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APPRAISAL
OF THE DRAFT LAW OF UKRAINE
ON LOCAL REFERENDA

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Introduction

The present legal appraisal of the draft Law on Local Referenda was requested by the Parliamentary Committee on State Building and Local Self-Government within the framework of the Council of Europe Programme to Strengthen Local Democracy in Ukraine (2010-2013, funded by the Swedish International Development Cooperation Agency Sida).

The right of citizens to participate in the management of local affairs is based on Articles 38, 69 and 70 of the Constitution of Ukraine. In particular, Article 38 provides for the right of citizens to participate in the management of public affairs through national as well as local referendums, and Article 69 states that the referendum is an expression of the will of the people, in addition to elections and other direct forms of democracy. The local referendum is provided by Article 7 of the 1997 basic Law on Local Self-Government (LSG) as "a form of resolving issues of local significance by a territorial community, directly through the will of the people"; this article refers to another piece of legislation to determine the conditions and the procedure of local referenda. According to the explanatory note of the draft law, the law on all-Ukrainian and local referenda of 1991, adopted before the new Constitution of Ukraine and the basic Law on LSG, is not adequate for the enforcement of the citizens' right to participate in the management of local affairs through referendum as guaranteed by the Constitution and it "makes [it] impossible to implement effectively" this constitutional right.

The proposed draft law is a very comprehensive piece of legislation regulating all aspects of the organisation of local referenda. In particular, this draft is very detailed on all procedural stages for the organisation of a local referendum, in order to guarantee the sincerity and reliability of the opinion expressed by the citizens. This is indeed essential to create confidence in society on referendum initiatives and in their results.

Between 1991 and 2009, 151 local referenda took place in 19 regions of Ukraine on the basis of the 1991 Law, and 135 of them were successful; 102 referenda took place in villages. However, the decisions approved were not always executed (in 9 *oblasts,* one out of four decisions remained unexecuted). Most referenda have been on administrative-territorial issues (31.8%), the name of localities (25.7%), and institutional issues (20.4%)[1]. This means about 8 cases per year on average for the whole country, with more than this being held in 2004 and less in 2007 and 2008. These observations are important, because, as demonstrated by experience of other countries the law, although necessary, is not enough in such cases. Very much depends on political culture and tradition, but also on the political system as a whole. However nothing prevents the practice from evolving and local referendum developing progressively in countries where there was no previous specific tradition (case of the Czech Republic), and a first step in this direction is to put in place a good legal framework.

On the whole, the draft law is quite good as a first draft. It opens the way to referendum initiatives launched by citizen groups and guarantees the proper referendum operation and the sincerity of the voting results. Some improvements could still be suggested, especially as regards the distinction between different kinds of referenda and different stages of the

[1] Ministry of Justice of Ukraine, *Місцеві референдуми в Україні: теоретичні та нормопроектні аспекти*, Kyiv, 2011.

referendum process, in particular in order to make the local referendum a practical and applicable tool.

This appraisal will address the following issues:

1. Definition and legal nature of local referendum in the draft law
2. The referendum initiative
3. The organisation of the referendum
4. The referendum campaign
5. Voting operations and results
6. Legal nature and force of acts approved by local referendum
7. The review of decisions taken.

I. Definition and legal nature of local referendum

A) On different kinds of local referenda

Article 2 distinguishes three kinds of referenda:

- an imperative referendum: in this case, the referendum is a decision-making procedure, and the vote will determine, if conditions are fulfilled, a decision that will be legally binding;
- a consultative local referendum: in this case, the referendum will express the opinion of the community on the subject matter of the referendum, but the final decision will still belong to the respective local self-government bodies;
- a repeated local referendum: an imperative local referendum has to be repeated when it has been declared void legally.

This terminology is not entirely adequate. What is meant by "imperative referendum" is a binding referendum, which is different from an obligatory/compulsory referendum, e.g. a referendum that is the only possible procedure for taking a final decision (for example, decisions mentioned in Article 5, paragraph 2).

