

# FAIR VOTING? THE REGULATION OF REFERENDUMS IN CYPRUS IN COMPARATIVE PERSPECTIVE

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## Abstract

Using examples of regulation of referendums in advanced democracies, the article provides an account of the administrative framework regulating the two referendums on the Annan-Plan in Cyprus in 2004. While there is no legal international consensus on what constitutes a free and fair referendum, a number of conditions are necessary to ensure the legitimacy of the outcome. The conclusion for Cyprus is that in the Turkish Cypriot community (TCC), the regulation of this referendum broadly met the international standards, whereas the level of regulation in the Greek Cypriot community (GCC) fell short of these. Had the Greek Cypriot (GC) referendum not suffered from these perceived shortcomings it seems likely that much of the post-referendum debate about the legitimacy could have been avoided.

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The two referendums in Cyprus held in April 2004 follow a general worldwide trend towards a greater use of referendums. Direct democracy is increasingly used to provide greater legitimacy for momentous social and political change, beyond that of the elected government. Recent examples have included major policy issues such as European integration, sovereignty, and ethnic divisions.

However, judging the fairness of referendums can be problematic. In theory, they ought to express unmediated majority will. But referendum campaigns have been accused of demagoguery, one-sided spending, and inappropriate government interventions, raising doubts about their integrity. This section compares the referendums in Cyprus with those in other democracies to determine the overall context of fairness in Cyprus.

Regulation of referendums is relatively rare outside the United States. Even in France, which frequently uses the referendum as a constitutional tool, they are virtually unregulated except for small practicalities,<sup>1</sup> and in America, direct democracy tends to be restricted by legislators mainly (ostensibly) to prevent overuse. In Europe, the typical lack of regulation may reflect the fact that

governments tend to initiate referendums, and in the effort to win, may be reluctant to restrict their room for manoeuvre.

Nevertheless, referendums have recently been subject to regulation in Australia, Canada, Ireland, New Zealand and the UK, among other places. There is no one set of international standards yet, but the general trend may be moving towards a “typology” of sorts. The regulations that have been generated so far are frequently quoted in the ongoing attempt to ensure a fair outcome and process.

We have selected a set of laws, acts, and regulations that together provide a relevant framework of comparison for the Cyprus case. Those regulations include:

- The Local Authorities (Conduct of Referendums) (Wales) Regulations 2004;
- The New Zealand Citizen Initiated Referenda Act 1993;
- The UK Political Parties, Elections, and Referendums Act 2001 (PPERA);
- The Québec C-64.1 Referendum Act (1978 with amendments);
- The New South Wales Government (Elections) Regulation 1998;
- The Ireland Referendum Act 2001;
- The Queensland Referendum Act 1997.

### **Provisions for Referendums in Cyprus: The Greek Cypriot Community**

The administration and general conduct of the referendum in the Greek Cypriot community was, in general, an ad hoc response to a unique event.

- In 1989, referendum legislation was passed – ‘A Law Providing for the Declaration and Conduct of Referendum Law ’ (1989, No. 206);
- In 2004, it became clear that the referendum would not be held under these provisions, as the poll was only to be held within the Greek Cypriot community – and therefore not overseen by the Republic as such;
- Consequently, on 13 April 2004 Parliament passed legislation governing this unique referendum, barely two weeks before the vote was to take place. According to Interior Minister Andreas Christou, the primary aim of the legislation was to give the leader of the Greek Cypriot community the power and assistance to carry out the task, and to provide the funding by a loan from the Central Bank (estimated at CYP £2m.). As in regular Cyprus elections, voting in the referendum was compulsory.

### **Provisions for Referendums in Cyprus: The Turkish Cypriot Community**

While no referendum had been held in the GCC before 2004, two previous polls were held in the TCC.<sup>2</sup> The authorities in the TCC have provisions for referendums

– in the Election and Referendum Law,<sup>3</sup> each individual referendum is regulated by special legislation, in this case, the Law on Referendum With Regard to the Solution of the Cyprus Problem (Special and Transitional Provisions).<sup>4</sup>

### **International Provisions for Fair Administration**

**Electoral Commissions:** A neutral Electoral Commission is considered necessary in order to prevent governments from interfering with the referendum process. Australia, New Zealand, Ireland the UK and Canada have all established permanent non-partisan Electoral Commissions to regulate the referendum, and adjudicate fair conduct.

