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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

GUIDELINES FOR CONSTITUTIONAL REFERENDUMS

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GUIDELINES FOR CONSTITUTIONAL REFERENDUMS¹

I. THE GENERAL CONTEXT

Recent experience of constitutional referendums in the new democracies has highlighted a number of issues which the present guidelines seek to address. These guidelines set out minimum rules for constitutional referendums and are designed to ensure that this instrument is used in accordance with the principles of democracy and the rule of law.

Constitutional referendums are taken to refer to popular votes in which the question of revising a State's Constitution is posed, irrespective of whether this requires voters to give an opinion on a specific proposal for constitutional change.

A. Types of referendum and the bodies competent to call referendums

Constitutional referendums generally take one of the following forms:

- *ordinary mandatory referendum*: under the Constitution, a text is automatically submitted to a referendum after it has been adopted by Parliament;
- (*mandatory*) *popular initiative referendum*: a section of the electorate puts forward a text which is (must be) submitted to the popular vote;
- *ordinary optional referendum*: a text is submitted to the popular vote at the request of a section of the electorate (petition for a referendum) following its adoption by Parliament;
- *extraordinary referendum*: irrespective of whether it has been approved by Parliament, a text is submitted to the popular vote *at the request of an authority*, namely:
 - Parliament itself;
 - a Parliamentary group;
 - the Head of State or the Government.

B. Subject of a referendum

By definition, a constitutional referendum is concerned with *a total or partial revision* of the Constitution.

It may take the form of:

- *a specifically-worded draft amendment* (of one or more articles of the Constitution);
- a proposal to repeal existing provisions (*abrogative referendum*, which is a form of popular initiative);
- a counter-proposal to a bill accepted by Parliament (*constructive referendum*);
- a *question of principle* on the advisability of revising the Constitution (example: "should the Constitution be totally revised?");

¹ A motion requesting the preparation of guidelines in this area has been tabled with the Parliamentary Assembly (Doc. 8677).

- a *generally-worded proposal* (especially in the area of popular initiatives) (eg. “Do you agree or disagree with the following proposal: The number of seats in Parliament shall be reduced from 300 to 200?”);

C. OUTCOME OF REFERENDUMS

A constitutional referendum may:

- be binding on the authorities (*decision-making referendum*); in this case:
 - it either directly results in an amendment to the Constitution (*constituent referendum*);
 - or (*preliminary referendum*) it entails the authorities’ carrying out a revision of the Constitution, which will, if necessary, be submitted in turn to a referendum: preliminary referendums may concern a question of principle or a generally-worded proposal;
- not be binding on the authorities (*consultative referendum*).

II. GUIDELINES

A. Law-making basis

The following issues must be expressly regulated at constitutional level:

- types of referendum and the bodies competent to call a referendum;
- the subject-matter of referendums;
- the outcome of referendums;
- general principles (point II.B)
- the main rules governing procedural and substantive validity (points II.C and II.D).

All the guidelines outlined below should be covered by the Constitution or legislation.

B. General principles

1. The *constitutional principles of electoral law* (universal, equal, free, direct and secret suffrage) apply to referendums as well as to elections.

2. Equally, *fundamental rights*, especially freedom of expression, freedom of assembly and freedom of association, must be guaranteed and respected, particularly when their exercise requires the use of public places.

3. The use of referendums must, in general, comply with the legal system as a whole and especially the rules governing *revision of the Constitution*. In particular, referendums cannot be held if the Constitution does not provide for them, for example where constitutional reform is a matter for Parliament’s exclusive jurisdiction.

C. The procedural validity of texts submitted to a referendum

Texts submitted to a referendum must respect:

- *unity of form*: the text must not combine a specifically-worded draft amendment with a generally-worded proposal or a question of principle;

- *unity of content*: there must be an intrinsic connection between the various parts of the text, except in the case of total revision of the Constitution;

- *unity of hierarchical level*: the text must not simultaneously amend the Constitution and subordinate legislation;

[- they must be *executable*: a popular initiative must not be declared unenforceable unless its implementation is objectively impossible.]

D. The substantive validity of texts submitted to a referendum

Texts submitted to a constitutional referendum must abide by the substantive limits of constitutional reform.

They must not be contrary to *international law* or the *Council of Europe's statutory principles* (democracy, human rights and the rule of law).

Popular initiatives that contradict the principles mentioned under II.C and II.D must be declared *invalid*.

E. Other aspects of free suffrage

In addition to the principles set out under B and C, free suffrage – particularly free determination of the elector's will – implies:

1. *The right to accurate composition of the electorate*;
2. *The right to expect that referendums provided for by the legislative system will be organised in compliance with the procedural rules*; in particular, referendums must be held within the time-limit prescribed by law;
3. *Prohibition of unlawful influence on the outcome of the vote*:
 - a. 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;
 - b. The authorities must provide objective information. This implies the following:
 - the text submitted to a referendum and an explanatory report should be made available to citizens sufficiently in advance, as follows:
 - they must be published in an official gazette at least one month before the vote;
 - they must be sent directly to citizens and be received at least two weeks before the ballot;
 - the explanatory report must give a balanced presentation not only of the (executive and legislative) authorities' but also opposing viewpoints.

c. The (national, regional and local) authorities must not influence the outcome of the vote by excessive, one-sided campaigning. The use of public funds for campaigning purposes during the referendum campaign proper (ie in the month preceding the vote) must be prohibited. A strict upper limit must be set on the use of public funds for campaigning purposes in the preceding period.

