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Promoting the revised Code of Good Practice on Referendums

Report¹

Committee on Political Affairs and Democracy

Rapporteur: Ms Isabel MEIRELLES, Portugal, Group of the European People's Party

Summary

A number of guarantees are necessary to ensure that referendums genuinely express the wishes of the electorate and comply with international standards in the field of human rights, democracy and the rule of law.

To respond to the changed nature of political campaigning and the rise of digital media, the European Commission for Democracy through Law (Venice Commission) adopted a Revised Code of Good Practice on Referendums in June 2022.

The Parliamentary Assembly should endorse the Revised Code of Good Practice on Referendums and recommend it to the parliaments of the Council of Europe member and observer States, as well as to the parliaments enjoying observer or partner for democracy status with the Assembly.

1. Reference to committee: [Doc. 15691](#), Reference 4714 of 2 March 2023.



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A. Draft resolution²

1. The Parliamentary Assembly refers to its [Resolution 2251 \(2019\)](#) “Updating guidelines to ensure fair referendums in Council of Europe member States” in which, taking note that the process of revision of the guidelines had already started, it asked the European Commission for Democracy through Law (Venice Commission) to take into account the increasing use of referendums, the rise of digital media and the changed nature of political campaigning.
2. Through this text, the Assembly wished to provide an input to the work of the Venice Commission, having taken note that, in recent years, the process and/or the fairness of the outcome in a number of national referendums had been questioned and that, in other cases, important innovations had been introduced, the knowledge of which could benefit legislators in all member States.
3. The Venice Commission emphasised 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. 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 Venice Commission was concerned that most of these referendums were aimed at concentrating powers and reducing democratic control by parliament. On that basis, the Venice Commission initiated the process of revision of the Code of Good Practice on Referendums and in June 2022 it adopted the Revised Code of Good Practice on Referendums (“Revised Code”).
4. The Revised Code responds to the Assembly’s concerns and takes into account developments with respect to a number of referendums which have been held by Council of Europe member States in recent years.
5. The Revised Code declares that it “does not intend to determine whether and under which circumstances recourse to referendums is desirable as such. The answer to this question varies according to the nature of the constitutional system and tradition. It belongs to national constitutional law to establish whether referendums are at all foreseen, what their scope is, and what procedure must be followed to hold them. However, a number of guarantees are necessary to ensure that they genuinely express the wishes of the electorate and do not go against international standards in the field of human rights, democracy and the rule of law.”
6. The Revised Code includes the Guidelines on the Holding of Referendums as well as an Explanatory Memorandum, which refers, when necessary, to the various items of the Guidelines in order to elaborate on their content and background. The Guidelines contain the Principles of Europe’s electoral heritage, the conditions for implementing these principles, and specific rules.
7. The present resolution is intended to elaborate on those aspects of the guidelines that are specific to referendums. Accordingly, it does not comment on the principles and general rules applicable to both elections and referendums.
8. The Revised Code applies to referendums at the different levels of the State structure (national, regional, local). However, it is mainly focused on national referendums. Its general rules are to be adapted to the reality of local and regional referendums, in conformity with national constitutional traditions.
9. In light of these considerations, the Assembly:
 - 9.1. welcomes the elaboration of the [Revised Code of Good Practice on Referendums](#) and endorses it as adopted;
 - 9.2. decides to disseminate the Revised Code of Good Practice on Referendums and recommends it to the parliaments of the Council of Europe member and observer States, as well as to the parliaments enjoying observer or partner for democracy status with the Assembly;
 - 9.3. invites parliaments and other relevant bodies of Council of Europe member States to promote the Revised Code of Good Practice on Referendums and to take it into account when revising the relevant national rules or developing best practices;
 - 9.4. encourages parliaments and other relevant bodies of Council of Europe member States to enter into dialogue as to how to improve the existing national rules on referendums;