- In Ireland, a Referendum Commission is established with every referendum, and consists of a former High Court judge, the Clerk of the upper house of the legislature, the Ombudsman and the Comptroller and Auditor General, all selected for their neutrality;<sup>5</sup>
- In Québec a Conseil du référendum is established with three judges of the Court of Québec. The Conseil has exclusive jurisdiction to hear any judicial proceeding relating to a referendum, and its decisions are final;
- In Australia the Electoral Commission is a permanent body, as in the UK;<sup>6</sup>
- In New Zealand, the electoral system is administered by three separate bodies: The Chief Electoral Office of the Ministry of Justice is responsible for the conduct of general elections, by-elections and referendums. The Electoral Enrolment Centre is responsible for the continuous enrolment of voters. Finally, the Electoral Commission is an independent statutory body that registers political parties and logos, supervises financial disclosure, allocates election broadcasting time and funds to eligible parties, and conducts public education and information campaigns on electoral matters.<sup>7</sup>

All commissions mentioned have the task of preparing and distributing information. The UK Electoral Commission also oversees expenditure limits and the administration of grants to political parties and non-party bodies. In other places, the referendum is administered by an ad hoc body.

### **TCC**

The TCC has a standing, independent commission, Yüksek Seçim Kurulu or YSK (Higher Electoral Council), which oversees referendums and information campaigns.

The “Council” is made up of five members, all from the “Judiciary,” and is thus similar to those in the countries cited above whose members are also

representatives of neutral bodies. The president of the “Council” is also the “Chief Justice” of the “Supreme Court.” Appointments are made by the “Supreme Court.”

Thus, in the TCC, the membership and structure of the electoral commission is in line with emerging international standards.

### **GCC**

Responsibility for the administration of the referendum was vested in a General Returning Officer who was appointed by President Papadopoulos, but no profile or capacity of that appointee was specified. However, this position has traditionally (in election law) been assumed by the Director of the Ministry of the Interior. In April 2004 this position was vacant, and the President asked the previous officer to fulfil this specific role.

Overall, the Greek Cypriot community therefore did not quite meet the emerging international standards in this respect.

### **Government Spending**

The use of public funds by the government to support a favoured position is considered problematic when the perceived goal is for people to decide without political bias. In 1994, the Austrian government spent considerable sums on a pro-EU campaign, but without violating Austrian election and referendum laws. The same has been true, more recently, in Spain where the government is reported to have spent considerable amounts of public monies on a (successful) campaign in support of the European Constitution.<sup>8</sup>

In other countries – most notably in Ireland – similar examples of government spending in support of a proposition have been ruled illegal by the courts.<sup>9</sup>

In 1995, an Irish MEP argued that the government had breached the Irish Constitution by spending public funds on aspects other than the impartial organisation of the process.

While the Supreme Court allowed that the government should be allowed to spend money to provide information, and members of the government have the right to campaign, it held that:

“the Government must stop short of spending public money in favour of one side which has the consequence of being to the detriment of those opposed to the constitutional amendment”.

Although legally non-binding, this judgment has inspired legislation both in Ireland and elsewhere. There is an emerging consensus that it is illegitimate for

governments to spend taxpayers' money on partisan information, or other partisan activities using state apparatus.

**TCC**

The "Election and Referendum Law" in the TCC explicitly invalidates any form of public financing for campaigns (paragraph 77, sections 1 and 2) that promote or endorse any one side.

**GCC**

There was no regulation of government spending in the GCC.

