



C O D E S A

WORKING GROUP 4

SUB-COMMITTEE 1 : "TESTING THE WILL OF THE PEOPLE" : MEETING ON MONDAY 17 AND TUESDAY 18 FEBRUARY 1992 : 10H00 : WORLD TRADE CENTRE

1.4 (A) TESTING THE WILL OF THE PEOPLE CONCERNED REGARDING RE-INCORPORATION OR OTHERWISE OF THE TBVC STATES BY ACCEPTABLE DEMOCRATIC MEANS

- {i} Department of Home Affairs : Paper Regarding Referenda.
- {ii} South African Law Commission : In Its Report On Constitutional Models Chapter 19, Inter Alia, Deals With Referenda : October 1991)



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TERMS OF REFERENCE FOR SUB-COMMITTEE 1
"TESTING THE WILL OF THE PEOPLE"

Working Group 4

1. Terms of Reference

IT IS RECORDED that the terms of reference of the Sub-Committee are as follows:

- 1.1 To investigate and report upon all proposals and make recommendations with regard to the relationships between South Africa, the TBVC states and the people of those states under a new South African constitution.
- 1.2 To identify the key issues and problems that need to be addressed.
- 1.3 To identify areas of commonality and aspects where agreement already exists between participating delegations.
- 1.4 Specifically, but without vitiating the generality of the above to consider:
 - (a) testing the will of the people concerned regarding re-incorporation or otherwise, of the TBVC states, by acceptable democratic means;
 - (b) strategies to keep the people of the TBVC states fully informed especially to avoid unfortunate misunderstandings;
 - (c) the method to be employed to test the feeling of the people (referendum? opinion poll? election?);
 - (d) deciding on who will be entitled to express an opinion (citizens? residents of TBVC states? and/or citizens also resident outside these states, within South Africa).

TESTING OF THE WILL OF CITIZENS BY MEANS OF A REFERENDUM

(Compiled by The Department of Internal Home Affairs)
14 February 1992

1. THE PURPOSE OF A REFERENDUM

A referendum can at best be described as a formal opinion poll. Thus, the Long title of the Referendums Act, states specifically that the purpose of the Act is to make provision for the holding of referendums in order to ascertain the views of voters or a group of voters in the Republic or any part thereof on any matter.

2. THE DIFFERENCES BETWEEN AN ELECTION AND A REFERENDUM

The main difference between a referendum and an election can be described as follows: In the case of a referendum a question is referred to voters for their direct decision. However, the result of a referendum does not legally bind the government to a particular course of action. The result of an election, on the other hand, is decisive with regard to the composition of Parliament as well as the Government of the day.

3. ADVANTAGES OF A REFERENDUM

3.1 A dynamic society and national economy which continuously endeavour to make systematic progress on a democratic basis, require the Government regularly to implement processes by means of which public opinion can be tested before decisions are made or action is taken.

3.2 The following are a few of the various methods of consultation between the Government and the country's inhabitants that are being employed in South Africa:

The Government tests the opinion of its supporters at its annual congresses; it tests the opinion of the voters by way of elections in which it asks for a mandate for its future conduct; it test the opinions of interested parties by calling for evidence to be given before commissions of inquiry; and it sometimes test opinions and attitudes with the help of bodies such as the HSRC.

However, important constitutional events sometimes require a special way of consulting the electorate. For this reason, a referendum was held in Natal in 1909, in which the voters had to indicate whether they were in favour of the draft constitution which had been proposed at the time; there was the referendum held in 1960, when the voters were asked whether they were in favour of becoming a Republic; and in 1983 the question was put to the electorate of the House of Assembly whether they were in favour of the present Constitution, or not.

4. MAIN FEATURES OF THE REFERENDUMS ACT, 1983

- 4.1 It is an enabling measure which empower the State President to prescribe the best system for conducting every kind of referendum which may be held in future.
- 4.2 In terms of the Act the State President may determine who shall be entitled to vote at a particular referendum, which category of voters shall be involved in a referendum and in which area in the Republic a particular referendum may be held.
- 4.3 The Act furthermore enables the State President to test public opinion on any subject which he may consider important. He may test the opinion of a specific group or category of inhabitants on the subject, for example, or he may test opinions in a particular area or areas.

5. REFERENDUMS IN THE TBVC-STATES

Should it be decided to hold referendums in the TBVC-states on, for instance, the question of reincorporation into South Africa, note should be taken of the following:

- 5.1 The South African Referendums Act would not be applicable in those states. Each state will have to adopt its own legislation regulating referendums.

