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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

PRELIMINARY DRAFT REPORT

ON

THE RECALL OF MAYORS/LOCAL ELECTED REPRESENTATIVES

on the basis of comments by

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I. Introduction

1. By letter of 7 November 2017, the Congress of Local and Regional Authorities of the Council of Europe (hereinafter "the Congress") asked the Venice Commission to examine, in the light of its work on the imperative mandate at national level, the compatibility of local recall referendums, aimed at cutting short the term of office of a local elected representative, with international standards and best practice. The Congress' request was made in connection with existing regulations and practice enabling voters, in the Republic of Moldova, to recall mayors through popular referendum.

2. Ms Sarah Cleveland, Ms Tanja Karakamisheva-Jovanovska, Ms Monique Jametti and Mr Josep Maria Castella Andreu acted as rapporteurs for this report. The report was prepared on the basis of contributions by the rapporteurs and available information on relevant national legislation and practice from a number of states.

3. *Following its discussion at the Sub-Commission on Democratic Institution (Venice, March 2018), it was adopted by the Venice Commission at its … Plenary Session (Venice, June 2017).*

II. Preliminary remarks

1. Scope and subject of the report

4. The present report does not aim to provide an exhaustive account of the different mechanisms by which local elected representatives may lose their mandate. Its purpose is, as requested by the Congress, to examine the very concept of local recall referendum as a mechanism of direct participation, its possible justification, as well as the impact it may have on the effective, democratic and legitimate governance of the concerned communities.

5. To do so, the Venice Commission has taken account of existing national regulations and practices in the field in Europe and outside Europe, and has reviewed these in the light of the principles of representative democracy, the most common political system in these areas.

6. The Commission's objective was twofold. On the one hand, to assess the advantages and disadvantages of local recall referendum as an accountability instrument and a political process based on the direct participation of citizens, and its added value in a political system based on representative democracy; and on the other hand, to find out whether it is possible to identify common minimum standards, principles and safeguards likely to govern the recourse to this tool in those societies having opted to make use of it.

7. The Commission's attention was focused on the particular case of democratically elected mayors and their possible recall by the way of popular referendum.

2. International instruments and documents

8. In the preparation the present report, the Venice Commission has taken into account European and international instruments and documents of relevance for the analysis of the concept of local recall referendum, and further related topics: the free/imperative mandate, the local self-government principles including the legal and political accountability of local elected representatives, and citizens' participatory rights at the local level. These include in particular:

- European Charter of Local Self-Government (CETS No. 207) and Additional Protocol to the Charter of Local Self-Government on the right to participate in the affairs of a local authority (CETS No. 207);
- Recommendation No. R(96) 2 of the Committee of Ministers to member States on referendums and popular initiatives at local level, and guidelines attached to it https://localgovernment.gov.mt/en/DLG/Legislation/Documents/Legislation/R(96)2.pdf
- Recommendation No. R (98) 12 of the Committee of Ministers to member states on supervision of local authorities' action R(98)12 on supervision of local authorities' action.
- Recommendation Rec(2001)19 of the Committee of Ministers to member States on the participation of citizens in local public life - https://rm.coe.int/16804f513c
- Recommendation CM/Rec(2009)2 of the Committee of Ministers to member states on the evaluation, auditing and monitoring of participation and participation policies at local and regional level, and the CLEAR tool appended thereto
- PACE Recommendation 1704 (2005) on referendums: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17329
- PACE Resolution 1303(2002), Functioning of democratic institutions in Moldova, par. 8
- the Guidelines for civil participation in political decision making (CM(2017)83-final)
- Congress of Local and Regional Authorities of the Council of Europe Resolution 401 (2016) on preventing corruption and promoting public ethics at local and regional levels
- the European code of conduct for the political integrity of local and regional elected representatives
- the 12 Principles of Good Democratic Governance
- the 2006 Abridged Handbook on Public Ethics at Local Level
- Report on the Status and working conditions of local and regional elected representatives - Basic principles, Steering Committee on Local and Regional Authorities (CDLR), 1992
- Report on liability local elected representatives for acts or omissions in the course of their duties, Steering Committee on Local and Regional Authorities (CDLR),1998
- the OSCE 1990 Copenhagen Document (on the Human Dimension of the CSCE)

9. The Commission also took into account its own findings in thematic and country-specific reports on issues of relevance for the present analysis (see specific references in the various sections below).

III. Imperative mandate and recall

10. The recall of elected representatives is a well-known, although not widespread, political institution which seems to attract increased interest throughout the world. It provides the electorate with a mechanism enabling them to remove from office, before the end of his/her term, i.e. without waiting the next regular elections, an elected representative who no longer gives satisfaction.

11. As underlined by the Venice Commission in its related work, "[t]*he institution of the representative recall, whereby the constituency has a right of continuous control over its elected representatives, is linked to the imperative mandate theory of representation. Under this theory, representatives are obliged and supposed to act in accordance with the mandate they received from their constituencies*."[1] This triggers the key question of whether the recall

[1] See CDL-AD(2007)018, Opinion on the law on amendments to the legislation concerning the status of deputies of the Verkhovna Rada of the Autonomous Republic of Crimea and of local councils in Ukraine, par. 6

of an elected official can be carried out when the imperative mandate is explicitly forbidden in the Constitution or in the laws of a given state.[2]

12. The difficulty of the question is obvious, as it touches upon the very essence of a representative democracy, a system based, by definition, on the principle of representation, where citizens transfer their sovereignty - that is, the right to rule - to their elected representatives who, on behalf of the citizens, make decisions and establish policies in the interest of all. This is also why the question whether voters enjoy a "right" to decide to recall ("un-elect") their elected representative if there is a reasonable doubt about his/her work (or even evidence of misuse of his/her position) remains disputed.

13. According to the answer given to this question, the recall may either be seen as a particular case of the imperative mandate - and thus not allowed in a representative system, at least for a representative assembly, or as a separate mechanism, with its own rationale, functions and conditions of operation.

14. It will therefore be essential, in order to assess the suitability and acceptability of the recall in a representative democracy, to determine its distinctive features from the imperative mandate, its advantages but also the risks it entails, and ultimately, the added value that it is likely to bring to the society.

1. Representative democracy. The principle of free parliamentary mandate

15. The principle of free political mandate and its corollary, the prohibition of any imperative mandate, are at the foundations of representative democracy.

16. Having its origins in Roman law, the imperative mandate gave way, throughout history, to the gradual enfranchisement of representatives, and was eventually replaced by a system - the representative democracy - where "*representatives do not exclusively represent their local electors but an abstract body, the nation, whose will is superior of and different from local constituencies*".[3] At the origins of the free mandate as a basic feature of the political representation: the liberal democratic theory,[4] with its new understanding of the concepts of political legitimacy and sovereignty and their source, the nation.

17. As far as contemporary world is concerned, as acknowledged by the Venice Commission, "Imperative mandate is generally awkward to Western democracies".[5]

[2] In its 2009 *Report on the imperative mandate and similar practices*, the Venice Commission was noting: " No European state (apart from Ukraine) has imperative mandate and it is worth noting that some former communist regimes have vigorously rejected attempts to re-introduce imperative mandate."
See for more details: CDL-AD(2009)027, Report on the imperative mandate and similar practices, p. 4.

[3] For a brief historical and theoretical background of the imperative mandate, See Venice Commission, Report on the imperative mandate and similar practices, CDL-AD(2009)027, par.4-7.

[4] The classic theory of political representation is clear on the prohibition of the imperative mandate. Both Burke[4] and Sieyès[4] agreed during the seventeenth century on the free mandate of representatives as a basic characteristic of the political representation, as also the election of representatives and the absence of revocation and recall. Before the French Revolution members of the Third State received *cahiers de doléances* or instructions from their constituencies. This is also the tradition in the Diet or Congress of Confederations with delegates or ambassadors of the sovereign states and still remains in the German *Bundesra*t. In the liberal tradition parliamentarians represent the whole nation or (later in the democratic one) the people. The Parliament as institution represents the people.
See E. Burke, *Speech to the electors of Bristol*, 3 November 1774; E. Sieyès on the deputies as representatives of the whole Nation. Speeches at the National Assembly 15 and 16 June 1789. On the prohibition of the imperative mandate. The motion of 8 July 1789. In *Escritos y Discursos de la Revolución,*CEC, Madrid, 1990, pp. 38, 47 and 58

[5] CDL-AD(2009)027 par. 11.

18. **Constitutions** of different countries:
- 1) prohibit imperative mandate in a disposition placed in the chapter of National Parliament (Article 7, section III chapter 1 Titre III French Constitution 1791. Among current constitutions, for instance: Article 67 of the Italian Constitution; Article 27 of the French Constitution; Article 67.2 of the Spanish Constitution; Article 68.2 of the Moldovan Constitution)[6], and
- 2) proclaim that the Parliament represents the people (i.e. Article 147 of the Portuguese Constitution; 66.1 of the Spanish Constitution; Article 50 of the Andorran Constitution) and the parliamentarians are representatives of the whole country and not of their constituency (Article 7, section III chapter 1 Titre III of the French Constitution 1791; Article 152.2 of the Portuguese Constitution).

19. Some Constitutions also recognize, in the bill of rights, the fundamental right of public officials and representatives to accede and exercise the public functions and positions. This happens in the context of the right of suffrage or of participation in public affairs (Article 51 of the Italian Constitution; Article 23.2 of the Spanish Constitution; Article 25 of the Andorran Constitution), not to mention the French Declaration of Human and Civic Rights of 1789 (Article 6).

20. **Constitutional Courts** have rejected, based on such constitutional provisions, attempts of revocation of elected representatives, and have stated that the parliamentary mandate is a representative one, on behalf of the whole nation.[7] The prohibition of imperative mandate means that the parliamentarian is free to vote according to the instructions of the party and also free to depart from those instructions and vote in another way. There is no legal obligation on the elected to support the party or the parliamentary group. Since, following their election, parliamentarians become representatives of the whole people and not just of the party to which they belong, they are not bound by orders or instructions of the party, nor by commitments that they might have undertaken before the election. Furthermore, no rule can establish legal consequences [the early termination of the mandate] for a parliamentarian voting against the instruction of the party.[8]

21. Constitutions and standing orders usually regulate the **causes of early termination and suspension of the parliamentary mandate,** such as voluntary resignation, death or incapacitation, or guilty verdict. As a rule, constitutions do not contain specific provisions against "floor crossing" or switching parties practices. Also, while acknowledging that parliamentarians need to comply with the discipline of the parliamentary group to which they belong,[9] constitutional courts have rejected the link between the resignation or expulsion of an MP from the parliamentary group, and the early termination of the mandate and his/her

[6] Also see the Statute for members of the European Parliament (Decision EP 28 September 2005 (2005/684EC, Euratom):
Article 2
1.Members shall be free and independent.
2.Agreements concerning the resignation from office of a Member before or at the end of a parliamentary term shall be null and void.
Article3
1.Members shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate.
2.Agreements concerning the way in which the mandate is to be exercised shall be null and void.

