

Parliamentary Assembly Assemblée parlementaire

Parliamentary Assembly
Assemblée parlementaire



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Doc. 10498
8 April 2005

Referendums: towards good practices in Europe

Report
Political Affairs Committee
Rapporteur: Mr Mikko Elo, Finland, Socialist Group

Summary

Referendums represent a long-standing political tradition in a number of Council of Europe member states; in others, the participation of citizens in the decision-making process through referendums is a more recent achievement, coinciding with their passage to pluralist and representative democracies.

Despite differences in historical development, scope, frequency and impact, over the last few years the recourse to referendums in Council of Europe member states as a whole has shown an upwards trend. This trend will continue in the next two years. In fact, the national referendums organised in the context of the ratification of the European Union Constitutional Treaty may be the greatest European popular vote of all times.

The Parliamentary Assembly is convinced of the complementarity between direct and representative democracy: referendums can be a means to reinforce the democratic legitimacy of political decisions, enhance the accountability of representative institutions, increase the openness and transparency of decision-making and stimulate the direct involvement of the electorate in the political process. On the other hand, referendums should not be considered as an alternative to parliamentary democracy and should not be misused to undermine the legitimacy and primacy of parliaments as legislative bodies.

The Council of Europe, in its role as the guardian of democracy, should take the lead in codifying rules on the holding of referendums and promote models of good practice, to ensure that referendums are used as a supplement to representative democracy and avoid any manipulation.

I. Draft recommendation

1. Referendums represent a long-standing political tradition in a number of Council of Europe member states; in others, the participation of citizens in the decision-making process through referendums is a more recent achievement, coinciding with their passage to pluralist and representative democracies.

2. Despite differences in historical development, scope, frequency and impact, in the last years the recourse to referendums in Council of Europe member states as a whole has shown an upwards trend. This is partly due to the high number of referendums that have been held to introduce constitutional changes in eastern European countries since the late eighties. The main explanation for this increase, however, is the organisation of referendums within the European Union integration process: between 1972 and 2003 the citizens of 23 countries expressed their vote on fundamental stages of EU integration in 41 national referendums.

3. This upwards trend will continue in the next two years. In fact, the national referendums organised in the context of the ratification of the EU Constitutional Treaty may be the greatest European popular vote of all times: 250 million people in at least 10 countries will be called to state their agreement or disagreement over the most ambitious project of European integration so far conceived. The political weight of this popular vote will also be unprecedented, as the negative stand of the electorate of one country will be able to affect the ratification of the Treaty in all the others. Likewise, the position of EU members over the membership of a candidate country will be decided, in some cases, by national referendums.

4. Being convinced of the complementarity between direct and representative democracy, the Parliamentary Assembly recommends the use of referendums as a means to reinforce the democratic legitimacy of political decisions, enhance the accountability of representative institutions, increase the openness and transparency of decision-making and stimulate the direct involvement of the electorate in the political process. Complementarity between direct and representative democracy implies that referendums should not be considered as an alternative to parliamentary democracy and should not be misused to undermine the legitimacy and primacy of parliaments as legislative bodies.

5. In this context, the Assembly recalls the activities of the Integrated Project "Making democratic institutions work" and, in particular, the Conference on "The future of democracy in Europe" (Barcelona, 17-19 November 2004) which defined citizen participation as a priority area for the Council of Europe and expressed support for the further development of innovations in the field of direct democracy, notably referendums. In addition, the Green Paper commissioned by the Secretary General of the Council of Europe in the framework of the same project recommends that the Council of Europe draft a handbook on referendums and initiatives.

6. The Assembly fully endorses this three-fold approach. First of all, reiterating the position expressed in its Resolution 1353 (2003) on "Future of democracy: strengthening democratic institutions", the Assembly believes that the recourse to referendums should be encouraged as a way to reinforce the democratic process in Council of Europe member states and bridge the distance between the electorate and the decision-makers.

7. Secondly, bearing in mind that even in democratic states on some occasions referendums have been used to legitimise undemocratic policies, the Assembly agrees that the Council of Europe should promote good practices on referendums with a view to reducing any possible abuse, including the risk that this instrument is used to circumvent the principle of the rule of law or to undermine the legitimacy of representative institutions.

8. The promotion of good practices on referendums should include the elaboration of guidelines addressed to Council of Europe member states as well as the dissemination of examples of best practice, the provision of technical assistance and the implementation of co-operation activities. In this respect, the Assembly recalls that the Council of Europe has already produced guidelines on local referendums, appended to Recommendation No. (96) 2 of the Committee of Ministers to member states on referendums and popular initiatives at local level, as well as on constitutional referendums, with guidelines adopted by the European Commission for Democracy through Law (Venice Commission) at its 47th Plenary Meeting (6-7 July 2001).

The Venice Commission is currently working on the possible elaboration of general guidelines on referendums.

9. The Assembly also recalls previous Council of Europe documents which should be considered for the elaboration of guidelines and the promotion of good practices, in particular Assembly Recommendation 1516 (2001) on financing of political parties, Recommendation (2003) 4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties as well as the guidelines adopted by the Venice Commission on financing political parties (2001) and on legislation on political parties: some specific issues (2004).

10. Finally, the Assembly shares the conviction that through the promotion of good practices on referendums, the Council of Europe should assist its member states in devising a better response to the challenges posed by participatory democracy in modern societies. In this regard, two innovations immediately stand out for their urgency: on the one hand, the extension of the right to vote in local referendums to immigrants who are legally resident in Council of Europe member states, in analogy with the efforts deployed by the Council of Europe in bringing its member states to grant the right to vote in local elections to legal immigrants, in compliance with the 1992 Convention on the Participation of Foreigners in Public Life at Local Level; on the other hand, the introduction of the possibility of holding referendums at all the levels in which policy decisions are made, be it local, regional or national.

