

A COMPARATIVE LOOK AT REFERENDUM LAWS

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I. STATEMENT OF PURPOSE

This paper seeks to set forth the varying legal and procedural elements found in the legal framework regarding national referenda and to identify the many options and alternatives available to countries which choose to incorporate the referendum mechanism into their political framework.

II. INTRODUCTION

The referendum is a direct democracy procedure that provides for a vote by the electorates on an issue of public policy and includes the citizen in decision making. A referendum can be a valuable political process in post-conflict states, such as Iraq, as it provides an invitation to the people to vote and to decide important issues. This participation can create a sense of belonging and can assist in the process of integration. In recent times, the referendum instrument has been used by presidents or other executive authorities and legislative authorities for consultative purposes or to obtain popular approval of their policies.

In designing and implementing the legal and operational framework of a referendum many issues must be considered. A country must decide everything from who has the authority to call a referendum; how do they go about doing this; to who writes the ballot question; who hears appeals on this question; and what is the legal effect of the referendum result. These questions are both procedural and substantive and must all be dealt by clear laws within the legal framework in order for the referendum to be considered legitimate.

III. REASONS FOR A REFERENDUM

There are several reasons that an authority may seek to hold a referendum:

- (1) To resolve divisions with a governing party or coalition. Under this reasoning, the goal is to serve as a mediation device between competing factions or to avoid the electoral repercussions of a divisive issue.
- (2) To promote a law that would not have passed through the normal legislative process (i.e. deadlocked disagreement between various chambers of legislature or when government is split on an issue (Bolivia, United Kingdom).¹
- (3) To demonstrate popular support for the president, government (France, Chile, Russia) or for a specific political decision (Chile, Uruguay).²
- (4) To protect a legislative minority which may demand a referendum on a decision undertaken by the legislative majority (Denmark, Sweden).³

¹ See Direct Democracy at chapter 2 (providing the example in Bolivia in 2004, on the issue of natural gas reserves and of the UK in 1975, on their membership to the European Community).

² See Direct Democracy at chapter 2 (describing the several occasions in which France's President, Charles de Gaulle, used the referendum as a means to demonstrate public confidence in his leadership); (detailing the 1978 referendum in Chile called by Augusto Pinochet asking voters to support him); (in 1993 in Russia, a referendum was called to determine if the public had confidence in President Boris Yeltsin).

³ See Direct Democracy at chapter 2; p. 47 -50 (in Denmark, one-third of the members of the legislature may demand a legally binding referendum on a bill passed by the legislature); (in Sweden a pending constitutional amendment must be referred to a legally binding referendum if one-tenth of the members of the legislature request it).

IV. INSTITUTIONAL FRAMEWORK

a. REGULATION OF REFERENDUM

The most important key feature that defines a referendum is how the referendum fits within a country's overall legal system. To determine this, certain questions must be answered: are referendums mandatory and set out in a country's constitution or other laws? Is a referendum required, or has it been initiated by the governmental executive order, by legislative acts, or by citizen initiative? Who can call a referendum and how can they do this?

Referendums can be regulated by a written constitution, by general and permanent legislation or by specified ad hoc laws on a particular popular vote. In Europe, the majority of states provide for the organization of national referendums in their constitutions (For examples see [Armenia](#), [Ireland](#), [Lithuania](#), & [Switzerland](#)).⁴ However the existence of a constitutional outline providing for a referendum does not preclude the necessity for implementing legislation. Constitutional rules may only provide general guidance for specific rules which need to be determined through ordinary legislation. As long as referendums are not expressly forbidden by the constitution, they may be established and regulated by explicit ad hoc laws passed by ordinary legislative procedure as is the case in [Norway](#).⁵

A referendum can be called by the executive and legislative institutions as well as by a number of citizens. Procedures on how this is done differ amongst jurisdictions. In some states this is specified in the constitution, while in others referendums may be called through legislative acts or executive orders.⁶ It is essential that all of these features be considered when creating the referendum mechanism.

b. TYPES OF REFERENDUM

Referendums can be mandatory or optional. A mandatory referendum is a vote of the electorate which is called automatically under particular circumstances as defined in the constitution or ordinary legislation. **Mandatory referendums** are usually restricted to very important political decisions. For example, this type for referendum is normally used in relation to constitutional revisions, disagreements between the president and legislature, adoption of international treaties, joining a supra-national organization, on issues of national sovereignty or self determination (For examples see [Australia](#), [Denmark](#), [Estonia](#), [Macedonia](#), [Iceland](#), [Peru](#), [Lithuania](#), [Switzerland](#) & [Venezuela](#)).⁷

⁴ See [Referendums in Europe](#); see also [Constitution of Ireland](#); [Constitution of Armenia](#); [Constitution of Lithuania](#); [Constitution of Switzerland](#).