- 5.2 If referendums are to be held in the TBVC-states whether prior to or after a referendum in South Africa, it would be possible to assist with equipment such as polling booths, ballot boxes, ultra violet lamps and the like. Should it however be held simultaneously with a referendum in South Africa, such assistance will not be possible.
- 5.3 An amendment to the Referendums Act requiring a voter to be in possession of an identity document, has already been introduced to Parliament. The feasibility of a similar requirement with regard to referendums in the TBVC-states will depend on -
- 5.3.1 the number of voters in those states who are in possession of identity documents;
- 5.3.2 the advisability to allow voters with dual citizenship (South African Citizenship and Citizenship of a TBVC-state) to participate in a referendum.
- 5.4 It is possible for the TBVC-states to adopt legislation similar to the Referendums Act of South Africa. As it is only enabling legislation, each State would be in the position to employ the best system for conducting a referendum in that state. In particular the question whether a referendum should be conducted either on voters' rolls - this imply registration of voters, or simply on the basis of identity documents, will be best decided by each state.

SOUTH AFRICAN LAW COMMISSION



Report on Constitutional Models

Volume 2

CHAPTER 19

REPRESENTATION: ELECTIONS, REFERENDUMS AND INITIATIVES

A. ELECTIONS(a) Forms of representation

19.1 It is accepted today that democratic government can function in two ways: directly or indirectly.

Dr W H Olivier¹ puts it as follows:

Direct democracy means that all the qualified voters in a joint assembly resolve issues and make laws, as was the case in early Athens and Rome ... Indirect democracy refers to representation according to which voters designate representatives in accordance with a particular method in order to perform legislative, executive, administrative and sometimes even judicial functions on behalf of the voters ... Therefore the purpose of elections is to establish a body that is competent to take decisions on behalf of the electorate - also decisions of a political nature. (Translation.)

19.2 Direct democracy in the form of a joint assembly is, at least at national and constituent-state or regional level and normally also at municipal level, simply no longer attainable owing to population numbers, the impossibility of the citizens' active participation in the decision-making process, or their unwillingness to participate, etc.

19.3 However, direct democracy in the form of referendums and initiatives by which the citizens can give a direct answer to a

1 "Party- en kiesstelsels" in Van Vuuren and Kriek (eds) Politieke Alternatiewe vir Suider-Afrika: Grondslae en Perspektiewe Hillcrest: Owen Burgess 1987 335.

specific question still exists and will be discussed later in this chapter.

19.4 The obvious way in which a modern democratic government is constituted and the basis from which it derives its legitimacy is the election of representatives. The citizens (the voters) choose representatives to go to the legislative body on their behalf and there to devote their time and energy to the business of government. In some countries it is not only the representatives that are to serve on legislative bodies who are designated, but also executive, administrative and judicial officials who have to perform specialised tasks on behalf of the citizens. This is the formal manner in which indirect representation takes place. The designation of representatives takes place by means of elections according to chosen electoral systems that are usually constitutionally enshrined and defined.

19.5 However, it should not be forgotten that the voter participates informally in countless ways in indirect democracy. Rodee, Anderson and Christol² say:

However, it would be a mistake to assume that his influence on government is limited to casting his ballot. The citizen may also write or personally contact his representative; through the many organizations to which he belongs he may bring collective pressure to bear; he may attend the many open hearings held by public bodies (e.g., the school board, the city council); he may write letters to the editors of newspapers; and he may campaign energetically for the candidates and policies of his choice. His representatives pay heed to the citizen's letters and telegrams, as well as to the published reports of public-opinion polls. The citizen of a democracy can be sure that his elected representative has his ear to the ground to catch the rumblings of civic approval or resentment. In addition, many citizens are called upon to participate in the process of government by serving on advisory boards and committees, which are widely used by all levels of government.

2 Introduction to Political Science McGraw-Hill Kogakusha Ltd 1967 207.

(b) The role of political parties in elections

19.6 R C Macridis³ shows convincingly that the problem of creating order out of the chaos of millions of individual voters, each with his or her own will, and of combining their will and expressing it in recognisable options, is solved by the existence of political parties. Voters eventually come to the fore as collective entities and are seen in terms of groupings: Democrats, Republicans, Conservatives, Workers, Socialists or Greens:

The voters become organized through a process of reconciliation and adjustment whereby individual interests and choices are boiled down to party formulas, pledges and candidates. Even parties of representation provide a common denominator for the different points of view. Parties simplify (some say they even determine) choice. But one thing is clear: given the size of the electorate today, there could be no elections and choice without parties.

(c) Criteria for legitimate, democratic elections

19.7 Macridis⁴ lays down the following criteria for democratic elections:

1. Substantially the entire adult population has the right to vote for candidates in office or running for office.
2. Elections take place regularly within prescribed time limits.
3. No substantial group in the adult population is denied the opportunity of forming a party and putting up candidates.

