Parliamentary **Assembly**
Assemblée parlementaire

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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

For debate in the Standing Committee — see Rule 15 of the Rules of Procedure

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Code of Good Practice on Referendums

Report
Political Affairs Committee
Rapporteur: Mr Luc VAN DEN BRANDE, Belgium, Group of the European People's Party

Summary

In recent years, the recourse to referendums in Council of Europe member states has increased, as well as the public perception of their political impact. While considering referendums as a positive means to enable citizens to participate in the political decision-making process and to bridge the distance between them and the decision-makers, the Assembly has constantly demanded that the Council of Europe, as an Organisation devoted to the promotion and reinforcement of democracy and the rule of law, establish clear and comprehensive guidelines in this field.

The Assembly, therefore, welcomes the adoption of a Code of Good Practice on Referendums by the European Commission for Democracy through Law (Venice Commission) and decides to forward it to national delegations and parliaments so that it can be applied in Council of Europe member states without delay. In addition, reiterating its Recommendation 1704 (2005) on Referendums: towards good practices in Europe, the Assembly asks the Committee of Ministers to adopt a recommendation to member states endorsing the Code of Good Practice on Referendums.

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I. Draft resolution

1. Referendums are an instrument of direct democracy which belong to the European electoral heritage. In recent years, recourse to this instrument in Council of Europe member states has increased, as well as the public perception of its political impact: European citizens have witnessed how the rejection of the European Union Constitutional Treaty in some European Union member states has had political repercussions in others, and has forestalled, for the time being, the continuation of the ratification process; similarly, many Europeans followed closely the referendum which led to the establishment of a new sovereign state: the Republic of Montenegro.

2. While considering referendums as a positive means to enable citizens to participate in the political decision-making process and to bridge the distance between them and the decision-makers, the Assembly has constantly demanded that the Council of Europe, as an Organisation devoted to the promotion and reinforcement of democracy and the rule of law, establish clear and comprehensive guidelines in this field.

3. The Assembly, therefore, welcomes the adoption of a Code of Good Practice on Referendums by the European Commission for Democracy through Law (Venice Commission), which enlarges on the Venice Commission's previous guidelines on constitutional referendums at national level, complements the Council of Europe guidelines on referendums and popular initiatives at local level and is the natural counterpart to the Code of Good Practice in Electoral Matters, adopted in 2003.

4. Considering that the adoption of the Code of Good Practice on Referendums would enable member states to re-evaluate and, if necessary, revise their legislation and practice in this field, and in accordance with the procedure followed for the Code of Good Practice in Electoral Matters, the Assembly decides to forward the Code of good practice to national delegations and parliaments so that it can be applied in Council of Europe member states without delay.

II. Draft recommendation

1. Recalling its Resolution …….. (2007) on the Code of Good Practice on Referendums, the Parliamentary Assembly welcomes the elaboration of a Code of Good Practice on Referendums by the European Commission for Democracy through law (Venice Commission), as a complement to the Venice Commission's pioneering work on the elaboration of a Code of conduct on electoral matters, which was endorsed by the Assembly in Resolution 1320 (2003) and by the Committee of Ministers through a solemn declaration.

2. In the light of the increasing recourse to referendums in Council of Europe member states over the last decades, as well as of the political impact of referendums including in some instances beyond national borders, the Assembly considers the Code of Good Practice on Referendums to be an important and necessary instrument in the Council of Europe's action to reinforce democracy and promote respect of the rule of law.

3. As another outstanding reference piece of work in this field, the Code of Good Practice on Referendums should be given the highest visibility and compliance with its provisions and examples of good practice should be recommended to Council of Europe member states.

4. Reiterating its Recommendation 1704 (2005) on Referendums: towards good practices in Europe, the Assembly therefore asks the Committee of Ministers to adopt a recommendation to member states endorsing the Code of Good Practice on Referendums.

III. Explanatory memorandum, by Mr Van den Brande, rapporteur

I. Introduction

1. They might have detractors and supporters but referendums represent a long-standing political tradition in a number of Council of Europe member states and are part of the European electoral heritage.

2. For several years, the Parliamentary Assembly has taken an interest in this instrument of direct democracy: in Resolution 1121 (1997) on instruments of citizen participation in representative democracy, the Assembly devoted great attention to referendums, highlighting the complementarity between direct and representative democracy. The same approach was adopted by the Assembly in its Recommendation 1704 (2005) on Referendums: towards good practices in Europe, which asked the Committee of Ministers to embark on the elaboration of guidelines and the promotion of good practices in this field.

