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

**REVISED CODE OF  
GOOD PRACTICE ON REFERENDUMS:  
ISSUES TO BE ADDRESSED**

**on the basis of comments by:**

**Mr Nikos ALIVIZATOS (Member, Greece)**  
**Mr Josep Maria CASTELLA ANDREU (Member, Spain)**  
**Mr Oliver KASK (Member, Estonia)**  
**Ms Regina KIENER (Member, Switzerland)**  
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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

## GUIDELINES ON THE HOLDING OF REFERENDUMS

*Note: Like the first edition of the Code, the new one would be accompanied by an explanatory report, which could explain, for example, why the revision of the Code is taking place and state the issue of representative democracy as a principle and referendum as an exception could however be raised in the explanatory report.*

### Distinctions could be made

- *Between national and local referendums. A paragraph could say that general rules are to be adapted to the reality of local referendums both concerning the kind of decision to be submitted to referendum and its monitoring (e.g. local referendums could be excluded from more precise rules on campaign, oversight by an impartial body and the need for an independent authority). Different rules could also apply to issues such as stability of the law, or the authority initiating the referendum. On constitutional referendums, see [Guidelines for Constitutional Referendums at National Level](#)*
- *At any rate the Code should be explicit on which referendums it is about (national, regional, local – constitutional, legislative etc.)*
- *Between specifically-worded draft amendments - on the one side - and generally-worded proposals or questions of principle - on the other side - (now a distinction is made on the effects of the referendum in III.8, it could be extended to other aspects of chapter III, like some aspects of the clarity of the question, unity of hierarchical level in III.2 or quorum in III.7; a specific issue to be addressed is multi-question/multi-level referendums)*

*The Code is however not about whether there should or not be referendums*

### Specific rules could address

- *Secession referendums (in the rare cases where they are admitted by constitutional law)*
- *Constitutional referendums*

*This could be included in a revised chapter III.7 addressing required majorities and quorums*

## 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;

**Commented [GP1]:** N. Alivizatos: I believe that the Revised Guidelines should start with an introduction, explaining why the Commissions complements the 2006 version. While acknowledging the importance of referendums as a means to revive parliamentary government in today's Europe, it should be stressed from the outset that parliamentary government is the rule and referendums the exception. ... [1]

**Commented [GP2]:** B. Vermeulen: ; What is not included yet in these Guidelines is reference to Resolution 2251 of the PACE (adopted 23 January 2019), calling upon the Venice Commission to update the Code, which is one of the reasons we are updating the this Code. The Resolution is quite specific as to the additions that could be made in the Code. I believe we should discuss them, and decide on which recommendations of PACE we accept. We should refer also to the changes in the political landscape, and some recent disastrous referenda (Brexit, Turkey, Catalunya). ... [1]

**Commented [RK3]:** I fully agree – this question is up to the states to decide ... [2]

**Commented [VmdB4]:** I would prefer to concentrate on national referendums. That national rules should be ada ... [5]

**Commented [U5]:** I share Maiani's comment (:FM2), i.e. that the code has been drafted for national referendums ... [2]

**Commented [RK6]:**  
I.Distinction: agree ... [4]

**Commented [FM7]:** I agree with the first statement. Not with the second. There is no reason why, e.g., local/regi ... [3]

**Commented [RK8]:** Agree with Maiani ... [2]

**Commented [FM9]:** ... [6]

**Commented [U10]:** While I agree with Regina (i.e. that it is up to the States to decide to hold referendums, at the sa ... [7]

**Commented [VmdB11]:** I agree with Nicos, but this is an issue that could better be discussed in detail in the ... [8]

**Commented [u12]:** I agree with Maiani: better leave to each Constitution such issue. However I come back to ... [13]

**Commented [U13]:** I once again share Maiani's view (:RK4), i.e. that we should limit ourselves to saying tha ... [12]

**Commented [U14]:** I once again share Maiani's view, i.e. that we should limit ourselves to saying that the code i ... [11]

**Commented [RK15]:** Too specific an issue to be dealt with in a report on referendums, even more so, as the VC a ... [10]

**Commented [VmdB16]:** I am not sure whether there should be a constitutional basis for referendums. I wou ... [14]

**Commented [FM17]:** We are entering high-danger constitutional ground here. The mere fact that we mentu ... [9]

**Commented [U18]:** Same as in hereabove, specifying though that for constitutional amendments in particula ... [16]

**Commented [U19]:** Same as hereabove, specifying though that for constitutional amendments in particular refere ... [15]

- b. Nationality:
  - i. a nationality requirement may apply;
  - ii. however, it would be advisable for foreigners to be allowed to vote in local referendums 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 referendums;
  - 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.

