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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON THE CITIZENS' BILL

ON THE REGULATIONS ON PUBLIC PARTICIPATION, CITIZENS' BILLS, REFERENDUMS AND POPULAR INITIATIVES AND AMENDMENTS TO THE PROVINCIAL ELECTORAL LAW

OF THE AUTONOMOUS PROVINCE OF TRENTO (ITALY)

on the basis of comments by

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I. Introduction

1. On 5 February 2015, the Presidency of the Italian Council of Ministers transmitted to the Venice Commission a request by the Provincial Council of the Trento Province for an Opinion on a Citizens' Bill on Public Participation, Citizens' Bills, Referendums and Popular Initiatives and Amendments to the Provincial Electoral Law (CDL-REF(2010)017).

2. This Bill under examination (Bill of 19 July 2012, n. 1-328/XIV/XV P, hereafter "the Bill") is intended to repeal and replace the Provincial "Referendum Law" of 5 May 2003 CDL-REF(2015)016) (hereafter "the Referendum Law" or "RL").[1] It aims at strengthening considerably the pre-existing instruments of participation and direct democracy, and at introducing a whole range of new ones, as stated in the Explanatory Memorandum.

3. The present opinion was prepared on the basis of comments by Mr Josep Maria Castellà Andreu, Ms Regina Kiener, Mr Francesco Maiani and Ms Anne Peters.

4. A delegation of the Venice Commission, including Ms Kiener, Mr Maiani, Ms Peters, as well as Mr Garrone from the Secretariat, met the authorities of the Trento Province on 27 May 2015: the President of the Province and the 1st Commission of the Provincial Council, as well as the promoters of the Bill.

5. The opinion will deal with the conformity of the Bill with international standards, in particular with the Code of Good Practice on Referendums, drafted by the Venice Commission and supported by the statutory bodies of the Council of Europe (CDL-AD(2007)008rev). It is not intended at assessing its conformity with superior national legislation (national or regional); it will however refer to it when useful.

6. The present opinion was adopted by the Council for Democratic Elections at its … meeting and by the Venice Commission at its … Plenary Session (Venice, …).

II. General remarks

A. The Italian (national and regional) constitutional framework

7. The Italian Republic is composed of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State (Article 114.1). While according to Article 114.2 of the Constitution, all Italian regions are constituted as autonomous bodies with their own statutes, powers and functions according to the principles laid down in the Constitution, Article 116 attributes particular conditions of autonomy to five regions – among them Trentino-Alto Adige/Südtirol – in accordance with Special Statutes adopted as constitutional laws

8. The region of Trentino-Alto Adige/Südtirol is composed of the autonomous provinces of Trento and Bolzano (Article 116.2).

9. The *Special Statute* for Trentino-Alto Adige/Südtirol[2] ("the Special Statute") gives the provinces legislative power on a wide range of subjects (Articles 8-15 of the Special Statute). The Special Statute sets down the rules regarding the organs of both the region and the provinces (Articles 24-54 of the Special Statute). According to Article 47 paragraph 1

[1] Legge Provinciale 5 marzo 2003 n. 3: Disposizioni in materia di referendum propositivo, referendum.
[2] Statuto Speciale per il Trentino-Alto Adige / Sonderstatut fur Trentino-Sudtirol, approved by the President of the Italian Republic, 31 August 1972, decree Nr. 670, as last amended by law n. 190 of 23 December 2014.

of the Special Statute, the organs of each province are the Provincial council (*Consiglio provinciale / Landtag*), the Provincial Government (*Giunta provinciale / Landesausschuss*) and the President of the Province (*Presidente della Provincia / Landeshauptmann*).

10. According to Article 47.2 of the Special Statute, the "statutory laws" of the two provinces determine *inter alia* the form of government of the province and, in particular, on the manner of election of the Provincial council, the President of the Province and members of the Provincial Government, the relationships between the organs of the province, the presentation and approval of a grounded motion of no confidence in the President of the Province, cases of ineligibility and incompatibility with the aforesaid roles, the exercise of the right to introduce citizens' bills on provincial laws and on provincial abrogative and advisory referendums as well as popular initiatives (but not instruments of participatory democracy). Accordingly, the Provincial Electoral Law of 5 March 2003 deals with different forms of referendums as well as citizens' bills that aim at changing provincial laws.

11. The Venice Commission underscores how important it is that a Bill on such a crucial subject-matter fully comply with all superior legislation, national or international. It encourages the authorities if the province to lift any remaining uncertainties as to the requirements flowing from the Italian Constitution and from Article 47 of the Statute, in the matter of popular participation and direct democracy in the Autonomous Provinces.

12. In particular, the special constitutional status of the province could make the use of instruments of direct democracy more delicate than in ordinary regions, because the competences and the financing of the province are not all based on guarantees set out in the (Italian) Constitution, but result of a political negotiating process between the province and the Italian central State – enshrined in a Special Statute with the status of constitutional law.

B. The Bill

13. The Citizens' Bill (further on: "the Bill") – according to its full title – sets out regulations on public participation, citizens' bills, referendums and popular initiatives and amendments to the Provincial Electoral Law.[3] The Bill is the result of a group of citizens' decision to participate directly in public life, using one of the available instruments existing in the provincial legal system.

14. Pursuant to the explanatory memorandum introducing the Bill (further on: "explanatory memorandum"), the latter aims at regulating "in a more organic and complete manner the institutions of direct democracy already present in the provincial system, integrating them with some institutions that increase citizens' capacity to intervene in the decision-making process".

