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

**DRAFT COMPILATION**

**OF VENICE COMMISSION OPINIONS AND REPORTS**

**CONCERNING REFERENDUMS**

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## 1. Secretariat note

The present compilation was initiated following a discussion held during the 108<sup>th</sup> Plenary Session of the Venice Commission (October 2016). During this discussion, concerns with respect to a number of referendums in member states were expressed and the Secretariat was asked to prepare a compilation to stimulate discussion on this issue.

In fact, already in the past, the Venice Commission raised serious concerns with respect to specific constitutional referendums, such as:

- The referendums of 24 November 1996 (see [CDL-INF\(1996\)008](#)) and 17 October 2004 in Belarus (see [CDL-AD\(2004\)029](#));
- the referendum of 16 April 2000 in Ukraine (see [CDL-INF\(2000\)011](#));
- the referendum on amendments to the Constitution of Liechtenstein proposed by the princely house of Liechtenstein in 2002 (see [CDL-AD\(2002\)032](#));
- the referendum on the revision of the Constitution of Moldova on the direct election of the President of the Republic: in March 2010, the Commission “underline[d] both the urgency of amending the constitutional provision on electing the President and the need to do so in full compliance with the requirements of the current Constitution” (press release of 15.03.2010);
- the referendum of 26 September 2016 in Azerbaijan (see [CDL-AD\(2016\)029](#));
- the referendums of 21 September 2007 (see [CDL-AD\(2007\)045](#)) and 11 December 2016 in Kyrgyzstan (see [CDL-AD\(2016\)025](#) and [CDL-AD\(2015\)014](#)).

The concerns expressed by the Venice Commission related both to the procedure for launching the referendum (Belarus, Ukraine, Moldova, Kyrgyzstan) and to the substance of the proposed changes (Belarus, Ukraine, Liechtenstein, Azerbaijan, Kyrgyzstan).

Regarding the procedure, the Commission emphasised first of all the need for referendums to respect the Rule of Law, and in particular to comply with the legal system as a whole, especially with the procedural rules on constitutional revision; this applies of course to all referendums, as confirmed by the opinion on the referendum of 16 March 2014 in Crimea (Ukraine) ([CDL-AD\(2014\)002](#)). It also warned against the use of referendums to bypass important constitutional safeguards such as the requirement for a qualified majority in parliament.

As regards the substance of the proposed changes, the Commission was concerned that most of these referendums aimed at concentrating powers and reducing democratic control by parliament.

The Venice Commission also addressed specific referendums which did not raise such concerns, such as the self-determination referendum in Montenegro (see [CDL-AD\(2005\)041](#)).

The Commission also dealt with the issue of referendums in reports/studies and guidelines such as the Code of Good Practice on Referendums ([CDL-AD\(2007\)008rev](#)), as well in opinions concerning (draft) constitutional and legal provisions dealing with referendums.

The present compilation could be a basis for future work of the Venice Commission addressing problematic aspects of referendums in a systematic way, in view of making prevention of abuses easier.

## **2. Introduction**

The present document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning referendums. The scope of this compilation is to give an overview of the doctrine of the Venice Commission in this field.

This compilation is intended to serve as a source of references for drafters of constitutions and of legislation relating to referendums, researchers as well as the Venice Commission's members, who are requested to prepare comments and opinions on such texts. However, it should not prevent members from introducing new points of view or diverge from earlier ones, if there is good reason for doing so. The present document merely provides a frame of reference.

This compilation is structured in a thematic manner in order to facilitate access to the topics dealt with by the Venice Commission over the years.

Each opinion referred to in the present document relates to a specific country and any recommendation made has to be seen in the specific constitutional context of that country. This is not to say that such recommendation cannot be of relevance for other systems as well.

The Venice Commission's reports and studies quoted in this Compilation seek to present general standards for all member and observer states of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

Both the brief extracts from opinions and reports/studies presented here must be seen in the context of the original text adopted by the Venice Commission from which it has been taken. Each citation therefore has a reference that sets out its exact position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the corresponding opinion or report/study.

The Venice Commission's position on a given topic may change or develop over time as new opinions are prepared and new experiences acquired. Therefore, in order to have a full understanding of the Venice Commission's position, it would be important to read the entire compilation under a particular theme. Please kindly inform the Venice Commission's Secretariat if you think that a quote is missing, superfluous or filed under an incorrect heading ([venice@coe.int](mailto:venice@coe.int)).

## **3. General**

### **3.1. Definition – types of referendums**

Constitutional referendums are taken as referring to popular votes in which the question of partially or totally revising a State's Constitution (and not of its federated entities) is asked, irrespective of whether this requires voters to give an opinion on a specific proposal for constitutional change or on a question of principle.

By definition a constitutional referendum is concerned with a partial or total revision of the Constitution.

A constitutional referendum may:

be required by the text of the Constitution which provides that certain texts are automatically submitted to referendum after their adoption by Parliament (mandatory referendum);

take place following a popular initiative:

- either a section of the electorate puts forward a text which is then submitted to popular vote;
- or a section of the electorate requests that a text adopted by Parliament be submitted to popular vote;

be called by an authority such as:

- Parliament itself or a specific number of members of Parliament;
- the Head of State or the government;
- one or several territorial Entities.

Constitutional referendums may be held both with respect to texts already approved or not yet approved by Parliament. They may take the form of:

a vote on specifically-worded draft amendments to the constitution or a specific proposal to abrogate existing provisions of the Constitution;

a vote on a question of principle (for example: "are you in favour of amending the constitution to introduce a presidential system of government?"); or

on a concrete proposal which does not have the form of specifically worded amendments, known as a "generally worded proposal" (for example: "are you in favour of amending the Constitution in order to reduce the number of seats in Parliament from 300 to 200?").

It could be a question of:

- a legally binding referendum or
- a non-legally binding referendum

9. As democracy has spread throughout the European continent, the forms it should take have naturally been discussed, both nationally and internationally. The utility of direct democracy and the limits to its use are a fundamental aspect of this debate.

10. The constitutions and constitutional practice of many of the new democracies give referendums a prominent role - sometimes more so than those of the older democracies.

19. (...) the general practice in Europe is for a national referendum to be provided for in the constitution. Where there is no such provision, referendums have either not been introduced on a permanent basis or are quite exceptional.

48. A referendum is often used to amend the constitution. In a number of states (...) this is a mandatory referendum, either for any constitutional provision or only for certain provisions judged particularly important.

61. A number of states limit the matters to which referendums may relate, doing so either by drawing up an exhaustive list or excluding certain areas from the popular vote.

267. (...) when it comes to referendums, national laws and practices vary widely. Europe has democracies which are almost entirely representative, democracies which are semi-direct, and any number of intermediary forms. Referendums are sometimes seen as a tool used by the executive branch of government, sometimes as an instrument used by groups of citizens to further their views outside traditional political party structures.

269. The rules which states share are usually minimum rules guaranteeing the democratic nature of the vote. To be truly democratic, referendums - like elections - must satisfy certain requirements. One, which recurs throughout this report, is respect for procedures provided for in law. Others are common to both elections and referendums, and cover respect for the principles inherent in Europe's electoral heritage, which apply *mutatis mutandis* to referendums. Those which are obvious are not detailed here, but those which may apply in a special way to referendums, such as the rules on election campaigns or judicial review, are examined in more depth.

270. Finally, other common democratic requirements are specific to referendums. This applies, for example, to certain aspects of voter freedom, such as respect for the principle of unity of content, and the rule that questions put to the public must be clearly phrased.

[CDL-AD \(2005\)034](#), *Referendums in Europe – an Analysis of the Legal Rules in European States*  
see also [CDL-AD\(2002\)023rev](#), *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report*

47. The analysis of the constitutions of the selected countries shows that a referendum on amendments may be required:

- on a mandatory basis for any amendment passed by Parliament;
- on a mandatory basis as a reinforced procedure for amending particular provisions enjoying special protection;
- on a mandatory basis for “total revision” or adoption of a new constitution;
- on an optional basis, upon demand by parliament, by popular initiative, by local authorities or upon decision of the Head of State.

[CDL-AD\(2010\)001](#), *Report on Constitutional Amendment*

[CDL-INF\(2001\)10](#), *Guidelines for Constitutional Referendums at National Level*, pp. 2-3

46. In many European countries the whole of the constitutional amendment process takes place in parliament. In a number of countries, however, there is also the requirement of a popular referendum, which may be mandatory or optional.

[CDL-AD\(2010\)001](#), *Report on Constitutional Amendment*

### **3.2. General (international) standards**

81. There is no international (or European) standard on the extent which should be given (or not) to instruments of direct democracy at national, regional or under-regional level. Nor is there a standard imposing their mere existence. What can be said is that there is a trend to extend them, especially at the infra-national level, which has always been a laboratory for innovations in the field of democracy. (...) These instruments of direct and participatory democracy should be seen as complementing representative democracy. “Parliamentary democracy, supported by free and fair elections ensuring representativeness, (political) pluralism, and the equality of citizens”, is the core, but not the only aspect, of the democratic process.

[CDL-AD\(2015\)009](#), *Opinion on the Citizens’ bill on the regulation of public participation, citizens’ bills, referendums and popular initiatives and amendments to the Provincial Electoral Law of the Autonomous Province of Trento (Italy)*

11. Any referendum must be organised in full conformity with internationally recognised standards. A consideration of these standards must begin with an examination of European standards. While the Commission has to consider the conformity of the proposed referendum with internationally accepted standards, the Commission is aware that not all the criteria considered in this opinion derive from binding international standards; some relate to statements of standards that are good practice but not binding, such as the Council of Europe and Venice Commission guidelines. The applicable international standards include the general requirements of fair, free and democratic elections, and guidance as to these requirements found particularly in the Code of Good Practice in Electoral matters of the Council of Europe/Venice Commission and in the Guidelines for constitutional referendums at national level. (...)

[CDL-AD\(2005\)041](#), *Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards*

25. As regards the right to vote in the referendum (...).It is fully in line with international standards that in a federal State each citizen votes in the federated entity of his residence, irrespective of the fact of a possible entity citizenship.