2. Draft resolution adopted unanimously by the committee on 5 March 2024.

- 9.5. invites parliaments of Council of Europe member States to update their rules on referendums on the basis of the Revised Code of Good Practice on Referendums;
 - 9.6. invites parliaments of the Council of Europe member States to develop best practices which would improve the legal and institutional environment for referendums;
 - 9.7. invites the political groups in the Assembly to promote the Revised Code of Good Practice on Referendums.
10. As regards its own activities, the Assembly resolves to play a greater role in promoting the Revised Code of Good Practice on Referendums by:
- 10.1. encouraging its political groups to enhance discussions on how to improve the legal framework for referendums;
 - 10.2. holding debates on how to develop the legal, including the soft law, environment and best practices relating to referendums;
 - 10.3. stepping up interparliamentary co-operation activities addressing the improvement of the legal framework for referendums;
 - 10.4. continuing to review, in co-operation with the Venice Commission, the Revised Code of Good Practice on Referendums and the issues raised in it, with a view to developing it further if required.

B. Explanatory memorandum by Ms Isabel Meirelles, rapporteur

1. Origin and aim of the report

1. The Code of Good Practice on Electoral Matters and the Code of Good Practice on Referendums are reference documents of the Council of Europe, drafted and adopted by the European Commission for Democracy through Law (Venice Commission), approved by the Parliamentary Assembly and the Congress of Local and Regional Authorities and supported by the Committee of Ministers. They are widely referred to in Venice Commission opinions and in reports of other international organisations as well as in judgments of the European Court of Human Rights. They have a significant impact on national legislation and its implementation, in Europe and beyond. Indeed, the fact that several non-European countries have become full members of the Venice Commission and that co-operation programmes have been developed with other countries, in particular in Central Asia, Southern Mediterranean and Latin America, has contributed to spreading the standards and expertise of the Venice Commission all over the world.

2. In June 2022, the Venice Commission adopted the [Revised Code of Good Practice on Referendums](#)³ ("Revised Code"). This text followed up [Resolution 2251 \(2019\)](#) "Updating guidelines to ensure fair referendums in Council of Europe member States" in which the Parliamentary Assembly, taking note that the process of revision of the guidelines had already started, asked the Venice Commission to take into account the increasing use of referendums, the rise of digital media and the changed nature of political campaigning.

3. The Revised Code responds to the Assembly's concerns and takes into account developments with respect to a number of referendums which have been held by Council of Europe member States in recent years.

4. The motion for a resolution⁴ which is at the origin of the present report recommends that the Assembly should welcome the adoption of the Revised Code and share it with the parliaments of Council of Europe member States. The Assembly should also seek to promote the Revised Code beyond its national delegations, reaching out to other parliaments, in Europe and beyond, which share its commitment to strengthening democracy, the good functioning of democratic processes and the respect for the rule of law. I fully subscribe to the proposals set out in the motion for a resolution

5. Furthermore, the Assembly should formally endorse the Revised Code. This is in line with existing practice as regards a number of documents emanating from the Venice Commission, including the Codes of Good Practice in Electoral Matters and on Referendums, and more recently the Rule of Law Checklist.

6. Finally, the Assembly should continue to review, in co-operation with the Venice Commission, the issues raised in the Revised Code, with a view to developing it further if required.

7. In the present document I shall describe the process which led to the adoption of the Revised Code and its content.

2. Background

8. The guidelines on the organisation of referendums ([CDL-AD\(2006\)027rev](#)) were adopted by the Council for Democratic Elections at its 18th meeting (Venice, 12 October 2006) and by the Venice Commission at its 68th plenary session (Venice, 13-14 October 2006). These guidelines are accompanied by an explanatory memorandum which was adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and by the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007). The Code of Good Practice on Referendums ([CDL-AD\(2007\)008rev-cor](#)) adopted at the same meeting of the Venice Commission includes these guidelines and the explanatory memorandum.

9. On 23 November 2007, with [Recommendation 1821 \(2007\)](#), the Standing Committee, acting on behalf of the Assembly, asked the Committee of Ministers to adopt a recommendation to member States endorsing the Code of Good Practice on Referendums. In its [Resolution 1592 \(2007\)](#), the Assembly decided to forward the Code of Good Practice on Referendums to national delegations and parliaments so that it could be applied in Council of Europe member States without delay.

