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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT CONSOLIDATED OPINION

On

**THE DRAFT LAW ON REFERENDUM
AND CITIZEN INITIATIVE OF
“THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA”**

**based on the contributions by
Mrs Anna MILENKOVA (Bulgaria) and
Mr Sergio BARTOLE (Italy)**

1. Introduction

In 1997 the European Commission for Democracy through Law (Venice Commission) was asked by the authorities of the “the former Yugoslav Republic of Macedonia” to examine the draft law on referendum and citizen initiative of “the former Yugoslav Republic of Macedonia”.

Following this request, the Venice Commission appointed Ms Anna Milenkova (Bulgaria) and Mr Sergio Bartole (Italy) to draw up an opinion on the draft law.

Having examined the draft law submitted by the Macedonian authorities, the rapporteurs formulated a number of observations. The most important of these are set out below.

2. The text

The status of a referendum varies. Under the constitution, a referendum may be either *mandatory* or *optional*, in so far as it is the Assembly of Representatives that decides whether or not a referendum must be called. The impact of this procedure also varies, depending on how easy it is to set in motion.

According to the Constitution of Macedonia, responsibility for organising a referendum rests with the Assembly of the Republic (cf “Assembly” below). A clear distinction is made in the constitution between referenda the Assembly is legally obliged to call and those which it has discretion to call. For example, the Assembly is obliged to issue notice of a referendum if one is proposed by at least 150 000 voters and in the case of decisions concerning any change in the borders of the republic (Articles 73 and 74 of the constitution).

Article 3 of the law on referendum also provides that “the referendum shall be obligatory in cases when the Assembly is to adopt a decision for changing the borders of the Republic or for uniting into or disuniting from a federation or confederation with other states.” The obligation on the Assembly to call a referendum if one is proposed by 150 000 voters is laid down in Article 21 of the law.

The law also provides for three kinds of referendum:

a. a *ratification referendum*, referred to in Article 14 of the law as a “legislative referendum”, on issues that are to be defined in a law. If the electorate votes in favour of the law, the Assembly is obliged to adopt it. If, on the other hand, the electorate votes against the law or “against the solution offered for defining a certain issue”, the Assembly is obliged to reject it (Article 25);

b. an *additional referendum* is called to confirm a law that has already been enacted (Article 14). A favourable response from the electorate results in promulgation of the law (Article 75 of the constitution), an unfavourable response in non-promulgation (Article 30);

c. an *advisory referendum* is called on “general issues concerning the citizens of the Republic” (Article 6). As the draft law lays down no organisational rules regarding advisory referenda, they are organised at the discretion of the Assembly according to rules decided by it on an ad hoc basis.

Articles 32 and 33 of the law provide that ratification of certain international treaties and certain other issues may be subject to a ratification referendum.

Article 8 of the draft law (together with Article 2 of the law on the procedure for collecting signatures for the purpose of organising a referendum) provides that referenda may be initiated by “citizens, registered political parties or citizen associations”. The question arises whether it is really necessary to include political parties on this list, given that (a) there are many other ways in which political parties can take part in the political life of the country, particularly through parliamentary debate. At the same time, in some Council of Europe member states political parties can themselves initiate a referendum.

3. Problems of interpretation of the law

1. According to the authors of the draft law, the constitution incorporates referenda in the country’s legal system and provides that responsibility for all decisions concerning the organisation of referenda rests with the legislative power. This interpretation is confirmed by the draft provisions of Article 15 banning the holding of referenda on:

- emergency bills that have been passed in states of emergency and war or on issues pertaining to national defence and security;
- laws relating to the budget of the republic;
- fiscal laws.

The question arises whether this interpretation is compatible with the Constitution.

On the one hand, the authors’ interpretation of the conditions governing the organisation of referenda limits not only the Assembly’s ability to call a referendum, but also the right of citizens in this regard. According to the draft law, it will no longer be possible for 150 000 voters to propose a referendum on the issues listed in Article 15. There appears to be no such limitation under the constitution.

On the other hand, exclusion of the issues listed in Article 15 from the list of those that can be decided by referendum is fully in line with the approach adopted by many modern constitutions. It would be inconceivable to hold a referendum on either “fiscal” or “emergency” laws. Exclusion of referenda on budgetary and monetary issues is equally justified. When considering the draft, it is also necessary to bear in mind the political and economic problems currently facing the country, which might explain why the issues listed in Article 15 have been expressly excluded from those that can be decided by popular referendum.

At the same time, the provisions of the constitution regarding referenda leave a number of gaps. It is the existence of these gaps which seems to explain the wish, and the authority, of the legislature to introduce limitations into the draft law.

The fact remains, however, that there is a problem of compatibility here which will have to be solved at some point, either by the Constitutional Court or by an amendment to the constitution.