**Commented [RK20]:** Which means we include local referendums

**Commented [u21]:** Or in the EU context of European citizenship

**Commented [u22]:** Depends of each legal system: sometimes for LOCAL referendums it is better only for residents (general rules of local elections apply). This is the case of Spain for instance.

**Commented [FM23]:** Bad form. Points ii-v should not be at the same hierarchical level as point i

## 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.

**Commented [RK24]:** formatting: why not a, b, c etc., as under heading 1.1?

## 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 votes<sup>1</sup>.

2.2. Equality of opportunity

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

- i. the referendum campaign; *issue to be reconsidered*
- ii. coverage by the media, in particular by the publicly owned media;
- iii. public funding of campaign and its actors;
- 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 advisable that equality be ensured between the proposal's supporters and opponents.

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 advisable that equality be ensured between the proposal's supporters and opponents. 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.

*The preference towards ensuring equality between supporters and opponents rather than between political parties could be underlined.*

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.

g. Political party and referendum campaign funding must be transparent.

*See also II.3.4. Transparency could be extended to election campaign. The issue of rigorous press regulation and impartial fact-checking could be addressed; digital media should be addressed.*

<sup>1</sup> See, however, I.2.3.

**Commented [VmdB25]:** I believe much more attention should be given to this whole para, not only a.i

**Commented [U26]:** Yes, we should expand

**Commented [FM27]:** Yes, and I believe we should expand this to social media in the campaign (as noted below)

**Commented [RK28]:** Should be in accordance with the relevant rules in the VC Code on elections -

**Commented [U29]:** I fully agree.

**Commented [U30]:** Fully agree

**Commented [u31]:** I agree

**Commented [RK32]:** Absolutely. In some states, referendums may be triggered by organisations other than political parties, or are especially opposed by civil society groups

**Commented [U33]:** The answer is yes. May I refer to my report to the Berlin conference (2016) on the issue (I'll send a copy to the attention of the rapporteurs).

**Commented [U34]:** The answer is yes. May I refer to my report to the Berlin conference (2016) on the issue (I'll send a copy to the attention of the rapporteurs).

**Commented [VmdB35]:** This is a very important issue, one of the main reasons why we are updating this Code.

**Commented [RK36]:** Fully agree

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 an exception to the normal vote-counting rules, in a proportional way, in the case of a referendum concerning the situation of national minorities do not, in principle, run counter to equal suffrage.

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. Administrative 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.

*It should be clear that this requirement applies throughout the campaign period, and concerns finances.*

b. Contrary to the case of elections, it is not necessary to prohibit completely intervention by the authorities in support of or against the proposal submitted to a referendum. However, the public authorities (national, regional and local) 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.

*This recommendation could be softened.*

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.

*The clarity of the question should be subjected to prior scrutiny, including by Parliament.*

*The issue of multiple questions should be raised. There is for the time being just a hint to the possibility of having a counter-proposal opposed by Parliament to a popular initiative (III.6), without addressing the voting modalities. If developed, the issue could be addressed in a separate chapter of part III.*

*The issue of blank vote could be addressed.*

d. The authorities must provide objective information. This implies that the text submitted to a referendum and an explanatory report or balanced campaign material

**Commented [VmdB37]:** This is a difficult issue. At least we should remark on the fact that referendums and their results may be inspired by misinformation, and point to the possibility of neutral factchecking. I would not want to exclude government nor parliament to discuss the pros and cons of the outcome of a referendum. As to Parliament see para 6.

**Commented [U38]:** On the contrary, I believe that the prohibition should be reiterated and hardened.

**Commented [FM39]:** I disagree

**Commented [RK40]:** Disagree. It is already soft (prohibition of EXCESSIVE, ONE-SIDED campaigning). Public authorities must inform neutrally and comprehensibly on the effects of a referendum

**Commented [RK41]:** Parliament should have its say whether it supports the ref or not. However, a political body is not best suited for the task of assessing the clarity of the question. Rather, this task should be with the body responsible for legislation technique (MOJ, specific body within parliament) or with the constitutional court

**Commented [U42]:** Parliament could be involved but the independent body (whether a Court or an Agency) should have the last word.