[7] In Lithuania, the Constitutional Court has ruled in a number of occasions that the mandate means that electors have no right to recall a member of the Seimas and his/her freedom cannot be limited by parties, or organisations that nominated them . See also Judgment of Moldovan Constitutional Court of 19 June 2012, on the interpretation of Articles 68 alin. (1), (2) and 69 alin. (2) of the Constitution (Application nr. 8b/2012), par. 44; more recently, see Spanish Constitutional Tribunal judgement 123/2017 (in relation with senators appointed by the Assemblies of Autonomous Communities).

[8] Italian Constitutional Court, judgement 14/1964.

[9] Judgment of Moldovan Constitutional Court of 19 June 2012, cit.

expulsion from parliament.[10] The party or parliamentary group may well exclude the MP from the organization, yet this exclusion does not entail the loss of the parliamentary mandate.

22. One of the consequences is the transformation of the principles of the theory of representation into a **fundamental right of the representatives to access and exercise their positions**. In Spain, thanks to the recognition of such constitutional right (Article 23.2), individual appeals by elected representatives - parliamentarians or local authorities - are possible before the Constitutional Tribunal (*recurso de amparo*). The Tribunal has a long-standing doctrine protecting the rights of representatives *vis-à-vis* the party or the parliamentary group they belong to. Although this right is not explicitly mentioned in the Constitution, the Constitutional Tribunal built it from the right to "access" to public positions, without having to consider the clause of prohibition of the imperative mandate (Article 67.2 SC). Such a right includes, then, not only the "access" but also the "exercise" and the "continuity" in the position. Through this right, not only the position of parliamentarians is protected, but also that of the local representatives, and this without the need to extend the prohibition of the imperative mandate (of the parliamentarians, in an original and restrictive interpretation) to the local authorities.

2. Venice Commission work

23. In its work, the Venice Commission has had several occasions to address issues of relevance for the present report, both in the framework of its thematic work and in a number of country-specific opinions.

24. In its 2009 *Report on the imperative mandate and similar practices*, the Commission also briefly referred to the mechanism of recall as a related, but distinct, institution from the imperative mandate. Yet, the Commission notably examined, in its report, different mechanisms enabling political parties to control and decide on the early termination of the mandate of individual members of parliament. The Commission's conclusion was that, "*even though the aim pursued by this kind of measures […] can be sympathetically contemplated, **the basic constitutional principle which prohibits imperative mandate or any other form of politically depriving representatives of their mandates must prevail as a cornerstone of European democratic constitutionalism***." (par. 39, emphasis added) The Commission consistently examined relevant national provisions in the light of this conclusion.[11]

25. Even before the adoption of the 2009 Report, the Venice Commission had to deal, on several occasions,[12] with national regulations providing for mechanisms for early termination of the mandate of parliament members or envisaging introducing such a mechanism. The Commission consistently stressed that such mechanisms were in breach with the principle of the free and independent mandate of the deputies by introducing the imperative mandate, which is not compatible with the traditional and generally accepted doctrine of representative democracy.

[10] Constitutional Court of Serbia, Decision of 27 May 2003

[11] *Venice Commission and the OSCE-ODIHR, The Republic of Moldova - Joint Opinion on the draft laws on amending and completing certain legislative acts (electoral system for the election of the Parliament)* CDL-AD(2017)012; *Joint Opinion of the Venice Commission and the Directorate of Democratic Governance of the Directorate General of Democracy of the Council of Europe on the revised draft law making amendment to the law "on the status of municipalities" of the Republic of Azerbaijan CDL-AD(2014)022*

[12] *Opinion on the draft law on additions to the law on the status of municipalities of the Republic of Azerbaijan*, CDL-AD(2009)049, par. 10-11;
Opinion on the Law on Amendments to the legislation concerning the status of deputies of the Verkhovna Rada of the Autonomous Republic of Crimea and of Local Councils in Ukraine, CDL-AD(2007)018.
See also *Opinion on the Amendments to the Constitution of Ukraine,* CDL-AD(2003)015; *Consolidated Opinion on the Ukraine Constitutional Reform Project*, CDL-INF(2001)011.

26. The Commission also expressed **concern that (most of the) grounds for curtailing the elective mandate imply legal judgments, and stressed that "*such judgments should rather be made by neutral and independent bodies,"* with corresponding legal expertise**". In particular, where the violation of constitutional or legislative provisions is invoked as a ground, it would be "*quite unusual to entrust voters with the complex responsibility to evaluate the respect of constitutional and legal obligations by a deputy, as citizen's votes essentially remain the expression of a political choice.*" In the Commission's view, "*it would be more appropriate to provide for the termination of the […] mandate through a legal procedure, which would comply with the principle of the rule of law and avoid the use of vague concepts likely to result in arbitrary interpretations essentially motivated by political reasons*." [13]

27. To support its denial (or reservation to) of the imperative mandate, the Venice Commission has recently invoked[14] three OSCE and Council of Europe documents:

- the 1990 OSCE Copenhagen Document, requiring that elected officials be permitted to remain in office "until their term expires", and "in a manner that is regulated by law *in conformity with democratic parliamentary and constitutional procedures*"(par. 7.9, italics added);
- the PACE Resolution 1303(2002) on the functioning of democratic institutions in Moldova (par. 8);
- its own 2009 *Report on the Imperative mandate and similar practices*. [15]

28. Of particular relevance for the present analysis, the Commission differentiates, in its 2009 Report, the imperative mandate "*stricto sensu*" from other legal provisions, in "very few countries among the Council of Europe member States" (Article 160 Portuguese Constitution and Serbian and Ukrainian cases), giving political parties the power to make members of the elected bodies resign if they change their political affiliation. These are cases of early termination of the mandate in the hands of the party, and not of revocation by parliament or recall by citizens.

29. The Commission acknowledges the existence of such practice, which in its view is closer to the model of "party administered mandate" and cannot be equated to the concept of "imperative mandate", forbidden in virtually all European countries. The Commission at the same time stresses that such mechanisms leave important decisions on the status of elected representatives "*to the governing bodies of the parties and the voters, which both do not present the necessary guarantees of independence and neutrality, lack the necessary legal expertise and, as whole, cannot meet the requirements deriving from the rule of law. In the absence of a judicial review, the rights and freedoms of deputies are not sufficiently guaranteed* ".[16]

30. As already indicated, the Report ends with the Commission's clear support to "*the basic constitutional principle which prohibits imperative mandate or any other form of politically depriving representatives of their mandates." (par. 39)* Yet, the way in which the general conclusion of the Report is expressed appears to accommodate particular provisions of some constitutions, and related practices, deviating from this principle ("*in these countries these practices have been considered consistent with their own constitutions"*). Moreover, the concluding paragraph starts with a consideration of fact: "*At present, imperative mandate*

[13] Opinion on the Law on Amendments to the Legislation concerning the Status of Deputies of the Verkhovna Rada of the Autonomous Republic of Crimea and of Local Councils in Ukraine ,Venice, 1-2 June 2007, CDL-AD(2007)018, par. 16-17

[14] Venice Commission and OSCE/ODIHR *Joint Opinion on the draft laws on amending and completing certain legislative acts (electoral system for the election of the Parliament)* CDL-AD(2017)012, par.16.

[15] *Report on the imperative mandate and similar practices, cit.* CDL-AD(2009)027, par. 39.

[16] Idem, par. 20

stricto sensu *and recall are unknown in practice in Europe*," which seems to leave the door open to a different situation based on other legal or constitutional provisions in the future.

31. More recently, the Commission examined one of the latest attempts to introduce a recall referendum in Europe, a draft law of the Republic of Moldova providing for the revision of the electoral legislation and proposing to enable voters to recall elected members of parliament through a referendum to be held in their constituency. The recall initiative required the signatures of at least 1/3 of the voters, and the successful revocation, the votes of at least half of the voters of the constituency, but not less than the number of those having voted for the concerned MP. As grounds for revocation, the draft law envisaged: failure to observe the interests of the community in the constituency; failure to exercise properly the duties of a member of Parliament stipulated by law; violation of moral and ethical norms.

32. The Venice Commission rejected this proposal as being both contrary to the Moldovan Constitution (Article 68.2 prohibits the imperative mandate) and to a judgment of the Constitutional Court in 2012 (parliamentary mandates are irrevocable and exercised in the interest of the whole nation), and in breach of international standards.[17] **The Commission noted in this context that the proposed amendment "*would have effectively established a system of general recall of representatives, which in a certain political context, may well function as an imperative mandate*." The Commission further stated that this "*has to be considered as a political and not a legal procedure*" and that "*[i]nvolving courts in such a procedure would put them at risk to be politicised*."[18]**

3. The recall - an *"ad-hoc"* instrument of direct democracy in a representative system

33. Different in nature but linked to the representative mandate is the mechanism of recall, a political procedure, involving a referendum, that gives electors the power to remove a representative from office before regular elections. Unlike other types of referendums, the recall referendum does not apply to laws or policies, being directed to people considered unfit to perform their duties.

34. While distinct from the imperative mandate, the recall, "a characteristically American institution", also "*differs from impeachment: whilst the second is a judicial proceeding against an elected officer because of some crime, recall is a political process*."[19]

35. By its very nature an instrument of direct democracy,[20] the recall is actually part of a whole set of direct democracy mechanisms of control,[21] agenda setting and accountability beyond elections, operating, according to the national legal and constitutional traditions, as a complement to representative democracy (the popular initiative, the referendum, the petition, the recall and the veto). Where authorized, the recourse to recall may be seen "as a counter-power in the configuration of checks and balances of democratic institutions".[22]

36. The common feature of all forms of direct democracy is that they are based on the direct, sovereign power of the voters, as opposed to the power of the elected representatives

[17] Republic of Moldova, Venice Commission and OSCE/ODIHR *Joint Opinion on the draft laws on amending and completing certain legislative acts (electoral system for the election of the Parliament)* CDL-AD(2017)012, par.16.
[18] Idem, par. 60
[19] Venice Commission, Report on the imperative mandate and similar practices, CDL-AD(2009)027, par. 14
[20] See CDL-AD(2007)018, par. 3 ; see also CDL-AD(2004)003, par.85-86
[21] See Yanina Welp*, Recall Referendum Around the World: Origins, Institutional Designs and Current Debates,* in "The Routledge Handbook to Referendums and Direct Democracy", Edited by Laurence Morel, Matt Qvortrup, 2018 – Routledge
[22] Serdült, U. and Welp, Y., "The levelling up of a political institution. Perspectives on the recall referendum", in Ruth, S., Welp, Y. and Whitehead, L. - Let the people rule? Direct democracy in the twenty-first century, ECPR Press. Forthcoming, p.1

of the citizens. What differentiates the recall is that the decision taken concerns the crucial question whether to put an end to the office of an elected representative - and replace him or her - before the end of the term.

