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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

O P I N I O N

ON THE BULGARIAN LAW ON POPULAR CONSULTATION

by

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Opinion on the Bulgarian popular consultation bill

Examination of the law on popular consultation prompts to the following observations:

I. CONCERNING THE FORM

Since the copy of the bill which was sent to us, in French, bears no date, signature or stamp, one may ask from the very outset what its exact nature is and, more specifically, what legal status such a document has.

Where does it stand in the hierarchy of legal rules?

Is it a constitutional law, an institutional law or simply an ordinary law?

This question is all the more relevant given that under paragraph I of the bill's "Final Provisions," the law is to be enacted as provided for in paragraph 3, sub-paragraph 3 of the transitional and final provisions of the Constitution and according to Article 42, paragraph 2 and Article 136 of the Constitution.

From these constitutional provisions, it can be seen that:

1. The laws required by the Constitution shall be passed by the National Assembly within three years.

2. The organisation and procedure for the holding of elections and referendums shall be established by a law.

3. Citizens shall participate in the government of the municipality both through their elected bodies of local self-government and directly, through a referendum or a general meeting of the populace.

It is appropriate here to add to these provisions other details provided in the Constitution regarding national voting procedure:

1. Under Article 10, all elections and national and local referendums shall be held on the basis of universal, equal and direct suffrage by secret ballot.

2. Article 98 provides that the President of the Republic shall schedule the elections for a National Assembly and for the bodies of local self-government and shall set the date for national referendums pursuant to a resolution of the National Assembly.

By virtue of these constitutional provisions, the referendum, at both national and local level, is explicitly laid down as a means of citizen participation in collective decision-making, and is by equal and direct universal suffrage, but its organisation and procedural details are to be regulated by a law which shall in turn be passed by the National Assembly within a period of three years.

Two comments must be made at this point.

The first concerns whether or not the law on popular consultation will in fact be adopted by the National Assembly within the three-year deadline set by the Constitution.

The second concerns the scope of this law.

Since the Constitution merely specifies that a law must regulate the organisation and procedural arrangements of a referendum, can this law go beyond regulating the practicalities of the actual voting procedure? In other words, can the Constitution simply provide for the principle of the referendum and leave it to a simple, ordinary law, to regulate not only the technicalities of the voting procedure but when the referendum can be used, the issues it may address and the persons who will be authorised to initiate it? Is it possible for an ordinary law to thus "add" to the Constitution? Should it then be assumed that the law on popular consultation is itself a constitutional law? Neither the Constitution nor the bill provides the answer to this question.

II. CONCERNING THE SUBSTANCE

A. General provisions

1. The first article of the law establishes the principle that popular consultations through which citizens directly take part in State or local government can deal only with matters which fall under the jurisdiction of the National Assembly and town councils.

Article 84 of the Constitution enumerates a number of the National Assembly's powers, leading one to conclude that national referendums can concern only issues which fall within this sphere of responsibility. However, careful reading of Article 84 makes it clear that this is not the case, given that this article does not present an exhaustive list of matters falling exclusively under the National Assembly's jurisdiction. It merely lists specific powers in several precise areas. Does this mean, then, that the National Assembly has general and exclusive legislative authority extending to all areas of national activity? An affirmative answer to this question is all the more compelling since nowhere in Chapter V regarding the Council of Ministers is there any mention of specific governmental powers.

It indeed appears that there is no strict distribution of powers between the government

and parliament in the Bulgarian Constitution. It is difficult to see, given this lack of a detailed distribution of their respective powers, what would be contested in the disputes between the National Assembly and the Council of Ministers referred to in Article 149-3 of the Constitution and over which the Constitutional Court has jurisdiction.

Accordingly, only one of the following can be true:

- either the National Assembly has broad law-making authority from which no area could possibly be excluded, in which case it is difficult to understand why the first article of the law on popular consultation stipulates that such consultations can concern only matters which fall under the authority of the National Assembly, since this authority would be all-embracing.

- or the National Assembly has only special jurisdiction, with ordinary legislative authority falling to the government; however, if this is the case, the Constitution should have been more explicit so as to make clear what each sphere of authority covers.

Such an explanation would clarify precisely what powers the National Assembly does not have.

2. Under Article 3 of the law, popular consultations can involve the entire country, one or several municipalities, a locality or a part of a locality.

Would it not be worthwhile to specify the exact nature of these administrative territorial units? The Bulgarian Constitution, in fact, mentions only the municipality and the region. It does provide for the setting up of other administrative territorial units by law. But can it be assumed that a "locality," with no further clarification, and, a fortiori, a "part of a locality" are administrative territorial units as provided for in Article 135 of the Constitution?

Furthermore, how will these "localities" and "parts of localities" be demarcated?

