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Rethinking Tools to Observe Direct Democratic Processes (updated April 2018)

Executive Summary:

Several academic and policy studies argue that referendums are different from elections, thus implicitly suggesting that their study and practice of monitoring by international organizations should also differ. In this concept note, I summarize the challenges of observing direct democratic processes (i.e. referendums) drawing on past as well as recent experiences across the world. I argue that while different from elections, referendums do not constitute a uniform category. For one thing, referendums are too complex and diverse to be subjected to a uniform normative, legal, or monitoring standard. Referendums could be binding or consultative, formal or informal, local or national (and in some cases even cross-national). For another, direct democracy might involve ‘minor issues’ in countries familiar with referendums (e.g. Switzerland) or pose significant national challenges in countries with no or little experience of them (e.g. the Brexit referendum in the UK; the South Sudan referendum on independence). The intentions of leaders and governments differ as well. On the one hand, referendums could be an instrument for authoritarian leaders to consolidate their power but on the other, they might promote positive change such as inclusive peace, local governance, and human rights. In many cases, it is difficult to judge intentions a priori given the normative complexity of referendums (e.g. voting on amnesties for war criminals as part of a peace settlement or changing a country’s electoral system). The concept note critiques the available standards and guidelines for conducting referendums, as stipulated by the Venice Commission of the Council of Europe. It then suggests three ways for international organizations to address the contemporary challenges of direct democracy: seeking more structured inter-agency collaboration to promote positive learning; ensuring the early involvement of a dedicated international task force to advise governments and other stakeholders on the risks, limitations and best practices of referendums; and building local capacity even in controversial cases but without legitimizing ill-intended uses of direct democracy that might infringe on international law. Drawing on the latter point, the concept note suggests that grey areas might require the use of soft power, including the cautious conveying of messages by international organizations, in addition to formal guidelines.
Highlights

- Although 2016 has been described as the year of terrible referendums, the conventional expectation is that referendums are here to stay. In 2018-9, new referendums on their respective territorial conflicts are planned in Guatemala and Belize, while in East Asia, 2018 could be the breakout year for referendums with possible developments in direct democracy in Taiwan, Japan and Korea. EU-related referendums seem to have paused, as highlighted in a landmark decision in the Netherlands to scrap advisory referendums, but there are still proposals in the UK for a second EU referendum on Brexit. Meanwhile, in the Balkans, efforts to resolve through international legal arbitration the Croatia-Slovenia border following a referendum seemed to have stalled while the Macedonian naming dispute could potentially lead (if successful) to a nation-wide referendum as part of the country’s ambition to join the EU and perhaps Greece. Finally, referendums are planned for 2018 on the constitution of Burundi (extending presidential terms) and the independence of New Caledonia. Given recent experiences with referendums, international media and monitoring organisations need new standards to evaluate direct democratic processes beyond the earlier work commissioned by the Venice Commission a decade ago.

- What are the major challenges facing international observers in direct democratic processes, and how are referendums different from elections? By definition, in a referendum, the public does not vote for elected representatives, as in an election, but for or against a specific issue (or issues if the ballot includes multiple questions). Because the wording and timing are extremely important whether the government or an independent commission decides on these issues constitutes the key concern in the
evaluation and monitoring of referendums. In principle, the exact theme and wording of referendums should be acceptable to all parties involve and clear leaving no ambiguities as to what follows after people vote.

- Referendums could serve multiple purposes. They could aim to promote positive change or alternatively support the status quo by extending the powers of a current leader demanding for instance from the public to endorse a more authoritarian constitution. Unlike elections, referendums can operate on an ad hoc basis, frequently outside existing national legal frameworks. The lack of consistency and the myriad possibilities can pose major challenges to outside observers. Nonetheless, external monitoring is often seen as essential, as referendums have significant generation-wide implications.

- Referendums are sometimes employed in positive ways as part of negotiated settlements, for instance, to promote peace following protracted conflicts. Successful referendums in South Africa in 1992 and Northern Ireland in 1998 facilitated the respective peace settlements by engaging broader segments of the society in the peace process and limiting the role of violent opposition groups. But referendums might also have unintended side effects and inflame already unstable ethnic relations, as in East Timor and Kyrgyzstan. ‘Wrongly’ designed, executed, or timed referendums could become conflict-inducing, rather than conflict-mitigating, opportunities. Choosing between the various types of referendums can be difficult for international missions.

