

WORKING GROUP 4

SUB-COMMITTEE 1: "TESTING THE wit oF
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TUESDAY 18 FEBRUARY 1992 z:_10OHOO :

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WORLD TRADE CENTRE ee :

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Z 4 Pg â\200\230TESTING THE WILL OF THE "PEOPLE: CONCERNED "REGARDING

| DEMOCRATIC. MEANS(eh

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1991)

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WORKING GROUP 4

SUB-COMMITTEE 1 s â\200\234TESTING THE Will OF
THE PEOPLE" >; MEETING ON MONDAY 17 AND
TUESDAY 18 FEBRUARY 1992 s 1LOHOO g
WORLD TRADE CENTRE

iat (A) TESTING OTHE Wiebe OnmeTHE 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

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

Working Group 4

Terms of Reference

uy AS} RUAKCKONRIDAO) Â« elnerea Â«ene ees CO wererEnce OF The
Sub-Committee are as follows:

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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.

To identify the key issues and problems that need to be addressed.

To identify areas of commonality and aspects where agreement already exists between participating delegations.

Specirically, sDUcmWLChOUCeIVttidatinge the General ity, of the above to consider:

testing the will of the people concerned regarding re-incorporation or Otherwise, of the TBVC states, by acceptable democratic means;

strategies to keep the people of the TBVC states fully informed especially to avoid unfortunate misunderstandings;

the method to be employed to test the feeling of the people (referendum? opinion poll? election?);

deciding) On whom wares Dem en tnt he Cums: Om CxPiseSiciarain) opinion (citizens? residents of TBVC states? and/or citizens also resident outside these states, within South Africa).

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(Compiled by â\202~h
Â© Depacanieime OF I :
14 February 1992 E nternal Home Affairs)

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.

THE DIFFE ES BETWE ELECTION AND A REFEREND

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.

ADVANTAGES OF A REFERENDUM

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.

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 gometimes test opinions and attitudes with the help of bodies such as the HSRC.

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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.

MAIN FEATURES OF THE REFERENDUM ACT, 1983

It is an enabling measure which empowers the State President to prescribe the best system for conducting every kind of referendum which may be held in future.

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.

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.

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:

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

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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.

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 -

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.

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 implies 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

REPRESENTATION: ELECTIONS, REFERENDUMS AND INITIATIVES

A. ELECTIONS

(a) Forms of representation

Oa It is accepted today that democratic government can function in two ways: directl aera ALSZo

Dr WH Olivier! puts it as follows:

Direct democracy means that ali 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 citizensâ\200\231 active participation in the decision-making process, or their

unwillingness to participate, etc.

OS 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
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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.

However, it should not be forgotten that the voter participates informally in countless ways in indirect democracy.

Rodee, Anderson and Christol? 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]. Moreover, a 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.

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(b) The role of political parties in elections

19.6 RC 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:

Ae 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.

Sh 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 1978b 7/.

⁴ Modern Political Regimes 78.

4. All the seats in the major legislative chamber can be contested and usually are.

SI 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.

â\200\230or 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.

19.8 Austin Ranneyâ® prescribes the following six requirements

as a minimum:

des Meaningful choices should be offered to the voters.

Ze 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.

35 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.

Bo Freedom of choice, which means, inter alia, that votes must be cast secretly.

5Â° The criteria â\200\230ire 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.

199) 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 times⁷
(st at at)) Freedom to form parties and to join and support any
Diary.
(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.

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

es lemien In the nineteenth century, dictators often abused this institution to circumvent the existing democratic processes and to manipulate general popular support for autocratic action. Cc F Strong? 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.!9

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.!!

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

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iiia C F Strong Modern Political Constitutions 202.

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

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 30,000 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

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representations made to the project leader
writings, 13

(b) Pros and cons of the referendum

and in some of their

Wold Cy Seema is gotatac 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. Wasticolilsy, sh{e

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

society of the benefits they were design

as might deprive

ed to bestow, or

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.

13Â° L Louw and F Kendall South Africa: The

Ciskei: Amagi 1986.

14 Modern Political Goinisitiitiuitavomn\sie2 Ooms

15 Modern Political COMBS iemMeLoOasg 207.

Qlution Bisho

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 VOTES => 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.

Ce INITIATIVES

Wo2y Wyss sipssiiesineiva tg 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). BZ 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."''⁷

1 Câ\2027 Â® Seeong Moclacin PoisiieIlecl Comariemeions 204,

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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. !8

19.25 C F Strong³ 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 Ewe, ANEeCorelime oO Weelele Vl Of eee Comsicitemisiem sim 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 Strong³ states these as follows:

Other objections besides these apply to the initiative. "It brings before the people," as one writer says, "200\230Bills that

18 Particulars in C F Strong Modern Political Constitutions 210 or

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 Greate 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 furdamental, only to be Changed after great deliberation. If it became a mass of laws inserted by popular drafting and Oyen yes ey Â© UPlecEmltoste 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.

(Voltooi in tweevoud)

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b) Registrasienommer en beskrywing van die voertuig.

c). Derde Party-skyfie se nommer en naa
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d) Stel vas of enigepassasier/s in die ande
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Indien enige ooggetuie/s die, ongeluk waargeneem het moet ful besonderhede, soos name, adres en a Telascons nommer/8, ens. verkry word.

Ooreenkomstig paragraaf 16 van die bylae tot Vervoer-omsendbrief No 1 van 1975, scos gewysig, moet alle ongelukke met Staatsvoertuie binne 24 uur by die naaste polisiestasie aangemeld en â\200\230n saaknommer verkry word.
LW Hierdie instruksie sluit nie ongelukke * privaat-

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ress Uses Ulyer.ua aacelirk dy ui ardelingshoof aan en toon u bestuurderslisensie aan hom/haar.

Voltooi die voorgeskrewe "Verslag oor 'â\200\230'n ongelukÂ® (TI 181-vorm) so spoedig ag moontlik en noem dit saam met die beskadigde voertuig na die naaste Staatsgarage of handelsgarage (indien 'n Staatsgarage nie geredelik naby is nie) sodat Deel IV van die Ongeluksverslag voltoot kan word.

Verseker dat wu beskrywing van hoe die ongeluk plaasge--vind het volledig en korrek is en dat die Ongeluksverslag volledig voltooi is.

LW "hn Ongeluksverslag waarvan sekere dele nie voltooi word nie, is onaanvaarbaar.

Oien ' die Ongeluksverslag, skets van ongelukstoneel, verklaring/s van ooggetuie/s, polisverslag en kommentaar/aanbevelings van u afdelingshoof in viervoud in.

Drie afskrifte moet na Roete XASO en een afskrif moet na Roete XAS5 gestuur word.

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