B. National Referendums

1. Under Article 7 of the law, "the decision to organise a national referendum is taken by the National Assembly by simple majority of the total number of representatives" and Article 8 stipulates that "proposals" to organise a referendum may be presented to the National Assembly by at least one-fourth of the total number of representatives, the Council of Ministers and the President of the Republic.

We would make several comments regarding these two articles.

a. First of all, what is a "simple" majority of the total number of representatives? It is possible to speak of simple majority, as opposed to absolute majority, that is, when no specific total number of votes is required. For example, the candidate in an election who comes out ahead is elected with no minimum number of votes required.

However, when one speaks, as in this case, of half plus one of the total number of representatives elected to the Assembly, this cannot be termed a "simple" majority, a term better applied to a passing vote which requires the majority of voters, of whom there may, on occasion, be very few.

As there are 240 members of the National Assembly, the "simple" majority is 121. If few representatives are present for the vote, it may be difficult to obtain this majority.

b. Why was this law designed so that the decision to organise a referendum depends upon the National Assembly's majority vote?

In classical constitutional theory, the national referendum is generally considered to be a way of consulting the population directly under important, often serious, specific circumstances. The referendum may be either for consultative or decision-making purposes; but in either case, it calls upon the population to give an opinion on a vital issue. The referendum is thus a form of direct democracy, contrasting by its very nature with instruments of representative democracy, in which the nation's elected representatives have comprehensive decision-making power.

This explains why, in a parliamentary democracy, the referendum can only be used on an exceptional basis, is bound by specific limitations and handled with great caution.

Since voting by referendum is used to consult the nation directly, over the heads of the Chambers, this procedure is usually entrusted to bodies other than the parliament, which, furthermore, never much appreciates this mechanism.

The power of initiative is often, therefore, given to the head of State. In his hands, it is a weapon which enables him to prevail over parliament's hostility to or obstruction of his proposals.

The Bulgarian law reflects a different perspective. The decision to organise a referendum is conditioned by the Assembly's approval. Since members of parliament have never been, by temperament and by interest, favourable to referendums, this mechanism may turn out to be too cumbersome to be effective, given the requirement for a majority vote calculated not on the number of members of the National Assembly present, but rather on the total number of members.

It is true that under Article 8, the request, but not the decision itself, may be initiated by one-fourth of the members of parliament, the Council of Ministers or the President of the Republic. However, no final decision can be taken without a vote of consent by the majority of parliament.

Therefore, when the President of the Republic, elected by universal suffrage, wishes to put a question to the nation which he feels is vital to the country's interest, the organisation of such a consultation may be refused by the Assembly's hostile vote. This is courting considerable difficulties. Furthermore, if the President's desire to organise a referendum is justified because the parliament is opposed to a measure which he feels is essential for the nation, this deadlock will be difficult to resolve.

The first article of the Bulgarian Constitution stipulates that "Bulgaria shall be a republic with a parliamentary form of government". However, this same article specifies that "The entire power of the State shall derive from the people. The people shall exercise this power directly and through the bodies established by this Constitution."

This clearly means that the people have two different ways of exercising their supreme power: directly (by referendum ...) and indirectly (through their representatives).

But what becomes of direct participation if it is conditioned, as appears to be the case here, by the representatives' approval?

It would be closer to the truth to say that the representatives of the people exercise, on behalf of their constituents, true supreme power, either by directly taking decisions themselves or, on occasion, by allowing consultation of the population by referendum.

There is a certain similarity between the Bulgarian law and the French Constitution of 1958 which also provides for two forms of participation. Under Article 3 of the French Constitution, "national sovereignty belongs with the people, who shall exercise it through their representatives and by referendum."

The Constitution then gives further explanation by providing for two possible types of referendum:

- that provided for in Article 11 which allows the President of the Republic, on the proposal of the Government or on a joint motion from the two assemblies, to submit bills regarding specified areas to popular referendum.

- that provided for in Article 89 which stipulates that a revision of the Constitution cannot be completed unless an amendment passed by the two assemblies in identical terms is confirmed through popular referendum. But this article also specifies that if the President of the Republic does not wish to use the referendum procedure, he can simply go before Congress (both Chambers together) to have the bill in question approved by a three-fifths majority of the votes cast.

It is clear that in France the two channels for expressing national sovereignty, through parliament and by referendum, are separate and distinct. They can, of course, be combined under some circumstances. However, their respective purposes being different, they are not entrusted to the same authorities nor put into the same hands.

This is not the case in the Bulgarian law on popular consultation. This may possibly be a source of difficulties in the future.

2. Under Article 18 (1) "the proposal to be decided upon through national referendum is considered to be passed if more than half of the total number of electors entitled to participate in national referendums vote for it.