**Commented [U43]:** Parliament could be involved but the independent body (whether a Court or an Agency) should have the last word.

**Commented [u44]:** I agree with Regina

**Commented [FM45]:** "clarity" is a technical issue and I don't think that involving Parliament should be required for that. This could be devolved to a technical body as foreseen already by the Code (see below passage on "faulty drafting"). Prior involvement of the parliament would be required, rather, to take a position on the initiative/referendum



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.

*This task should be transferred to the independent body.*

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.

*The extent of the sanctioning powers should be addressed, to be extended to all aspects of campaign regulation, including breaches of the finance campaign rules.*

### 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;

**Commented [RK46]:** If there is one

**Commented [VmdB47]:** In my view it should be permanent. I assume it will be the Electoral Management Board

**Commented [U48]:** Whose creation, either ad hoc or on a permanent basis, should become mandatory.

**Commented [u49]:** I agree: independent bodies are required by the Parliamentary Assembly of the C of Europe in the last resolution. It can be an specific one for referendums or the Electoral authority, depending on the will and necessities of each country.

**Commented [FM50]:** See my comment below (next comment)

**Commented [u51]:** It is a problematic point that can affect the legal security: official languages of a country normally includes the official character of the languages of national minorities. What is relevant legally speaking is the official character of a language, both for the whole territory of the country or for parts of it.

- 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 is not subject to the executive's initiative;
- 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. There should be sanctions against the violation of secret suffrage.

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 parties<sup>2</sup>.

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

**Commented [u52]:** Here the current III.1: rule of law is a general principle.

<sup>2</sup> 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.



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 superior to 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 referendum<sup>3</sup>;
- the effects of the referendum (with the exception of rules concerning matters of detail)
- the participation of the proposal's supporters and opponents to broadcasts of public media.

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.

The issue of civil servants' impartiality could be raised.

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 electoral 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.).

<sup>3</sup> See sections III.2 and III.3.

**Commented [u53]:** ?? They should be written in the Constitution or in a general law of referendums. See next commentary

**Commented [u54]:** It depends of each legal system: if it has or not statutes hierarchically superior to ordinary laws. What is relevant is the distinction among the general law and the law or other norm establishing a particular referendum.

**Commented [U55]:** See my previous remark.

**Commented [U56]:** See my comment U8 hereabove. I admire and respect the Swiss referendums tradition, but I think it is unique worldwide and cannot be easily imitated nowhere.

**Commented [VmdB57]:** I believe this issue has been discusses in the Guidelines on (ab)use of administrative resources, in general terms

**Commented [U58]:** See my comment hereabove. I admire and respect the Swiss referendums tradition, but I think it is unique worldwide and cannot be easily imitated nowhere.

**Commented [RK59]:** Before addressing this issue in substance, I'd like to have a comparative analysis on the status quo (in which countries are referendums managed by administrative authorities, do these states foresee referendums, have there been any problems so far, etc.) Until then, I'd leave the text as it stands.

As you all may well know, Switzerland is referendum country, so as to speak, and referendums have always been managed – at national and at cantonal/state level – by the chancelleries of state, fulfilling this task in a highly professional way and in full independence. Accordingly, this competence has never given raise to any objections

**Commented [FM60]:** I think that the text as it stands is perfectly balanced. In contexts where the executive gives sufficient guarantees of impartiality, I believe that it would be excessive to require independent bodies to manage the whole process.

**Commented [u61]:** Should be distinguished among general rules for every referendum and rules for each one. The independent commission is not created for each referendum. A priori it is unknown who are supporters and opponents. Maybe a flexible composition of the Body is a solution, including for each referendum a representative of supporters and opponents, other than permanent members (for the period of the mandate of the Commission).



*This could be reconsidered, in particular if permanent electoral commissions are in charge of referendums.*

Commented [FM62]: See comment above.

- 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.