10. At its 14th plenary session (Strasbourg, 30 May - 1 June 2007), the Congress of Local and Regional Authorities of the Council of Europe approved the Code of Good Practice on Referendums.

3. [CDL-AD\(2022\)015-e](#).

4. [Doc. 15691](#).

11. On 27 November 2008, at the 1042bis meeting of the Ministers' Deputies, the Committee of Ministers adopted a Declaration on the Code of Good Practice on Referendums for the purpose of inviting public authorities in member States to take it into account.

12. In October 2016, the Venice Commission addressed recurring concerns with respect to a number of referendums in member States, relating both to the procedure for launching referendums and to the substance of the proposed changes.

13. Regarding the procedure, the Venice Commission emphasised 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. 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 Venice Commission was concerned that most of these referendums were aimed at concentrating powers and reducing democratic control by parliament. On that basis, the Venice Commission initiated the process of revision of the Code of Good Practice on Referendums.

14. In 2017, the Council for Democratic Elections and the Venice Commission adopted a questionnaire (CDL(2017)022rev2) asking for information on recent developments in member States in the field of referendums. The replies to the questionnaire can be found in the "Study on Referendums – Replies to the Questionnaire" (CDL(2018)042).

15. The final version of the Revised Code of Good Practice on Referendums, including the explanatory memorandum, was approved by the Council for Democratic Elections at its 73rd meeting (Venice, 16 June 2022) and adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022). It was endorsed by the Committee of Ministers (7 September 2022) and by the Congress of Local and Regional Authorities (25 October 2022).

3. Previous work of the Assembly

16. While the Council for Democratic Elections and the Venice Commission were working on the revision of the Code, the Assembly worked on a report entitled "Updating guidelines to ensure fair referendums in Council of Europe member States" (Doc. 14791) which led to [Resolution 2251\(2019\)](#), adopted on 22 January 2019.

17. Through this text, the Assembly wished to provide an input to the work of the Venice Commission, having taken note that, in recent years, the process and/or the fairness of the outcome in a number of national referendums had been questioned and that, in other cases, important innovations had been introduced, the knowledge of which could benefit legislators in all member States.

18. In [Resolution 2251 \(2019\)](#), the Assembly "welcome[d] the fact that a process for updating the 2007 Code ha[d] been initiated by the Venice Commission and invite[d] it to take into account, in the revised Code, the following general principles:

- referendums should be embedded in the process of representative democracy and should not be used by the executive to override the wishes of parliament or be intended to bypass normal checks and balances;
- proposals put to a referendum should be as clear as possible and subject to detailed prior scrutiny, including by parliament, to ensure that they reflect voters' concerns and express their wishes;
- the campaign should ensure a balance between the different sides and allow voters access to balanced and quality information in order to be able to make an informed choice."

19. These principles were fully incorporated in the Revised Code.

4. The Revised Code of Good Practice on Referendums – the approach

20. The Revised Code declares that "it does not intend to determine whether and under which circumstances recourse to referendums is desirable as such. The answer to this question varies according to the nature of the constitutional system and tradition. It belongs to national constitutional law to establish whether referendums are at all foreseen, what their scope is, and what procedure must be followed to hold them. However, a number of guarantees are necessary to ensure that they genuinely express the wishes of the electorate and do not go against international standards in the field of human rights, democracy and the rule of law".

21. In the constitutional systems of Council of Europe member States, decision-making ordinarily occurs through mechanisms of representative democracy, whereas recourse to referendums tends to complement such decision-making processes. This is true even in countries where legislation is generally open to referendum. In view of the foregoing, referendums and representative democracy should be harmoniously combined. In particular, recourse to direct democracy should not exclude the involvement of the representative bodies in the process. Furthermore, recourse to a referendum should not be used to upset constitutional checks and balances, for example used by the president or the government in order to circumvent parliamentary amendment procedures.

22. Participatory democracy and, in particular citizens' assemblies, are also complementary to representative democracy; they are not addressed in the Revised Code. The introduction of such assemblies does not exclude nor imply referendums, and vice versa: they can be a step in a process which will lead to a referendum.

