

# LEGAL FRAMEWORK FOR NATIONAL REFERENDUMS IN UKRAINE<sup>1</sup>

## EXECUTIVE SUMMARY

Referendums are becoming increasingly prevalent in Europe. In 2016 alone, the Prime Ministers of Italy and the UK resigned after losing referendums. They are also increasingly controversial, as they offer only binary choices on complex questions, weakening accountability (“when everybody is responsible, nobody is”), and they may be abused for interests unrelated to the referendum question. Ukraine suffered from the latter phenomenon when a majority of the Dutch electorate voted against the EU-Ukraine Association Agreement. The initiators of the referendum, the Euro-sceptical organisation Burgercomité EU, made it clear that they had no opinion on Ukraine.

Ukraine has its own history of divisive referendums, which have often been used by presidents to ride roughshod over constitutional institutions, resulting in destabilising consequences. The question of referendums may soon become topical again, with recent announcements by President Petro Poroshenko that he would soon try to hold a popular vote on NATO membership.

Yet, despite these high stakes and increasing polarisation in Ukraine, referendums in the country are poorly regulated, leaving significant space for abuse. The current Law on All-Ukrainian Referendum of 2012 was adopted by the Verkhovna Rada (the Ukrainian Parliament) during the Yanukovich period without proper legislative process. It allows the Ukrainian public to demand a referendum on practically any subject (except taxes, public expenditure or the pardoning of criminals), including changes to the Constitution. The Law has further shortcomings, including unequal treatment of the supporters and opponents of referendum, insufficient guarantees for the impartial

administration of referendums and no provisions requiring clear wording of referendum questions. Together, these shortcomings pose a significant threat to political stability and the rule of law in the country.

Civil activists and members of parliament (MPs) in Kyiv have become more vocal in the last months about the risks because of the current legal framework for referendums. Civil society has criticised the Constitutional Court’s unreasonable postponement of its decision on the constitutionality of the Law of 2012, which was already challenged in 2012. Civil society actors have also demanded that the Parliament consider a new draft law on referendums that was tabled in the Verkhovna Rada in June 2015. This proposal was not only worked out in a transparent process, but it also provides the necessary guarantees against abusive, destabilising national voting. The draft law of June 2015 reflects the Code of Good Practice on Referendums of the Venice Commission and respects the prerogative of parliamentary procedure for constitutional amendments. While some aspects of that draft law could be strengthened, its adoption would represent real progress. On 17 January 2017, in their open letter to President Poroshenko, 23 deputies requested that the President declare the draft law of 2015 to be urgent in order to speed up its consideration by the Verkhovna Rada.<sup>2</sup>

<sup>1</sup> This paper was written by Ruslana Vovk, Democracy Reporting International.

<sup>2</sup> Along with the draft law on referendum, the MPs requested to declare the following draft laws as urgent: law on election of deputies of the Verkhovna Rada, law on impeachment of President, law on parliamentary immunity, and law on anti-corruption measures and measures to prevent the conflict of interests among those who hold political posts. The letter was signed by reform MPs including Mustafa Nayyem, Svitlana Zalishchuk, Oksana Syroyid and Yehor Soboliev. The reprinted letter is available in Ukrainian: <<http://www.pravda.com.ua/news/2017/01/18/7132779/>>

# 1. REFERENDUMS IN THE UKRAINIAN CONSTITUTION

The Constitution of Ukraine differentiates between “local” and “all-Ukrainian/national” referendums as forms of direct democracy through which the “citizens can express their will” and “govern public affairs” (Articles 38 and 69). Whereas the Constitution contains a generic reference to “local referendums”, indicating the right of local communities to conduct and implement such referendums in line with existing laws (Articles 138 and 143), it regulates “national referendums” in a more detailed, but imprecise, way.

The Constitution sets out principles for two types of national referendums: 1) a **mandatory** national referendum in two cases, and 2) national referendum at the **request** of the electorate.

The main characteristic of a mandatory referendum is that the legal texts put for voting address legal provisions that, according to the Constitution, can only be amended by referendum and are automatically submitted to national voting after their adoption by the Parliament.

The Constitution specifies two cases for a mandatory national referendum: 1) any changes to the territory of Ukraine have to be approved by a **legislative referendum** which must be called by the Verkhovna Rada (Article 73 and 85 (2)); and 2) amendments to Title I “General Principles”, Title III “Elections, Referendum”, or Title XIII “Making Amendments to the Constitution of Ukraine” of Ukraine’s Constitution have to be approved by a **constitutional referendum** which the President must call for, but only after these amendments have already been endorsed by the Constitutional Court and adopted by the Parliament in the second voting with the majority of a minimum of 300 votes (Articles 156 and 106 VI).

