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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**SERBIA**

**URGENT OPINION**

**ON THE DRAFT LAW ON THE REFERENDUM  
AND THE PEOPLE'S INITIATIVE**

**Issued pursuant to Article 14a  
of the Venice Commission's Rules of Procedure  
on 24 September 2021**

**Endorsed by the Venice Commission  
at its 128<sup>th</sup> Plenary Session  
(Venice and online, 15-16 October 2021)**

**on the basis of comments by**

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## I. Introduction

1. By letter of 2 August 2021, Ms Marija Obradović, Minister of Public Administration and Local Self-Government of Serbia, requested an urgent opinion of the Venice Commission on the draft law on the referendum and the people's initiative ([CDL-REF\(2021\)059](#), hereinafter: "the draft law").
2. On 5 August 2021, the Bureau of the Venice Commission authorised the preparation of an urgent opinion on this matter, the reason for the urgency being that the constitutional amendments on the judiciary in preparation would have to be submitted to referendum, most probably before the end of the year.
3. Mr Josep Maria Castellà Andreu (member, Spain), Mr Oliver Kask (member, Estonia) and Ms Regina Kiener (member, Switzerland) acted as rapporteurs for this opinion.
4. Due to the COVID-19 crisis and the time constraint, the rapporteurs were not able to travel to Belgrade. Instead, assisted by Mr Garrone and Ms Wistehube from the Secretariat, they held a series of video meetings on 3 September 2021 with the Ministry of Public Administration and Local Self-Government, the Ministry of Justice, the Republic Electoral Commission, political groups in the National Assembly,<sup>1</sup> as well as representatives of international partners of Serbia and representatives of the civil society working in the field of elections. The Venice Commission is grateful to the office of the Council of Europe in Serbia for the excellent organisation of these virtual meetings.
5. This urgent opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings. It was issued on 24 September 2021 pursuant to the Venice Commission's Protocol on the preparation of urgent opinions (CDL-AD(2018)019). It was endorsed by the Venice Commission at its 128<sup>th</sup> Plenary Session (Venice and online, 15-16 October 2021).

## II. Background and scope of the opinion

6. The law on referendum currently in force in Serbia dates back to 1994. All stakeholders agree that it should be updated, not least because it looks inconsistent with the 2006 Constitution, and the legislation was supposed to have been updated in accordance with this Constitution by the end of 2008 already.<sup>2</sup>
7. The Venice Commission addressed the issue of referendum and people's initiative in Serbia in an opinion of 2010<sup>3</sup> on a draft law which was never adopted. The opinion recommended *inter alia* revising the structure of the draft law to make it clearer, more coherent and more precise, for example by clearly defining the various types of referendums and the rules applying to each of them. The draft law was never adopted and a new draft law was prepared in 2019 but was not adopted either.
8. The draft under review in the present opinion was published on 9 July 2021. Public discussion was opened through 29 July. The draft law was presented at a time when a constitutional revision, to be adopted if possible by the end of the year, was planned. This constitutional revision has to be understood in the context of Serbia having applied to become a member of the European Union.

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<sup>1</sup> Unfortunately, due to technical problems, the opposition in Parliament could not take part in the meetings.

<sup>2</sup> Constitutional law on Implementation of the Constitution of Serbia, November 2006, Article 15.

<sup>3</sup> Venice Commission, [CDL-AD\(2010\)006](#), Opinion on the Draft Law on Referendum and Civil Initiative of Serbia.

9. The present opinion will examine the conformity of the draft law with international standards, and in particular with the revised Guidelines on the holding of referendums adopted by the Venice Commission in October 2020 (hereinafter: the Guidelines).<sup>4</sup>

10. The present opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing referendums in Serbia. While the draft addresses referendums at the national, provincial and local levels, the opinion will mainly focus on referendums at the national level and pay particular attention to constitutional referendums, since such a referendum is planned in the near future. It should not be inferred from this that the Venice Commission is of the opinion that the provisions not expressly dealt with here are unproblematic.

11. This opinion was prepared in reliance on the English translation of the draft law as revised after the public consultations held in July 2021, which is still not available to the public. The translation may not accurately reflect the original version on all points. Discrepancies between the version submitted to the Venice Commission and the Serbian version available to the public will be addressed when necessary.

### **III. Analysis**

#### **A. General remarks**

12. The initiative of the Serbian authorities to adopt a new Law on the Referendum and the People's initiative in order to bring the legislation in line with international standards is to be welcomed. The authorities are aware of the shortcomings of the current law and its possible unconstitutionality.

13. According to the Venice Commission's consolidated doctrine, any successful changes to electoral (and referendum) legislation should be built on at least the following three essential elements: 1) a clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations; 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders;<sup>5</sup> and 3) the political commitment to fully implement such legislation in good faith. An open and transparent process of consultation and preparation of such amendments increases confidence and trust in the adopted legislation and in the state institutions in general.

#### **1. The legislative process and its timelines**

14. According to the authorities, thorough public consultation took place, if not in 2020, at least in 2019 on a draft prepared by the previous Ministry; the new Ministry, constituted at the end of October 2020, revised the draft and did not change it significantly in any fundamental aspect. NGOs on their side complained that the time given to them was too short (20 days during the summer, extended by 4 days due to the delayed publication of the information on the internet); moreover, they remarked that the draft sent to the Venice Commission on the day of the expiration of the deadline could not yet take the comments expressed during the public consultation into account. The Venice Commission recommends taking these comments into account at a future stage of the legislative process, if this was not yet the case.

15. The timeline of the amendments raises concerns. The legislation had to be adapted to the Constitution, adopted in 2006, by the end of 2008. The Serbian authorities failed to reform the law on referendums by that deadline. Its new version was drafted at a time of preparation of constitutional reform, which would require a constitutional referendum. As regards such

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<sup>4</sup> Venice Commission, Revised guidelines on the holding of referendums, [CDL-AD\(2020\)031](#).

