

Concept for the Electoral Code of the Republic of Belarus

Main Directions

The transition to democratic elections in Belarus and their institutionalization will require a revision of the electoral legislation. That revision must lay the foundation for fair and free elections and sustainable democratic development in the long run. It should be understood that the first free elections after a period of authoritarian rule are often held without significant difficulties. The political rivals feel the importance of the historical moment of transition to a democratic form of government, whereas the voters are united through a perception of freedom. In subsequent electoral processes, political competition intensifies, voters give preference more clearly to different political actors, and political confrontation may lead to polarization of the society. The preservation and consolidation of democratic elections as an institution will be associated, among other things, with the success of the model of organizing the electoral process and the viability of the chosen approaches. This concept outlines the main directions for reforming the electoral legislation and proposes certain solutions based on the comparative experience of countries in transition (i.e. transition to a democratic form of government) as well as on scientific research. Each planned direction is accompanied by a rationale and key provisions to be enshrined in the legislation.

The provisions of the draft Electoral Code will be based on the premises laid down in the draft Constitution of the Republic of Belarus prepared by the Public Constitutional Commission. At the same time, some of the solutions proposed in the concept provide for possible adjustment of the text of the draft Constitution.

Each of the topics in that concept deserves a separate expert discussion, which can be followed by steps to formulate provisions of the Electoral Code.

1. Electoral system

Direction. Protection against frequent changes.

Rationale. One of the significant problems in new democracies consists in frequent changes of electoral legislation in the interests of the current political majority. To ensure the stability of the political competition rules, it is necessary to protect the fundamental elements of the electoral process from such frequent changes. This applies primarily to the choice of the electoral system as well as of the system and methods of forming election management bodies (commissions).

Electoral systems are usually divided into two main types: majoritarian and proportional. However, there is a considerable variety of systems within each type and there are also mixed systems containing elements of both types. A conscious choice of an electoral system is a matter of constitutional construction. Each electoral system influences intra- and inter-party competition and thus sets the preconditions for the formation of a particular political landscape. For example, studies have shown that, as a rule, the first-past-the-post majoritarian electoral system with single-member constituencies over time tends to lead to a two-party political system. Proportional systems are conducive to more parties being represented in the parliament and prevent excessive concentration of power in the hands of one political force, but can complicate the formation of a government, etc.

What matters for consolidating a democratic form of government is not only the choice of an electoral system but also its stability. Stability discourages political forces from trying to gain an advantage in elections by changing the rules of the game in their favor, encouraging them instead to form a democratic tradition of playing by the rules.

Key provisions. The choice of electoral system remains the prerogative of political players, who must take into account both international experience and scientific research. The electoral system can be defined in both the Constitution and the Electoral Code. It is important for both the Constitution and the electoral legislation to enshrine a list of provisions that can only be changed if an adopted law on amendments is reapproved by the parliamentary majority of the next convocation (provided that the parliament is elected in a regular rather than early election).

2. Legislation

Direction. *Codification and parallel development of related laws.*

Rationale. Codification of legislation allows avoiding contradictions between provisions of different laws after their (inevitable) modification. The 2020 Venice Commission Report on Electoral Law and Electoral Administration in Europe recommends codifying electoral legislation. An Electoral Code must also contain provisions on holding referendums. There is a risk that the referendum instrument may be used in a populist way to resolve conflicts between elected bodies in the period when democracy is taking shape. In view of that, the adoption of a separate law on referendum carries the risk of opportunistic modification of the principles for holding referendums in such a way that, as a result, elections and referendums will be conducted on the basis of different approaches.

In the process of developing an Electoral Code, an important subject to be discussed should be the role of political parties and other actors in the electoral process. In view of the expected instability of the party system, the likely emergence of new parties and the growth and decline of the influence of the existing ones, it is proposed that the role of parties in the administration of elections be restricted and that they be provided with the opportunity to focus on their main role as subjects of political competition. The provisions of the Electoral Code should be developed in parallel with the elaboration of principles and approaches to the regulation of the activities of parties.

Key provisions. Priority should be given to developing an Electoral Code rather than separate legislative acts for different types of elections or for regulating the activities of individual entities involved only in the electoral process (for example the CEC). The provisions on referendum should be enshrined in a separate section of the Electoral Code. Related legislation should be developed in parallel; and special attention should be paid to the role of political parties.