[CDL-INF\(2001\)023](#), *Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia*

#### **4. Legitimacy of the use of Referendums**

183. The Commission is of the opinion that the national parliament is the most appropriate arena for constitutional amendment, in line with a modern idea of democracy.

184. As previously seen, the legitimacy of the constitutional amendment may be strengthened by direct involvement of the people in the amendment procedure by means of referendum (...). In this regard, the Commission considers that for constitutional reform, it is equally legitimate either to include or not include a popular referendum as part of the procedure.

185. Having said that, it is to be stressed that the use of referendums should comply with the national constitutional system as a whole. As a main rule, a referendum on constitutional amendment should not be held unless the constitution explicitly provides for this. In some countries this is a well established and integral part of the amendment procedure. But in constitutional systems with no mention of referendum, parliament is the legitimate constitutional legislator, and should be respected as such. Representative democracy is certainly as legitimate as direct democracy on issues such as these, and may often be the more suitable procedure for in-depth discussion and evaluation.

186. A national tradition of holding referendums may contribute to the democratic legitimacy of a constitution. In the view of the Commission, in certain circumstances, it may also reduce the risk that political actors could try unilaterally to change “the rules of the game”. Referendums can also contribute to strengthening the democratic legitimacy of the constitutional protection of human rights.

204. In this sense, properly conducted amendment procedures, allowing time for public and institutional debate, may contribute significantly to the legitimacy and sense of ownership of the constitution and to the development and consolidation of democratic constitutional traditions over time. In contrast, if the rules and procedures on constitutional change are open to interpretation and controversy, or if they are applied too hastily or without democratic discourse, then this may undermine political stability and, ultimately, the legitimacy of the constitution itself.

[CDL-AD\(2010\)001](#), *Report on Constitutional Amendment*

18. Countries make use of the referendum instrument for different purposes and in different ways. Arguments in favour of a referendum include reference to the principle of popular sovereignty, to the necessity of asking the opinion and the consent of the 'people' on the most important issues during the period between elections. Democracy exercised by way of a referendum overcomes the size and space limitations of direct democracy: the people decide directly on certain issues without gathering together as in direct democracy. It can also have the beneficial effect of overcoming voter apathy and re-engage voters with politics and democracy.

19. Opponents to referendum recall the negative experiences of history when plebiscite was used for justifying dictatorial ambitions. Referendum is regarded as a tool to undermine parliamentary democracy. Voters are not sufficiently informed, the decisions are based on partial knowledge, and often are not guided by rational arguments relating to the issues involved. The option or alternatives put to the voters are often too simplified or abstract to make a well-considered vote possible. Referenda are often used instead of deciding basic issues for short-sighted political purposes.

[CDL-AD\(2008\)010](#), *Opinion on the Constitution of Finland*

7. (...) This more restrictive approach is in line with the aims of the constitutional reform, since referendums may be more easily manipulated by those in possession of "administrative resources". Referendums also have other drawbacks, in particular the limited possibilities of broad and comprehensive discussion of the issues involved and the impossibility of amending and improving the respective legislation during this process. They may also be used to put the people against the elected representatives of the people, i.e. parliament. (...)

[CDL-AD\(2005\)022](#), *Interim Opinion on Constitutional Reform in the Kyrgyz Republic*

15. (...) it is important to avoid that referendums are used to undermine the legitimacy of representative institutions. Does that mean that the instrument of referendums has to be controlled by those representative institutions, at least to a certain extent? Does it mean that occasions where legislative or binding referendums may be held, should be regulated exhaustively?

16. The possible abuses that cause representative institutions to be undermined include above all the misuse of referendums to increase the power of the executive vis-à-vis parliament, either directly or indirectly. The power of the executive is increased directly where the text put to a referendum shifts the balance between the legislature and the executive in favour of the latter; it is increased indirectly where the executive circumvents parliament by referring directly to the people, calls a referendum on parliamentary decisions which are not to its liking or uses this instrument to enhance its legitimacy.

[CDL-AD\(2005\)028](#), *Opinion on Parliamentary Assembly Recommendation 1704 (2005) on Referendums : towards good practices in Europe*

23. In any case, the legitimacy of the referendum needs to be examined as well. Provisions outlining the power to amend the Constitution are not a legal technicality but they may heavily

influence or determine fundamental political processes. In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of the constitution and, thereby, of the political system as a whole. It is of utmost importance that these amendments are introduced in a manner that is in strict accordance with the provisions contained in the Constitution itself. Equally important, a wide acceptance of these amendments needs to be ensured.

[CDL-AD\(2015\)014](#), *Joint Opinion on the draft law "on introduction of changes and amendments to the Constitution" of the Kyrgyz Republic*

174. (...) while acknowledging that referendums can contribute to strengthening the democratic legitimacy of the constitutional process, it [*the Commission*] expressed reluctance to such a general requirement: "At the same time, the requirement that all constitutional amendments be submitted to referendum risks making the Constitution excessively rigid, and the expansion of direct democracy at the national level may create additional risks for political stability."

[CDL-AD\(2013\)010](#), *Opinion on the Draft New Constitution of Iceland*

[CDL-AD\(2009\)024](#), *Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine, 136*

33. (...) Enlarging the possibility of holding referendums, or the introduction of their binding effect or of popular initiatives, is a political choice. However, it is a slippery slope. In the case of negative experiences or even abuse of the tool of referendum, it is very difficult to withdraw the means offered to the people by this specific form of direct democracy. Politicians and political parties would face serious difficulties when explaining such a withdrawal. Therefore, any widening in the regulation of referendum requires special caution. Enlarging the scope of referendums, and lowering the necessary thresholds, may be dangerous and undermine the ordinary functioning of representative democracy. (...)

[CDL-AD\(2008\)015](#), *Opinion on the Draft Constitution of Ukraine*

58. (...) it is a fundamental question whether advisory referendums are appropriate at all. Due to their purely advisory nature, they may backfire and create more discontent if they are not honoured by the law-making authorities. This may waste the energy of the citizens, and – most importantly – serve as a pretext for the lawmaker to shove off responsibility, and in any case blur the political responsibilities.

[CDL-AD\(2015\)009](#), *Opinion on the Citizens' bill on the regulation of public participation, citizens' bills, referendums and popular initiatives and amendments to the Provincial Electoral Law of the Autonomous Province of Trento (Italy)*

16. To make possible the holding of a fair and democratic referendum, and to enable the outcome of a referendum to be accepted as legitimate both in Serbia and Montenegro and in the international community at large, questions of principle or potential difficulty relating to the conduct of the referendum should as far as possible be resolved in advance. If necessary a law should be passed to deal authoritatively with these matters, and this law could include the question to be asked to the electorate. It is desirable that all significant issues surrounding the conduct of the referendum should command the highest possible level of agreement from the major political forces in Montenegro. (...)

[CDL-AD\(2005\)041](#), *Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards*

187. At the same time, the requirement that all constitutional amendments be submitted to referendum risks making the Constitution excessively rigid, and the expansion of direct democracy at the national level may create additional risks for political stability.

[CDL-AD\(2010\)001](#), *Report on Constitutional Amendment*

78. However, the Venice Commission wishes to highlight that practical experience of referendums has not always been positive (in particular in post-Soviet countries but also in some Western countries) (...)

[CDL-AD\(2014\)027](#), *Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia*

11. (...) to pass this test of legitimacy the referendum must be conducted in accordance with minimum standards of legality and good electoral practice (...).

[CDL-AD\(2005\)041](#), *Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards*

33. The question put to the electorate should not relate directly or indirectly to the person of a political leader as in that case it would no longer be a referendum, but a plebiscite.

34. Care should also be taken to ensure that voters actually answer the question asked, instead of expressing an opinion on the country's political and social situation. Major importance should therefore be attached to debates on the referendum question. However, it is to be feared that this will not be enough to eliminate the danger.

[CDL-AD\(2005\)028](#), *Opinion on Parliamentary Assembly Recommendation 1704 (2005) on Referendums : towards good practices in Europe*

24 (...) it is of fundamental importance that the referendum and its results be accepted as legitimate. This applies in particular since the referendum law provides in general that decisions in a referendum are binding without a specific reference to referendums amending the Constitution. It appears that the authors of the law do not share the analysis of the Commission that decisions in such referendums have to be confirmed by a two-thirds majority in the Assembly. This is all the more reason to require an additional safeguard at the level of the decision by the people.

[CDL-INF\(2001\)023](#), *Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia*

(...) The Italian Constitutional Court observed that it might be acknowledged that the Parliament has a constitutional duty to co-operate, in that if the outcome of the referendum is in favour of repealing the existing legislation, the Parliament has to introduce (on its own initiative) legislation to comply where necessary with the wish of the people as expressed in the referendum. However, if after the referendum the legislator fails to introduce new legislation to fill the legal vacuum or amend the electoral provisions, there would be no effective remedy to oblige the Parliament to enact a law and the situation amounts to a crisis in the functioning of representative democracy. To avoid this, a referendum affecting the rules of functioning of constitutional bodies should only be admitted if the rules that remain in force after the referendum allow the constitutional body concerned to function without any further legislative action being required.

[CDL-INF\(2000\)013](#), *Opinion on the constitutional amendments concerning legislative elections in the Republic of Slovenia*, p. 4-5

16. To make possible the holding of a fair and democratic referendum, and to enable the outcome of a referendum to be accepted as legitimate both in Serbia and Montenegro and in the international community at large, questions of principle or potential difficulty relating to the conduct of the referendum should as far as possible be resolved in advance. If necessary a law should be passed to deal authoritatively with these matters, and this law could include the question to be asked to the electorate. It is desirable that all significant issues surrounding the conduct of the referendum should command the highest possible level of agreement from the major political forces in Montenegro. It may be noted in this regard that in the Agreement of 7 April 2005, paragraph 3, each member state undertook to cooperate with the European Union on respecting international democratic standards.