***A new sub-chapter on the independent body to scrutinise the question put and supervise the holding of referendums should be added here. It could be an already existing electoral commission. If an ad hoc body for referendums is created, it would not imperatively be permanent in countries with few referendums, but legislation should define its composition in abstracto. At any rate, the independent body should be in a position to intervene during the electoral campaign. Its basic powers and means for intervening efficiently should be quoted. (According to the report of the Assembly, this independent body would check any proposed referendum question, would supervise the conduct of the campaign, take all necessary measures to ensure that this is properly held and possess the means to enforce its decisions and sanction possible breaches).***

Commented [U63]: I fully agree. See my comment hereabove (U10).

Commented [U64]: I fully agree. See my comment hereabove.

### 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: the review of the validity of texts should take place before the vote; domestic law determines whether such review is obligatory or optional;
- 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 of the global result, 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 electoral campaigns must be applied to both public and private funding.

b. The use of public funds by the authorities for campaigning purposes must be prohibited<sup>4</sup>.

*The principle of transparency could be emphasised and should then apply both to the sources of campaign funding and to how those funds are spent; the issues of spending limits and prohibition of foreign funding should be raised.*

Commented [U65]: I fully agree

### III. Specific rules

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<sup>4</sup> 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 or a statute in conformity with the Constitution does not provide for them, for example where the text submitted to a referendum is a matter for Parliament's exclusive jurisdiction.

*This section could be developed and possibly renamed to address issues to be excluded from referendums - e.g; proposals which would run counter to (imperative norms of) international law or Council of Europe membership conditions -*

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 superior law (principle of the hierarchy of norms).

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 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.

*The issue of the minimum "sufficient" number of signatures could be raised.*

**Commented [u66]:** Put in II.2 the principle of rule of law: is a general one.

**Commented [U67]:** I fully agree

**Commented [VmdB68]:** We should be careful in proposing exclusions; it is up to the constitution or legislature to determine that. But the example (higher law) is plausible.

**Commented [FM69]:** I think that point 3 below addresses the issue with all due clarity: "Texts submitted to a referendum must comply with all superior law (principle of the hierarchy of norms).

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)."

**Commented [u70]:** Change the position from num. 3 to num. 1 in the place of The rule of law. It is a concretization of such principle. See next commentary

**Commented [u71]:** Such section maybe is better in II.2, in the same par. of the rule of law. Or all the point 3 can be included in II.2 See commentary 12

**Commented [RK72]:** Why not also the maximum sufficient numbers of signatures?

**Commented [FM73]:** Yes but without indicating strict thresholds

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.

*Code of Good Practice, par. 39: "At the very most, some signatures need not be checked once it has been established beyond doubt that the number of valid signatures required by law has been collected". This could be included in the Guidelines.*

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.

*The issue of citizens' assemblies could be raised.*

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 superior 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

**Commented [u74]:** It is different than the referendum issue. Only here if it is a kind of popular initiative

**Commented [U75]:** See in that respect Buquicchio's speech of 22.1.2019

**Commented [u76]:** Legally is problematic: a constitutional amendment can change the content of an ordinary law or regulation introduced by referendum



a section of the electorate, after the expiry, where applicable, of a reasonable period of time.

*Vesting periods (during which there can be no further referendum on the very same issue) could be addressed.*

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. It is advisable for constitutional rules relating to referendums to be put to a referendum, compulsorily or at the request of a section of the electorate.

**Commented [U77]:** ...on any issue?

**Commented [u78]:** Why? Such section introduces confusion. General rules of referendum for constitutional amendments, if exists in a particular system, should apply.

## 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 to 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.

*This section could be developed by addressing the possible exclusion of some issues (constitutional revisions for example, issues affecting the balance of power, human rights, minority issues) from the popular vote if not accepted by Parliament/a simple majority in Parliament; in particular if the initiative of the referendum comes from the executive branch of government (post-legislative referendum as a principle).*

*As indicated above, there is here a hint to the possibility to have a vote on two issues (popular initiative and counter-project). There could be a separate sub-chapter on voting modalities, addressing the various possibilities to submit several questions to the electorate. This could also multi-round referendums, in case of a (first) vote on a question of principle or a generally-worded proposal.*

**Commented [RK79]:** Maybe I get this wrong, but: What's the use of a referendum, then? Acclamation?

**Commented [FM80]:** I disagree with the idea that Parliament could make "referendable" objects that by law are excluded. Or that it could exclude objects that by law are referendable. The whole concept undermines the rule of law.