3. Organization of elections

Direction. Maximum autonomy of the system of formation of election management bodies (commissions) from political parties and electoral competitors. Formation of professional election management bodies (hereinafter – EMBs) of highest and middle level.

Rationale. In many countries in transition, the formation of election management bodies was based on the principle of political representation – election commissions were formed entirely or primarily from representatives of political competitors participating in the elections. The underlying idea was that this approach would strengthen the political competitors' trust in the integrity of the elections during the transition period. It should be noted that such approach to election management body formation is hardly in use in developed democracies, especially in Europe. The proponents of this model assumed that as trust in the elections grows, the need for political representation declines.

It must be acknowledged that this idea failed to justify the hopes placed in it. Under conditions of intense political competition, it turns the struggle for votes into a struggle over who will count the

ballots. Rather than build trust in the process, political representation in the commissions sows mutual suspicions of manipulation. Competitors who succeed in controlling election commissions try to get the most out of it. Political forces not represented in the commissions are confident that their votes will not be counted fairly and that the way to protect their votes lies precisely in being represented in the commissions. Registration of phantom parties to obtain a representation quota in election commissions and political competitors trading seats in commissions – these are just some of the results of the practice of forming commissions from representatives of political parties and candidates.

The path to building trust in the honest work of the EMBs lies elsewhere – it requires maximum autonomy of the process of EMB formation from various political actors as well as ensuring professionalism and transparency of in the work of EMBs. To form the CEC, middle-level commissions, as well as precinct commissions, the principles of professionalism and maximum involvement of ordinary voters in the organization of the process as election commissioners should be combined; this will contribute to enhancing civic education and instilling democratic values.

Proponents of the party/political principle of formation of the commissions often state that membership in commissions helps parties to monitor the integrity of their rivals or the integrity of the performance of functions by the commission itself. The function of such an – essentially political – struggle can be achieved even without membership in a commission – it is sufficient for a political party to be able to send its observers within the framework of the rules that grant observers rather broad powers. Thus, the benefits of party representatives' participation in the work of the commissions are implementable even without membership in the commissions.

International experience shows that party representation in commissions does not always have a positive effect on the commissions' decision-making ability, nor does it always protect them from the political influence of larger parties or their alliances; and it often results in a situation where parties underrepresented in the commissions call the election results into question.

Key provisions.

CEC: An odd number of members (for example 9) who will be appointed by the parliament from the lists of candidates presented by non-governmental and non-political institutions and associations enjoying public trust (e.g. three members from each of the lists of the Academy of Sciences, the Association of Notaries, the Association of Advocates or Lawyers, the Council of Rectors of the Republic of Belarus, etc.; a list can include up to 6 candidates). CEC members must be provided with guarantees of their independence and relief from removal at least to the same extent as Constitutional Court judges. The term of office should be no less than one electoral cycle.

Regular rotation of a part of the CEC members is often seen as a guarantee that the composition of the CEC will not reflect the current political configuration. In the period of transformation, it is a utopia to expect that the political configuration will be stable. Therefore, every opportunity to change the CEC composition will represent an opportunity to influence the outcome of elections.

Apart from the fact that the replacement of a part of the CEC members creates the risk of the emergence of a political majority in the CEC, it can lead to loss of the accumulated experience. A one-time replacement of all CEC members is justified because it presupposes a balance of interests of many political forces within the entire commission, even if the CEC members do not formally represent political parties. In addition, the appointment of a new CEC composition is easier to organize well in advance of an election compared to mandatory appointment of some members.

Middle-level commissions: The CEC will form in each oblast, on a competitive basis, a roster (“pool”) of candidates who will be trained to serve on middle-level commissions. They will be required to pass an examination and to periodically receive advanced training. Remuneration must be provided for completing training and work on the commissions. The creation of such a roster can take up to 1 year.

Precinct commissions: These will be formed from civilian volunteers. They will receive basic training (in-depth training for chairpersons) and take a procedure proficiency test. They will be entitled to remuneration for work on the commissions. Political parties can help to ensure that their members and supporters receive training and have a chance to be appointed as election commissioners. Under such commissioner appointment system, the distance between the parties and the commissioners will be maintained and the commissioners will receive the knowledge required for functioning independently of the parties.

