THE WORK OF THE VENICE COMMISSION IN THE FIELD OF REFERENDA:

Towards a Code of Good Practice for Referenda

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Ladies and Gentlemen,

It is an honour for me to take the floor once again before the annual meeting of the Association of Central and Eastern European Election Officials. This is a good sign of the deepening of the co-operation between the Venice Commission and the ACEEEO. This deepening was underlined last spring by the strong participation of the members of the ACEEEO in the last European Conference of Electoral Management Bodies. This conference was organised in Moscow by the Venice Commission in co-operation with the Central Election Commission of the Russian Federation. A still stronger co-operation should be confirmed through the organisation of the next ACEEEO meeting at the Council of Europe premises in Strasbourg, to be followed by the 4th European Conference of Electoral Management Bodies.

I shall not introduce the Venice Commission and its work on electoral matters today. Sufficient opportunities were given to me at other meetings of this Association. I shall just remind that the ACEEEO takes part regularly – in the person of Ms Marta Dezsö – in the work of the Council for Democratic Elections as an observer (as does OSCE/ODIHR). The Council for Democratic Elections is the body of the Council of Europe specialised in electoral matters, which includes representatives of the Venice Commission, the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe. It examines all opinions and studies in the electoral field before their submission to the plenary session of the Commission. For example, the first document adopted by the Council for Democratic Elections was the Code of Good Practice in Electoral Matters, which has become the reference document of the Council of Europe in the electoral field. It will now be followed – and we come to the theme of the conference – by a Code of Good Practice for Referenda, which was submitted for comments, at the various stages of its elaboration, *inter alia* to the ACEEEO observer. The Venice Commission should adopt this code at its next session in October.

The Code of Good Practice for Referenda is the little brother of the Code of Good Practice in Electoral Matters, but not a twin brother. It has to take account of the specificities of referenda, as previous work of the Venice Commission did.[1]

In parallel with the work of the Parliamentary Assembly,[2] the Venice Commission prepared a comparative report on referenda in Europe, on the basis of replies to a

[1] *See the Guidelines for constitutional referenda at national level ,CDL-INF(2001)010.*

questionnaire submitted by Commission members from thirty-three countries. The report – adopted in 2005 - has been made available to you, as well as the summary tables of the replies to the questionnaire.[3] It sets out to identify the fundamental aspects of referenda, as used in European countries, and also points of convergence and divergence between national traditions.

I shall now summarise the main features of the report, and put the emphasis on the points which will be introduced into the Code of Good Practice for Referenda.

Before entering into more details, let me underline that the Venice Commission does not make recommendations to countries to provide for referenda or not, and if they do, in what cases. Such recommendations belong to the political bodies of the Council of Europe.

Experience of referenda

A few statistics may be of interest before discussing the substance. It results from the study of the Venice Commission that, among the 32 states whose data were available to the Venice Commission:

1 experienced no referendum;
13 experienced only one referendum;
8 experienced two referenda;
1 experienced three referenda;
1 experienced four referenda;
3 experienced six referenda.

Referenda are more frequent in *France* (9 cases since 1958), *Denmark* (14 cases), *Ireland* (28 cases) and *Italy* (54 cases since 1948).

Switzerland is the only country where referenda are very frequent: more than 500 matters have been put to a referendum[4] since 1848.

These data take account only of national referenda.

Legal basis of the referendum

The first question relates to the *legal basis* of the referendum. In most countries, it is the Constitution which provides for the organisation of national referenda; this is rarer for regional and local referenda. Only four states, where referendum is exceptional, have no constitutional provision at all. The Venice Commission recommends that the

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[2] *See Recommendation 1704 (2005) on "Referenda: towards good practices in Europe".*

[3] *CDL-AD(2005)034, 034add and 034add2.*

[4] *The reference periods were not the same for all countries (in principle: the time under a democratic constitution), for this gives an indication.*

most important issues, at least concerning constitutional referendum, are expressly regulated at constitutional level.[5]

Types of referenda

Bodies competent to call referenda

The issue of what body has the power to call referenda is probably the most important one from the point of view of political science. There are three types of referenda, if distinguished on that basis:

- mandatory referenda
- referenda at the request of an authority
- referenda at the request of part of the electorate (optional referenda, popular initiatives).

