law introduces new requirements for the composition of the committees. In accordance with Parts 2-4 of Art. 34 all the bodies which form the committee (executive committee and presidium of the Council, in fact - only executive committees), consist of not less than one third of representatives of political parties and public associations. This provision does not apply only for the formation of election commissions in hospitals and other in-patient health care facilities, as well as outside the Republic of Belarus. The commission can not include judges, prosecutors, heads of local executive and administrative bodies. At the same time civil servants can not be more than one third of the commission.

The draft law does not set requirements for the inclusion of representatives of political parties and public associations in the commission. If there is an option, these representatives will be included by the subjective choice of the executive committee, which doesn't guarantee the presence of representatives of oppositional political parties in the commission.

The draft law also provides a right to attend the joint meetings of the registration authorities, as well as to appeal the decision in court for the representatives of organizations and citizens who have nominated a representative to the electoral commission.

It should be noted that this right may lead to the usage of primary documents by local authorities for the nomination of the representatives supported (formerly observers noted that in some cases, decisions were made without the presence of protocols or nominating signatures, as this happened in a closed manner). However, judicial review may be undertaken only in case of violation of procedures for the nomination - the lack of documents, a quorum of the Executive Committee or the Council for not voting, etc. The court, as before, will not be considering a reference to the professionalism or lack of professionalism of applicants, as the subjective right to make decision is given to the forming bodies.

In light of the foregoing, additional conditions of termination of office of members are being introduced. In accordance with Part 4 of Article 36 the powers of committee member may also be terminated in case of violation of the Electoral Code requirements during the formation of the commission.

2. Nomination and registration of candidates:

The nomination of presidential candidates and deputies is simplified by collecting signatures. Now the subscription form for nomination of the presidential candidate may include

signatures of voters residing in the territory of large administrative units - regional towns, districts, and in towns with district division - one area (previously - in one city, town, village council, and in towns with district division - one district). As for nomination of the candidates for local deputies, signature sheets must be signed by voters residing in the constituency, rather than administrative units within the district. This change is important because the earlier presence of at least one signature of in different administrative unit led to the invalidation of the signature sheet (if there is up to 17 signatures on it).

The draft law allows to collect signatures in all non-prohibited areas. This means that the authorities will provide the requirements, which will specify the areas where the collection of signatures will be prohibited.

An abolition of the requirement for the certification signature of the local executive committee leader, or his deputy is also important. This requirement was an additional bureaucratic hurdle only before. According to the new version of the law, the subscription list will be certified by a member of the initiative group who was collecting the signatures.

The procedure for nomination of candidates by political parties was simplified by the elimination of requirement for the country or district party organization availability. Therefore, when nominating candidates for election to Parliament Congress the party can nominate them in all districts. The procedure for the nomination of candidates for deputies of local councils is more complicated. The simplest would be to nominate candidates for regional, Minsk City Council by decision of the relevant regional and Minsk city party organization. The procedure for nomination of candidates for lower-level councils remains the same - this requires the presence of pre-election appointment of district (town) party organizations. Taking into consideration the administrative difficulties associated with the registration of party organizational structures, the primary nomination of party candidates in local elections will take place by collecting signatures.

In connection with abolishment of requirement for availability of party's lower-level organizational structures reduces the number of documents submitted by the party candidates for registration. The necessity (introduced into law in 2006 and de facto no longer required in 2008) to provide a copy of the certificate of state registration, located in the constituency of the organizational structure of political parties, as well as of the location of the organizational structure of a political party certificates issued by the regional department of justice or by the Minsk City Executive Committee is derived from the draft law.

The Article 68 of the Code is extended with provisions about the right of persons nominated for the presidency of the Republic of Belarus or for deputies, to inspect the verification of documents submitted for registration.

The candidate can be registered after submitting the required documents. The registration may be refused in two cases:

1. If more than 5 percent of the total tested voters' signatures in signature sheets found to be unreliable
2. If the declaration of income and property of the person nominated for the President or the deputy contains any false data. The Central Commission is to explain what untrue information on income and assets is substantial

This condition greatly simplifies the conditions for registration, since previously the Electoral Code provided for refusal of registration by presenting the nomination paper of any untrue information, including biographies.

