

# **Promo-LEX OPINION**

**on the Draft Law Amending and Supplementing the  
Electoral Code No 1381-XIII of 21 November 1997  
drafted by the Ministry of Justice**

Published on 3 March 2018

*Promo-LEX Association, under the Law No 239-XVI of 13 November 2008 on Transparency in the Decision-Making and the Government Decision No 967 of 9 August 2016 on Public Consultation Mechanism with Civil Society in the Decision-Making Process, would like to participate in the public consultations of the draft Law Amending and Supplementing the Electoral Code, published on the Ministry of Justice website, and sets out its findings, conclusions and recommendations on the given topic in this Opinion.*

## **Regarding the deadline for submitting the recommendations**

Article 12(2) of the Law No 239 of 13 November 2008 on Transparency in the Decision-Making stipulates that the recommendations on draft decisions should be submitted within at least 10 working days since the date when the announcement of starting preparing the decision or announcement of public consultations is made public.

To that effect, being guided by the cited rule, the Ministry of Justice published on its website on 15 February 2018 the draft Law Amending and Supplementing the Electoral Code and set 28 February 2018 as the deadline for submitting the recommendations.

However, Promo-LEX Association draws attention to the fact that, after studying the technical properties of the document published on the ministry's website,<sup>1</sup> it found that this document was produced on 20 February 2018, after the declared date of publication and initiation of public consultations. The Information Note to the draft law was also produced on 20 February 2018.

With this in mind, we tend to believe that the document initially published on the website was replaced and, respectively, **the new deadline for submitting the recommendations is 3 March 2018<sup>2</sup>.**

In addition, the same Article 12(2) of the Law No 239 lays down that, at the request of stakeholders, the public authority may extend the deadline for submitting the recommendations.

## **Regarding the draft Law**

Examining the proposed amendments and addenda to the Electoral Code, Promo-LEX Association identified several risks that could affect the proper functioning of the rule of law and damage citizens' constitutional rights.

To this end, we bring back to attention and express our agreement with most of the arguments stated by 'WatchDog.md' Community Association in its Opinion on the draft Law **Amending and Supplementing the Electoral Code<sup>3</sup>.**

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1. Upon the publication of this Opinion

2. According to the Government Decision No 89 of 24.01.2018 on the Transfer of Certain Days Off in 2018, the Sunday of 3 March 2018 will be a working day.

For example, we agree with the 'WatchDog.md' Community Association that Article 75 of the Constitution is wrongly interpreted in the Information Note to the draft Law. The author of the draft law states that, according to Article 75, only the Parliament has the right to initiate any type of referendum, but analysing the text of the mentioned article, Promo-LEX Association does not find any premises for such a finding. Moreover, the author puts forward no arguments and makes no reference that would justify the above.

Besides, it is also important to draw attention to the possible ways for other subjects to initiate referenda. Thus, according to experts from the 'WatchDog.md' Community, based on the proposed edition of the Code:

**(1)** 200 thousand citizens will only be able to initiate constitutional referenda (Article 141(1)(a) of the Constitution);

**(2)** the Government will be able to initiate constitutional (Article 141(1)(c) of the Constitution) and consultative referenda;

**(3)** the President of the country will only be able to initiate consultative referenda.

We also remind you that Promo-LEX Association addressed the topics of referenda and possibility of initiating them in its Opinion, published on 22 January 2018, entitled 'The fact that the application for registration of the Initiative Group for conducting a legislative referendum was rejected, puts in doubt the citizens' right to directly exercise sovereignty'<sup>4</sup>.

Examining at this stage why CEC rejected the registration of an initiative group for conducting a legislative referendum, **Promo-LEX Association took notice and even foresaw certain risks to the free initiation by citizens of a legislative referendum.**

The risks described in detail in that Opinion originated from the same Judgment of the Constitutional Court, for the enforcement of which this Law Amending and Supplementing the Electoral Code should be adopted.

Analysing the order of arguments put forward in the Opinion and the provisions of the draft Law Amending and Supplementing the Electoral Code, we must admit that our concerns that *citizens' right to initiate any type of referendum* might be restricted tend to come true.

Although the text of the Information Note to the draft law only refers to the Court's findings related to the impossibility of the President of the Republic of Moldova to initiate constitutional referenda, we would like to emphasize another judgment of the Constitutional Court.

Thus, the Court stated that: *'[...] the constitutional right of the President to resort to the referendum cannot confer on him the possibility of lawmaking, since, according to the Constitution, the President cannot initiate a 'legislative referendum', but only a 'consultative referendum'. This is clear from Article 60(1) of the Constitution, as the Parliament is the sole legislative authority of the State. Otherwise, this would mean a recognition of the President's legislative competence.'*

By the logic that the Parliament is the sole legislative authority and citizens, same as the President, do not have such a prerogative, we admit that the Constitutional Court believes that the permission of initiating a legislative referendum by the citizens, would mean a recognition of the fact that they have the competence of lawmaking.

