



## REFERENDA IN EUROPE

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In the framework of the revision of the Constitution of Iceland, where one of most important issues is the question of referenda, this report will address the rules relating to referenda all over Europe.

This presentation is based on a research project by the Venice Commission on referenda in Europe on the basis of information from over thirty countries – not including Iceland – which should lead to the adoption of a report this year and then the elaboration of guidelines.

First, let us say just a few words about the Venice Commission, represented here by its two eminent Icelandic members, Mr Hjörtur Torfason – Deputy Chairman of the Council for Democratic Elections – and Ms Herdis Thorgeirsdottir. The Venice Commission not only deals with the constitution *stricto sensu* and constitutional justice, but also with electoral matters.

The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters. Established in 1990, the Commission has played a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage.

The Commission contributes to the dissemination of the European constitutional heritage, based on the continent's fundamental legal values.

The work of the European Commission for Democracy through Law aims at upholding the three underlying principles of Europe's constitutional heritage: democracy, human rights and the rule of law – the cornerstones of the Council of Europe. Accordingly, the Commission works not only on constitutions *stricto sensu*, but is also very active in the fields of constitutional justice and – what interests us today – electoral matters, including referenda.

The documents of the Venice Commission in the electoral field are prepared by the Council for Democratic Elections (CDE) which is made up of representatives of the Venice Commission, the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe. The OSCE/ODIHR and the Association of Central and Eastern European Election Officials (ACEEEO) joined in its work in an observer capacity.

The Council for Democratic Elections and the Venice Commission defined the principles of the European electoral heritage, in particular with the Code of Good Practice in Electoral Matters<sup>1</sup> and the Guidelines for constitutional referenda at national level.<sup>2</sup> As already said, more general guidelines in the field of referenda should be elaborated on at a later stage.

The address of the Venice Commission website is as follows: <http://venice.coe.int>. Furthermore, the Commission has created a database in the electoral field, called “vota”, available at <http://venice.coe.int/vota>.

This report will focus on national referenda. The number of questions which can be dealt with in a discussion about referenda is of course very high. I shall deal with topics relating specifically to referenda, rather than with more general questions of electoral law, such as conditions for free and fair voting or the time for voting.

The main issues for discussion are as follows:

- Legal basis of the referendum: the constitution or ordinary legislation?
- Types of referenda: who calls them? Are they mandatory? Are they held at the request of an authority? Are they held at the request of part of the electorate?
- The content of the referendum: the constitution? Ordinary law? Treaties etc.
- The form of the text submitted to the referendum
- Possible quorums
- Effects of referendum
- Parallelism of procedures: how to go against a decision taken by referendum?
- Experiences of referendum

This report will leave aside some questions like access to the media, campaigning, funding or judicial review, because they are less specific to referenda. Neither will it deal with rather technical questions, such as deadlines for collecting signatures for referenda or information to be provided to the voters.

Before entering into the substance, it is possible to state that, although there is no general trend in Europe towards radical changes of the rules on referenda; it is clear that, when changes have taken place recently or are envisaged, they nearly always go towards extending direct democracy rather than restricting it.

## **A – Legal basis of the referendum**

As previously mentioned, my report will focus primarily on national referenda and the first question which comes to mind is: what is the nature of the legal basis of these referenda? Is it in the constitution?

The general practice in Europe is for a national referendum to be provided for in the constitution. Where there is no such provision, referenda have either not been introduced on a

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<sup>1</sup> Doc. CDL-AD(2002)023rev. All documents adopted by the Venice Commission are available on its website: <http://venice.coe.int>.

<sup>2</sup> CDL-INF(2001)010.

permanent basis or are quite exceptional.<sup>3</sup> More detailed rules are contained in national law and regional and local referenda are often mentioned only in ordinary legislation.

## **B – Types of referendum – bodies competent to call referenda**

The nature of the referendum varies according to whether it is mandatory or optional and depends on the body competent to call it. This will be considered next. There are three main types of referenda: mandatory referenda, referenda at the request of an authority and referenda at the request of part of the electorate.

### *1. Mandatory referendum*

A referendum is *mandatory* when a text is automatically submitted to referendum, perhaps after its adoption by Parliament.