The legal consequences of the consultative referendum are not clear. Under Article 50, the council members may adopt a decision deviating from the opinion expressed by the consultative referendum (if the results are valid) only if no less than two thirds of council members vote for such a decision. The same rule is applicable if the decision has to be taken by the executive committee. As a consequence, the results of the consultation are partially binding: if there is no two-third majority of council members to overrule the result of the referendum, it will be binding for the council that has to adopt the final decision. This is not a consultative referendum; this is rather a joint decision-making process. It is also unclear on what issues an imperative referendum may be organised.

The notion of a "repeat referendum" is rather vague. The only cases when a local referendum has to be repeated are: i) when a referendum is declared void for irregularity; ii) when a referendum is declared not valid, because the required threshold of participation was not reached. If, according to the law, local referendum is the only procedure provided for

taking a decision, the law should also provide for a solution in the event that the repeat referendum again fails to meet the required threshold.

B) On the participants of the referendum

Article 3 determines who is entitled to participate in a local referendum. According to paragraph 1, "the right to immediately decide upon matters of local relevance at referendum (…) belongs to participants *[учасник*] of local referendum".

This definition is not adequate. To be a participant at a local referendum is a matter of fact, not a quality conferring the right to participate in a local referendum, and there is no obligation for such "participants" to take part in a local referendum. Under Article 1, such a right derives from the quality of voter and membership of the territorial community (*hromada*). Strictly speaking, therefore, the citizen has the right to participate, and cannot by nature be a "participant" in local referendums. Under the draft law, the right to participate in a local referendum belongs to everyone: 1) who is a Ukrainian citizen (with passport or temporary certificate); 2) who is not declared incapable by a court or sentenced by a court to be deprived of such political right; 3) registered at its place of residence; and 4) registered in the State Voter Register of Ukraine at that place of residence, meaning that one person may participate in a local referendum in only one place (as a consequence of Article 28, para 2, al.2).These are the same conditions as for participating in local elections. The draft law should avoid suggesting that the voting right could be different for participating in a local referendum and in local elections.

Therefore, the recommendation is to revise paragraph 1 of Article 3 as follows: **"The right to decide immediately upon matters of local relevance (…) belongs to the registered voters of the hromada".**

C) Matters that can be subject to a local referendum

Matters that can be submitted to local referendum are determined by Articles 5, 6 and 8 of the draft law.

As regards the structure of both Articles 5 and 6, paragraph 2, matters precluded from referendum initiatives should be shifted to Article 5. For clarity, **the recommendation is to have three articles:**

- On matters that can be submitted to a local referendum:
    - matters that must be submitted to a local referendum (para 2 of Article 5);
    - matters that may be submitted to a local referendum on a citizen initiative (para 3 of Article 5);
    - matters that may be submitted to a local referendum by the local council (paragraph 1 of Article 8);
    - those matters or questions that may not be submitted to a local referendum (para 2 of Article 6);
- On the form of submitting an issue to a referendum (paragraphs 4 to 7 of Article 5);
- On circumstances when a local referendum may not be organised (paragraphs 1 and 3 of Article 6).

As regards matters subject to a referendum procedure, several remarks can be made.

Since there is no link between Article 2 and Article 5, an imperative (= binding) referendum may be organised on the basis of a citizen initiative, on any matter of local relevance, subject to the exceptions in Article 6, while an imperative referendum must be organised on matters listed in paragraph 2 of Article 5. This issue should be clarified in these articles. Furthermore, it follows that the initiative group should also determine the kind of referendum: consultative or imperative.

A few matters must be decided only through a local referendum (Article 5, para 2): matters of reorganisation or closing down of communal pre-school educational establishments, and pre-school educational establishments created by the former agrarian collective and State enterprises. This is a very specific subject matter, and the reasons for this provision are not clear. It is easy to expect that voters will vote against any arrangement to close down a pre-school establishment or to group them together while reducing capacity. And if there is not enough demand for these services, this provision will be an obstacle to decision-making.

