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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

**DRAFT REPORT
ON PARLIAMENTARY ASSEMBLY RECOMMENDATION 1704 (2005)
ON REFERENDUMS : TOWARDS GOOD PRACTICES IN EUROPE**

on the basis of contributions by

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I. Introduction

1. *On 29 April 2005, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1704 (2005) entitled: Referendums: towards good practices in Europe.*
2. *At their 926th meeting (11 May 2005), the Ministers' Deputies agreed to communicate this recommendation to the European Commission for Democracy through Law (Venice Commission), for information and possible comments by 30 September 2005.*
3. *This draft opinion is based on comments by MM François Luchaire (member of the Commission, Andorra), Pieter van Dijk (member, Netherlands) and Giorgio Malinverni (member, Switzerland).*

II. Introductory remarks

4. The Recommendation of the Parliamentary Assembly is very appropriate and useful. It supports the activities in the field of referendums already undertaken by the Venice Commission.
5. It must however be underlined that the Recommendation is formulated in a somewhat one-sided way. It draws the attention to the advantages of referendums only, without even paying lip service to the possible side effects, or at the very least to the different views on the subject in the member States.
6. The Assembly is in favour of the formulation of good practices on referendums, and the elaboration of guidelines addressed to the member States (see § 9 of the Recommendation). These may provide for some of the answers. However, that does not take away the necessity for the Assembly to formulate its resolutions with the highest possible precision.

III. Specific remarks on the text of the Recommendation

7. Ad § 1: The wording of § 1 of the Recommendation suggests that holding referendums is now part of the democratic legislation and decision-making process in all the member States of the Council of Europe; in some of them as a long-standing tradition; in the others as a more recent achievement. However, the picture is a more complex one. There are also member States, such as the Netherlands, where referendums may take place at the regional and local levels only and not at the national level, unless a specific law provides for a specific referendum (as was the case for the Netherlands in connection with the approval of the Constitutional Treaty of the European Union).
8. Moreover, the implication in § 1 of the Recommendation that new developments in the practice of referendums are in all the States concerned "coinciding with their passage to pluralist and representative democracies" would seem to suggest a connection that is not necessarily always there.
9. Ad § 2: The emphasis on participatory democracy is a somewhat one-sided approach towards democracy. There is also the view that referendums, especially if they have a binding and not only a consultative character, may limit the powers of Parliament.

10. In this respect, the wording of § 5 is more clear. However, here again, the wording is rather one-sided since it only sums up the advantages and not the possible side-effects on accountability of representative institutions.

11. Ad § 4: It is obvious that the wording of § 4 has to be amended, and indeed, moderated, in view of the reactions in several member States of the European Union to the outcome of the referendums concerning the Constitutional Treaty in France and the Netherlands. Some States have already indicated that the planned referendum will, at the very least, be suspended.

12. Ad § 6: It should be pointed out that neither the recommendations of the Project "Making democratic institutions work" nor those included in the Green Paper necessarily imply the view that referendums should be introduced in all member States of the Council of Europe, at all levels of legislation and decision-making, with always a binding character. The words "In this context" create the wrong impression in that respect.

13. Ad § 7: More or less the same applies to the words "the recourse to referendums should be encouraged as a way to reinforce the democratic process". Such recourse will not necessarily reinforce the democratic process in all respects and on the whole line. Therefore, the statement should be formulated with some qualification.

14. Ad § 5 and 8: In the light of the above comments, it is important to avoid that referendums are used to undermine the legitimacy of representative institutions. Does that mean that the instrument of referendums has to be controlled by those representative institutions, at least to a certain extent? Does it mean that occasions where legislative or binding referendums may be held, should be regulated exhaustively?

15. The possible abuses that cause representative institutions to be undermined include above all the misuse of referendums to increase the power of the executive vis-à-vis parliament, either directly or indirectly. The power of the executive is increased directly where the text put to a referendum shifts the balance between the legislature and the executive in favour of the latter; it is increased indirectly where the executive circumvents parliament by referring directly to the people, calls a referendum on parliamentary decisions which are not to its liking or uses this instrument to enhance its legitimacy.

16. The risk that the instrument of referendums may be used to circumvent the principle of the rule of law is also not very clear. Does that imply that the use of referendums and of their outcomes has to be subject to judicial control without any restriction? An exception could be foreseen in the case of constituent referendums.

17. Ad § 10: A reference could be added to the already existing documents of the Venice Commission on referendums (the Guidelines for Constitutional Referendums at National Level, CDL-INF(2001)010), the ongoing work of the Commission in this field, as well as the Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev).