3 Modern Political Regimes Boston: Little, Brown & Co 1986 77.

4 Modern Political Regimes 78.

4. All the seats in the major legislative chamber can be contested and usually are.
5. Campaigns are conducted with reasonable fairness in that neither law nor violence nor intimidation bars the candidates from presenting their views and qualifications or prevents the voters from finding out what they are and discussing them.
6. Votes are cast freely and secretly; they are counted and reported honestly; and the candidates who receive the proportions required by law are duly installed in office until their terms expire and a new election is held.⁵

19.8 Austin Ranney⁶ prescribes the following six requirements as a minimum:

1. Meaningful choices should be offered to the voters.
2. Freedom to know and discuss the choices: Candidates and their supporters should be free to publicise their names and policy positions and appeal for support on an equal basis.
3. A manageable number of clear choices: The electoral systems should be such as not to confuse voters - Ranney gives the example of the absurd situation in Illinois in 1964 where voters had to choose 177 candidates from a list of 236 names.
4. Equal weighting of votes.
5. Freedom of choice, which means, inter alia, that votes must be cast secretly.

5. The criteria are set forth in Butler, Penniman, and Ranney (eds) Democracy at the Polls Washington DC : American Enterprise Institute 1981 3.

6 The Governing of Men 144.

6. Accurate registration, counting and reporting of votes should be guaranteed.

19.9 The Commission is of the opinion that the following principles should be entrenched in the constitution :

- (i) Universal suffrage, with the same general qualifications and disqualifications, without discrimination on any grounds.
- (ii) Regular elections at fixed times.⁷
- (iii) Freedom to form parties and to join and support any party.
- (iv) All seats in the legislative assembly must be contestable in a general election.
- (v) Voters must be offered meaningful choices.
- (vi) Freedom of information and discussion and a prohibition on intimidation or violence.
- (vii) A manageable number of clear choices.
- (viii) Votes must carry equal weight.
- (ix) Freedom of choice.
- (x) A voting system ensuring the accurate, secret registration of votes, counting thereof and reporting of the results.

⁷ Subject to what was said above regarding the dissolution of parliament as a result of motions of no confidence, etc.

B. REFERENDUMS

19.10 The mechanism of the referendum dates from the time of the Roman Republic when a plebiscitum was a law passed by the national assembly, the comitia tributa. The word plebiscite was later used in European politics for a testing of the will of the people. However, the word plebiscite has become old-fashioned and has been replaced by the word referendum.⁸

19.11 In the nineteenth century, dictators often abused this institution to circumvent the existing democratic processes and to manipulate general popular support for autocratic action. C F Strong⁹ refers to the actions of Napoleon I and Napoleon III in this connection. Better known is Hitler's abuse of the institution to enlist popular support for his actions.¹⁰

19.12 At present the referendum as a constitutional mechanism is provided for in a considerable number of constitutions for two purposes :

- (i) To obtain approval of amendments to the constitution; and
- (ii) to obtain wide support for ordinary (non-constitutional) legislation.¹¹

19.13 As regards (i) - amendments to the constitution - one finds the referendum in Australia, Denmark, Ireland, France, Italy, Switzerland, New Zealand; in some states of the USA, and in

8 C F Strong Modern Political Constitutions London : Sidgwick & Jackson 1972 200.

9 Modern Political Constitutions 200 - 201.

10 C F Strong Modern Political Constitutions 201.

11 C F Strong Modern Political Constitutions 202.

the German constitution (for changes to the borders of the Länder).

19.14 As regards (ii) - support for ordinary legislation - the referendum is found in Italy, Switzerland, France and some states of the USA.

19.15 As there is support in our country for the referendum as applied in Switzerland as an example worthy of emulation in South Africa, we describe that system in the words of C F Strong:¹²

In Switzerland, in the case of all laws passed and resolutions carried by the federal legislature, a referendum must be held if a demand for it is made either by 50,000 citizens or by the legislatures of any eight cantons, unless the resolution is declared by the federal legislature to be "urgent". If a referendum is held and a majority of the people vote against the law in question, it is thereby void. Similarly, in eight cantons all laws whatsoever must be so submitted. This is called the Obligatory Referendum. In seven other cantons, if a certain number (which varies from one canton to another) of citizens demand a referendum, it must be held. This is called the Facultative or Optional Referendum. In a further three cantons some laws of a specified kind must be submitted to the people in any case, and others if a certain proportion of citizens demand it. In most of the remaining cantons the population is so small that primary democracy exists (that is, the whole people forms the legislature) and in such cases, of course, a referendum would be superfluous.

(a) Proposals for South Africa

19.16 Several proponents have advocated the referendum as a constitutional mechanism for our country. The strongest support has come from Mr Leon Louw and Ms Frances Kendall in personal

12 Modern Political Constitutions 203.

representations made to the project leader and in some of their writings.¹³

(b) Pros and cons of the referendum

19.17 C F Strong¹⁴ states the advantages as follows:

First, the referendum corrects the faults of legislatures which may act corruptly or in defiance of their mandate. Secondly, it keeps up a useful and healthy contact between the elected and the electors, a contact not always assured by infrequent general elections. Thirdly, it secures that no law which is opposed to popular feeling shall be passed.