**Commented [U81]:** I agree.

**Commented [U82]:** I agree

## 7. Quorum

It is advisable not to provide for:

a. a turn-out quorum (threshold, minimum percentage), because it assimilates voters who abstain to those who vote no;

b. an approval quorum (approval by a minimum percentage of registered voters), since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold.

**Commented [VmdB83]:** I find it very problematic to exclude approval quora. Whereas a referendum is the exception to representative democracy, it is plausible to limit its success to those proposals that reach a serious approval quorum

*Specific rules on secession and/or constitutional referendums could be dealt with here (possibly in a revised chapter III.7 dedicated to required majorities and quorums) – e.g. requirements of supermajority (similar to quorum) or multi-majority.*

*More generally, the question of the quorum could be discussed (in particular for important questions).*

*Referendums only on subjects that are likely to attract significant public interest (to be defined)?<sup>1,2</sup>*

#### 8. Effects of referendums

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

*A distinction could be made between referendums which bind the legislature and those which bind only the executive.*

- 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.

*See also the second paragraph under III.6 above.*

*Other questions:*

- *Should a referendum be possible at the same time as an election?*
- *Minimum time limits between calling a referendum and the vote*
- *Organisation of the vote on several (consecutive or non-consecutive) days*

**Commented [FM84]:** See my comments above in page 1.

**Commented [u85]:** What is important for me is to leave open the possibility of particular rules for special referendums, as they are secession of a territory, or membership of the EU or other constitutional issues very relevant for a particular State, when they are accepted by the constitution: in such cases general rule of not providing an approval quorum does not apply. Venice Commission recognized this in particular opinions regarding secession referendums: Montenegro or Crimea.

**Commented [GP86]:** O. Kask: we could discuss deleting the recommendation not to provide for a turn-out quorum, as quite often those who abstain are content with the current situation and are not eager to participate. Such quorum may well be less than 50%, but for referendum with a significant question and turn-out of 20% such a quorum might be well-placed

**Commented [VmdB87]:** Agree with Nicos

**Commented [U88]:** Forget it. Impossible to define.

**Commented [FM89]:** This is to be taken care of when making recommendations on the number of signatures. There is no way to determine in advance what "subjects are likely to attract significant public interest".

**Commented [U90]:** No

**Commented [GP91]:** O.Kask: As PACE commented, it should be preferable not to hold referendums and elections at the same time, as it would mix up the campaigning and election campaigning could be limited only to the issue of election (if it is not Brexit, there might be other issues as well, which otherwise should be discussed). We could discuss in the CDL about giving some guidelines on the issue, although our wording should not be very strong.

**Commented [RK92]:** Why not also: maximum time limit?

**Commented [U93]:** At least 3 weeks

**Commented [U94]:** Preferably on a single day



**Page 2: [1] Commented [GP2]** **GARRONE Pierre** **24/09/2019 11:24:00**

B. Vermeulen: ; What is not included yet in these Guidelines is reference to Resolution 2251 of the PACE (adopted 23 January 2019), calling upon the Venice Commission to update the Code, which is one of the reasons we are updating the this Code. The Resolution is quite specific as to the additions that could be made in the Code. I believe we should discuss them, and decide on which recommendations of PACE we accept. We should refer also to the changes in the political landscape, and some recent disastrous referenda (Brexit, Turkey, Catalunya).

**Page 2: [2] Commented [U5]** **User** **21/09/2019 18:19:00**

I share Maiani's comment (:FM2), i.e. that the code has been drafted for national referendums and that its rules should be adapted to the specificities of local referendums, taking into consideration the constitutional tradition of every State

**Page 2: [3] Commented [FM7]** **Francesco Maiani** **18/09/2019 09:07:00**

I agree with the first statement. Not with the second. There is no reason why, e.g., local/regional executives should be allowed to use referenda to bypass the will of parliament. If that principle is valid at national level, there is no reason to dis-apply it at local level

**Page 2: [4] Commented [RK6]** **KienerR** **19/09/2019 13:26:00**

1. Distinction: agree
2. Rules should be adapted to local referendums: agree
3. However, formal rules ought to be the same (I disagree with the examples given in the brackets)
4. For all kinds of ref., clear rules as to the authority proposing a ref and the scope of a ref should be set out in the Constitution or in the law.

