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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT GUIDELINES ON REFERENDUM

on the basis of contributions by

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I. Referendums and Europe's electoral heritage

1. Universal suffrage

1.1. Rule and exceptions

Universal suffrage means in principle that all human beings have the right to vote. This right may, however, and indeed should, be subject to certain conditions:

a. Age:

the right to vote must be subject to a minimum age but must be acquired, at the latest, at the age of majority;

b. Nationality:

i. a nationality requirement may apply;

ii. however, it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence.

c. Residence:

i. a residence requirement may be imposed;

ii. residence in this case means habitual residence;

iii. a length of residence requirement may be imposed on nationals solely for local or regional elections;

iv. the requisite period of residence *should be reasonable and, as a rule*, should not exceed six months;

v. it is desirable that the right to vote be accorded to citizens residing abroad.

d. Deprivation of the right to vote:

i. provision may be made for depriving individuals of their right to vote, but only subject to the following cumulative conditions:

ii. it must be provided for by law;

iii. the proportionality principle must be observed;

iv. the deprivation must be based on mental incapacity or a criminal conviction for a serious offence.

v. furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.

1.2. Electoral registers

Fulfilment of the following criteria is essential if electoral registers are to be reliable:

i. electoral registers must be permanent *or refer to a register that is constantly updated (population register or register of births, marriages and deaths)*;

ii. there must be regular up-dates, at least once a year. Where voters are not registered automatically, registration must be possible over a relatively long period;

iii. electoral registers must be *public*;

iv. there should be an administrative procedure - subject to judicial control - or a judicial procedure, allowing for the registration of a voter who was not registered; the registration should not take place *as a result of a decision taken* by the polling station on election day;

- v. a similar procedure should allow voters to have incorrect inscriptions amended *within a reasonable time*;
- vi. *provision may be made for a supplementary register as a means of giving the vote to persons who have moved or reached statutory voting age since final publication of the register.*

2. Equal suffrage

2.1. Equal voting rights

Each voter has in principle one vote; where the electoral system provides voters with more than one vote (*for example, where there are alternatives*), each voter has the same number of votes¹.

2.2. Equality of opportunity

a. Equality of opportunity must be guaranteed *for the supporters and opponents of the proposal being voted on*. This entails a neutral attitude by state authorities, in particular with regard to:

- i. the referendum campaign;
- ii. coverage by the media, in particular by the publicly owned media;
- iii. public funding of parties and campaigns;
- iv. *billposting and advertising*;
- v. *the right to demonstrate on public thoroughfares*.

b. *In public radio and television broadcasts on the referendum campaign, it is preferable that equality be ensured between the proposal's supporters and opponents rather than between political parties.*

c. Balanced coverage must be guaranteed to the proposal's supporters and opponents in other public mass media broadcasts, especially news broadcasts. *Account may be taken of the number of political parties supporting each option or their election results.*

d. *Equality must be ensured in terms of public subsidies and other forms of backing. It is preferable that equality be ensured between the proposal's supporters and opponents rather than between political parties. Such backing may, however, be restricted to supporters and opponents of the proposal who account for a minimum percentage of the electorate. If equality is ensured between political parties, it may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections.*

e. Financial or other conditions for radio and television advertising must be the same for the proposal's supporters and opponents.

f. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual media, with regard to the referendum campaign and to advertising, for all participants in the referendum.

¹ See, however, I.2.3.

- g. Political party and referendum campaign funding must be transparent.
- h. The principle of equality of opportunity can, in certain cases, lead to a limitation of spending by political parties and other parties involved in the referendum debate, especially on advertising.
- i. *Sanctions must be imposed in the case of breaches of the duty of neutrality.*

2.3. Equality and national minorities

- a. *Special rules providing for a proportional exception to the normal vote-counting rules in the case of a referendum concerning the situation of national minorities do not in principle run counter to equal suffrage (text on reserved seats deleted).*
- b. Voters must *not* find themselves obliged to reveal their membership of a national minority.