15. In short, the *most important novelties* of the Bill (vis-à-vis the law of 2003) are the following:

- It establishes the following *instruments of participatory democracy*: prytanies, petition, consultation, and public debate;
- It establishes *new bodies*, most importantly the "Commission for participation"
- It modifies the existing three types of referendum: popular initiative (*referendum propositivo*), advisory referendum *(referendum consultivo)* and abrogative referendum *(referendum abrogativo)* and adds a fourth type of referendum, the confirmatory referendum *(referendum confermativo)*, which is currently only implied by Art. 47.5 of the Special Statute for the region for specific statutory laws;
- It modifies the existing citizens' bill (*iniziativa popolare*);

[3] Bill of 19 July 2012, n. 1-328/XIV/XV P.

- It abolishes the *voter turnout quorum* of 50 per cent of the voters entitled to vote for the validity of the approval of a text by referendum (as currently foreseen in Articles 4,17(4) and 18(15) of the Referendum Law).
- It introduces a motion of no confidence on the basis of a proposal by citizens (*mozione di sfiducia*);
- It grants *non-national residents* the right to vote or the right to participate in some of the instruments (petition, public debate, citizens' bill, advisory referendum).

16. Furthermore, the Bill aims at the referendums having *"definite consequences".* Also, referendums shall be admissible in *all fields of competence* of elected representatives, be they part of the executive or of the legislative power. In order to increase democratic participation, the right to participation shall be extended to *all residents of more than 16 years* of age. Not least the Bill envisages strengthening *transparency* where political rights and voters' participation are concerned.

17. The report will now examine the various parts of the Bill.

III. Part I - General provisions

18. **Article 1** (subject matters) refers to the various types of institutions dealt with by the Bill, which will not be detailed here. If this does not clearly result from another piece of legislation, it would be necessary to define "residence" more precisely (as lawful habitual residence). In particular, it mentions the popular initiative ("referendum propositivo") and the citizens' (initiative) bill ("iniziativa popolare").

19. Interventions in the field of *education*, as foreseen in **Article 2** of the Bill, notably implementing information on the instruments of direct democracy in the education curricula, are an adequate means for the full realisation of political rights[4], and should therefore be welcomed. Effective voter education is crucial to ensuring that potential voters be informed not only about their voting rights, but also about the electoral process as such[5].

20. **Article 3** of the Bill sets out the rules for the (new) *Commission on participation* which is the main body implementing the law. The Commission is composed of three expert members (law professors or attorneys), two of them being elected by the Provincial Council through "limited voting" (*recte*: single non-transferable vote?), one member by the President of the Province. All three members serve for a single term, with no possibility of being re-elected. The question could be raised of whether the number of regular members is not too low. The proponents of initiatives or referendums may appoint two additional members to the commission who need not be experts on the subject matter concerned. If the decision is taken to create a body not belonging to the administration in charge of organising the referendums, there should be more legal safeguards ensuring its independence vis-à-vis the Provincial council, Government and Administration, but also the promoters of the initiative or referendum, in conformity with international standards.[6] The presence of (partisan) supporters of the initiative could lead to excessive politicisation; therefore, a more impartial composition should be envisaged. The proposed composition appears however more balanced than the present referendum commission, since the presidency of the Council has the possibility to appoint all members of the commission (Article 6 RL). The functions of the Commission should be clearly laid out in Article 3.

21. According to **Article 4** of the Bill, anyone who promotes citizens' bills, popular initiatives or referendums, may request the President of the Provincial Council (i.e. the *Consiglio*

[4] See also UN CCPR, General Comment 31, para 7, on human rights education.
[5] See The Carter Center, Election Obligations and Standards: A Carter Center Assessment Manual, p 96.
[6] Code of Good Practice on Referendums, II.3.1.

provinciale) to be *assisted in the drafting* of the text. It seems that the political bodies cannot refuse such assistance. On the one hand, this could appear as problematic, and for various reasons: First, the President, due to party affiliation and other commitments and loyalties, might not act as a neutral advisor, or at least might not be perceived as such by the general public or by the promoters. Second, after having assisted in the drafting of the text, he or she will be biased (in favour or against the proposal) at a later stage, when the Assembly debates on whether to support the proposition. Third, the responsibility for the content and wording of a proposition lies with those who make it, and cannot be delegated to political bodies. Fourth, the concrete availability of the authorities is not unlimited and the unqualified obligation to assist the promoters, coupled to the quantitative increase of initiatives potentially deriving from the adoption of the Bill, might conceivably adversely affect the smooth functioning of the Presidency of the Council. On the other hand, institutions have to be assessed *in concreto* and not *in abstracto*. The fact that such a provision already exists for citizens' bills[7] and does not appear to have led to criticism could be a point in favour of extending it.

22. Quite a different question is whether there should be a preliminary examination of the draft proposal prior to its submission to popular vote, for example by the Department of Justice. The Venice Commission's Code of Good Practice states that in order to avoid having to declare a vote totally invalid, an authority must have the power, prior to the vote, to correct faulty drafting, e.g. when the question is obscure, misleading or suggestive, or when rules on procedural or substantive validity have been violated.[8]

23. In a democracy, voters are to cast an informed vote. It goes without saying that the potential promoters of referendums or initiatives should have access to all relevant information, too, according to the relevant legislation[9].