37. While, further to the strengthening of representative democracy, direct democracy instruments have lost ground throughout history, one cannot fail to notice that there is renewed interest for such instruments, in recent times. Representative democracy is often subject of criticism on behalf of those who consider that this model of democracy lacks civic legitimacy and political responsibility. In principle, in a democracy, politicians are accountable primarily to the citizens who elect them. In practice, in contemporary societies, the links are often tenuous and the politicians are increasingly disconnected from their voters, as they tend to be accountable first to their party leadership and to political decision-makers, and only secondarily to citizens.[23] This has been translated into attempts to introduce mechanisms for more effective and direct participation, including regulations on recall, as a way to restore the links and ultimately to enable voters to regain the power of choice and decision on whom they want to have, and for how long, as their representatives.

38. As pointed out before, the recall is to be seen as a political tool, since it operates as a political process. While the free mandate serves as a basic operational principle, formally enshrined in law, for the political system as a whole, the recall, in those jurisdictions where it is allowed, will only intervene as a reactive mechanism, an additional counter-force to existing checks, involving an expression of (political) will on the part of citizens.

39. The recall does not call into question or circumvent the representative system as such; it actually completes it by introducing an additional - political - institution, directly involving voters to address insufficient accountability and responsiveness of the system and its main actors. In fact, it enables voters to provide feedback on their representatives' performance and to remove them as a sanction for poor action.

40. The mechanism of recall in fact operates on a set of principles - the principles of democratic representation, of the people sovereignty and of the responsibilities inherent to a public function - which are at the same time underlying principles of any representative democracy. From this perspective, the recall may be seen rather as an *ad-hoc*, though contested, corollary of the representative principle rather than as a sub-category of the imperative mandate.

41. Unlike the imperative mandate - where the binding will of the electors forms the representative's permanent framework for action, the recall intervenes as a punctual, *ad-hoc* corrective instrument and has not the character of a default rule. The recall only comes into operation ***if*** it is activated, being the subject of a decision *dependent* on the political *will* of a prescribed *number of voters*, motivated by *specific grounds*, under *specific circumstances*.

IV. Potential and risks of the recall

42. There are various reasons justifying the recall, according to the national context. For instance, in transitional democratic states, one the main reasons for its application remains the - still - strongly expressed need of voters to have the final say in the management of the public affairs and in their relation with the state. Recall is also seen, including in countries with a democratic tradition, as a tool for citizens to influence the process of breaking or weakening certain narrow interest groups with strong political or economic power in the country.

[23] See: Derick W. Brinkerhoff, (2001), Taking Account of Accountability: A Conceptual Overview and Strategic Options, March, 2001: http://www1.usaid.gov/our_work/democracy_and_governance/publications/ipc/wp-14.pdf

43. In any event, the justification of the recall follows the main line of thinking that citizens are or should be the last factor, the final arbiter to decide whether elected officials, depending on how well they perform, should stay or should leave their positions.

44. The theory also lists certain mitigating circumstances for implementing the procedure itself. The increased number of cases of recall initiation has been linked to a number of factors, which are often interrelated, in particular: "*scandals, the impact of digital media, which add a new speed and scope for campaigning, and the leadership of political parties activating recall referendums against their opponents*".[24] Less restrictive conditions for launching a recall procedure are another facilitating factor.

1. Arguments in favour of the recall

45. By definition, the recall constitutes an empowering tool for citizens, enabling them to remove from office bad politicians who have defected in their work, and who do not take into account the interests of the electorate that has elected them. In this sense, citizens will no longer be bound to tolerate incompetent politicians and wait for their mandate to pass before changing them.

46. As a matter of fact, voters become the main factor in giving and taking away public office, which practically minimizes the influence of parties, on the one hand, and increases the influence of the electorate on elected officials, on the other. To secure their position, when they know that they can be recalled, elected officials are more concentrated to work in the interest of the citizens of their constituency, or in accordance with their conscience, rather than according to the party directives or other instructions. By doing this, the recall alsohelps to check and prevent the exercise of undue influences or interests in the communities' affairs.

47. Another dimension of the recall, and a further argument in its favour, is that it leaves room for voters' control over the work of elected officials throughout the entire mandate, by enabling them to hold early elections and "un-elect" such officials when it is most needed, without being bound to wait until the end of their term. Under the general rules of representative democracy, citizens only have the opportunity, after three, four, or five years, to decide and elect their (new) representatives, through regular elections. On the other hand, when used irresponsibly, the recall can be abused as a tool by the political parties in the battle against their political competitors.

48. The recall is also expected to play an important role as a protective and preventive mechanism from corrupt and irresponsible holders of political power; in other terms, a tool to clean up the political activity, to promote accountability in public life and to curb corruption. In the short term, this should help strengthen the individual political responsibility of elected towards their electorate, and in the long run also strengthen the overall political responsibility of the system in the country.

49. To sum up, the recall has the potential to bring elected officials closer to their voters, make them more accountable and more responsive to the needs of the people they serve. It helps to bridge the democratic gap engendered by often lower levels of participation in election, by motivating public participation and interest in public affairs between elections. At the same time, by enabling permanent control of the elected, it gives citizens the power to hold politicians accountable during their entire

[24] Welp, Yanina (2018) "Recall referendum around the world: origins, institutional designs and current debates", in The Routledge Handbook to Referendums and Direct Democracy, Edited by Laurence Morel, Matt Qvortrup, Routledge. https://www.routledge.com/The-Routledge-Handbook-to-Referendums-and-Direct-Democracy/Morel-Qvortrup/p/book/9781138209930, p. 6

term, without waiting the next round of elections. From this perspective, the recall is also a mechanism to shift the balance of power between the electors and the elected.

2. Arguments against the recall. Risks and vulnerabilities

50. Despite its democratic vocation, in its operation, recall is in fact far more complex than it seems: it involves complex challenges and risks of abuse, and sometimes unexpected consequences on democracy.

51. One of the main arguments put forward by those opposed to the recall is that its frequent use can lead to a so-called process of "surplus of democracy," that jeopardizes the independence of the elected representatives, makes public office less attractive and/or leads to populism.

52. Further vulnerabilities include: the instability and ineffectiveness of the government as a possible consequence of the recall; the costs necessary to initiate it and the prominent role of money in the recall process; and the use of recall petitions as a political "weapon".

53. The recall can indeed be misused by various interest or pressure groups to destabilize the governance and make it inefficient by preventing selected politicians from taking certain steps or decisions because of the danger of being removed by the citizens.

54. Elected political authorities have a specific responsibility, namely that of harmonizing contradictory demands within society and trying to design and implement a common collective future. Obviously, this requires time and a margin of discretion in their action. From this perspective, the recall can seriously discourage the politicians from acting according to their own convictions and views, and making their own decisions. Instead, a system of distrust and fear risks being built in which the elected officials will be afraid to make unpopular, but sometimes necessary political decisions, precisely because they know that they can be removed at any time.

55. Money plays a dominant role in the process of recall. The collection of signatures, in the opinion of many, has become a professional activity. It is considered that the success of any petition for recall dominantly depends on collecting signatures, which is actually related to how much money is invested in that process.

56. It is also known that there is a lot of blackmailing and there are corrupt deals. The recall campaign itself is often used to politically discipline political competitors, since it can be initiated with a promise to stop when the concerned authority acts in a "proper" way. This can increase the influence of wealthy corporations over the government. Seen in this way, it will be difficult to measure the actual impact of the recall, and whether this impact is positive, in terms of improved quality of the governance, responsiveness the voters' expectations and adequacy to their needs.

57. As a result, where supporters of the recall see its important role in disciplining elected officials and increasing their political responsibility, their opponents point out to the risk, through the recall, of ultimately undermining the trust of the electorate in their elected representatives, as well as in politics and representative democracy as whole.

58. From a wider perspective, recall processes often lead to confusion and division within society, and may result in too much burden on citizens, between regular elections, to monitor the action of their elected leaders. Recall requests, even when they fail, as well as the threat of the recall, often engender a climate of suspicion and instability. They occupy the public space and divert the debate away from otherwise important problems of the community.

59. One important risk is that of confusing, as ground for the recall, legal and political responsibility, by making the contested elected official politically responsible before the electorate, although the grounds for dismissal are formulated in a way which invokes legal responsibility. Of particular importance in terms of legal security and from the perspective of the protection of the fundamental rights of the elected official concerned, this question, arises for instance when conflict of interests, abuse of power or corruption are included among the reasons for the recall. Such issues should normally be settled by a court according to the legislation in force, and not submitted to the people for decision. [25]

60. Further vulnerabilities arise from the practicalities of the implementation of the recall.

61. For example, depending on the electoral system and the quorums required, some interesting scenarios may result, which may be seen as abnormal from democratic perspective, where the challenged representative is removed by a quite high majority, with the successor being be elected by an significantly lower number of voters. Problems may also occur if the electoral system is a proportional one with closed party lists, which appears hardly compatible with the logical of the recall.

62. There are also tensions that may result from the strict party discipline in some systems, where it will be difficult for voters to recall the local elected for (unpopular) decisions taken as part of the party's line; on the contrary, recall may function as an efficient tool to remove incompetent or unethical representatives. It is thus important to make a clear distinction between politicians who are merely not suitable for the function to which they were elected and competent and committed representatives, who found themselves, in some particular situation, faced with difficult, controversial and unpopular decisions.

63. Another argument against the recall is related with the large costs associated with the conduct of the procedure itself, which can be prohibitively expensive.[26] The costs for organizing the recall referendum should be added to the costs for organizing additional elections to fill the vacant position, or for organizing completely new parliamentary elections. The costs for the candidates, the parties, as well as for the administrative bodies responsible for conducting the whole procedure will also need to be taken into account.

64. On the technical side, where an electronic petition system is in place, it may have serious failures in protecting the voters from possible abuses of their electronic signature, especially in cases where voters have the same name and surname.

V. National Practice

65. While its history dates back in ancient times,[27] the national legislation provides for recall in a number of contemporary democracies and a number of practical examples of effective use of recall, most of them out of Europe, may be found.

[25] Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, CDL-AD(2012)026, par. 78.

[26] Recall and Direct Democracy, Remarks by Ho. David Kilgour, MP for Edmonton Southeast Ontario Provincial High School Debate Tournament Room West Block, House of Commons, Ottawa, 2 April 2004.