As far as the disadvantages are concerned, Strong says:¹⁵

As to the referendum, if used too frequently, it could cause such delay in the promulgation of laws as might deprive society of the benefits they were designed to bestow, or permit the perpetuation of the evils they were intended to remove. Another objection is that, in a crowded industrial community, the various voices which it would allow to express themselves would, over a long series of measures submitted, probably neutralize one another and so lead to a complete nullification of all progressive legislation. Again, under modern conditions, legislation has become so highly specialized that even a well-informed citizen could hardly hope to grasp the details of all the Bills submitted for popular consideration - which, moreover, would already have enjoyed the great advantage of being carefully weighed and debated in a legislature - and this would lead either to the enthronement of ignorance or to an indifference which would render the practice futile.

(c) The Commission's evaluation

19.18 The referendum can be used to protect minorities, but also to prejudice them.

13 L Louw and F Kendall South Africa: The Solution Bisha Ciskei: Amagi 1986.

14 Modern Political Constitutions 206.

15 Modern Political Constitutions 207.

19.19 For example, if the constitution were to provide that a particular constitutional principle may not be amended except with the support of a qualified majority of all who are entitled to vote - say, two-thirds or three-quarters - the referendum obviously serves a very good purpose because it protects minorities against simple majority domination, especially where the majority is small. However, it would be extremely dangerous to use a referendum as a means of justifying unconstitutional actions if there is support from only a small majority - 51%, 60%, - of the voters.

19.20 The Commission is therefore of the opinion that provision for referendums in the constitution should be clearly limited to particular, exceptional matters, for example amendments to the bill of rights. The referendum as a general means of circumventing the constitution or justifying legislation is a source of great danger and is best avoided.

C. INITIATIVES

19.21 The initiative is a constitutional mechanism by which voters are enabled to initiate or propose legislation in such a manner that it must at least be considered by the legislature.

19.22 While the referendum protects voters against the legislature's "sins of commission, the initiative offers them a remedy for its sins of omission".¹⁶

19.23 The great advantage of the initiative "is that legislatures do not adequately represent the people's point of view and that, as a referendum only concerns proposals made by the legislature, it is not by itself a sufficient guarantee against abuse."¹⁷

16 C F Strong Modern Political Constitutions 204.

17 C F Strong Modern Political Constitutions 204 - 205.

19.24 The initiative is used in Switzerland, some states of the USA and Italy. In Switzerland 50 000 voters may propose a constitutional amendment at federal level and this will then have to be considered by the federal legislature. In the cantons there are various measures by which the popular initiative can be used to pass ordinary legislation or to amend the cantonal constitution.¹⁸

19.25 C F Strong¹⁹ also mentions the interesting linkage of the initiative and the referendum in the constitution of the Weimar Republic:

It stated that if one-tenth of those entitled to vote initiated a request for the introduction of a Bill (which had to be fully drafted) the government was obliged to present it to the Reichstag. If the Reichstag passed it, the law was promulgated without further ado; if it did not, the Bill had to be submitted to a referendum. A similar example of the initiative appears in the Constitution of the Italian Republic. According to Article 71 of that Constitution any fifty thousand electors may submit a Bill, which must be properly drawn, for consideration.

Evaluation

19.26 On the face of it, the initiative is attractive as an ultra-democratic mechanism which enables minority groups to take the initiative in order to make their wishes known to the legislature. But it is also an institution that poses great dangers. C F Strong²⁰ states these as follows:

Other objections besides these apply to the initiative. "It brings before the people," as one writer says, "Bills that

18 Particulars in C F Strong Modern Political Constitutions 205.

19 Modern Political Constitutions 205.

20 Modern Political Constitutions 207.

have never run the gauntlet of parliamentary criticism, which, if they have been carelessly or clumsily drafted, will, if enacted, confuse the law, creating uncertainty and inviting litigation". Further, the initiative may offer scope to unscrupulous leaders or corrupt factions to do great harm to the state by playing upon the ignorance and irresponsibility of the crowd. These objections to the initiative apply even more strongly when it is used in connection with constitutional law. As we have emphasized earlier, a Constitution is something fundamental, only to be changed after great deliberation. If it became a mass of laws inserted by popular drafting and voting, it would lose its essential character and become a conglomeration of unworkable provisions. Such a condition of things would probably lead first to anarchy and then to despotism, in which case this popular device would entirely defeat its own end.

19.27 The Commission is of the opinion that one would be better advised not to provide in our constitution for the initiative as a constitutional mechanism.