This requirement appears to us to be excessive. As we have understood it, the referendum is passed only if the proposed text is approved by more than half of the national electorate, not simply half of the number of people who voted. This means that if just 60% of the eligible voters actually voted, the referendum would not be positive unless 50.1% of registered voters were in favour, rather that 30.1% of the voters, when only 60% of the electorate turned out to vote.

Excepting massive, enthusiastic approval by an overwhelming majority of the population, no referendum would have a chance of being approved.

- The first alternative text proposed for Article 18 (2) states that the result "of a national referendum shall be announced by the National Assembly within 7 days of the report issued by the Central Committee for the Organisation of the National Referendum" and "published in the *Durzhaven Vestnik* or State Gazette."

Why should the National Assembly be given this authority? Unfortunately, things seem to be quite muddled once again.

Since the population has directly expressed its opinion, there is no reason to again turn to the National Assembly. The task of announcing the results, as well as verifying their legality, would more appropriately fall to the Constitutional Court.

- The second alternative text (Article 18 (a)) poses other problems. It proposes that, based on the results of the national referendum, the National Assembly can modify or amend the Constitution in force, decide to call for elections for a National Constituent Assembly, pass a law or a decision.

Here again, things seem to be quite confused.

We will make several comments at this point:

a. Once the population has directly and sovereignly taken a stand by referendum, the National Assembly, that is, the peoples' representatives, has no reason to intervene. If a bill was put up for referendum and if the required majority was obtained, the bill must become law, ipso facto. There is no need for the population's direct participation to be given the Assembly's seal of approval.

b. The alternative text of Article 18 (a) provides that, based on the results of a national referendum, the Assembly shall modify or amend the Constitution in force, meaning that the referendum can be constituent.

However, the Bulgarian Constitution does not in any way provide for the amendment or modification of its text through referendum.

Chapter IX of the Bulgarian Constitution provides for an extensive, rather cumbersome, procedural mechanism to revise the Constitution: initiative by one-fourth of the deputies or by the President of the Republic; a majority of three-fourths of the votes of all Members of the National Assembly in three ballots on three different days; the possible convening of the Grand National Assembly, which also follows a specific voting procedure.

But there is never any mention of the referendum.

It appears that there is a slight contradiction here between the Constitution and the law on popular consultation, unless, of course, it is meant to be added to the Constitution. But is this possible? Here again, we come up against the question of the legal status of the law on popular consultation. If it is just an ordinary law or an institutional act, it could not go so far. If it is meant to be a true constitutional law, it must be incorporated into the Constitution itself. However, the articles would have to be made consistent with each other, which would require meticulous tidying up.

C. Local Referendums

1. Our comment on Article 20 is by and large the same as that made earlier on Article

Under Article 20, "local referendums are organised to decide on matters which fall under the authority of municipal councils. But what are these matters?

There are no details whatsoever in the Bulgarian Constitution (chapter VII on local self-government and administration) on the exact scope of local authorities' powers. The Constitution does address local self-government and the mayor's "activity" (Article 139-2), however, aside from financial matters for which it is stipulated (Article 141) that the municipality has its own budget (but that the State plays a part in the everyday functioning of municipalities by allocating budgetary funds), there is no provision mentioning any type of division of powers between local and central authorities at municipal level.

On the other hand, at regional level, it appears that the regional government, appointed by the Council of Ministers, is wholly in charge of the administration of the regions given that it ensures the implementation of State policy, the protection of national interests, law and public order.

Now, Article 146 of the Constitution provides that "the organization and the procedures of the bodies of local self-government and local administration shall be established by a law."

So, have laws been introduced to define the central authorities' and local authorities' respective powers?

If this is the case, local referendums can only concern issues which fall under the authority of municipal councils.

If this is not the case, should one assume, based on the principle of local self-government, that the municipal council has jurisdiction in all matters at local level? Would it be possible, for example, to organise a local referendum on an ethical matter or on a problem of national defence?

2. Article 22 provides that decisions to organise local referendums are taken by the municipal council, by a majority of the total number of municipal councillors (such a requirement is less unwieldy at local level than at national level where representatives' absenteeism may be greater ...) and at the initiative of one-fourth of the total number of municipal councillors, by the Chair of the municipal council, or by the municipality's mayor.

Two comments:

a. What is the difference between "the mayor of the municipality"and "the Chair of the municipal council"?

The Bulgarian Constitution makes no allusion whatsoever in any of its articles to the Chair of the municipal council. It only mentions the mayor, specifying that he is the municipality's organ of executive power and is elected by the people or by the municipal council for a four-year term in accordance with a procedure laid down by law. Has this law been enacted and does it specify when the mayor is elected by the people and when he is elected by the municipal council?

b. In one alternative text, Article 22 proposes that "the prefect" can also propose the organisation of a referendum.

The prefect is not mentioned anywhere in the Constitution. It actually provides explicitly only for two local authorities: the municipality and the region, but, as was mentioned earlier, other administrative territorial units can be set up by law.