[CDL-AD\(2005\)041](#), *Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards*

25. It must also be taken into account that the referendum concerns an issue of outstanding importance. In its opinion on Montenegro quoted above, the Venice Commission noted (...) that "the issue at stake is possibly the most important decision that a political community may take by democratic means: its independence. Hence, the matter requires the broadest possible commitment of the citizens to the resolution of the issue." The Venice Commission recommended serious negotiations among all stakeholders to ensure the legitimacy and credibility of the referendum and such negotiations subsequently took place.

[CDL-AD\(2014\)002](#), *Opinion on "whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 19 92 constitution is compatible with constitutional principles"*

## **5. The Rule of Law**

### **B. General norms and principles**

1. The constitutional principles of electoral law (universal, equal, free, direct and secret suffrage) apply to referendums.
2. Equally, fundamental rights, especially freedom of expression, freedom of assembly and freedom of association must be guaranteed and protected.

3. The use of referendums must comply with the legal system as a whole and especially the rules governing revision of the Constitution. In particular, referendums cannot be held if the Constitution does not provide for them, for example where constitutional reform is a matter for Parliament's exclusive jurisdiction.

4. Judicial review should be available in the field covered by the present guidelines.

[CDL-INF\(2001\)10](#), *Guidelines for Constitutional Referendums at National Level*, p. 3

II.2.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.

### III.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.

[CDL-AD\(2007\)008rev](#), *Code of Good Practice on Referendums*

26. The principle of the rule of law, which is one of the three pillars of the Council of Europe along with democracy and human rights, applies to referendums just as it does to every other area. The principle of the sovereignty of the people allows the latter to take decisions only in accordance with the law. The use of referendums must be permitted only where it is provided for by the Constitution or a statute in conformity with the latter, and the procedural rules applicable to referendums must be followed. On the other hand, referendums must be organised where the legal system provides for them (point I.3.2.b.i).

[CDL-AD\(2007\)008rev](#), *Code of Good Practice on Referendums*

17. (...) Democracy cannot be reduced to a simple reflection of the popular will. In a State respecting the principles of the Council of Europe decisions have to be taken in accordance with the Law. (...)

[CDL-INF\(2001\)023](#), *Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia*

26. Even if "the national parliament is the most appropriate arena for constitutional amendment, in line with a modern idea of democracy" (...) "it is to be stressed that the use of referendums should comply with the national constitutional system as a whole. As a main rule, a referendum on constitutional amendment should not be held unless the constitution explicitly provides for this".

[CDL-AD\(2015\)014](#), *Joint Opinion on the draft law "on introduction of changes and amendments to the Constitution" of the Kyrgyz Republic*

[CDL-AD\(2010\)001](#), *Report on Constitutional Amendment*, 183 and 185

269. The rules which states share are usually minimum rules guaranteeing the democratic nature of the vote. To be truly democratic, referendums - like elections - must satisfy certain requirements. One (...) is respect for procedures provided for in law. Others are common to both elections and referendums, and cover respect for the principles inherent in Europe's electoral heritage, which apply mutatis mutandis to referendums. Those which are obvious are

not detailed here, but those which may apply in a special way to referendums, such as the rules on election campaigns or judicial review, are examined in more depth.

[CDL-AD\(2005\)034](#), *Referendums in Europe – an Analysis of the Legal Rules in European States*

23. In any case, the legitimacy of the referendum needs to be examined as well. Provisions outlining the power to amend the Constitution are not a legal technicality but they may heavily influence or determine fundamental political processes. In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of the constitution and, thereby, of the political system as a whole. It is of utmost importance that these amendments are introduced in a manner that is in strict accordance with the provisions contained in the Constitution itself. Equally important, a wide acceptance of these amendments needs to be ensured.

[CDL-AD\(2015\)014](#), *Joint Opinion on the draft law "on introduction of changes and amendments to the Constitution" of the Kyrgyz Republic*

6. The Venice Commission notes that various sectors of civil society and some political actors have regretted the insufficient consultation which has taken place before the adoption of the said reform and the limited public discussion on the pros and cons of the various amendments proposed. Although the authorities contend that the reform procedure has been carried out in compliance with the electoral legislation, the pace of the adoption of the reform, from the submission of the draft referendum act on 16 December 2008 to its consideration by the Milli Majlis on 18 December 2008, its approval by the Constitutional Court on 24 December 2008 and its submission to a national referendum on 18 March 2009, appears to be quite expedient given the importance of the issues at stake and the need to enable the population to be fully acquainted with the various implications of the reform.

7. Against this background, concerns have also been raised about the possible lack of respect for the existing procedure of revision of the Constitution in that some aspects of the proposed reform could have been adopted through a parliamentary procedure. The procedure of revision is dealt with in two distinct chapters. Chapter XI (Articles 152 to 155) governs “changes” in the Constitution. Article 152 states that “Changes in the text of the Constitution of the Azerbaijan Republic may be made only by way of referendum”. Chapter XII (Articles 156-158) governs “amendments” to the Constitution. Such amendments are not subject to referendum, but must be enacted as Constitutional Laws according to a complex procedure, which includes qualified majorities and prescriptive deadlines (Article 156). The Azerbaijani authorities, however, consider that these two procedures can be interchangeable.

[CDL-AD\(2009\)010](#), *Opinion on the draft amendments to the Constitution of the Republic of Azerbaijan*

7. The constitutionality of the procedure chosen for the adoption of both new versions of the Constitution was contested by some members of parliament. On 14 September 2007 the Constitutional Court decided that the procedure for the adoption of both new versions of the Constitution had been unconstitutional and annulled both versions of the Constitution. This decision was contested by the Jogorku Kenesh, which claimed that the Court had clearly exceeded its powers.

8. On 19 September 2007 President Bakiev issued a decree submitting a new version of the Constitution as well as a draft Electoral Code for adoption by referendum. The referendum took place on 21 October 2007. According to the Central Election Commission, more than 50% of eligible voters took part in the referendum and both the draft Constitution and the

Electoral Code were approved. A Spot Report of the OSCE (No. 11/07) noted that according to local observers there had been cases of ballot stuffing and abuse of administrative resources.

57. The new Constitution was adopted by referendum in an extremely complex and unusual legal situation. The timeframe of one month between the publication of the draft Constitution and the date of the referendum was extremely short.

59. On the whole, the negative elements of the text prevail. The main thrust of the new version of the Constitution is to establish by all possible legal means the indisputable supremacy of the President with respect to all other state powers. This corresponds to an authoritarian tradition which Kyrgyzstan has tried to overcome. While the Constitution proclaims the principle of the separation of powers, the President clearly dominates and appears both as the main player and the arbiter of the political system. Few obstacles exist for the President having his tenure prolonged by changing the Constitution. Moreover, if there are no legal constraints on the powers of the President and few opportunities for an opposition to effectively make its views heard, the consequence might be that changes of power in the country will also in the future be based on revolutions and not on a peaceful and constitutional transfer of authority.

[CDL-AD\(2007\)045](#), *Opinion on the constitutional situation in the Kyrgyz Republic*

17. The risk that the instrument of referendums may be used to circumvent the principle of the rule of law is also not very clear. Does that imply that the use of referendums and of their outcomes has to be subject to judicial control without any restriction? An exception could be foreseen in the case of constituent referendums.

[CDL-AD\(2005\)028](#), *Opinion on Parliamentary Assembly Recommendation 1704 (2005) on Referendums : towards good practices in Europe*

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

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

In addition (...) free suffrage – particularly free determination of the elector's will – implies:

1. The right to expect that referendums provided for by the legislative system will be organised, and in compliance with the procedural rules; in particular, referendums must be held within the time-limit prescribed by law

[CDL-INF\(2001\)10](#), *Guidelines for Constitutional Referendums at National Level, p. 4*

It can of course be argued that the referendum is the manifestation of popular sovereignty and that, therefore, the validity of decisions taken by referendum can never be challenged in a democratic society. However this approach is nowadays hardly tenable. Most European Constitutions, (...), lay down the procedure for the referendum and define its possible scope. Moreover, there is a clear tendency in Europe today to make more frequent use of referendum as an instrument of direct democracy for legislative purposes and in this respect the referendum is subject to a control as to its compatibility with the Constitution. Consequently, both the procedural and substantive aspects of the people's action designed to introduce new law or remove existing law are clearly subjected to constitutional scrutiny. Definitely, and notwithstanding their undisputed political value, decisions taken by legislative referendum are not beyond the reach of the Constitution.

This is all the more so as the referendum cannot be regarded as an exercise of sovereign power by the people, but rather it is the expression of the will of the people by a means regulated within the framework of the Constitution. This is true also for constitutional systems that establish a co-habitation of popular and parliamentary sovereignty, as is the case of Slovenia where the people are not excluded from the process of constitutional revision (...).

The Commission finds that there is no common European standard according to which the results of any referendum of whatever nature are binding upon the constituent power even in the absence of a constitutional provision. (...)

[CDL-INF\(2000\)013](#), *Opinion on the constitutional amendments concerning legislative elections in the Republic of Slovenia*, p. 3-4

The essentials of referenda should be regulated in the Constitution along the lines suggested by the Concept. The institution of the referendum tallies with all other measures designed to ensure greater and more effective participation by civil society in government, from the perspective of the forms of semi-direct democracy that are possible in contemporary societies. As such, however, the practice of the referendum must not be allowed when it can be used as a means of destabilising the established government and, in particular, against each of the established powers arising from it. In other words, it must not be used as a substitute for the specific mechanisms of the exercise of constituent power, the revision of the basic law, the exercise of legislative power, appraisal of the government's political responsibility and, generally speaking, budgetary, fiscal and financial acts. That would be tantamount to rejecting the authority of the established powers or even of the state itself. In a democracy other channels must be used, not those that would be formally allowed by the undue demagogical use of the referendum (...).