A mandatory referendum generally relates to constitutional revisions. In some states, any constitutional revision is submitted to a mandatory referendum, with the result that the people itself becomes the constitution-making body<sup>4</sup>. In a few states (*Austria, Spain*), only total revisions (as opposed to partial revision) are submitted to a mandatory referendum. A mandatory referendum may also be restricted to changes to certain provisions or rules.<sup>5</sup>

Other very important instruments are sometimes submitted to mandatory referendum. They are mainly instruments that involve a considerable limitation of sovereignty, especially in the context of European integration, such as accession to the European Union or association with other states.<sup>6</sup>

### *2. Referenda at the request of an authority*

Referenda at the request of an authority – or *extraordinary referenda* – exist in quite a number of states. The state body that calls for such a referendum may be the executive (in particular, the

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<sup>3</sup> Examples: *Belgium, Netherlands, Cyprus, Norway*.

<sup>4</sup> Examples: *Andorra, Armenia, Azerbaijan, Denmark, Ireland, Switzerland*.

<sup>5</sup> Basic constitutional provisions (*Estonia – the chapters of the Constitution on general provisions and the revision of the Constitution as well as the law complementing the Constitution, on accession to the European Union –*, *Latvia – democratic and sovereign nature of the state, territory, official language and flag, election of the Parliament by universal, equal, direct, secret and proportional suffrage, a rule providing for a referendum to be called for the revision of previous provisions –*, *Lithuania – an independent and democratic republic, chapters on the state and revision of the constitution, constitutional law on the country's non-alignment with post-Soviet alliances –*); three provisions relating to constitutional revisions and the duration of Parliament (*Malta*).

<sup>6</sup> Accession to the European Union (*Latvia*), joining collective security organisations or supranational communities (*Switzerland*), joining international organisations in the case of a transfer of powers (*Lithuania*), association with other states (*Croatia*) or joining or leaving a community with other states (“the former Yugoslav Republic of Macedonia”). In *Denmark*, a referendum must take place when constitutional powers belonging to the national authorities are delegated to international bodies, unless Parliament approves this by a five-sixths majority. Also submitted to mandatory referendum are changes to a country's territorial integrity, such as a redefinition of borders (*Azerbaijan*, “the former Yugoslav Republic of Macedonia”) or, in *Denmark*, a change in the voting age.

President), in which case the citizens' confidence in this body may be concerned: the referendum has then a plebiscitary aspect, in the sense that the vote is not so much on a specific issue than a vote for or against the President. In fact, very few states allow only the executive to call a referendum.<sup>7</sup> In *France*, the President can call a referendum on the proposal of the Government or a joint proposal by the two assemblies (except for constitutional revisions).

A referendum may also be called by the legislative, or part of it (in that case, most probably the opposition: for example, in *Denmark*, 1/3 of members of Parliament; in *Spain*, 10% of the members of either chamber). They may also be called by the President *or* Parliament;<sup>8</sup> the executive and the legislative together;<sup>9</sup> or only the Parliament.<sup>10</sup>

### 3. *Referendum at the request of part of the electorate*

Provision for a referendum at the request of part of the electorate is less common than that of a mandatory referendum or referendum at the request of an authority.

Referenda at the request of part of the electorate must be divided into two categories: the *ordinary optional referendum* and the *popular initiative* in the narrow sense. An ordinary optional referendum challenges a text already approved by a state body, while a popular initiative enables part of the electorate to propose a text that has not yet been approved by any authority. The *role of the authorities*, and especially Parliament, is limited in the case of the popular initiative.

It is in *Switzerland* that the mechanisms of the ordinary optional referendum and the popular initiative are the most highly developed. A "referendum" can be requested by 50,000 citizens against laws, certain international treaties and certain federal orders. A "popular initiative" can be presented by 100,000 citizens with the aim of revising the constitution and a "general popular initiative", which can also lead to a change in the law, will be introduced shortly.<sup>11</sup> Parliament decides solely on the validity of the popular initiative: it checks unity of form, unity of content and respect for mandatory rules of international law.

A request for an ordinary optional referendum or a popular initiative requires 500,000 signatures in *Lithuania* and 150,000 in "*the former Yugoslav Republic of Macedonia*", or one tenth of the electorate in *Latvia*.