3. The Committee of Ministers, in response to the latter Recommendation, indicated that, as the Venice Commission was examining this issue, it was premature to respond positively to the Assembly's request and that it would await the results of the Venice Commission's efforts before deciding whether further steps would be necessary.[1]

4. In March 2007, the Venice Commission adopted a Code of Good Practice on Referendums.[2] This document is very thorough and comprehensive and can be an authoritative reference document for Council of Europe member states. As a member of the Council for Democratic Elections, I have followed closely the work leading to the elaboration of the Code. I was therefore pleased that the Political Affairs Committee, after examining it, decided to have it endorsed at the highest level, according to the same procedure followed in 2002 for the Code of Good Practice in Electoral Matters.

II. Origin of the code

5. In response to a request from the Parliamentary Assembly, the Council for Democratic Elections and, subsequently, the Venice Commission adopted the Code of Good Practice in Electoral Matters in 2002. This document was endorsed by the Parliamentary Assembly at its part-session of January 2003[3] and by the Congress of Local and Regional Authorities of the Council of Europe at its Spring session the same year. In a solemn declaration, dated 13 May 2004, the Committee of Ministers recognised *"the importance of the Code of Good Practice in Electoral Matters, which reflects the principles of Europe's electoral heritage, as a reference document for the Council of Europe in this area, and as a basis for possible further development of the legal framework of democratic elections in European countries".*

6. As recourse to referendums has become increasingly common in Europe, a Code of Good Practice specifically devoted to them is an important counterpart to the Code of Good Practice on Electoral Matters. With a view to its elaboration, the Venice Commission drew up a summary report based on replies to a questionnaire on the issue circulated amongst its members ('Referendums in Europe – An analysis of the legal rules in European States') and a background paper on referendums.

7. The Guidelines on the organisation of referendums were adopted by the Council for Democratic Elections at its 18th meeting (Venice, 12 October 2006) and by the Venice Commission at its 68th plenary session (Venice, 13-14 October 2006). These guidelines are accompanied by an explanatory memorandum, which was adopted by the Council for Democratic Elections at its 19th meeting (Venice, 16 December 2006) and by the Venice Commission at its 70th plenary session (Venice, 16-17 March 2007). Together they constitute the Code of Good Practice on Referendums.

III. Structure of the Code

8. The structure of the Code of Good Practice on Referendums mirrors the structure of the Code of good practice in electoral matters:

[1] Reply from the Committee of Ministers adopted at the 945th meeting of the Ministers' Deputies (9th November 2005).
[2] CDL-AD (2007)008
[3] Resolution 1320 (2003)

- the document lists the principles of Europe's electoral heritage applicable to both elections and referendums, such as universal, equal, free, secret and direct suffrage (Part I);
- it analyses the conditions for implementing these principles (including respect for fundamental rights, stability of the law, organisation of the ballot by an impartial body, existence of an effective appeal system), adapting them to the specific features of referendums (Part II);
- its last section focuses on the specific rules applicable to the referendum, such as unity of substance and form, compliance with all superior law and the entire legal order, including procedural rules (Part III).

IV. Some highlights

9. I would like to dwell on a few issues which have been the object of extensive discussion within the Political Affairs Committee, to draw the members' attention to the conclusions reached by the Venice Commission:

a) Freedom of voters to form an opinion

10. In the case of elections, the intervention by the authorities in support of a list or a candidate is unacceptable: their duty of neutrality is absolute. In the case of referendums, the situation is different: the use of public funds for campaigning purposes should be prohibited in order to guarantee equality of opportunity but, to a certain extent, it is legitimate for the authorities at all levels to express their point of view for or against the text put to the vote. The authorities, however, should not abuse their position through excessive and one-sided campaigning and they should provide a certain amount of information in order to enable voters reach an informed opinion. The best practice recommended by the Venice Commission indicates that:

- sufficiently in advance of the vote, the authorities provide voters with an explanatory report setting out not only their point of view or that of persons sharing it, but also the opposing view, in a balanced way; or
- the authorities send voters balanced campaign material from the proposal's supporters and opponents.

b) The issue of the quorum

11. This question is highly divisive. Based on its experience in the area of referendums, the Venice Commission has decided to recommend that Council of Europe member states make no provision for quorums.

12. Its argument is that the existence of a turn-out quorum (minimum percentage) encourages those who oppose the proposal contained in the referendum question to abstain rather than to vote against it. In addition, their absence from the campaign is liable to increase the number of abstentions and thus the likelihood that the quorum will not be reached. Encouraging abstention or the imposition of a minority's view cannot be healthy for democracy.

13. On the other hand, an approval quorum (acceptance by a minimum percentage of registered voters) may also be inconclusive. If a text is approved by a majority of voters without the quorum being reached, the majority will feel that they have been deprived of victory without an adequate reason.

