

Introducing the Draft Law on Referenda: Its Constitutionality and Legal Implications

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June, 2018



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Policy Note 02/2018

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June 2018

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INTRODUCING THE DRAFT LAW ON REFERENDA: ITS CONSTITUTIONALITY AND LEGAL IMPLICATIONS

Introduction

United Nations Special Envoy's, former Finish president Martin Ahtisaar, *Comprehensive Proposal for the Kosovo Status Settlement* generated the premise for a new reality in the region. Often referred to as Ahtisaar's Plan, it provided the basis for the declaration of independence of Kosovo in 2008, following the nine-year long international administration.

Upon the declaration of independence, Ahtisaar's plan served as the groundwork for the drafting of the Constitution of the Republic of Kosovo. It enclosed several provisions to ensure a smooth transition of executive authority to local institutions and sustainable statehood. The plan foresaw a period of supervised independence, which lasted for four years¹. It also enclosed several other principles adopted in the Constitution which provide insurance that institutional authorities will not succumb to any nationalist sentiment that could overwrite the general principles of a free, equal, modern, democratic, secular, and multi-ethnic state. These provisions were meant to be insuperable, and because of the ethnic demographic of the population – Albanian ethnics in vast majority², they may not become subject to future referenda. This was intended as a safeguard measure that prevents any legal attempt to bypass the rules of procedures regarding these provisions of vital interest. Nevertheless, the Constitution does recognize referendum as a direct exercise of popular sovereignty³. Recently, a legislative initiative to regulate and establish procedures for referenda has been undertaken⁴.

History and context

From a historical point of view, Kosovo has only two past experiences with referenda, in 1991 and 2012. The former was in response to the revocation of the autonomous status under the former Socialist Federal Republic of Yugoslavia and the systematic violence executed upon the ethnically Albanian population. Referendum took place across the territory of Kosovo, and 99% of Albanians voted in favor of declaring Kosovo as a sovereign and independent Republic⁵. The latter was in response to the actual independence of Kosovo, in which ethnic Serbs inhabiting solely the northern part of Kosovo rejected the rule of Kosovar government, with 99% of voters declaring their disregard of central authority⁶.

¹Group for Legal and Political Studies (2018). "Ten Years of Statehood: What are 10 successes and 10 failures that marked the first decade of Independence?", available online at: <http://www.legalpoliticalstudies.org/ten-years-statehood-10-successes-10-failures-marked-first-decade-independence/>

² Kosovo Population (2018) data available online at: <http://worldpopulationreview.com/countries/kosovo-population/>

³ See text of the Constitution of the Republic of Kosovo available online at: <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf>

⁴Koha Net (2018). "GDP procedon projektligjin per referendum", available online at <https://www.koha.net/arberi/86424/gdp-procedon-projektligjin-per-referendum/>

⁵ Telegrafi (2016). "Hamiti: Referendumi i vitit 1991 vendosi themelet juridike e demokratike te shtetit te Kosoves", available online at <https://telegrafi.com/hamiti-referendumi-vitit-1991-vendosi-themelet-juridike-e-demokratike-te-shtetit-te-kosoves/>

⁶ Business Insider (2012). "99.7% of Kosovo Serbs rejected the authority of the Kosovo government in a referendum", available online at: <http://www.businessinsider.com/997-of-kosovo-serbs-rejected-the-authority-of-the-kosovo-government-in-a-referendum-2012-2>

Although both instances failed to produce any legally or politically binding effect, past tendencies to create new political realities through referenda rather than utilizing it as a mechanism of direct participation of citizens in the decision-making processes and enhancing democracy as an end, did not go unnoticed. To that extent, caution can be noted in both Ahtisaar's document and the Constitution of Kosovo. Ahtisaar's document referred to referendum only once in its entirety, but insofar merely related to which laws are not subject to it⁷. The Constitution of Kosovo, on the other hand, recognizes it but only with regards to compliance with the very provisions that stem from the former, Ahtisaar's document⁸. These provisions are set in Article 81 of the Constitution and include the laws on the scope of municipalities, rights of Communities, use of language, local elections, cultural heritage, religious freedom, education, and use of symbols⁹.