<sup>5</sup> Guidelines, II.3.c.

situations, the Guidelines provide that “the fundamental aspects of referendum law should not be open to amendments to be applied during the year following their enactment, or should be written in the constitution or at a level superior to ordinary law”.<sup>6</sup> The Serbian authorities plan to hold a referendum in the months following the adoption of the law. Even if the revision is aimed, *inter alia*, at ensuring conformity of the legislation with the Constitution and international standards,<sup>7</sup> the Serbian authorities should have addressed the issue much earlier and much more thoroughly. This was clearly possible in the fifteen years which have elapsed since the adoption of the Constitution and the eleven years since the last Venice Commission’s opinion. The adoption of the legislation on referendums, formally ordinary law, needs the majority of all members of Parliament.<sup>8</sup> It is doubtful that it should be considered as superior to ordinary law; at any rate the exception to the principle of stability of referendum law (the one-year rule) has to be understood as implying a broad political agreement and therefore related to the requirement of a broad consensus.<sup>9</sup> The Venice Commission regrets that the authorities waited until a constitutional referendum was imminent to revise the law on referendums. According to the interpretative on the stability of electoral law,<sup>10</sup> fundamental provisions of electoral law should be applied less than one year after their adoption only if they ensure conformity with the standards of the European electoral heritage, or implement recommendations by international organisations, which is only partially the case.<sup>11</sup>

16. In general, any reform of electoral legislation to be applied during an election (or referendum) should occur early enough for it to be really applicable to this election (or referendum).<sup>12</sup> The Venice Commission therefore recommends holding the next referendum late enough to make the revised law really applicable to it.

## **2. The structure of the draft**

17. Some elements of the structure of the draft should be reconsidered. For example, Article 2 (Referendum) and Article 3 (People’s initiative) are systematically placed under heading I (Basic Provisions); the details are set out in Articles 9 and following (and in Articles 53 and following, respectively). These general provisions are not placed in the specific parts of the law dealing with referendums and initiatives. The various types of referendums could be defined more precisely in an introductory provision under heading II. The text of the constitutional provisions on referendums could be restated in the law when necessary, rather than merely referred to.<sup>13</sup>

18. As to the formal drafting of the law, it would be very helpful in terms of clarity and comprehensiveness of the law to number the paragraphs and divide some provisions into several articles (for instance Articles 15 and 18).

## **B. Specific remarks: referendums**

### **1. Types of referendum**

19. As foreseen by the Constitution, the draft law regulates different types of referendums, in different provisions (Articles 2, 9, 10, 11, 13, 43, 44, 46, 47, 48, 49, 50, 52...). The constitutional provisions on referendums (in particular Articles 108, 182 and 203) are not restated or referred to in the draft law. The Serbian authorities informed the Commission that, under the Serbian rules on drafting legal acts, it is a rule not to take over the provisions or regulations that occupy a higher

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<sup>6</sup> Guidelines, II.3.b.

<sup>7</sup> Cf. Venice Commission, [CDL-AD\(2005\)043](#), Interpretative declaration on the stability of the electoral law, II.2.

<sup>8</sup> Article 105.3.1 of the Constitution.

<sup>9</sup> Guidelines, II.3.c.

<sup>10</sup> Venice Commission, [CDL-AD\(2005\)043](#), Interpretative declaration on the stability of the electoral law, II.2.

<sup>11</sup> Venice Commission, [CDL-AD\(2005\)043](#), Interpretative declaration on the stability of the electoral law, II.2.

<sup>12</sup> Venice Commission, [CDL-AD\(2005\)043](#), Interpretative declaration on the stability of the electoral law, II.5.

<sup>13</sup> Cf. below par. 19, 36.

place in the hierarchy of legal acts This however makes the categorisation of referendums rather difficult to understand.

20. The draft law provides for the following types and subtypes of referendums:

- Mandatory referendum, in particular on specific constitutional amendments, but also in the field of the establishment, revocation and merger of autonomous provinces (Articles 203.1 and 182 of the Constitution, Article 9 of the draft law);
- At the request of the majority of the Assembly (but not of the minority), referendum on an issue within the competence of the Assembly: previous vote or confirmation of the adopted act, before its promulgation (Article 108.1 of the Constitution, Article 10 of the draft law);
- At the request of the voters, a referendum on a preliminary statement on the issue to be regulated or for the adoption of the act or its amendment or repeal (Article 11 of the draft law);
- Advisory referendum on an issue of “wider significance” within the competence of the Assembly (Article 13 of the draft law).

21. Referendums at the request of the majority of the Assembly or at the request of voters can address constitutional revisions which are not subject to a mandatory referendum (Article 44.2). It seems that referendums can concern questions of principles, generally worded proposals (previous vote, referendum on a preliminary statement) as well as concrete proposals (referendum for adoption of an act, its amendment or repeal).<sup>14</sup> It also seems that referendums on confirmation of an adopted act (only at the request of the majority of the Assembly) (are the only ones to) have a suspensive effect (cf. Article 39.1). Should this be the case, the relevant provisions should be worded more precisely.

22. In sum, in relation with the types of referendums, the Venice Commission recommends addressing in detail the following matters in the law: the questions subject to referendum; the hierarchical rank of the provisions submitted to referendum (constitutional or statutory provisions); the nature of the proposal submitted to referendum (e.g. a generally worded or a concrete proposal), and the effect of the request for a referendum on existing legislation.

## **2. Right to vote in referendums and right to participate in people’s initiatives**

23. In issues which do not cover the whole territory of Serbia, the right to participate through the means of direct democracy belongs not only to those citizens who live in that territory, but also to those citizens whose ownership rights and obligations are concerned (Article 4.2; Article 21.2). This solution is quite unusual and can lead to an overly unbalanced result, since owners are not always as directly concerned by the decision to be taken as residents are. Moreover, it may be difficult to establish the situations in which ownership rights are affected, especially as the laws pertaining with human and minority rights and freedoms (including fundamental property rights) are excluded from the referendums by the Constitution. Sometimes, the question in a referendum may touch upon ownership rights just slightly with the key issue of the referendum being else. One property may be owned by a large number of co-owners and co-ownership may also be established in view of manipulating the referendum result. Owners who are not Serbian nationals are not entitled to the right to vote; nor are other people than owners whose rights and obligations may be affected by the result of the referendum as well. Thus, the inclusion of owners to the voters’ list may lead to politically disputable results and call in question the legitimacy of the referendum result. For these reasons, the Venice Commission recommends reconsidering the extension of the right to vote to those citizens whose ownership rights and obligations are concerned, or at least provide this extension in a detailed manner.