V. The impact of the Code

14. It should be clear that the aim of the Code is not to promote recourse to referendums but contribute to improving member states' legal framework and practice on referendums. This is yet another example of pioneering work from the Venice Commission which can contribute to the reinforcement of democracy and of the rule of law. This is particularly so when one considers the high political impact of referendums, which may often be felt well beyond national borders, as was the case for certain referendums on the EU Constitutional Treaty or the referendum which led to the independence of Montenegro. The high political impact of referendums requires a clear legal framework, in order to reduce all risk of manipulation.

VI. Conclusions and recommendations

15. The Assembly should endorse the Code of Good Practice on Referendums, by recommending that member and observer states comply with its provisions and refer to its examples of good practice.

16. The Assembly should also ask the Committee of Ministers to endorse the Code of Good Practice, through the adoption of a recommendation, as already requested by the Assembly in Recommendation 1704 (2005).

Reporting Committee: Political Affairs Committee.

Reference to Committee: Reference No. 3375 of 01.10.07

Draft resolution and draft recommendation adopted by the Committee on 04.10.07

Members of the Committee **:** Mr Abdülkadir **Ateş** (Chairman), Mr Konstantion **Kosachev** (Vice-Chairman), Mr Zsolt Németh (Vice-Chairman), Mr Giorgi Bokeria (Vice-Chairman), Mr Miloš Aligrudić, Mr Claudio **Azzolini**, Mr Denis Badré (alternate: Mr Laurent **Béteille**), Mr Radu Mircea Berceanu, Mr Andris Bērziņš, Mr Alexandër **Biberaj**, Mrs Gudfinna Bjarnadottir, Ms Raisa Bohatyryova, Mr Pedrag Boškovic, Mr Luc **Van den Brande**, Mr Lorenzo Cesa, M. Muro Chiaruzzi, Ms Elvira Cortajarena, Ms Anna **Čurdová**, Mr Noel Davern, Mr Dumitru Diacov (alternate: Mr Arcadii **Pasecinic**) Mr, Mr Michel **Dreyfus-Schmidt**, Ms Josette **Durrieu**, Mr Joan Albert **Farré Santuré**, Mr Pietro Fassino, Mr Per-Kristian Foss, Ms Doris Frommelt, Mr Jean-Charles Gardetto, Mr Charles Goerens, Mr Andreas **Gross**, Mr Davit **Harutiunyan**, Mr Jean-Pol Henry, Mr Serhiy **Holovaty**, Mr Joachim Hörster, Mrs Sinikka **Hurskainen**, Mr Tadeusz Iwiński, Mr Bakir Izetbegović, Mrs Corien W.A. Jonker, Ms Darja Lavtižar-Bebler, Mr Göran **Lindblad**, Mr Younal Loutfi, Mr Mikhail Margelov, Mr Tomasz Markowski, Mr Dick Marty, Mr Frano Matušić, Mr Murat Mercan, Mr Mircea Mereută, Mr Dragoljub Mićunović, Mr Jean-Claude **Mignon,** Ms Nadezhda Mikhailova, Mr Aydin Mirzazada, Mr João Bosco Mota Amaral, Ms Natalia Narochnitskaya, Mrs Miroslava Nemcova, Mr Grygoriy Nemyrya, Mr Fritz Neugebauer, Mrs Kristina Ojuland, Mr Theodoros Pangalos, Ms Elsa Papadimitriou, Mr Christos Pourgourides, Mr John **Prescott**, Mr Gabino Puche, Mr Lluís Maria **de Puig**, Mr Jeffrey Pullicino Orlando, Mr Andrea **Rigoni,** Lord **Russell-Johnston**, Mr Oliver Sambevski, Mr Ingo Schmitt, Ms Hanne Severinsen (alternate: Mr Per **Kaalund**), Mr Samad Seyidov, Mr Leonid Slutsky, Mr Rainder Steenblock, Mr Zoltán **Szabó**, Baroness Taylor of Bolton (alternate: Lord **Tomlinson**), Mr Mehmet Tekelioğlu, Mr Mihai Tudose, Mr José Vera Jardim, Ms Biruté Vesaité, Mr Björn **Von Sydow**, Mr Harm Evert Waalkens, Mr David **Wilshire**, Mr Wolgang **Wodarg**, Ms Gisela Wurm, Mr Boris **Zala**, Mr Krzysztof Zaremba.

Ex-officio: MM. Mátyás Eörsi, Tiny Kox

N.B. : The names of the members who took part in the meeting are printed in **bold**

Head of the Secretariat : Mr Perin

Secretaries to the Committee: Mrs Nachilo, Mr Chevtchenko, Mrs Sirtori-Milner, Mr Pfaadt