4. *The right to accurate establishment of the result* [by an independent committee] and formal publication in the official gazette.

The vote must be declared invalid where irregularities may have influenced the outcome.

F. Funding

- The general rules on the funding of political parties and electoral campaigns must be applied to both public and private funding.

- In contrast to elections, the use of public funds for campaigning purposes need not be strictly prohibited in all cases; however, it must be restricted - see point E.3.c above.

- Payment from private sources for the collection of signatures for popular initiatives and optional referendums must be regulated, with regard to both the total amount allocated and the amount paid to each person. [Alternative: such payments must be prohibited.]

G. Use of public places

a. Advertising

Supporters and opponents of the proposal submitted to a referendum must have equal access to election hoardings.

b. Collection of signatures

If authorisation is required in order to gather signatures for popular initiatives and referendum petitions on public thoroughfares, such authorisation may be refused only in specific cases, on the basis of overriding public interest and in accordance with the principle of equality.

c. Right to demonstrate

Street demonstrations to support or oppose a text submitted to a referendum may be subject to authorisation: such authorisation may be refused only on the basis of overriding public interest.

H. Media

Radio and television broadcasts on the electoral campaign must allocate equal amounts of time to supporters and opponents of the proposal being voted on.

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

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

J. Specific rules for popular initiatives and optional referendums

- Everyone enjoying political rights is entitled to sign an initiative or referendum.
- The time-limits for collecting signatures (particularly the *dies a quo* and the *dies ad quem*) must be clearly specified, as well as the number of signatures to be collected.
- Everyone (regardless of whether he or she enjoys political rights) must be entitled to collect signatures.
- All signatures must be checked. In order to facilitate checking, lists of signatures should preferably contain the names of electors registered in the same municipality.
- For popular initiatives only: in order to avoid having to declare a vote totally invalid, an authority must have the power, prior to the vote, to correct faulty drafting, such as:
 - the question's obscure, misleading or suggestive nature;
 - violation of the rules on procedural or substantive validity; in this event, partial invalidity may be declared if the remaining text is coherent; sub-division may be envisaged to correct a lack of substantive unity.
- See also point F, third paragraph (remuneration for collecting signatures) and point G.c (use of public places for collecting signatures).

K. Preliminary referendum

In order to avoid uncertainties about the follow-up action to a referendum, the use of *preliminary referendums* must be limited or, at the least, the consequences of adopting the proposal must be clear. Votes on *questions of principle* or *generally-worded proposals* should preferably be *consultative*.

L. Mandatory referendums

Mandatory referendums may be limited to total revision or revision of fundamental provisions. In the latter case, the Constitution will identify these particular provisions in an article whose revision is subject to a mandatory referendum.

M. [Waiting period and] parallelism in procedures

[a. A waiting period of not more than five years may be set after a constitutional referendum. During this period, a text accepted in a referendum may not be amended, while a text rejected in a referendum may not be resubmitted.]

b. Parallelism in procedures:

- a text that has been rejected in a referendum may not be adopted by another procedure for constitutional revision;
- a constitutional provision that has been accepted in a referendum may not be revised by another method of constitutional revision.

The foregoing does not apply:

- in the case of a consultative referendum;
- in the case of a referendum on partial revision of the Constitution, where the previous referendum concerned a total revision;
[- once a reasonable time has elapsed following the referendum;]
- in the event of rejection of a text submitted to an optional referendum, a similar new text must not be submitted to the vote unless a referendum is requested.

N. The role of Parliament

When a popular initiative or extraordinary referendum is held, Parliament must state its opinion on the text submitted to the vote. It may be entitled to put forward a counter-proposal to the proposed text. A dead-line must be set for Parliament to give its opinion: if this dead-line is not met, the text will be submitted to the popular vote without Parliament's opinion.

O. Follow-up action to be taken by the authorities

In the case of preliminary referendums, the Constitution or the legislation will set a time-limit for the adoption of a text that conforms to the popular vote – which will, if necessary, be submitted to a referendum in its turn. Judicial review will be exercised to determine whether the adopted text conforms to the popular vote.

The same applies to *abrogative referendums*, if the repealed provisions are necessary for the operation of institutions or compliance with international obligations. In this case, the repealed provisions will remain in force until the adoption of the new text and judicial review will determine whether the text adopted conforms to the popular vote.

P. Quorum

In decision-making referendums, it is best if acceptance by a minimum percentage of the electorate is required in order for a referendum to be valid. This type of quorum is preferable to requiring a minimum turnout.

Q. Judicial review

Observance of the above rules will be subject to judicial review. This is exercised, in the final instance, by a constitutional court or equivalent body. In particular, judicial review will focus on:

- the procedural and substantive validity of the texts submitted to referendum;
- respect for free suffrage;
- the completion of popular initiatives and referendums;
- the follow-up action taken by the authorities on a preliminary vote;
- the results of the ballot.