11. Confirming its previous positions, the Assembly highlights that direct popular participation in the decision-making process requires the electorate to be adequately informed about those matters to be decided upon, as well as about the democratic decision-making process in general. With these considerations in mind, the Council of Europe should reinforce its activities on media awareness and education for democratic citizenship, also in the context of the elaboration of good practices on referendums.

12. The Assembly therefore recommends that the Committee of Ministers:

i. taking into account previous Council of Europe work in this field as well as the ongoing work of the Venice Commission, draw up a recommendation to member states containing guidelines on referendums, which should refer to:

a. the need for a clear national legal framework for holding referendums;

b. who can initiate a referendum, with a clear indication that popular initiative should always be possible;

c. the referendum campaign, including provisions on the registration of campaigners, funding of the referendum campaign and safeguards for pluralism;

ii. collect and disseminate examples of good practices on referendums, placing particular emphasis on the recognition of voting rights of immigrants who have been legally and habitually resident in Council of Europe member states for a given time and on encouraging the plurality of levels at which referendums can be organised ;

iii. among its activities, give priority to media awareness and education for democratic citizenship and include these issues in its examples of good practices on referendums;

iv. when necessary, set up assistance and co-operation programmes to help one or more member states in the implementation of good practices on referendums;

v. continue to encourage the recourse to e-voting, in compliance with its Recommendations (2004)11 on legal, operational and technical standards for e-voting and (2004)15 on electronic governance (e-governance);

vi. call on Council of Europe member states to:

- a. sign and ratify the 1992 Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level;
 - b. introduce the possibility of holding referendums at local, regional and national level and inform the electorate of this possibility through appropriate means;
 - c. grant the right to vote in local referendums to foreigners who have been residing legally in their country for a period of five years, by analogy with the provisions on participation in local elections contained in the 1992 Convention on the Participation of Foreigners in Public Life at Local Level;
 - d. ensure that their electorate is put in a position of being able to make an informed and balanced decision and is made aware of the political importance of its vote in all referendums submitted to it, including the next referendums on the EU Constitutional Treaty and on the issue of the EU enlargement;
- vii. invite the European Union to consider making greater use of instruments of direct democracy in the EU decision-making process and in this context conduct a feasibility study on the introduction of an EU referendum.

II. Explanatory memorandum by Mr Elo

1. Introduction

1. Referendums may have supporters and detractors but whatever we think of them it is a fact that they are more and more in use in Council of Europe member states. As your Rapporteur, I believe that the Council of Europe, in its role as the guardian of democracy, should take the lead in codifying rules on the holding of referendums and promote models of good practice, to ensure that referendums are used as a supplement to representative democracy and avoid any manipulation.

2. In this respect, I largely share the opinions expressed by Professor Auer of the University of Geneva, whom I thank most warmly for his research paper which is attached to the present memorandum. As an academic expert in direct democracy, Professor Auer has described in a very balanced manner advantages and risks of the use of referendums, and has indicated safeguards that should be employed when relying on such an instrument.

3. I shall not duplicate his work but rely on it. I shall, however, expand on a few issues, also in response to an invitation in this sense expressed by some members of the Committee.

2. Recourse to referendums in the context of EU integration

4. The organisation of referendums within the EU integration process accounts for a great number of referendums which were held in European countries over the last decades: between 1972 and 2003 the citizens of 23 countries expressed their vote on fundamental stages of EU integration, in 41 national referendums.

5. This upwards trend will continue over the next two years. In fact, the national referendums organised in the context of the ratification of the EU Constitution may be the greatest European popular vote of all times: 250 million people in at least 10 countries will be called to state their agreement or disagreement over the most ambitious project of European integration so far conceived. The political weight of this popular vote will also be unprecedented, as the negative stand of the electorate of one country will be able to affect the ratification of the Constitution in all the others. Likewise, the position of EU members over the membership of a candidate country will be decided, in some cases, by national referendums.

6. The next round of national referendums in the context of EU integration raises, in your Rapporteur's opinion, two questions: are voters well informed about what they are going to vote on, and do they understand the implications of such a vote? Are referendums used to give the electorate the power of the last word or to enable the authorities to shirk their responsibilities?

7. These questions may sound provocative but they reflect two arguments often put forward by detractors of referendums. Besides, these arguments are not without foundation: referendums imply free voting citizens and the expression of a free vote implies that citizens have a level of information which enables them to understand the issue at stake. It is not only a matter of how the question is formulated but also of whether the media ensure the expression of pluralism and of the way the referendum campaign is financed and conducted.

3. The issue of the threshold

8. Voting is a right and not an obligation. It is a worrying phenomenon, however, that electorate participation is generally decreasing. This trend reflects general disaffection for the political system which is a duty for us politicians to take into account.

9. Professor Auer says that *'a low turnout (...) is not necessarily bad for direct democracy. It weakens the victory of the majority and encourages minorities to continue arguing their case'*. I am afraid I disagree with the first part of this statement. Unfortunately, we do not live in perfect democracies. The decision of the majority not to vote is not necessarily a sign of a political mature decision, and the result that a minority imposes its will on the majority should be avoided.

10. Personally, I am therefore in favour of introducing a minimum turnout threshold for referendums to be valid and I believe that the threshold of 50% plus one of the registered voters is the most appropriate.

4. Financing of the referendum campaign

11. The issue of financing electoral campaigns has been the subject of a number of Council of Europe instruments. Amongst these, I would recall Assembly Recommendation 1516 (2001) on financing of political parties as well as two guidelines adopted by the European Commission for Democracy through Law (Venice Commission): the first on financing political parties (2001); and the other on legislation on political parties: some specific issues (2004). In order to respond to the concerns of the Parliamentary Assembly, in 2004 the Committee of Ministers adopted Recommendation (2003) 4 to member states on common rules against corruption in the funding of political parties and electoral campaigns, which takes into account many of the ideas and proposals put forward by the Assembly in its Recommendation 1516 (2001). Recommendation (2003) 4 disciplines sources of external funding of political parties, sources of funding of candidates for elections and representatives elected to public offices, electoral campaign expenditure and transparency.