The EMB structure must be consistent with the electoral system and applicable to various types of elections. If the majoritarian component of the electoral system is preserved, it is proposed that middle-level commissions be formed at the level of majoritarian constituencies for the election of deputies. That way, a set of district commissions will be formed each of which will be responsible for about 60 PECs. This commission structure will be used for presidential and parliamentary elections as well as for republican referendums. For the holding of local elections, oblast and rayon election commissions will be formed whose role will be limited to establishing the results of elections to the local councils of deputies of the respective territories. When local and national elections are held simultaneously, some of the rayon commissions will act as district commissions for the national elections. In the event of transition to an exclusively proportional system, it is proposed that middle-level commissions for holding presidential and parliamentary elections as well as for republican referendums be formed at the level of rayons and cities of oblast subordination. For the conduct of local elections, election commissions will be formed whose role will be limited to establishing the outcome of the elections to local councils of deputies of the respective territories.

4. Voter registration

Direction. Creation and use of a Unified Voter Register on the basis of the Register of Citizens.

Rationale. As regards voter registration, today the most progressive option is a Unified Voter List, to be formed on the basis of the Register of Citizens. Belarus is a fairly centralized country, so the transition to a unified list will not be an overly complicated process. At first, the CEC may be responsible for the creation and maintenance of the list, but later on other bodies may be created or these functions may be entrusted to citizens registration offices. Transparency of voter lists must be ensured with due regard for personal data protection, i.e. voters should be allowed to check only their own data in the list.

Key points. The right to vote must be universal without exceptions. The Unified Voter List be formed on the basis of the Register of Citizens and permanent registration addresses. It should be possible for a voter to be included in the list on the basis of registration of temporary residence. Out-of-country registration can be carried out on the basis of an application concurrently with removal from the in-country lists. Data on the total number of voters in the country and at each precinct, disaggregated by sex, must be subject to mandatory publication.

5. Candidate registration

Direction. Ensuring political pluralism and fair competition in elections.

Rationale. Admission to participate in elections must not become an instrument of political struggle, or else elections will lose their democratic essence. The main criteria for admitting a party or candidate to an election are the availability of minimal support from the electorate and a serious intention to participate. In practice, these criteria are controlled by instruments such as proof of voter support and electoral deposit.

Proof of minimal voter support depends on the electoral system in place and the size of the electorate. International good practice suggests collecting signatures of no more than 1% of the voters in the constituency. Parties represented in parliament can be exempted from this requirement. Verification of signatures must be based on clear criteria, be transparent, and leave room for correcting minor technical deficiencies.

The size of the electoral deposit should demonstrate the seriousness of the competitor's intentions to participate in the election, while not being a property qualification. The simultaneous use of both deposit and collection of signatures in support of potential candidacy should be avoided.

Key provisions. Candidates or parties meeting the criteria of minimum support and serious intentions are to register for participation in the election. Complaints should only be allowed in case of refusal of registration. The number of support signatures required for registration will depend on the chosen model – either a reasonable minimum number of known valid signatures or a larger number of signatures with clear criteria for verification. The electoral deposit, if applied, is to be returned to candidates and parties achieving the required minimum result (for example 1% of the votes in the constituency).

6. Election campaign

Direction. Providing opportunities for free competition. Restricting the possibility to cancel registration of a candidate.

Rationale. The basic conditions for free campaigning and competition are created through respect for and protection of fundamental rights and freedoms, of which the main during an election period are freedom of opinion and freedom of speech, right to peaceful assembly, freedom of association, and freedom of movement. These rights must be protected at the level of the Constitution, and the electoral legislation must be instrumental in providing interpretation of disputable issues in the best interests of the voters. A fair competitive environment enables candidates and parties to compete for votes using their ideas and arguments, skillful campaigning and persuasive platforms, rather than “shooting down” the opponents. Cancellation of registration means actual deprivation of the right to be elected; therefore, such measure can only be applied in extreme cases – for example when there is indisputable evidence that a candidate has committed certain criminally punishable acts.

Key provisions. Interpreting in the best interests of the voters the protection of fundamental rights and freedoms laid down in the Constitution and other laws. Administrative bodies are obliged to maintain neutrality. The use of state resources by candidates for campaign purposes must be prohibited. Political parties and their representatives, including their elected representatives or representatives holding public offices, have the right to actively participate in the campaign, provided that they temporarily resign from office, with the possible exception of the President and the Prime Minister. Disqualification from the election race should only be possible on very narrow grounds; such decisions can be entrusted a specialized court (see below), if the CEC has issued an opinion to this effect, with the possibility of appeal.

7. Election campaign financing

Direction. Ensuring transparency and accountability of candidates' finances. Providing a wide range of opportunities for financing candidates.