24. **Article 5** of the Bill proposes *reimbursement of expenses* to anyone who proposes a referendum (including popular initiative) (1 € per signature required) or a citizens' bill (0.5 € per signature required). Reimbursement is uncommon in states with strong participative institutions, like Switzerland and the United States. The same is true for most of the German Länder (however, in six German Länder there are rules on reimbursement), and, in Spain, for the citizens' bills at national and regional level.[10] While reimbursement – which is already provided by Article 24 RL - enhances the chances for minority groups outside the realm of established parties or well-funded pressure groups to promote their ideas and to bring along political change, it also bears a risk of abuse, as it might be used as a way of general fundraising, or by persons simply launching a referendum in order to receive the reimbursement. On the other hand, public reimbursement reduces the danger that the collection of signatures is funded by private sources, a practice that – according to the Venice Commission's Code of Good Practice – should be prohibited from the outset.[11]

25. In order to be in line with international standards, reimbursement of expenses for the promoters of referendums or initiatives must respect the principles of transparency and of equal opportunity. This entails a neutral approach by the administrative authorities responsible for the funding,[12] which is best fulfilled if the criteria for reimbursement are laid down in the law.[13] In addition, it must be made clear that remuneration only be granted to those who actually collect signatures, and not to voters who sign a request for a referendum

[7] Article 20 of the Referendum Law.
[8] Code of Good Practice on Referendums, III.4.g; see also below ch. VI.B
[9] See Chapter V of Law No. 241 of 7 August 1990 on Access to Administrative Documents.
[10] http://www.mehr-demokratie.de/fileadmin/pdf/verfahren02-kostenerstattung.pdf. Spain: Article 15 of the national law and Article 16 of the law of Catalonia, for example.
[11] Code of Good Practice, III.4.e.
[12] See also Code of Good Practice, I.2.
[13] See also Code of Good Practice, II / 2.

or a citizens' bill. With respect to the rule of law, both the amount allocated in total and the amount paid to each person collecting signatures should be regulated.[14]

IV. Part II - Instruments of participation

A. Petitions (Articles 6-8)

26. According to **Article 6** of the Bill, petitions concern matters of general interest and may be submitted as a request for information; they may concern the activities or intentions of the Provincial council and Government, but may also serve as an invitation to make specific decisions. Petitions must be addressed to the Provincial Council (Article 7 paragraph 1 of the Bill) and shall be published in the participation section on the Provincial Council's website and the Council shall assign them to the commission responsible.

27. Petitions can be a useful means to redress grievances where there is no formal means of appeal available (but in that case they are not limited to matters of general interest). Also, petitions may serve as a means to achieve policy goals, mainly where there are no effective instruments of direct political participation in the form of initiatives or referendums. Requests for information should not have to be drafted as petitions, but regulated by legislation on access to information held by the authorities.

28. With regard to the Bill, it should be welcomed that the principles concerning petitions are laid down in primary legislation (instead of the Provincial Council's internal rules of procedure). Even if petitions are in substance not binding on the addressee, time limits for the handling of petitions as well as electronic publication of pending petitions are adequate means to the full realisation of the citizen's (legal) right to petition. Referring to referendums held at a request of a section of the electorate and to popular initiatives, the Venice Commission' Code of Good Practice on Referendums stresses that time limits prescribed by law must be observed as the authorities might be tempted to draw out the process until the question is no longer relevant.[15] The same is true for any other form of request by parts of the electorate, such as petitions.

29. The Bill establishes different procedures and consequences according to the number of signatures of the petition. The most important one consists in an invitation to the first signatory to present the petition to the responsible commission of the Council, if the petition contains at least 200 signatures. If the signatures are at least 20 (a very low number), the petition shall be included on the agenda for the following Provincial Council meeting, depending on some circumstances. The very broad obligations to hear the first signatory and to include petitions on the agenda of the Provincial Council seems excessive and might impair the smooth functioning of the Provincial Council.

30. Petitions "concern matters of general interest". It should be clarified that individual petitions (for instance by inmates) are nevertheless admissible, even if they merely concern matters of personal interest.

B. Prytanies (Articles 9-13)

31. In **Articles 9-13** the Bill introduces the institution of prytanies (from the Greek πρυτανεῖα, *prytaneía*). Article 9 of the Bill defines the prytanies as "19 persons registered on the Provincial Council's [i.e. the Provincial Assembly's] electoral roll, composed by sortation among those registered on a specific list, with advisory and proactive duties that are

[14]Code of Good Practice, Explanatory Memorandum, paragraph 38.
[15]Code of Good Practice, Explanatory memorandum, paragraph 18.

regulated by law". The creation of prytanies is left to several organs and groups (Article 11): one third of the Council, the Government or one of its members, at least ten municipalities with at least 20.000 residents and 2.500 residents of the province. According to the explanatory memorandum, prytanies are "an effective way to discuss and decide on specific and timely matters as well as on issues requiring documents or complex evaluations". More details on the appointment procedure should be addressed at regulatory level (Article 9.2). Forming a sort of people's committee, these bodies are open to everyone requesting participation. The prytanies submit their proposals to the Provincial Parliament or Government. If these bodies fail to completely process a proposal within 60 days, the prytanies may propose a vote of no confidence under Article 7 of the Provincial Electoral Law (Article 13 of the Bill).

32. With respect to the fact that the prytanies may deal with any kind of subject matter, and regarding their small size and their members not being democratically elected, the competence to propose a vote of no confidence – which leads to the resignation of the Provincial Government and the dissolution of the Provincial Parliament –[16] seems clearly out of proportion, undermining the principle of separation of powers.

33. Other problematic issues could be the following: the lack of definition of the goals of the prytanies (they can be used for different objectives as proposals for legislation, supervision of political authorities or evaluation of the policies); the public hearing of any person just submitting a request; the establishment of the list for the appointment of prytanies (Article 10.1 is not very explicit on this point); the rule barring persons acquitted thanks to a statute of limitation from being inscribed in the list of prytans (Article 10.5). The "request for selection" (Article 12.5) should also be defined more precisely.

C. Consultations (Article 14)

34. According to **Article 14** of the Bill, the Provincial Council and Government, before passing laws, regulations and general administrative acts, shall "promote" (promuovono") consultations with the persons concerned. It should be clarified whether consultation is compulsory, and how the "persons concerned" ("interessati") are defined. Terms and outcomes are summarised in the reports accompanying the acts.