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<sup>14</sup> Articles 10.3, 11.2 of the draft. On the categories of referendums, see Guidelines, para. 12.

24. Article 4.3.1 refers to “citizens who... submitted a request for registration in the voter list in order to vote at the upcoming national referendum according to their place of residence abroad, *i.e.* according to the chosen place of residence”. The phrase “the chosen place of residence” is difficult to understand and should be clarified.

### 3. Quorum

25. The translation of Article 2.4 provided to the Venice Commission gives the impression that the majority of registered voters is required for the adoption of a question submitted to referendum. However, according to the information provided by the Serbian authorities and other stakeholders, the draft law actually does not require any quorum for the validity of referendums, a majority of those voting sufficient (Article 2.4 and 5). This is a positive change *vis-à-vis* the existing legislation and the draft law of 2009, in line with the Guidelines (III.7.ii) and the recommendations of the Venice Commission in its previous opinion to abolish the quorum. Moreover, the constitutionality of any quorum is doubtful in Serbia.<sup>15</sup>

### 4. Intervention by the Assembly and deadlines for calling a referendum

26. The draft provides that the Assembly should take a position about the text submitted to referendum and inform the citizens about it, in case of a referendum at the request of the voters (Article 12). This is in line with the Guidelines (III.6) as well as with the principle that direct democracy is complementary to representative democracy.<sup>16</sup>

27. In the case of an advisory referendum, the Assembly “is obliged” to make a special statement on the acceptance or non-acceptance of the obtained opinion of the citizens (Article 13.2). This provision aims at clearly specifying the effects of the referendum, in conformity with the Guidelines (III.8.a). It should be added that, if the advisory referendum is not on a draft law but on a generally worded proposal, the result of the referendum can have implications for various decisions adopted by the parliament. Parliament could therefore point out its reasoning in explanatory reports without an obligation to adopt by a vote a special statement. Anyway, such a statement does not have legal effect and parliament may (*e.g.* after elections) reconsider its opinion. The reference to the “validity” of a decision taken by an advisory referendum could also be confusing (Article 2.5).

28. The Assembly is obliged to call a referendum within 30 days from the day of the decision it has taken on the issue (Articles 9, 10, 11). Then, the referendum may be held not earlier than 30 days and no later than 60 days from the day of calling (Article 14). Even though the period between the decision in the Assembly and the referendum is provided in the constitution for constitutional amendments, such deadline could be prolonged for other referendums. The minimum deadline set out in the draft is the shortest one recommended by the Guidelines, which recommend a considerably longer period (III.9.a). . A longer period would leave time for a wider public debate. The draft law gives an advantage to the majority in parliament or those requesting the referendum as they could plan and organise their campaigning already before the adoption or even before the discussion of the issue in the parliament. The Venice Commission recommends extending the deadline between the decision of calling a referendum and the vote and restricting the discretionary possibility for the Assembly to reduce this deadline, in particular for constitutional referendums.

29. The draft law does not provide for what happens if the parliament does not decide within the deadline(s) set out in the draft law. A possible solution would be to leave the decision to fix the

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<sup>15</sup> Venice Commission, [CDL-AD\(2010\)006](#), Opinion on the Draft Law on Referendum and Civil Initiative of Serbia, paras 36ff; see in particular Article 203.8 of the Constitution.

<sup>16</sup> Guidelines, para. 9; PACE [Resolution 2251\(2019\)](#), Updating guidelines to ensure fair referendums in Council of Europe member States, 3.1.



date of the referendum to an independent institution such as an election commission and to provide the parliament only with the possibility to express its position.

30. Article 9 on mandatory referendums (mainly constitutional ones) is confusing. Apparently, according to Article 9.3, two decisions are needed if the decision of the Assembly on the substance of the issue submitted to referendum (on a generally-worded draft?) is taken after the referendum. A regulation by which the parliament has to decide to hold a referendum and fix its date in separate decisions may lead to situations where the latter decision will not be made at all. It would be advisable to decide on the referendum (whether and when) in one sole decision and to have only one vote in the parliament on the matter, as provided with regard to the referendum on an adopted act (Article 9.2). At any rate, the possibility to organise a mandatory referendum before the vote by the Assembly does not appear elsewhere in the draft, and should be addressed more thoroughly.

31. The current text of Article 9 on mandatory referendums (mainly constitutional ones) declares that the National Assembly and others are “obliged to *make a decision on calling* a referendum regarding an issue for which the Constitution or law . . . stipulates that citizens may decide on it by means of a referendum” (emphasis added). In contrast, Article 10 requires that when “a majority of the total number of all members of parliament, ambassadors [*recte*: members of provincial assemblies] or councilors” requests a referendum, “the National Assembly . . . *shall be obliged to call* a referendum” (emphasis added). The Venice Commission recommends a revision of these terms, to clarify when it is in fact mandatory for a referendum to be held.

32. The Venice Commission reiterates its recommendation to address the nature of the proposal submitted to (a mandatory) referendum in a systematic way. It also recommends simplifying the procedure on drafts submitted to mandatory referendum before the Assembly.

33. Nothing is said in the draft regarding the holding of a referendum on the same day as an election. In this respect, the Venice Commission recommends not holding elections and referendums on the same day if the referendum is about the institution facing election.<sup>17</sup>

34. Article 48. 7 foresees a deadline of six months for the Assembly to decide on the request to organise a Republic referendum at the request of voters. According to the information provided by the Serbian authorities, this decision concerns only formal aspects of the request and does not include the position of the Assembly on the substance. A deadline of six months to decide on formal issues appears too long. The Venice Commission recommends considering a reduction of this deadline and clarifying the deadline given to the Assembly to take a position on the substance.