18. Ad § 11 and recommendation vi.c: Usually the recommendation to extend the right to vote in local elections to immigrants who are legal residents contains the restriction that those immigrants must have had residency in the country for a certain period. The Assembly could also have made some kind of restriction here, which would have brought the text in conformity with that of recommendations ii. and vi.c. under § 13. An exception could be made where the number of foreign residents exceeds a certain percentage of that of nationals. The

recommendation refers only to participation by foreign nationals in local referendums. Participation by foreign nationals in national referendums might raise an issue of national sovereignty.

19. Ad § 12 and recommendation vi.d: All voters must be provided with accurate, objective information. Publication in an official gazette is not sufficient. Each voter must receive the whole of the text submitted for his or her approval, together with an explanatory report setting out not only the viewpoint of the authorities, but also any opposing viewpoints, in a balanced way. Provision should be made for this report to be vetted by an independent body (cf CDL-INF(2001)010, point II.E.2¹).

20. In addition, supporters and opponents of the proposal must have equal access to public facilities, such as election hoardings (cf CDL-INF(2001)010, point II.G).

21. Balanced coverage must be guaranteed to the proposal's supporters and opponents in the public media (cf. CDL-INF(2001)010, point II.H²).

22. It might be recommended that the private media give an objective account of the opposing viewpoints before deciding in favour of one of them.

23. Ad recommendation i.a.: The words "national legal framework" seem to indicate that in a federal State the legal regulation of referendums have to be the same for all constitutive states. The text should be qualified in that respect, for example by dropping the word "national".

24. Ad recommendation i.b.: The words "should always be possible" would seem to be too "sweeping". Could it be assumed that what is meant is: "should be possible in all cases where a referendum is provided for"? It should be borne in mind that, in some legal systems, referendums may only be initiated by parliament or the president.

25. There should also be reference to questions such as what will be the legal effects of the results of referendums, what are the minimum requirements for their being valid, and what are the consequences of invalid referendums.

26. Ad recommendation vi.d.: The reference to referendums in connection with the EU Constitutional Treaty has become, if not obsolete, at least misplaced.

27. Ad recommendation vii: Is there a precedent of the Council of Europe giving a recommendation to the European Union, which as organisation is not part of the Council of Europe? There is no problem as long as the institutions of the EU see no problem.

¹ "The authorities must provide objective information. This implies that the text submitted to referendum and an explanatory report should be made available to electors sufficiently in advance, as follows:

- they must be published in an official gazette at least one month before the vote;
- they must be sent directly to citizens and be received at least two weeks before the ballot;
- the explanatory report must give a balanced presentation not only of the executive and legislative authorities' viewpoint but also the opposing one."

² Public radio and television broadcasts on the electoral campaign must allocate equal amounts of time to programmes which support or oppose the proposal being voted on.

Balanced coverage must be guaranteed to the proposal's supporters and opponents in other public mass media broadcasts, especially news broadcasts.

Financial or other conditions for radio and television advertising must be the same for the proposal's supporters and opponents ..."

IV. Further recommendations concerning referendums

28. The text of the recommendation would need to be expanded. The Venice Commission will draw up additional guidelines once it has completed its study on referendums. Although it is not possible to set out complete recommendations at this stage, the following points can already be stressed:

29. Texts put to a referendum must comply with the principle of unity of content. They may comprise several questions, but voters should not be asked to give an overall answer to several unrelated provisions (cf CDL-INF(2001)010, point II.C).

30. The question put to the vote must be clear (not obscure or unambiguous). It must not be misleading. Furthermore, it must not be worded in such a way as to suggest an answer.

31. Legislative texts accepted by referendum must be consistent with the Constitution and with higher-ranking law in general. They should be subject to the same judicial controls as other laws.

32. 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.

33. Care should also be taken to ensure that voters actually answer the question asked, instead of expressing an opinion on the country's political and social situation. Major importance should therefore be attached to debates on the referendum question. However, it is to be feared that this will not be enough to eliminate the danger.

34. The setting of a quorum for the vote to be valid gives the majority of voters the impression that if that minimum is not achieved, their opinion is not taken into account. Moreover, in the case of a decision-making referendum, this blocks the whole process. It is therefore better to dispense with the quorum requirement, because it is difficult to make voting compulsory. If there has to be a quorum, it should be a quorum of approval (acceptance by a minimum percentage of the electorate) rather than a quorum of participation, which encourages opponents to call for a boycott in the hope of defeating the proposal despite being in a minority.

V. Concluding remarks

35. The Venice Commission is ready to support and assist any work by the statutory bodies of the Council of Europe on the question of referendums.

36. The Venice Commission is currently preparing a general study on referendums. On the basis of this study, it will draw up detailed recommendations which will enlarge upon its earlier work, such as the guidelines for constitutional referendums at national level (CDL-INF(2001)010).