[CDL-INF\(1996\)002](#), *Opinion on the regulatory concept of the Constitution of the Republic of Hungary*, p. 18

7. In order for the referendum to be constitutional and legal, it would be required that the issues put before the voters be issues which can be the object of a local referendum under the Constitutions of Ukraine and the Autonomous Republic of Crimea. The Constitution of Ukraine enjoys supremacy over the Constitution of Crimea as an autonomous republic. Ukraine is a unitary state (Article 2.2 of the Constitution of Ukraine). According to Article 132 of the Constitution of Ukraine, "the territorial structure of Ukraine is based on the principles of unity and indivisibility of the state territory, the combination of centralisation and decentralisation in the exercise of state power, and the balanced socio-economic development of regions (...)". Under Article 134 of the Constitution of Ukraine, "the Autonomous Republic of Crimea is an inseparable constituent part of Ukraine and decides on the issues ascribed to its competence within the limits of authority determined by the Constitution of Ukraine". The Autonomous Republic of Crimea therefore enjoys autonomy only to the extent that powers were transferred to it by the Constitution of Ukraine.

8. Accordingly, Article 135 of the Constitution of Ukraine holds that, "regulatory legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea and decisions of the Council of Ministers of the Autonomous Republic of Crimea shall not contradict the Constitution and laws of Ukraine and shall be adopted in accordance with and in pursuance of the Constitution of Ukraine, laws of Ukraine, acts of the President of Ukraine and the Cabinet of Ministers of Ukraine". A corresponding provision is included in Article 28 of the Constitution of the Autonomous Republic of Crimea: "The statutory acts of the Supreme Rada of the Autonomous Republic of Crimea and the Council of Ministers of the Autonomous Republic of Crimea upon any and all matters regarding the powers of the Autonomous Republic of Crimea shall conform to the Constitution of Ukraine and Ukrainian laws." An act by an authority of the Autonomous

Republic of Crimea which is contrary to the Constitution of Ukraine is therefore also contrary to the Constitution of Crimea.

10. It is true that the Constitution of Ukraine, in particular Article 69, recognises referendums as an expression of the will of the people. This does, however, not mean that any referendum is automatically constitutional. On the contrary, there are numerous provisions of the Ukrainian Constitution which show very clearly that the secession of a part of the territory of the country cannot be the object of a local referendum.

*[CDL-AD\(2014\)002](#), Opinion on “whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea’s 19 92 constitution is compatible with constitutional principles”*

12 The present referendum relates to the Constitution and not to legislation. It is less clear whether it is binding or not. (...)

17 (...) other provisions of the Constitution clearly show that Article 72.2 cannot be used as the basis for a constitutional referendum.

18 Under the Constitution of Ukraine, it is therefore not possible to give the present referendum a legally binding character. The referendum does not have, and may not have, the character of a binding constitutional referendum.

(...)

32. The first part of the question is clearly unconstitutional. The Constitution of Ukraine contains no legal basis for a vote of no confidence by the people in the Verkhovna Rada.(...)

33. (...) the fact that the authors of the proposal propose at the same time a constitutional amendment seems to indicate that they were conscious of the absence of a legal basis. This is a violation of the fundamental principle that any action by a State organ requires prior legal authorisation.

53. With respect to the referendum as originally proposed in the decree of 15 January 2000 the conclusions of the Commission can be summarised as follows:

- the present referendum cannot directly amend the Constitution;
- it seems highly questionable whether a consultative referendum on the people's initiative is admissible;
- it is up to the Constitutional Court of Ukraine to decide whether at the present stage of the implementation of the Ukrainian Constitution there is in general a legal basis for the holding of referendums in Ukraine (...)

*[CDL-INF\(2000\)011](#), Constitutional referendum in Ukraine – Opinion adopted by the Commission at its 42<sup>nd</sup> Plenary Session*

40. The present Constitution of Liechtenstein dating from 1921 already provides for a fairly strong position of the monarch, stronger than is the practice in other European monarchies members of the Council of Europe. However, the experience of these monarchies shows that this is not necessarily an obstacle to the development of a constitutional monarchy fully respecting democratic principles and the rule of law. The Constitution therefore was not considered an obstacle to accession to the Council of Europe in 1978.

41. By contrast, the present proposal from the Princely House would present a decisive shift with respect to the present Constitution. It would not only prevent the further development of constitutional practice in Liechtenstein towards a fully-fledged constitutional monarchy as in other European countries, but even constitute a serious step backward. Its basic logic is not based on a monarch representing the state or nation and thereby being removed from political affiliations or controversies but on a monarch exercising personal discretionary power. This applies in particular to the powers exercised by the Prince Regnant in the legislative and executive field without any democratic control or judicial review. Such a step backwards could lead to an isolation of Liechtenstein within the European community of states and make its membership of the Council of Europe problematic. Even if there is no generally accepted standard of democracy, not even in Europe, both the Council of Europe and the European Union do not allow the “*acquis européen*” to be diminished.

[CDL-AD\(2002\)032](#), *Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein*

## **6. Preliminary Conditions for Holding Referendums**

12. The internationally recognised fundamental principles of electoral law, as expressed for example in Article 3 of the First Protocol to the ECHR and Art. 25 ICCPR, have to be respected, including universal, equal, free and secret suffrage. For a referendum to give full effect to these principles, it must be conducted in accordance with legislation and the administrative rules that ensure the following principles:

- the authorities must provide objective information;
- the public media have to be neutral, in particular in news coverage;
- the 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 restricted.

13. Free suffrage includes freedom of voters to form an opinion as well as freedom of voters to express their wishes.

14. Moreover, the freedom of voters to form an opinion includes not only the objectivity of public media as mentioned above, but also a balanced access of supporters and opponents to public media broadcasts.

15. The freedom of voters to express their wishes implies that any question submitted to the electorate must be clear (not obscure or ambiguous); it must not be misleading; it must not suggest an answer; voters must answer the questions asked by yes, no or a blank vote.

17. Furthermore, the framework conditions for a free and fair vote must be guaranteed, such as:

- respect for fundamental rights, in particular freedom of expression and the press, freedom of circulation inside the country, freedom of assembly and freedom of association for political purposes;
- organisation of the referendum by impartial electoral commissions;
- the widest possible access of national and international observers;
- an effective system of appeal.

[CDL-AD\(2005\)041](#), *Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards*

20. (...) All voters must be provided with accurate, objective information. Publication in an official gazette is not sufficient. Each voter must receive the whole of the text submitted for his or her approval, together with an explanatory report setting out not only the viewpoint of the authorities, but also any opposing viewpoints, in a balanced way. Provision should be made for this report to be vetted by an independent body.

21. In addition, supporters and opponents of the proposal must have equal access to public facilities, such as election hoardings.

22. Balanced coverage must be guaranteed to the proposal's supporters and opponents in the public media.

23. It might be recommended that the private media give an objective account of the opposing viewpoints before deciding in favour of one of them.

31. The question put to the vote must be clear (not obscure or unambiguous). It must not be misleading. Furthermore, it must not be worded in such a way as to suggest an answer.

33. The question put to the electorate should not relate directly or indirectly to the person of a political leader as in that case it would no longer be a referendum, but a plebiscite.

[CDL-AD\(2005\)028](#), *Opinion on Parliamentary Assembly Recommendation 1704 (2005) on Referendums : towards good practices in Europe*

27. Finally, the process of amending the Constitution should be marked by the highest levels of transparency and inclusiveness – in particular in cases where draft amendments (...) propose extensive changes to key aspects of the Constitution, such as the roles of the highest court and the Constitutional Chamber, the functioning of the state institutions and the independence of the judiciary. (...) Transparency, openness and inclusiveness, as well as adequate timeframes and conditions allowing for a variety of views and proper wide and substantive debates of controversial issues are key requirements of a democratic constitution-making process and help ensure that the text is adopted by society as a whole, and reflects the will of the people. Notably, these should involve political institutions, non-governmental organisations and citizens' associations, academia, the media and the wider public; this includes proactively reaching out to persons or groups that would otherwise be marginalized, such as national minorities. It is thus recommended to ensure (...) that all relevant stakeholders, including non-parliamentary political parties, civil society, and the wider public, are aware of the proposed changes, and are included in various platforms of discussion on this topic; there should also be time for proper discussions, at all levels, on the proposed amendments. This will ensure that (...) they enjoy the widest support of the public.

[CDL-AD\(2016\)025](#), *Kyrgyz Republic - Joint opinion on the draft law "on Introduction of amendments and changes to the Constitution"*

24. (...) the competent state authorities must direct their efforts to ensuring inclusive discussions on the intended amendments, and provide a necessary period for reflection as well as adequate time for the preparation of a referendum (where applicable).

28. (...) the matters that are being decided by a referendum should never be too imprecise or too vague, and the draft legislation adopted in this manner should not leave important matters to future laws (...) Asking citizens to engage in such a 'blind vote' would dilute the very purpose of popular referenda, and should be avoided.

[CDL-AD\(2015\)014](#), *Joint Opinion on the draft law "on introduction of changes and amendments to the Constitution" of the Kyrgyz Republic*

6. The Venice Commission notes that various sectors of civil society and some political actors have regretted the insufficient consultation which has taken place before the adoption of the said reform and the limited public discussion on the pros and cons of the various amendments proposed. Although the authorities contend that the reform procedure has been carried out in compliance with the electoral legislation, the pace of the adoption of the reform, from the submission of the draft referendum act on 16 December 2008 to its consideration by the Milli Majlis on 18 December 2008, its approval by the Constitutional Court on 24 December 2008 and its submission to a national referendum on 18 March 2009, appears to be quite expedient given the importance of the issues at stake and the need to enable the population to be fully acquainted with the various implications of the reform.

[CDL-AD\(2009\)010](#), *Opinion on the draft amendments to the Constitution of the Republic of Azerbaijan*

8. Constitutional reforms in other “new democracies” previously examined by the Venice Commission indicate that there is a strong risk that referendums on constitutional amendments “are turned into plebiscites on the leadership of the country and that such referendums are used as a means to provide legitimacy to authoritarian tendencies”. Constitutional amendments strengthening the position of the executive should thus be subject to special scrutiny (...)

[CDL-AD\(2016\)029](#), *Azerbaijan - Opinion on the draft modifications to the Constitution submitted to the Referendum of 26 September 2016*

51. (...) it is not correct to transform the referendum on the draft into a consultation implying a vote of confidence (or no-confidence) in the President.