Incorporating these provisions was certainly a calculated measure to address wary concerns over potential violation of minority rights, especially those of the Serb minority given the underlining historical component. Thus is looked to ensure that other ethnic minority communities living in the Republic of Kosovo are not vulnerable to ethnic fragmentation. Moreover, these provisions aim to conceive a Kosovar identity and internationally establish Kosovo as an indivisible political entity – in hindsight further fade Albanian Kosovars' folklorist aspirations for unification with Albania. In this context, the referendum device has since often struck discomfort in both international and domestic circles. Out of fear of political implications that could jeopardize Kosovo's progress, talks about referendum were almost always considered premature and destructive given Kosovo's rigid statehood and underdeveloped democracy.

Summary of the Draft law - Types and Procedures

A decade after the declaration of independence, the recently fragmented body from the parliamentary group of the Self Determination Movement (VV), then Group of Independent Deputies (GDP), has started a legislative initiative for the draft law on Referenda¹⁰. The draft law aims to define and regulate procedures for referendum which are not included in the Law for Local Self-Government¹¹. It foresees three types of referenda, namely *abrogative*, *consultative* and *constitutional*.

Abrogative referendum is defined as a referendum in which citizens of Kosovo are prone to voting on repealing a law in whole or in part, including the laws that have already entered into force. The verdict of the referendum enters into force immediately upon the declaration of the results.

Consultative referendum is defined as a referendum on a matter of particular importance to the citizens of Kosovo. It could be initiated by the Assembly or by the President of Kosovo given Assembly approval. However, the yielded results are not legally binding to the Assembly.

Constitutional referendum is defined as a referendum mandatory and automatic for any amendments to the Constitutions of the Republic of Kosovo. The Assembly may decide by double

⁷ See text of Ahtisaar's document available online at: <https://www.kuvendikosoves.org/common/docs/Comprehensive%20Proposal%20.pdf>

⁸ See Article 81 of the Constitution of the Republic of Kosovo, available online at: <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf>

⁹ Ibid

¹⁰ Koha Net (2018). "GDP procedon projektligjin per referendum", available online at: <https://www.koha.net/arberi/86424/gdp-procedon-projektligjin-per-referendum/>

¹¹ See Article 71 of the Law for Local Self-Government available online at: <http://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2530>

majority¹² that the proposed constitutional amendments will be voted on in a referendum. Upon a successful vote, the decision of the Assembly on requesting a constitutional referendum shall be revised by the Constitutional Court, and only if/when the Constitutional Court decides that the request is in compliance with the Constitution is a referendum date set by the President of the Republic of Kosovo.

A general referendum may be triggered by the citizens, gathering at least 100.000 signatures from eligible voters, but only upon the proposal and approval of the Assembly. The President of Kosovo also has the authority to initiate a referendum, but the approval of the Assembly is required. The request to begin the procedures for a referendum is submitted to the Central Election Commission (CEC) by a group of no fewer than 12 initiators who are voters registered in the National Registry of Voters. Accordingly, the initiating request should entail detailed reasoning and explanation regarding the purpose and objectives, and the voting issue must be stated in a clear, complete and unequivocal manner so that citizens vote in with a “Yes” or “No”. The winning alternative is the one that has the majority of valid votes, more than half but no less than one-third of the number of registered votes.

Conclusions

From a legal perspective, the draft law is conscious of the constitutional limitations, and as such the entire substance of the draft law is respectively harmonious. Ergo, legislation of vital interest regulated in Article 81 of the Constitution, as well as related issues concerning territorial integrity of the Republic of Kosovo - financial obligations of the state, naturalization bills, the imposition or lifting of a state of emergency, a declaration of war or peace, decisions regarding individuals holding posts, amnesty - are not subject to a referendum. Domestic and international concerns that future referenda may breach the Constitution are thus addressed in this draft law.

Indeed, the draft law applies excluding provisions, but the range of affected laws remains wide. Out of over 430 laws that are currently in force, only 23 are immune to a referendum. The remaining are well subject to abrogative referendum that has the potential to retroactively repeal a law in whole or in part. In case of point, some worth mentioning is: Law on Social Assistance Schemes; Law on Pension Funds; Law of Security Force of Kosovo; and Law on State Border with Montenegro. Every single of the aforementioned laws has distinct settings, capable of spurring a request for referendum and arise new implications. In the following section we will look into a few cases in point.