35. Additionally, Article 48 does not address mandatory referenda. The Venice Commission recommends articulating the procedures by which the Assembly will determine whether a mandatory referendum is to be held.

## **5. Issues on which the referendum cannot be called**

36. Article 45 of the draft law specifies the issues on which a referendum cannot be called. It applies to referendums at all levels (national, provincial and local). The provision mainly deals with the need to ensure conformity of the text submitted to referendum with superior law, in accordance with the principle of the rule of law.<sup>18</sup> It goes however somewhat further by forbidding to “reduce the achieved level of human and minority rights”. It is unclear how this provision is to be coordinated with Article 108 of the Constitution which (more broadly) prohibits the referendums on “laws pertaining with human and minority rights and freedoms”, as well as with

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<sup>17</sup> Guidelines, III.9.c.

<sup>18</sup> Guidelines, II.1.

“duties deriving from international treaties, fiscal and other financial laws, the budget and financial statement, introduction of the state of emergency and amnesty, as well as issues pertaining to election competences of the National Assembly. On the specific issue of human and minority rights, the Constitution appears broader on the one side (referendums cannot deal with human rights in general and not only with their limitation), but narrower on the other side (the exclusionary clause concerns “laws” and, apparently, not constitutional revisions). The definition of substantive limitations to the scope of the referendums could lead to electoral disputes. Therefore, these limitations have to be defined very clearly. The Venice Commission recommends clearly defining the issues which cannot be submitted to referendum, by restating the constitutional limitations in the law, as well as by making a clear distinction between those limitations which are linked to the subject matter of the referendum, on the one hand, and those linked to the respect for superior law and the rule of law, on the other hand. In particular, the reach of the restrictions regarding human rights should be harmonised with the Constitution.

## **6. Electoral administration**

37. The present opinion will address the composition of the electoral administration to the extent that it is dealt with by the draft law.

38. Despite this limitation, it is important to first assess the composition of the election administration in general, at least briefly. According to Article 33.1 of the Law on the Election of Members of Parliament, the “standing composition of the Republic Electoral Commission shall consist of the President and sixteen members appointed by the National Assembly of the Republic of Serbia on the proposal of parliamentary groups of the National Assembly of the Republic of Serbia”. At least in the current composition of the National Assembly where nearly all political groups belong to the majority, this implies that the designation of the Republic Electoral Commission is controlled by the majority in Parliament. The Guidelines<sup>19</sup> recommend that the Central Electoral Commission include “at least one member of the judiciary or other independent expert”. The Constitutional Court of Serbia held that judges cannot be members of electoral commissions on any level. This does not seem to exclude “other independent experts” from the Republic Electoral Commission. Even if the members of the latter are lawyers and act impartially, the composition of the election commissions has to appear impartial. Independent experts can increase the trust in the election authorities. Moreover, in its meeting with representatives of the Republic Electoral Commission, the Venice Commission was informed that, even in the case of early elections, the practice is to renew the composition of the Republic Election Commission – provided for in electoral legislation - after each parliamentary election. This reinforces the impression that this body is systematically dependent on the political majority of the moment. The Venice Commission recommends reconsidering the composition of the electoral administration to ensure its independence.

39. Article 15 does not set up special bodies responsible for conducting a referendum but entrusts electoral commissions and voting boards with this task. Not providing for special bodies in charge of conducting referendums is in conformity with international standards.<sup>20</sup>

40. According to Article 15.6, members of the subcommittee formed by the Republic Election Commission (responsible for the technical preparations for conducting referenda, the determination of polling stations and voting results, the submission of voting results to the Republic or Provincial Election Commission, and the performance of other tasks determined by the draft law and the decision on calling a referendum, see Article 17.2), are appointed at the proposal of parliamentary groups in proportion to their representation in the respective Assembly on the day the decision to call a referendum enters into force. This gives the majority in Parliament

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<sup>19</sup> Guidelines, II.4.1.d.

<sup>20</sup> Guidelines, II.4.1.b.

control over these bodies. The Venice Commission recommends ensuring a balanced composition of Republic or Provincial Electoral Commissions, too.

41. The draft law establishes that the “persons” who requested a referendum (the authorised proposers) may appoint their representatives to the bodies conducting the referendum (Article 16). This is in line with international standards.<sup>21</sup> According to the information gained during the online meetings, these representatives are members of the electoral commissions with voting rights. This should be commended. In case of a referendum at the request of the Assembly – rather than at the request of a section of the electorate -, it would however appear more appropriate to add supporters and opponents of the referendum issue to the ordinary composition of the electoral bodies. Otherwise, even though the main political parties have representatives in the election commissions, the election commissions may seem to be unbalanced even when they fulfil their tasks in a neutral manner if the parties represented in the Assembly support the referendum question and its positive answer.

42. According to Article 18.4, members of *voting committees* (which manage the voting process at the polling stations, ensure the regularity and secrecy of voting and determine the results of voting at polling stations) are *appointed on the proposal of parliamentary or councillor groups* that are represented in the respective Assembly. *Proportional representation* shall be provided in relation to the total number of seats of members of all voting committees in the territory for which a referendum is called and will therefore not be ensured in each electoral commission (Article 18.5-6). This can lead to a situation where the members of political parties in opposition could be concentrated in those voting committees where the number of voters is small or where the voters tend to support only government parties. Thus, political balance in the voting committees could not be achieved in all commissions or in the commissions where it counts the most, and the parliamentary majority would be in a position to control the appointment of the bodies responsible for the conduct of referendums. Moreover, it would be suitable to also require a gender-balanced composition of the electoral administration. The Venice Commission therefore recommends ensuring proportional representation in each voting committee, as well as the gender-balanced composition of the electoral administration.