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<sup>7</sup> *Turkey*, where the President can submit to the people amendments that he or she has sent back to Parliament and have been subsequently adopted by the latter by a two-thirds majority. In *Albania*, on the other hand, the President can call on the people to decide only at the request of 50,000 voters. It has to be emphasised that these two states have a parliamentary system. In *Portugal*, there also has to be an agreement between the President and Parliament or the President and the Government. In *Croatia*, an issue may be put to the vote either by Parliament or the President, but the latter can only call a referendum on the Government's proposal and with the Prime Minister's counter-signature.

<sup>8</sup> *Azerbaijan, Georgia.*

<sup>9</sup> *Armenia, Cyprus, Ireland.*

<sup>10</sup> *Estonia, Finland, Latvia, Lithuania, Luxembourg, Malta, Sweden.*

<sup>11</sup> *No details are available up to now on how this new type of people's initiative will work.*

For example, *Italy* has both optional constitutional referenda and abrogative legislative referenda, at the request of part of the electorate (500,000 signatures are necessary). Similar rules exist in *Albania* and *Malta*.

In several states, there is also a limited form of popular initiative, with a number of voters being able to propose that another body call a referendum (*Poland, Portugal, Hungary*).

## **C – Content**

### *Constitutional referenda*

A referendum is often used to amend the *constitution*. In a number of states, as noted above, this is a *mandatory referendum*, either for any constitutional provision<sup>12</sup> – or only for certain provisions judged particularly important.

*Optional constitutional referenda* exist in most states that do not have mandatory constitutional referenda. They may take place at the request of an authority<sup>13</sup> or of *part of the electorate*: for example, in *Italy*, 500,000 signatures are required, in *Lithuania*, 300,000 signatures, in *Hungary*, 200,000 signatures – if there are only 100,000, the additional consent of Parliament is necessary.

The constitutional *popular initiative* is very common in *Switzerland* (100,000 signatures) and also exists in *Lithuania* (300,000 signatures) and “*the former Yugoslav Republic of Macedonia*” (150,000 signatures).

By contrast, several states exclude constitutional issues from the scope of the referendum.<sup>14</sup>

### *Legislative referenda*

Quite a number of states provide for legislative referenda. In most cases, this is an extraordinary referendum held at the initiative of the President,<sup>15</sup> Parliament,<sup>16</sup> or a number of members of Parliament.<sup>17</sup>

The *ordinary* legislative referendum is very common in *Switzerland* (at the request of 50,000 voters) but also exists in *Hungary, Lithuania* and “*the former Yugoslav Republic of Macedonia*”.

The popular legislative initiative is less common.<sup>18</sup> *Albania, Italy* and *Malta* provide for *abrogative legislative referenda*, on the initiative of part of the electorate.

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<sup>12</sup> *Andorra, Armenia, Azerbaijan, Denmark, Ireland, Switzerland.*

<sup>13</sup> *For example, the French President or Parliament, Parliament in Estonia, Lithuania and Malta.*

<sup>14</sup> *Bulgaria, Greece, Luxembourg, Netherlands – temporary law applicable up to 2004 –, Portugal.*

<sup>15</sup> *Azerbaijan, France.*

<sup>16</sup> *Albania, Austria, Azerbaijan, Lithuania, Luxembourg.*

<sup>17</sup> *Denmark, Greece.*

<sup>18</sup> *It exists in Lithuania, Russia and “the former Yugoslav Republic of Macedonia”.*

### *Treaty-related referenda*

Several states have provision for treaty-related referenda. They are mandatory in some states in very specific cases, essentially accession to the European Union or very important losses of sovereignty.

The ordinary optional treaty-related referendum exists in *Switzerland* and in “*the former Yugoslav Republic of Macedonia*”, and is subject to the same conditions as the ordinary legislative referendum.

The treaty-related referendum may also be extraordinary.<sup>19</sup>

### *Matters to which referenda may relate*

A number of states limit the matters to which referenda may relate, doing so either by drawing up an exhaustive list or excluding certain areas from the popular vote. The most common exceptions relate to financial, budgetary and tax issues.