[CDL-INF\(1996\)008](#), *Opinion on the amendments and addenda to the Constitution of the Republic of Belarus*

21. While the first requirement for the validity of the referendum is that it may not contradict the provisions of the Constitution of Ukraine, this is by no means sufficient. It is also necessary that the referendum comply with basic democratic standards for the holding of referendums, such as those established by the Venice Commission’s Code of Good Practice on Referendums (CDL-AD(2007)008rev).

[CDL-AD\(2014\)002](#), *Opinion on “whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea’s 19 92 constitution is compatible with constitutional principles”*

## **7. Free Suffrage**

### **7.1. Freedom of Voters to Form an Opinion**

I.3.1.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.

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.

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.

[CDL-AD\(2007\)008rev](#), *Code of Good Practice on Referendums*

## 2. Fairness of the vote

a. the question submitted to the electorate must be clear (not obscure or ambiguous); it must not be misleading; it must not suggest an answer; electors must be informed of the consequences of the referendum; voters must answer the questions asked by yes, no or a blank vote;

b. The authorities must provide objective information. This implies that the text submitted to referendum and an explanatory report should be made available to electors sufficiently in advance (...)

[CDL-INF\(2001\)10](#), *Guidelines for Constitutional Referendums at National Level*, p. 4

51. (...) Voter education is especially important in emerging and new democracies and in situations where new electoral provisions or technologies are being applied for the first time. As far as referendums are concerned, the voters must be objectively and comprehensively informed both about the question submitted to the electorate in the referendum and its consequences.

[CDL-AD\(2006\)018](#), *Report on Electoral Law and Electoral Administration in Europe - Synthesis study on recurrent challenges and problematic issues*

47. (...) All media should try to be objective, with regard to facts. And the social pluralism, combined with the freedom of speech and press, implies that public-owned media have to (try, at least, to be) also impartial and balanced, as far as they are funded by public means and, therefore, they "belong" to the public opinion, where there are different opinions, as the very organisation of the referendum shows. The principle of impartiality (or, better to say, of equal treatment) may also be applied to the conditions of paid publicity (i.e.: advertisements should not be more expensive for different subjects in the same media), as it is provided for with relation to the use of buildings (premises).

[CDL-AD\(2013\)017](#), *Opinion on the Law on National Referendum of Ukraine*

14. (...) the freedom of voters to form an opinion includes not only the objectivity of public media as mentioned above, but also a balanced access of supporters and opponents to public media broadcasts.

[CDL-AD\(2005\)041](#), *Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards*

25. In general, OSCE/ODIHR and the Venice Commission warn against constitutional referenda without a prior qualified majority vote in Parliament. The fact that no debate can take place during the referendum procedure exposes this instrument of direct democracy to polemics, misleading information and abuse of democracy if not carefully managed in accordance with generally accepted democratic rules. Especially the lack of a proper debate at the moment of the vote on the one hand, and the fact that the submitted questions can potentially be very complex and difficult to understand for the majority of voters on the other, require the relevant authorities to establish clear and strict criteria for such processes. Such criteria are necessary in order to ensure that the voter understands the question submitted for referendum, and to give the voter a real chance to decide which parts of a question or draft law he/she wants to adopt and which he/she wants to reject.

[CDL-AD\(2015\)014](#), *Joint Opinion on the draft law "on introduction of changes and amendments to the Constitution" of the Kyrgyz Republic*

26. Generally, the matters being decided by a referendum should never be too imprecise or too vague, and the draft legislation adopted in this manner should not leave important matters to future laws. (...) In all of these cases, the amendments state that more detailed provisions will be set out in legislation. As the contents of such legislation have not even been drafted yet, this means that citizens will not have a clear idea of the changes that they are expected to decide on in a referendum. Asking citizens to engage in such a "blind vote" would dilute the very purpose of popular referenda, and should be avoided.

[CDL-AD\(2016\)025](#), *Kyrgyz Republic - Joint opinion on the draft law "on Introduction of amendments and changes to the Constitution"*

77. Freedom to vote presupposes that "the question submitted to the electorate must be clear (not obscure or ambiguous); it must not be misleading; it must not suggest an answer; electors must be informed of the consequences of the referendum; voters must answer the questions asked by yes, no or a blank vote". A number of national legal systems explicitly uphold these rules, especially the requirement that the question be clear. In Albania, questions of principle (particularly important questions) submitted to the electorate must be clear, complete and unequivocal; in Armenia, the question must be straightforward; in Hungary, devoid of ambiguity; in Portugal, questions must be formulated in an "objective, clear and precise manner", and may not contain any suggestion or preliminary considerations; in France three conditions are attached: fairness, clarity and absence of ambiguity. The requirement for clarity relates to the rules providing that the voter should be able to reply yes or no (Austria, Croatia, Greece, Malta, "the former Yugoslav Republic of Macedonia") or to vote on a specifically worded text (Ireland). The requirement that the question be clear and non-leading is also upheld in Bulgaria, Italy, Poland, Portugal and Switzerland. Elsewhere it should apply in pursuance of the principle of freedom to vote.

[CDL-AD\(2005\)034](#), *Referendums in Europe – an Analysis of the Legal Rules in European States*

38. (...) the wording of the proposal seems seriously flawed. It is proposed to give to the President of Ukraine the power to terminate the powers of the Verkhovna Rada and to dissolve the Verkhovna Rada. The drafting of the proposal is unclear and confusing. It is proposed to amend at the same time Article 90 and Article 106 of the Constitution and both proposals are mixed up in the proposed wording.

39. Moreover, the conditions for this step are ill-defined. What precisely is the meaning of failing to form a stable and operational majority? This gives too much discretion to the President and the period of one month for forming such a majority appears short

40. In conclusion, the drafting of this question is so unclear that its admissibility appears questionable and the adoption of the proposal would appear highly undesirable.

[CDL-INF\(2000\)011](#), *Constitutional referendum in Ukraine – Opinion adopted by the Commission at its 42<sup>nd</sup> Plenary Session*

## **8. The Procedural Validity of Texts Submitted to a Referendum**

III.2. 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;

[CDL-AD\(2007\)008rev](#), *Code of Good Practice on Referendums*

[CDL-INF\(2001\)10](#), *Guidelines for Constitutional Referendums at National Level, p. 3*

71. The question then arises as to whether the texts submitted to referendum have to comply with the principle of unity of form (the same question must not combine a specifically-worded draft amendment with a generally-worded proposal or a question of principle).

72. States that do not provide for any rule concerning the form of the texts submitted to referendum logically do not adopt the principle of unity of form either. By contrast, when a single form is prescribed, this principle is imposed by definition. Certain states that provide for several types of referendum adopt the principle of unity of form. (...)

[CDL-AD\(2005\)034](#), *Referendums in Europe – an Analysis of the Legal Rules in European States*

62. (...) The advisory referendum with multiple choice is an unusual and complex provision. The unity of content between the various proposals should be ensured, in order to avoid any falsification of the voters' intentions.

[CDL-AD\(2015\)009](#), *Opinion on the Citizens' bill on the regulation of public participation, citizens' bills, referendums and popular initiatives and amendments to the Provincial Electoral Law of the Autonomous Province of Trento (Italy)*

5. This combination in a single question of two distinct issues, one relating to an individual situation and one proposing a constitutional amendment, is in contradiction with the principle of unity of content as set forth for example in the Guidelines for Constitutional Referendums at National Level, adopted by the Venice Commission in July 2001 (CDL-INF(2001)10, at II.C). Although two questions are put to the voters, they are not allowed to give a separate and distinct answer to each of these questions but have to reply in a uniform way. The appropriate opportunity for the electorate to indicate whether it supports abide is at a parliamentary or presidential election, and not in the context of an amendment to the Constitution. Inevitably the

linkage of principle with personality confuses the issue, and will inhibit impartial consideration by the Belarusian voters of the important principle which is at issue. It is open to doubt whether this way of wording a referendum question is compatible with Art. 114 of the Electoral Code of Belarus according to which "The question (draft decision) offered for the referendum shall be worded by the initiative group in a clear and definite manner so that it shall be possible to give an unambiguous answer to such question." This provision, which appears in an article of the Electoral Code applicable to referendums on the basis of popular initiatives, has as its purpose to protect the exercise of the freedom of the vote of the electorate and therefore has to be equally applied to referendums called by the President.

[CDL-AD\(2004\)029](#), *Opinion on the Referendum of 17 October 2004 in Belarus*

5. The possibility for the voters to pronounce themselves on each amendment separately will apparently preserve the principle of the unity of substance, although the relatively high number (29) of questions posed will inevitably make the ensuing results and various possible combinations less legible. This confusion is reinforced by the way in which the proposal to remove the two term limit of the President is formulated (...)

[CDL-AD\(2009\)010](#), *Opinion on the draft amendments to the Constitution of the Republic of Azerbaijan*

30. The first question contains in reality two questions. Citizens are asked to pronounce themselves at the same time

- on the question whether the present Verkhovna Rada enjoys their confidence;
- on a proposal to amend the Constitution introducing the possibility for the President of Ukraine to dissolve the Verkhovna Rada in the case of such a vote of no confidence.

31. To combine two questions in this way is in contradiction with a principle of referendum law known for example in Switzerland or Italy as the unity of subject matter. It may well be that a citizen of Ukraine wishes to have in general the right to express his lack of confidence in parliament without at the same time doing so with respect to the Verkhovna Rada presently in office. The present wording of the question deprives him of this possibility to give different replies to the two questions.

[CDL-INF\(2000\)011](#), *Constitutional referendum in Ukraine – Opinion adopted by the Commission at its 42<sup>nd</sup> Plenary Session*

## **9. The Substantive Validity of Texts Submitted to a Referendum**

III.3. 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 [*the procedural validity of texts submitted to a referendum*] and III.3 [*the substantive validity of texts submitted to a referendum*] may not be put to the popular vote.

[CDL-AD\(2007\)008rev](#), *Code of Good Practice on Referendums*

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

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

[CDL-INF\(2001\)10](#), *Guidelines for Constitutional Referendums at National Level*, p. 4

18. It can be said that the almost unlimited scope of questions that can be put to a referendum under the law is problematic from the perspective of international standards, which make it clear that referendums should not be used to undermine a constitutionally mandated division of powers. (...)