**Public Information**

Alongside the opposition to public funding, there is a general acceptance of the need for funding to provide the public with neutral information about the issue and referendum process. However, the task of regulating this information typically falls to the Electoral or Referendum Commission, as in the following examples:

- While criticising public spending for partisan information, the Irish Supreme Court held that it is necessary to ensure that public information is distributed to the voters;
- Queensland Referendum Act 1997: The Electoral Commission in the State must prepare a 1,000 word description of the proposals authorised by legislators representing the particular view (S.10);
- Ireland Referendum Act 2001: The Commission must prepare a statement of the proposal (There is no provision that both sides be consulted over this text, though in practice they are.);
- Political Parties, Elections and Referendums Act 2001 (PPERA UK): Each umbrella organisation prepares a booklet to be distributed to all households (Sec. 110);
- Quebec Referendum Act: The Chief Electoral Officer must send the electors a single booklet explaining each of the options submitted to the referendum. The text is established by each national committee. Equal space, as fixed by the chief electoral officer, must be given in this booklet to each option (S. 26).

The norm is thus that the Electoral Commission or an equivalent body administers the distribution of a pamphlet, with representatives of each side responsible for the text.

**TCC**

The "YSK" was given the task of distributing material about the referendum, though its chief role was to act as a referee in cases of dispute. This aspect of regulation on the Turkish side generally met international standards.

## **GCC**

The legislation did not provide for public information to be generated or distributed by public or state bodies. Neither the respective campaigns nor parties used established mechanisms to distribute information. However, the Public Information Office did distribute an A4 booklet that was a Greek translation of the principle body of the Plan. The booklet was not widely circulated or effectively advertised. The United Nations filled the gap partially, publishing the full text of the Annan Plan on its website in Greek, Turkish and English. Thus, on the issue of neutral information, the GCC only marginally met emerging international norms and the only way citizens could receive information was to search through an external source.

## **Political Advertising in Broadcast Media**

Political advertising in the broadcast media is an integral part of election and referendum campaigns in the USA and Canada. However, it is not the norm in many other western societies; in fact it is banned in the United Kingdom, Switzerland, Scandinavian countries and France. Opponents of electoral advertising say it gives the biggest spenders an unfair political advantage, in effect allowing them to buy the results – ‘a blight to democracy’.

In 1991 in Australia, the federal government introduced legislation to proscribe political advertising on radio and television, which was then amended to restrict advertising only during election and referendum campaigns. However, in 1992 the High Court nullified the legislation on the grounds that limiting such communication is a restriction of free speech, which the Constitution implies is guaranteed.<sup>10</sup>

It is too soon to know whether the same principle will be applied to other countries that presently ban political advertising. At present, there does not appear to be any trend towards limiting the right to use political advertising in the broadcast media.

There is, however, a growing consensus that disclosure laws are necessary, so voters know who is behind a proposal. In Australia the Referendum (Machinery Provisions) Act 1984 (Sect. 111), requires broadcasters to give details to the Electoral Commission of who paid for the advertisement.

## **GCC**

There were no specific regulations on political advertising during the debate about the Plan and during the referendum campaign period. More generally, there are regulations of media conduct during elections that stipulate equal treatment of state and government, local authorities, trade unions and social forums, presidential and parliamentary candidates and citizens in general. This was probably interpreted as a right to equal access – a free market approach – which guided media on this issue during the referendum period.

**TCC**

There were no restrictions on paid advertising in the electronic media in the TCC regarding the Plan or the referendum vote.

**Equal Broadcasting**

While it is difficult to ensure parity in the quality or bias of news reports, public or private (commercial) broadcasters are generally expected to strike a balance of quantity (i.e. print space or air time) between the contending sides for referendum-related content.

- Equality of access was pioneered in the first UK-wide referendum in 1975, when each side was allocated four ten-minute television spots;<sup>11</sup>
- In the 1979 referendums on Scottish and Welsh Devolution, the Independent Broadcasting Authority decided to allocate broadcasting time to political parties (rather than to the two sides). This proved controversial, since three out of four parties favoured devolution, and the decision was subsequently successfully challenged;<sup>12</sup>
- In UK referendums now, the two designated ‘YES’ and ‘NO’ umbrella organisations are allocated equal broadcasting time;<sup>13</sup>
- A similar policy was adopted in Australia in 1999 and in the Québec referendum in 1995. No other countries have adopted such rules.