In addition, Article 72 (2) of the Constitution allows a **referendum upon popular initiative**. Three million eligible voters can demand a national referendum, provided that the signatures in favour of the referendum have been collected in at least two-thirds of the country’s *oblasts* with at least 100,000 signatures per *oblast*. Upon such a request, the head of state shall declare a national referendum (Article 106 (6)). However, despite the advice of the Council of Europe’s Venice Commission that the scope of such a referendum should be clearly defined and, above all, the scope should exclude the possibility of constitutional amendments,<sup>3</sup> the text remains silent about which questions can be submitted to a referendum on people’s initiative. Taken literally, Article 72 (2) seems to empower Ukrainian citizens to initiate voting on any subject except draft laws on taxation, state budget or criminal amnesty, which cannot be put to a vote by anybody (Article 74). Article 72 (2) is read by many as providing a legal basis for initiating a referendum to decide on constitutional amendments or an entirely revised (new) constitution. This reading is supported by the Law on All-Ukrainian Referendum that was

introduced under the government of Yanukovich in 2012 and, despite criticisms by civil society activists, is still in force.

The Constitution does not state either if a national referendum upon citizens’ initiative has a consultative character or whether it imposes an obligation on state bodies to implement the voting results.

## National Referendums in the Ukrainian Constitution

Content of referendum	Referendums on Constitutional Amendments		Other Referendums	
	President	People	Parliament	People
Initiators	President	People	Parliament	People
Subject Matter	Constitutional amendments to the Titles I, III and XIII of the Constitution after their approval by a two-thirds majority in Parliament	Any changes to the Constitution	Any changes related to the territory of Ukraine	Any questions except draft laws on taxation, state budget or criminal amnesty
Type of Referendum	Mandatory	Upon request	Mandatory	Upon request
Effects	Binding	Consultative/ Binding	Binding	Consultative/ Binding

# 2. REFERENDUMS IN THE CONSTITUTIONAL COURT’S PRACTICE

The lack of clearly defined subject matters in Article 72 (2) creates room for manoeuvre for those who support a radical understanding of direct democracy as an opportunity to *inter alia* dissolve the Parliament or other state bodies. A good illustration of this are the suggestions by the *Batkivshchyna* Party in 2007/2008 to use referendums for revoking the mandates of elected officials, including judges,<sup>4</sup> or its initiative in 2017 to call for a referendum to introduce a ban on selling agricultural land in Ukraine,<sup>5</sup> or recent calls of the *Right Sector’s* Party to express non-confidence in the President, Parliament, and Cabinet of

<sup>3</sup> Venice Commission, “Opinion on the Draft Constitution of Ukraine”, CDL-INF (96) 6, p. 8. [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(1996\)006-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(1996)006-e)

<sup>4</sup> See “Tymoshenko Suggests Whom to Revoke: President or Prime minister,” *Ukrainiska Pravda*, 13 September 2007.

<http://www.pravda.com.ua/articles/2007/08/13/3269565>

<sup>5</sup> This initiative was stopped by a decision of the Kyiv District Administrative Court. See “The District Administrative Court Banned ‘Land’ Referendum – Tymoshenko,” *Ukrainiska Pravda*, 27 April 2017.

<http://www.pravda.com.ua/news/2017/04/27/7142464/>

Ministers of Ukraine via referendum.<sup>6</sup> Contentious issues, such as the division of state power, NATO membership, and Russian as a second official language, are also very popular topics that political leaders suggest for national polls. Despite numerous attempts, only one all-Ukrainian referendum upon people's initiative has taken place<sup>7</sup>: the questionable constitutional referendum of April 2000 that was declared – and, in fact, engineered – by then-President Leonid Kuchma. Engaged in a bitter dispute with the Verkhovna Rada, he called for amendments to the Ukrainian Constitution with a view to weaken the position of the Parliament by extending the President's authority to dissolve Parliament, establishing a second legislative chamber, reducing the number of deputies and restricting their immunity. The Constitutional Court declared that the results of the referendum were to have an advisory effect. They were never implemented because of a lack of consensus between the elites.<sup>8</sup>