⁵ See [Direct Democracy](#); see also [Referendums in Europe](#) (explaining that in Norway, there are no relevant provisions in the constitution regarding referendums however, two referendums were organized on the basis of specific acts of parliament (both on accession to the European Economic Community and then the European Union).

⁶ See [Direct Democracy](#) (relaying that if the constitution sets out that the president or government is allowed to call a referendum without the approval of the legislature or other governmental institutions (i.e. constitutional court), or if no regulation exists, these executive institutions have greater flexibility in making use of the referendum procedure. However, these advantages may be at the expense of democratic legitimacy, as popular support is most often sought when it suits the government).

⁷ See [Direct Democracy](#) (stating that in countries such as Australia, Denmark, and Venezuela all constitutional amendments have to be approved by referendum, and in countries such as Iceland and Peru, this is the case for certain constitutional amendments. In Switzerland, certain international treaties have to be approved by referendum,

The second category of referendum is the **optional referendum**. This is a vote of the electorate which does not have to be held by law but can be initiated by the government and in some cases by other parties. This type of referendum can have many different forms: they may be pre-regulated by constitutional rules or otherwise prescribed referendum rules (Spain, Austria, Argentina)⁸; or they may be special (ad hoc) referendums setting forth particular rules to be followed specifically for individual referendum (Norway, The United Kingdom).⁹ Optional or special (ad hoc) referendums are those that are not regulated in the constitution or any permanent legislation. Generally, in order to hold a special (ad hoc) referendum the decision to do so must come from the majority of the legislature via passage of a specific law authorizing the holding of the special referendum.¹⁰ Optional referendums have been seen frequently in Europe on the issue of integration into the European Union. The determination of the type of referendums allowed will assist with the future development of a country's referendum mechanism.

c. SUBJECTS OF REFERENDUM

Referendum legislation should specify which topics must and may be subject to the referendum mechanism. The topics on which referendums are held vary widely across the globe. In Australia and most of Europe, referendums are commonly held on issues of major political or constitutional importance. Whereas in Latin America, referendums are by and large held in regards to internal political issues.¹¹

Certain subjects may be constitutionally or legally excluded from being subject of a referendum. Some countries develop an exhaustive list (France) of topics which can be sent to referendum or set out certain areas that are excluded from the popular vote. Typically exclusions are limited and commonly applied to issues concerning taxes and public expenditures (Examples: Armenia, Estonia, Denmark, Hungary, Uruguay).¹² In

and in Denmark a transfer of authority to international or supranational bodies requires a referendum); *see also* Constitution of Estonia; Constitution of Macedonia; Constitution of Lithuania.

⁸ *See* Direct Democracy (stating that in Spain, political decisions of special importance may be submitted for a consultative referendum and according to the constitution, the king may call a referendum at the request of the president of the government following authorization by the Congress of Deputies; In Austria, a majority of the House of Representatives may demand that an enactment of the House of Representatives be submitted to a referendum; and in Argentina, the constitution sets out that both the legislative and the executive branch has the right to initiate a referendum).

⁹ *See* Direct Democracy (explaining that in Norway, the constitution states nothing about referendums and so the legislature decides whether to hold a referendum and also the details of its implementation; in the UK, the Political Parties, Elections and Referendums Act of 2000 sets out the legal framework under which referendums may be held and assign the implementation to the Electoral Commission. However, parliament must pass a specific law in each instance in order for a referendum to be held).

¹⁰ *See* Direct Democracy (asserting that in parliamentary systems, the decision to hold an ad hoc referendum on a specific issue is generally taken by the majority of the legislature by passing a specific law to do so).

¹¹ *See* Direct Democracy; *See also* Referendums in Europe.