Rationale. Campaign finance issues are crucial for the quality of elections and should be regulated in a comprehensive way. Without adequate financing, candidates and parties have little chance of campaigning effectively and getting their message across to voters. At the same time, transparency and accountability must be guaranteed. It is necessary to envisage opportunities for both public and private funding, including all possible types of donations, but without encouraging excessive spending.

Party development requires the inclusion of provisions on certain financing of the activities of parties from the State Budget in proportion to their election results. These provisions can be enshrined in electoral legislation, but it is better to have these provisions in a specialized law on political parties.

Key provisions. Public funding will be allocated in the form of free venues for meeting with voters, general campaign posters, and free airtime on state media. Private donations will be allowed within certain limits – from individuals or legal entities, in cash and in kind. Anonymous donations will be prohibited. Regulation of third-party participation in election campaigns will be provided for, so as to ensure transparency and proper control. The established spending limit should not be too high.

Candidates will be required to open accounts for their campaign fund. If the campaign period remains no more than one month, it is deemed optimal to submit three mandatory reports – at the beginning of the campaign, before the election day, and after the election day. The publication of the detailed reports will be mandatory. The CEC's role in regulating funding can be limited to consideration of complaints, but it can also be much more active, up to initiating investigations.

For violation of the requirements of the legislation on electoral campaign financing, proportionate sanctions should be established, primarily relating to warnings and public dissemination of information about violations, as well as financial sanctions (fines). Cancellation of registration can be envisaged for exceeding the maximum spending limit.

8. Mass media

Direction. Creation of the basic framework for media work during an election campaign.

Rationale. General legislation on freedom of opinion and freedom of speech will be crucial. However, some specific election-related points should be minimally regulated in the electoral legislation. "Minimally" is the word, because in matters pertaining to media and to freedom of expression, it is always better to leave more space than to overregulate.

When developing the Electoral Code, account should be taken of approaches to regulating media activities in general. It is not enough to prescribe in the Electoral Code the principles of media activities within the framework of an election campaign, since such principles may conflict with the general approaches to regulating media activities. The overall approach should take into account the special role and responsibility of the state media, their duty to ensure equality and objectivity in the coverage of the campaign and individual candidates. While private electronic media (radio, TV) may also have an obligation to provide equal opportunities for candidates, the requirement of objectivity can only be applied to them if editorial freedom is respected. Here, a prerequisite for

regulation is the use of public resources (frequencies) by such media, which must not be used as a ground for regulating the press and Internet resources. The latter – as well as electronic media – can also initiate self-regulation by creating their own complaint mechanisms independent of the state.

Oversight of the media during elections and referendums must be entrusted to an independent and adequately resourced oversight body with the mandate to conduct comprehensive media monitoring. Professionalization or political balance of the composition of that body will be a prerequisite for its impartiality and professionalism. The consideration of media-related complaints must be clearly regulated to ensure effective remedies.

Key provisions. Entrenching the principles of impartial coverage, editorial policy independence, equal access of candidates to media and equal access of media to information. Anchoring the definition of political advertising, including on social media, its regulation and transparency, adhering to the main goal: that it should provide voters with the opportunity to make informed choices. Prevention of advertising in news reports and mandatory labeling of non-editorial materials. Existence of a specialized independent body overseeing the media during election campaigns.

9. Consideration of complaints

Direction. Separating the election organization function from the dispute resolution function. Clear responsibility for and jurisdiction over various categories of complaints.

Rationale. The system of election management bodies should focus on organizing elections. When it is entrusted with complaint consideration functions, this turns the commissions into platforms for political showdowns, entails considerable time and resource costs which often fail to provide effective protection of violated rights. Proper handling of electoral complaints requires appropriate legal qualifications and experience which are not required for the organization of elections.

To form a sustainable and uniform practice of applying the legislation, it is necessary to centralize the complaints handling system. It should also be borne in mind that for certain political actors the filing of complaints can be one of their election campaigning methods. The complaint handling bodies must have sufficient authority and independence.

Key provisions. Complaints against decisions, actions or inaction of any election commissions prior to the day of voting will be sent to the CEC, which will consider them in an administrative proceeding. A specialized court will be created to consider appeals against the CEC's actions and against other entities; it will operate only during electoral periods. The specialized court will include a sufficient number of judges to ensure its work in two instances: comprising of 3-5 judges (first instance) and in plenary sessions (appellate instance). The judges of the specialized court will be randomly selected for the election period by the CEC from the lists of oblast and high court judges.