[27] "The origins of the institution can be traced back to the Roman Republic, where tribunes were occasionally recalled (Qvortrup 2011)." See Welp, Yanina (2018) "Recall referendum around the world:origins, institutional designs and current debates", in The Routledge Handbook to Referendums and Direct Democracy, Edited by Laurence Morel, Matt Qvortrup, Routledge. https://www.routledge.com/The-Routledge-Handbook-to-Referendums-and-Direct-Democracy/Morel-Qvortrup/p/book/9781138209930, p. 1

66. Recall has a long tradition in (North and South) America but not in Europe,[28] with the exception of Switzerland and, a more recent evolution, several other European countries. Authors note that, if in the past, only a few countries had such regulations, more recently - in particular since the 1980's - legal provisions allowing for recall have been introduced in different areas of the world, and the examples of effective application of the mechanism are growing.[29]

67. The growing interest in this mechanism has been seen as being "*related to the relatively recent restoration of democracy in many parts of the world such as the so-called third wave of democratization in Latin America as well as with a crisis of representative democracy. Both of these factors led to a demand for reinvigorating democracy through more direct citizens' participation. While scandals place a recall on the political agenda, the replacement of constitutions […] or constitutional reforms in general create a window of opportunity to introduce the mechanism*."[30]

68. Yet, the number of countries where the recall is allowed - over 25 countries worldwide - remains fairly low, with sometimes significant differences as regards both the level of regulation (national or subnational), the level at which it may be applied (national, regional or local), and related grounds and procedure.

69. Research conducted in recent years[31] shows that "*recall can be activated against all the elected authorities in five countries, four of them in Latin America (Bolivia, Ecuador, Venezuela, Cuba) and in Taiwan RC. In Cuba it means that only the delegates at the bottom level can be removed by referendum (as this is the only level that is elected) […]. In Liechstenstein the whole council can be removed, such as in the cantonal level in Switzerland. Then, in nine countries recall can be activated against MPs (Russia, Ethiopia, Kyrgyzstan, Kiribati, Nigeria, Liberia, Panama, Palau and Uganda). In the case of Colombia recall is only regulated to remove executive authorities at the subnational level. In the other three cases (Japan, Poland, and Peru) executive and legislative authorities at the subnational level can be removed through a recall process. In addition, there are another seven cases in which the regulation comes from the subnational level only. In this group, there are cases in which recall is available only against MPs (British Columbia), Switzerland (see above) and four cases (Argentina, Germany, USA and Mexico) where the legislature and executive can be removed according to the law introduced by some subnational governments.*"

70. One may note for example that, in the United States, today, 19 federal states practice recall of elected state officials. Additionally, several other states apply this mechanism at municipal or regional levels of government.[32] At federal level, this mechanism cannot be applied, as it is not allowed by the federal Constitution. Apart from the United States, this mechanism has also found its way in constitutional systems which are under direct influence

See also Qvortrup, M. (2011) Hasta la vista: a comparative institutional analysis of the recall, Representation, 47(2), pp. 161-170.

[28] "Imperative mandate and recall of representatives are unknown in modern European democracies." See Venice Commission and OSCE/ODIHR, *Joint Opinion on the draft laws on amending and completing certain legislative acts (electoral system for the election of the Parliament), cit.* CDL-AD(2017)012, par. 67.

[29] Serdült, U. and Welp, Y. "The levelling up of a political institution. Perspectives on the recall referendum", in Ruth, S., Welp, Y. and Whitehead, L. Let the people rule? Direct democracy in the twenty-first century. ECPR Press. Forthcoming, p.1

[30] Idem, p. 13

[31] Idem, p. 5

[32] Almost all US states that apply the recall use the referendum as a mean of determining whether a particular official really needs to be recall. In 2011, in 17 states out of 50, there were 150 recall attempts (75 lead to the recall of the concerned person); most concerned mayors. The most known case is that of 7 October 2003 in California, when the Governor Gray Davis was recalled and A. Schwarzenegger was subsequently elected.

of the American system - Japan, Taiwan, and the Philippines (at the local level), as well as in countries where, as mentioned before, the need for increased direct involvement of citizens in government processes has become an acute concern. In countries with the Westminster Parliamentary system, the recall is applied in British Columbia (Canada), and there is also a proposal for its limited application in the United Kingdom in response to a scandal over the abuse of parliamentary funds by MPs covered.

71. In Europe, authorities may be recalled, at different levels, in Germany (local mayors, in four *Länder,* Brandenburg, Sachsen, Schleswig-Holstein and North-Rhine Westphalia), Liechtenstein (the Parliament as whole), Poland (executive and/or legislative authorities at the subnational and local level), Romania (the president of the country, the mayor and the local council), the Republic of Moldova (the president of the country, the mayor), the Russian Federation (members of parliament, local elected representatives), Switzerland (Uri: all elected authorities; Bern, Solothurn, Schaffhausen, Thurgau, Ticino: parliament and/or government as a whole; Uri, Ticino: executive authorities at the local level (mayor)).

72. Well-known examples of presidential recall may be mentioned, such as those in Venezuela - where Hugo Chavez, former President, faced recall elections in August 2004, while his successor Nicolas Maduro experienced a recall attempt in 2016, or Bolivia - in respect of the President Evo Morales, who survived a recall referendum in August 2009.

73. A more recent process of presidential recall, held in Romania in 2012, was the subject of an Opinion of the Venice Commission.[33] The Venice Commission underlined in that context a requirement which, in its view, is fundamental in the framework of recall processes, i.e. that clear distinction should be made between the legal and political responsibility of the elected contested. In this regard, the Commission noted the following: "*The procedure for suspending the President confuses in a rather peculiar way legal and political responsibility. It tends to make the President politically responsible before the Parliament and the electorate, although the grounds for dismissal are formulated in a way which invokes legal responsibility.* ***The role of the Constitutional Court in the procedure is also rather unclear. If maintained at all, the procedure of Article 95 of the Constitution on the suspension of the President as it stands should be transformed into a clearly legal responsibility, initiated by Parliament but settled by a court***."

VI. Local recall

74. Most constitutions, particularly in the European context, contain provisions entailing the prohibition of the imperative mandate for parliamentarians. Constitutional Courts have usually extended the scope of the prohibition to every representative, local included, according with the theory of political representation.[34] More generally, European instruments tend to invoke the theory of representation and the principles of democratic constitutionalism for the prohibition of a binding mandate. The Venice Commission confirms this position.

[33] Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, CDL-AD(2012)026, par. 78.

[34] In Spain the free mandate of local representatives has been recognised by the Constitutional Tribunal on the grounds of Article 23.2 or the fundamental right to exercise a public position, and not on the grounds of the prohibition of the imperative mandate (of the parliamentarians). Thus, termination of membership of a political party cannot be ground for revoking an elected deputy's mandate in municipal assemblies. See Constitutional Tribunal of Spain, decisions 5 &10/1983; Constitutional Court of Serbia, decision 25 September 2003

75. Based on national constitutional traditions, exceptions are however admitted, for the recall, in some cases at local level, by constitutions, statutes and doctrine. The ensuing question is whether the recall should, more generally, be permitted at the local level and what are the suitable conditions for its acceptance.

1. European standards

76. The European Charter of Local Self-Government, so far ratified by 39 states, applies the general principles of representative government and representative democracy at local level. Article 7.1 of the Charter provides: "*The conditions of office of local elected representative shall provide for free exercise of their functions*." Article 7.3 adds: "*Any functions and activities which are deemed incompatible with the holding of local elective office shall be determined by statute or fundamental legal principles*". Yet, the Charter is silent on the potential reasons for ineligibility or incompatibly, leaving to the national legislator the task to draw these limits and conditions, through national legislation and "fundamental legal principles". The Explanatory Report to the Charter interestingly explains: "*this paragraph provides that disqualification from the holding of local elective office should only be based on objective legal criteria and not on* ad hoc *decisions. Normally this means that cases of incompatibility will be laid down by statute. However, cases have been noted of firmly entrenched, non-written legal principles, which seem to provide adequate guarantees*."

77. Article 3.2 of the Charter once more confirms, at local level too, the primacy of representative democracy, with all its implications: local self-government "*shall be exercised by councils or assemblies composed of members freely elected by secret ballot...and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute."* This shows that the importance of various forms of direct participation, including referendums, as an additional component of the local governance, or a complement to it, is at the same time, recognized.

78. One may assume in view of the above that, under the Charter, the representative system of local governance, based on local organs formed of locally elected representatives, and direct participation instruments, are not mutually exclusive. The Explanatory Report clarifies that, under the right of self-government, "*allowance is also made for the possibility of direct democracy where this is provided for by statute*."[35] This explanation seems to open the door, potentially, to direct democracy practices, without excluding those involving early termination of an elective mandate, where these are allowed by the national legal and political traditions.

79. Important guarantees for the local self-government system are provided by Article 8 (regulating the administrative supervision of local authorities' activities) and Article 11 (on local authorities' right to a judicial remedy). It is important to stress that, under the Charter, any expedience control should relate exclusively to the execution of tasks delegated to local authorities by higher-level authorities.

80. Additional emphasis on the specificity of local government as government by local authorities for the interest of the local population may be found in Article 4, paragraph 3 of the Charter, which underlines, in line with the principle of subsidiarity, that "*[p…]ublic*

[35] The Charter describes the essence of local self-government and contains the main principles, often referring to the internal law of member states to determine the exact content of a rule. However, nothing prevents the judicial authorities of a Contracting State from considering one or other provision of the Charter to be directly applicable and binding, as the Swiss Federal Court did in a judgment of 3 June 2016 (ATF 142 I 216), by which it invalidated, for lack of prior consultation of the concerned citizens, a popular initiative for the merger of several municipalities.

responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen ». By way of symmetry, it may be inferred that public accountability should also be directed to the ultimate beneficiaries of the local authorities' action, the citizens. The question that arises is whether regular elections are a sufficient tool to check - and if needed, to address - the adequacy between the action of the local representatives and the interests of the local community.

81. Finally, the Additional Protocol to the Charter,[36] dealing especially with the right to participate in the affairs of a local authority, although not mentioning the recall as such, states that this right "*denotes the right to seek to determine or to influence the exercise of a local authority's powers and responsibilities*" (article 1.2). Article 2 of the Protocol requiring implementing measures to give effect to this right, mentions, among such measures, "*procedures for involving people which may include consultative processes, local referendums and petitions […]*" (article 2.ii.a).