12. Your Rapporteur believes that these recommendations are also relevant for financing referendum campaigns and that the Council of Europe should make an additional effort to codify its relevant recommendations in a single text on referendums.

5. The main challenge: modernising participatory democracy

13. Furthermore, the Council of Europe should assist member states in devising a better response to the challenges posed by participatory democracy in modern societies. In this regard, two innovations stand out because of their urgency: on the one hand, the extension of the right to vote in local referendums to immigrants who are legally resident in Council of Europe member states, in analogy with the efforts deployed by the Council of Europe in bringing its member states to grant the right to vote in local elections to legal immigrants, in compliance with the 1992 Convention on the Participation of Foreigners in Public Life at Local Level; on the other hand, the introduction of the possibility of holding referendums at all the levels in which policy decisions are made, be it local, regional or national.

14. The issue of the political participation of foreigners is one in which Council of Europe member states are reluctant to change the *status quo*, as it is apparent from the low number of ratifications of the 1992 Convention on the Participation of Foreigners in Public Life at Local Level (only 7 as of 18 March 2005). It is my conviction, however, that leaving the vote an exclusive prerogative of citizens condemns our political systems to a permanent democratic deficit given that the proportion of legal immigrants in our societies is considerable and sometimes increasing. Once they have been legally residing in a country for a certain time, foreigners should be entitled to vote at least at the level which is the closest to them, the local level, and by analogy they should have the right to vote in local referendums. The underlying principle is that participatory democracy should aspire to involve all those who are liable to be affected by the political process.

15. Similarly, participatory democracy should be exercised at all the levels at which decision-making takes place. The latter consideration should also apply at the supranational level, as for a substantial number of Council of Europe member states decisions affecting their electorate are taken by the European Union. In this respect, the introduction of the principle of participatory democracy in the EU Constitution, in the form of the European Citizen Initiative, represents remarkable progress. Your Rapporteur invites the European Union to make greater use of instruments of direct democracy in the EU decision-making process and in this context consider the feasibility of introducing an EU referendum.

6. Conclusions and recommendations

16. Referendums can contribute to reinforcing the democratic legitimacy of political decisions, enhancing the accountability of representative institutions, increasing the openness and transparency of decision-making and stimulating the direct involvement of the electorate in the political process.

17. To ensure that referendums have such a positive impact on our political systems, it is necessary to set clear rules and limits with which they should comply. The Council of Europe is very well placed to do so, given the substantial input which could be provided by the Venice Commission.

18. Your Rapporteur, therefore, recommends that the Committee of Ministers of the Council of Europe draw up a recommendation to member states containing guidelines on referendums and organise the necessary activities to collect and disseminate examples of good practices on this matter.

19. Similarly, the Assembly should call on member states to adapt their legislation to the new challenges posed by modern societies and ensure that they make an informed choice.

**III. Working document prepared by the Research and Documentation Centre on
Direct Democracy - Geneva**

Table of Contents

Introduction

1. Historical background

- 1.1 American origin
- 1.2 Passage to France
- 1.3 Swiss apotheosis
- 1.4 Return to the USA
- 1.5 Post-war

2. General legal framework

- 2.1 Constitutional basis
- 2.2 Different types of referendum
- 2.3 Procedural issues

3. Political analysis

- 3.1 Direct democracy and representative democracy
- 3.2 Popular sovereignty
- 3.3 Distinction between plebiscites and referendums
- 3.4 Political functions
- 3.5 Instrument of control
- 3.6 Requirements of a well-run referendum

4. Criticisms

- 4.1 Low turnout
- 4.2 Voter ignorance
- 4.3 Populist pressure
- 4.4 Tyranny of the majority
- 4.5 Curb on development of the legislative process

5. Limits

6. Practical experiences

- 6.1 Referendums that have made history
- 6.2 Causes of the development of the referendum in Europe

Conclusion

Introduction

Referendums are a **democratic instrument** that enables the people to give a decision on acts or measures taken by a governmental authority. They are becoming increasingly widespread in modern political societies. Very different political systems are including them in their constitutions or using them in practice.

Having noted that every country applies its own criteria on the subject, the Council of Europe, in its specific role as the guardian of democracy in Europe, has a duty to take the lead in codifying rules on the holding of referendums.

1. Historical background

The first referendum was held more than two hundred years ago, in the late eighteenth century, in the former British colonies in America. The referendum was then formally enshrined in the constitutions of revolutionary France, but was not used. It was embraced by and frequently used in Switzerland in the nineteenth century, whence it was exported to a good half of the States of North America. After the Second World War it became far more widespread in Western Europe and, after the fall of the Berlin Wall, in Eastern Europe. The process of European integration is now giving it a new dimension.

1.1. American origin

It was in New England, in the first written constitutions, that the idea of the popular vote as their main source of legitimacy and single criterion of superiority was born. The constitutional referendum is the unadulterated product of the American constitutionalist movement of the revolutionary period. The experience of Massachusetts and New Hampshire in 1778-1780 showed that the establishment of this institution resulted from the fact that, because of mistrust of Parliament, a constituent assembly was given the task of drafting a constitution which could then be submitted for approval only to the people themselves.

1.2. Passage to France

From the New World, the institution crossed the Atlantic to revolutionary France. On 21 September 1792, on Danton's proposal, the National Assembly declared that "there can be no constitution but one approved by the people". The Constitution of February 1793, drafted by Condorcet, faithfully copied the stages of the procedure for revising the constitution that had been followed in Massachusetts. The Mountain's Constitution of 24 June 1793 was the first to be submitted to the people. The institution did not survive the Napoleonic period, however.

1.3. Swiss apotheosis

The first vote by the people of Switzerland on a law was on the second Swiss Constitution of 25 May 1802. The democratic movement of the 1860s made referendums and popular initiatives its key issue, tacitly drawing on the "suggestions box" (Alfred Kölz) of the French Revolution. The institution gradually spread in the Swiss cantons, before being established at legislative level by the Federal Constitution of 1874.