¹² *See* Referendums in Europe (commenting that in France, an exhaustive list of matters to which referendums may relate is drawn up – in the case of legislative or treaty-related referendums, which can relate to the organization of public authorities, economic and social policy reforms and the relevant public services and, the ratification of a treaty not contrary to the constitution but liable to influence the operation of the institutions); (expressing that while Armenia expressly excludes elections and questions submitted to the decisions of a judicial or administrative body, the principle matters of which national laws exclude from referendum are financial, budgetary and tax issues such as is done in Estonia, Denmark, Hungary); *see also* ACE Electoral Knowledge Network (noting that in Uruguay referendums cannot be held in relation to fiscal policy or laws relating to the executive power); *see also* Direct

countries where there has been recent transition, certain sensitive subjects such as sovereignty, might also be excluded (Columbia).¹³ It is important to determine what issues must, can and cannot be subjected to a referendum of the people.

d. LEGAL CONSEQUENCES OF REFERENDUM

The legal effect of a referendum, that is the determination as to whether the results of a referendum will bind the government or serve to be purely advisory must be clear from the start. Referendums are either legally binding or purely consultative. If a referendum is legally binding, the government is compelled to implement the proposal. If, on the other hand, a referendum is consultative, the result of the referendum serves only as advice to the government. While the distinction may not in actuality change the effect of the results of the referendum (as it may be difficult for a democratic government to disregard the result of a referendum even though it may only be consultative), it is nonetheless imperative that this issue be determined in the referendum mechanism.¹⁴

How each jurisdiction determines the legal effect of a referendum varies. Several states only enlist legally binding referendums (Examples: Armenia, Estonia, France, Italy, Turkey).¹⁵ In Denmark, legally binding referendums are the rule but consultative referendums are not excluded, whereas some states differentiate between legally binding and consultative referendums according to the nature of the proposal (Andorra, Austria, Spain, Lithuania).¹⁶ Still, others make this determination based on the amount of people who vote (Poland, Portugal).¹⁷ These issues should be given complete consideration when designing a states referendum mechanism.

e. OTHER ISSUES TO CONSIDER

It is advisable for a state to consider the issue of the validity of the results of a referendum, meaning – how will it be validated, by whom and for how long does a particular decision remain valid.¹⁸ Addressing these issues in legislation in advance of the referendum rather than resolving them only when the issues are under debate can avoid many complications, as well as support the legitimacy of the referendum.

Democracy (illustrating that issues, such as taxes and public expenditures are often excluded from being the subject of a referendum and also that the requirements for, or exclusion of referendums on specific issues is usually set out in a jurisdiction's constitution or ordinary legislation).

¹³ See ACE Electoral Knowledge Network (stating that in Columbia, the issue of political amnesty is excluded from being the subject of a referendum).

¹⁴ Direct Democracy; Referendums in Europe.

¹⁵ See Referendums in Europe (noting that these countries and several other states provide only for decision-making, legally binding referendums).

¹⁶ See Referendums in Europe (observing that in Andorra, Austria and Spain, a referendum on an important issue is consultative, while a constitutional referendum is legally binding; in Lithuania a referendum is binding if it relates to legislative provisions proposed by a popular initiative and to constitutional provisions submitted to a mandatory referendum, while other cases are consultative).

¹⁷ See Referendums in Europe (remarking that in Poland & Portugal, a referendum is binding if the majority of the electorate has voted and otherwise it is consultative).

¹⁸ See Direct Democracy (exemplifying what happened in Sweden where Swedish voters rejected a proposal to switch from driving on the left-hand side of the road to the right-hand side in a 1955 referendum, however in 1963 the Swedish parliament passed a law which enacted this change without a further referendum).

V. PROCEDURAL FRAMEWORK

a. TIMING

In order to be legitimate, an adequate period for campaign must be given, thus it is vital to establish when a referendum will take place. The referendum mechanism should dictate that the referendum must be held within a specific period of time from when it is called but not before a period of time which is sufficient for an in-depth public debate and campaign on the issue. If the time set is too short, genuine public debate will not be possible and if the period is too long, the public interest may become exhausted or the referendum issue may become submerged. Finding the right balance in timing is essential to the democratic legitimacy of the referendum (Thailand).¹⁹

It must also be considered whether to hold referendums together with scheduled elections or at separate times. The advantages of holding them in conjunction with scheduled elections are a matter of efficiency and cost. In addition, some argue that holding referendums simultaneously with elections produces a higher voter turnout, although in practice this doesn't hold up.²⁰ Conversely, holding referendums with elections runs the risk of voter distraction. The referendum issue may get overwhelmed by the larger election at hand and not receive sufficient attention from the voters or campaigners.²¹