3. Free suffrage

3.1. Freedom of voters to form an opinion

- a. State authorities must observe their duty of neutrality (*see 1.2.2.a. above*), which is one of the means of ensuring that voters can form an opinion freely.
- b. Contrary to the case of elections, it is not necessarily to prohibit completely intervention by the authorities in support of or against the proposal submitted to a referendum. However, the national, regional and local authorities must not influence the outcome of the vote by excessive, one-sided campaigning. The use of public funds by the authorities for campaigning purposes must be prohibited.
- c. The question put to the vote must be clear; it must not be misleading; it must not suggest an answer; electors must be informed of the effects of the referendum; voters *must be able to answer the questions asked solely by yes, no or a blank vote.*
- d. The authorities must provide objective information. This implies that the text submitted to a referendum and an explanatory report *or balanced campaign material from the proposal's supporters and opponents should* be made available to electors sufficiently in advance, as follows:
 - i. they must be published in the official gazette *sufficiently far in advance* of the vote;
 - ii. they must be sent directly to citizens and be received *sufficiently far in advance* of the vote;
 - iii. the explanatory report must give a balanced presentation not only of the viewpoint of the executive and legislative authorities *or persons sharing their viewpoint* but also of the opposing one.
- e. The above information must be available in *all the official languages and* in the languages of the national minorities.

f. Sanctions must be imposed in the case of breaches of the duty of neutrality and of voters' freedom to form an opinion.

3.2. Freedom of voters to express their wishes and action to combat fraud

a. Voting procedure

- i. voting procedures must be *readily understandable by citizens*;
- ii. voters should always have the possibility of voting in a polling station. Other means of voting are acceptable under the following conditions:
- iii. postal voting should be allowed only where the postal service is safe and reliable; the right to vote using postal votes may be confined to people who are in hospital or imprisoned or to persons with reduced mobility or to electors residing abroad; fraud and intimidation must not be possible;
- iv. electronic voting should *be in conformity with Committee of Ministers' Recommendation Rec(2004)11 on Legal, operational and technical standards for e-voting. In particular, it should be used only if it is safe, reliable, efficient, technically robust, open to independent verification and easily accessible to voters*; the system must be transparent; *unless channels of remote electronic voting are universally accessible, they shall be only an additional and optional means of voting*;
- v. very strict rules must apply to voting by proxy; the number of proxies a single voter may hold must be limited;
- vi. mobile ballot boxes should only be allowed under strict conditions that avoid all risks of fraud;
- vii. at least two criteria should be used to assess the accuracy of the outcome of the ballot: the number of votes cast and the number of voting slips placed in the ballot box;
- viii. voting slips must not be tampered with or marked in any way by polling station officials;
- ix. unused *and invalid* voting slips must never leave the polling station;
- x. polling stations must include representatives of a number of parties, and the presence of observers appointed by *the latter or by other groups that have taken a stand on the issue put to the vote* must be permitted *during voting and counting*;
- xi. military personnel should vote at their place of residence whenever possible. Otherwise, it is advisable that they be registered to vote at the polling station nearest to their duty station;
- xii. counting should preferably take place in polling stations;
- xiii. counting must be transparent. Observers, representatives of *the proposal's supporters and opponents* and the media must be allowed to be present. These persons must also have access to the records;
- xiv. results must be transmitted to the higher level in an open manner;
- xv. the state must punish any kind of electoral fraud.

b. *Freedom of voters to express their wishes also implies:*

- i. *that the executive must organise referendums provided for by the legislative system; this is particularly important when it has not called a referendum*;
- ii. compliance with the procedural rules; in particular, referendums must be held within the time-limit prescribed by law;

iii. the right to accurate establishment of the result by *the body responsible for organising the referendum, in a transparent manner*, and formal publication in the official gazette.

4. Secret suffrage

a. For the voter, secrecy of voting is not only a right but also a duty, non-compliance with which must be punishable by disqualification of any ballot paper whose content is disclosed.

b. Voting must be individual. Family voting and any other form of control by one voter over the vote of another must be prohibited.

c. The list of persons actually voting should not be published.

d. The violation of secret suffrage should be sanctioned.

II. Conditions for implementing these principles

1. Respect for fundamental rights

a. Democratic referendums are not possible without respect for human rights, in particular freedom of expression and of the press, freedom of movement inside the country, freedom of assembly and freedom of association for political purposes, including freedom to set up political parties².

b. Restrictions on these freedoms must have a basis in law, be in the public interest and comply with the principle of proportionality.

