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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS  
ON THE CONSTITUTION  
OF FINLAND**

by  
**Mr Peter PACZOLAY (member, Hungary)**

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*\*This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. The following observations comment on two issues raised in connection with the evaluation of the constitutional revision process ongoing in Finland:

- referendum and popular initiative (Article 53);
- election of the President (Article 54).

### **Referendum and popular initiative**

2. The letter by the Ministry of Justice dated 12 March 2007 raised among others the issue of referendum and popular initiative. The strengthening of the existing national, voluntary and consultative referendum towards a decision-making referendum was indicated as one of the current debates. The option of making possible referendum by civic initiative has been raised, too. The issue of direct participation has been kept on the agenda without preparing concrete proposals.

3. The role of direct democracy in contemporary parliamentary democracies is a complex question. Direct consultation of the people via referendum has long been the subject of heated discussion. Modern democracies without exception are representative democracies. Regularly held general elections are the corrective mechanisms for the deficiencies of representative democracy. Nevertheless, most countries implement some forms of direct democracy in their constitutional system. There are only a few countries worldwide that have never held a nationwide referendum.<sup>1</sup> But direct democracy is only complementary to representative democracy. The Hungarian Constitutional Court declared that representation is the primary form of the exercise of sovereignty.<sup>2</sup>

4. Countries make use of referendum for different purposes and in different ways. Arguments in favour of referendum include reference to the principle of popular sovereignty, to the necessity of asking the opinion and the consent of the 'people' in the most important issues. Democracy exercised by the way of referendum overcomes the size and space limitations of direct democracy: the people decide directly on certain issues without gathering together as in direct democracy.<sup>3</sup> It can have also the beneficial effect of overcoming voter apathy and re-engage voters with politics and democracy.

5. Opponents of referendum recall the negative experiences of history when plebiscite was used for justifying dictatorial ambitions. Referendum is regarded as a tool to undermine parliamentary democracy. Voters are not informed sufficiently, the decisions are based on partial knowledge, and often are not guided by rational arguments. Referendums are often used instead of deciding basic issues for short-sighted political purposes.<sup>4</sup>

6. However, it can be observed that there is a clear trend towards more direct democracy. This trend was initiated in 1948 by the United Nations Universal Declaration of Human Rights stating that "Everyone has the right to take part in the Government of his country, directly or through freely chosen representatives" (Article 21).

7. The Venice Commission in 2005 adopted a comprehensive study based on the experience of 33 countries on REFERENDUMS IN EUROPE – AN ANALYSIS OF THE LEGAL RULES IN

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<sup>1</sup>Arjen Nijeboer, "Direct Democracy in the Netherlands." In *Direct Democracy in Europe: A Comprehensive Reference Guide to the Initiative and Referendum Process in Europe*. Eds. Bruno Kaufmann and M. Dane Waters. Carolina Academic Press, Durham, North Carolina. Sponsored by IRI Europe, Initiative and Referendum Institute Europe and IRI Initiative and Referendum Institute.

<sup>2</sup>Judgment of the Hungarian Constitutional Court (CODICES HUN-1993-1-001) of 22-01-1993 no. 2/1993.

<sup>3</sup>See Giovanni Sartori, *The Theory of Democracy Revisited*. Chatham House Publisher: Chatham, New Jersey, 1987. 111.

<sup>4</sup>Walker, Mark Clarence, *The Strategic Use of Referendums. Power, Legitimacy and Democracy*. Palgrave, New York, 2003.

EUROPEAN STATES.<sup>5</sup> The nature of the referendum varies according to whether it is mandatory or optional and depends on the body competent to call it.<sup>6</sup> To hold a referendum might be mandatory (on certain well-defined issues as constitutional amendments) or facultative (initiated by public authorities like the head of State, the government, the Parliament, a certain number of representatives or by the citizens). A referendum is *mandatory* when certain texts are automatically submitted to referendum, perhaps after their adoption by Parliament. It is generally related to constitutional revisions.<sup>7</sup> Certain referendums are held at the request of an authority. Referendums might be held also at the request of a part of the electorate; this is less common than mandatory referendum or referendum at the request of an authority. Referendums 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 (when the referendum is initiated by the citizens, in other words a citizen's initiative).<sup>8</sup> 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 effects of the referendum might be binding (decision-making) or non-binding. The non-binding referendum is a form of consultation with the voters. The CODE OF GOOD PRACTICE ON REFERENDUMS adopted by the Venice Commission in March 2007 when speaking of the effects of referendums<sup>9</sup> suggested that the effects of legally binding or consultative referendums must be clearly specified in the Constitution or by law. Referendums on questions of principle or other generally-worded proposals should preferably not be binding. If they are binding, the subsequent procedure should be laid down in specific rules.

8. The first referendum in the history of Finland was held on the 29<sup>th</sup> and 30<sup>th</sup> of December 1931 on the prohibition, and more than 70% of the voters were in favour of freeing all alcoholic beverages, thus prohibition was lifted. As most Scandinavian countries, Finland had had for a long time no constitutional provision on referendum. In 1987 a constitutional amendment inserted a provision on the referendum. This provision pointed out some essential features to be regulated in the Act on referendums, and obliged the State to inform the voters of the alternatives and support the dissemination of information about them.<sup>10</sup> Under this new procedure one referendum was held in 1994 on Finland's accession to the European Union (the majority voted in favour of it).