23. The Revised Code applies to referendums at the different levels of the State structure (national, regional, local). However, it is mainly focused on national referendums. Its general rules are to be adapted to the reality of local and regional referendums, in conformity with national constitutional traditions.

24. National law may provide for referendums:

- on specifically worded draft amendments to a legal text or a specific proposal to abrogate existing provisions of this text;
- on a question of principle;
- on a concrete proposal which does not have the form of specifically worded amendments, known as a "generally-worded proposal".

25. Issues submitted to referendum may be of a constitutional, legislative or even administrative nature (especially at the local level). They may concern (the ratification of) a treaty. They can also address territorial issues, such as the creation or merger of subnational entities as well as secession, in the rare cases where it is allowed by the national constitution.

26. Distinctions also have to be made between mandatory referendums (imposed by the constitution or legislation) and optional referendums (at the request of an authority, a minority in parliament or part of the electorate) as well as, according to the effect of the referendum, between legally binding and consultative referendums. Consultative referendums binding the executive – in the sense that it has to introduce a draft in parliament – are an intermediate category.

5. The Revised Code of Good Practice on Referendums: Guidelines and Explanatory Memorandum

27. The Revised Code includes the Guidelines on the Holding of Referendums as well as an Explanatory Memorandum, which refers, when necessary, to the various items of the Guidelines in order to elaborate on their content and background.

28. The Guidelines contain the Principles of Europe's electoral heritage and the conditions for implementing these principles; furthermore, rules specific to referendums are also included in the Guidelines. The explanatory memorandum is intended to elaborate on those aspects of the guidelines that are specific to referendums. Accordingly, it does not comment on the principles and general rules applicable to both elections and referendums.

29. The Principles of Europe's electoral heritage are universal, equal, free and secret suffrage. The following issues may be underlined:

Universal suffrage

30. The conditions for according the right to vote are normally the same for both referendums and elections. The right to vote in referendums should not be more onerous than those applying to elections, including for citizens residing abroad.

Equal suffrage

31. It is worth emphasising that – as in the case of elections – there may sometimes be grounds for taking account of the specific circumstances of national minorities and to make an exception to the normal vote-counting rules. In particular, this would apply to a referendum on self-government for a territory with a relatively high concentration of a minority population: a double majority of electors within that territory and throughout the country may be required. The principle of proportionality must be respected.

Free suffrage

32. In the case of elections, intervention by the authorities in support of a list or a candidate is unacceptable: their duty of neutrality is absolute. An authority must not use its position, or public funds, to stay in power; nor must it do so on behalf of its supporters in another organ. The situation is however different in the case of referendums since it is legitimate for the different organs of government to convey their viewpoint in the debate for or against the text put to the vote.

Secret suffrage

33. The revised guidelines make it clear that, while secret suffrage is not only a right, but also a duty, this duty does not extend outside the polling station, as it does not restrict the voters' right to express their view outside the polling station.

34. The conditions for implementing these principles as above are the following: the rule of law, respect for fundamental rights, the stability of referendum law and procedural guarantees. 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 of law. Concerning the stability of the law, the organisation of referendums should preferably be provided for by national constitutions and laws enacted well in advance. The procedural guarantees include the organisation and supervision of the referendum by an impartial body, an effective system of appeal and rules on funding. General rules on both public and private funding of political parties and election campaigns must also be applicable to referendum campaigns, including the rules on transparency and limitation of spending and individual donations.

35. Among the rules specific to referendums, there are requirements concerning the effects of the referendum. Where a referendum concerns a question of principle or a generally-worded proposal, it may be difficult for voters to know the consequences of their vote. Voters should therefore be informed about the proposed follow-up in advance of the vote. In the case of a legally-binding referendum on a question of principle or a generally-worded proposal, it is up to parliament to implement the people's decision. Parliament may be obstructive, particularly where its direct interests are affected (reducing the number of members of parliament or the allowances paid to them, for example). In order to avoid such obstruction, the procedure for follow-up to binding referendums on questions of principle or generally-worded proposals should be laid down in specific rules. It should be possible to appeal before the courts in the event that the parliament fails to act.