Further, it is worth deciding whether referendums may be held on different issues at the same time. Some states allow numerous referendums on various issues to be held on the same day (Switzerland, Columbia), while others only allow referendum questions on one topic at a time (Armenia, Portugal).²² The advantages to holding more than one referendum at a time, is that it efficiently involves voters on a wide array of public affairs. On the flip side, holding referendums on more than one topic at a time puts more of a burden on the voters to inform themselves on many subjects which may not be in any way related. Having uninformed voters weakens the legitimacy of a referendum.

b. BALLOT TEXT

One of, if not the most, important issues involved in crafting a referendum mechanism lies in the drafting of the referendum question. The way the question is phrased can have significant consequences on how people vote and the method in which the question is crafted and whom drafts it, can have substantial implications on the legitimacy of the referendum overall. Therefore, it is crucial to consider all aspects influenced and procedures necessary to develop a strong, neutral and effective referendum question.

¹⁹ See Direct Democracy (illustrating the case in 2007 in Thailand, where a referendum held by the military government was widely criticized on the length of time allowed for the campaign. The referendum materials and information, of over 300 constitutional articles, were sent to the Thai community only 19 days before the referendum was to take place. This is widely criticized as it did not give voters enough time to be educated and informed on the lengthy and complex issues of the referendum).

²⁰ Referendums in Europe; ACE Electoral Knowledge Network; Direct Democracy.

²¹ Referendums in Europe; ACE Electoral Knowledge Network; Direct Democracy.

²² See Direct Democracy (stating that in Switzerland, several issues are typically decided by the voters on the same day and noting that in 2003 in Columbia, a referendum was held on 19 separate issues at the same time); see also Referendums in Europe (reporting that in Armenia, a referendum cannot relate to more than one question and in Portugal, no more than three questions are allowed).

i. Referendum Question

The wording of the referendum question and who is entitled to draft it have a great effect on the outcome of the proposal. Those campaigning for and against the proposal have an interest in how the question is worded as even a slight change to the question may affect how people vote. The wording must be precise, as clear as possible, neutrally formulated, have only one goal and one possible interpretation.²³ States are urged to provide for rules on what form referendums may be presented in.²⁴

In light of the fact that the wording of the ballot text can play a significant role in determining the outcome of the proposal, who determines the exact question is significant. Various organizations and governmental divisions could have the responsibility to determine the referendum text. Consideration on whether the government should play a part in the question formulation is necessary as it gives them much power to influence their desired outcome and this could harm the legitimacy of the referendum. Many jurisdictions create a neutral Electoral Management Body (EMB) and prescribe the responsibility of drafting referendum questions to them. Another option is to allow part of the government to draft the question, but provide for an independent organization, like an EMB, to provide a neutral oversight of the process and of the resulting question.²⁵ An additional measure which could be incorporated into the process is to provide for a public period of review of the question. Once the specified party has drafted the referendum question, it then becomes publically available by request and also via the press. A process whereby voters and interested parties can comment, ask for clarification or make suggestions to be taken into account by a neutral organization is created and the neutral body then re-drafts the final question. This option, while creating a longer and heavier work burden on the drafters, could provide for greater transparency and further involvement of the electorates.

ii. Number of Alternatives

Typically, referendums put forth the possibility to vote for or against a specific proposal, this design provides for the clearest result. In some instances the choice between three or more alternatives has been presented (Sweden).²⁶ An additional manner which has been used with more than two alternatives is a rank-ordered style, whereby electorates are given a number of options and asked to rank them in order of preference (Ireland).²⁷

The method of using more than two alternatives may lead to difficulty in

²³ See Referendums in Europe (noting that in Albania, the question submitted to the electorate must be clear, complete and unequivocal; in Armenia the question must be straightforward; in Hungary the question must be devoid of ambiguity; Portugal, questions must be formulated in an objective, clear and precise manner and may not contain any suggestion or preliminary considerations; likewise, in France the question must be fair, clear and lack ambiguity); see also Direct Democracy (stating that the ballot text should be precise and as clear as possible and should have one goal and interpretation); see also ACE Electoral Knowledge Network (observing that the question put to the electorate must be clear and straightforward).