43. According to Article 18.10, the replacement of a member of the voting committee is performed by the competent commission at the request of the authorised nominator no later than three days before the day set for holding the referendum. Exceptionally, the competent commission may replace a member who cannot be on the voting board due to legal restrictions, at the latest until the opening of the polling station for voting (Article 18.11). Article II.4.1.f of the Guidelines provides that the bodies appointing members of commissions must not be free to dismiss them at will. Although the authorised nominator may only request (and not perform) replacements, the rule could still be problematic due to the political appointment process of the commission’s members. The Venice Commission recommends reconsidering these provisions.

44. Article 18.13 does not specify in which circumstances a member of a voting committee cannot fulfil his or her tasks due to legal restrictions. The Venice Commission recommends making this provision more precise.

45. Article 19 provides for objections against the decisions on the appointment of voting committees. The draft law would benefit if the rules for deciding on these objections were clearly regulated: What happens if the objection is submitted? What happens if the objection is left unanswered? Is it possible to dismiss members of the committees based on the objection? The Venice Commission recommends regulating these issues more precisely.

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<sup>21</sup> Cf. Guidelines, II.4.1.c.

## 7. Question submitted to the voters and information provided to them

46. The competent electoral commission has no power to address the content of the question submitted to the voters (see Article 17; Article 33 only requires clarity and a binary question, but the electoral commission does not intervene in the supervision of such requirements). The draft law explicitly states that the competent committee of the Assembly or the Assembly (at the national, provincial or local level) decides on the substantive validity of the text of the referendum (Article 48.2, Article 49.2, Article 50.3, Article 51.3, and Article 52.2). These tasks should belong to an election commission or another impartial authority.<sup>22</sup> The Venice Commission recommends revising the relevant provisions of the draft.

47. According to the draft law, the Government provides citizens with objective information on the issue submitted to referendum (Article 23), which “should faithfully and equally reflect the view of the parties advocating different answers to the referendum question” (Article 23.3). This is a positive step. However, this competence too should belong to an election commission or another impartial authority.<sup>23</sup> Moreover, the deadline for providing such information, “which is eight days since the calling of the national referendum” (Article 23.1), raises serious concerns. It appears impossible for the various political forces to provide their opinion and for the government to prepare a document with such information in such a short timeframe, let alone the time for sending the document to the voters. This goes against the principle of legality, which is one of the pillars of the rule of law and implies that legislation must be implementable.<sup>24</sup> The extension of the deadline is therefore imperative; however, voters should receive the information well in advance of the vote. The Venice Commission recommends revising the relevant provisions of the draft.

## 8. Campaign, media and finances

48. Article 23.4 provides that both public and private mass media for the campaign must ensure equal access to the parties that advocate different answers to the referendum question. In contrast with public mass media, private media are not subject to a requirement of neutrality, even if equal conditions for radio and television advertising must be ensured.<sup>25</sup> The Venice Commission recommends providing for less strict rules for private media.

49. The organisations which are prohibited to finance campaigns are too widely defined (Article 26): churches and religious communities could have a legitimate interest in some issues submitted to a referendum. The same applies to foundations and unions. Limitations which could be acceptable in an electoral campaign could go against the principle of proportionality in a referendum on a subject which may address the core activities of these organisations. Moreover, foreign nationals are also excluded from contributing to the financing of campaigns. This should not be the case if they are legal residents in Serbia and the referendum is not about the Constitution or constitutional laws. The Venice Commission recommends reconsidering this provision.

50. According to Article 24.1, public opinion research is considered to be a referendum campaign activity. However, where such research is not aimed at targeting voters' groups but just at making opinion polls (for their publication or scientific research), such activities are not aimed at the result of the referendum and should not be considered to be a referendum campaign activity. Organisers of this activity should not be obliged to follow the rules on campaign financing and reporting. More generally, this provision should not be interpreted too broadly. It should not be extended to any position taken or debate organised by any individual or group on the issue

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<sup>22</sup> Guidelines, I.3.1.d and II.4.1.b.

<sup>23</sup> Guidelines, I.3.1.e and II.4.1.b.

<sup>24</sup> Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, II.A.7.

<sup>25</sup> Guidelines, II.2.2.

submitted to referendum. The Venice Commission recommends reconsidering the relevant provision.

51. Reference is made to the law governing the financing of political activities (see, e.g., Articles 26.2 and 31.2, which makes a general reference to this law). In this opinion, the Venice Commission will not address the conformity of that law with international standards, nor examine which of its provisions should be applied in conformity with Article 31.2 of the draft law. Rather, the opinion will focus on some specific issues to be found in the draft law.

52. The Guidelines provide that the use of public resources by the authorities for campaigning purposes must be prohibited and that payment from private sources for the collection of signatures for people's initiatives and requests for referendums should, as a rule, also be prohibited.<sup>26</sup> If payment from private sources is permitted, it must be regulated with regard to both the total amount allocated and the amount paid to each person. The Venice Commission recommends addressing these issues if they are not addressed by the legislation in force.

53. Article 26.4 prohibits financing the costs of referendum campaigns with funds obtained from public sources that political subjects receive for financing regular work or election campaign costs. However, it is not possible to distinguish between the costs of organising campaign activities and other costs, as the costs for political party organisation (bureau costs, salaries, computers, cars etc.) are aimed at implementing all tasks of the political party. The Venice Commission recommends reconsidering this provision.

## **9. Parallelism of procedures**

54. Article 40 makes it possible to adopt an act contrary to the decision made in a referendum or amend its essence only after the expiration of one year from the day of the referendum. According to the English translation of Article 40 as submitted to rapporteurs, a referendum is to be called any time if such an amendment takes place. The Venice Commission was however informed that the Serbian version available to the public does not include the phrase "with the obligation to repeat the referendum", in the sense that no referendum would be needed after one year (see also Article 41.1). This should be clarified. The Guidelines recommend that "[f]or a certain period of time, a text that has been rejected in a referendum may not be adopted by a procedure without referendum".<sup>27</sup> A deadline of one year appears short and could make it easy to circumvent the will of the people. More respect for the people's decision would lead to wait at the very least until the next legislature, with a new mandate of the citizens for the Assembly. On the contrary, excluding forever the revision of a text adopted by referendum without holding a referendum could be too rigid. An intermediate way could be to submit such revision to an optional referendum at the request of voters.