The most heated discussions are around the issue of whether constitutional changes or even a new constitution can fall under the scope of a national referendum on popular initiative. The meaning of Article 72 (2) has been explored in decisions of the Constitutional Court of Ukraine, which understands it in the context of other articles (systematic interpretation). Title XIII of the Constitution contains rigid procedural guarantees for constitutional amendments and allows a referendum as the final stage of approval of changes to certain – not all – constitutional provisions that have already been adopted by Parliament and approved by the Constitutional Court. With this in mind, the Court concluded in its decision of 2000 that, based on Article 72 (2), Ukrainian voters cannot directly amend the Constitution; this authorisation should have been explicitly granted to them by the Constitution.<sup>9</sup> The Venice Commission welcomed the Court's conclusion and stressed how crucial it is for the stability of the country to respect the revision procedure that is already established by the Constitution in force.<sup>10</sup>

However, in the same decision, the Constitutional Court conceded the possibility of a constitutional referendum of a

purely consultative character upon peoples' initiative.<sup>11</sup> The legal consequence of such a referendum would be that state bodies consider its results while amending the Constitution in accordance with Title XIII. This interpretation of Article 72 (2) is questionable and not shared by the Venice Commission. The Commission finds it “highly unusual [...] if the result of an initiative by the people would only be that the people have to be consulted and cannot decide directly”. Furthermore, in democratic countries, elected authorities are under pressure to abide by the people's will. The Venice Commission reads Article 72 (2) as a legal basis only for a legislatively binding referendum (but not for amending the Constitution).<sup>12</sup> Thus, similar to the binding referendum, the consultative referendum on constitutional amendments would risk destabilising the balance of power between institutions engaged in constitution-making and constitutional amendments.

In its later decision of 2008, the Constitutional Court examined the possibility of a binding popular initiative on an entirely revised (new) constitution based on Article 72 (2).<sup>13</sup> In conjunction with Article 5 of the Constitution, which provides for the exclusive right of Ukrainian citizens to determine and change the constitutional order of the country, the Court allowed in principle the adoption of a new Ukrainian constitution solely through a binding national referendum at peoples' initiative with the reservation that the “Referendum and its implementing procedures have to be envisaged by the Constitution and the statutes.”<sup>14</sup>

The wording of this caveat can be used to strengthen arguments both for and against direct democracy at the constitutional level. In light of the restrictive procedure for constitutional amendments currently in force and the previous positions of the Court, it can be claimed that the people may directly decide on a new constitution only after Article 72 (2) is explicitly amended to include such a possibility and thereby determine the conditions and requirements under which a referendum on a revised constitution could be implemented. At any rate, because Article 72 (2) is part of Title III of the Constitution “Elections, Referendum”, any changes thereto first require approval by a two-thirds majority of MPs.

Supporters of popular constitution-making interpreted the cited reservation differently. They saw no need to amend Article 72 (2) and claimed that an ordinary statute to regulate a procedure of popular constitution drafting and

<sup>6</sup> “Yarosh Announces a New Stage of the Ukrainian Revolution” *BBC*, 21 April 2015.

<[http://www.bbc.com/ukrainian/politics/2015/07/150721\\_yarosh\\_right\\_sector\\_sx](http://www.bbc.com/ukrainian/politics/2015/07/150721_yarosh_right_sector_sx)> On the other hand, an attempt led by a controversial politician Viktor Medvedchuk to organise a national referendum on Ukraine's possible membership in NATO and the “Single Economic Space” (SES) with Russia, Belarus, and Kazakhstan failed due to the refusal of then-President Yushchenko to issue a respective decree. See “The Court Obligated Yushchenko to Announce the Referendum on the NATO's and SES's Membership,” *Unian*, 9 July 2009. <<http://www.unian.net/politics/242111-sud-obyazal-yuschenko-provozglasit-referendum-po-vstupleniyu-v-nato-i-eep.html>>

<sup>7</sup> For example, the referendum on NATO never took place due to President Yushchenko's reluctance to call it. The threat that Presidents (L. Kuchma, V. Yanukovich or V. Yushchenko) would use a referendum to enact their own version of the Constitution has not materialised.

<sup>8</sup> See the Decision of the Constitutional Court of 27 March 2000, No. 3-pn/2000, available in Ukrainian at:

<<http://www.ccu.gov.ua/uk/doccatalog/list?currDir=9891>>. When reviewing the proposed referendum questions, the Court also found two out of six questions unconstitutional.