²⁴ See Referendums in Europe (explaining the various forms of presenting a referendum to be (1) a specifically-worded draft of a constitutional amendment, legislative enactment or other measure; (2) a repeal of an existing principle; (3) a question of principle; (4) a concrete proposal).

²⁵ Direct Democracy.

²⁶ See Direct Democracy (stating that the clearest result of a referendum comes from only two alternatives but using Sweden's use of three alternatives in a referendum during the 1980 referendum concerning nuclear power as an example of the three alternative route).

²⁷ See Direct Democracy (using Ireland as an example of another way to form referendum alternatives. In 1992, Ireland's referendum on their abortion policy was split up into three separate questions each having two alternatives).

interpreting the results of the referendum; the most unambiguous result of a referendum is obtained when a question provides for a simple “yes” or “no” response from the voters. However it is determined that the question be drafted, the process must be clear and strictly followed.

c. CAMPAIGN

The campaign component of the referendum mechanism is vital to the success and legitimacy of a referendum. As discussed earlier in this paper (see section on Timing of a Referendum V (a)), it is important to consider the amount of time allotted to educate the public and debate the proposal. Additionally, in order to try to ensure that there is a level playing field between organizations campaigning for and against the proposal, some jurisdictions place further regulations on a referendum campaign itself. Two issues that are frequently regulated in terms of referendum are the amount of money that can be spent on a campaign (Examples: Armenia, Croatia, Ireland, Switzerland)²⁸ and access to media (Examples: Bulgaria, Cyprus, Lithuania, Switzerland).²⁹ Caution must be used when deciding on such campaign regulations as it is a slippery slope before problems will emerge between these regulations and such fundamental democratic principles of equal opportunity and freedom of expression.³⁰

Another issue which should be considered is the role of the government in a referendum campaign. Should the government be allowed to campaign for the outcome it supports? Can they or should they distribute its own promotional material or run government broadcasts outlining its views? And similarly, is there a designated neutral source of information separate from the government and campaigners or other requirements providing for the dissemination of non-partisan information about the issue? There are different approaches to the dissemination of non-partisan, neutral information. In some states rules specifying that the government must provide objective information exist (Examples: Netherlands, Switzerland, France, Ireland, Portugal, United States).³¹ When constructing a referendum mechanism, consideration must be given as to the role of the government in the campaign.

²⁸ See Referendums in Europe (discussing that the use of public funds for or against a draft submitted for referendum is prohibited in many states including: Armenia, Croatia, Ireland and Switzerland).

²⁹ See Referendums in Europe (noting that several states regulate access to the public media during the referendum campaign such as in Bulgaria, Cyprus, Lithuania and Switzerland. Also explaining that often times, equal air time is given to supporters and opponents of the issue); see also Ellis, Seminar on the Referendum (describing further restrictions often placed on referendum campaigns such as in Canada where those who wish to campaign are required to register their intention to do so; in addition states may require that all materials used for campaign purposes bear name and address of organization which publishes it, such is the case in Australian and the UK; further there is also sometimes the requirement to disclose expenditures & contributions after referendum and in Columbia, expenditures and campaign accounts have to be published after the poll).

³⁰ See Code of good Practice (commenting that equal opportunity must be guaranteed for the supporters and opponents of the referendum proposal. This includes neutrality with regard to: the referendum campaign; the coverage by the media; public funding of campaigns; billposting and advertising; and the right to demonstrate on public thoroughfares); see also Direct Democracy (asserting that if regulations are put in place, the state must be careful as the regulations could have an adverse effect on the fundamental right to freedom of expression which could weaken the legitimacy of the referendum result).

³¹ See Referendums in Europe (explaining that some states have rules which require that the authorities must not only make the text public but also provide additional objective information. In the Netherlands, a summary of the text is sent to the voters; in Switzerland and France, the text is sent to voters together with an explanatory note from the government setting out the various view points in a balanced manner and in France the explanatory note is checked by the Constitutional Court; in Ireland, an explanatory note is created if the two houses of parliament make

d. APPEALS

The determination needs to be made as to whether there will be an appeals process set out in the referendum mechanism. In order to promote the legitimacy of the referendum, it is advisable to establish a method for appeals to take place.