82. Equally important, in its Recommendation 113 (2002)[37] related to the application of Article 3.2 of the Charter, the Congress stresses: "[…]*Where those in charge of the public authority are directly elected by the people, any dismissal must be endorsed by the people. However, these procedures should at the same time carry all the guarantees necessary for stable local government (precise definition of issues on which the executive can be called to account, qualified majorities for votes of no confidence, reasonable time-limits for implementing the procedure)*."

83. It would be difficult to conclude from the above that the Charter contains clear guidance as to the advisable limits of the recall of a local representative or that it would actually prohibit the recourse to recall. It may not be said either that it explicitly authorizes the recall. It must be added also, that the Charter provides for a variable system of undertakings for its State Parties upon ratification, enabling a non-uniform implementation of its principles at national level.

Venice Commission position

84. Ukraine has had some experience on this issue at regional and local level. The Verkhovna Rada adopted legislation providing, as regards the autonomous parliament of Crimea and local councils, for the revocation of MPs in case of termination of membership of a political party, and for the removal of representatives by means of recall of electors.

85. With reference to Ukraine, **the Venice Commission acknowledged, in its 2009 Report, the difficulty to articulate a direct criticism of mechanisms entailing application of the recall at the local level**. "*Since there are precedents in democratic countries, it would be difficult to articulate a direct criticism of this principle [recall by electors].*" While differentiating the situation in Europe and in America, the Commission seemed open to accommodate particular cases. At the same time, the Commission rightly argued that grounds for recall should not imply legal appreciations and that, where this is the case, other options, in particular the intervention of neutral and independent legal bodies, may be used/suitable instead of recall.[38]

86. When it examined local self-government legislative provisions in Azerbaidjan, the Venice Commission has also expressed concerns, in the light of Article 7 of the Charter,

[36] Opened to the signature of the state parties to the Charter in November 2011, 6.XI.2009, entered into force on 1 June 2012.
[37] Recommendation 113 (2002) on relations between the public, the local assembly and the executive in local democracy (the institutional framework of local democracy), see Appendix §3, let. E.ii
[38] *Report on the imperative mandate and similar practices* CDL-AD(2009)027 par. 35.; see also footnotes 32 to 35 for the Ukrainian experience.

over the conditions under which the powers of a municipal councillor can be terminated in advance or temporarily suspended (in case of prolonged unjustified absence). For the Commission, adequate guarantees should be provided as regards the type of regulating norm and the deciding organ:

- first, the specific rules for early termination of power/suspension cannot be determined by the statute of each municipality as this may result in an inequality of treatment among municipal councillors. A general regulation is required, national or regional (according with the distribution of powers in each country);
- second, the decision on the termination of the mandate of the municipal councillor cannot be adopted by a majority vote of the Council. "*The intervention of the Court is a necessary element of the system [...] This would ensure the free exercise of the functions of local elected representatives in conformity with the European Charter*"[39].

87. The Commission concluded: "*the verification procedure should be established in a clear and precise manner and consistently with the principle that this dismissal of an elective representative is an exceptional measure to be applied only in case of serious failures*" and "*all procedural guarantees, including the intervention of a court should be expressly guaranteed*".[40]

88. Although this was not a case of recall, there are elements that could be applied to the recall, as follows:

a) the grounds for early termination of the mandate of a local representative should be regulated by law (or Constitution) and not left to each municipal statute;
b) they should be exceptional;
c) when there are legal causes for the early termination, preference should be given to the decision of the courts instead of a majority decision of the local Council or the citizens through the recall.

89. One may conclude that, while the Commission's criticism and rejection of any forms of early termination of parliament members is very clear, when it comes to recall processes at the local level, the position of the Commission seems more open, especially when such processes are allowed by the local legal and constitutional tradition.

2. The Moldovan case. Elements of constitutional case law

90. The Congress, in its 2017 Resolution concerning the suspension of the mayor of Chisinau,[41] expressed concern with regard to the country's *"failure to comply with Article 7.1 of the Charter inasmuch as a local recall referendum is being organised to curtail the mayor's term of office, despite the fact that the Moldovan Constitution and the law on the conditions of office of local elected representatives prohibit any binding mandate*". For the Congress, the decision to hold a recall referendum is against the Moldovan Constitution and "*is also problematic with respect to Article 7.1 of the Charter*".[42]

91. In the view of the Congress, "local democracy" is a constituent part of the European democracy, and "*[t]his implies that local elected representatives must be able to exercise their functions freely, in fact and in law, in the same way that elected representatives at the*

[39] *Opinion on the draft law on additions to the law on the status of municipalities of the Republic of Azerbaijan*, CDL-AD(2009)049, par. 10-11.
[40] *Ibidem*, par. 27.
[41] Resolution 420 (2017) no. 3 c).
[42] (Local democracy in the Republic of Moldova: clarification of the conditions surrounding the suspension of the Mayor of Chișinău), Report CG33(2017) 23 final, no. 82. (Local democracy in the Republic of Moldova: clarification of the conditions surrounding the suspension of the Mayor of Chișinău)

national level must be able to exercise theirs in any democratic state".[43] The Congress points out in this contexts that, "*[i]n electing a mayor by direct universal suffrage, voters are delegating their power of action to the mayor and more generally giving him or her a mandate to represent the community as a whole*."[44]

92. In its analysis, the Congress invokes *inter alia* the position of the Venice Commission on parliamentarians' recall as expressed in its 2017 joint opinion on Moldova's electoral reform,[45] where reference is made also to relevant case-law of the Moldovan Constitutional Court. For the Congress, the Commission's "doctrine" "*should also be applicable mutatis mutandis to local elected representatives, since prohibition of 'any imperative mandate' applies to all elected representatives, whether elected nationally or locally*".[46]

93. It is recalled that, under Article 68, paragraph 2, of the Moldovan Constitution: "*Any imperative mandate shall be deemed null and void.*" This is confirmed by Law 768 of 2 February 2000 on the conditions of office of local elected representatives also providing (Section 4, subparagraph 1) that "*Any imperative mandate shall be null and void*." Section 5, subparagraph 4 of the same Law 768 of 2 February 2000 at the same time includes the recall ("*d) Recall by a local referendum pursuant to the Electoral Code*") among the reasons for curtailing the term of office of mayors. Article 177, paragraph 2, of the Electoral Code sets out the grounds for the mayor's recall: a) failure to uphold the interests of the local community; b) failure to properly exercise properly the responsibilities of the office foreseen by the law, and c) infringement of moral and ethical norms if this conduct has been "confirmed in the established way".

94. In view of the lack of legal clarity surrounding the local recall, marked in particular by contradicting provisions in the text of the same law, it is difficult, and certainly not within the mandate of the Venice Commission, to assess whether the recall process held in respect of the mayor of Chisinau, although it did not lead to the removal of the mayor, was totally free from concerns from the standpoint of applicable standards, including national constitutional norms. As to this latter aspect, it ultimately belongs to the Constitutional Court of the Republic of Moldova to take a stand.

95. In a judgment it delivered in 2012,[47] the Moldovan Constitutional Court interpreting Article 68, paragraph 2, of the Constitution (which prohibits the imperative mandate) held that "*in line with free representation, the parliamentarian's mandate is irrevocable: voters cannot end it prematurely and the practice of 'blank resignations' is prohibited. Voters cannot, therefore, express dissatisfaction with the way in which a candidate has fulfilled his or her mandate other than by refusing to vote for that candidate again when he or she seeks re-election*."

96. Yet, according to the information available to the Venice Commission, in its dialog with the Congress' rapporteurs, the Court has recently explained that the provisions of article 68, paragraph 2 may only be applied to the national parliament, and that its considerations in the 2012 judgment may not be extended to the local mandate. The Court implicitly seems to confirm this position in a subsequent decision adopted in October 2017,[48] when it rejected, for admissibility reasons, a constitutional review request regarding *inter alia* art. 177 para (2)

[43] Resolution 420 (2017), no. 5.
[44] Report CG33(2017) 23 final, no. 67.
[45] With a quotation of the Joint Opinion CDL-AD(2017)012 on Moldova's electoral reform, cit. above.
[46] Report CG33(2017) 23 final, no 68.
[47] Judgment of Moldovan Constitutional Court of 19 June 2012, on the interpretation of Articles 68 alin. (1), (2) and 69 alin. (2) of the Constitution (Application nr. 8b/2012), par. 44.
[48] Constitutional Court Moldova, Decision of inadmissibility of the request no. 123a / 2017 on the constitutionality control of Articles 33 and 34 of the Local Public Administration Act and art. 177 par. (2) of the Electoral Code (the mayor's dismissal by referendum), Chisinau, 4 October, 2017

of the Electoral Code. In particular, the Court referred, in its decision, to its relevant past case law (a decision of 2002)[49] in which it had concluded that, by withdrawing the provision enabling removal of mayors by local referendum, one of the citizens' rights had been restricted, without the restriction being justified in the Moldovan Constitution.

97. The Court in particular had pointed out in that context to citizens' right to revoke an elected official for failing to respond to the interests of the collectively, right based on: the principle of direct exercise by the people of sovereignty; the right to administration, i.e. to participate in the administration of affairs public directly; the principle of direct consultation of citizens on local issues of particular interest, all constitutionally protected principles.

98. Moreover, although it did not take a stand on the constitutionality of the contested articles of the Electoral Code (dealing with the local recall referendum), the Court provided in its 2017 decision a number of considerations (elements of reasoning), based also on relevant views expressed by the Venice Commission and the Congress. These elements, which could lead to understand that the Court would not see the mayors' recall as problematic from constitutional perspective, include the following:

- that the contested provisions are a concretization of art. 112 (2) of the Constitution, guaranteeing the autonomous functioning of local councils and mayors, under the conditions established by the law;
- that, to guarantee the free exercise of the local elective mandate, in accordance with the European Charter, the legal provisions establishing the grounds the termination of mandate must be interpreted in a restrictive manner and applied only in exceptional cases (CDL-AD(2014)022, §27);
- that the mayor, being a publicly elected authority, is not subordinated to either local council (which cannot dismiss the mayor except by organizing a local referendum), or any other public authority of another level (see Congress, report on "Local Democracy in the Republic Moldova "CPL (12) 9 §65);
- that the Electoral Code requires that the decision to hold the local referendum must include the reasons for the mayor's dismissal;
- that, when the decision to hold a local referendum for the dismissal of the mayor must not be limited to reiterating the formal grounds provided by the Electoral Code, but must motivate the actual existence of these grounds for each particular case; similarly, the decision of the Central Electoral Commission when establishing the date of referendum should be a motivated decision, containing relevant and sufficient factual arguments to justify the mayor's dismissal from office
- that the decision of the local council and of the electoral body may be the subject of an administrative litigation action, thus, it will belong to a court to verify and rule on the merits of the reasons for the mayor's recall, in each individual case.