- Referendums, argues Quintin Oliver, are different from elections, as the former are usually more emotional than rational, especially on national issues or against a background of conflict. As a result, referendums can be highly polarizing and risky.
for international monitoring missions. In particular, territorial referendums imply decisions with multiple implications across generations. Yet the more a polarizing referendum is likely to be, the more necessary an international mission is to prevent violent conflict. Early preparation and inter-agency cross-learning could break the vicious cycle of violence by mitigating the most polarizing aspects of an incipient referendum.

- While differing from elections, all referendums are not alike and do not comprise a homogenous category. For example, a referendum could focus on changing the constitution (in either a more or a less democratic direction), on supporting or rejecting a peace plan (which might unite or divide a country), or on promoting or restricting human rights (see the University of Kent’s online database on peace referendum designs). Referendums can be based on national legislation, or such legislation might be too lacking in scope or detail to backstop a referendum. The intentions of leaders can vary as well, with some promoting positive and others promoting negative change. In many cases, it is difficult to judge intentions *a priori* because of the legal complexity of a referendum or the issue it focuses on (e.g. amnesties for war criminals might be viewed by some as ‘necessary’ and by others as ‘evil’, or both). How we deal with problematic referendums or grey areas might be an issue of signaling for international organizations – alerting actors to possible danger. It may not necessitate a stricter code of practice such as that created by the Venice Commission. Alternatively, the two approaches could be complementary, with monitoring organizations building a body of knowledge based on both new cases and comparative cross-learning.
• In referendums, domestic political parties might split, making the monitoring of election campaign financing, the distribution of time in the media, and other party related commitments much more difficult. The key dilemma is whether time should be divided between supporters vs. opponents of a referendum motion or among political parties, as in elections. Moreover, political parties and domestic NGOs often help international missions by monitoring each other during elections. This might not be the case with politically intense referendums. If parties split, for example, they may not be able to maintain their own internal monitoring mechanisms. The external monitoring bodies will be entirely responsible, setting the stakes that much higher.

• Some countries grant a specified minimum of petitioners the right to call a referendum. This has become easier, with social media increasingly becoming important players in elections and referendums. Some of these thresholds might need to be reconsidered as technology and access to voters become easier.

• International monitors and standards might not be in a position to follow the new technological advances. A key theme emerging from the Facebook- Cambridge Analytica data inquiry is that policymakers are unaware of even the basic mechanics by which social media operate thus largely incapable of monitoring even following relevant developments in the field. Despite these limitations, international observers must solicit the cooperation from social media platforms and monitor closely their use during referendum campaigns.

• Referendums can be formal or informal and binding or non-binding. Importantly, direct democracy might involve minor issues in countries with referendum experience or highly significant issues in a country with no or little experience (e.g. Brexit
referendum in the UK or Japan’s proposed ‘peace clause’ referendum. A key challenge for ‘newcomers’ in referendum politics (e.g. Japan) is setting the standards for the most appropriate and fair referendum system in their first attempt. In the case of the pacifist constitution debate in Japan this will involve a law ensuring a level playing field in the use of political advertising ahead of the referendum. Countries experiencing first-ever national referendums might adopt stricter and more cautionary regulations particularly if the question in the ballot is of primary importance for the future of the country.

- Referendums can cover multiple issues voted on separately (e.g. Guatemala 1999) or provide comprehensive packages for change through overall constitutional reform. Some countries might regulate referendums through relevant legal frameworks while others might not. Finally there might be wide consensus on the wording, timing and duration of the referendum or these issues might be contested across the political spectrum (see OAS recommendations for the Colombian case).

- It might be useful to think of referendums as belonging in different normative categories. One category might feature referendums with general consensus on their necessity, design, and external monitoring. Conditions facilitating external observation of these referendums could include the presence of a referendum commission (e.g. Ireland) and nation-wide standards on the wording of questions, the turnout, approval thresholds, explicit limits of direct democracy, the obligations of government after the vote, and the role of parliaments and courts in either endorsing or challenging the result. In such ideal settings, international missions might be not only desirable but also effective in ensuring the pre-agreed conditions and rules are met by all parties.
Supermajority and quorum requirements are also important, but as the cases of Iraq, Cyprus and Northern Ireland suggest, there is no uniform standard on this issue. The Venice Commission says: ‘There may sometimes be grounds for taking into account the specific circumstances of national minorities. In particular, this would apply to a referendum on self-government for a territory with a relatively high concentration of a minority population: a double majority of electors within that territory and throughout the country may be required.’ The same principle could apply to other affected groups. Supermajority and quorum requirements should mirror the referendum question. For example, in deeply divided societies, two or more majorities might be needed if the referendum question is on a constitutional amendment to introduce a form of power-sharing.