The fact that the prefect is mentioned in the law on popular consultation seems to indicate that "departments" or their equivalent have been set up by law.

But if the prefect is given the power to propose the organisation of a referendum, why has this same possibility not been granted to the regional governor? It appears, moreover, that the "regional referendum" has not even been provided for. Why?

c. The law on popular consultation mentions that referendums can be organised in "localities." What type of localities? What are their dimensions? Who delimits them?

d. Under Article 27, "the proposal presented in the local referendum is considered passed if it is approved by more than half of the total number of eligible electors of the corresponding municipality or locality " (that is the citizens residing in the area concerned).

As for the national referendum, it should be pointed out here that the requirement of such a majority may be excessive, given the possibility of a high abstention rate.

Recent constitutional experience shows that when electors are called upon to vote by referendum on local issues of sometimes limited importance, they are often not very motivated and so electoral participation is rather low. Therefore, requiring that a referendum poll more that half of the total number of electors in the locality in order to be accepted may result in a high number of negative outcomes. If a referendum does not obtain this majority it may, even though approved by the majority of those who voted, end up being defeated.

e. In accordance with Article 28-3, the Municipal Council announces the results of the local referendum.

The same comment that was made concerning the national referendum stands here. Why is the municipal council given the task of announcing the results of the consultation?

D. General Meetings

1. Article 31 provides that "for a locality or a part of a locality, issues of local importance concerning construction, rebuilding and modernisation of urban building sites, cultural sites and others can be resolved by consultation of the people in a general meeting."

If we have correctly understood this article, the referendum can, for specific matters, be replaced by a general meeting of the population.

What is the advantage of such a procedure? If a general meeting is easier to organise than a referendum, why should it be limited only to the areas of urban planning and culture?

2. According to articles 33-1 and 2, the decision to convene a general meeting can be taken by the municipal council or the municipality's mayor but must be taken by the corresponding administration if a request is signed by one-fourth of the citizens eligible to participate in the general meeting.

Why is a distinction made between these two possibilities, while in the case of the referendum, proposals by the mayor, the chair of the municipal council, the prefect (possibly), or one-fourth of the municipal councillors, are treated in the same way?

3. Article 36 stipulates that the general meeting of the population is legitimate and can be held if more than half of the eligible population attends.

It is easy to understand why a minimum quorum is required. But what will actually happen?

If one-fourth of the citizens entitled to participate in a general meeting call for one, the local authority is obligated to convene a meeting. However it will not be known the meeting whether the required quorum has been reached. If it has not, will hundreds, even thousands of citizens who came especially to attend the meeting then be sent home?

4. Article 37 requires that at least half of the total number of citizens entitled to participate attend the meeting in order for a decision to be approved by public vote.

Here again, as at national level, this refers to the majority of the electors and not the

majority of those present.

This is quite a hefty requirement.

Indeed, let us take the case of a general meeting of the population which barely manages to gather a quorum (more than half of the eligible citizens). The meeting is nevertheless legitimate and can therefore validly deliberate. However, since the adoption of a decision requires the approval of at least the majority of those authorised to participate, everyone present would have to be unanimously in favour of the decision for it to be passed in accordance with the law. Can this truly be the situation the law is meant to create?

E. Subscription

1. For the same matters mentioned in Article 31 regarding the National Assembly, under Article 39 the people can be consulted by subscription. This method can also be used to delimit localities or their corresponding local administrative entities.

Subscriptions are organised by a special commission (Article 40) appointed by the municipal commission for the election of municipal councillors (which has the authority to organise national referendums (see Article 13-1)).

The powers and responsibilities of this special commission are not specified anywhere in the law. All that is known is that it shall "organise" the operation, under the scrutiny of the regional court which shall hear any complaints or disputes.

Is this commission responsible for drawing up the questions or texts to be submitted for subscription? This is a serious problem, for it is widely known that the wording of a question or document can be a deciding factor on the outcome of the vote.

2. Under Article 41, subscription is organised when the citizens authorised to participate sign lists which have been duly certified by the municipal government.

Must all of the citizens sign the document? What will happen if only a minority participate?

Are the lists signed before or after the submission of questions? Article 41 does not clarify this point

3. Article 43, on the other hand, leads us to believe that matters which are to be resolved through subscription are considered to be "resolved" if at least half of the eligible citizens sign the subscription document.

This suggests that the questions were put to the citizens before they signed the document, and presumably only those citizens in agreement with the proposal would have signed it. Here again is the requirement of the approval of the absolute majority of eligible citizens to resolve issues. Things are thus not made any easier.

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P.S. This opinion is based on the French translation of the "law on popular consultation" of the Republic of Bulgaria.

This did not appear to us to be extremely clear, hence our numerous observations.