55. The question could also be asked whether this provision applies only to amendments of the text submitted to referendum or, more broadly, to bills concerning the same issue.

56. Some additional rules limiting or excluding a further referendum after a binding referendum could be envisaged during a certain period of time, in line with the Guidelines:<sup>28</sup> a larger period before the next referendum on the same topic at the request of a section of the electorate; excluding a second referendum to partially revise a text that has been previously adopted by a referendum on a total revision; or excluding the revision of a superior law that is contrary to the popular vote, at least during a certain period of time.

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<sup>26</sup> See Guidelines, I.3.1.b. and III.3.f.

<sup>27</sup> Guidelines, III.4.a.i.

<sup>28</sup> Cf. Guidelines, III.4.a-b.

57. According to the English of the draft (Article 40.2, which does not appear in the Serbian version available to the public), such rules would not apply to advisory referendums; this is in conformity with international standards.<sup>29</sup>

58. The draft law would benefit from norms regulating a situation where multiple proceedings for the collection of signatures are carried out simultaneously with contradictory proposals. If two or more such proposals are successful, does the parliament have to organise different referendums, may the parliament unite such proposals or decide on them in the order it prefers? Article 41 does not allow consecutive referendums on the same subject, but it remains unclear whether there could be a simultaneous referendum on several related items. The Venice Commission recommends addressing these issues.

## 10. Complaints and appeals

59. According to international standards, time-limits for deciding on complaints and appeals should be short.<sup>30</sup> The draft law foresees very short deadlines for the submission of and decision on the complaints and appeals (for referendums, 24 hours for appealing in first instance – competent electoral commission -, 48 hours for appealing in second instance – administrative court - and for taking a decision at both instances: Articles 67.1 and 5; Article 69.1-2). Such deadline seems to be overly restrictive as the persons concerned may have difficulties in providing adequate and serious substantial reasoning as well as evidence. In some cases, legal aid might be needed and within such deadline, it may be too difficult to submit the complaint or appeal. It is doubtful that deadlines for the decision-making in the field of referendums and peoples' initiatives should be as short as for electoral disputes, because the results of the referendums, contrary to those of elections, affect only the issue(s) submitted to the people's vote. The Venice Commission therefore recommends a reasonable extension of the deadlines for lodging and deciding on complaints and appeals.<sup>31</sup>

60. The right to object to irregularities in the conduct of the referendum is limited to the authorised proposers, *i.e.* their representative, and each Member of Parliament, member of the provincial Assembly or councillor (Article 67.2). This is too restrictive. The Venice Commission recommends extending the right to appeal to all voters; a reasonable quorum might be imposed for appeals by voters against the results of a referendum<sup>32</sup>

61. Article 67.7 foresees that if the competent electoral commission does not decide on the complaint within the deadline (48 hours), the complaint will be "considered as adopted". This consequence is difficult to understand, and the law should be clarified. If the complaint is on a decision by an electoral commission, the outcome may be its invalidity, but if the complaint concerns campaigning by other persons, it requires an action by the commission in relation to campaigning or campaign financing. In addition, if the election commission is overloaded with complaints, a strict deadline may lead to a situation where the results of the referendum cannot be ascertained at all. While the electoral commissions should decide on the complaints quickly, the violation of the deadline should not be considered as a decision on the complaint. The Serbian authorities informed the Commission that in practice the deadline was always respected. However, the Venice Commission recommends reconsidering this provision.

62. Moreover, the draft does not provide for hearings in the case of complaints and appeals. This should be reconsidered too.<sup>33</sup>

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<sup>29</sup> Cf. Guidelines, II.4, which refer to "a provision" accepted in a referendum.

<sup>30</sup> Guidelines, II.4.3.g.

<sup>31</sup> See already Venice Commission, [CDL-AD\(2010\)006](#), Opinion on the Draft Law on Referendum and Civil Initiative of Serbia, para. 44.

<sup>32</sup> Guidelines, II.4.f.

<sup>33</sup> See already Venice Commission, [CDL-AD\(2010\)006](#), Opinion on the Draft Law on Referendum and Civil Initiative of Serbia, para. 44.

63. Article 8.3 (Protection of rights) states that no fees are paid for complaints and appeals submitted by citizens and authorised proposers in order to gain protection from irregularities in the procedure of conducting the referendum and realising the people's initiative. The Venice Commission recommends clarifying (for instance in the explanatory report) that the provision is not limited to procedural irregularities (such as non-compliance with deadlines, etc.), but that it extends to irregularities during the conduct of the referendum / peoples' initiative process (such as undue pressure on voters, hidden payments, etc.).

64. The draft law does not regulate the decision power of the electoral commission or court. For example, the question arises whether the Administrative Court can decide to hold the referendum by itself or only oblige the Assembly to take a decision (see Article 48.11-12). In order to make the possible consequences of the court decisions clear, the Venice Commission recommends addressing the decision-making power of the bodies dealing with complaints and appeals in a more precise way.

### **11. Election observation**

65. Article 32 (Public access to the referendum procedure) holds that the conduct of the referendum and the work of the bodies conducting the referendum may be monitored by domestic and foreign observers, in accordance with the regulations governing the monitoring of elections for members of parliament. The Guidelines recommend that national and international observers should be given the widest possible opportunity to participate in a referendum observation exercise.<sup>34</sup> It is unclear whether the rules on the monitoring of elections for members of parliament comply with this recommendation.

### **12. Provincial and local referendums**

66. First, it has to be pointed out that the draft law provides for a number of similar rules for the regulation of referendums and people's initiatives at the levels of national, provincial and local government. It takes into account differences between referendums at these various levels. However, further differentiations would be indicated. For instance, the number of signatures requested should be smaller at the provincial and local level than at the national level, and could be defined as a proportion of the number of registered voters. A maximum and a minimum number could be defined in the national legislation, leaving some space for provincial and local authorities to fix the exact number.