<sup>9</sup> See para. 4.3 of the Decision of the Constitutional Court of 27 March 2000, No. 3-pn/2000, available in Ukrainian at:

<<http://www.ccu.gov.ua/uk/doccatalog/list?currDir=9891>>

<sup>10</sup> See Venice Commission, “Opinion of the Venice Commission on Constitutional Referendum in Ukraine,” CDL-INF, 2000, 11, para. 18 ff.

<[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2000\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)011-e)>

<sup>11</sup> See Decision of the Constitutional Court of 27 March 2000, No. 3-pn/2000, available in Ukrainian at:

<<http://www.ccu.gov.ua/uk/doccatalog/list?currDir=9891>>

<sup>12</sup> See Venice Commission “Opinion of the Venice Commission on Constitutional Referendum in Ukraine,” para. 22

<sup>13</sup> The idea of a so-called “new edition” of the Ukrainian Constitution emerged in 2008 among the circles of the supporters of then-President V. Yushchenko, see S. Hrynevetskyj, “The Sad Anniversary,” *ZN,UA*, 19 December 2008. <[http://gazeta.dt.ua/POLITICS/sumna\\_richnitsya.html](http://gazeta.dt.ua/POLITICS/sumna_richnitsya.html)>

<sup>14</sup> See para. 4 of the Decision of the Constitutional Court of 16 April 2008, No. 6-pn/2008, available in Ukrainian at:

<<http://zakon4.rada.gov.ua/laws/show/v006p710-08/print1442773950177839>>; and para. 4.3 of the Decision of the

Constitutional Court of Ukraine of 5 October 2005, No. 6-pn/2005, wherein the Court underlines the right of people to adopt a new constitution, available in

Ukrainian at: <http://zakon2.rada.gov.ua/laws/show/v006p710-05/print1442773549041495>.

ratification would be sufficient.<sup>15</sup> In 2016, this idea was framed into a draft law about the procedures for preparing a new constitution of Ukraine that was registered with the Verkhovna Rada (draft law on the constitutional convention).<sup>16</sup>

### 3. A “NEW CONSTITUTION” AND THE EUROPEAN PERSPECTIVE

The authors of the draft law on a constitutional convention propose that the President be obliged to issue a decree on convening a constitutional convention within one month of receiving a petition supported by at least 3,000,000 Ukrainians<sup>17</sup> that demands the adoption of a new constitution by a national referendum. Even though the draft law provides for certain safeguards to ensure an impartial constitution-drafting process,<sup>18</sup> it does not state the requirements for a valid outcome of a constitutional referendum, such as participation and acceptance quorums. It leaves the regulation of the construct of the referendum – forming of commissions, campaigns, participation and acceptance quorum – to be decided by another legislative act: the Law on Referendum. As shown below, the current Law on All-Ukrainian Referendum demonstrates a number of serious shortcomings in this respect. In addition, if the constitution is drafted by an independent convention, it does not provide for guarantees against risks of diminishing protections for human rights or other constitutional principles in the course of constitution-making; in the parliamentary constitution-making process, it is the responsibility of the Constitutional Court to ensure compliance with fundamental rights and principles.

It is worth noting that even though direct decision-making is well established in most European countries, the holding of citizen-initiated referendums on constitutional issues is not usual in West European countries, with the exception of Switzerland and Italy.<sup>19</sup> Constitutional referendums are rather common in the post-Communist countries. For example, in Slovenia the parliamentary opposition initiated referendum procedures to block the government’s unpopular economic and social reforms.<sup>20</sup> Such referendums

weaken a key principle of democracy, namely clear accountability. The government, which was elected by voters to implement a programme, was told by voters that it cannot do so, leaving nobody accountable. In Russia, Belarus and Kazakhstan, presidents misused referendums to undermine the legitimacy of parliaments and unilaterally reshape the constitutional order according to their interests.<sup>21</sup> In Belarus, for example, President Lukashenko initiated a national referendum in 2004, asking whether he was allowed to run for a third term and amend the Constitution accordingly. On 11 December 2016, an overwhelming majority of the people of Kyrgyzstan (80% of voters; 42% turn-out) approved the constitutional amendments as suggested by the President. The amendments aimed to shift some presidential powers to the Prime Minister as well as define marriage as a union between a man and a woman and, thus, ban same-sex marriage. Upon the amendments, the President would no longer chair the Defence Council and appoint or dismiss the cabinet ministers. Some political analysts in the country believe that the changes will allow the current President to stay in power either as a Prime Minister or through a “puppet prime minister” after his term ends this fall.<sup>22</sup>