1.4. Return to the USA

The referendum was imported to the north-western States of the USA from Switzerland in the late nineteenth century. Brought to the knowledge of the American public by a series of publications by prominent English, American and Swiss writers, the referendum first became part of the programme of the populist and then progressive left who saw it as an ideal means of reviving the democratic traditions of the Founding Fathers and combating corruption and big business.

1.5. Post-war

The referendum was established in Liechtenstein at the end of the First World War and spread to a number of countries in Western Europe, in particular Denmark, Ireland, Italy and France, after the Second.

2. General legal framework

Direct democracy can only be exercised within a **legal framework**. It is a fundamental political option but is nothing if the details of its implementation are not set out in law.

2.1. Constitutional basis

The legal basis for referendums is usually the Constitution since it transforms the people into an **organ of the State** whose remit and functioning have to be specified in the basic law in the same way as those of parliament and government.

2.2. Different types of referendum

Most referendums concern **norms**. A distinction is drawn between constitutional, legislative, treaty-related and administrative referendums, according to whether they concern the constitution, the law, an international treaty or a decision. In some countries a referendum may also be held on **issues of general national interest** which are not norms.

There are three types of **constitutional referendum**. If the referendum is on the first constitution, the term constituent referendum is used. This is characterised by its being used to found a new constitutional order that breaks with what has gone before. The most recent constituent referendums took place in Romania, Bosnia, Estonia, Lithuania, Russia and Poland when they were adopting their first constitutions. The second type, the constitutional amendment referendum, involves a public vote on amending the constitution in force and is an integral part of the traditional amendment procedure that constitution itself lays down. The third type is the referendum on sovereignty, ie consultation on, for example, territorial changes, the self-determination of a decentralised authority or the country's joining an international organisation. Examples of this type of referendum are those on membership of NATO or the EU.

A referendum is **mandatory** when it concerns instruments that can enter into force only with the explicit consent of the people. It makes the popular vote and its positive outcome a precondition for the validity of a norm. Conversely, a referendum is **non-mandatory** where a popular vote must be requested by a specific number of voters within a certain deadline. It will only take place if the request is formally successful.

An **extraordinary** referendum is distinguished from an **ordinary** referendum by the fact that the popular vote on a particular measure is held at the request of a government body – the president, parliament, a minority of deputies or, again, decentralised authorities – rather than a proportion of the electorate.

A referendum whose result is binding on the authorities and the citizens is known as **decision-making**. One that does not bind the authorities is **consultative**. From a political point of view, however, the result of a consultative referendum can be difficult to ignore, so the distinction between the two is less important than it seems.

2.3. Procedural issues

One of the most common technical rules is that a referendum is only valid if there is a defined **minimum turnout**. The basic idea is that the people's decision can only be valid if it is sufficiently representative. The drawback here is that, in order to defeat a proposal, its opponents may simply rely on or foster abstention and apathy. A great many referendums have been rendered ineffective by the application of this rule. Romania, Poland, Slovakia, Slovenia, Latvia, Lithuania and Italy are examples of this.

Sometimes a **qualified majority** of the votes cast is required to validate the result. Here again, the basic idea is that the electorate's decision is only legitimate if it expresses the will of two-thirds or three-quarters of its members. The drawback is that this requirement enables a minority to impose its will on the majority.

According to the democratic principle, voting is optional and therefore only the votes actually cast are taken into account. This principle also requires that it should be the majority rather than the minority that decides.

Referendums are often subject to **formal conditions of validity**: number of and period within which signatures are collected, a single issue, etc. If one of these conditions is not fulfilled, the vote cannot in principle take place. If the subject of a referendum is a norm, that norm must **substantively comply** with higher domestic law and international law. If it does not, the vote or norm may be invalidated.

One decisive procedural issue is deciding which **players** can initiate the referendum procedure. The situation differs greatly from one country to another. In France, it is the President, while in the United Kingdom it is the Government. In most countries, such as the Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Latvia, Liechtenstein, Lithuania, Malta, Norway, Poland, Romania, Slovakia, Slovenia and Sweden, it is Parliament. In Italy and Switzerland, the citizens initiate the procedure.

Constitutional courts are playing an increasingly important role in relation to referendums, often being called upon to rule on their formal, and above all substantive, legality. It is therefore their duty to guarantee that the people can effectively exercise their referendum powers, but also that they do not exceed them.

3. Political analysis

3.1. Direct democracy and representative democracy

In theory, democracy – government of the people, by the people, for the people (Abraham Lincoln) – may take two different forms: the **direct form and the representative form**. The former implies direct participation of citizens in the exercise of political power, the latter that political power will be entrusted to representatives elected by the citizens and accountable to them. This apparent contradiction has fuelled an already ages-old controversy between the partisans of the two forms.

In practice, this very interesting debate has little significance since representative democracy is in fact based on an element central to direct democracy – the election of representatives by the people – and direct democracy is inconceivable without representation. The people as an organ of the State cannot speak and act by itself. It must always be represented and regularly pronounce upon documents drafted by other organs, namely parliament, the government or part of the electorate. For this reason, direct democracy should be understood as **supplementing representative democracy** rather than as an alternative to it. Referendums enrich and modify, rather than suppress, the classic relationship of representation in that parliament is forced to share the exercise of its constitutional, legislative and administrative functions with the people. In other words, the political reality is that the system of direct democracy is to a great extent crossed with representative democracy.

3.2. Popular sovereignty

The electorate is not above the constitution when it pronounces on problems of national interest and approves or rejects norms. It is an organ of the State and the most important one at that, but this does not mean that it is the only one. Referendums are not and cannot be the only means of exercising popular sovereignty. They are simply one of many instruments of democracy. The people cannot govern themselves without cooperating with the other organs. As supreme organ, it is **subject to the constitution**.

The people's part in government must be laid down by the **legal system**. Without it, no one can give the people unlimited power. More than 200 years ago Rousseau said that positive freedom was subject to the law. This means that unconstitutional use of referendum institutions and initiative has no place in a state governed by the Rule of Law. The voice of the people is therefore sovereign only within constitutional limits.