35. The explanatory memorandum makes it clear that the proposal is inspired by the Swiss Federal Act on the Consultation Procedure,[17] which finds its basis in Article 147 of the Swiss Constitution. In Switzerland, next to initiative and referendum, consultation is another tool to integrate the people in the legislative process. The consultation procedure aims at enabling the cantons, political parties and interested groups and organisations but also individuals to participate in the decision-making process of the Confederation, and is intended to provide information on material accuracy, feasibility and public acceptance of a federal project. Consultation is an important sequence of the legislation process; it gives the interested parties the possibility to intervene at an early stage of the law-making process, to express their views and to defend their interests. For the authorities, it is a means to "feel the pulse" and to judge the prospects of a successful adoption of the law.[18]

36. However, consultation should be regulated in a way that does not endanger the principle of separation of powers and hinder good administration by imposing on the authorities the duty to submit each and every act to a consultation procedure. For instance, the Swiss consultation process is not applicable to all kinds of parliamentary or governmental acts, but only takes place when amendments to the Constitution, provisions of federal laws and

[17] Consultation Procedure Act, CPA, SR 172.061.
[18] See also OECD Reviews of Regulatory Reform: Switzerland (2006), at p 30.

international law agreements subject to referendum or affecting essential cantonal interests are drafted.[19] For other projects, a consultation procedure is carried out only if the project is of major political, financial, economic, ecological, social or cultural significance or if its enforcement will to a substantial extent be the responsibility of bodies outside the Federal Administration[20]. Article 14 of the Bill should be redrafted so as to better define the scope of the obligation to promote consultation.

D. Public debate (Articles 15-18)

37. The Bill provides for more detailed regulations on the "public debate". The explanatory memorandum outlines that public debate is "a special form of consultation that is held for works of major relevance upon a specific demand from the public bodies concerned or from other interested bodies, citizens included". Other Italian regions have regulated such a participative institution: Tuscany passed a new and more complete law on the issue in 2013 (Regional Law n. 46 of 2013) after the application and evaluation of the former law approved six years before.

38. With a view to its aims – involving citizens and assuring accurate information on relevant public works – the Bill is in accordance with relevant international standards, notably the UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) to which Italy is a party.

39. The following questions should however be answered either in the law or in secondary legislation:

- Who decides about what is "of major social, economic, territorial or environmental impact" (**Article 15**) or "works or interventions of major … impact"?
- The Commission for participation establishes a maximum duration for the debate (not exceeding 6 months; **Article 17**). Should there also be a minimum period for the duration?
- **Article 18** deals with "the body responsible for implementing the work or intervention". Is it always clear which body this is?

V. Part III - Citizens' Bill

40. Part III of the Bill deals with the citizen's Bill, the details being outlined in **Articles 19-22**. The present legislation already provides for citizens' bills; the major innovations are as follows:

- Instead of the President of the Council, the Commission for participation shall *evaluate the admissibility* of the bills and the regularity of the signatures (**Article 20.2 and 20.5**), thus ensuring in theory[21] a more independent scrutiny.

- The Bill introduces some changes in the grounds for *inadmissibility* of a citizens' bill. According to the Code of Good Practice,[22] "texts submitted to a referendum must comply with all superior law", as under the principle of the rule of law, the electorate is not exempt from compliance with the law.[23] A citizens' bill on provincial laws, which may be eventually submitted to referendum (Article 20.6), must therefore be in accordance with the Italian Constitution and legislation, the Special Statute for Trentino-Alto Adige/Südtirol, as well as with international law and not least with the Council of Europe's Statutory Principles (democracy, human rights and the rule of

[19] See Article 3 paragraph 1 CPA.
[20] See Article 3 paragraph 3 CPA.
[21] See above par. 19.
[22] III.3.
[23] Code of Good Practice, explanatory memorandum, par. 32.

law).[24] **Article 20** of the Bill is insufficient, as a citizens' bill shall be declared inadmissible only when in conflict with the norms listed in Article 20.2.a-e of the Bill.

Subject matters excluded from a citizens' bill disappear in the Bill. For instance, in the current 2003 law budget and taxation are excluded matters. From a comparative perspective, it can be noted that laws on citizens' bills often feature this kind of exclusions, for example in Spain. However, this is not the case in Italy at national level (Article 71 of the Constitution) or in the neighbouring province of Bolzano (provincial Law 18 November 2005, n. 11, article 4). However in all these cases the citizens' bills are not linked with the popular initiative.

- A *public hearing* may take place if it is requested by the proponents. They may require the participation on such public hearing of the members of the Council and the government (**Article 21**). The public hearing promotes more intensive public debate on the bill with the participation of the population interested in the bill.

- *A popular initiative as the last step or conclusion of a citizens' bill.* There are two hypotheses in the Bill: 1) If the contents of a citizens' bill have been distorted by the Council ("is approved…with substantial changes"), a popular initiative "may" be demanded by the proponents (**Article 22**), leaving the last decision to the people. The – difficult - decision about the meaning of substantial changes belongs to the Commission for participation. 2). It is also unclear whether the rejection of the bill by the Assembly would amount to "substantial changes" – if not, it seems that the rejection would be final. On the contrary, when the initiative has not been passed by the Council ("fails to approve or reject") in the 14 months following the introduction of the bill, the citizens' bill "is" mandatory (**Article 20.6**).

41. The Venice Commission recommends reconsidering Article 22, for the following reasons: (a) while "sanctioning" the inaction of the Council with a referendum is *per se* not problematic, deferring the vote to the people when the Council makes amendments to the bill distorts the nature of the instrument, and is furthermore redundant with the popular initiative;[25] (b) the "transformation" of a citizen's bill into a popular initiative is also problematic *per se* because it allows the initiators to turn around the formal requirements (number of signatures) as well as the substantive requirements for the popular initiative. At the very least, Article 22 should be clarified and made more coherent.