Under the draft law, the only issue that can be decided by a local referendum on the initiative of the local council or of the Mayor of the village, settlement or city is the pre-term termination of the powers of, respectively, the council or the Mayor/Head of the Council (Art.8, para 1.2). However, under Article 6 of the 1997 Local Government Law, the unification of several territorial communities or the secession of a village is subject to local referendum. Other matters of local relevance may be submitted to local referendum, subject to restrictions in Article 6.2. Matters of local relevance [*питання місцевого значення*], according to Article 1.1.2, are all matters referred to local self-government and "that do not fall within the competence of State bodies and bodies of the Autonomous Republic of Crimea", and include those matters belonging to the competence of State executive bodies that were delegated by them to local self-government bodies. This is a very broad definition, equivalent to what is called the "general competence clause" as recognised by Article 4 of the European Charter of Local Self-Government. Unfortunately, it conflicts with Article 19 of the Constitution of Ukraine: "Bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine" (para 2). Pursuant to Article 9, the Constitution has priority over international treaties, which may not be ratified before the Constitution has been changed to amend conflicting provisions. The European Charter was nevertheless ratified. Since the Constitution cannot have been violated, Article 4 (para 2) has to be interpreted in accordance with the Constitution. This is possible: "Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority". **As a result, the definition of matters of local relevance that can be submitted to a referendum has to be revised and put in accordance with Article 19 of the Constitution**.

However, it might be inappropriate to give citizens the possibility of initiating local referenda on issues belonging to the competence of state executive bodies, and hence not qualified as a matter for local concern even though they are performed by local self-government bodies,

acting in this instance as agents of the State. The recommendation therefore is to **delete "unless these matters are delegated by executive bodies"** in paragraph 1.2 of Article 1 of the draft law (definition of matters of local relevance).

Several matters are precluded by Article 6, paragraph 2 from the scope of referendum: local budgets, local taxes and fees, setting tariffs on housing and public utility services, matters of State competence, personnel issues and issues of an organisational nature. This is a rather wide exclusion. In some countries with a law on local referenda, it is quite usual to rule out budgetary and financial matters from the scope of local referendum.[2] In other countries the law provides for the possibility to submit to local referendum the question of establishing an exceptional levy for financing specific projects.[3] In short, there is no matter of principle in this regard; solutions depend on the institutional and political context of each country, and on the importance the legislator is willing to give to the local referendum in the management of local government affairs. Nevertheless, in the case of Ukraine, these exclusions might be in conflict with Article 143 of the Constitution: "Territorial communities of a village, settlement and city, directly or through the bodies of local self-government established by them, manage the property that is in communal ownership; approve programmes of socio-economic and cultural development, and control their implementation; approve budgets of the respective administrative and territorial units, and control their implementation; establish local taxes and levies in accordance with the law; ensure the holding of local referendums and the implementation of their results; establish, reorganise and liquidate communal enterprises, organisations and institutions, and also exercise control over their activity; resolve other issues of local importance ascribed to their competence by law". On the other hand, it could be argued that this article provides an option to the legislator (Art.140, para 1), and is not an imperative mandate for the parliament to arrange for the possibility of adopting local budgets though referendum. Article 143 means that the parliament could do it, it does not mean that it must do it.

D) On the constituency of local referendum

Under Article 1, paragraph 1.1, only matters of local relevance belonging to the competence of *hromada*, and not to the competence of *rayon* and *oblast* councils, may be submitted to a local referendum. This restriction is consistent with the principle that *rayon* and *oblast* are not territorial communities but the jurisdiction of elected councils in charge of joint interests of territorial communities. Beyond this, it is a matter of opportunity. The regional referendum is possible and practiced in several federal or regional states[4].

[2] Germany in most *Länder*, Croatia, Hungary, Italy, Portugal, Rumania, Russia, Slovenia.

[3] Poland, Serbia, Slovakia. In Serbia, this resource is estimated about 1% of municipal incomes on average. In France, the law is silent on this issue. Only in Switzerland is there, in most cantons, an obligation to submit the budget of the municipality to approval through the municipal assembly of citizens or through a local referendum. In Bulgaria, various financial decisions may be submitted to a local referendum.

