



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 11 June 2001

<cdl\doc\2001\cdl\010rev.2-e>

Restricted
CDL (2001) 10 rev.2
Or. Fr.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

GUIDELINES FOR CONSTITUTIONAL REFERENDUMS

**Document prepared by the Secretariat
in co-operation with
Mr S. Bartole (member, Italy)
Mr G. Batliner (member, Liechtenstein)
Mr G. Malinverni (member, Switzerland)
Mr H. H. Vogel (member, Sweden)
and revised on the basis of comments
by members of the Commission**

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 as referring to popular votes in which the question of partially or totally revising a State's Constitution (and not of its federated entities) is asked, irrespective of whether this requires voters to give an opinion on a specific proposal for constitutional change or on a question of principle.

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

A constitutional referendum may :

- be required by the text of the Constitution which provides that certain texts are automatically submitted to referendum after their adoption by Parliament (mandatory referendum);
- take place following a popular initiative :
 - either a section of the electorate puts forward a text which is then submitted to popular vote;
 - or a section of the electorate requests that a text adopted by Parliament be submitted to popular vote;
- be called by an authority such as :
 - Parliament itself or a specific number of members of Parliament;
 - the Head of State or the government;
 - one or several territorial Entities.

Constitutional referendums may be held both with respect to texts *already approved or not yet approved* by Parliament.

They may take the form of :

- a vote on specifically-worded draft amendments to the constitution or a specific proposal to abrogate existing provisions of the Constitution;
- a vote on a question of principle (for example: “are you in favour of amending the constitution to introduce a presidential system of government?”); or
- on a generally worded proposal (more precise) which does not have the form of specifically worded amendments (for example: “are you in favour of amending the Constitution in order to reduce the number of seats in Parliament from 300 to 200?”).

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

II. GUIDELINES

A. Legal 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 norms and principles (point II.B), including the franchise;
- the main rules governing procedural and substantive validity (points II.C and II.D);
- judicial review (point II.P).

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

B. General norms and 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 protected, 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.
4. *Judicial review* should in general be available in the field covered by the present guidelines.

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*: except in the case of total revision of the Constitution, there must be an intrinsic connection between the various parts of the text, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse as a whole provisions without intrinsic link ; the revision of several chapters of the Constitution at the same time is equivalent to a total revision;
- *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 (intrinsic and extrinsic) 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 must not involve the withdrawal of norms which are essential to the functioning of institutions.

Popular initiatives that contradict the requirements mentioned under II.C and II.D *should not be submitted to popular vote*.

E. Other aspects of free suffrage

In addition to the principles set out under B, C and D, 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, and 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 that the text submitted to referendum and an explanatory report should be made available to electors 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' viewpoint but also the opposing one.

c. Contrary to the case of elections, it is not necessary to completely prohibit the intervention of the authorities supporting or opposing a proposal submitted to referendum. However, the (national, regional and local) authorities must not influence the outcome of the vote by excessive, one-sided campaigning. The use of public funds by the authorities 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 (negative or positive) outcome of the vote. In addition, a partial cancellation of the vote is possible when irregularities only occurred in specific geographical unities (regions, communes, even polling stations).

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 by the authorities 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 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 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 referendum may be subject to authorisation: such authorisation may be refused only on the basis of overriding public interest, in accordance with the general rules applicable to public demonstrations.

H. Media

Public radio and television broadcasts on the electoral campaign must allocate equal amounts of time to programmes which support or oppose 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.

[It could be foreseen to prohibit the publication of opinion polls during the week before the election.]

J. Specific rules for popular initiatives

- Everyone enjoying political rights is entitled to sign an initiative or referendum.
- The time-limit 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.
- 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. Referendums imposed by the Constitution (mandatory referendums)

The cases where referendums are imposed by the Constitution 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 the revision of which is subject to a mandatory referendum.

L. [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 above does not apply:

- in the case of a consultative referendum (which does not bind the authorities);

- 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 adopted by Parliament and submitted to popular vote at the request of a section of the electorate, a similar new text must not be submitted to vote unless a referendum is requested.

M. The role of Parliament

When a draft constitutional revision is proposed by a section of the electorate or an authority other than Parliament, Parliament must state its opinion on the text submitted to vote. It may be entitled to put forward a counter-proposal to the proposed text. A deadline must be set for Parliament to give its opinion: if this deadline is not met, the text will be submitted to popular vote without Parliament's opinion.

N. Effects of referendum

Referendums on specifically worded draft amendments will usually have a *binding character* and their implementation will not present particular problems.

Referendums on *questions of principle* or other *generally-worded proposals* should be *consultative* only. While some countries recognise that such referendums may bind parliament in principle, this leads to difficulties of implementation and entails a high risk of political conflicts.

O. Quorum

It is admissible for acceptance by a minimum percentage of the electorate to be required in order for a referendum to be valid. This type of quorum is preferable to requiring a minimum turnout.

P. Judicial review

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

- the franchise;
- the completion of popular initiatives;
- the procedural and substantive validity of the texts submitted to referendum, which should be subjected to preliminary review; domestic law determines whether this control is obligatory or optional;
- respect for free suffrage;
- [the follow-up action taken by the authorities on a question of principle or a generally-worded proposal];
- the results of the ballot.