Even though it is the political choice of each country to decide on the scope and effects of referendums, the national rules should respect European constitutional principles and the rule of law, in particular. The Venice Commission repeatedly warns that the possibility of adopting constitutional provisions through referendums can be abused to undermine the separation and balance of powers and thereby lead to serious political instability. Especially in the Ukrainian context – with negative referendum experience in the past and continued tension between the President and Parliament – caution is required. Moreover, “in 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.”<sup>23</sup>

An additional challenge is framing the referendum process in such a way that it guarantees the active and deliberative engagement of citizens so that it avoids rash decisions. This challenge is even more significant in divided societies and in states with weak institutions (at the local level as well) that are essential to encourage deliberation and compromise needed for successful constitutional adoption.<sup>24</sup>

<sup>15</sup> See V. Shapoval, “Adoption of a New Constitution via Referendum Is Possible”, *4Vlada*, 7 March 2008. <<http://4vlada.net/vlast/volodimir-shapoval-priinyattya-novoi-redaktsii-konstitutsii-na-referendumi-yuridichno-mozhlive>>

<sup>16</sup> See the draft law “On the Procedure to Prepare a Draft of a New Constitution” of 18 January 2016, No. 3781, available in Ukrainian at: <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=57684](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57684)>

<sup>17</sup> The signatures have to be collected in at least two-thirds of the country’s administrative-territorial units envisaged in Article 133 of the Constitution, with at least 1000 signatures per unit (Article 3 of the draft law).

<sup>18</sup> For example, all 300 members of the convention should be elected in general, direct, free, equal and secret elections in accordance with the majority electoral system with all candidates being self-nominated (Articles 11- 29). President, members of Parliament or government, judges, and public servants cannot belong to the convention. Furthermore, the members of convention cannot hold the mentioned posts for ten years after the adoption of the constitution they draft. The quorum of the convention is three-fourths of its members (225); decisions of the convention on approval of the constitution require a two-thirds majority (200) in two subsequent voting procedures that cannot be held on the same day (Articles 30-48).

<sup>19</sup> See Venice Commission, “Referendums in Europe – an Analyses of the Legal Rules in European States,” CDL-AD, 2005, 034. <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)034-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)034-e)>

<sup>20</sup> See Robert Podolnjak, “Constitutional Reforms of Citizen-Initiated Referendum: Causes of Different Outcomes in Slovenia and Croatia,” *Revus*. <<https://revus.revues.org/3337#text>>

<sup>21</sup> See William Partlett, “The Dangers of Popular Constitution-Making,” *Brookings*, 3 December 2012. <<https://www.brookings.edu/research/the-dangers-of-popular-constitution-making/>>

<sup>22</sup> Radio Free Europe, “Kyrgyz Voters Back Amendments on Same-Sex Marriage, Presidential Power,” 11 December 2016. <<http://www.rferl.org/a/kyrgyzstan-constitutional-referendum-voting/28168872.html>>

<sup>23</sup> See Venice Commission, “Opinion of the Venice Commission of 16 June 2008”, CDL-AD, 2008, 015, para. 33. <available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2008\)015-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)015-e)>

<sup>24</sup> Stephen Tierney, “Constitutional Referendums: A Theoretical Enquiry,” *Modern Law Review* Vol. 72, No. 3. <<http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2009.00749.x/abstract>>; and Stephen Tierney, “Whose Political Constitution? Citizens and Referendums,” *Edinburgh School of Law Research Paper No. 2013/08*. <[https://www.upf.edu/dcpis/\\_pdf/2009-2010/forum/Tierney\\_paper.pdf](https://www.upf.edu/dcpis/_pdf/2009-2010/forum/Tierney_paper.pdf)>

## 4. LAW ON ALL-UKRAINIAN REFERENDUM OF 2012

The current Law on All-Ukrainian Referendum was adopted in 2012.<sup>25</sup> The legislative procedure of its adoption was opaque. The draft of the Law was originally registered in the Parliament in 2010, after which it was subject to an extensive critique. There were 1,026 amendments proposed; however, they were not considered as the Law never reached a second reading.<sup>26</sup> On 6 November 2012, 265 deputies voted to adopt the draft in its original form without further discussion.<sup>27</sup>

The Law of 2012 regulates the organisation of different kinds of national referendums (constitutional, ratification, legislative and general) in a very detailed, but not necessarily coherent, way that can be challenged from the perspective of international standards.<sup>28</sup> The most problematic provision, which was also heavily criticised by the Venice Commission,<sup>29</sup> concerns constitutional referendums. Article 15 of the Law stipulates that people can request a referendum on:

- A new constitution;
- Constitutional amendments;
- Declaring the law on constitutional amendments invalid.