[CDL-AD\(2013\)017](#), *Opinion on the Law on National Referendum of Ukraine*

## **10. Competent Authorities to Initiate a Referendum**

23. Certain referenda are held at the request of a public authority such as the Head of State, the Government, Parliament, a certain number of representatives. The initiative may also lay with citizens; referenda may be held at the request of a part of the electorate, but this is less common than mandatory referendum or referendum at the request of an authority.

[CDL-AD\(2008\)010](#), *Opinion on the Constitution of Finland*

24. A mandatory referendum generally relates to constitutional revisions. In some states, any constitutional revision is submitted to a mandatory referendum, with the result that the people itself become the constitution-making body (Andorra, Armenia, Azerbaijan, Ireland, Switzerland – where a majority of the people and of the cantons is required –, Denmark where a precondition for a constitutional revision is the holding of general elections). In other states (Austria, Spain), only total revisions are submitted to a mandatory referendum. A mandatory referendum may also be restricted to changes to certain provisions or rules: basic constitutional provisions (Estonia – the chapters of the Constitution on general provisions and the revision of the Constitution as well as the law complementing the Constitution, on accession to the European Union –, Latvia – democratic and sovereign nature of the state, territory, official language and flag, election of the Parliament by universal, equal, direct, secret and proportional suffrage, a rule providing for a referendum to be called for the revision of previous provisions –, Lithuania – an independent and democratic republic, chapters on the state and revision of the constitution, constitutional law on the country's non-alignment with post-Soviet alliances –); three provisions relating to constitutional revisions and the duration of Parliament (Malta).

25. A mandatory referendum may also be conditional on a preliminary procedure, as in the case of France, where it concerns only constitutional revisions initiated by Parliament (there has been no actual case in which it has been used) and Turkey, where it concerns only constitutional amendments adopted by at least three-fifths but less than two-thirds of the members of the Grand National Assembly and not returned to the Assembly by the President of the Republic for reconsideration, although such a case is unlikely. In Russia, the mandatory referendum may be provided for only by an international treaty.

27. Referendums at the request of an authority – or extraordinary referendums – exist in quite a number of states. The state body that calls for such a referendum may be the executive (in particular, the President), in which case the citizens' confidence in this body may be concerned (plebiscitary aspect) or the legislative (or part of it). If the call for a referendum comes from the majority or, indeed, the opposition, it too may have a plebiscitary character, which will not be the case if the legislative takes the decision by common consensus to hold a referendum.

39. Provision for a referendum at the request of part of the electorate is less common than that for a mandatory referendum or referendum at the request of an authority.

40. Referendums at the request of part of the electorate must be divided into two categories: the ordinary optional referendum and the popular initiative in the narrow sense. Both result in a

popular vote without an authority taking a decision in this respect, but the authorities are least involved in the case of the popular initiative. An ordinary optional referendum challenges a text already approved by a state body, while a popular initiative enables part of the electorate to propose a text that has not yet been approved by any authority.

[CDL-AD\(2005\)034](#), *Referendums in Europe – an Analysis of the Legal Rules in European States*

III.5.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.

[CDL-AD\(2007\)008rev](#), *Code of Good Practice on Referendums*

13. According to Article 72 of the Constitution of Ukraine the All-Ukrainian referendum may be called by the Rada or by the President of Ukraine, in accordance with their powers determined by the Constitution. In addition, it can be held on a popular initiative at the request of at least three million citizens of Ukraine eligible to vote, provided that the signatures in favour of the referendum have been collected in at least two-thirds of the oblasts with at least 100,000 signatures gathered in each oblast. Such a referendum shall be called by the President (Article 106(6)).

[CDL-AD\(2013\)017](#), *Opinion on the Law on National Referendum of Ukraine*

#### **10.1. Referendums on the Request of a Section of the Electorate and Popular Initiative**

24. Referenda at the request of part of the electorate must be divided into two categories: the ordinary optional referendum and the popular initiative in the narrow sense (when the referendum is initiated by the citizens, in other words citizens' initiative, including the abrogative referendum as practiced for example in Italy). An ordinary optional referendum challenges a text already approved by a state body, while a popular initiative enables part of the electorate to propose a text that has not yet been approved by any authority.

[CDL-AD\(2008\)010](#), *Opinion on the Constitution of Finland*

79. In any event, the Venice Commission recommends keeping referendums and popular initiatives separate. Where a democracy is functioning, political parties are supposed to aggregate popular initiative and compose political programmes so that important political and social issues reach Parliament.

[CDL-AD\(2014\)027](#), *Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia*

26. Therefore the most problematic provisions in the law under examination concern the possibility to hold referendums on popular initiative on a new Constitution or constitutional amendments. According to Article 3(3) (1) matters submitted to a national referendum can include both approving a new version of the Constitution and amending the Constitution. Article 15(2) even gives room to the interpretation that a new Constitution can only be adopted through a national referendum: "Through a national referendum, the Ukrainian people as the bearer of sovereignty and the only source of power in Ukraine can exercise their exclusive right to determine and change the constitutional arrangement in Ukraine by adopting the Constitution of Ukraine (constituent power) in the manner established by this Law". In addition, Article 15(3) provides that "through a national referendum by popular initiative the Ukrainian people as the

bearer of sovereignty and the only source of power in Ukraine can express their will and approve, in the manner established by this Law, a new version of the Constitution of Ukraine, make amendments to the Constitution of Ukraine, repeal, reject or deem invalid a law on amending the Constitution of Ukraine”.

[CDL-AD\(2013\)017](#), *Opinion on the Law on National Referendum of Ukraine*

## **11. Procedures for Referendums**

244. Rules and procedures on constitutional amendment should be as clear and simple as possible, so as not to give rise to problems and disputes of their own.

[CDL-AD\(2010\)001](#), *Report on Constitutional Amendment*

17. In addition, another factor which may jeopardise the “constitutional legitimacy” of the reform is the time-frame in which the modifications have been submitted to the referendum. As the Venice Commission has previously stated, the process of amending the Constitution should be marked by the highest levels of transparency and inclusiveness. It is particularly important where the reform, such as the current one, is so heterogeneous and proposes extensive modifications to various key aspects of the Constitution. “Transparency, openness and inclusiveness, as well as adequate timeframes and conditions allowing for a variety of views and proper wide and substantive debates of controversial issues are key requirements of a democratic constitution-making process and help ensure that the text is adopted by society as a whole, and reflects the will of the people. Notably, these [debates] should involve political institutions, non-governmental organisations and citizens’ associations, academia, the media and the wider public; this includes proactively reaching out to persons or groups that would otherwise be marginalized, such as national minorities”.

[CDL-AD\(2016\)029](#), *Azerbaijan - Opinion on the draft modifications to the Constitution submitted to the Referendum of 26 September 2016*

78. In general, the number of questions asked at the same ballot is not limited. However, in Armenia a referendum cannot relate to more than one question and in Portugal no more than three. In some states, alternatives can be proposed (Austria, Russia, Sweden). In Switzerland, Parliament can adopt a counter-proposal to a popular initiative, which is put to the vote at the same time.

[CDL-AD\(2005\)034](#), *Referendums in Europe – an Analysis of the Legal Rules in European States*

24. (...) the competent state authorities must direct their efforts to ensuring inclusive discussions on the intended amendments, and provide a necessary period for reflection as well as adequate time for the preparation of a referendum (where applicable).

[CDL-AD\(2015\)014](#), *Joint Opinion on the draft law "on introduction of changes and amendments to the Constitution" of the Kyrgyz Republic*

48. There is often a prescribed time limit for the organisation of the referendum after the decision of parliament to amend the constitution. When provided for, it varies from three months after the Parliament decided to hold a referendum, to fifteen, thirty, sixty, ninety days, six months or twelve months after the amendment was passed by Parliament.

[CDL-AD\(2010\)001](#), *Report on Constitutional Amendment*

106. In most states, the vote takes place over one day, in the Czech Republic over two days. Finland schedules two days if the referendum is held at the same time as the national elections. The vote can also take place over one or two days in Poland. By definition, when advance or postal voting is allowed, it takes place before the actual polling day. For example, postal voting takes place over a period of thirty days in Sweden and three weeks before polling day in Switzerland. In Estonia, advance voting may take place at the polling stations from thirteen days before the election (moreover, electronic voting between four and six days before the election will be allowed from 2005). Advance voting is permitted by Russian law for fifteen days in the case of less accessible localities, boats, polar stations and, more generally, everywhere outside the national territory.

107. If there are different time-zones within a country, is it possible for the results from some polling stations to be known before voting closes in others? This question arises in Russia much more than anywhere else, and the outcome of the vote is announced after the closure of all polling stations and the general counting of the votes. There is a significant time-difference between Metropolitan France and the overseas departments, and up to now the publication of the results has not been prohibited before the last polling stations close.

[CDL-AD\(2005\)034](#), *Referendums in Europe – an Analysis of the Legal Rules in European States*

### **11.1. Thresholds and Special Majorities**

III.7. 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.

[CDL-AD\(2007\)008rev](#), *Code of Good Practice on Referendums*

49. Several constitutions spell out the majority needed for the amendment to be approved by referendum or entrust the determination of the majority to a special law. The required majority is generally more than one-half of the valid votes or of votes cast. In Armenia, the draft amendment shall be considered to have been approved if more than one-half of the participants to the vote but not less than one-fourth of the registered citizens have voted in favour of it. The constitution of Montenegro requires a majority of more than three-fifths of the votes cast. The Swedish Instrument of Government provides that the amendment proposal is rejected before being submitted to the second Parliament for approval if a majority of those taking part in the referendum vote against it, and if the number of those voting against exceeds half the number of those who registered a valid vote in the election.

50. A few constitutions demand a minimum participation of the electorate in the referendum. The requirement can be that at least half of the eligible voters participate. The Danish constitution demands a majority of the votes cast, but only if more than 40% of the electorate participated. The Lithuanian constitution requires a majority of more than three-fourths of the electorate if Article 1 of the Constitution is to be amended ("Lithuania is an independent democratic republic").