2. Regulatory levels and stability of referendum law

a. Apart from rules on technical matters and detail (which may be included in regulations of the executive), rules of *referendum* law should have at least the rank of a statute.

b. The fundamental aspects of referendum law should not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level higher than ordinary law.

c. Fundamental rules include, in particular, those concerning:

- the composition of electoral commissions or any other body responsible for organising the referendum;*
- the franchise and electoral registers;*
- the procedural and substantive validity of the text put to a referendum³;*
- the effects of the referendum (with the exception of rules concerning matters of detail).*

² In particular, street demonstrations to support or oppose the text submitted to a referendum may be subject to authorisation: such authorisation may be refused only on the basis of overriding public interest, in accordance with the general rules applicable to public demonstrations.

³ See sections III.2 and III.3.

3. Procedural guarantees

3.1. Organisation of the referendum by an impartial body

- a. An impartial body must be in charge of *organising the referendum*.
- b. Where there is no longstanding tradition of administrative authorities' *impartiality in electoral matters*, independent, impartial electoral commissions must be set up *at all levels, from the national level to polling station level*.
- c. The central commission must be permanent in nature.
- d. It should include:
 - i. at least one member of the judiciary *or other independent legal expert*;
 - ii. representatives of parties already in Parliament or having scored at least a given percentage of the vote; these persons must be qualified in *referendum matters*.
It may include:
 - iii. a representative of the Ministry of the Interior;
 - iv. representatives of national minorities.
- e. Political parties *or supporters and opponents of the proposal put to the vote* must be equally represented on electoral commissions or must be able to observe the work of the impartial body. Equality between political parties may be construed strictly or on a proportional basis (see I.2.2.d.).
- f. The bodies appointing members of commissions must not be free to dismiss them at will.
- g. Members of commissions must receive standard training.
- h. It is desirable that commissions take decisions by a qualified majority or by consensus.

3.2. Observation of the referendum

- a. Both national and international observers should be given the widest possible opportunity to participate in a referendum observation exercise.
- b. Observation must not be confined to election day itself, but must include the referendum campaign *and, where appropriate, the voter registration period and the signature collection period*. It must make it possible to determine whether irregularities occurred before, during or after the vote. It must always be possible during vote counting.
- c. *Observers should be able to go everywhere where operations connected with the referendum are taking place (for example, vote counting and verification). The places where observers are not entitled to be present should be clearly specified by law, with the reasons for their being banned.*
- d. Observation should cover respect by the authorities of their duty of neutrality.

3.3. An effective system of appeal

- a. The appeal body in referendum matters should be either an electoral commission or a court. In any case, final appeal to a court must be possible.
- b. The procedure must be simple and devoid of formalism, in particular where the admissibility of appeals is concerned.
- c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). *The law must specifically designate the competent body in each case.*
- d. *The appeal body must be competent to deal with the sphere covered by these guidelines, in particular with:*
 - *the franchise and electoral registers;*
 - *the completion of popular initiatives and requests for referendums from a section of the electorate;*
 - *the procedural and, where applicable, substantive validity of texts submitted to a referendum, which should be subjected to preliminary review: domestic law determines whether such review is obligatory or optional; the review of the validity of texts should take place before the vote;*
 - *respect for free suffrage;*
 - *the results of the ballot.*
- e. The appeal body must have authority to annul the referendum where irregularities may have affected the outcome. It must be possible to annul the entire referendum or merely the results for one polling station *or constituency*. In the event of annulment, a new referendum must be called.
- f. All voters must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters against the results of a referendum.
- g. Time-limits for lodging and deciding appeals must be short.
- h. The applicant's right to a hearing involving both parties must be protected.
- i. Where the appeal body is a higher electoral commission, it must be able *ex officio* to rectify or set aside decisions taken by lower electoral commissions.

3.4. Funding

- a. The general rules on the funding of political parties and referendum campaigns must be applied to both public and private funding.
- b. In contrast to elections, the use of public funds by the authorities for campaigning purposes need not be strictly prohibited in all cases; however, it must be restricted⁴.

III. Specific rules

⁴ See point I.3.1.b. above.

1. The rule of law

The use of referendums must comply with the legal system as a whole, *and especially the procedural rules*. In particular, referendums cannot be held if the Constitution does not provide for them, for example where the *text submitted to a referendum* is a matter for Parliament's exclusive jurisdiction.

2. The procedural validity of texts submitted to a referendum

Questions submitted to a referendum must respect:

- unity of form: the same question must not combine a specifically-worded draft amendment with a generally-worded proposal or a question of principle;

- unity of content: except in the case of total revision of a text (Constitution, law), there must be an intrinsic connection between the various parts of each question put to the vote, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse as a whole provisions without an intrinsic link; the revision of several chapters of a text at the same time is equivalent to a total revision;

- unity of hierarchical level: it is desirable that the same question should not simultaneously *apply to legislation of different hierarchical levels*.

