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**IN DEFENCE OF DIRECT DEMOCRACY: THE  
CASE FOR BINDING CITIZENS INITIATED  
REFERENDA IN NEW ZEALAND**

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## *Table of Contents*

I	Introduction.....	4
	A Terminology.....	4
	B Referenda in New Zealand.....	6
II	The Case for Binding CIR .....	10
	A The argument from individual rationality.....	10
	B Greater democracy .....	12
	C Practical arguments .....	14
	1 Agenda-setting .....	14
	2 A check on government power.....	15
	3 A check on the influence of other groups .....	16
III	The Case against Binding CIR.....	17
	A Referenda are impractical .....	17
	B ‘The clarion call’: The voters are incompetent .....	18
	C Unpalatable results.....	19
	D Tyranny of the majority .....	20
	E Incompatibility with current governing arrangements.....	22
	F The intractability of parliamentary sovereignty.....	24
	G Referenda discourage compromise .....	25
IV	How BCIR would work in New Zealand.....	26
	A The referendum process .....	26
	B Interpreting BCIR .....	29
	C The importance of context .....	31
V	Conclusion .....	32
VI	Bibliography .....	<b>Error! Bookmark not defined.</b>

### ***Abstract***

I argue that citizens initiated referenda (CIR) should be legally binding. While referenda are an established part of New Zealand's constitutional framework, ordinary citizens only have the power to initiate nonbinding CIR. A system of binding CIR (BCIR) would be an improvement. Firstly, BCIR would give greater respect to individual citizens' rationality, freedom and equality. Secondly, BCIR would make New Zealand more democratic. Thirdly, BCIR would have a number of instrumental benefits. Various arguments can be advanced in defence of the current representative democratic paradigm. They include common arguments such as those regarding voter incompetence, tyranny of the majority, and incompatibility with current governing arrangements. They are all flawed. In short, the people can be trusted to govern themselves. I finish my argument by providing an example of how the process of direct democratic lawmaking might work in New Zealand. It differs significantly from the current CIR process, but I do not mean to set it in stone. I use it to show how proper institutional design can refute some counterarguments. The final form will be decided upon by the people and their representatives.

***Key words:*** Citizens Initiated Referenda; direct democracy; representative government

## *I Introduction*

In this paper, I address the question of how New Zealand's constitution might be made more consistent with the ideal of direct democracy. In particular, I argue that citizens initiated referenda<sup>1</sup> (CIR) should be legally binding in New Zealand. This paper has five sections. Section I is an introduction. It establishes the context for this paper. It is divided into two parts. Part A explores the definition of 'democracy' and establishes the place of CIR within the nomenclature of democracy. Part B gives an account of the constitutional context within which CIR operate in New Zealand. Section II sets out the positive case for binding CIR (BCIR). Part A thereof makes the case that BCIR would give greater recognition to the rationality, freedom, and equality of the human individual. Part B argues that adopting BCIR would make New Zealand more democratic. Part C sets out a number of instrumental arguments for BCIR. Section III refutes several common arguments against direct democracy generally and BCIR in particular. These include the arguments from voter incompetence, tyranny of the majority, and incompatibility with current governing arrangements. The counterarguments can be stated positively as arguments for the virtues of representative democracy. Section IV sets out a model of how BCIR could work practically in New Zealand. Its purpose is to show how proper institutional design can dispatch some of the counterarguments. Section V concludes the argument.

### *A Terminology*

The word 'democracy' stems from the Greek roots *demos*, meaning 'people', and *kratos*, meaning 'rule' or 'power'. Thus, democracy literally means 'people rule' or 'rule by the people'.<sup>2</sup> Lijphart writes that the literal meaning likely remains "the most basic and most widely used definition".<sup>3</sup> It is the touchstone for all more scholarly definitions. However, beyond that etymological definition, democracy is said to be an "essentially contested

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<sup>1</sup> I prefer the Latinate plural, if for no other reason than its greater elegance than the Anglo-Saxon.

<sup>2</sup> Or 'people power'.

<sup>3</sup> Arend Lijphart *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, New Haven, 1984) at 1.

concept”.<sup>4</sup> In other words, democracy means many different things to many different people.