67. Article 11.4 states that the request for calling a referendum on the territory of an autonomous province must meet the conditions determined by the statute of the autonomous province. This provision should make it clear that such additional conditions may not go against the content of the draft law.

68. The limitations introduced by the law for provincial referendums (Article 49) seem appropriate. In conformity with the general rule on conformity with superior law (Article 45), the draft provides that the referendum may only address issues within the competence of the province and its Assembly. The limitations relating to the subject of the referendum, that is the exclusion of the proposal to repeal the statute of the autonomous province, as well as of budgetary and electoral competences, seem justified too. Similar provisions apply *mutatis mutandis*, to the local self-government unit referendum (Article 51).

69. The deadline for the rejection by the Provincial Assembly of a referendum at the request of voters is "the next session" (Article 50). The same applies to the local referendum ("the first following session") (Article 52), while the deadline provided at national level is six months (Article 48.7). According to the information provided by the Serbian authorities, the next/following session

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<sup>34</sup> Guidelines, II.4.2.a.

would at any rate take place in the next six months). The remarks made earlier on this deadline apply to provincial and local referendums too.<sup>35</sup>

### 13. Other issues

70. Article 7.2 (signature authentication) mentions that the amount of the fee for the authentication of signatures is determined by a special act of the Ministry of Justice. Requiring such fee may have a chilling effect, thus preventing the collection of signatures. If a fee had to be perceived, it should at any rate be very low, its maximum amount should be mentioned in the law, and its debtor should be defined (the committee responsible for collecting the signatures?). The Venice Commission recommends not requiring a fee, or a very low one; in the latter case, the provision should mention the maximum fee and its debtor(s).

71. Article 8.2 regulates the protection of personal data. The question arises whether the ban to use personal data collected during the referendum and people's initiative processes for any other purpose means that the data may not be published in the media. Such a consequence is obvious outside the field of elections and referendums. For the people's initiative, this would mean that only the number of signatures could be published, but not who has signed the petition. It would be better to state this explicitly. Since many voters could decide to sign the request for referendum based on who the initiators are, the Venice Commission recommends publishing the name of the initiators. Other personal data such as addresses should be kept secret.

72. Article 22 – according to the translation submitted by the authorities - provides that the referendum should be held during one day, as a rule on Sundays. This is in line with international standards.

73. The 60-days deadline from the day of the referendum to the adoption of the act, established in Article 39, seems too short, particularly when it requires a parliamentary procedure for the approval. The Venice Commission recommends extending this deadline. Moreover, the draft law does not provide for sanctions in case the deadline is not respected. This could be considered.

74. Article 36 enables electoral commissions to issue special rules in specific situations, including epidemics. This delegation is too broad and should not lead to excessive restrictions of fundamental political rights. Moreover, the mention of “other reasons” could lead to an excessively broad interpretation of this provision. The Venice Commission recommends providing for more detailed rules in the law.

75. The sanctions catalogue in Articles 72 and 73 concentrates on sanctions against the organisers of the referendum campaign and donors. Breaches of the duty of neutrality and of voters' freedom to form an opinion by other parties, as well as electoral fraud are not sanctioned by the draft law. According to the information provided by the Serbian authorities, these sanctions are complementary to those of the criminal code, which deals in general with the violation of electoral rights.

76. The requirement of unity of content, according to which “there must be an intrinsic connection between the various parts of each question put to the vote, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse, as a whole, provisions without an intrinsic link” – except in the case of total revision of a text,<sup>36</sup> does not appear in the law. The Venice Commission recommends introducing it.

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<sup>35</sup> See above para. 34.

<sup>36</sup> Guidelines, III.2.



### **C. Specific remarks: People's initiatives**

77. The people's initiative can take place as a "general initiative" (that is a generally worded proposal) or a "specific proposal" amending a legal text. It is aimed at a decision by the Assembly, not at the holding of a referendum.

78. The draft law requires no concrete number of signatures for the people's initiative. According to Article 107 of the Constitution, at the national level, they are 30.000 voters. The question arises whether lower tiers of government are competent to determine the minimum number of signatures. The Venice Commission recommends including in the law the numbers of signatures at every level (national, provincial and local), or at least defining a maximum and minimum number of signatures to be required at each level of government, on the basis of the number of registered voters.

79. Article 55.5, allows supplementing and changing the proposal for the purpose of eliminating shortcomings in the proposal verification procedure. This is commendable. This was however not the case in the Serbian version available to the public.

80. The deadline of 90 days for the collection of signatures seems adequate. However, the obligation for the Assembly to decide on the proposal no later than within six months from the day of initiating the people's initiative (Article 65.1), appears too short. While the Assembly should not delay the examination of the draft, the deadline could be extended by a few months at least. Moreover, an appeal against the inaction of the Assembly should be introduced.

81. Article 65.3 stipulates that when the Assembly accepts the general initiative, it obliges the competent authority to prepare a draft legal act and to decide on it within 180 days. The aim of this provision is unclear. The proposal has to be in the competence of the parliament, not of any other authority. It is the task of the Assembly itself to adopt a law if it accepts it. The law could regulate the possibility of the parliament to request the government to draft such a law and present it to the parliament, but not its adoption by any other institution. A deadline seems overly restrictive in this case, as it is up to the parliament to decide on the urgency of the matter. If there is no such urgency but a need to discuss the draft law for a longer period, the parliament could reject the general proposal just to formally respect the legal deadline. Moreover, a strict deadline could go against the principle of democracy: acceptance of a proposal by the outgoing parliament should not oblige a newly elected parliament to draft and adopt legislation implementing this general proposal. Sanctions for not following the general proposal after its formal adoption by the parliament should not be legal, but just political. The Venice Commission recommends reconsidering this provision.