A process must be adopted establishing who can appeal the referendum (government institutions, organizations, or a certain number of citizens, etc)³²; within what time period the appeal can take place; and what body hears and takes action on the appeal (constitutional court, independent electoral management body, etc)³³. In addition, constitutions, laws or regulations must be determine which parts of the referendum process can be appealed (the decision to submit or not submit a matter to referendum; the referendum question and its formulation; the referendum procedure; or the result of the referendum).³⁴ Other matters of importance are: the time frame of which the appeal body has to render its judgment and what will be the effect of that appeal body's decisions.³⁵ The appeal body should have the power to invalidate specific parts of the referendum process, as well as have the option to annul the referendum in its entirety in certain situations.³⁶ An appeals procedure will promote the legitimacy of the referendum and should be incorporated into the referendum mechanism.

provision for this in the law and it must be neutral; and in Portugal, authorities are required to ensure the strictest impartiality); *see also* [Ellis, Seminar on the Referendum](#) (remarking that in the United States, many State governments are responsible for publishing an information pamphlet containing an article from each side of issue and an independent analysis of the proposition . These pamphlets have been known to be where many voters get their prime source of information).

³² *See* [Referendums in Europe](#) (detailing that in many states, such as Croatia, Hungary, Ireland, Switzerland, all electors are able to bring an appeal; in the Netherlands, any person directly concerned can assert an appeal; in Andorra one must have a legitimate interest to lodge an appeal and in Denmark and Estonia a legal interest is necessary on the part of one asking for an appeal; Austria requires that a certain number of electors is required to lodge an appeal. In other states the capacity to bring an appeal is more limited, such as in Spain where only interested political parties and institutions may do so; in Russia only the persons or bodies that took part in the referendum; in Bulgaria it is limited to only the parties which are allowed to initiate a referendum and in France limits appeal power to the central government representative in each department; still there may be more strict appeal capacity where it is granted only to certain authorities, such as in Armenia, where the President of the Republic of a third of the members of parliament are the only ones allowed to bring an appeal); *see also* [Code of Good Practice](#) (noting that all voters must be entitled to appeal and that a reasonable quorum may be imposed for the appeals by voters against the results of a referendum).

³³ *See* [Referendums in Europe](#) (reviewing who should hear such appeals, asserting that in countries which have a constitutional court, such as Croatia, France, Malta and Portugal, they are usually the competent body to hear the appeals; in other states, there is sometimes another body responsible for scrutiny of the result focused appeals, such as in Bulgaria, Hungary, Italy); *see also* [Code of Good Practice](#) (asserting that an appeal bodys should be either and electoral commission or a court and that the appeal body must be competent to deal with the many different issue, in particular: the franchise and electoral registers; the completion of popular initiatives and requests for referendums for a section of the electorate; the procedural and substantive validity of the texts submitted to a referendum; respect for free suffrage; the results of the ballot).

³⁴ *See* [Referendums in Europe](#) (examining the judicial review aspect of referendum appeals, stating that an appeal can be made regarding everything from the decision to put forth in a referendum, through the entire process and finally of the referendum result itself;insert parenthetical).

³⁵ *See* [Code of Good Practice](#) (stating that time-limits for lodging and deciding appeals must be short).

³⁶ *See* [Code of Good Practice](#) (commenting that the appeal body must be able to ex officio rectify or set aside decisions taken by lower electoral commissions).

e. VOTING QUALIFICATIONS, MECHANISMS, RULES

Voter qualifications and electoral procedure also need to be determined for a referendum. As with a general election, the following questions need to be answered: how the referendum voting procedures should be organized; who is responsible for ensuring that voting procedures are carried out in accordance with the law; what are the voter qualifications (are they the same that exist for a general election?)³⁷; what is the period of time for the voting (one day, two days, etc)³⁸; by which means can the electorate vote (postal, absentee, internet, etc); and when is the referendum judged to be passed.³⁹

In general it is best practice to apply the same rules used in national elections to the procedures of referendums. Not only does this avoid confusion and run more smoothly, it also lessens the ability of manipulation of the process by interested parties. As with general elections, an independent body should be charged with ensuring that the procedures are carried out in accordance with the law (this could be another task prescribed to the Electoral Management Body discussed earlier).