3. Pre-election campaign:

The draft law introduces some innovations to the campaign. Despite the fact that it has not returned the provision for free meetings with voters, which was excluded in 2006, it provides

more opportunities for campaigning than in 2007 and 2008. Thus, in accordance with the provisions of the amended Article 45, the local executive and administrative bodies in consultation with the relevant election commissions determine the premises not only for candidates to meet with the voters, but also for any pre-election meetings organized by the voters. As for the events whose purpose is to implement pre-election campaign, they may be held only in authorized locations, but via notification. The draft law is not clear whether the meeting with voters in the yards are considered to be large-scale events. The possibility of a real campaign will depend essentially on application of this concept into practice.

The law establishes the equal right to use the premises and places for all candidates. This is the first time when it's said that joint meetings with voters can be held by mutual agreement of the candidates.

The developers of the draft law took into account the negative experience of campaigning during the parliamentary elections in 2008, when part of the candidates without having a possibility to publish separate and even general campaign materials, withdrew from the election. The draft law established the right for candidates to order a joint poster, the costs of the production should be paid by candidates in equal shares. We believe this rule to be a progressive and attractive to the party candidates.

As for the electronic media, the important change is the possibility of holding a debate between presidential or parliamentary candidates. The law does not establish the obligation to participate in the debate, but candidates wishing are able to get additional time to submit their program and vision for the country, territory and district development.

The most revolutionary change in the campaigning is the introduction of personal fund of presidential candidates or candidates for deputies of the Parliament. And if the value of the presidential candidate's fund is planned to be 3000 basic units (about 37500 U.S. dollars), which is insufficient for the campaign even in conjunction with the state allocated money (without any violations of financial discipline), for the parliamentary candidate's fund the upper limit is set in 1000 base units (about 12500 U.S. dollars), which is quite acceptable for the quality of the campaign.

In accordance with the provisions of the Article 48¹ election funds of candidates can be generated from the candidate's own funds (maximum 50 basic units for the elections of the President of the Republic of Belarus, 20 basic units for the elections of deputies of the House of Representatives), as well as donations of citizens of the Republic of Belarus. The size of donations from a citizen can not exceed 10 basic units for the elections of the President of the Republic of Belarus, 5 basic units for the elections of deputies of the House of Representatives. In addition, legal persons can make donations. The maximum size of donations from legal persons should not exceed 30 basic units for the elections of the President of the Republic of Belarus, 10 basic units for the elections of deputies of the House of Representatives.

It's forbidden to make donations to the election funds of candidates from:

- 1) foreign governments and organizations;
- 2) foreign nationals and stateless persons;
- 3) international organizations;
- 4) organizations with foreign investments;
- 5) citizens of the Republic of Belarus, under 18;
- 6) state authorities and local self-government;
- 7) organizations wholly or partially financed from the budget;
- 8) charitable and religious organizations;
- 9) anonymous donors.

To create his/her own election fund, a candidate for President of the Republic of Belarus or for the deputy of the House of Representatives should open a special election account in the Open Joint Stock Company "Savings Bank" Belarusbank". The ground of account opening is a written request of the candidate and a copy of the Central Commission (District Election Commission) decision to register a candidate.

The right to arrange the election funds belongs to the candidates who created them. Election funds can be used to pay for airtime and print space in the media; rental of facilities, equipment, transportation, communications services, as well as for production of printed campaign materials, consulting and promotional work (services), stationery goods and other expenses directly related to the conduct of election campaign.

As a result the additional responsibility for the unlawful use of a fund was introduced. Thus, in accordance with the new provision in the Article 49, the Central Commission or the district election commission may revoke the registration of the candidate without any notice if there is a fact of exceeding the limit of electoral funds or spending of other funds over the same limit, which means spending more than 50 basic units for candidates for the President of the Republic of Belarus, and more than 15 basic units for a candidate in the House of Representatives.

4. Voting and counting:

The draft law modifies the principles of transparency in the early voting procedure. Thus, in accordance with the new provisions in the Article 53 of the Code, the chairman or the deputy chairman of the election commission is to glue up the slot chairman or deputy chairman of the election commission and member of the election commission put their signatures on this sheet. Opening slots for dropping the ballots in the ballot box is produced daily before the start of early voting by the chairman or deputy chairman of the election commission. The observers, foreign (international) observers and media representatives may be present when sealing and opening the slots for dropping the ballots in the ballot box. The storage of the boxes should be provided by the chairman of the commission.