82. In case of non-acceptance of the initiative on substance, the Assembly has to submit a "reasoned decision" to the initiative committee and to publish it (Art. 66). This does not go against any international standard since it is a discretionary political decision.

83. Moreover, the task of checking the list of signatures should be assigned to the Electoral Commission, instead of the Assembly (Article 63). The Venice Commission recommends amending this provision.

84. Article 56.3 regulates the procedure after the initiative group has submitted a proposal to the President of the Assembly. If the President of the Assembly considers that the submitted proposal goes against legal requirements concerning its form or content, and the initiative group sticks to the proposal, the proposal shall be put on the agenda of the parliament instantly. While it is legitimate to verify whether the proposal goes against superior law or human rights, there are two risks: 1) that the verification procedure, if politically biased, may delay the parliamentary debate; 2) that a high number of proposals, which may not be serious in nature, be presented for

verification only in order to hamper the ordinary work of the parliament as the draft law allows an initiative committee consisting of three persons only. If every proposal has to be added to the agenda of the Assembly unless verified by the speaker, there could be hundreds or even thousands of such proposals, which could paralyse the work of the legislative body. The Venice Commission thus recommends enabling an independent body (such as an election commission) to verify the initiative, with a possible judicial remedy in case the proposal is rejected. The law could provide for a deadline for such verification.

85. Article 58 regulates the method for collecting signatures, requesting the initiative committee to announce the beginning of the collection of signatures and providing that all places for the collection of signatures should be available to the public. This means that it is forbidden to collect signatures, for instance, door-to-door or during political party meetings, which are otherwise an efficient means for collecting signatures. Such restrictions seem excessive. Similarly, there is no legitimate aim to avoid collection of signatures after the proposal has been verified. Unless the collection of signatures is carried out by administrative bodies or election commissions, the requirements for the collection of signatures should only be limited to avoiding voter intimidation or pressure on the voters. Since the signatures are collected to present a draft law or a similar proposal to the parliament, but will not lead to a referendum, such collection of signatures has a rather low risk of voter intimidation and pressure. The Venice Commission recommends providing for less restrictive rules.

86. Moreover, Article 58.2 provides that “[t]he places where signatures are collected must be available to the public, and their use for the purposes of collecting signatures may not interfere to a significant extent with the normal use of those places, nor violate public order”. The phrase “to a significant extent” does not appear in the Serbian version available to the public. Since the collection of signatures nearly always needs using public ground, not qualifying the interference with the normal use of those places would imperil the possibility to collect signatures. It is therefore indispensable to forbid only major interferences with the normal use of public places.

87. Article 63.4 provides that if the Assembly determines that an insufficient number of signatures has been collected, the deadline for collecting signatures is extended by 15 days. An initiative committee could thus knowingly introduce a proposal with an insufficient number of signatures and automatically obtain an additional deadline. It would be more expedient to provide for a longer deadline in all cases, if appropriate.

#### **IV. Conclusion**

88. The initiative of the Serbian authorities to adopt a new Law on the Referendum and the People’s Initiative in order to bring the legislation in line with international standards is to be welcomed.

89. The Venice Commission regrets that the revision of the law on referendums started only when a constitutional referendum was imminent. Amendments to its fundamental provisions should be applied less than one year after their adoption only if they ensure conformity with the standards of the European electoral heritage or implement recommendations by international organisations. Moreover, the Venice Commission recommends holding the next referendum late enough to make the revised law really applicable to it. The amendments should be adopted by broad consensus and by taking account of the public consultations with all relevant stakeholders.

90. On the substance, the amendments include several positive elements, such as the suppression of the quorum, the regulation of the possibility for the Assembly to take a position on the issue submitted to referendum and the obligation to provide citizens with objective information on the referendum issue.

91. However, a number of issues should be addressed and dealt with in a revised version of the draft.

92. The Venice Commission makes the following key recommendations:

- A. To clearly define the various types of referendums and the provisions applicable to them by addressing in detail the following issues in the law: the questions subject to referendum; the hierarchical rank of the provisions submitted to referendum (Constitutional or statutory provisions); the nature of the proposal submitted to referendum (*e.g.*, a generally-worded or a concrete proposal); the effect of the request for a referendum on the current legislation; and to clearly define the issues which cannot be submitted to referendum;
- B. To reconsider the extension of the right to vote to owners of real estate, or at least to provide this extension in a detailed manner;
- C. Not to require a fee, or at most a very small one, for signature authentication;
- D. To extend the right to appeal to all voters and to reasonably extend the deadlines for lodging and deciding on complaints and appeals;
- E. To reconsider the composition of the electoral administration in order to ensure its independence by revising the relevant legal texts;
- F. To give to the electoral commissions the power to check to question submitted to voters as well as signatures, and to provide objective information to voters;
- G. Not to subject private media to a requirement of neutrality, but only require that equal conditions for radio and television advertising be ensured.

93. Furthermore, the Venice Commission recommends, *inter alia*:

- A. To reconsider the restrictions on electoral campaigns, in particular by providing a narrower definition of such campaigns, and not excluding automatically unions, churches, religious communities, and foundations;
- B. To reconsider provisions on the financing of campaigns, *e.g.* by allowing financing the costs of the referendum campaign with funds obtained from public sources that political subjects receive for financing regular work or election campaigns;
- C. To extend the deadline between the decision of calling a referendum and the vote, and to restrict the discretionary use by the Assembly of the possibility to reduce this deadline, in particular for constitutional referendums;
- D. To address the decision-making power of the bodies dealing with proposed referenda, complaints and appeals in a more precise way;
- E. To request unity of content of the text submitted for referendums (except for total revisions);
- F. To provide for less restrictive rules concerning the collection of signatures for people's initiatives;
- G. To extend the deadline for providing objective information to voters, to be received well in advance of the vote;
- H. To provide in the law for more detailed rules applicable in the case of emergency.

94. Other recommendations may be found in the text of the opinion.

95. The Venice Commission stands ready to assist the Serbian authorities to further review the legislation on referendums and people's initiatives, to bring it closer in line with international standards and good practice.