[CDL-AD\(2010\)001](#), *Report on Constitutional Amendment*

It is admissible for acceptance by a minimum percentage of the electorate to be required in order for a referendum to be valid. This type of quorum is preferable to requiring a minimum turnout.

[CDL-INF\(2001\)10](#), *Guidelines for Constitutional Referendums at National Level*, p. 7

109. Most states do not provide for a quorum to validate the result of a referendum.

110. Where a quorum does exist, it can take two forms: quorum of participation or quorum of approval. The quorum of participation (minimum turnout) means that the vote is valid only if a certain percentage of registered voters take part in the vote. The quorum of approval makes the validity of the results dependent on the approval (or perhaps rejection) of a certain percentage of the electorate.

111. A quorum of approval is considerably preferable to a quorum of participation, which poses a serious problem. The opponents of the draft proposal submitted to referendum, as several examples have shown, appeal to people to abstain even if they are very much in the minority among the voters concerned by the issue.

[CDL-AD\(2005\)034](#), *Referendums in Europe – an Analysis of the Legal Rules in European States*

35. The setting of a quorum for the vote to be valid gives the majority of voters the impression that if that minimum is not achieved, their opinion is not taken into account. Moreover, in the case of a decision-making referendum, this blocks the whole process. It is therefore better to dispense with the quorum requirement, because it is difficult to make voting compulsory. If there has to be a quorum, it should be a quorum of approval (acceptance by a minimum percentage of the electorate) rather than a quorum of participation, which encourages opponents to call for a boycott in the hope of defeating the proposal despite being in a minority.

[CDL-AD\(2005\)028](#), *Opinion on Parliamentary Assembly Recommendation 1704 (2005) on Referendums : towards good practices in Europe*

78. (...). Moreover, for countries whose citizens live abroad, determining a right quorum (number of registered voters who must effectively express their vote) can become problematic.

[CDL-AD\(2014\)027](#), *Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia*

48. (...) it is also in accordance with the recommendations of the Venice Commission, which deem it “advisable” not to provide for turn-out quorums or for approval quorums. Turn-out quorums have at least two undesirable effects: first, abstentions are assimilated to no-votes, and secondly, votes cast for a proposal which ultimately does not reach the quorum will be futile. Opponents will be tempted to encourage abstention, which is not healthy for democracy. Approval quorums risk “involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold”. In this respect, it may be noted that, contrary to the central state, other regions in Italy have reduced the quorum required (however without eliminating it).

49. The abolition of any voter turnout requirement may be to some extent counterbalanced by a higher number of signatures required. A high number of signatures may indicate a broad popular support. However, it does not guarantee that support because persons might sign because they are convinced that the matter is controversial and should be decided by the people (in whatever sense).

[CDL-AD\(2015\)009](#), *Opinion on the Citizens' bill on the regulation of public participation, citizens' bills, referendums and popular initiatives and amendments to the Provincial Electoral Law of the Autonomous Province of Trento (Italy)*

19. The required level of participation (minimum turnout) means that the vote is valid only if a certain percentage of registered voters take part in the vote.

21. According to an inquiry carried out by the Venice Commission that provided information on 33 of the 48 member states of the Commission, twelve of these states, as well as Slovenia, have legal provisions setting a minimum threshold of participation of 50% of registered voters (the only exception is Azerbaijan that requires the participation of 25% of the registered voters). The report by the Commission states: "a quorum of participation of the majority of the electorate is required in the following states: Bulgaria, Croatia, Italy and Malta (abrogative referendum), Lithuania, Russia and "the Former Yugoslav Republic of Macedonia" (decision-making referendum). In Latvia, the quorum is half the voters who participated in the last election of Parliament and in Azerbaijan, it is only 25% of the registered voters. In Poland and Portugal, if the turnout is not more than 50%, the referendum is de facto consultative and non-binding (in Portugal, the quorum is calculated on the basis of the citizens registered at the census)."

25. Secondly, it is sometimes argued that setting a level of participation grants an initial bonus to those who are opposed to the question posed. Lack of participation favours the rejection of the proposal subjected to referendum (whether this is framed in a positive or negative sense). Non participation by a voter has a result more powerful than a mere vote against, since the latter legitimises the result (whereas an intentional boycott of the referendum puts its legitimacy in to question). But whatever the judgement that this attitude may deserve from the point of view of civic culture, a decision to abstain from voting is nevertheless a legitimate attitude that citizens may adopt on a fundamental issue such as national independence. Naturally, there is an unavoidable level of technical abstention (sick people, citizens affected by accidents, who cannot exercise their vote because of personal circumstances) that cannot be taken as arising from opposition to the question asked, even though its effect may be to reinforce opposition to the subject proposed.

29. The required majority makes the validity of the results dependent on the approval (or perhaps rejection) of a certain percentage of the electorate. If a simple majority of those voting is not sufficient, there are two different kinds of possible majority requirements:

- (A) a rule requiring a qualified majority of those voting (that could be e g 55%, 60% or 65%);
- (B) a rule requiring that there must, in addition to a simple majority of those voting, also be a specified number of Yes votes (e g 35%, 40%, 45% or 50%) of the total national electorate.

31. A study of comparative material relating to the general practice on referendums shows that only a few European countries require a specific majority. The following approval rates are necessary: approval of half of the electorate in Latvia, for constitutional revisions submitted to referendum (§ 79 of the Constitution); approval of a quarter of the electorate in Hungary (Art. 28C/6 of the Constitution), one-third of the electorate in Albania (Art. 118. 3 of the electoral code) and Armenia (Art. 113 of the Constitution). In Denmark, a constitutional amendment must be approved by 40% of the electorate (§ 88 of the Constitution); in other cases, the text put to the vote is rejected only if not only the majority of voters vote against it, but also 30% of the registered electorate (§ 42.5 of the Constitution).

34. In its ruling on constitutional aspects of the possible secession of Quebec, the Canadian Supreme Court held that *democracy means more than simple majority rule*. Hence, if a referendum were to be conducted, a clear majority in favour should exist. The Court said: *we refer to a "clear majority" as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question*

*and in terms of the support it achieves. Nevertheless, the Court refrained from defining what, in quantitative terms, a “clear majority” could be, saying: it will be for the political actors to determine what constitutes a “clear majority on a clear question” in the circumstances under which a future referendum may be taken.*

37. As regards the choice between a rule requiring the support of a specific proportion of the total national electorate (B in paragraph 29 *supra*) and a rule requiring a qualified majority of those who vote (A in paragraph 29 *supra*), the Commission would not recommend the latter since that could mean approval of a fundamental change being given on a very low turnout.

[CDL-AD\(2005\)041](#), *Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards*

## **11.2. Compulsory Voting**

108. Compulsory voting is prescribed for referendums only in a very limited number of states: Greece, Luxembourg, Turkey and Belgium (where just one ad hoc referendum has been organised). In Switzerland, it is imposed only in one canton.

[CDL-AD\(2005\)034](#), *Referendums in Europe – an Analysis of the Legal Rules in European States*

## **12. Opinion of Parliament**

II.6. “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.”

[CDL-AD\(2007\)008rev](#), *Code of Good Practice on Referendums*

221. In this context, it is recalled that the Venice Commission has previously taken the view, on the basis of several experiences in Europe over the last 20 years, that “there is a strong risk, in particular in new democracies, that referendums on constitutional amendment are turned into plebiscites on the leadership of the country and that such referendums are used as a means to provide legitimacy to authoritarian tendencies. As a result, Constitutional amendment procedures allowing for the adoption of constitutional amendments by referendum without prior approval by parliament appear in practice often to be problematic, at least in new democracies”. It should therefore be explicitly stipulated that the President of the Republic may not submit a constitutional law to referendum until it has been passed by the Assembly of People’s Representatives.

[CDL-AD\(2013\)032](#), *Opinion on the Final Draft Constitution of the Republic of Tunisia*

31. (...) The challenge is to balance the requirements of rigidity and flexibility. The report states, however, that “if there is not a “best model”, then there is at least a fairly wide-spread model – which typically requires a certain qualified majority in parliament (most often 2/3), and then one or more additional obstacles – either multiple decisions in parliament (with a time delay), or additional decision by other actors (multiple players), most often in the form of ratification through referendum”.

[CDL-AD\(2013\)029](#), *Opinion on three Draft Constitutional Laws amending two Constitutional Laws amending the Constitution of Georgia*

189. The Commission also wishes to stress that recourse to a referendum should not be used by the executive in order to circumvent parliamentary amendment procedures. The danger and potential temptation is that while constitutional amendment in parliament in most countries requires a qualified majority, it is usually enough with simple majority in a referendum. Thus, for a government lacking the necessary qualified majority in parliament, it might be tempting instead to put the issue directly to the electorate. On several occasions the Venice Commission has emphasized the danger that this may have the effect of circumventing the correct constitutional amendment procedures. It has insisted on the fact that it is expedient in a democratic system upholding the separation of powers that the legislature should always retain power to review the executive's legislative output and to decide on the extent of its powers in that respect.

[CDL-AD\(2010\)001](#), *Report on Constitutional Amendment*

27. The executive should also never take recourse to a referendum in order to circumvent parliamentary amendment procedures.

[CDL-AD\(2015\)014](#), *Joint Opinion on the draft law “on introduction of changes and amendments to the Constitution” of the Kyrgyz Republic*

25. Such an interpretation would be in line with good practices and earlier comments made by the OSCE/ODIHR and the Venice Commission, which have warned against holding constitutional referenda without a prior qualified majority vote in Parliament. Indeed, the failure to hold a parliamentary debate prior to a referendum could expose this instrument of direct democracy to polemics, misleading information and abuse of democracy if not carefully managed in accordance with generally accepted democratic rules. As highlighted by the OSCE/ODIHR and the Venice Commission in the past, “provisions outlining the power to amend the Constitution [...] may heavily influence or determine fundamental political processes. In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of the constitution and, thereby, of the political system as a whole. It is of utmost importance that these amendments are introduced in a manner that is in strict accordance with the provisions contained in the Constitution itself”. In any case, the competent state authorities must direct their efforts towards ensuring inclusive discussions on the intended amendments, and provide a necessary period for reflection as well as adequate time for the preparation of a referendum (where applicable).