Diaspora involvement is a major challenge for a referendum. Quintin Oliver argues referendums are ‘susceptible to undue diaspora influence, both in terms of out of country votes, but also contribution to the debate, positive and negative, funding and campaign support.’ Monitoring new procedures for diasporas and voting in a highly polarized environment (e.g. Turkey’s referendum on April 16, 2017) could be extremely difficult for international organizations, as they must work in various locations and monitor activities among countries and governments with opposing standards and interests (e.g., Dutch-Turkish controversy). If referendums are informal or mandate referendums, expanding voting rights to the diaspora might be easier. Although the Venice Commission suggests, ‘It is desirable that the right to vote be accorded to citizens residing abroad, at least for national referendums,’ this recommendation needs to be reconsidered following the outcome of the Turkish
referendum and the negative impact voters in liberal democracies had in strengthening authoritarianism in their home country.

- Another category of referendums might feature ‘unwelcome cases’ where the general procedures, themes and wording of a referendum makes it clearly incompatible with international legal or normative standards (Hungary’s 2016 refugee referendum). In these cases, an electoral observation mission might risk undermining not just national democratic processes but also international norms on refugee rights.

- A key issue, particularly for the European Union, is whether referendums should be regulated when existing commitments and legal frameworks are violated particularly where there are cross-border spill-over effects. To cite one example, the Brexit referendum had a disproportionate impact on the Republic of Ireland, both financially and politically, by threatening the country’s economy and stability following the Belfast/Good Friday Agreement. Likewise, EU leaders encouraged Greek PM George Papandreou to resign rather than proceed with a bail-out referendum, fearing its impact on the entire Eurozone. Perhaps the best case is the Dutch referendum rejecting the European Union Association Agreement with Ukraine. These all fall into the ‘less welcome’ category because of their political, financial and/or reputational costs.

- In some cases, the involvement of electoral observers might require keeping a balance between legitimizing and condemning a national referendum. As noted above, the Turkish presidential referendum belongs in the ‘less welcome’ category; its supporters framed it as an exercise of national sovereignty, while its critics saw it as a
step towards authoritarianism. To address such problematic cases, international organizations might shape their observation missions in a way that does not legitimize wrong intentions but still offers support to countries facing democratic challenges (i.e. engaging without endorsing).

- Peace and human rights referendums are a special category requiring a delicate balancing act. Governments have an obligation (legal and moral) to protect their citizens and end the oppression of vulnerable groups. If a dominant group votes to end its own oppressive regime, that’s normally a ‘good’ referendum. However, voting in favor of oppression does not offer dominant groups legitimacy to continue their oppression. Even if it is problematic to challenge popular will, this might be necessary (e.g. Swiss referendum on women’s right to vote). In other cases, walking a fine line between supporting positive change while challenging the referendum’s legitimacy might be necessary. During the 1992 (last white) referendum in South Africa, the ANC condemned the indignity of a racial vote but still tried to convince its followers that ‘it benefited the peace process’.

- Can we think of direct democratic processes that feature citizen involvement without pitfalls? Peace referendums, such as the one in South Africa in 1992, for instance, could be a ‘welcome category’ of direct democratic procedures. ‘Welcome’ referendums share some common elements with elections (and could be framed as election/referendums) but have the strengths and legitimacy of direct democracy. A straightforward way for a government to win a referendum and promote reconciliation is to ask for an early vote of confidence in the leader to settle a negotiated peace. This was the case in South Africa in 1992. F.W. De Klerk asked whites only to back him to
negotiate an end to apartheid; against early predictions, he gained a resounding ‘yes’.

In a mandate referendum, a leader might ask for public support to finalize negotiations for peace. Alternatively, the leader might resign, triggering a new election. These prior consultation processes are more likely to lead to positive change and are less polarizing, making them easier to monitor.

This concept note ends with three policy recommendations, hoping to trigger further discussion. Based on the highlights above, the following recommendations are made for a:

- **More structured inter-agency collaboration.** The complexity, sub-types and variations in intentions across referendums require a level of comparative knowledge, skills and training, arguably beyond the capacity of a single organization.

- **Establishment of an international task force to advise governments, national parliaments and other stakeholders,** particularly in the use of social media platforms, early enough in the referendum process to explain the risks, limitations and best practices of referendums.

- **A set of measures and policies to signal (partial) opposition of international organizations to certain (majoritarian) uses of direct democracy.** This might involve ‘engagement’ on some level but not the ‘endorsement’ of the kind of soft power that may violate international norms.

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