### **D – Form of the text submitted to referendum (formal validity)<sup>20</sup>**

The text submitted for referendum may be presented in various forms:

- a *specifically-worded draft* of a constitutional amendment, legislative enactment or other measure, including a *repeal* of an existing provision,
- a *question of principle* (for example: “Are you in favour of amending the constitution to introduce a presidential system of government?”), or
- a *concrete proposal*, not presented in the form of a specific provision and known as a “*generally-worded proposal*” (for example: “Are you in favour of amending the Constitution in order to reduce the number of seats in Parliament from 300 to 200?”).

In most European states which use referenda, votes are possible both on specifically-worded drafts and questions of principle or generally-worded proposals.

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<sup>19</sup> *Examples: France, Malta, Portugal, Russia.*

<sup>20</sup> *CDL-INF(2001)010, Guidelines for constitutional referenda at national level, adopted by the Venice Commission at its 47th Plenary Meeting (Venice, 6-7 July 2001), para. II.C.*

### *Unity of form*

In general however, the texts submitted to referendum have to comply with the principle of unity of form (the same question must not combine a specifically-worded draft amendment with a generally-worded proposal or a question of principle).

### *Unity of content*

The principle of unity of content means that, except in the case of a total revision of the constitution or another piece of legislation, there must be an intrinsic connection between the various parts of each question put to the vote in order to guarantee freedom of suffrage (the voter must not be expected to accept or reject, as a whole, provisions without an intrinsic link between them). This principle is an expression of freedom to vote and is recognised explicitly in a number of European states.<sup>21</sup>

### *Unity of hierarchical level*

Unity of hierarchical level means that the same question must not relate simultaneously to the constitution and subordinate legislation. It is complied with in the following countries: *Andorra, Armenia, Ireland, Italy, Switzerland* and, implicitly, *Hungary* and *Lithuania*.

### *Clear and non-leading questions*

Freedom to vote presupposes that “the question submitted to the electorate must be clear (not obscure or ambiguous); it must not be misleading; it must not suggest an answer; electors must be informed of the consequences of the referendum; voters must answer the questions asked by yes, no or a blank vote”<sup>22</sup>. A big number of national legal systems explicitly uphold these rules, which should however be considered as universal.

## **E – Quorum**

Most states do not provide for a quorum to validate the result of a referendum.

Where a quorum does exist, it can take two forms: quorum of *participation* or quorum of *approval*. The quorum of participation (minimum turnout) means that the vote is valid only if a certain percentage of registered voters take part in the vote. The quorum of approval makes the validity of the results dependent on the approval, or perhaps rejection, of a certain percentage of the electorate.

A quorum of approval is considerably preferable to a quorum of participation, which poses a serious problem<sup>23</sup>. The opponents of the draft proposal submitted to referendum, appeal to people to abstain even if they are very much in the minority among the voters concerned by the issue. This often happened in *Italy*.

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<sup>21</sup> Explicitly: *Bulgaria, Hungary, Italy, Portugal and Switzerland*.

<sup>22</sup> CDL-INF(2001)010, para. II.E.2.a.

<sup>23</sup> Cf. CDL-INF(2001)010, para. II.O.

A *quorum of participation* of the majority of the electorate is required in the following states: *Bulgaria, Croatia, Italy and Malta* (abrogative referendum), *Lithuania, Russia* and “*the former Yugoslav Republic of Macedonia*” (decision-making referendum). In *Latvia*, the quorum is half the voters who participated in the last Parliamentary election (except for constitutional revisions, see below), and, in *Azerbaijan*, it is only 25% of the registered voters. In *Poland* and *Portugal*, if the turnout is lower than 50%, the referendum is consultative and non-binding.

A *quorum of approval* is laid down in *Hungary* (a quarter of the electorate); in *Albania* and *Armenia* (one-third). In *Denmark*, a constitutional amendment must be approved by 40% of the electorate; in other cases, the text put to the vote is rejected only if not simply the majority of voters vote against it, but also 30% of the registered electorate.

Moreover, a particularly high quorum is sometimes required for fundamental decisions. In *Latvia*, when a constitutional amendment is submitted to referendum, it must be approved by more than 50% of registered voters. In *Lithuania*, certain particularly important rules relating to sovereignty can only be decided by a majority of three-quarters of the electorate. In *Croatia*, a “yes” vote by the majority of the electorate is required in the case of an association with other states.