The first two laws are responsible for regulating the current welfare state programs in place. Both feature modest benefits that often fail to meet the bare minimum of personal expenses. Likewise, both laws are dictated by the international presence, and are a carbon copy of Western neo-liberal legacy. Admittedly, recent developments suggest a shifting trend. Rebranding of the Social Democratic Party¹³, in addition to two other established parties that share socio-democratic principles, VV and NISMA, translate into a growing interest towards leftist political movements. Hence, taking into consideration the lavish governmental expenditures on the one hand, and the poor living conditions and economic underdevelopment on the other, initiatives to recalculate

¹² Two thirds (2/3) of all deputies of the Assembly including two thirds (2/3) of all deputies of the Assembly holding reserved or guaranteed seats for representatives of communities that are not in the majority in the Republic of Kosovo

¹³ Telegrafi (2018). “Shpend Ahmeti kryetar, keta jane udheheqesit e tjere te PSD-se”, available online at: <https://telegrafi.com/shpend-ahmeti-kryetar-keta-jane-udheheqesit-tjere-te-psd-se/>

welfare state packages in the benefit of social categories in need could seek legitimacy through an abrogative referendum.

Another example is the Law on Security Forces of Kosovo¹⁴. Out of the necessity to conclude the transformation of the Security Forces of Kosovo into a Military force, alternative gateways as opposed to constitutional changes have come into consideration¹⁵. To that extent, amendments to the current law could legally help disentangle the process by enabling the Security Forces to build new capacities and by extending its mandate without violating the constitution¹⁶. In spite of a strong political consensus and willingness to go down that road, external resistance from the international community is beyond circumventing¹⁷. In this case, or the case of other initiatives that contribute to the consolidation of statehood, an abrogative referendum may strip politicians of international pressures and constraints, and authorize the citizens to become the ultimate decision-maker.

Lastly there is the case in point concerning Law on State Border with Montenegro, which to our argument serves as a representative case of international agreements, particularly those that have and will derive from the dialogue in Brussels. Before the state border agreement came into final conclusion, Kosovo underwent a political stalemate, experienced preliminary election due to the fall of the government, witnessed massive public protests, received worldwide coverage because of the tear gas released in parliament, and became subject to intensive international and domestic pressure¹⁸. All of this relies on the reason that there was no political consensus and no safety valve mechanisms capable of diffusing the situation. Suggestively, in another scenario that shares the same features, the presence of the possibility to trigger a referendum could both directly or indirectly assist the settling of strong political disputes.

Furthermore, in alignment with its provision on *constitutional* referendum, the draft law proposes that in addition to current constitutional provisions that regulate constitutional amendments¹⁹, proposed amendments may also be voted on in a referendum. That is, in cases when the Assembly shares different opinions over proposed amendments, it may decide by a double majority that they become subject to people's approval. If an approval is granted, they become part of the Constitution with immediate effect. The inclusion of these amending proposals intends to directly include citizens in the decision-making process and effectively serve as a safety valve mechanism in the face of a political deadlock over constitutional matters.

However, months have passed since the draft law on referenda has been initiated, and only two parliamentary groups have publicly professed their political support; the very recently rebranded Social Democratic Party, as the official initiators of this draft law in an attempt to enact

¹⁴ Koha Net (2017). "Kur do te themelohet Ushtria e Kosoves", available online at: <https://www.koha.net/arberi/4019/kur-do-te-themelohet-ushtria-e-kosoves/>

¹⁵ Zeri (2017). "NATO: Ushtria e Kosoves sipas Kushtetutes", available online at: <http://zeri.info/aktuale/162473/nato-ushtria-e-kosoves-sipas-kushtetutes/>

¹⁶ Evropa e lire (2018). "Transformimi i FSK-se ne ushtri nuk eshte rruge pa krye", available online at: <https://www.evropaelire.org/a/fsk-ushtria-kosoves-fak/29101740.html>

¹⁷ Insjaderi (2017). "SHBA riperserit qendrimin kunder nismes se Thacit per transformimin e FSK-se me ligj", available on at: <http://www.insajderi.com/shba-riperserite-qendrimin-kunder-nismes-se-thacit-per-transformimin-e-fsk-se-ligj/>

¹⁸ Group for Legal and Political Studies (2018). "Stallin on a Process that Never Happened: A review analysis of the border agreement between Kosovo and Montenegro", available online at: <http://www.legalpoliticalstudies.org/4200-2/>

¹⁹ See article 144 of the constitutions of the Republic of Kosovo available online at: <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf>

its political and ideological presence, and VV as a longtime advocate of the right for self-determination and the right to referendum. No public stand from other parties or members of parliament has been recorded. Other parties have never truly shown any sign of interest in pushing forward a legislative initiative on referenda, which suggests that pushing on this particular piece of legislation will require a successful and inclusive campaign – targeting both domestic and international political actors.

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