[4] Austria, Germany, Italy – abrogative referendum, Switzerland, and Spain - for more controversial issues in relation to conflicting relationships between regional and central governments, for example the referendum on the new statute of Cataluña; regional referendum is now possible in France, Poland and Czech Republic, but until now it has been practiced only in the Czech Republic.

The draft law contains no prohibition to organise a local referendum on an issue of interest to several territorial communities. On the contrary, Article 1, paragraph 1.1 contemplates the possibility of a local referendum organised for the voters within a voluntary association of villages (meaning that they are distinct territorial communities). Under Article 16, on the constituency of a local referendum, the only obligation is for the boundaries of the territorial constituency for the local referendum to coincide with the administrative boundaries of a village, a voluntary association of villages, a city or an urban district of a city: this formulation can be read either as meaning that the constituency must coincide with the boundaries of one territorial community, or that the constituency must only coincide with the boundaries of one or several communities. If this interpretation prevails, the local referendum could be used to support boundary changes, or to oppose them, on the initiative of citizens. However, the division of the territory could be a state matter, and not a matter of local concern. Nevertheless, several provisions of the 1997 Local Government Law provide for the use of local referendum in case of change of boundaries, and this has been the major cause of local referenda since 1991.

E) The kind of decisions that can be submitted to a local referendum

Only the imperative referendum and the referendum on pre-term termination of the mandate of the council or the mayor are strictly speaking binding decisions. However, the term "matters of local relevance" may apply to any kind of legal act, since it refers to its object. Through the local referendum as it is provided by the draft law, citizens can be involved in the decision-making process on local regulations (for example in the field of planning) or on local projects (for example whether to build a new public transport system). But the law should rule out the use of local referendum for involving citizens in individual decisions (such as, for example, revoking a license or terminating a contract).

Therefore, the present **Article 6 should be revised and completed by another paragraph** to avoid misuse of the local referendum. The wording should be coordinated with the terminology used in the Code of administrative procedure.

II. The referendum initiative

As it follows from Articles 2 and 5, citizens may take the initiative for an imperative (binding) or a consultative referendum on any matter of local relevance. However, it is not ruled out for citizens to take an initiative on matters that must be decided exclusively through local referendum and listed in paragraph 2 of Article 5. This broad interpretation of the present draft law is supported by Article 9, paragraph 4, according to which the general meeting of citizens has to approve the "draft text of the decision of the local referendum", whereas, under Article 1, paragraph 1.4, the decision of a local referendum is referred to the imperative referendum. Nevertheless, the scope of referendum initiatives allowed by law should be more clearly set out, in order to avoid contradictory interpretations.

The initiative procedure is precisely regulated and gives adequate guarantee of the sincerity and loyalty of the process. As the system of electoral commissions is involved in the whole process of organisation and monitoring of local referendums, the electoral commission of the

territory where the referendum is to be organised has to call for the referendum at the request (Art. 7) of a minimum number of voters, of the council or the Mayor for pre-term termination of the mandate of the other body, or on request of the local authority if it takes the initiative to reorganise or close down a pre-school educational establishment. In the case of a citizen initiative, the referendum shall be organised if the request is supported by at least 10% "of the total number of local referendum participants". Again, it would be better to refer to "registered voters of the territorial community". But the threshold of 10% of registered voters supporting the initiative seems to be acceptable, in line with the legislation of various countries[5].