99. The interest of the above decision goes beyond the specific recall case at issue in the Republic of Moldova. Given the explicit prohibition of the imperative mandate by the Moldovan Constitution and the Court's past case law on the recall of parliament's members, the reasoning of the Court - as it may result from the above considerations - may only by justified if the Court has opted to consider the local recall as a separate tool, one of those mechanisms which, though enabling removal of elected before the end of the term, may not be seen as an expression of an imperative mandate, and thus subject to the constitutional prohibition.

[49] Constitutional Court Moldova, Decision no. 13 of 14 March 2002, point 6

3. National legislation and practices

100. According to available information, the recall as a mechanism is available at the local level in at least 15 countries, with a different degree of activation of the related procedure. An increased move of the tendency to have recourse to recall, from small municipalities to bigger cities, is also reported[50].

101. In **Argentina**, the election and mandate of local authorities is regulated in each of the provinces' Constitutions. The institution of recall of local authorities is not contemplated in every province and the requirements and effects may vary depending on the province. Some of the provinces that regulate the recall of its local authorities (at provincial and municipal level) are: Buenos Aires, Catamarca, Corrientes, Chaco, Chubut, Entre Rios, La Rioja, Misiones, Neuquén, Rio Negro, San Luis, San Juan, Santiago del Estero and Tierra del Fuego.[51] In the provinces where recall is contemplated, the population directly is enabled to file a petition to recall the mandate of the locally elected authorities. The recall is regulated as a citizens' right and it amounts to a "non-confidence" vote due to the poor management of the local community.

102. In **Colombia**, the recall of mayors and governors was recognized in 1994 as "a political right, by means of which citizens terminate the mandate that they have conferred on a governor or a mayor".[52] The Colombian Constitutional Court referred to the concept of **"programmatic mandate"** to distinguish it from the imperative mandate and the free mandate. According to the Court, following article 259 of the Constitution, when they are elected, candidates commit to fulfil a government program; hence, if the elected fails to comply with the programme without justification, voters shall logically have the right to revoke that mandate. Moreover, in the eyes of the Court, those entitled to remove the mayor or governor are the electors of the concerned local community. The Court explicitly stated in this respect: "*[I]n the case of the programmatic vote, it is necessary to clarify who imposed the mandate in order to determine who can revoke governors and mayors […]. Article 259 clearly states that "those who elect governors and mayors impose by mandate on the elected authority, the program that was presented upon registration" (underlined by the Court). This means that the active subjects of the relationship of mandate are the active electors, meaning those who participated in the election of the mayor or governor, since it is them - and no one else - who made the choice. […]. Therefore it is legitimate that in the process of revocation only those who chose may participate, but not obviously in the election of the new authority, in which all citizens must be able to participate."*[53]

103. In **Ecuador**, the recall is established in the national Constitution, recognizing in Article 61, among the rights to participation, the right "to recall authorities elected by universal suffrage." Article 105 adds that "all persons, in the exercise of their political rights, will be

[50] Serdült, U. and Welp, Y. "The levelling up of a political institution. Perspectives on the recall referendum", in Ruth, S., Welp, Y. and Whitehead, L. Let the people rule? Direct democracy in the twenty-first century. ECPR Press, p.7

[51] As an example, the Constitution of Buenos Aires establishes: "*Article 67- The electorate has the right to require the **revocation of mandate** of the elected authorities founded on causes related to their performance, by promoting this initiative with the signature of twenty per cent of the registered voters on the electoral register of the City or corresponding Municipality. The revocation request is not admissible for those who have not yet reach a year of mandate, nor for those who have less than six months left for the termination of their mandate. The Superior Court must check these requirements and call for a revocation referendum among the ninety days after the request has been presented. The participation on the referendum will be compulsory and it will be binding if the votes for the revocation exceed the fifty per cent of the registered voters*."

[52] Article 6 of Law Nr.134 of 1994 on Mechanisms of Citizen Participation. Law Nr. 131 of 1994 on Programmatic Vote further regulated this mechanism, see at:
http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=330#

[53] See Constitutional Court judgments C-011/1994 and C-180/1994, available at:
http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=4176#0
http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=5430#0

able to recall elected authorities". Since 2011, specific rules in the national electoral legislation and the legislation on citizens' participation regulate the different aspects of the recall mechanism (initiative, conditions and grounds for recall, removal procedure).[54] Under these rules, local voters are enabled to initiate the recall and remove the local authorities directly through their vote. Here again, it is explained that, upon registration, candidates (including for the position of mayor), must provide a **work plan** with general and specific objectives and ways to achieves these. According to the national rules, the grounds for recall can be related to: (a) aspects of the work plan that would have been breached by the elected; (b) legal provisions related to citizen participation that are considered unfulfilled or violated (c) non-compliance with their functions and obligations established in the Constitution and laws.

104. In **Peru**, the most intensive user of recall referendums at the local level in the world,[55] the recall is also constitutionally protected as a **citizens' participatory right**.[56] The national legislation further specifies this right and establishes the conditions and procedure for the recall.[57] The National Elections Jury considered important to stress that one of the requirements related to a popular recall referendum is *"to substantiate the request",* meaning to give reasonable support of the reasons for the recall. This implies giving details on why the concerned authority is questioned, on the shortcomings in the exercise of the function ("*which must have affected notoriously their adequate performance")*, and the incidence of such problems on the local management.[58]

105. In **Costa Rica,** the reform of the Municipal Code (1998), in addition to allowing direct election of mayors, established a new mechanism for the mayors' removal, based on a recall vote procedure.[59]

106. By way of comparison, one may note that, in **Chile**, in case of "*serious impediment, violation of administrative probity regulations or notable abandonment of duties,*" the removal of the mayor will be declared by the regional electoral court after a petition by at least 1/3 of the members of the local council. The petition can ask either for the removal or for the discipline measures against the mayor. "Notable abandonment of duties" intervenes in case of: inexcusable, manifest or repeated breaches of the obligations imposed on the mayor by the Constitution and other provisions regulating municipal affairs; action or omission attributable to the mayor that causes serious damage to the municipality's patrimony and activity; repeated failure to pay timely and fully the financial contributions due to municipal officials or workers. One can conclude that, in Chile, the mayor's recall follows an

[54] See in particular Constitution (Article 105 and 106), Electoral Law (Articles 199 to 201), National Electoral Council - Rules of Procedure.
See at: http://aceproject.org/ero-en/regions/americas/EC/ecuador-ley-organica-electoral-codigo-de-la/ https://aceproject.org/ero-en/regions/americas/EC/ecuador-reglamento-para-el-ejercicio-de-la/ ; see also "La Revocatoria del Mandato en el Ecuador, Países de la Comunidad Andina y del Continente Americano" [Verdugo, 2007], Available in Spanish at: http://repositorio.uasb.edu.ec/handle/10644/771

[55] In Peru between 1997 and 2013, there were over 5,000 procedures of recall against local elected authorities in almost half of the country's 1,645 municipalities.
Several hypotheses would explain this:
(a) the political culture, including perceptions, attitudes and habits by which the public assesses the performance of its government,
(b) the institutional design or how easy or difficult is to activate the mechanism,
(c) the unanticipated incentives created by a particular institutional design, which in certain contexts could encourage political organizations to promote these processes, and
(d) the institutional guarantees offered to initiate and achieve a recall referendum.
See **"**Recall referendums in Peruvian municipalities: a political weapon for bad losers or an instrument of accountability?" [Welp, 2015], http://www.tandfonline.com/doi/abs/10.1080/13510347.2015.1060222

[56] Article 2, point 17 and Article 31 of the Constitution, see at : http://www.congreso.gob.pe/eng/?K=362

[57] Law Nr.26.300 of Participation Rights and Citizen Control, see Articles 20 to 30

[58] National Elections Jury of Peru, Resolution Nr. 3798/ 2014

[59] See "Revocatoria del mandato para funcionarios de elección popular en los gobiernos locales" [Rivera, 2006, Costa Rica], at: http://www.tse.go.cr/revista/art/2/rivera.pdf.

impeachment-type of procedure, since it is contemplated for specific unlawful actions and follows a judicial procedure instead of a decision by a public vote.[60]

107. In the **United States**, although US citizens cannot recall officials at the federal level, the recall has great power at the local level and at the level of federal states[61]. In at least 29 US federal states, there are specific rules for the removal of locally elected officials, including mayors, members of local councils, etc. Each state that permits the recall has its own internal rules for managing the process. The interest in the recall has intensified with the election of the actor Arnold Schwarzenegger as governor of California in 2003, following a successful recall procedure against the former governor.

108. In **Canada**, the Province of British Columbia is the only province that has a recall mechanism, under the Recall and Initiative Act (1995). However, this mechanism is not for mayors since this 1995 Act only allows registered voters to petition to remove a member of the legislative assembly.

109. The interest in the recall, translated also in direct recall referendums at the subnational level, is growing in other parts of the world. For example in **Venezuela**[62] and **Bolivia**[63], countries that, as mentioned, before, have experienced presidential recall.

110. Recall of local governing bodies is also permitted at present in **Japan**. Although it rarely occurs, the system still recognizes it as an instrument.

111. In **India**, the first recall elections occurred in 2008 when three local mayors, despite the recall procedure, were re-elected by voters in accordance with Chhattisgarh Nagar Palika Act of 1961.

112. In **Europe,** in the **Russian Federation**, Article 36, par. 6 of Russian Federal Law No. 131-FZ, lists the recall by the voters (*otsyv*) as one of the cases of early termination of the mandate of heads of a municipal formation. As stipulated by the above-mentioned law, the reasons for initiating local recall (actions leaving a mark on reputation of the elected person) are to be established by the Charter of the municipality.

113. According to the regional statutes, in most of the Entities of the Russian Federation a local recall (seen as a "loss of confidence") may be the basis for early termination of the mandated of a municipal official. It appears that the legislation varies from region to region, is often blurred and has, in some cases, been recognized as unconstitutional by the Constitutional Court. Nevertheless, the federal legislator has set some standards in this field. Voting for the local recall shall be conducted at the initiative of the population, in accordance with the procedure established by federal legislation,[64] and with the Law of the subject of the Russian Federation for holding a local referendum (Art. 24 par. 1).

114. In its case-law, the Russian Constitutional Court has pointed out to some specific safeguards as a pre-condition for an implementation of the recall in line with the Constitution and the local self-government principles. In particular, to avoid a subjective evaluation of the

[60] "Concepto de Notable Abandono de Deberes y Falta Grave de Probidad para los efectos de remoción de un Alcalde" [Fernández, 2013]. Available in Spanish at: http://www.cde.gob.cl/wps/wcm/connect/9838a767-0791-4a9c-8e66-f30bfe9a7b1b/rev_30_6+concepto+de+notable+abandono.pdf?MOD=AJPERES

[61] Between 1903 and 1989, over 6,000 attempts and 4,000 votes for local recall have been reported (see Serdült, U. and Welp, Y. "The levelling up…" quoted above, p.7).