- A referendum is *mandatory* when a text is automatically submitted to referendum, perhaps after its adoption by Parliament. A mandatory referendum generally relates to constitutional revisions. In some states, any constitutional revision is submitted to a mandatory referendum.[6] In a few states,[7] only total revisions are submitted to a mandatory referendum. A mandatory referendum may also be restricted to changes to certain provisions or rules.[8]

Other very important instruments are sometimes submitted to mandatory referendum. They are mainly instruments that involve a considerable limitation of sovereignty, especially in the context of European integration, such as accession to the European Union or association with other states.[9]

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[5] *CDL-INF(2001)010, II.A.*

[6] *Examples: Andorra, Armenia, Azerbaijan, Denmark, Ireland, Switzerland.*

[7] *Austria, Spain.*

[8] *Basic constitutional provisions (Estonia – the chapters of the Constitution on general provisions and the revision of the Constitution as well as the law complementing the Constitution, on accession to the European Union –, Latvia – democratic and sovereign nature of the state, territory, official language and flag, election of the Parliament by universal, equal, direct, secret and proportional suffrage, a rule providing for a referendum to be called for the revision of previous provisions -, Lithuania – an independent and democratic republic, chapters on the state and revision of the constitution, constitutional law on the country's non-alignment with post-Soviet alliances -); three provisions relating to constitutional revisions and the duration of Parliament (Malta).*

[9] *Accession to the European Union (Latvia), joining collective security organisations or supranational communities (Switzerland), joining international organisations in the case of a transfer of powers (Lithuania), association with other states (Croatia) or joining or leaving a community with other states ("the former Yugoslav Republic of Macedonia"). In Denmark, a referendum must take place when constitutional powers belonging to the national authorities are delegated to international bodies, unless Parliament approves this by a five-sixths majority. Also submitted to mandatory referendum are changes to a country's territorial integrity, such as a redefinition of borders (Azerbaijan, "the former Yugoslav Republic of Macedonia") or, in Denmark, a change in the voting age.*

- *Referenda at the request of an authority* exist in quite a number of states. The state body that calls for such a referendum may be the executive (in particular, the President), the legislature or part of it (in practice, the opposition). Contrary to what could be thought, very few states provide for only the executive to call a referendum, and countries where Parliament is the only authority able to call a referendum are rather numerous. From a political point of view however, the importance of referenda initiated by the President of the Republic is essential, since they imply the risk of an evolution towards a plebiscitary system.

- On the contrary, the possibility for *parts of the electorate to initiate the process* would rather help at opening the political system to the civil society. Referenda at the request of part of the electorate must be divided into two categories: the *ordinary optional referendum* and the *popular initiative* in the narrow sense. An ordinary optional referendum challenges a text already approved by a state body, while a popular initiative enables part of the electorate to propose a text that has not yet been approved by any authority. The *role of the authorities*, and especially Parliament, is limited in the case of the popular initiative. It is in *Switzerland* that the mechanisms of the ordinary optional referendum and the popular initiative are the most highly developed, but this institution has been extended in the last decades to a number of European states. Both ordinary optional referenda and popular initiatives exist now in *Albania, Italy, Latvia, Lithuania, Malta and "the former Yugoslav Republic of Macedonia"*. Such instruments of direct democracy are still more frequent at local and regional level.

The Venice Commission underlined that "the question put to the electorate should not relate directly or indirectly to the person of a political leader as in that case it would no longer be a referendum, but a plebiscite".[10] For the rest, the question of the types of referenda belongs to the political bodies of the Council of Europe.[11] The Parliamentary Assembly already recommended that popular initiative should always be possible

Nor will the Venice Commission recommend *for what type of norms* referenda should be called. Shortly said, the national provisions are quite diverse to this respect. Referenda may be about the Constitution, ordinary legislation, international treaties as well as a number of norms emanating from local and regional authorities.