The initiative includes two stages: the initiative group and the collection of signatures. The initiative group will be officially responsible for collecting the signatures supporting the initiative. The initiative is formed at a general meeting of citizens (Art.9), attended by a number of citizens varying according to the size of the community. The initiators of the general meeting must notify the Mayor and the territorial electoral commission in writing at least five days before the event. A registration list of the participants to the meeting must be drawn up. The decision on initiating a local referendum and the draft text to be submitted to the referendum have to be approved by a majority of the citizens attending the general meeting. The initiative group must be elected by the general meeting, with a person authorised to act as the representative of the initiative group and a person vested with the financial management of the initiative. A protocol must summarise and make official the results of the meeting. These provisions would give legitimacy and seriousness to referendum initiatives, and limit the risk of abuse by interest groups. **There is a lack of clarity in paragraph 4: if an imperative referendum may be proposed on any matter of local relevance, paragraph 4 should provide that the voters have to decide clearly at the meeting on the kind of referendum following their initiative.** In case of a consultative referendum, the voters should decide whether the text to be submitted to the local referendum will be a "draft text of decision" or a "draft proposal" directed to the council by the majority of voters – if the referendum is valid.

Then the initiative group has to be registered by the territorial electoral commission (Art.10). This includes checking the data transmitted by the initiative group; the request can be rejected only on grounds listed by law and under judicial supervision. The draft law refers to the application of the procedure specified in the code of Administrative Justice of Ukraine (para 5). The recommendation is to **make sure that the administrative court has the power to issue interim injunctions at very short notice, in order to avoid a late final decision.**

Article 11 provides for a local referendum fund, and it may benefit from voluntary contributions. Article 11 requires full transparency in these contributions. Anonymous contributions and those from persons who are not registered voters of the community concerned are prohibited, etc. These provisions have to be approved and will protect the

[5] it is 20% in France for the initiative of a voting consultation at the municipal level, 15% in various German *Länder* for decision-making referendums, 10% in Belgium, 5% in Finland and Sweden, from 6% to 30% of registered voters of the municipality, depending on the number of registered voters, and 6% for a regional referendum in the Czech Republic.

initiative from being manipulated and limit the risk of initiatives supported by hidden agendas. But **they can be applied only if the initiative group is vested with a limited legal capacity in order to be able to open and manage the account. This should be clearly provided by the draft law.**

The initiative group has then to collect signatures. Article 12 contains the requirements for guaranteeing the authenticity of the signatures. Only members of the initiative group may collect signatures, and only during the month which follows the date of issuance of the certificate of registration of the initiative group. The official date for the beginning of the collection of signatures must be advertised by the territorial electoral commission. Formal signature sheets (with the registration number of the initiative group, its index number and territory where signatures are collected) must be used, or the signatures will not be valid. Voters who sign the sheet (and they may sign only one sheet) and the member of the initiative group collecting the signatures have to be fully identified on the signature sheet; the collecting member of the initiative group has to certify the signature sheet. The State and local government body, their officials, managing bodies of institutions or companies of all kinds may not participate in the collection of signatures (para 11), in order to avoid pressure or misunderstanding of the origin of the initiative. This paragraph also forbids pressure, fraud, bribery and other actions impeding the collection of signatures. Forcing citizens to sign or rewarding them for signing is also forbidden, etc. All these measures are welcome in order to prevent any misbehaviour that would alter the citizen confidence in the local referendum procedure. The recommendation is to make only one amendment: **Article 12, paragraph 11 should be completed by provisions qualifying the violation of these rules as new criminal offences and establishing the penalties (fine, or prison in case of violence or bribery)**. The prohibitions should be supported by penalties in order to be effective. A fixed period of time for collecting signatures seems justified in order to make oversight possible. However, **one month might be too short in large cities; two months would be more reasonable in cities over 100.000 inhabitants**.

Then the territorial electoral commission has to check the signatures collected and to establish that the required number of valid signatures has been collected to support the initiative (Art.13). The commission has only 15 calendar days to complete the verification of signatures, in full or on a sample basis. Article 14 enumerates the grounds on which a signature sheet is not taken in account. However, **some of the provisions are too strict: for example, if there are corrections without reservations on a signature sheet, this should invalidate the signatures affected by such corrections, not the whole signature sheet; the notion of "unreliable data about a member of the initiative group" is too imprecise, this provision should be completed and the possibility opened to correct the data if evidence can be given on the identity of the signature collector.**

Lastly, **it is not reasonable to open broadly the possibility of citizens' initiatives for local referenda and to rule out practically such an initiative from local self-government bodies. In some cases, it would be useful for the council to submit the decision to the citizens for approval, in order to give legitimacy to a project.** If the government is willing to develop the local referendum and reconcile councils' and citizens' initiatives, the councils should also be allowed to initiate referenda.