[62] 167 local recall attempts between 1999 and 2013

[63] 216 local recall attempts between 2012-2012

[64] Chapter II *on Referendum* of Federal Law No. 67-FZ of 12 June 2002, "On the main guarantees of electoral rights and the right to participate in the referendum of citizens of the Russian Federation", and Art. 22 of Federal Law No. 131-FZ *On local referendum*

activity of the local officials, the grounds for revocation should not allow for extensive interpretation, and should be supported by facts to be verified. In the Court's view,[65] it is only by providing sufficiently specified grounds and by allowing the contested official to provide explanations at all stages at the recall procedure, that the respect for the rights of the elected can be guaranteed and local self-government principles effectively implemented.

115. In **Germany**, the recall procedure is not foreseen by the Constitution at the federal level. However, two variants of mayors' recall mechanism are in place in the German Länder. On the one hand, the fully fledged direct democratic variant, where the local electorate is given not only the right to vote on a recall referendum (under certain procedural and majority requirements), but also to initiate the recall procedure (with a certain requirement of signatures petitioning the referendum): four Länder, Brandenburg (for mayors), Sachsen, Schleswig-Holstein and North-Rhine Westphalia,[66] have adopted this. On the other hand, the recall procedure can be initiated indirectly in all the other Lander, except two, by parliamentary majorities of varying thresholds; the right of initiating the recall is reserved to the local council (which decides with a qualified majority vote of its members), while the local electorate only intervenes to finally vote on the recall motion as adopted by the council. In this variant, the "recall" procedure has been seen as a kind of mix of the representative democratic and the direct democratic principles, where the council "exercises a kind of representative democratic control over the local citizens in their exercise of their direct democratic power."[67]

116. Since the 2000s, the **Polish** legislation also appears to have been receptive to direct democracy arrangements, in particular the referendum. In 2013, an attempt to recall the mayor of Warsaw failed for lack of sufficient participation in the referendum (25% of registered instead of 29% required), largely due to the call for boycott of the party in place.[68]

117. In **Romania**, under the Public Administration Law,[69] the mechanism of local recall by the vote of the local population may lead to the dissolution of the local council and the removal of the mayor (both directly elected by the population). The referendum for the removal of the mayor is organised upon the request of the local population, addressed to the representative of the government (the prefect). The recall may be initiated in case of: failure

[65] Constitutional Court of the Russian Federation, Decision of 2 April 2002 on the case of verification of the constitutionality of certain provisions of the Krasnoyarsk Territory Law "On the procedure for recalling a deputy of a representative body of local self-government" and the Law of the Koryaksky Autonomous Okrug on the Procedure for recalling a deputy of a representative local self-government body"

[66] See in particular for the case of Duisburg, in 2012, where the local mayor was recalled following a change in the Local Government Act on 18 May 2011 enabling citizens' initiated recall procedure. This recall is connected to the Love Parade 2010 when 21 people died and 500 were injured.
See more in Serdült, U. and Welp, Y. "The levelling up of a political institution. Perspectives on the recall referendum", in Ruth, S., Welp, Y. and Whitehead, L. Let the people rule? Direct democracy in the twenty-first century. ECPR Press. Forthcoming, p.10;
See also Vetter, A. (2006) Modernizing German Local Government: Bringing the People Back, in V. Hoffmann-Martinot and H. Wollmann (eds.) *State and Local Government Reforms in France and Germany: Divergence and Convergence*, Wiesbaden: VS Verlag, pp. 253-268.

[67] See "The direct election and "recall" of the mayors in Germany::From representative democracy-based to direct democracy-based local leadership", Hellmut Wollmann, Humboldt-Universität Berlin, p. 15.

[68] The procedure for recall of the mayor of Warsaw, in Poland, Hanna Gronkiewicz-Waltz was one of the most remarkable examples of recall in Europe in recent years. The recall procedure was led by several opposition parties, several interest groups, and NGOs that tried to remove Hanna Gronkiewicz-Waltz from her office. The procedure was initiated by a non-governmental organization of the citizens of Warsaw, by filing a petition against the increased price of tickets in public transport, and against the slow construction of the second line of the subway in Warsaw. These were the two key issues on which the procedure for recall of the mayor was based. The opposition in Poland, even before the recall procedure was initiated, was preparing a ground for the mayor's removal, due to the fact that her party was a close coalition partner of the Prime Minister party. Although the referendum failed due to the low voter turnout, the withdrawal remains an important instrument for achieving direct democracy in Poland.

[69] Law n° 215 of 23 April 2001, as republished in M.O. no. 123/20 Feb. 2007
See http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=78841

to promote the general interests of the local community or; failure to fulfil the tasks associated with the function of mayor under the law, including the tasks that the mayor is expected to execute in his/her capacity as representative of the state.

118. Finally, in **Switzerland**, although the country is well-known for its level of decentralization and for being the example of implementation of direct democracy tools, only six cantons allow, since the 19th century, the popular revocation of an authority (and not of individuals). Recall of municipal executives (mayors) is possible, since 2011, in two cantons: Uri and Ticino.

119. In 2017, in **Slovenia**, the Parliament rejected a bill allowing citizens to revoke their mayors through popular referendums, one month after its initial adoption in the lower house. Resubmitted to the vote, following a negative opinion of the upper house, in which local communities are represented in particular), the law was rejected.

120. There is no legal mechanism in the **United Kingdom** to recall a mayor prior to his/her term. The Recall of Elected Representatives Bill sought to systemize a recall system of elected representatives in England, which included the mayors.[70] However, the bill could make no progress as the 2014-15 session of Parliament has prorogued. On the other hand, the Recall of MPs Act enacted in 2015 only provides for the recall of members of the House of Commons or the lower house of the Parliament of the UK, and thus does not apply to mayors.[71]

121. Despite the absence of such a mechanism, citizens have petitioned to remove from the office the Mayor of London, in 2017, alleging the crime of treason.[72] According to applicable rules, if the petition receives 100,000 signatures, the Parliament is obligated to debate the proposal.[73] As of January 2018, the mayor Sadiq Khan was still in office.

VII. Implementation process

122. Despite it being recognized as a political institution, or a political instrument in the hands of the electors, the recall is in most cases a strictly regulated and institutionalized mechanism. It involves a multi-stage process with specific content, time and quorum requirements, and requires the participation of a series of actors, the most important being the local population, with clearly regulated functions.

123. Looking in more details at the national procedures for mayor's recall, they all involve, beyond local specificities, several basic elements. While the grounds or criteria for initiating the recall may vary, the general framework for its implementation involves conditions and steps, procedural aspects that are similar in most cases. These include the initiative of the recall, the timeframe and/or time limits for the recall; similar procedural steps; quorum requirements (turnout and approval majority); judicial control.

[70] Recall of Elected Representatives Bill, 2014-2015. s. 27(2)(a), s. 27 (2)(b); see at: http://publications.parliament.uk/pa/bills/cbill/2014-2015/0088/150088.pdf,

[71] Recall of MPs Act 2015, 2015, c. 25; see at: http://www.legislation.gov.uk/ukpga/2015/25/pdfs/ukpga_20150025_en.pdf ;

[72] https://bnp.org.uk/petition-remove-sadiq-khan-mayor-london/

[73] https://petition.parliament.uk/help. In Wales, there is an ongoing case to remove David Boswell, the mayor of Pembroke for facing six counts of indecent assault and one charge of historic rape of a child. Facing a trial on 5th February 2018, he is currently suspended by the party and granted bail. Therefore, he remains a mayor but simply stands aside during the court process.

1. Grounds

124. As a rule, the initiators of the petition for the mayor's recall must specify the reasons for this initiative, although the recall is contemplated as a "non-confidence" mechanism, founded on causes related to the poor performance of the elected official, and not as an impeachment process.

125. The most commonly mentioned grounds for the recall include:
- failure to uphold the interests of the local community;
- incompetence in the performance of duties; gross mismanagement;
- failure to perform duties prescribed by the law, neglect of duties (for example, not fulfilling his/her obligations);
- failure to implement/violation of legal provisions related to citizen participation;
- unethical behaviour in the service (unprofessional and irresponsible performance of the job), infringement of moral and ethical norms;
- misuse of office and authority (in case of bribery and corruption), conviction for a felony; conviction for a drug-related misdemeanor or a misdemeanor involving a "hate crime".[74]

126. These grounds are usually broad and, in most cases, the petition must mention them. Differences arise when it comes to the question whether these reasons must be proven, circumstantiated (as generally required by the applicable legislation[75]) or, they are understood just as a formal requirement and there is no need to prove evidence of them (or to be assessed by the authority in charge of reviewing the recall procedure[76]).

127. As pointed out by commentators, the grounds required to initiate the recall are actually the expression of "different models", or different understanding of representation. "One is based on "dissatisfaction", and accordingly, does not provide basis for accountability (e.g. Peru between 1994 and 2015, Ecuador between 2008 and 2010). The other is based on "programatic vote" and seems closer to a delegate model of representation" (e.g. some American States such as Georgia, Minnesota or Washington), and sometimes empowers a public body to assess the validity of the reasons (e.g. Ecuador since 2011).[77]

128. A more critical question is whether acts or behaviour of the mayor that should normally be the subject of a judicial decision, may be among the acceptable reasons for popular recall. The position of the Venice Commission in this regard is clear: to ensure the required independence and neutrality, the decision on issues involving legal responsibility of the elected, as opposed to political responsibility, should be left to more neutral and independent bodies, with adequate legal expertise, such as the courts. In such cases, recall does not appear as a suitable removal mechanism (see comments in paragraph 59 above).

129. An additional question may be that of the most suitable level of regulation on the permissible reasons for recall. As indicated below, while in most cases, this is an issue to be

[74] Conviction for a crime during the term of office appears to be a reason for recall of local eleted representatives at least in several US federal states: Alaska, Knasas, Minessota, Rhode Island, Virginia etc. (**Source:** National Conference of State Legislatures, July 2011.

[75] See above-mentioned case law of the Constitutional Court of the Russian Federation

[76] It seems that some provinces in Argentina even prohibit explicitly that the electoral authority judges the motives invoked for the recall

[77] Welp, Yanina (2018) "Recall referendum around the world:origins, institutional designs and current debates", in The Routledge Handbook to Referendums and Direct Democracy, Edited by Laurence Morel, Matt Qvortrup, Routledge. https://www.routledge.com/The-Routledge-Handbook-to-Referendums-and-Direct-Democracy/Morel-Qvortrup/p/book/9781138209930, p. 4

regulated by the law, there are also examples, such as in the Russian Federation, where the list of grounds for recall is established by the municipal charter.