VI. Part IV – Referendums

A. The key reform proposals

42. Chapter IV of the Bill enlarges the scope of the popular right to decide by referendums, facilitates its exercise, and reinforces its legal consequences. These are the key points:

- The Bill does not in fact introduce any new kind of referendum. The advisory referendum, popular initiative and abrogative referendum are already foreseen in Article 47.2 of the Special Statute, and Article 47.5 directly makes provision for confirmatory referendums on statutory laws in the sense of Art. 2 of the Special Statute (laws on the institutions subject to special adoption procedures). More details are available in the Referendum Law.

[24] See Code of God Practice, explanatory memorandum, par. 33.
[25] Cf. CDL-AD(2008)035, par. 81

- The scope of these four types of referendums would however be greatly enlarged.

    - As the law stands, confirmatory referendums can be requested only for statutory laws (article 47.5 of the Special Statute), abrogative referendums can only concern ordinary laws subject to exceptions – e.g. fiscal laws as in Article 75 of the Constitution - and Statutory laws themselves (see Article 18.1-2 Referendum Law - RL), and a popular initiative can concern any issue having a provincial dimension but again with exceptions – e.g. taxes (see Article 1 and 2 RL). Only advisory referendums can be asked for any question having provincial relevance without limitations, possibly because of their weak legal effects and of the fact that their initiative is reserved to public authorities (see Article 17 RL).
    - Under the Bill, it would become possible to request confirmatory and abrogative referendums for all provincial laws, regulations and administrative acts or parts thereof (subject only, for the latter category, to the limitations of Article 23.2, see below), while popular initiative and advisory referendum could be requested for any question which might be covered by such acts, with no exclusions whatsoever as to subject-matter (see Article 23 combined with Articles 34 and 40).

- The Bill also intervenes to alter the legal effects of some categories of referendums:

    - The main effect of abrogative and confirmatory referendums – roughly corresponding to the abrogative referendums of the Italian Constitution and the optional referendums of the Swiss Constitution – would remain unchanged, but
    - Popular initiatives) would be profoundly altered, being transformed from something akin to the Swiss popular initiative "in general terms" (see Article 16 RL) to a form closely resembling a Swiss popular initiative on specific drafts (see Articles 40 and 41(5) of the Bill), and
    - Advisory referendums, whose effects are currently left undefined in Article 17 RL contrary to paragraph III.8 of the Code of Good Practice on Referendums, would place the political authorities under an obligation to publicly declare how they intend to follow-up (Article 37); furthermore, every administrative activity in the area subject to the question put to the referendum would be suspended – save for urgent measures – as from the declaration of admissibility (Article 35.6 of the Bill, apparently derived from Article 7.6 RL which however concerns popular initiatives in their present form).

- The right to launch a referendum would be widened (voter initiative for advisory referendum) or facilitated (longer deadlines for popular initiative and abrogative referendum).

- Importantly, the turnout quorum currently applicable to popular initiative, advisory and abrogative referendums would be abolished (Article 47.5 of the Special Statute already provides that confirmatory referendums on statutory laws are not be subject to any quorum).

B. Scope of Referendums

43. As just noted, the Bill makes it possible to trigger referendums on provincial laws, provincial regulations, as well as on particularly important administrative acts, projects

thereof, or questions potentially falling thereunder. This does not appear to be *per se* objectionable. Article 123 of the Italian Constitution – which is inapplicable here but certainly belongs to the relevant legal context – mentions regional referendums "on laws and administrative measures"; in some Swiss cantons, administrative decisions are subject to optional referendum, and nothing in the Code of Good Practice on Referendums seems to speak against "administrative" referendums. Some moderation is nonetheless advisable, lest direct democratic procedures become a trivial matter and decisions requiring specific expertise (or more importantly impartiality and due process) be taken by popular majority. Article 23.2 commendably attempts to limit "administrative" referendums to decisions having some political importance, but further reflection on the issue might be beneficial. In examining this point, Article 54 of the Special Statute – attributing to the provincial executive the main competence on all such matters – would also have to be taken into account. Referendums on issues in the competence of the executive are very uncommon. The fact of subjecting acts of the executive to referendums may also have the undesirable result of muddling the hierarchy of law in the Province, as it may become politically delicate to pass a law indirectly modifying or rendering void an administrative regulation or act that has been approved in a referendum.

44. The inclusion of administrative acts in the scope of referendums can be explained as a reaction to the fact that, generally speaking, law-making powers have been increasingly transferred to the executive branch. However, this (allegedly excessive) transfer of powers to the executive should rather be curbed by reserving important normative acts and even important single decisions to the Provincial Council. Parliamentary laws and decisions would then on their turn be submitted to referendum.

C. Admissibility/Validity criteria

45. The Bill lays down, albeit at times in implicit form, the key formal admissibility criteria recommended by the Code of Good Practice (see para. III.2). "Unity of form" should be guaranteed by the rules on the "object" of each kind of referendum (Articles 34, 38, 40, 42). It seems that Article 34 provides for votes on specifically-worded drafts as well as on "generally-worded proposals"; Articles 34 and 38 should however be made clearer. "Unity of hierarchical level" could also be expressed more clearly, given that referendums are designed to cover both laws and regulations. "Unity of content" is implied by Article 25.4.

46. The key problem is the absence of substantive criteria on the validity/admissibility of referendums. According to paragraph III.3 of the Code of Good Practice, "text(s) submitted to a referendum must comply with all superior law". The same requirement flows from Article 47.2 of the Special Statute, which appears to require that statutory laws ensure respect for all superior law. Whereas the Bill provides for some limits for citizens' bills[26], it is silent on referendums and popular initiatives. Article 25.5 specifically establishes that a referendum can be declared inadmissible exclusively when it is contrary to the provisions of the Bill itself. If the Bill is to be in line with the European Constitutional Heritage, a clear validity condition relating to the full compliance of texts submitted to referendum to all superior law is indispensable for the popular initiative. Such a condition is recommended for advisory referendums, although here the problem is less acute in light of the authorities' responsibility in the final adoption of any legal text. The issue does not arise in the same terms for confirmatory and abrogative referendums, but they too should not lead to a situation contrary to superior legislation.