III. The organisation of local referenda

The organisation of local referenda, as well as the oversight of citizen initiatives and the establishment of referendum results, are assigned to electoral commissions. They form a territorial hierarchy from the central to the local level. The territorial commission at the level of the territorial community where the referendum is requested is the most important in the system. Article 15, paragraph 1.3 provides for the possibility of establishing a constituency commission on local referendum. The territorial commission is in charge of in particular:

- Registering the initiative group of a local referendum;
- Overseeing the collection of signatures, and certifying the signatures requesting the referendum;
- Calling the referendum;
- Organising and scrutinising the voting process and the counting of ballots;
- Establishing the results;
- Examining complaints.

Whereas the role of constituency commissions is unclear, they offer the opportunity for adjusting the functions of electoral commissions to fit the needs of a local referendum organised jointly in several territorial communities, despite being designed for inner city districts.

Under Article 18, "the territorial commission shall be a legal person" (para 3), in contrast to the district commission which is not a legal person. There is no reason to elevate territorial commissions to the category of a legal person. If the purpose is to guarantee the independence of the territorial commission, this depends on the status of its members, not on its legal personality, as is demonstrated with the issue of judicial autonomy. There is no management justification since the territorial commission has no property or own resources, and it is funded from the State budget. Therefore, **paragraph 3 should be deleted.**

The role of the territorial electoral commission is an adequate answer for monitoring the whole process, if commission members are independent. Collegiality will also strengthen independence. The territorial commission will form the district commissions (Article 21, paragraph 5). The initiative group is entitled, among others, to propose members for all district commissions, in order to be able to scrutinise the referendum operations, but there is no formal obligation for the territorial commission to appoint them (Art.20, paragraph 4). Provisions on the observation of the referendum process demonstrate the will to avoid any bias during the voting and counting procedure.

A number of other detailed provisions on the organisation, membership and termination of territorial commissions, on their responsibility to ensure an accurate voters list, on observers, on guarantees of impartiality of the electoral commissions (prohibition on their members to campaign for or against the local referendum's subject matter – Art 26, para 9; public servants and officials may not be members of the district commission, Art 26, para 3) in particular are adequate to their purpose and do not call for remarks.

IV. Campaigning for local referendum

Campaigning for a local referendum is regulated by Article 31, which raises the following issues.

Is it justified to rule out any participation of local government bodies at the campaign of the local referendum? Despite the support of citizens, it is quite possible that the initiative be negative or disputable. The elected bodies might and must have an opinion on the subject matter. It would be paradoxical to oblige them to be neutral, as a notary, whereas the issue submitted to the referendum also pertains to their competences according to the law. On the contrary, the local bodies should have an option to support or be against an initiative during the campaign. **It would be adequate to provide for a discussion in the council on the issue submitted to referendum**, even if a decision cannot be taken at this stage. The true issue is **to ensure equal treatment during the campaign, and avoid any privilege for the local public bodies. In this regard, paragraph 6 should be modified: the territorial commission should decide, instead of the local self-government bodies, on the allocation of premises, the provision of stands, boards in public places, etc**, and the decisions are to be executed by the local government administration[6].

The next remark is on paragraph 3. The Ukrainian text is not restricted to campaigning in favour of the decision or issue submitted to the referendum: "*Кожен громадянин, місцевий осередок об'єднання громадян, громадська організація, ініціативна група з місцевого референдуму мають право розпочати агітацію місцевого референдуму…*" As a consequence, it can be expected that, locally, some will support and some will oppose the initiative. In that case, the organisation of the campaign should guarantee fair treatment to both parties. This issue is quite important and is overlooked by the draft law. Therefore, **paragraphs 3 and 6 should be amended in order to guarantee pluralism in the campaign of the local referendum**.