Let us now come to issues where good practice has to be defined, from a legal point of view.

The procedural validity of texts submitted to a referendum

Unity of form

The text submitted for referendum may be presented in various forms:

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[10] *CDL-AD(2005)028, Opinion on parliamentary assembly recommendation 1704 (2005) on referenda: towards good practices in Europe.*

[11] *Recommendation 1704 (2005) – Referenda: towards good practices in Europe, 13.i.b.*

- a *specifically-worded draft* of a constitutional amendment, legislative enactment or other measure, including a *repeal* of an existing provision,
- a *question of principle* (for example: "Are you in favour of amending the constitution to introduce a presidential system of government?"), or
- a *concrete proposal*, not presented in the form of a specific provision and known as a "*generally-worded proposal*" (for example: "Are you in favour of amending the Constitution in order to reduce the number of seats in Parliament from 300 to 200?").

The Venice Commission underlines that the same question must not combine a specifically-worded draft amendment with a generally-worded proposal or a question of principle.[12]

Unity of content

The principle of unity of content is an aspect of free suffrage and is recognised explicitly in a number of European states:[13] except in the case of total revision of a text (Constitution, law), there must be an intrinsic connection between the various parts of each question put to the vote, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse as a whole provisions without an intrinsic link; the revision of several chapters of a text at the same time is equivalent to a total revision.[14]

Unity of hierarchical level

The Venice Commission would recommend that the same question should not simultaneously apply to legislation of different hierarchical levels.[15]

Clear and non-leading questions

Free suffrage presupposes that the question submitted to the electorate must be clear (not obscure or ambiguous); it must not be misleading; it must not suggest an answer; electors must be informed of the consequences of the referendum; voters must be able to answer the questions asked by yes, no or a blank vote[16]. A big number of national legal systems explicitly uphold these rules, which should be considered as universal.[17]

Texts that are not in conformity with the procedural requirements just mentioned (unity of form, unity of content, unity of hierarchical level, clarity of the question) may not be put to the popular vote. In order to avoid the authorities to put aside too

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[12] *See already CDL-INF(2001)010, II.C.*

[13] *Explicitly: Bulgaria, Hungary, Italy, Portugal and Switzerland.*

[14] *Cf. already CDL-INF(2001)010, II.C.*

[15] *Cf. already CDL-INF(2001)010, II.C.*

[16] *Cf. CDL-INF(2001)010, para. II.E.2.a.*

[17] *For more detail, see CDL-AD(2005)034, par. 77.*

easily requests coming from a section of the electorate, the Venice Commission would however suggest that an authority has the power to correct faulty drafting.[18]

Substantive validity of texts submitted to referendum - Rule of law

The Code of Good Practice for Referenda should underline the need to respect the principle of the hierarchy of norms as well as the Council of Europe's statutory principles (democracy, human rights and the rule of law). Respect of the rule of law means that the legal system as a whole - and especially the procedural rules - applies to referenda. The people is not a *princeps legibus solutus*, which handles outside of law, and so less the authorities when submitting a text to the people. In particular, referenda cannot be held if the Constitution does not provide for them, for example where the text submitted to a referendum is a matter for Parliament's exclusive jurisdiction.

Campaigning and funding

Equal conditions for campaigning and funding are essential in ensuring a free and fair referendum. However, national legislation is less developed in this field than for elections, due probably to the lesser frequency of referenda. Moreover, ensuring equality between parties is not the best solution, even if this is provided for by a number of national laws. A better solution is to ensure equality between supporters and opponents of the proposal being voted on.

Information for voters

Already in its guidelines adopted in 2001, the Venice Commission underlined that the authorities must provide objective information. This implies that the text submitted to a referendum and an *explanatory report* or balanced campaign material from the proposal's supporters and opponents should be not only published, but sent to the voters. The explanatory report must give a balanced presentation not only of the viewpoint of the executive and legislative authorities or persons sharing their viewpoint but also of the opposing one. This is very important in order for the referendum not to be abused by the authorities, to help voters focusing on the question asked, instead of expressing an opinion on the country's political and social situation and to avoid giving it a plebiscitary character.