47. Moreover, legislation should not only address the yardstick against which the validity of the text has to examined, but also other aspects, such as the competent authority, the time and the

[26] See above par. 38.

effects of the declaration of invalidity. The scrutinising body could be a court, the Provincial Council, a special parliamentary commission, or the commission foreseen in Article 3. The suitable point in time would be before the collection of the signatures. As to the effects of the declaration of invalidity, the Code of Good Practice on Referendums states that "texts that contradict the requirement [on procedural and substantive validity] should not be put to the popular vote".[27]

D. Abolition of the quorum and number of signatures to be collected

48. A third set of issues concerns the abolition of the turn-out quorums, and the thresholds for the collection of signatures. A 50 % turn-out quorum is laid down in the current legislation. The Bill *abolishes the turn-out quorum of 50%* of the citizens for the validity of the affirmative votes cast ("…the proposal receiving the majority of votes is approved", Article 41.4). The option of the Bill is not only coherent with the regulation of the referendums in the same Bill; it is also in accordance with the recommendations of the Venice Commission, which deem it "advisable" not to provide for turn-out quorums or for approval quorums.[28] Turn-out quorums have at least two undesirable effects: first, abstentions are assimilated to no-votes, and secondly, votes cast for a proposal which ultimately does not reach the quorum will be futile. Opponents will be tempted to encourage abstention, which is not healthy for democracy.[29] Approval quorums risk "involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold".[30] In this respect, it may be noted that, contrary to the central state,[31] other regions in Italy have reduced the quorum required (however without eliminating it). [32]

49. The abolition of any voter turnout requirement may be to some extent *counterbalanced* by a higher number of signatures required. A high number of signatures may indicate a broad popular support. However, it does not guarantee that support because persons might sign because they are convinced that the matter is controversial and should be decided by the people (in whatever sense).

50. Concerning the number of signatures required to launch a referendum, the key reference number seems to be that of 8'000 voters – both in the Referendum Law in force (Article 8 and 18) and in the Bill (Article 39.2: confirmatory referendum; Article 41.1: popular initiative; Article 43: abrogative referendum). That is – as things stand now, counting 416'000 electors in the Province – slightly less than the threshold of 1/50 (2%) of the electorate indicated in Article 47.5 of the Special Statute for the statutory laws. The advisory referendum only requires 2.500 signatures, like the citizens' bill.

51. It would be recommendable to align the text of the Bill to that of Article 47 of the Special Statute (2% of the electorate), and to leave it to a subordinate administrative Act to periodically translate that into a minimum number of signatures. A lower number of signatures for ordinary legislation than for statutory legislation could however be envisaged.

52. The alignment with the thresholds set by the Special Statute is indeed mandatory when it comes to defining the number of signatures necessary to launch a confirmatory referendum on Statutory laws – a matter concurrently regulated by the Bill and (the superior) Article 47 (para. 5 and 6) the Special Statute.

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[27] CDL-AD(2007)008rev, III.3.
[28] Code of Good Practice on Referendums (CDL-AD(2007)008rev), III.7.
[29] CDL-AD(2007)008rev, par. 51.
[30] CDL-AD(2007)008rev, par. 51, III.7.b.
[31] Article 71 of the Constitution.
[32] The abolition of the quorum does not seem to go against the Italian Constitution, see below ch. IX.

E. Further issues on referendums

Section I – General provisions

53. The Bill seems to devote too little attention to its impact on the smooth functioning of the Provincial institutions. Suspension of all administrative acts pending an advisory referendum – save only for urgent measures – also appears out of all proportion (**Article 35.2**; the provision originates from the current Article 7.6 RL, applicable to popular initiatives in their present form). The problem is exacerbated by the ease with which such a referendum could be launched (**Article 35.1** of the Bill) and by the fact that administrative paralysis could prolong itself for weeks or months (Article 31). If the intended goal is to avoid that the referendum be undermined by unilateral acts of the administration, the clause should be drafted accordingly. In the same vein, the proposal to do away with the current provision imposing a "cool-off" period after the rejection of a referendum (see e.g. Article 2.1.b and Article 18.13 RL) could be reconsidered, since recourse to referendum would be easier and more frequent should the Bill be approved.

54. The coordination between Article 23 and the other provisions of the Bill delimiting the scope of the various kinds of referendums is also not entirely clear.

55. Article 29 – Transparency. Funding is only regulated through a disclosure obligation. A prohibition of individual funding above a financial limit could be envisaged. It is presumed that the authority responsible for sanctions is established by the law of 24 November 1981, n. 689.

56. Article 30 – Information. According to the Code of Good Practice,[33] it is advisable that the authorities prepare an explanatory report giving 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. Article 30 should be considered as implementing this recommendation.

57. Article 33 – Result of the referendum. It might be advisable to regulate when the text submitted to referendum shall enter into force.

Section II – Advisory referendum

58. The instrument is foreseen in Article 17 RL, but it is a fundamental question whether advisory referendums are appropriate at all. Due to their purely advisory nature, they may backfire and create more discontent if they are not honoured by the law-making authorities. This may waste the energy of the citizens, and – most importantly – serve as a pretext for the lawmaker to shove off responsibility, and in any case blur the political responsibilities.

59. The Bill is an improvement vis-à-vis the current Referendum Law in the way it sets out the legal effects of the various types of referendums, and this is commendable in light of paragraph III.8 of the Code of Good Practice.