The printed materials have to be submitted to the electoral commission within three days following their publication (para 12). **This paragraph should be amended to ensure that the electoral commission will not control the content of the message, except where there is an obvious violation of law**.

V. Voting operations and results

The local referendum is valid if 50% of registered voters took part in the referendum ("participants of local referendum") (Art 39, para 4), and it is successful, e.g. the decision is

[6] The practice of other countries is varied: in Armenia, Portugal, Russia, local authorities are not allowed to take part in the campaign, but they are in Hungary; in Austria they are bound to self-restraint and not to issue massive and partial propaganda; in most countries there is no regulation on this point.

considered as adopted, or the proposed solution on a matter of local relevance is considered as adopted, when it is supported by the votes of more than half the valid votes cast by voters who participated in the referendum (Art 39, para 5). The requirement of a participation of 50% of the registered voters is rather high compared to other countries. Electoral participation rarely exceeds 50%; the rates of participation in local referendums are not much higher[7]. The requirement of 50% of registered voters participating at the referendum might discourage people from organising an initiative, because they will feel that the level of participation necessary for the success of the initiative is too difficult to reach. Therefore it would be useful to **accept a lower rate of participation and to calculate the majority of the participants with the requirement of a minimum participation for the validity of the local referendum.**

Articles 32 to 38 detail the organisation of the voting operations. These provisions give enough guarantees to prevent fraud in voting and in counting of the ballots to establish the results. However, **articles 35 and 37 need revision**.

Voting at a place of residence (Article 35) for persons with limited mobility does provide enough guarantee against abuse[8]. **The recommendation is to delete Article 35 and to replace it by an article providing for the possibility of voting by proxy.**

According to Article 37, the district (precinct) commission may declare the voting operations of a polling station void for irregularity as determined by law. Then the territorial commission is entitled to declare the voting operations at a polling station void for irregularity listed by the law (para 5). **Because the overall responsibility is conferred to the territorial commission, it is better to give the power do declare void the voting operations in a polling station only to the territorial commission, on a proposal from the district commission, and after its own inquiry.**

According to Article 40, when voting at a particular polling station(s) is declared void, but those votes influence the results of the referendum, the territorial commission shall call for a repeat vote at the(those) polling station(s), on its own initiative, on a proposal from the district commission or of the group that has initiated the local referendum. This provision also needs a revision. First of all, if the voting operations are void for irregularity in one or several polling stations and the amount of votes concerned could influence the results of the referendum, repeating the vote should be a legal obligation; it should not depend on the

[7] In France also, the referendum is valid with a participation of 50% of registered voters, and the decision is adopted and binding if it is supported by more than 50%; but this is a referendum at the initiative of the council, not of the citizens. In Bulgaria, Croatia, and the Czech Republic for municipal referendums, a participation of 50% of registered voters is required. But in Poland this is only 30%. In the Czech law of April 2010 on regional referendum, the referendum is valid with the participation of 35% of registered voters and the decision is taken if it is supported by more than 50% participants representing more than 25% of registered voters. In various countries, only the approval by a percentage of registered voters is required. In Germany, the decision is adopted if is supported by the majority of valid votes, representing 30% or even 25% of the registered voters, depending on the legislation of the Land. This is 25% in Hungary, 33% in Armenia.

[8] In France, the law gives an opportunity to any voter who cannot vote for any justified reason (lack of mobility, absence due to professional duties, etc) to vote by proxy instead. The request to vote by proxy has to be registered in due course. The voter who appoints the proxy has taken a free decision, and the commission of the polling station may check that this is a recognised voter.

initiative or the decision of the electoral commission. Secondly, if the vote has to be repeated, it is not only in the said polling stations: if the irregularities are such that they could influence the final results, then the referendum must be repeated for the whole territorial community. This is because voters of the precincts where voting operations were declared void know the results of the referendum in other places, and their vote could be different: probably, they will not vote at all or they will change their vote. Therefore **Article 40 has to provide for the whole local referendum to be repeated if the voting is declared void in one or several polling stations for irregularity affecting the final results of the local referendum.**

VI. Legal nature and legal force of acts approved by a local referendum

Article 42 concerns the legal consequences of an imperative referendum. According to this article, the decision shall be a "normative legal act of local self-government", binding on the whole territory of the community (para 3); it can be amended only through another local referendum (para 4); it has a higher legal force with regard to legal acts of local self-government bodies and their officials (para 6).