3. The substantive validity of texts submitted to a referendum

Texts submitted to a referendum must comply with all higher law (principle of the hierarchy of law).

They must not be contrary to international law or to the Council of Europe's statutory principles (democracy, human rights and the rule of law).

Texts submitted to a constitutional referendum must abide by the substantive limits (intrinsic and extrinsic) of constitutional reform.

Texts that contradict the requirements mentioned under III.2 and III.3 may not be put to the popular vote.

4. Specific rules applicable to referendums held at the request of a section of the electorate and to popular initiatives (where they are provided for in the Constitution).

a. Everyone enjoying political rights is entitled to sign a popular initiative *or request for a referendum*.

b. The time-limit for collecting signatures (particularly the day on which the time-limit starts to run and the last day of the time-limit) must be clearly specified, as well as the number of signatures to be collected.

c. Everyone (regardless of whether he or she enjoys political rights) must be entitled to collect signatures.

- d. If authorisation is required in order to gather signatures for popular initiatives *or requests for a referendum* on public thoroughfares, such authorisation may be refused only in specific cases *provided for by law*, on the basis of overriding public interest and in accordance with the principle of equality.
- e. Payment from private sources for the collection of signatures for popular initiatives *and requests for referendums* [*should, as a rule, be prohibited. If permitted, it*] must be regulated, with regard to both the total amount allocated and the amount paid to each person.
- f. All signatures must be checked. In order to facilitate checking, lists of signatures should preferably contain the names of electors registered in the same municipality.
- g. In order to avoid having to declare a vote totally invalid, an authority must have the power, prior to the vote, to correct faulty drafting, for example:
 - i. when the question is obscure, misleading or suggestive;
 - ii. when rules on procedural or substantive validity have been violated; in this event, partial invalidity may be declared if the remaining text is coherent; sub-division may be envisaged to correct a lack of substantive unity.

5. Parallelism in procedures and rules governing the referendum

- a. When the referendum is legally binding:
 - i. For a certain period of time, a text that has been rejected in a referendum may not be adopted *by a procedure without referendum*.
 - ii. During the same period of time, a provision that has been accepted in a referendum may not be revised by another method.
 - iii. The above does not apply in the case of a referendum on partial revision of a text, where the previous referendum concerned a total revision.
 - iv. *The revision of a rule of higher law that is contrary to the popular vote is not legally unacceptable but should be avoided during the above-mentioned period.*
 - v. In the event of rejection of a text adopted by Parliament and put to the popular vote at the request of a section of the electorate, a similar new text must not be put to the vote unless a referendum is requested.
- b. *When a text is adopted by referendum at the request of a section of the electorate, it should be possible to organise a further referendum on the same issue at the request of a section of the electorate, after the expiry, where applicable, of a period of time laid down by law.*
- c. *When a text is adopted by referendum at the request of an authority other than Parliament, it should be possible to revise it either by parliamentary means or by referendum, at the request of Parliament or a section of the electorate, after the expiry, where applicable, of the same period of time.*
- d. *Constitutional rules providing for referendums should be put to a referendum, compulsorily or at the request of a section of the electorate.*

6. Opinion of Parliament

When a text is put to the vote at the request of a section of the electorate or an authority other than Parliament, Parliament must be able to give a *non-binding* opinion on the text put to the vote. *In the case of the popular initiatives*, it may be entitled to put forward a counter-proposal to the proposed text, *which will be put the popular vote at the same time*. A deadline must be set for Parliament to give its opinion: if this deadline is not met, the text will be put to the popular vote without Parliament's opinion.

7. Quorum

It is admissible for acceptance by a minimum percentage *of registered voters (approval quorum)* to be required in order for a referendum to be valid. This type of quorum is preferable to a participation quorum (minimum turnout). *Provision may be made whereby the quorum is applicable only if the text put to the vote has not been approved by Parliament.*

8. Effects of referendums

a. The effects of legally binding or consultative referendums must be clearly specified in the Constitution or by law.

b. Referendums on questions of principle or other generally-worded proposals should preferably not be binding. If they are binding, the subsequent procedure should be laid down in specific rules.