60. Article 34 – Subject matter. The commission may rephrase the question. It could be useful to say to which extent.

61. Article 35 – Requirements. An advisory referendum "may" be held at the request of, inter alia, 5000 citizens, one third of the members of the Provincial Council, the provincial Government or one of its members. Does it mean that the holding of the referendum is not compulsory? If it is, one member of the Government would have the same right as 5.000 citizens or one third of the legislative body, and break the unity of governmental decisions.

[33] CDL-AD(2007)008rev, I.3.1.d.

62. The combination of paragraphs 3 and 4 could be clarified and/or reconsidered: a referendum on matters concerning only a part of the province is expressly envisaged, but other (non concerned) municipalities may participate in the voting.
Article 36 – The advisory referendum with multiple choice is an unusual and complex provision. The unity of content between the various proposals should be ensured, in order to avoid any falsification of the voters' intentions.
Article 37 – Concerning the referendum follow-up procedure, the Bill is unclear on who is charged of announcing the result of the referendum.

Section III – Confirmatory referendum

63. Article 38 – Subject matter. The Bill provides that confirmatory referendums are possible on laws, regulations and administrative acts, but also on their individual provisions. This could lead to some incoherence in the legislation – which the electorate would be allowed to amend through the selective abrogation of texts that they have never seen applied – or an excessive numbers of questions put to the electorate on the same piece of legislation. It is also unclear how a confirmatory referendum can concern the "date and the number of the Official Bulletin [where a law was published]" and such other "details". The issue of referendums on matters falling under the competence of the executive has already been addressed above.

64. Article 39 – Requirements of the referendum and follow-up procedure. This provision makes exceptions to the suspension of laws pending a confirmatory referendum – in the Swiss tradition of the *lois urgentes* – but makes no reservation of this kind in favour of urgent administrative acts, which can nonetheless be just as urgent, as expressly mentioned in Article 54.7 of the Special Statute.

65. The time frame for allowing the collection of signatures for the confirmatory and advisory referendums is short (90 days), in contrast to twice as long (180 days) for the popular initiative and the abrogative referendum. This makes sense, because the confirmatory referendum relates to a law which has just been discussed in the Provincial Council and has a suspensive effect.

Section V – Abrogative referendum

66. Should the abrogative referendum be allowed as soon as the law is in force, this might create instability, and would not allow testing the law. This is still truer if a (suspensive) confirmatory referendum on the same provisions is possible, as provided for in the Bill.

VII. Part V - The amendments to the provincial electoral law

67. In part V of the Bill, there are some proposals for amendment as well as the addition of some articles to the Referendum Law (Articles 7.1, 14.2 and 21 bis): first, the introduction of a motion of no confidence against the President of the Province or one or more *assessori* (members of the Executive body) by 5000 voters in accordance with the procedures set out for the citizens' bills (article 44); second, the introduction of a limitation to the eligibility to the office of President of the Province or reappointment as *assessori* if they have performed these duties for more than nine years, and the eligibility as members of the Council – *consiglieri* - if they have performed only these duties for more than fourteen years or the duties of *consiglieri*, *assessori* or President of the Province for more than nine years in total (article 45); and 3) the introduction of more transparency in the financial position of the members of the Council, as well as the sanctioning of the violation of this obligation (article 46).

A. Introduction of a motion of no confidence against de President of the Province or one or more assessors by citizens' bill (Article 44)

68. The motion of no confidence is (here) a specific instrument of direct democracy relating to persons, as opposed to issues. In principle, there are two models for a vote of no confidence: (1) "Negative", i.e. without obligation to re-elect someone else. This is the path chosen in Article 44 of the Bill as it happens in Italy. (2) "positive" or "constructive", i.e. only when tied to the election of an alternative candidate ("konstruktives Mißtrauensvotum", as e.g. under the German Constitution for the Federal Chancellor under Article 67 Basic Law or Spanish Constitution under Article 113).

69. According to Article 7 of the Provincial Electoral Law, currently only 7 councillors (*consiglieri*) have the initiative for this kind of motion against the members of the provincial Executive. The Bill intends to add the citizens' bill to the former one. It seems that the rest of Article 7 of the law in force would also apply in this new case: a) an overall majority of the Council is required to pass the motion, and b) the effects of the motion if it is passed: in the case of a motion against the President, the consequence is new elections to the Council and to the President of the Province (according to the principle introduced in the Italian Constitution in 1999 *simul stabunt, simul cadent*), and in the case of a motion against one or more *assessori* he, she or they should resign.

70. Article 44 does not attribute to the population the capacity to automatically terminate the mandate of the President or the members of the executive. It introduces a form of indirect recall in the hands of the legislative (which will be dissolved in case it recalls the President).

71. There is however an ambiguity in the Explanatory Memorandum, where the drafters talk about the recall in other systems – some States of the USA and Cantons of Switzerland - and about the possibility for the citizens to exercise control over the Executive during the whole mandate. One interpretation could be that the Bill is introducing such instrument of control. The fact that Article 44 of the Bill excludes any (direct) recall should be made clear.

72. A direct recall by the people would arguably go against the prohibition of the imperative mandate in Article 67.2 of Italian Constitution. It may be reminded that the Venice Commission considers the recall as "obsolete" in Europe[34] and that the prohibition of imperative mandate "or another form of politically depriving representatives of their mandates must prevail as a cornerstone of European democratic constitutionalism".[35]

[34] Report on the Imperative Mandate and Similar Practices (CDL-AD (2009) 027), par. 16.
[35] *Ibid.*, par. 39.

B. Introduction of a temporal limitation to the mandate of the President of the Province, the assessors and the councillors (Article 45)

73. As a preliminary comment, it is important to underline that the provisions of **Article 45** are different in nature and content from the other parts of the Bill.

74. The Bill introduces time limits for those holding a mandate as members of the Provincial Council (fourteen years, or nine years if combined with other functions), as Councillors (nine years) and as President of the Province (nine years).