3.3. Distinction between plebiscites and referendums

Here again political practice makes nonsense of theory. The term referendum is generally used where the popular response is given **according to the subject** submitted to popular vote: a good law, a bad constitutional amendment, a pointless treaty, etc. Where there is a plebiscite, the popular response is determined more **according to the personality of the author of the question**, who him- or herself is submitted for approval: a president in whom confidence has been eroded, a government in step with feeling in the country, a corrupt system, etc.

In practice, however, it is often difficult to distinguish referendums from plebiscites. The initial blackmail and the personalisation of power can make what is presented as a referendum, in fact turn into a sort of plebiscite. Furthermore, the main issue at an election is sometimes a normative or political question, such as the privatisation of a public service or membership of an international community. It is therefore not true to say that a plebiscite is simply a negative, *distorted form of referendum*. The most that can be said is that the trend towards plebiscite will more easily gain momentum where the organisation and subject of the popular vote leave a great margin of manoeuvre to its initiator, the president or parliament. This is in particular the case in France, as well as in many countries of Eastern Europe.

3.4. Political functions

The instruments of direct democracy, and referendums in particular, are an important factor in the **openness of the political system**. They restrict the margin of action of those in power and reduce the elitist nature of the system. By delegating the taking of certain important decisions to the people, they introduce a degree of unpredictability to the decision-making process. At the same time, referendums tend to increase the integrationist capacity of the political system and to strengthen its legitimacy.

The main advantage of referendums is probably their **legitimising function**. Their effect is to legitimise the government by stamping its actions, often the most important for state and society, with the seal of popular approval. They reduce the distance between government and governed and are a useful addition to the classic relationships resulting from election, control, accountability and the exercise of power. The people generally consider their own decisions more legitimate than those of their representatives. In this, referendums imply a strengthening of the system's efficacy since their acceptance, even by the losing side, is facilitated.

Nor should the **symbolic value** of referendums be forgotten: they dramatise the collective existence. In a world in which the powers or authorities are increasingly dispersed and fragmented, sometimes exuding a sense of powerlessness, referendums produce focus and visibility. From time to time they therefore compensate for a feeling of disenchantment or palpably reaffirm the sense of living together (Pierre Rosanvallon).

Referendums are a means of directly involving the people in political decision-making and thus of **strengthening the citizen's political role**. They enable the human potential represented by citizenship to be harnessed. The people need to express themselves on the most important issues and are no longer satisfied by electoral power alone. It is certainly better that this wish be expressed legally through the instruments of direct democracy than through violence or rioting.

By providing them with more direct forms of participation, referendums make citizens more interested in political problems or even revive their interest in politics. Setting aside the vote itself, referendums **fuel and enrich public debate**; they may even release creative potential.

Modern democracy implies the existence of **civil society**, that is, power relationships which are not, or at least not directly, governmental: the voluntary sector, parties, the churches, businesses, trade unions, the family, societies and many others. Referendums are a particularly effective means of grafting government onto civil society in order to prevent the former from crushing the latter or the latter taking over the former.

3.5. Instrument of control

Referendums give the people the opportunity, through legal political means, to **control government** and the exercise of power. The people are able to force parliament and government to consult them on certain issues and can even make those governmental organs

act in the way they have decided. Referendums therefore prevent any authority from exercising total control. They are neither an instrument of acclamation nor of opposition, but an instrument of control.

The referendum hangs like a sword of Damocles over any governmental activity which is subject to it. This **element of uncertainty** in the functioning of power between government and governed is the beauty of direct democracy.

The referendum is a sort of **power of the last word** which comes only at the end of a decision-making process. It has the character of a veto or safety valve that enables the people to intervene when they are not satisfied with the actions developed by political elites. It is becoming a right of veto for the exercise of which no one is accountable since the people, unlike the other organs of the State, are not accountable.

Referendums sometimes enable the authorities to **shrug off their responsibilities**, particularly when it is they that decide to hold one. Rather than taking responsibility for an unpopular or difficult decision, the authority may be tempted to submit the question to the people which will decide in its place.

3.6. Requirements of a well-run referendum

Direct democracy is possible and can only work if citizens are able to express their opinions **freely and without hindrance**. Such freedom implies, in particular, that they receive information that enables them to form an opinion and that they can decide on the basis of the information available to them. It therefore requires that they be able to express their opinions, assemble to discuss them and form associations to promote them. Direct democracy therefore requires recognition of the freedoms of opinion, expression, assembly and association.

The conditions in which the vote takes place must be such that the will expressed by the people is authentic and not distorted or rigged. In particular, every precaution should be taken to ensure that the popular will cannot be misled as to the subject, scope or consequences of the vote. Similarly, referendum campaigns must be properly financed and conducted, and the media must present a balanced number of views on each side. Referendums are inseparable from the **free vote**, which gives every citizen the right to demand that the result reflects the freely expressed will of the majority of voters, protected from any unlawful influence or rigging.

Citizens need to learn about public affairs. This means that true direct democracy requires that free voting citizens have a **level of information and education** that enables them to understand the questions upon which they are called to express an opinion. The ballot must not be totally beyond those who cast their votes. The question must not be worded in unnecessarily ambiguous and complex terms; it should be simple and have only one subject; it should be such as to enable a clear yes or no response.

4. Criticisms

Referendums are often the subject of criticisms that seek to lessen their importance or even deny their usefulness. These criticisms are often based on **prejudices** that are easily contradicted by practical experience.

4.1. Low turnout

While this criticism is not specific to referendums, it also concerns them. A low turnout often results in a law being accepted by a majority of voters representing only a small proportion of the electorate. It is said that the result is to weaken legitimacy, since most people have not voted.

First, it should be recalled that in modern political societies the right to vote is precisely a **right** and not a duty. The free vote, which is the expression of this, also protects those who, with full knowledge of the facts or on principle or for any other reason, choose not to vote.