**TCC**

There was no requirement that broadcasters grant equal access to advocates and opponents. In practice, political parties individually took positions on the plan. Notably the DP abstained from taking a position, telling voters to vote their conscience. According to the law regulating elections and referendums in the TCC, all parties to an election or referendum are granted equal time on state-run radio and television. Consequently, there is no guarantee that both sides in a referendum get an equal hearing, but in 2004, with both parties relatively evenly divided between the two positions, the lack of a “50:50” rule was of little consequence.

**GCC**

The referendum legislation made no reference to the conduct of the broadcast media during the referendum; no time was officially allocated to contending parties or groups for campaign broadcasts. In practice, the state channel (CYBC) along with other channels allocated prominent broadcasting slots to the President, whose explicitly aligned ‘NO’ message led leaders of the ‘YES’ camp to protest.

In the GCC, the lack of regulation meant that the ‘NO’ side was granted more air time than the ‘YES’ side. Had a “50:50” rule been in place, this would have been avoided.

### **Campaign Spending**

The issue of whether there ought to be a ceiling on campaign expenditure is contentious. Some argue that expenditure ceilings keep costs within manageable limits, ensure that referendums cannot be 'bought' by the richer side, and increase public confidence in the result. Further, limits assure equality of communication capability, particularly in paid broadcasting. Others contend that ceilings prevent a truly effective information campaign.

This is not a conclusive debate. Many argue that the outcome of the referendum seems to be driven by other structural factors, such as the economy, the length of tenure of the respective governments and other factors.<sup>14</sup> Some doubt on the importance of money in ballot campaigns, though it has been reported that 'negative' spending in many cases has been successful.<sup>15</sup>

Still, restrictions on expenditures in ballot campaigns are fairly common:

- In 1970, in the run-up to the first Québec referendum on 'sovereignty association', the provincial Parliament restricted campaign expenditure, and mandated that two campaigns be established representing each side of the argument.<sup>16</sup>

Quebec's Minister of State for Electoral and Parliamentary Reform, in a 1977 paper, noted that the regulations it had passed were inspired by Great Britain's experience with a referendum in 1975, which it held up as an "invaluable guide," reflecting a "deep-rooted sense of fair play."

- In the more recent past the UK Labour government has in turn enacted legislation based on the Québec Act, namely The Political Parties, Elections and Referendum Act 2001 (PPERA). PPERA also introduced limits on campaign spending, and due to its comprehensiveness, this Act is often cited as a key reference point in debates about referendum regulation, internationally.<sup>17</sup> The restrictions on campaign spending are as follows (Sections 117-118):
  - Political parties may spend money in proportion to its percentage of votes in the last general election. Parties receiving more than 30 per cent receive £5 million, those with between 20-30 per cent receive £4 million, between 10-20 per cent (£3 million), and so on;
  - For other permitted participants the limit is £0.5 million;
  - Individuals may not spend more than £10,000;
  - Designated umbrella organisations may spend a total of £5 million.

Following a referendum, all participants are required to submit a very detailed expenditure report to the Commission:

- Each individual expense must be itemised;
- Reports must be submitted within three months of the referendum, if the permitted participant incurred expenditure of £250,000 or less, or within six months of the election if more than £250,000 was spent;
- Permitted participants that spent more than £250,000 must submit a statement from an independent auditor with their report.

The first example to see the results of this legislation will be in early 2005, as the expenditure reports for the referendum in South-East England on regional governance are to be presented.

Similar provisions exist in New Zealand under the Citizen Initiated Referenda Act 1993. Under this act, it is an offence to spend more than \$50,000 promoting the petition (at the qualification stage), and to spend more than \$50,000 promoting an answer to the referendum. As in the UK and Australia, an organisation's spending on advertising in relation to the petition or referendum must be reported to the Chief Electoral Officer.