75. Restriction in tenure touches upon the citizen's voting rights, the right to take part in periodic elections entailing both the right to vote freely and to stand for election. The European Court of Human Rights stresses the wide margin of appreciation the contracting states enjoy in this respect. The test for the compatibility of restrictions on the right to vote is basically limited to two criteria, namely "whether there has been arbitrariness or a lack of proportionality" and "whether the restriction has interfered with the free expression of the opinion of the people".[36] The margin of appreciation is even wider when passive electoral rights are concerned.[37] In a more general way, the UN Human Rights Committee holds in its General Comment on Article 25 ICCPR that conditions which apply to the exercise of the rights protected under Article 25 ICCPR should be based on objective and reasonable criteria.[38]

76. The limitation of the mandate of the representative authorities and executive ones are not a typical characteristic of the parliamentary systems, but it does not mean it is contrary to the constitutional system. Recently some laws have introduced this limitation at regional level, in Italy (Veneto, Law n. 5/2012, article 6.2) as well as in Spain (Extremadura, Castilla-La Mancha). The rationale is, according to the Explanatory Memorandum, "to avoid that politics become a profession". This is a legitimate goal – albeit debatable in political terms, as it is up to the voters to decide by whom they wish to be represented. It may also be recalled that the Venice Commission stated that "prohibiting re-election of parliamentarians involves the risk of a legislative branch of power dominated by inexperienced politicians. This may lead to increase the imbalance in favour of the executive".[39]

77. What is disputable is the time limit of nine (fourteen) years. The Provincial Council and the President of the Province are elected for 5 years (Article 48 Special Statute). Therefore, it seems more accurate to limit the mandate to 10 (15) years or two terms in office. This is, for instance, the option adopted in the abovementioned Autonomous Communities in Spain.

VIII. Further items which might deserve regulation

78. Furthermore, it would be suitable for the law to deal (more in detail) with the following issues, which are not - or only partially - addressed in the present legislation:

- General (technical) principles of citizens' participation (such as the requirement to use official ballot forms and to vote at the polling station), on the validity of votes, on the protocols etc. could be introduced into the law.[40] A reference could also be made to the general legislation on elections.

[36] ECtHR (Grand Chamber), Zdanoka v. Latvia, No 58278/00 (2006) paragraph 115.
[37] ECtHR (Grand Chamber), Zdanoka v. Latvia, No 58278/00 (2006) paragraphs 106 and 115.
[38] General Comment No 25 (1996), paragraph 4.
[39] Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions, CDL-AD(2012)027rev, par. 71.
[40] The issue of the representation of people who are unable to write could also be addressed.

- A rule on withdrawal of the referendum could be envisaged.

- If minority languages can be used, this should be stated expressly.

- The reference to the applicability of the criminal code is rather short. The law itself could mention which fraudulent acts are criminalised.

- Rules on the "parallelism of procedures"[41] are missing. It would be suitable for a law adopted through a referendum to be rescinded only in the same procedure (abrogative referendum) within a certain time frame, so as not to circumvent the decision taken in a direct-democratic procedure.

- Judicial review or other forms of effective review against decisions taken by various governmental bodies in the context of the application of the law are not regulated. If this is governed by a different law (e.g. the law on administrative procedure or tribunals), references might be included in this law.[42]

IX. Conclusion

79. The Bill extends the institutions both of direct democracy and of participatory democracy in the province of Trento.

80. There is no international (or European) standard on the extent which should be given (or not) to instruments of direct democracy at national, regional or under-regional level. Nor is there a standard imposing their mere existence. What can be said is that there is a trend to extend them, especially at the infra-national level, which has always been a laboratory for innovations in the field of democracy. The same is true for the instruments of participatory democracy. These instruments of direct and participatory democracy should be seen as complementing representative democracy. "Parliamentary democracy, supported by free and fair elections ensuring representativeness, (political) pluralism, and the equality of citizens", is the core, but not the only aspect, of the democratic process.[43]

81. In order to maximise the beneficial effects expected of the Bill, and to reduce any problems that might derive therefrom, the Venice Commission underscores the following points:

- The obligation for the authorities to assist drafters of citizens' bills and referendums (Art. 4) is not well-delimited and might give rise to unintended negative consequences.
- Petitions and the obligation for the Provincial Council to address them are too extensively defined.
- The institution of "prytanies" is unusual. It is problematic to provide them with supervisory powers with respect to the provincial authorities, including with the right to introduce a motion of no confidence against the President of the Province and the members of the government.
- The possibility for the citizens' bill to be transformed into a popular initiative without observing the requisites for the latter may muddle the nature of the instruments and lead to confusion.
- The conformity of all citizens' bills, requests for referendums and popular initiatives with all superior law must be ensured and should be examined before they are submitted to the vote.

[41] Code of Good Practice on Referendums, III.5.
[42] Cf. Code of Good Practice, II.3.3 (an effective system of appeals).
[43] Cf. CDL-AD(2013)011, par. 40, with references.

- The extension of initiatives and referendums to administrative acts in the competence of the executive is quite unusual and could give raise to several problems, including the trivialisation of direct democracy procedures. Further risks arise also from the possibility to submit specific provisions of a provincial law, a provincial regulation or an administrative act to a confirmative referendum.

82. More generally, it would appear advisable to carefully consider the impact that the Bill could have on the smooth functioning of the provincial institutions. It extends the cases in which the political responsibility of the elected bodies can be put at stake and, at the same time, greatly develops the instruments of direct democracy, which exist in entities where the government is not responsible before Parliament like Swiss cantons or states of the United States. This should be considered in order to avoid any negative impact on the coherence and the functioning of the political system. More generally, it would appear advisable to carefully consider the impact that the Bill could have on the smooth functioning and for the government of the Province.

83. The Venice Commission stays at the disposal of the authorities of the Province of Trento to assist them when elaborating further legislation in the field.