Secondly, a low turnout, which, moreover, also happens at elections, **is not necessarily bad for direct democracy**. It weakens the victory of the majority and encourages minorities to continue arguing their case. If 95% of the electorate votes in a referendum in favour of an idea, the minority that supports the opposing idea has little hope of overturning it. It may be tempted to reject the system entirely. But if 60% of the electorate abstains, so that the majority decision represents only 25% of voters, the minority knows that it may be within its power to mobilise those who have abstained and win next time. It is not so much the result as the prospect of another referendum that is important in direct democracy.

Falling turnout may be connected with **overloading** the people who are frequently called upon to cast their votes. Such overloading, far from being serious, is the price of using the available instruments of direct democracy. The more frequently the people have the opportunity to express their opinions on the widest range of issues, the more voters will choose to vote or abstain according to the issue. While some are interested in social problems, others are fascinated by societal, taxation or economic issues. It is therefore seldom the same citizens who abstain or vote at the various ballots. Consequently, measured over a specific period, the rate of abstention will prove lower than on a particular subject.

In order for democratic legitimacy to be truly affected by low turnout, the minority that votes must, over a prolonged period no longer constitute a representative sample of the population. As long as the minority of voters is not systematically organised and manipulated in such a way as to make the referendum that of a clan, the popular will expressed will continue to represent the general will. In this respect, the fact that serious forecasts by polling organisations generally correspond fairly closely to actual results is an indication of the system's health.

The **new information technologies** and procedure influence the act of voting itself. The development of information technology (e-government and e-voting), as well as easy access to the Internet, are likely to reinvigorate public debate and foster participation.

4.2. Voter ignorance

Since referendums involve the people having the last word on the passage of norms, they require that voters should **be informed** and, above all, able to **understand**. Direct democracy, still more than representative democracy, is based on the image of the willing, informed, educated and intelligent citizen. One of the major criticisms of it is that this image is illusory, that the people do not really understand what is at issue and that referendums simply amount to intelligence appealing to ignorance (James Fazy).

It is true that the idea that every citizen conscientiously studies every subject on which he or she is called upon to vote, carefully weighs the pros and cons, discusses it with his or her peers and finally forms a well-considered, rational view is to a **great extent imaginary**. However, the same is certainly true of the idea of the model member of parliament who only decides all the issues he or she has to deal with after careful consideration. We know that both citizens and members of parliaments often vote according to the orders of a party or group, their gut feelings, intuition, advice, etc. The votes of both are therefore not a question of intelligence or ignorance, but a **key moment in a complex process** that is both individual and social and always political in the full sense of the term. And, while it is true that the result of referendums sometimes seems to be the fruit of chance or matters unrelated to them, it has to be recognised that the same phenomenon occurs in parliaments.

The criticism that the people do not understand what is at issue in the votes they take part in is the result of a **rather naïve and extremely elitist view** which assumes voters to be a little less well-educated, a shade less intelligent, than members of parliaments who, in their turn, are not on the same level as ministers, who themselves are less brilliant than the prime minister or president, and so on.

It is nonetheless true that **citizens need a particularly high level of information** in direct democracy. This need should be satisfied by both government and society. The former has a duty to provide the electorate with objective information on the subject of a referendum and what is at issue in it. The latter should give them the means of comparing this information with the opinions of various people through the media and other information technologies.

4.3. Populist pressure

The consequence of alleged citizen ignorance may be that the popular vote is the expression of the **passions** of the moment, subject to populist pressures. This criticism is thus a logical extension of the previous one.

The progress in crowd psychology has clearly revealed the formidable threats to the veracity of expression of the popular will: partisans and opponents choose striking slogans, put photogenic political high-fliers on television and golden-voiced ones on radio (Blaise Knapp). The yes and the no are sold using **marketing methods** that prefer a charm offensive to political persuasion.

It should first be noted that these arguments could also be applied to universal suffrage and that they were put forward throughout the nineteenth century by all those worried at the prospect of popular elections. One may wonder how citizens could be considered sufficiently well-informed to elect their representatives but incapable of taking decisions on political actions.

The people's **ability to understand** should not be underestimated. In Switzerland, for example, they are used to deciding regularly on complex political issues, divided into several questions. Although the most important parties and interest groups have recommended entirely rejecting or accepting proposals, the people have always shown themselves capable of differentiating between and accepting or rejecting a proportion of them. Furthermore, every matter put to the vote, however complicated, can be reduced to a set of values and interests that can often be summarised simply and understandably. Simplification of an issue to its very essence is not necessarily manipulation of the masses.

4.4. Tyranny of the majority

Since referendums are subject to the majority principle, there is said to be a danger that the demands of some minorities will be systematically ignored, disregarding the **fundamental rights and freedoms** that are supposed to protect them.

Democracy through referendum has proved that it is in no way tyrannical, however. Popular votes are always specific, on precise problems and are held according to a procedure laid down in advance. They are balanced by a whole range of other classic and modern mechanisms of the state based on the Rule of Law, such as the separation of powers, parliamentary democracy, federalism or decentralisation, and constitutional law. Their results do not systematically go against the authorities, any more than they always confirm their opinions. The proliferation of ballots and the concomitant low turnout also tend to reduce the rigour of the popular verdict.

It is true, however, that there may be a **conflict between democracy and freedoms**, the popular vote and the rights of minorities. One of the most delicate tasks of constitutional law is to make the exercise of democracy, including direct democracy, subject to compliance with fundamental rights, at the same accepting that these must, in their turn, be subject to certain restrictions where the latter are the expression of the popular will.

4.6. Curb on development of the legislative process

Referendums are often considered essentially **conservative** elements that delay the legislative process, make innovation difficult, curb development and may even block government machinery.

It is true that by referring a question to free debate by the people referendums may result in the political authorities **losing absolute control of the political agenda**. It is also true that in terms of effort, cost and time, referendums are not the most effective means of action. But legitimacy comes at this price. As for whether they are conservative or progressive, all depends on the particular subject.