The results of such a referendum are binding. The Law obviously goes beyond constitutional norms, and it contradicts the Constitutional Court's opinion against constitutional amendments through national referendums at popular initiative. This constitutional setup cannot be changed by means of an ordinary statute on referendums; both, Article 72 (2) of the Constitution (on the scope of national referendums) and Title XIII "Making Amendments to the Constitution of Ukraine" require a two-thirds majority of Members of Parliament and subsequent approval through referendum for their amendment. Furthermore, the Law sets rather low requirements for the validity of referendum results; it does not specify any participation quorum as a condition for validity of a referendum, and it states that the decisions are taken by the simple majority of votes cast (Article 93).

Since the review of statutes for constitutional validity is allowed in Ukraine,<sup>30</sup> on 1 December 2014, 57 MPs requested that the Constitutional Court examine the conformity of the 2012 Law with the Constitution.<sup>31</sup> The MPs found the Law to be unconstitutional because 1) the Verkhovna Rada has exceeded its competences by establishing new procedures for amending or adopting a new constitution through an ordinary statute and 2) there were mistakes in the legislative adoption process. The Court declared the application admissible but the hearings have not yet started. Provided that the Court agrees with the applicant, it can either require that the Verkhovna Rada bring the 2012 Law in line with the Constitution or it can declare the Law unconstitutional in its entirety and, thus, invalid.

On 1 December 2014, two bills were also registered with Parliament aiming to repeal the 2012 Law on All-Ukrainian referendum due to its unconstitutionality that results from fact that the public has the right to initiate a binding constitutional referendum.<sup>32</sup> Furthermore, the authors explained that the statutory norms 1) lack the proper procedures for forming referendum commissions, 2) insufficiently regulate the campaign, 3) are inconsistent, and 4) include technical and legal errors.<sup>33</sup> The Venice Commission also pointed out these shortcomings in its opinion on the 2012 Law.<sup>34</sup> One of the bills has been considered by the relevant committee and is waiting to be put on the agenda of the Parliament.<sup>35</sup> There are speculations that the bill will not receive enough support to pass simply because a number of parliamentarians are concerned about creating a gap in legislation and prefer to adopt new legislation to replace the existing Law. Supporters argue that the allegedly unlawful possibility of circumventing the Parliament's role in constitutional changes needs to be eliminated as soon as possible.

## 5. INITIATIVES TO IMPROVE THE LEGAL FRAMEWORK

The need to reform the current legal basis for referendums in Ukraine and bring it in line with international standards is clear.

On 23 June 2015, a new draft law on all-Ukrainian referendum upon peoples' initiative was registered with the

<sup>25</sup> See the "Law on All-Ukrainian Referendum of 6 November 2012," No 5475-VI, available in Ukrainian at: <<http://zakon4.rada.gov.ua/laws/show/5475-17/print1443001847337500>>

<sup>26</sup> See IFES, "Preliminary Comments on the Proposed Law on National Referendums," 15 November 2012. <<http://www.ifes.org/publications/preliminary-comments-proposed-law-national-referendums-ukraine>>

<sup>27</sup> See "Plan B. Why Authorities Want a New Law on Referendums," *Liga News*, 13 November 2012. <[http://news.liga.net/print/articles/politics/765585-neytralizator\\_rady\\_zachem\\_vlasti\\_novyy\\_zakon\\_o\\_referendume.htm](http://news.liga.net/print/articles/politics/765585-neytralizator_rady_zachem_vlasti_novyy_zakon_o_referendume.htm)>

<sup>28</sup> See Venice Commission, "Opinion of the Venice Commission of 17 June 2013," CDL-AD, 2013, 017. <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)017-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)017-e)>

<sup>29</sup> See Venice Commission, "Opinion of the Venice Commission of 17 June 2013," CDL-AD, 2013, para. 26.