A crucial matter that must be contemplated is when a referendum proposal is determined to have passed. The clearest and most simple way to judge a proposal as passing is to simply look at the majority decision (i.e. when a majority of the voters vote “yes”). However, in some countries, a particular quorum is necessary for a referendum to pass. A quorum can take two different forms: a participation quorum or an approval quorum. A participation quorum, also known as a minimum turn-out quorum, means that there is a predetermined turnout threshold of registered voters which must be reached in order to validate the result (Examples: [Bulgaria](#), [Croatia](#), [Italy](#), [Lithuania](#)).⁴⁰ With an approval quorum, the validity of the vote depends on the approval of a certain predetermined percentage of the electorate (Examples: [Hungary](#), [Albania](#), [Armenia](#), [Denmark](#)).⁴¹ Additionally, a particularly high quorum is sometimes required for fundamental decisions (examples: [Latvia](#), [Lithuania](#), [Croatia](#)).⁴² Most states do not provide for a quorum to validate the result of a referendum and recent recommendations state

³⁷ See [Direct Democracy](#) (commenting that some states set forth specific regulations stating whether there is a difference between those who can vote in a referendum and those who can vote in a national election. The most common variation on requirements is seen in relation to age and citizenship).

³⁸ See [Referendums in Europe](#) (stating that in most states, a referendum vote takes place over one day. Some states allow for a two day voting period, such as in the Czech Republic, Finland, Poland).

³⁹ See [Direct Democracy](#) (reviewing the situations of when a referendum is judged to have passed, in some jurisdictions, it will if a simple majority of the voters vote “yes”, while in others only if a specified turnout threshold is reached, or if a specified number of voters cast a “yes” vote; and still some jurisdictions require a double majority for a referendum vote to pass).

⁴⁰ See [Referendums in Europe](#) (asserting that in many jurisdictions a quorum of participation is required, such as is the case in Bulgaria, Croatia, Italy and Lithuania).

⁴¹ See [Referendums in Europe](#) (explaining that several states require an approval quorum to pass a referendum, such is the case in Hungary where the quorum is a quarter of the electorate; in Albania and Armenia, the quorum is one-third of the electorate; and in Denmark, for referendums which relate to constitutional amendments, approval by forty percent of the electorate is required).

⁴² See [Referendums in Europe](#) (discussing jurisdictions where a particularly high quorum is required for fundamental decisions, such as is the case in Latvia, which requires approval by more than 50% of the registered voters when a constitutional amendment is submitted to referendum; in Lithuania, rules relating to sovereignty can only be decided by a majority of three-quarters of the electorate and other issues relating to the state or a revision to the constitution requires a majority of the electorate; in Croatia, a “yes” vote of a majority of the electorate is required in the case of an association with other states).

that it is not advisable to establish rules on quorums in referendum mechanism.⁴³ The way a referendum is determined to have passed, clearly has a large impact on the result of the referendum and must be precisely specified in the referendum mechanism.

VI. CONCLUSION

In designing and implementing a referendum mechanism many important issues must be considered. The questions are both procedural and substantive and must all be dealt with by law in order for the referendum to be deemed legitimate.

The referendum can serve as a valuable tool especially in post-conflict states, such as Iraq, as it is an invitation to the people to get involved, to join the decision making process, and to take ownership of shaping their country's future.

⁴³ See Code of Good Practice (asserting that based on its experience in the area of referendums. The Venica Commission recommends that no provision be made for rules on quorums).

REFERENCES

ACE Electoral Knowledge Network, *The Design and Political Issues of Referendums* (ACE Project) available at <http://aceproject.org>

Constitution of Armenia available at <http://legislationonling.org>

Constitution of Estonia available at <http://legislationonling.org>

Constitution of Ireland available at <http://legislationonling.org>

Constitution of Lithuania available at <http://legislationonling.org>

Constitution of Macedonia available at <http://legislationonling.org>

Constitution of Switzerland available at <http://legislationonling.org>

Direct Democracy, *The International Idea Handbook: Chapter 2 When The Authorities Call A Referendum: Design and Political Considerations* (International Institute for Democracy and Electoral Assistance 2008) available at http://www.idea.int/publications/direct_democracy/index.cfm

European Commission for Democracy Through Law, *Referendums in Europe- an Analysis of the Legal Rules in European States* (Venice Commission 2005) available at <http://www.venice.coe.int/>

European Commission for Democracy Through Law, *Code of Good Practice on Referendums* (Venice Commission 2007) available at <http://www.venice.coe.int/>

Director of Operations International Idea, Andrew Ellis, Presentation of *An International IDEA Working Paper: The Use and Design of Referendums*, at the Seminar on the Referendum in Costa Rica (May 25, 2007) available at <http://www.idea.int>