9. Article 53 of the Constitution of Finland regulates the referendums:

*The decision to organise a consultative referendum is made by an Act, which shall contain provisions on the time of the referendum and on the choices to be presented to the voters.*

*Provisions concerning the conduct of a referendum are laid down by an Act.*

10. Under the present regulation referendums on all level (national and local) are of consultative nature. A national referendum can be called only by the Parliament. The two national referendums held so far in Finland were regulated by special acts. Popular initiative at

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<sup>5</sup> Report adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005) CDL-AD (2005)034. The tables summarising the replies to the questionnaire on referendums by the Venice Commission appear in documents CDL-AD(2005)034add and CDL-AD(2005)034add2.

<sup>6</sup> CDL-AD (2005)034, para. 22.

<sup>7</sup> CDL-AD (2005)034, para. 23-24.

<sup>8</sup> CDL-AD (2005)034, para. 39-40.

<sup>9</sup> CDL-AD(2007)008, III.8., and para. 53-54 of the respective explanatory notes.

<sup>10</sup> Section 22 as passed on 26 June 1987 said:

"Provisions for the holding of a consultative referendum shall be determined by Act of Parliament. The Act shall contain provisions on the date of the referendum and on the alternatives to be presented to the voters. The State shall inform the voters of the alternatives and support the dissemination of information about them as prescribed in the aforesaid Act. Provisions on the procedure to be applied in a consultative referendum shall be prescribed by Act of Parliament."

national level does not exist in Finland. The present-day regulation in the constitution is shorter than the previous one quoted above.

11. The study of the Venice Commission confirmed that national laws and practices related to referendums vary widely. Europe has democracies which are almost entirely representative, democracies which are semi-direct, and any number of intermediary forms. Referendums are sometimes seen as a tool used by the executive branch of government, sometimes as an instrument used by groups of citizens to further their views outside traditional political party structures.<sup>11</sup> Therefore the present rather limited possibility of referendum in the Finnish constitution is not against any European standard. Enlarging the possibility of holding referendums or the introduction of a binding effect, or of a popular initiative is fully depending on the background political decisions. However, it is a slippery road. In the case of negative experiences or even abuse of the tool of referendum, it is very difficult to withdraw the means offered to the people in this peculiar form of direct democracy. Politicians and political parties would face serious difficulties when explaining such a withdrawal. Therefore, any widening in the regulation of referendum requires special cautiousness. Scholars drew attention to the paradox that Scandinavian countries are among the world's most advanced democracies, placing high priority on such values as community participation. Grass-roots popular movements play an important role. And, paradoxically, referendum plays so minor a role.<sup>12</sup> Both politicians and political scientists underline that Scandinavian democracies operate on consensual manner, and based on the value of compromise. The majoritarian decision taken by referendum contradicts these values.<sup>13</sup> Constitutional traditions strongly influence in Finland even the constitutional reforms. Taking into consideration the tradition of holding referendums only under exceptional circumstances, and on rare occasions, the revision of the present day regulation is not advisable.

### Presidential Elections

12. The most important alteration in the new constitution concerned the powers of the President of the Republic. The new boundaries of presidential powers are determined by the fundamental provisions of the basic law. While under the former constitution legislative power was exercised by Parliament in conjunction with the President of the Republic, and supreme executive power was vested in the President of the Republic (section 2), presently *the legislative powers are exercised by the Parliament, which shall also decide on State finances. The governmental powers are exercised by the President of the Republic and the Government, the members of which shall have the confidence of the Parliament* (section 3). The original solution of the Finnish constitutional system was defined as a semi-presidential dualist system – until 1958 the only European example of it.<sup>14</sup> The executive power was divided in a balanced way between presidency and government.<sup>15</sup> The unusually wide semi-presidential solution was not considered as a mixture of American-type presidential and European parliamentary system, but it was deeply rooted in the peculiar monarchic tradition.

13. The considerable limitation of presidential powers introduced by the new constitution is not reflected in the way of electing the head of State. Originally, under the provisions of the 1919 constitution a special college of electors composed of 300 members was empowered to elect the President. In four cases the President was not elected by the electoral college: the Parliament (*Eduskunta*) elected the first President in 1919 (Ståhlberg) and Paasikivi in 1946. Mannerheim in 1944 and Kekkonen in 1974 were elected by special laws. In 1987 the system

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<sup>11</sup> CDL-AD (2005)034, para 267.

<sup>12</sup> Vernan Bogdanor, "Scandinavia." In *Referendums around the world – the growing use of direct democracy*. Eds. David Butler and Austin Ranney. The American Enterprise Institute, Washington, DC, 1994. 69.

<sup>13</sup> Bogdanor, *op. cit.* 78.

<sup>14</sup> Jean Blondel, "Dual Leadership in the Contemporary World." In Arend Lijphart (ed.), *Parliamentary versus Presidential Government*. Oxford University Press: Oxford, 1992. 165.

<sup>15</sup> Maurice Duverger, "A New Political System Model: Semi-Presidential Government." In Lijphart, *op. cit.*, 145.

of presidential election was amended, and the election of the President was changed into a combination of direct election and an electoral college. In 1991, by a further reform, a two-stage method of a direct popular election was introduced (section 23). The text of the present constitution repeats the same provisions (section 54):

*The President of the Republic is elected by a direct vote for a term of six years. The President shall be a native-born Finnish citizen. The same person may be elected President for no more than two consecutive terms of office.*

14. Thus, two seemingly contradictory tendencies can be observed in the constitutional regulation: on the one hand, the limitation of presidential powers, on the other hand, the popular election of the head of State. This logical inconsistency is based on the presupposition that wider presidential powers require more legitimacy, and this is accomplished by popular vote. But, as a matter of fact, there is no necessary correlation between direct election and presidential powers. Once decided in favour of popular election, it is difficult to turn back to other solutions. Therefore the most adequate solution is to hold on the present regulation.