<sup>30</sup> President, or at least 45 MPs, or the Supreme Court, Ombudsman, or Parliament of the Autonomous Republic of Crimea are authorised to launch the constitutional review of statutes and other legal acts before the Constitutional Court of Ukraine. See Articles 13 (1) and 40 of the Law on Constitutional Court of Ukraine of 16 October 1996, No. 422/96, available in Ukrainian at: <<http://zakon4.rada.gov.ua/laws/show/422/96-ep/print1443001847337500>>

<sup>31</sup> The MPs who signed the appeal belong mainly to "Samopomich" and "Batkivshchyna" parties. Among them, there is also the Deputy Head of Parliament, Ms Oksana Syroid. The full application in Ukrainian is available at: <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc2\\_5\\_1\\_J?ses=10009&num\\_s=2&num=&date1=&date2=&name\\_zp=%F0%E5%F4%E5%F0%E5%ED%E4%F3%EC&out\\_type=&id="](http://w1.c1.rada.gov.ua/pls/zweb2/webproc2_5_1_J?ses=10009&num_s=2&num=&date1=&date2=&name_zp=%F0%E5%F4%E5%F0%E5%ED%E4%F3%EC&out_type=&id=)>

<sup>32</sup> See the draft laws of 1 December 2014, No. 1133 and No. 1133-1, available in Ukrainian at: <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=52558](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=52558)>

<sup>33</sup> See the Explanatory Note to the law no. 1131, available in Ukrainian at: <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=52558](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=52558)>

<sup>34</sup> See Venice Commission, "Opinion of the Venice Commission of 17 June 2013," CDL-AD, 2013, 017. <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)017-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)017-e)>

<sup>35</sup> See the stages of the legislative procedures with regards to the bill no 1131 at: <[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=52569](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=52569)>

Parliament.<sup>36</sup> It was elaborated by a parliamentary working group that was established in May 2015 and headed by Oleksandr Chernenko (a member of the party Petro Poroshenko Bloc and the parliamentary Committee on Legal Policy and Justice). The group included representatives of all of the parliamentary fractions as well as prominent experts. The starting point for the discussions of the working group was a text prepared by the “Coalition for an Honest Referendum” with the support of IFES.<sup>37</sup> The coalition was formed by representatives of civil society organisations after the signing the 2012 Law by Yanukovich and continued its efforts up until the Maidan events began.

The draft law addresses the main issues related to the organisation and administration of referendums. With 135 articles, it is, like the current Law, rather long and complex. However, the proposed solutions take due account of the major comments of the Venice Commission. These points were indicated in the Commission’s Opinion of 2013 on the Law on All-Ukrainian Referendum. They include:

### CONSTITUTIONAL REFERENDUM

The draft restores guarantees of the Parliament’s role in amending the Constitution while reaffirming the procedural requirements as set out by the Constitution (Articles 14 and 15). Unlike the current Law, it does not speak about the possibility of adopting a new constitution, but only refers to revisions of the existing Constitution.

### SCOPE AND VALIDITY OF REFERENDUM AT POPULAR INITIATIVE

The Venice Commission criticised the 2012 Law for the unlimited scope of questions that could be put to a referendum and, thus, the potential use of a referendum as a tool to “undermine a constitutionally mandated division of powers.”<sup>38</sup> For example, nothing in the Law prevents the electorate from initiating a vote and deciding directly on the appointment or dismissal of high officials. This wide scope is narrowed in the draft law, defining a referendum at popular initiative as a national vote about the repeal of already adopted legislative acts or certain provisions of the act, so called “rejective referendum” or “people’s veto”, excluding the laws on budget, taxes and amnesty (Article

19). Another matter that must be decided by referendum is a law on changes to Ukrainian territory. Given the nature of a “veto referendum” under the draft law, there could not be referendums on questions such as NATO membership or issues regarding official languages if the Parliament has not yet decided on them. In terms of laws on the ratification of international treaties (including treaties about membership in international organisations) a referendum could, however, put Ukraine in an awkward position; a valid law on the ratification of a certain treaty can be challenged by a referendum; even though Ukraine is already bound to the treaty at the international level, following the referendum, it might have to denounce it. Thus, it is advisable to consider other mechanisms that would both prevent politically motivated manipulations of questions on foreign policy and allow public consultation beforehand.

The draft law also provides that results of a national referendum by popular initiative are final and do not require the approval of any public authority. There would be a quorum requirement. Namely, according to Article 124 (5 and 6), the referendum questions would be decided by a simple majority (50% +1) of votes cast (acceptance or approval quorum), provided that turnout equals or is above 50% of the electorate (the participation quorum).