### **TCC**

All expenditures were to be reported, approved and published by the electoral commission. While disclosure of sums paid to a campaign is only available after the result, the hope is that such laws may prompt wealthy groups to think twice before bankrolling a campaign disproportionately. Disclosure laws do tend to restrict the overall level of expenditure in campaigns; therefore, the TCC made credible attempts to limit the impact of financial influence.

### **GCC**

While there are limits on campaign spending in candidate elections, no such rules apply to referendums. In 2004, there was no requirement that expenditure be disclosed after the referendum. In the absence of disclosure laws, groups on both the 'Yes' and the 'No' side made claims that the other side had received funds from wealthy backers both from Cyprus and from overseas. These accusations significantly soured relationships, and could have been avoided had disclosure laws been in place.

### **Disinformation**

Information issues are complex both legally and politically. In the democratic context of free speech, the danger of disinformation is real. There is relatively little legislation on this issue:

- The New South Wales Local Government (Elections) Regulation 1998, establishes (Section 109) “A person must not ... print, publish or distribute a ‘how to vote’ card, electoral advertisement, notice, handbill, pamphlet, or card, containing an untrue or incorrect statement intended or likely to mislead or improperly interfere with an elector in or in relation to the casting of his or her vote”. However, there has been no litigation over the regulation, and it consequently, remains to be seen how it will be enforced;
- The Local Authorities (Conduct of Referendums) (Wales) Regulations 2004 does not deal specifically with the issue, except for allowing local authorities to publish material, which “refute or correct any inaccuracy in material published by a person other than the local authority” (Sec.5.3);
- The British Political Parties, Elections and Referendum Act 2001 does not regulate disinformation, nor does the Québec 1978 Referendum Act.

The traditional response to disinformation is to ensure that a campaign period is long enough so that false information can be countered and proven wrong. On this count the referendums in Cyprus were ill served by the very short campaign period. Average referendum campaign periods around the world range between one to six months, but the Cyprus campaigns began less than one month before the vote. By most campaign standards, this is considered insufficient time for debating, refuting or challenging allegations made by the different campaigns.

The Cyprus campaigns were not, however, unique in this respect. The campaign in Slovakia (on EU membership) in 2004 was shorter (only one week!), as were those in Malta and Slovakia (respectively two and three weeks). The UK Political Parties, Elections and Referendum Act – often regarded as the cutting edge of fair referendum regulation – prescribes only 28 days of campaigning.

Moreover, even a long campaign cannot prevent one side from presenting disinformation late in the process. The question is whether legal mechanisms can prevent the dissemination of deliberately false information; precedents are scarce.

### **TCC**

There was no regulation of disinformation in TCC.

### **GCC**

There was no regulation of disinformation.

### **Conclusion: International Standards of Referendums**

There is no legal international consensus on what constitutes a free and fair referendum; there is not even consensus on whether regulation is needed at all. A number of Commonwealth countries and Ireland have introduced regulations, while

others remain unregulated. However, based on the international experience, we find that referendums are most likely to be free and fair when the following conditions are met:

- An Electoral Commission is established (either permanent or ad hoc):
  - 1) The Commission oversees the information campaign (e.g. the production and distribution of a voter pamphlet – in consultation with both sides),
  - 2) Its members are representatives of neutral bodies (e.g. members of the judiciary, the Office of the Ombudsman, and/or similar figures whose neutrality is beyond dispute).
- Public and Commercial Broadcasters strike a 50:50 balance between sides (not political parties);
- No public funds (i.e. taxpayers' money) are spent to endorse or promote one side;
- Equal sized grants are provided for both sides in the referendum;
- Umbrella organisations are established for each side, and both receive equal grants from the government;
- All expenditures must be reported, approved and published by the Electoral Commission;
- There is a campaign period sufficient in length to assure open and robust debate. In particular that this campaign period be long enough so that false information can be countered and proven wrong.