The quorum of participation and quorum of approval may be combined. For example, in *Lithuania*, for most mandatory referenda, the quorum is a 50% turnout and one-third of the voters must approve the draft proposal. For accession to supranational organisations, only the minimum turnout has to be achieved.

What is the effect of such thresholds? According to the data available to the Venice Commission, the 50% turn-out threshold was not achieved in 18 out of 53 abrogative referenda in *Italy*, in two out of six in *Lithuania*, in one out of two in “*the former Yugoslav Republic of Macedonia*” and *Portugal*. In this latter case, the referendum was, to all intents and purposes, merely consultative. With regard to approval quorums, the only referendum held in *Armenia* since the adoption of the current constitution failed as it was not approved by a third of the electorate. Similarly, one referendum (out of the four that have been held) in *Hungary* was invalidated as none of the alternatives in the question obtained the approval of one quarter of the electorate.

## **F – Effects of referenda**<sup>24</sup>

### *Decision-making (legally binding) and consultative referenda*

Most referenda organised in the states that replied to the questionnaire of the Venice Commission are of a decision-making nature, in other words the result is legally binding, in particular on the authorities.

Several states provide only for decision-making referenda.<sup>25</sup>

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<sup>24</sup> Cf. CDL-INF(2001)010, para. II.N.

<sup>25</sup> *Albania, Armenia, Azerbaijan, Bulgaria, Croatia, the Czech Republic (one case), France, Georgia, Greece, Ireland, Italy, Latvia, Russia, Switzerland, “the former Yugoslav Republic of Macedonia” and Turkey.*



In other states, such as *Denmark*, decision-making referenda are the rule but consultative referenda are not excluded. In *Hungary*, a referendum on a law or following a popular initiative launched by 200,000 citizens is always binding, while in other cases Parliament decides whether the referendum will be binding or consultative. Some states distinguish between decision-making referenda and consultative referenda according to the nature of the text put to the vote.<sup>26</sup> In *Poland* and *Portugal*, the referendum is binding if the majority of the electorate has voted but is otherwise considered consultative.

Finally, five states, including three Scandinavian states.<sup>27</sup>, provide only for consultative referenda.

The binding character of a referendum does not mean that Parliament does not have any role once the vote has taken place. In the case of questions of principle and generally-worded proposals, Parliament must adopt implementing legislation. A problem may arise if it does not, or not completely; as even if courts are competent to give it an injunction to do it, they cannot do its work.

#### *Suspensive and abrogative referenda*

Leaving the case of the popular initiative aside, which leads to the adoption of a new text, a decision-making referendum may also be:

- *suspensive*: the text may not enter into force unless it has been approved by the voters or unless a request to hold a referendum has not been made within the time-limit established by the Constitution or by law;
- *abrogative* or *resolutive*: the text ceases to be in force following a vote against it or failure to secure a “yes” vote within a certain time-limit after its adoption.

A *suspensive* referendum, since it involves voting on a text not yet applied, is more likely to result in the rejection of the matter put to vote. It is always employed when international treaties are put to the vote, in order not to incur international liability of the state, as well as in about ten countries.<sup>28</sup> In *Denmark* and *Switzerland* – where it is very frequent, the referendum is suspensive unless it relates to an emergency law.

The suspensive character of the referendum may depend on its content: for example, a referendum is suspensive only in respect of constitutional issues in *Albania*, *Andorra*, *Italy* and *Spain*.

By contrast, in *Russia*, a referendum is in principle *abrogative*. *Albania*, *Italy* and *Malta* have *abrogative* referenda in respect of legislative matters. Both suspensive and resolutive referenda exist in “*the former Yugoslav Republic of Macedonia*”.

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<sup>26</sup> In *Andorra*, *Austria* and *Spain*, a referendum on an important issue is consultative, while a constitutional referendum (and a legislative referendum in *Austria*) is legally binding. In *Lithuania*, a referendum is binding if it relates to legislative provisions proposed by a popular initiative and to constitutional provisions submitted to a mandatory referendum. In other cases, it is consultative.

<sup>27</sup> *Finland*, *Norway*, *Sweden*, *Belgium* and *the Netherlands*.

<sup>28</sup> *Armenia*, *Azerbaijan*, *France*, *Greece*, *Hungary*, *Ireland*, *Latvia*, *Lithuania* and *Turkey*.