In addition, I think this issue is addressed below (III/3, substantive validity of texts submitted)

**Page 2: [5] Commented [VmdB4]** **Vermeulen, mr. drs. B.P.** **23/09/2019 07:51:00**

I would prefer to concentrate on national referendums. That national rules should be adapted to the specificities of local referendums can be added, but I think it will be quite difficult to say more, for instance to state which particular national rules do not apply in local referendums

**Page 2: [6] Commented [FM9]** **Francesco Maiani** **03/09/2019 15:55:00**

Bearing in mind the nature of the document, we should probably just say that the code has been drafted with nationwide referenda in mind and that its application to local referenda should reflect the latter's specificities according to the constitutional traditions of each State?

The alternative strategy is to systematically point out the parts of the code that do not apply, or apply differently, to local referenda. Note that the current code seems to do this already (see para. 1.1 let c para. ii).

**Page 2: [7] Commented [U10]** **User** **21/09/2019 18:24:00**

While I agree with Regina (i.e. that it is up to the States to decide to hold referendums, at the same time I believe that we should insist that representative government is the rule and referendums the exception. We should do so in line with G. Buquichio's comments in his intervention before the Parliamentary Assembly on January 22, 2019.

**Page 2: [8] Commented [VmdB11]** **Vermeulen, mr. drs. B.P.** **23/09/2019 07:56:00**

I agree with Nicos, but this is an issue that could better be discussed in detail in the Explanatory Memorandum. Although I do not mind to state in the guidelines that representative government is the rule, but that the referendum may be a (sometimes useful) corrective instrument of direct democracy, the extent to which that instrument is to be allowed resting with the national Constitution (with some qualifications)

**Page 2: [9] Commented [FM17]** **Francesco Maiani** **18/09/2019 09:07:00**

We are entering high-danger constitutional ground here. The mere fact that we *mention* secession referenda in a paper like this might be taken to imply that the Venice Commission believes that such referenda are (read: ought to be) possible, whereas their very existence is NOT accepted in many (most?) federal experiences. As far as I know, furthermore, the VC fully accepts that secession be prohibited in national constitutions: see CDL(2014)019, §16.

Or are we discussing “internal secession”, i.e. the holding of local referenda in cases where a part of a constituent unit of a State wishes to rejoin another constituent unit? In this case, I suggest changing terminology

**Page 2: [10] Commented [RK15] KienerR 19/09/2019 12:08:00**

Too specific an issue to be dealt with in a report on referendums, even more so, as the VC accepts that states may prohibit secession in their constitutions.

However, if a state should allow for secession referendums as a specific form of ref foreseen in the constitution, the general rules for ref should apply

**Page 2: [11] Commented [U14] User 21/09/2019 18:29:00**

I once again share Maiani’s view, i.e that we should limit ourselves to saying that the code is applicable only if such referendums are provided by national constitutions.

**Page 2: [12] Commented [U13] User 23/09/2019 07:57:00**

I once again share Maiani’s view (:RK4), i.e that we should limit ourselves to saying that the code is applicable only if such referendums are provided by national constitutions.

**Page 2: [13] Commented [u12] usuari 27/09/2019 10:50:00**

I agree with Maiani: better leave to each Constitution such issue. However I come back to this at III.7, quorum.

**Page 2: [14] Commented [VmdB16] Vermeulen, mr. drs. B.P. 23/09/2019 08:07:00**

I am not sure whether there should be a constitutional basis for referendums. I would suggest a phrase like: a referendum is only allowed if it is not contrary to letter, spirit our system of the Constitution. For instance, the Brexit referendum, which was a consultative referendum - though Cameron said he would obey the outcome - had not explicit basis in common or statutory law, but as not against constitutional rules, I would think.

**Page 2: [15] Commented [U19] User 21/09/2019 18:33:00**

Same as hereabove, specifying though that for constitutional amendments in particular referendums cannot supersede parliamentary deliberation.

**Page 2: [16] Commented [U18] User 21/09/2019 18:33:00**

Same as in hereabove, specifying though that for constitutional amendments in particular referendums cannot supersede parliamentary deliberation.