130. In view of the variety of national practices and taking into account the above-mentioned risk of confusion between political and legal responsibility (which should be decided in court, and not by the people's vote), one way to address these questions would be not to provide any list, in the legislation (or local charter), of permissible grounds for recall. This will be more in line with the political nature of the process, and its understanding as a political act involving the "loss of confidence" on the part of the electors. This does not contradict or prevent the important requirement, in most national regulations, that the petition for initiating the recall should be motivated and should contain a detailed and circumstantiated description of the reasons for which its initiators are proposing the recall.

2. Conditions and procedural aspect

1. Initiative

131. According to the requirements of the national legislation, the popular recall may be initiated directly by the citizens[78], but also, in addition to citizens, by any social organization, party or political movement.[79] The initiative may also belong, in some systems, to a minimum number of members of the local assembly (in many cases one third), in which the support of a minimum number of citizens is required.

2. Quorums (turnout and approval quorums)

132. In any event, in order for the initiator(s) to present a request for recall, the support from the citizens of the local community is needed. Generally, the number of signatures required should be no less than a specific threshold established by the law (usually a percentage of the votes obtained by the mayor upon election; the range is wide, from 5 or 10% up to 40% of the number of those having elected the mayor).

133. When the necessary signatures are collected, the process of their verification comes into play. In general, it belongs to a specially designated authority to decide whether the petition fulfils the "support" condition, as well as the requirements related to the reasons for the recall (whether those reasons are dully mentioned and, according to the legal system, whether sufficient substantiating information is provided), Some legislations also impose a deadline for the collection of signatures and for the 'verification' authority to implement this task.[80] As an additional safeguard, the financial aspects of the recall campaign must also be checked.

134. One of the main common features of existing recall regulations is indeed the focus which is put on the participatory (and legitimating) dimension of the recall. This dimension is achieved through the different participation requirements: the number of people having agreed to activate the mechanism of recall (the number of signatures needed for filing the petition); the number of local electors participating in the vote needed to validate the process (the turnout quorum); and, finally, the most decisive one, the majority of votes required to approve the mayor's removal (the approval quorum).

[78] Argentina, Columbia, Germany, Romania, the Republic of Moldova, the Russian Federation, the United States. In Ecuador, citizens included in the electoral register used in the last elections in the concerned local community (Rues of Procedure, Article 13).
[79] Columbia
[80] Colombia : six months are provided as a deadline for the initiators to collect the signature, and 45 days for the Registration Civil Service to verify the respect of the requirements.

135. As already mentioned, as a rule, the thresholds must be sufficiently high to ensure that there is a closed link between the number of electors having elected the official, and those deciding to withdraw their confidence and put an end to the mandate.

136. The Constitutional Court of the Russian Federation has, in 2002, declared as unconstitutional legislative provisions admitting that the recall of a local elected official can be carried out by a smaller number of votes than that this person was elected.[81] The Court considered "*unacceptable that the recall can be implemented mainly by the votes of citizens who have remained in the relevant minority during the election, i. e. who voted for candidates who did not receive the necessary majority*." The Court stressed that "*at least no fewer citizens must vote for the recall than the person whom elected the official, so that the vote on the recall does not diminish the value of the voters' will expressed during the elections, and the results of election are protecte*d," and concluded: "***Otherwise, conditions are created not only for arbitrary, not based on the actual will of the population, early termination of the powers of specific local government officials, but also for narrowing the scope of representative democracy […]***." (emphasis added)

3. Timeframe (time limits and frequency)

137. In practically all countries where the recall is allowed, there are strict rules establishing the time limits, during the mayors' term, within which the procedure for recall may be initiated. In this way, a reasonable time for action is left to the elected in the first part of the term, to prove that he/she is acting in accordance with his/her voters' expectations. These limits range from six months to one year after the start and before the end of the term. [82] There are also jurisdictions where the recall may only be activated in the second half of a term (Bolivia and Venezuela), or where the recall is only allowed once per term (Peru). In Colombia, if, as a result of the voting, the mandate of the local elected is not revoked, it cannot be attempted again in the reminder of the term.

138. One may see these regulations as another way to confirm that the recall does not intervene as a deviation from the representative system in place, but rather as an additional tool to reinforce it and oversee its efficiency.

4. Decision

139. In virtually all cases, the people's decision through their vote requires mandatory and immediate reinforcement. As soon as the body entrusted with the verification of the regularity of the recall operations has issued its conclusions and the removal decision is confirmed, the challenged mayor shall be removed from office. The mandate is emptied and new additional elections are scheduled to fill the post, usually for the remaining of the mandate. Pending the election of the replacement, a temporary authority is put in place, according to the applicable national rules.

[81] Decision of The Constitutional Court of the Russian Federation of 2 April 2002 on the case of verification of the constitutionality of certain provisions of the Krasnoyarsk Territory Law "On the procedure for recalling a deputy of a representative body of local self-government" and the Law of the Koryaksky Autonomous Okrug "On the procedure for recalling a deputy of a representative local self-government body, an elected local government official in the Koryaksky Autonomous Okrug" in connection with the applicants' complaints of Zlobin and Khnaev. See: http://cikrf.ru/law/decree_of_court/pes_7p_02.html .

[82] In the Republic of Moldova, the mayor's recall may not be initiated earlier than one year after the beginning of the term, nor later than six months before the end of the term; in Colombia, Ecuador and Peru, the recall is possible only after the first year of the term and before the last year of the term; in Argentina, the recall is usually excluded for the first year of mandate and the last six months.

5. Judicial review

140. The information available to the Venice Commission does not highlight aspects related to the judicial review of the different steps in the recall procedure, or the availability of judicial appeal for the challenged official. Presumably, such remedies, indispensible guarantees for a process which is highly sensitive and subject to various possibilities of abuse and manipulation, are available under the general electoral legislation or in the framework of the administrative law provisions.

141. One aspect, already mentioned before, is crucial: no decision by the voters should intervene on those matters, such as allegations concerning the commission of certain specific crimes, which (should) fall within the exclusive domain of the courts.

6. "Adversarial" nature of the procedure

142. It is important to point out, in this connection, that from the information available, little is said on the "adversarial" nature of the recall procedure during its different steps. It is essential for the concerned elected to be provided adequate opportunities to give explanations and make known his/her views on the action(inaction) complained of and the shortcomings having lead to the activation of the recall. One may assume that such opportunities are provided in the context of the campaign which is normally conducted prior to the vote in favour or against the recall.

VIII. Concluding remarks. Safeguards for recall

143. Although not widely spread, the recall of local elected representatives, as a democratic tool in the hands of the citizens, is a practice which has drawn new, increased interest in recent years.

144. Uncontested shortcomings of representative democracy and, notably, present days' deficit of quality, legitimate and efficient representation, coupled with enabling social and political environment for direct participation - the development of new technologies, social networks etc. - are non-negligible factors in this respect.

145. Successful or failed attempts to remove elected representatives by the way of popular vote, as a corrective democratic tool for poor management, have notably been reported at the local level. It is at this level that sub-performance, insufficient or inefficient governance may most easily be revealed, and that issues of politicians' accountability are perceived as most immediate and most acute. Expectations are more concrete and, to some extent, more quantifiable.

146. At the same time, it is at the local level that the predictability of a successful process of recall is believed to be higher, and the means to bring the recall to a success, to be more plentiful and more readily accessible.

147. Existing standards on the European and international levels do not seem conclusive: while they do not explicitly prohibit the recourse to popular recall, they do not firmly authorize it. Where such a mechanism is not permitted, the prohibition is usually linked to the juxtaposition (vicinity?) of the instrument with the notion of the imperative mandate, a mechanism commonly seen as an obsolete and unsuitable instrument in modern representative systems, since it contravenes the very basic principle of free representative mandate underlying such systems. There is indeed general consensus that the prohibition of any imperative mandate must prevail, as a cornerstone of European democratic constitutionalism, and this is also the position of the Venice Commission.

148. As a corrective political practice, relatively marginal, the popular recall nonetheless exists, and may not be criticised, *a priori*, as being undemocratic. The importance of national legal and political traditions may not be neglected, in this respect. In view of existing practice in democratic countries, the Venice Commission has recognized the difficulty to articulate a direct criticism of mechanisms entailing application of the recall at the local level.

149. It is however crucial to acknowledge that, as a political tool, the recall involves a major challenge: it is based, fundamentally, on an *ad hoc* political behaviour, hard to anticipate and to regulate, namely the active expression of convergent individual wishes and perceptions, at a certain point in time. The way from the presumption of a common wish to its translation into an effective vote implies a complex and costly process, the output of which is far from being predictable.

150. Furthermore, subject of a variety of factors and influences, even manipulation in many cases, the recall may be used in an undemocratic manner, and may lead to unexpected results and consequences for democracy.

151. For this reason, in the absence of a decisive ban in relevant international instruments and case law, popular recall of elected officials may be accepted, in particular at the local level, where it is allowed by the national traditions and laws, *if* it is properly dimensioned in the system, and *if* it exists within the framework of well-defined reasons for its activation, coupled with adequate and effective safeguards to prevent and protect against its misuse.

152. In view of its vulnerabilities, in order for the recall to be seen as a useful democratic institute, likely to contribute, in specific contexts, to more responsible, legitimate and efficient democratic governance, a number of key conditions must be fulfilled.

153. Recall legislation should attempt to find a balance between the need for voters to be able to remove an elected representative having lost their confidence, and the necessity to prevent frivolous use of the process.

154. This implies, in the first instance, that the recall should only to intervene as an exceptional tool, responding to a real need to correct serious and objective governance deficiencies, in the interest of the community. The reasons for early termination of the mandate, whether or not they are prescribed by the law, should dully motivate, in a detailed, circumstantiated and individualized manner, the petition for the initiation of the recall. Where those reasons imply legal appreciations, other options, in particular the intervention of neutral and independent judicial bodies, should be used instead of recall.

155. Adequate safeguards should be provided in terms of legitimacy and legality of the implementation process. Sufficiently high thresholds for both initiating (numbers of signatures) and validating the recall (turnout and voting quorums), clear and reasonable timeframe and steps in the procedure, clearly identified actors - and their roles -, effective opportunities for defence and discussion provided to the contested official, appeal opportunities - these are only a few requirements that are likely to contribute to a democratic and responsible recall process, respectful of the rule of law and fundamental rights principles.

156. In the absence of such safeguards, a high risk will remain that an otherwise well intended democratic instrument serves populist, demagogic or other kinds of interests, which may be detrimental both the electors and the elected, and the society as a whole.