5. Limits

Since the referendum process is necessarily **framed and regulated** by the legal system and the constitution in particular, it is for these to lay down its limits. These limits, which differ from one country to another, may concern the timing, subject, procedure or effects of referendums. They are essential since they give referendums their political and legal characteristics.

In principle, the result of a referendum should have a **direct effect** only in the legal system in which it takes place. This is the problem presented by the "European" referendums as an increasing number of European Union member States are holding on the major stages of the integration process, particularly on the Treaty introducing a European Constitution. In view of the importance of this step, the democratic principle would seem even to require that this decision should be taken by the people. However, since the adoption of the European Constitution implies unanimity of all member States, a negative vote in a single country blocks the whole process. Unlike parliaments and governments, the people cannot take such a responsibility because, by definition, they are not accountable: the government can be changed, another parliament can be elected, but the people cannot be changed. Moreover, if following a negative vote, the people are asked to vote again, but this time in favour, as happened in Denmark in 1993 and Ireland in 2001, democracy loses its most valuable asset, dignity.

Some questions **are not of a kind to be decided** by referendum. This is true, in particular, of personal questions that closely affect the legal situation of the individual and the status of certain persons, such as for example the naturalisation of foreigners. In any case, this is what the Swiss Federal Court held in an important decision in July 2003.

The prohibition on the **abuse of right** is in a sense the ultimate limit on referendums. In principle, popular rights, like all rights, are open to abuse but in this field it is most unlikely. It is true that the recent case-law of the Swiss Federal Court has tentatively recognised abuse of right with respect to the popular initiative. But popular initiative allows a tiny proportion of the electorate to define, and sometimes to draft restrictively, the subject that will be put to the people. It is therefore conceivable that the authors of the initiative will wrongly try to circumvent the limits the legal system has placed on its exercise. The same is not true of a referendum, which is always on a subject defined and determined by an organ other than the people, usually parliament, sometimes the executive. When it is mandatory, abuse is inconceivable; the same is true when it is non-mandatory and ordinary, in that the people call for one in response to a measure adopted by parliament. It is also inconceivable when a referendum can be called by parliament, a set number of deputies or the head of state, that is in the event of an extraordinary referendum. This is so either because these organs use their right in compliance with the conditions laid down in the constitution, in which case abuse of right is impossible, or they exceed these limits and come up against a constitutional principle which is far more precise than the concept of abuse of right. For example, when Prince Adam II of Liechtenstein obtained an extension of his role and powers as the result of a referendum held in March 2003, having threatened to move to Vienna if the constitutional proposals were rejected, it was the freedom of vote that was indirectly violated, rather than the prohibition on abuse of right.

6. Practical experiences

Constitutional practice on referendums often goes beyond the constitutional framework. Many democratic institutions provided for by constitutions have never led to popular votes. Conversely, the people have more than once been called upon to make a decision without any constitutional or legal basis. Both procedures and practical experiences with respect to referendums **vary a great deal** in different countries¹.

6.1. Referendums that have made history

Paradoxically, if the image of referendums has improved, it is partly thanks to the negative results of some popular votes. In 1969, a Head of State resigned for the first time in French history following his defeat in a referendum on which he had staked his political future: General de Gaulle, believing his popularity would lead the French people to accept Senate and local

¹ <http://c2d.unige.ch>.

government reform, met with a crushing defeat. If a referendum can go against the very person who calls for it, is this not proof that in the present context it is frequently the expression of the authentic will of the people?

Another notorious example: it was following a referendum that, on 19 August 1934, Hitler was able to hold concurrently the posts of Chancellor and President of the German Reich. Furthermore, it was this that led the leader of the British Labour Party, Clement Atlee, to say in 1945 that the use Hitler had made of the referendum justified British distrust of such an "expedient". However, the merits of referendums cannot be judged on the use made of them by any particular general or dictator, just as it would be absurd to reject the idea of representation by arguing that elections are rigged in some countries.

Referendums have sometimes been salutary and enabled a regime to be changed radically. The 1981 Constitution of Chile established under Pinochet stated that after eight years the army would put forward a single candidate to be supported or rejected, thus leading to a free election. In 1988, Pinochet was the candidate and received only 45% of the vote in the referendum held on 5 October, on a turnout of 92%. Azocar was therefore democratically elected President in 1989. This is an example of a dictatorship being ended by referendum. In the same period, General Jaruzelski in Poland also suffered a setback in a referendum, despite his dictatorial powers. Similarly, in Italy in 1993 the people set in motion long blocked institutional reform, thus ending the hijacking of the institutions by the party system and making possible the changeover of power between parties.

6.2. Causes of the development of the referendum in Europe

The number of referendums held in Europe has been increasingly rapidly. Since 1960, there have been no fewer than 250 national referendums in the 46 member States of the Council of Europe, excluding Switzerland and Liechtenstein. Since 1990, the number has almost doubled in Western Europe and increased by a factor of seven in Eastern Europe. Two main causes for this spectacular increase can be identified: the collapse of communism and European integration.

After the collapse of communism the countries of Central and Eastern Europe regained their independence. Each country embarked on the drafting of a new constitution and the devising of institutions that would promote liberal constitutional democracy. **Constituent referendums** were therefore held in Bosnia, Estonia, Lithuania, Poland, Romania and Russia and when their first constitutions were adopted. Bulgaria, Croatia, Estonia, Hungary, Lithuania, Poland, Romania, Russia, Slovakia and Slovenia included the referendum in their constitutions.