It is obvious that the decision adopted though a local referendum is a normative act if it is a regulation; but other decisions might be binding although they are not regulations (for example the decision to build a new public transport line). **Paragraph 3, therefore, should say that "the decision of local referendum is binding on the whole territory of the community and for local self-government bodies of the community".**

The provision which makes organisation of a new local referendum necessary for amending the decision is not adequate for two reasons. First, the local referendum is organised on the basis of a citizen initiative except in a few number of cases mentioned in the draft law. Therefore, to amend such a decision, it would be necessary to wait for a new initiative of citizens proposing an amendment and to hope that this initiative would be successful. In other words, it would be almost impossible to amend a regulation adopted through a local referendum. Secondly, all questions that can be submitted to a local referendum are in the competence of LSG bodies. There is no reason to consider that the initiative of citizens to request the organisation of a local referendum on such a question would result in a change in the responsibilities assigned by law to local self-government bodies. **Therefore, paragraph 4 should be deleted.**

There is also no reason for ascribing a higher legal force to decisions adopted though a local referendum than to legal acts adopted by the competent LSG bodies. Such a statement does not derive from the Constitution. According to Article 140, "Local self-government is exercised by a territorial community by the procedure established by law, both directly and through bodies of local self-government: village, settlement and city councils, and their executive bodies". It follows that the direct exercise of LSG rights through local referendum and through elected self-government bodies is on the same level, as other alternatives. Furthermore, giving a higher legal force to decisions adopted though a local referendum would make it impossible to amend such decisions otherwise than through another local

referendum initiated by citizens, with the inconveniencies pointed out above. **Therefore, paragraph 6 should be deleted.**

VII. Review of decisions or of inaction of authorities involved in organising local referendums

Articles 43 to 48 detail the remedies for irregular decisions or inaction of authorities involved in organising local referendums. All operations for calling and organising the referendum, counting the votes and establishing the results may be challenged at the "commission of the local referendum", e.g. the electoral commission, or at the court. This is the case for a decision declaring the results of the referendum void for irregularity, or for a decision declaring the results valid. These articles determine the conditions of appeal, who can appeal and against whom, rules of evidence, and time limits for lodging the appeal and for decisions. Appeal against decisions of the commission may lie to the court, but there is no legal criterion for cases when a referral should be made directly to the court rather than the commission. The law determines the procedure for appeals (*скарга*) directed to the commission, whereas claims (*позовна заява*) directed to the court are subject to the provisions of the Code of administrative justice. If there are grounds for appeal, the commission may decide on the irregularities, quash the decision under review, order those responsible for the irregularities to take the necessary steps to comply with the law - this includes, as mentioned earlier, declaring void the results of the referendum, and organising a repeat the referendum, as the case may be.

However, as the appeal may not only be made against a decision of an electoral commission (in particular a precinct commission), but also against initiative groups, local government bodies or officials, and even against voters, the impact of the decision to be taken by the commission is not clear with regard to its purpose. Furthermore, it is inappropriate to allow appeals to lie to the commission of the referendum which was also in charge of organising and monitoring the whole referendum procedure.

It would be simpler, more transparent and more effective to distinguish between appeals against decisions or acts before the voting, and appeals directed against the results of the referendum. The former could be treated by the referendum commission, subject to review by the court. But all claims concerning the results of the referendum, even if they put they concern questions on decisions taken at a previous stage, should be left to the court. Lastly, as far as various legal subjects - and not only public bodies involved in the referendum process - can be challenged though the review procedure, the referendum commission of the administrative court (ordinary court in fact) should have a legal duty to refer to the prosecutor cases in which offences (for example fraud or manipulation) are suspected. Such provisions should be introduced in the law.