## **G – Parallelism of procedures**<sup>29</sup>

Can a provision approved by referendum be revised without going through the same procedure again (what is called parallelism of procedures)? If it has been rejected by the people, can it be adopted without a referendum?

There is no clear trend in this respect and the various national laws are divided in their approach. In some cases, a new referendum cannot even be held for a few years, as in *Russia*, in principle; parallelism of procedures may also be applicable only for a certain time (in *Croatia*: one year). In practice however, it is difficult to imagine that Parliament would be reckless enough to go against a decision taken in a referendum, even a consultative one.

## **H – Experiences of referenda**

Countries' experiences of referenda vary considerably. Most states rarely use this possibility. Among the 32 states whose data was available to the Venice Commission:

- 1 experienced no referendum;
- 13 experienced only one referendum;
- 8 experienced two referenda;
- 1 experienced three referenda;
- 1 experienced four referenda;
- 3 experienced six referenda.

Referenda are more frequent in *France* (9 cases since 1958), *Denmark* (14 cases), *Ireland* (28 cases) and *Italy* (54 cases since 1948).

*Switzerland* is the only country where referenda are very frequent: more than 500 matters have been put to a referendum<sup>30</sup> since 1848.

Accession to the European Union was the reason for the majority of referenda in countries where they are infrequent.<sup>31</sup>

*The body initiating a referendum* obviously varies in line with the procedures provided for in domestic law. In *Switzerland*, it is a percentage of the electorate, except in the case of mandatory referenda. In *Italy*, referenda have generally been initiated by the electorate, and only rarely by regional councils. The two referenda held in “*the former Yugoslav Republic of Macedonia*” following its independence, have been at the request of part of the electorate. Two referenda have been held at the request of the electorate in *Hungary* and two on the initiative of the

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<sup>29</sup>Cf. CDL-INF(2001)010, paragraph. II.L.

<sup>30</sup> *The reference periods were not the same for all countries (in principle: the time under a democratic constitution), for this gives an indication*

<sup>31</sup> *It was the subject of the only referenda held in the Czech Republic and Estonia and the two referenda in Norway (to be more accurate, in 1972 it concerned accession to the European Communities). One of the two to four referenda held in Austria, Hungary, Poland and Latvia, also concerned accession to the Union.*

government. The executive has initiated the referenda held in seven countries<sup>32</sup> and, jointly with parliament, in two.<sup>33</sup> Parliament has also initiated referenda in nine countries.<sup>34</sup>

## Conclusion

In short, when it comes to referenda, national laws and practices vary widely. Europe has democracies which are almost entirely representative, democracies which are semi-direct, and any number of intermediary forms. Referenda are sometimes seen as a tool used by the executive branch of government and sometimes as an instrument used by groups of citizens to further their views outside traditional political party structures.

However, a number of general trends give us some idea of the form which a European constitutional law on referenda might take. For example, it is customary to provide for referenda (at least at national level) in national constitutions.

The rules which states share are usually minimum rules guaranteeing the democratic nature of the vote. To be truly democratic, referenda – like elections – must satisfy certain requirements. One is respect for procedures provided for in law. Others are common to both elections and referenda, and cover respect for the principles inherent in Europe's electoral heritage, which apply *mutatis mutandis* to referenda<sup>35</sup>.

Finally, other common democratic requirements are specific to referenda. This applies, for example, to certain aspects of voter freedom, such as respect for the principle of unity of content, and the rule that questions put to the public must be clearly phrased.

Thus, like the rest of constitutional law, referenda combines diversity with the need to respect the principles of Europe's constitutional heritage.

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<sup>32</sup>France, Armenia, Azerbaijan, Cyprus, the Czech Republic, Spain, Turkey.

<sup>33</sup>Luxembourg and Malta.

<sup>34</sup>Austria, Belgium, Estonia, Lithuania (with the exception of one case of a popular initiative), Sweden, Ireland (by adopting texts submitted to mandatory referendum), Portugal (one mandatory referendum, one parliamentary initiative). In Finland and Norway, special acts of parliament were passed. There has been a referendum in Denmark following a request made by a minority in Parliament.

<sup>35</sup>See the Code of Good Practice in Electoral Matters adopted by the Venice Commission at its 52<sup>nd</sup> plenary session, CDL-AD(2002)023rev.