No fewer than twenty-nine national referendums have been held in the twenty-five member States of the European Union on treaties, the single currency or membership. To these can be added two each in Norway and Liechtenstein and five in Switzerland directly connected with the European integration process. Many **referendums on sovereignty** have been held in this framework. In 1972 Ireland's and Denmark's membership of the EC was put to those countries' electorates, which agreed to it. Three years later, the United Kingdom's continued membership of the EC was confirmed by the British people. After Austria, Sweden, Norway and Finland in 1994, nine of the ten new member States decided by referendum on and for membership of the EU. In 1986, Denmark opened the way to **referendums on the ratification of treaties** representing the major stages of the integration process with the referendum on the Single European Act, followed by Ireland in 1987. The Maastricht Treaty was put to the French, Irish and Danish people in 1992, and the Amsterdam Treaty to the last two in 1998. The Nice Treaty was the subject of two Irish referendums in 2001 and 2002. Ten member States have already announced that they will hold a referendum on ratification of the European Constitution.

Conclusion

Referendums have become an essential instrument of constitutional democracy in Europe and elsewhere. Far from replacing classic representative democracy, they supplement and enrich it substantially. While they have become far more frequent at national level, they have virtually invaded regional and local levels and are becoming ever more common at transnational level.

Continuing distrust of referendums is both understandable and unjustified. Understandable, because they transform the classic representative relationship, making many deputies fear a loss of power; unjustified, because experience has shown that the authorities often emerge from them strengthened by the increased legitimacy they confer on their decisions.

C2d 11 August 2004

Bibliography

Andreas AUER, *Le référendum constitutionnel : histoire et avenir*, in : Plädoyer, 1991.

Andreas AUER, *General Conclusion*, in : *Direct Democracy : the eastern and central European experience*, 2001.

Jean-Marie DENQUIN, *Référendum et plébiscite*, Paris, 1976.

Etienne GRISEL, *Initiative et référendum populaires*, Berne, 2004.

Francis HAMON, *Le référendum : étude comparative*, Paris, 1995.

Blaise KNAPP, *Principes et modalités de la démocratie directe*, in: *La participation directe du citoyen à la vie politique et administrative*, Bruxelles, 1986.

Alfred KÖLZ, *Neuere schweizerische Verfassungsgeschichte*, Bern, 1992.

Yannis PAPADOPOULOS, *Elites politiques et peuple en Suisse*, Lausanne, 1994.

Pierre ROSANVALLON, *Vices et vertus du référendum*, in : *Le Monde*, 2.06.2004.

Serge ZOGG, *Direkte Demokratie in Westeuropa : Grundlagen*, Aarau, 2000.

Reporting Committee: Political Affairs Committee

Reference to Committee: Doc. 9874 and Reference 2868 08.09.03

Draft Recommendation unanimously adopted by the Committee on 05.04.05

Members of the Committee: Mr Abdülkadir **Ateş** (Chairperson), M. Mikhail **Margelov** (Vice-Chairperson), M. Latchezar **Toshev** (Vice-Chairperson), M. Dick **Marty** (Vice-Chairperson), Mrs Manuela Aguiar, Mr. Giuseppe Arzilli, Mr David **Atkinson**, Mr Claudio **Azzolini**, Mr Miroslav **Beneš**, Mr Radu-Mircea **Berceanu**, Mr Gerardo **Bianco**, Mr Haakon **Blankenborg**, Mr Giorgi Bokeria, Mrs Beáta Brestenká, Mr Doros **Christodoulides**, Mrs Anna **Čurdová**, Mr Enrique Curiel (alternate: Mr Julio **Padilla**), Mr Noel **Davern**, Mr Michel Dreyfus-Schmidt, Mr Adri Duivesteijn (alternate: Mr Frans **Timmermans**), Mrs Josette Durrieu, Mr. Mikko **Elo**, Mr Jean-Charles Gardetto, Mr Charles Goerens, Mr Daniel Goulet, Mr Andreas **Gross**, Mr Klaus-Jürgen Hedrich, Mr Jean-Pol Henry, Mr Joachim Hörster, Mr Tadeusz **Iwiński**, Mr Elmir Jahić, Mr Ljubiša **Jovašević**, Lord Frank **Judd**, Mr Ivan **Kalezić**, Mr Oleksandr Karpov, Mr Oskars Kastēns, Mr Petro Koçi, Mr Konstantin Kosachev (alternate: Mr Victor **Kolesnikov**), Mr Yuriy Kostenko, Mrs Darja Lavtižar-Bebler, Mr. Göran Lindblad, Mr Tony Lloyd, Mr Younal Loutfi, Mr Frano Matušić, Mr José Medeiros Ferreira, Mr Evangelos **Meimarakis**, Mr Murat **Mercan**, Mr Jean-Claude Mignon, Marko **Mihkelson**, Mrs Natalia Narochnitskaya (alternate: Mr Umar **Dzhabrailov**), Mr Zsolt Németh, Mrs Carina Ohlsson, Mr Boris **Oliynyk**, Mr Algirdas Paleckis (alternate: Mr Jonas **Čekuolis**), Mr Theodoros **Pangalos**, Mrs Eleonora **Petrova-Mitevská**, Mrs Sólveig Pétursdóttir, Mrs Clara Pintat Rossell, Mr Gordon Prentice (alternate: **Lord Kilclooney of Armagh**), Mr Dumitru Prijmireanu, Mr Gabino **Puche**, Mr Lluís Maria de Puig (alternate: Mrs Maria Rosario Fátima **Aburto**), Mr Jeffrey Pullicino Orlando, Mr Umberto **Ranieri**, Mr Michael Roth, Mr Jan Rzymelka, Mr Peter Schieder, Mr Adrian **Severin**, Mrs Hanne Severinsen, Mr Samad **Seyidov**, Mr Leonid **Slutsky**, Mr Michael Spindelegger, Mr Zoltán Szabó, Mr Mehmet **Tekelioğlu**, Mr Tigran Torosyan, Mrs Marianne **Tritz**, Mr Vagif Vakilov (alternate: Mr Azim **Mollazade**), Mr Luc **Van den Brande**, Mr Varujan **Vosganian**, Mr Andrzej **Wielowieyski**, Mr Bart van Winsen, Mrs Renate Wohlwend, Mr Marco Zacchera (alternate: Mrs Tana **de Zulueta**)

Ex-officio: MM. Mátyás Eörsi, Mats Einarsson,

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