Before the day of voting, the specialized court will also consider complaints against decisions, actions or inaction of bodies other than election commissions or electoral competitors. The terms of consideration will be sufficient to ensure effective protection of violated rights and a comprehensive study of the circumstances of the complaints.

On election day, complaints against violations, as well as any comments and suggestions, will be recorded by the PEC and subsequently analyzed by the CEC to determine whether the violations affected the election outcomes. Appeals against voting results in individual election precincts or

districts or against election results will be heard in court; and the right to file such appeals will be vested in voters, observers, as well as candidates and parties participating in the elections.

Most of the complaints will be finally considered by the first instance of the specialized court. Appeals to the plenary court will only be possible in limited categories of cases – such as removing a candidate or party from the election race or challenging the results of voting (elections).

10. Observation

Direction. Ensuring maximum transparency of all stages of the electoral process.

Rationale. Transparency is the cornerstone of the electoral process. Sufficient level of detail and clarity of the electoral legislation will help ensure transparency and freedom from manipulation by administrative authorities.

Key provisions. The right to observe the process must be granted to civic and international observers, media representatives, representatives of political parties and candidates. It is necessary to ensure the right to have unhindered access to all stages of the electoral process and to obtain information on those stages. The law should provide for observers' rights to review electoral documentation, attend meetings, observe electoral activities at all levels, and receive copies of decisions and protocols.

Restrictions on the observers' rights must be aimed solely at compliance with their observation function and include a ban on interference in the conduct of voting, campaigning at polling stations, and assistance with voting and conduct of voting. Additional restrictions in the form of a ban on campaigning during the campaign period must be imposed on civilian and international observers. Observers will be guaranteed the right to receive a certified copy of vote count protocols.

11. Day of voting

Direction. The legislation should describe procedures guaranteeing the secrecy of vote, safeguards against abuse, ensuring vote counting transparency, and provide guarantees for the transmission of accurate voting results.

Rationale. Many technical aspects related to election day will be regulated in bylaws (CEC resolutions). But the fundamental elements that will contribute to preventing fraud must be enshrined in the code, in particular for preventing politically motivated interpretations of legislative provisions.

Key provisions.

Voting will only take place on the election day. Clear criteria must be introduced for voting not carried out in the premises for voting. Strict requirements must be established regarding the accessibility of polling stations for persons with disabilities. Prohibition of the presence of unauthorized persons at polling stations.

Vote counting and establishment of results. Voting results from polling stations and copies of protocols will be posted on the CEC website as soon as they are ready. When serious discrepancies have been discovered in a PEC's protocol by the higher commission, it must adopt a decision on recount of votes. A decision to recount the votes can also be passed by court on the basis of a complaint. The recount must be conducted as transparently as possible.

All the election materials must be stored until all possible deadlines for appealing have expired.

12. Referendum

Direction. Ensuring equality of the parties and preventing abuse on the part of the state.

Rationale. Historically, referendums in Belarus were initiated and conducted under the control of the authorities; therefore, the new legislation must limit the ability of the state to manipulate the provisions on the conduct of referendums; it also must expand opportunities for holding referendums initiated by citizens. The main goal should be to create equal opportunities for supporters and opponents of the referendum question.

Key provisions. All referendum timeframes must be clearly spelled out, so that the state bodies will have no opportunities for adopting any timing-related decisions at their discretion.

As regards registration of initiative groups, provisions must be in place to allow correcting minor errors and omissions. The signature verification provisions must focus on establishing the required number of valid signatures.

Equality of opportunities must be guaranteed for both supporters and opponents of a referendum. Campaigning provisions must be well-defined, so as to ensure clarity regarding their applicability to referendums and appropriate guarantees of equality of opportunities and access for referendum participants. Sufficient time should be provided for the campaign. Administrative bodies are obliged to maintain neutrality. The use of state resources for campaign purposes must be prohibited. Political parties and their representatives, including their elected representatives or representatives holding public offices, have the right to actively participate in the campaign, provided that they temporarily resign from office. Campaigning restrictions apply to persons in charge of organizing a referendum as well as those involved in its observation.

Equal financial opportunities must be ensured. Financial transparency and accountability must be provided similarly to how it is done in the case of elections.

The transparency of the entire referendum process must be guaranteed, starting from the creation of initiative groups and ending with the announcement of the results.