### WORDING OF THE REFERENDUM QUESTIONS

The draft law provides that the referendum question offers voters a clear “yes” or “no” option and be clear and precise (Article 18). Additionally, the draft law requires that the text of the law or specific provisions of the law to be adopted, repealed or amended forms an integral part of a question. The suggested legal safeguards to prevent misleading and manipulative referendum questions could be strengthened on the basis of the Code of Good Practice on Referendums.<sup>39</sup>

### EQUAL TREATMENT BETWEEN THE SUPPORTERS AND THE OPPONENTS OF A REFERENDUM

The draft law includes provisions aimed to create equal conditions for political parties and groups that initiative referendums that are registered as supporters/opponents with regards to campaigning and being electoral subjects/observers to the referendum process.<sup>40</sup>

Contrary to the 2012 Law (Article 24) the proposed draft limits the involvement of state bodies (the President, Parliament) in the referendum campaign. They are not designated as electoral subjects, their role is restricted to stating their opinions, and they may not campaign for or against the referendum options (Article 23).

### FORMATION OF REFERENDUM COMMISSIONS

<sup>36</sup> See the Draft law on all-Ukrainian referendum of 23 June 2015, No. 2145a, available in Ukrainian at: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=55689](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55689) An alternative draft law on the same issue was registered by Vasyl Nimchenko (“Opposition Block”, a former judge of the Constitutional Court) on 3 April 2015, see the Draft law on national and local referendums by popular initiative of 3 April 2015, No. 2535, available in Ukrainian at:

[http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=54645](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54645). Contrary to the draft law No. 2145a, the text of the draft law No. 2145 does not follow the major recommendation of the Venice Commission and allows that constitutional amendments, approval of a new constitution as well as any other question entrusted to the state authorities can be subject to a national referendum by people initiative (Articles 16 and 20). Thus, similar to the currently valid law, it makes it possible to circumvent the requirement of a qualified majority in the Verkhovna Rada while amending the Constitution and compromises the constitutional stability.

<sup>37</sup> Center for Civil Liberties, “To the Official Delegation of Ukraine’s on the Law of Ukraine ‘About All-Ukrainian Referendum’ from the Coalition of Civil Society Organizations ‘For Honest Referendum’”, 30 September 2013. <http://www.osce.org/odihr/106108?download=true>

<sup>38</sup> See Venice Commission, “Opinion of the Venice Commission of 17 June 2013,” CDL-AD, 2013, 017, para. 18. [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)017-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)017-e)

<sup>39</sup> For example, the law could refer to and define directly the following criteria mentioned in the Code: unity in form, unity of content, unity of hierarchical level. See Venice Commission “The Code of Good Practice on Referendums,” Study No. 371, 2006. [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)008-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008-e)

<sup>40</sup> See for example Articles 23, 44–48, 57, 74, 78, 83, 84, 98, 99, 101, 103 of the Draft law on all-Ukrainian referendum of 23 June 2015, No. 2145a, available in Ukrainian at: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=55689](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55689) Also see “The Code of Good Practice on Referendums,” Section I.2.2.

The Venice Commission indicated that the Law currently in force lacks clarity in the procedures for appointing the members of referendum commissions and would benefit from further harmonisation with electoral legislation. The draft law address these issues and foresees guaranteed slots in the referendum commissions for parliamentary political parties. Additional slots are allocated to other political parties or initiative groups registered as supporters/opponents of the question by lottery, and a 50/50 distribution of slots amongst supporters/opponents is guaranteed as well as a 50/50 share of leadership positions in the commissions (Articles 45, 46 and 48). Furthermore, the draft law eliminates the nomination of referendum commission members by local authorities – a point that the Venice Commission had questioned.

## 6. GENERAL RECOMMENDATIONS

The draft law of June 2015 incorporates a number of international standards regarding the organisation of referendum and, thus, demonstrates a reasonable improvement compared to the Law of 2012 that is currently in force. To reach a firm conclusion on whether it forms a solid legal basis for referendums, a separate legal examination of the text of the draft law against the Code of Good Practice on Referendums of the Venice Commission and other international standards is required.

However, the law is still extremely long and detailed and risks being very difficult for citizens to understand, and for political actors and state bodies to implement. The repeated suggestions of many experts and international organisations to unify rules for conducting elections and referendums in an Electoral Code remain relevant. The Code of Good Practice on Referendums states that “conditions for according the right to vote are normally the same for both referendums and elections.”<sup>41</sup> Efforts to harmonise and simplify electoral legislation in Ukraine have been on-going for the last few years and were a key aspect of recent discussions on the Law on Local Elections. Many of the contributing authors of other pieces of electoral legislation were involved in the preparation of the draft law of June 2015, and this is seen as a means of ensuring consistency in the procedural and administrative aspects.

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<sup>41</sup> See, Venice Commission “The Code of Good Practice on Referendums,” I.1.1.1.6.