It is true that most countries do not provide for such an explanatory report. This is one of the few points on which national legislation in most member states should be revised.

A possibility for the authorities to campaign?

Whereas it is generally admitted that the authorities should be forbidden to campaign in the case of elections, not all national legislations impose them so strong restrictions in the case of referenda. The solution proposed is as follows: it is not necessary to prohibit completely intervention by the authorities during the campaign. However, the

[18] *Cf. CDL-INF(2001)010, II.J.*

national, regional and local authorities must not influence the outcome of the vote by excessive, one-sided campaigning. The regulation of funding should be strict, in the sense that the use of public funds by the authorities for campaigning purposes must be prohibited.

Access to the media

Equal access to the media is essential too in order to ensure a free and fair vote. This is one of the points where equality should preferably be ensured between supporters and opponents, rather than between political parties.

Funding

The same is true for public funding of the campaign. However, in order to avoid financing fanciful groups created at the occasion of a referendum, public subsidies divided between supporters and opponents may be restricted to those who account for a minimum percentage of the electorate.

Quorum

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

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

A quorum of approval is considerably preferable to a quorum of participation, which poses a serious problem.[19] In the case of a quorum of participation, the opponents of the draft proposal submitted to referendum, appeal to people to abstain even if they are very much in the minority among the voters concerned by the issue. This often happened in *Italy* and led to rejection of the proposal submitted to the vote.

Effects of referenda

Most referenda organised in the states that replied to the questionnaire of the Venice Commission are of a decision-making nature, in other words the result is legally binding, in particular on the authorities, but consultative referenda are not really an exception. The effects of referenda must be clearly specified in the Constitution or by law, in order for the voter to know the consequences of his or her vote.

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

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[19] *Cf. CDL-INF(2001)010, par. II.O.*

Referendum may also be suspensive or abrogative. The Venice Commission would not make a recommendation on this issue.

Parallelism in procedures

Can a provision approved by referendum be revised without going through the same procedure again (what is called parallelism of procedures)? If it has been rejected by the people, can it be adopted without a referendum?

The national laws are divided in their approach. The Venice Commission would suggest that, when a text has been accepted or rejected in a referendum, a decision to the contrary may not take place without a referendum – or the possibility to ask for it in the case of an optional referendum, at least during a certain period of time.[20]

Judicial review

An effective system of appeals is an essential feature of the European electoral heritage. In its absence, electoral law is just *lex imperfecta*.[21] Whereas judicial review of the results has nothing specific to referenda, this is not the case for the review of the decision to hold a referendum. A number of legal orders provide for such a review, from the point of view of validity of the texts as well as conformity with procedural rules. Such a review takes place in general before the Constitutional Court; however in Switzerland, the country where most referenda take place, it has for the time being only a limited scope. The Venice Commission would recommend that the appeal body be competent to deal in particular with the procedural and, where applicable, substantive validity of texts submitted to a referendum, as well as the completion of popular initiatives and request for referenda from a section of the electorate.

Conclusion

Even if national law and practice is very diverse, a number of trends allow defining standards which should apply to referenda all over Europe, to be included in a Code of Good Practice for Referenda to follow the Code of Good Practice in Electoral Matters.[22] To be truly democratic, referenda − like elections − must satisfy certain requirements. Some of them are the general principles of the European electoral heritage, applicable to elections as well as to referenda. Other democratic requirements are specific to referenda. This applies, for example, to certain aspects of voter freedom, such as unity of content and clarity of the question, or to rules on the substantive validity of texts submitted to referendum. Other principles have to be adapted to the specific nature of referenda, for example concerning the scope of judicial review, information to voters and other aspects of campaigning and funding.

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[20] *Cf. CDL-INF(2001)010, par. II.L*

[21] *See the Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, point II.3.3.*

[22] *CDL-AD(2002)023rev.*

Thus, like the rest of constitutional law, referenda combine diversity with the need to respect the principles of Europe’s constitutional heritage.