[CDL-AD\(2016\)025](#), *Kyrgyz Republic – Joint opinion on the draft law “on Introduction of amendments and changes to the Constitution”*

### **13. Effects of Referendums**

5. a. 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.

5.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.

8. a. The effects of legally binding or consultative referendums must be clearly specified in the Constitution or by law.
8. 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.

[CDL-AD\(2007\)008rev](#), *Code of Good Practice on Referendums*

Referendums on specifically worded draft amendments will usually have a binding character and their implementation will not present particular problems.

Referendums on questions of principle or other generally-worded proposals should be consultative only. While some countries recognise that such referendums may bind parliament in principle, this leads to difficulties of implementation and entails a high risk of political conflicts.

[CDL-INF\(2001\)10](#), *Guidelines for Constitutional Referendums at National Level*, p. 7

25. The effects of the referendum might be binding (decision-making) or non-binding. The non-binding referendum is a form of consultation with the voters. The Code of Good Practice on Referenda adopted by the Venice Commission in March 2007 when speaking of the effects of referenda suggested that the effects of legally binding or consultative referenda must be clearly specified in the Constitution or by law. Referenda 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.

[CDL-AD\(2008\)010](#), *Opinion on the Constitution of Finland*

131. The scope of a popular vote depends not only on whether it is a binding or consultative one, but also on whether parliament is able to reverse the decision taken by the people. In other words, can a provision approved by referendum be revised without going through the same procedure again? If it has been rejected by the people, can it be adopted without a referendum?

[CDL-AD\(2005\)034](#), *Referendums in Europe – an Analysis of the Legal Rules in European States*

116. Most referendums organised in the states that replied to the questionnaire are of a decision making nature, in other words the result is legally binding, in particular on the authorities.

117. Several states provide only for decision-making referendums: Albania, Armenia, Azerbaijan, Bulgaria, Croatia, Estonia, France, Georgia, Greece, Ireland, Italy, Latvia, Russia, Switzerland, “the former Yugoslav Republic of Macedonia” and Turkey. The only referendum organised in the Czech Republic (on accession to the European Union) was a decision-making one.

118. In other states, such as Denmark, decision-making referendums are the rule but consultative referendums are not excluded.

119. In Hungary, a referendum on a law or following a popular initiative launched by 200,000 citizens is always binding, while in other cases Parliament decides whether the referendum will be binding or consultative.

120. Some states distinguish between decision-making referendums and consultative referendums according to the nature of the text put to the vote. In Andorra, Austria and Spain, a referendum on an important issue is consultative, while a constitutional referendum (and a legislative referendum in Austria) is legally binding. In Lithuania, a referendum is binding if it relates to legislative provisions proposed by a popular initiative and to constitutional provisions submitted to a mandatory referendum. In other cases, it is consultative.

121. In Poland and Portugal, the referendum is binding if the majority of the electorate has voted; otherwise it is de facto consultative.

122. Finally, Belgium, Finland, the Netherlands and Norway have had only consultative referendums to date. In Sweden, while a legally binding referendum on a question relating to basic laws is possible, only consultative referendums have been held up to now.

123. Leaving out the case of the popular initiative, which leads to the adoption of a new text, a decision-making referendum may also be:

- suspensive: the text may not enter into force unless it has been approved by the voters or unless a request to hold a referendum has not been made within the time-limit established by the Constitution or by law;
- abrogative or resolutive: the text ceases to be in force following a vote against it or failure to secure a “yes” vote within a certain time-limit after its adoption.

[CDL-AD\(2005\)034](#), *Referendums in Europe – an Analysis of the Legal Rules in European States*

12. In general, two main types of referendums can be distinguished: consultative or binding. The binding referendum can relate to the Constitution or to legislation. With respect to the referendum on popular initiative, the Ukrainian Constitution unfortunately is silent as to its legal nature, although the Commission, in its Opinion on the Draft Constitution of Ukraine (CDL-INF (96) 6) had recommended that the possible subject matters of people’s initiatives be clearly defined.

13. The present referendum relates to the Constitution and not to legislation. It is less clear whether it is binding or not. (...)

17. (...) other provisions of the Constitution clearly show that Article 72.2 cannot be used as the basis for a constitutional referendum.

18. Chapter XIII on introducing amendments to the Constitution of Ukraine contains detailed provisions on the procedures required for amending the Constitution. These procedures clearly reflect the conviction of the authors of the Constitution that the Ukrainian Constitution should be a rigid constitution which cannot be amended very easily but only on the basis of procedures implying sufficient guarantees. Article 156 mentions the possibility of constitutional referendums, but only with respect to certain chapters of the Constitution and only to confirm a decision already taken by the Verkhovna Rada by a two-thirds majority in favour of a constitutional change.

19. With the exception of question 6, the proposed changes relate to Chapter IV of the Constitution, which is not mentioned in Article 156, and no decision has been taken by the Verkhovna Rada in favour of a constitutional change. Article 156 therefore cannot be used as the basis for the present referendum. No other article of the Constitution refers to the possibility of amending the Constitution by a referendum. Having regard to the detailed rules on amending the Constitution and the clear tendency to make constitutional amendments difficult and subject

to guarantees, the possibility of amending the Constitution directly by a binding constitutional referendum would have to be provided for expressly in the text of the Constitution.

20. Under the Constitution of Ukraine, it is therefore not possible to give the present referendum a legally binding character. The referendum does not have, and may not have, the character of a binding constitutional referendum.

21. Therefore, only the possibility of a consultative referendum remains in the present case. Nevertheless, even this possibility is not at all certain. A consultative referendum is not legally irrelevant. By giving the people the possibility to express their opinion, pressure is put on the elected bodies to abide by the will of the people. Therefore the possibility to have recourse to a consultative referendum has an important influence on the balance of powers between the State organs.

22. (...)

23. The Commission would therefore tend to stick to its previous interpretation, that Article 72.2 refers to the legislative referendum. Nevertheless, it would be desirable for the Ukrainian Constitutional Court to give an interpretation of this article. The issue whether the individual questions put to referendum may be submitted *ratione materiae* to a consultative referendum will be examined below.

24. It is irrelevant whether the Law on all-Ukraine and local referendums gives a wider scope to the possibility of holding referendums. The Constitution prevails over ordinary laws (see Article 8.2 of the Constitution) and is moreover even the more recent law.

25. To sum up, the Commission is of the opinion that the present referendum does not have, and may not have, the effect of directly introducing amendments to the Ukrainian Constitution and that it appears highly questionable whether the referendum is admissible as a consultative referendum.

[CDL-INF\(2000\)011](#), *Constitutional referendum in Ukraine – Opinion adopted by the Commission at its 42<sup>nd</sup> Plenary Session*

## **APPENDIX - List of opinions and reports quoted in the compilation**

- [CDL-AD\(2016\)029](#), Azerbaijan - Opinion on the draft modifications to the Constitution submitted to the Referendum of 26 September 2016
- [CDL-AD\(2016\)025](#), Kyrgyz Republic - Joint opinion on the draft law "on Introduction of amendments and changes to the Constitution"
- [CDL-AD\(2015\)014](#), Joint Opinion on the draft law "on introduction of changes and amendments to the Constitution" of the Kyrgyz Republic
- [CDL-AD\(2015\)009](#), Opinion on the Citizens' bill on the regulation of public participation, citizens' bills, referendums and popular initiatives and amendments to the Provincial Electoral Law of the Autonomous Province of Trento (Italy)
- [CDL-AD\(2014\)027](#), Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia
- [CDL-AD\(2014\)002](#), Opinion on "whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 constitution is compatible with constitutional principles"
- [CDL-AD\(2013\)032](#), Opinion on the Final Draft Constitution of the Republic of Tunisia
- [CDL-AD\(2013\)029](#), Opinion on three Draft Constitutional Laws amending two Constitutional Laws amending the Constitution of Georgia
- [CDL-AD\(2013\)017](#), Opinion on the Law on National Referendum of Ukraine
- [CDL-AD\(2010\)001](#), Report on Constitutional Amendment
- [CDL-AD\(2009\)024](#), Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine
- [CDL-AD\(2009\)010](#), Opinion on the draft amendments to the Constitution of the Republic of Azerbaijan
- [CDL-AD\(2008\)010](#), Opinion on the Constitution of Finland
- [CDL-AD\(2008\)015](#), Opinion on the Draft Constitution of Ukraine
- [CDL-AD\(2007\)045](#), Opinion on the constitutional situation in the Kyrgyz Republic
- [CDL-AD\(2007\)008rev](#), Code of Good Practice on Referendums
- [CDL-AD\(2006\)018](#), Report on Electoral Law and Electoral Administration in Europe - Synthesis study on recurrent challenges and problematic issues

- [CDL-AD\(2005\)041](#), Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards
- [CDL-AD\(2005\)034](#), Referendums in Europe – an Analysis of the Legal Rules in European States
- [CDL-AD\(2005\)028](#), Opinion on Parliamentary Assembly Recommendation 1704 (2005) on Referendums : towards good practices in Europe
- [CDL-AD\(2005\)022](#), Interim Opinion on Constitutional Reform in the Kyrgyz Republic
- [CDL-AD\(2004\)029](#), Opinion on the Referendum of 17 October 2004 in Belarus
- [CDL-AD\(2002\)032](#), Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein
- [CDL-AD\(2002\)023rev](#), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report
- [CDL-INF\(2001\)023](#), Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia
- [CDL-INF\(2001\)010](#), Guidelines for Constitutional Referendums at National Level
- [CDL-INF\(2000\)013](#), Opinion on the constitutional amendments concerning legislative elections in the Republic of Slovenia
- [CDL-INF\(2000\)011](#), Constitutional referendum in Ukraine – Opinion adopted by the Commission at its 42<sup>nd</sup> Plenary Session
- [CDL-INF\(1996\)008](#), Opinion on the amendments and addenda to the Constitution of the Republic of Belarus
- [CDL-INF\(1996\)002](#), Opinion on the regulatory concept of the Constitution of the Republic of Hungary