2. Furthermore, even if it is accepted that Article 15 of the draft law does not contradict the constitution, the absence of any rules establishing a judicial procedure for checking whether or not referendum proposals submitted to the Assembly are compatible with Article 15 poses a number of problems. As a political body, parliament should not be competent in this area. Admittedly, Article 19 of the law confers such powers on the Assembly, but there is no justification for doing so. As it stands, the Assembly has the power to change or reject a proposal by the electorate if it does not like it, whereas the whole point of a referendum is to impose the will of the electorate on the Assembly.

In Italy, for example, it is the Constitutional Court which is empowered to check whether or not referendum proposals are compatible with the rules. This solution would also be perfectly feasible in the case of "the former Yugoslav Republic of Macedonia", where the Constitutional Court already has jurisdiction in the protection of citizens' rights and freedoms, and the authority to verify that measures taken by the public authorities are compatible with the constitution. Furthermore, since it is clear from the final paragraph of Article 19 that the organisation of referenda is governed by constitutional law, there is justification for involving the Constitutional Court in this matter.

Article 110 of the Constitution includes a provision intended to allow for a broadening of the powers of the Constitutional Court. This article also defines the power of the court to protect the "rights and freedoms of the individual and the citizen relating to ... political associations and activities", thereby establishing a sufficient basis for guaranteeing citizens access to the Constitutional Court should the Assembly impose unlawful restrictions on referenda. If, however, this solution to the problem is unacceptable, the power to investigate complaints against Assembly decisions in this regard, as well as against voting irregularities, could be given to the Supreme Court (Article 65 of the draft law).

3. Articles 25 para. 2 and 31 of the draft law provide that if the Assembly calls a referendum on a question and its proposal is rejected by the electorate, a year must elapse before another referendum may be held on the same question. This period does not seem long enough. In this connection it would be better if the ban on holding another referendum on the same question lasted until the end of the Assembly's term of office.

4. According to Article 52 of the draft law, "the ballot paper shall include the question that has to be decided on the referendum and voting instructions". It is not clear what is meant by "instructions". If they are instructions on how to vote, their inclusion on the ballot paper could mislead voters.

On the other hand, if this reference to instructions links up with the final paragraph of Article 52, which states that "the text of the question on the ballot paper shall be clearly and unambiguously formulated", it is very important. It is indeed essential that the question be

absolutely clear to the electorate¹. As it is so important, the clarity of the referendum question could be established in law as a condition for a referendum's admissibility, and it could be made obligatory to have the question checked by an independent authority, such as the Constitutional Court. Without such a check, the authority organising the referendum (ie the Assembly) is the sole judge of whether or not the referendum question is clear, and experience has shown that the absence of "checks and balances" in this regard may entail risks. There would therefore seem to be a need for an impartial and neutral body to ensure that the rights of the electorate to cast their votes in an informal manner are upheld.

At all events, the criteria and conditions for drafting referendum questions should be incorporated in the law and the applicable rules should be made more specific.

5. Other observations

The constitution establishes no rule to the effect that voters must be "capable of working", as stated in Article 39 of the draft law. This requirement is contrary to the constitutional guarantees in Section II of the constitution, particularly Article 22 which states that the "[...] right to vote is equal, universal and direct".

According to Article 42 of the draft law, the Polling Committee shall help illiterate citizens exercise their right to vote. This provision is open to misunderstanding because it can be interpreted as meaning that only the polling station is authorised to help illiterate citizens whereas, in principle, citizens who are either illiterate or incapable of voting are free to choose who accompanies them and helps them to cast their vote. The risk of the same person helping more than one or two illiterate voters must also be avoided.

The draft law contains a contradiction as to which body is responsible for fixing the date of the referendum. Article 35 confers this power on the Assembly, whereas from Article 44 it would seem that it is the governmental Polling Committee that determines the date of the referendum.

The third paragraph of Article 64, which concerns the possibility of appealing against a decision by the Polling Committee, is ambiguous: it is not clear which body is meant, the Polling Committee at the polling station, or the governmental Polling Committee.

6. Conclusions

On the whole, the draft law provides a good basis on which to establish the conditions for organising a referendum. The authorities have made a considerable effort to improve the initial draft law on referendum.

Nevertheless, there are a number of provisions in the new draft that could still be improved.

¹ The aforementioned Italian experience may be very helpful. For more details, see the report on the UNIDEM seminar on Constitutional Justice and Referendum held in 1996 in Strasbourg (pp. 59-61).

The Assembly's decision-making powers sometimes seem too broad. The Assembly decides not only whether or not a referendum should be held, but also the rules governing the way the in which it is organised. A more equal distribution of powers in respect of referenda would have been better. In particular, certain supervisory powers could be entrusted to the Constitutional Court.

In addition, the draft law should define the criteria and conditions for drafting the referendum question, and the rules applicable during a referendum should be clarified.

Many passages in the law, at least in the English translation, are unclear and consequently open to a rather broad interpretation.