Unfortunately, just as we previously mentioned, even though all arguments in the Court Judgment were to the disadvantage of the President of the country, Article 144(2) of the Electoral Code (*after*

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<sup>3</sup><https://watchdog.md/2018/02/26/opinia-asociatiei-comunitatea-watchdog-md-asupra-proiectului-legii-pentru-modificarea-si-completarea-codului-electoral-autor-ministerul-justitiei/>

<sup>4</sup>. <https://promolex.md/11377-opinia-asociatiei-promo-lex-respingerea-cererii-de-inregistrare-a-grupului-de-initiativa-pentru-desfasurarea-unui-referendum-legislativ-pune-la-intoiala-dreptul-cetatenilor-de-a-exercita-direct-suve-2/?lang=en>

*republishing the Electoral Code – Article 155(2))* was declared not partially, but fully unconstitutional. As a result, the citizens, holders of the national sovereignty, also fall under the prohibition of initiating any type of referendum.

In another train of thoughts, examining in detail the draft Law Amending and Supplementing the Electoral Code, we note that the provisions of the Code relating to subjects entitled to initiate referenda are still quite unclear.

Although Article 155(2) expressly lays down that at least one third of MPs are entitled to initiate any type of referendum, Article 1(a) remains in the old wording. The latter is interpretable in the new circumstances, thus, the phrase '*in the case of the constitutional referendum*' conveys the idea that, besides constitutional referenda, citizens might initiate other types of referenda.

Regarding the Government's right to initiate referenda, we should note that, unlike the period before the Court's adoption of the above-mentioned judgment, when the executive could also initiate any type of referenda, now it could remain with the possibility to initiate only two types. The right to initiate a consultative referendum stems from the new Article 160<sup>1</sup> of the Electoral Code, while a constitutional referendum – from Article 141(1)(c) of the Constitution. Regarding the latter, we draw attention to the fact that the Government submits draft constitutional laws to the Parliament, and only if they concern the sovereign, independent and unitary nature of the State, as well as its permanent neutrality, they are susceptible to be approved by a referendum. In other words, the Government has the right to initiate constitutional referenda only on matters regarding the sovereign, independent and unitary nature of the State, as well as its permanent neutrality.

As early as the publication of the above-mentioned Opinion, Promo-LEX Association believed that things had been heading towards a wrong direction, threatening the constitutional rights of Moldovan citizens to directly exercise their sovereignty and freely express in a referendum their opinion on an important subject. Thus, in its Judgment, the Constitutional Court elaborated on the rule of law concept, the primordial role of the people as the holder of national sovereignty and the importance of referenda as an instrument of direct democracy through which citizens exercise their sovereignty directly.

The Constitution states that national sovereignty is an absolute and perpetual power of people, who shall exercise it through the state power representative bodies and sovereignly own it. Thus, the national sovereignty is inalienable, since the representative bodies only exercise it. **People directly exercise sovereignty by participating in referenda and elections, as well as by directly making decisions** (CCJ No 16 of 19.03.2001).

**At the constitutional level, the referendum was designed as a way for the people to directly exercise national sovereignty**, expressing their will regarding issues of general interest or that of particular importance for the state's life. In this respect, Article 75 of the Constitution states that problems of utmost importance confronting the society and State shall be resolved by referendum, while the decisions adopted according to the results of the republican referendum shall have supreme legal power.

As mentioned above, national sovereignty results from the fact that the people of the Republic of Moldova is the sole sovereign holder of power. The power, in turn, being a quite complex term, contains several elements, one of which is lawmaking. The lawmaking, in the representative democracy form of government, is exercised by elected representatives on behalf of the people. However, under a direct democracy, the lawmaking is exercised directly by the people. To this end, we cannot ignore the direct power of the people to propose and approve legislative acts by means of referendum.

**Concluding** the above,

**Promo-LEX Association shows its disagreement** over the amendment proposed in the consulted draft Law. The people of the Republic of Moldova, as the sole sovereign holder of power, cannot be deprived of the right to initiate any type of referendum. Moreover, we have found certain artificial barriers that are not necessary in a democratic society and seem to be obstacles, which in the future might suppress people's intentions to exercise direct democracy.

**Promo-LEX Association expresses the hope** that participatory democracy counts and public institutions and political stakeholders adopt decisions in good faith, and this will be the decisive factor in the evolution of law and jurisprudence in the Republic of Moldova.

**Promo-LEX Association recommends** to amend the Constitution and related legislation in order to guarantee legal certainty for citizens' right to initiate any type of referendum and, according to the obligation of public authorities, to allocate the needed financial resources in order to consult the will of people. This would reduce the room for manoeuvre of public institutions in interpreting constitutional provisions and ensure their execution in accordance with the fundamental right of the people to exercise its sovereignty directly.

**03.03.2018**