During the early voting day the chairman or deputy chairman of the election commission is to keep record, which lists the number of ballots received by election commissions, the number of citizens who have received ballots to vote (last day of early voting - the total number of citizens who have received ballots to vote), the number of damaged ballots and the number of unused ballots. Protocol is to be signed by the chairman or deputy chairman and member of the commission. Copy of the protocol is to be posted for public inspection in the premises of the election commission.

If the provision on sealing the slot was moved from the decision of the Central Electoral Commission accepted after parliamentary elections in 2008 (which did not help to avoid violations and falsification during the process), the disclosure of the number of votes of citizens is a completely new chapter.

There are some innovations introduced in vote counting procedure at a polling station. Now all the stages of the vote count must be delivered by the chairman of the committee, including information about the number of voters who participated in early voting, voting at the location, and voting on election day in the premises of polling stations.

After the counting of votes in accordance with new requirements of Article 55 of the Code the district commission should conduct a meeting, during which the results of the counting will be confirmed and documented. The dissenting opinions of the committee members, as well as complaints about violations, if there are some, can be discussed and considered during this meeting.

The draft law does not provide for the publication of the results distinguished by groups (citizens who participated in early voting, voting at the location, and to vote on election day in the

premises of polling stations) separately from one another. This means that the protocol will contain a summary that will not allow at least indirectly, to determine whether the results were falsified or not.

One of the positive aspects of the law is an abolishment of the 50 per cent voter turnout limit which allows to recognize the elections to be valid. The adoption of this proposal means that elections to local councils will definitely happen in all districts. In addition, the adoption of this rule will reduce the motivation to force people to vote at least on the election day.

5. Public control:

Provisions of the Code which relate to the capacity of public control over elections, voting and counting procedures had been a subject of minimal changes. For example, Article 13 of the Code was amended so that the voluntary associations and political parties involved in the monitoring process could involve not only their members but also representatives. In addition to this, the rights of observers were complemented by the right to attend the recount of votes meetings, and make referrals to the corresponding or a higher commission or to the prosecutor in order to eliminate the violations of the Code and other legislative acts of the Republic of Belarus on elections, referenda or recall of a deputy.

Still, the observer remains to be helpless against the arbitrariness of a chairman. Since the law does not entitle the observers to observe the counting of votes, we can assume that in most cases the observer can not perform his/her functions and can only confirm whether the votes had been counted or not, but could neither confirm nor deny the accuracy during the counting process. This definitely defeats the purpose of public observation.

6. Some issues concerning resolving electoral disputes:

The draft law proposes to introduce changes in two more cases of election disputes in court, but does not change the existing practice of appeal only those disputes that are set out in the Code, which gives no right to both administrative and judicial review of most disputes.

The clearer procedure of Commission's making decision in administrative disputes should be noted as well. It is proposed to introduce a new Article 49.1 "The procedure and terms of appeals consideration on the violation of legislation of the Republic of Belarus on elections, referenda, voting on recall of a deputy or a member of the Council of the Republic". In accordance with this article an appeal on the violation of Belarusian legislation on elections, referendum, voting on recall of a deputy or a member of the Council of the Republic, received by the Commission, public bodies or other organizations, are to be discussed within three days from the date of receipt. Appeals, which contain information requiring verification shall be considered no later than ten days from the date of receipt.

The applicant has a right to get acquainted with the materials related to his appeal.

Complaints about the decisions of the commissions shall be considered at meetings of the commissions. The date, time and venue of the meeting are to be reported to the applicant, who may attend the meeting.

The Commission, having considered the complaint, takes one of the following decisions:

- to annul the contested decision in whole or in part and make decision based on the situation;
- to reject the complaint;
- to leave the complaint without consideration, if the applicant was not complied with the procedure or terms of filing a complaint under this Code.

Superior commission may consider an appeal on a matter within the competence of a lower commission if necessary.

The applicant's right to learn the materials is completely new. In addition to this, previous legislation legally (not actually) did not allow the superior commission to override the decision of the lower commissions.

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