### How Cyprus Compares

The two parts of the island had different levels of regulation. The referendum process was comparatively well regulated in the TCC, but subject to practically no regulation in the GCC. The extent of regulation can be summarised as follows:

- **Referendum Commission:** In the TCC an independent Commission (consisting of five members of the judiciary) – “YSK”, oversaw the referendum. In the GCC no such body existed, and the process was overseen by the General Returning Officer;
- **Government campaign spending:** Government spending supporting either side was prohibited in the TCC. The GCC had no similar provision;
- **Information campaign:** In the TCC, “YSK” was tasked with distributing information about the referendum. In the GCC there were no provisions;
- **Political Advertising:** Neither side placed restrictions on political advertising;
- **Neutrality of Broadcast media:** Neither side made provisions to ensure 50:50 coverage of the campaign;
- **Disclosure laws:** The TCC implemented expenditure disclosure laws; the GCC did not.

Overall, in the TCC, the regulation of this referendum broadly met the emerging international standards. The level of regulation in the GCC fell short of the emerging international standards, but this does not make it unique internationally. Other democratic countries, such as Denmark and France, similarly do without an independent referendum commission, and other countries, such as Spain and Austria, allow government spending in the campaign. Yet, few other countries (with the possible exception of Malta) are as unregulated as the GCC. Though it is difficult to measure the degree to which the lack of regulation affected the actual voting results, our basic observation is that it may have compromised the legitimacy of the result.

Had the GC referendum not suffered from these perceived shortcomings it seems likely that much of the post-referendum debate about the legitimacy could have been avoided. This would arguably have eased relations between the communities on the island generally, but also the internal tensions between parties in the GCC. In the absence of these regulations the referendum entrenched existing tensions between political groups.

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### Notes

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1. See Décret no 200-667 du juillet 2000 relatif á la campagne en vue du referendum for an example of this. It should be noted, that France prohibits commercial publicity (D 2000 -667) Art. 2 and Code Électorale L52-1.
  2. The first was on the Constitution in 1975 and the second on a Constitution following the declaration of independence in 1985.
  3. Seçim ve Halkoylaması Yasası.
  4. Kıbrıs Sorununun Çözümüne İlişkin Halkoylaması (Özel ve Geçici Kurallar) Yasası, (22 March 2004, Sayı 2/2004).
  5. Referendum Act, 2001 (Ireland).
  6. The Australian Commission was established under Commonwealth Electoral Act 1918; The UK Electoral Commission was established in 2001 under The Political Parties Elections and Referendum Act 2001.
  7. This was established on the recommendation of a Royal Commission on the Electoral System reporting in 1986.
  8. El País 5 January 2005, "Periodistas, futbolistas y actores abren el viernes la campaña

del referendum europeo”.

9. The most cited case internationally is The Supreme Court ruling in McKenna v. An Taoiseach, an Tanaiste and ors 1995.
10. Australian Capital Television Pty Ltd. The Commonwealth and New South Wales v. The Commonwealth (No. 2) (1992) 66 ALJR 695.
11. House of Commons Research Reports 00/3 – Referendums the New Rules.
12. Wilson v. Independent Broadcasting Authority.
13. See The Funding of Political Parties in the United Kingdom, Cm 4413, July 1999, Chapter 9.
14. M. H. Qvortrup, (2001) ‘How to Lose a Referendum’, The Political Quarterly , Vol. 72, No. 1.
15. Elizabeth Gerber, an American political scientist, has found that campaign spending in support of a proposition was ineffectual. However, negative campaign spending, i.e. spending against a proposition was often effective. See E. Gerber, (1999) The Populist Paradox. Group Influence and the Promise of Direct Legislation, Princeton, Princeton University Press.
16. In a 1998 amendment, contributions were limited to \$3000 per donor to each campaign. (1978 Québec Referendum Act 1978.) The 1998 Amendment states “The total of contributions to each national committee by the same elector in the same referendum shall not exceed the amount of \$3,000” (Section 91).
17. See also: The Local Authorities (Conduct of Referendums) (Wales) Regulations 2004.