Nonetheless, extrapolating from the literal definition, Lijphart writes that, “An ideal democratic government would be one whose actions were *always* in *perfect* correspondence with the preferences of *all* its citizens.” I would add that there must be some mechanism to guarantee that the government’s actions correspond to citizens’ preferences. A dictator’s decisions could coincidentally correspond to those preferences, but that would not make the regime democratic. In light of this, I adopt Saward’s definition of democracy as a political system that “creates a necessary correspondence between acts of governance and the equally weighted felt interests of citizens with respect to those acts”.<sup>5</sup> This encapsulates the essence of rule by the people. Indeed, Budge writes that, “Democracy as such can hardly be conceived in other terms”.<sup>6</sup>

There are various ways of classifying democracies. One classification distinguishes between direct and indirect democracy. In the latter, elected representatives of the people ultimately make policy decisions. The people are said to rule indirectly, through their representatives. In a direct democracy, the people themselves make the decisions.

The ideal direct democracy would consist of a comprehensive, unmediated, and unrestrained system of popular voting, whereby the people directly decided all major political decisions.<sup>7</sup> The people would replace Parliament as the legislature. However, advocates generally conceive of direct democracy not as a replacement but as an adjunct

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<sup>4</sup> W B Gallie “Essentially Contested Concepts” (1956) 56 Proceedings of the Aristotelian Society (New Series) 167 at 180, 183–186; see generally Howard A Doughty “Democracy as an Essentially Contested Concept” (2014) 19 The Innovation Journal 1.

<sup>5</sup> Michael Saward *The Terms of Democracy* (Polity Press, Cambridge (UK), 1998) at 51.

<sup>6</sup> Ian Budge “Implementing popular preferences: Is direct democracy the answer?” in Brigitte Geissel and Kenneth Newton (eds) *Evaluating democratic innovations: Curing the democratic malaise?* (Routledge, New York, 2012) 23 at 23.

<sup>7</sup> Ian Budge *The New Challenge of Direct Democracy* (Polity Press, Cambridge (UK), 1996) at 37.

for existing representative institutions.<sup>8</sup> Referenda are a mechanism of direct democracy, but in practice they invariably exist in the context of a representative democratic system.

A referendum is “a general vote by the electorate on a single political question which has been referred to them for a direct decision”.<sup>9</sup> A CIR is a referendum triggered by ordinary citizens, rather than the government, potentially against the government’s will. It enables citizens to force an issue onto the politico-legislative agenda and to force a vote on the issue. CIR can be distinguished from government initiated or controlled referenda, which governments can use at their discretion, and from constitutionally required or ‘mandatory’ referenda, which a constitution requires be held to adopt certain policies.<sup>10</sup> Referenda are an established part of New Zealand’s constitutional framework.

### ***B Referenda in New Zealand***

A constitution is the “system or body of fundamental principles under which a nation is *constituted* or governed”.<sup>11</sup> Democracy is one of the broad principles underlying New Zealand’s constitution.<sup>12</sup> “New Zealand is a representative democracy, with a Parliament consisting of members who represent the voters that elected them. ... [V]oters’ views are considered and acted on indirectly via their members of Parliament.”<sup>13</sup> New Zealand inherited its constitutional structure from the United Kingdom.<sup>14</sup> New Zealand was once

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<sup>8</sup> Harel Arnon *A Theory of Direct Legislation* (LFB Scholarly Publishing, New York, 2008) at 21–22, 51.

<sup>9</sup> Angus Stevenson and Maurice Waite (eds) *Concise Oxford English Dictionary* (12th ed, Oxford University Press, Oxford, 2011) at 1208.

<sup>10</sup> David Butler and Austin Ranney “Theory” in David Butler and Austin Ranney (eds) *Referendums: A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research, Washington, 1978) 23 at 24.

<sup>11</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand’s Constitution and Government* (4th ed, Oxford University Press, South Melbourne, 2004) at 4 (emphasis added).

<sup>12</sup> At 5.

<sup>13</sup> Nigel Roberts “Referendums – Representative democracy and referendums” (13 July 2012) Te Ara – The Encyclopedia of New Zealand <[www.teara.govt.nz](http://www.teara.govt.nz)>.

<sup>14</sup> Jack Vowles and others *Towards Consensus? The 1993 Election in New Zealand and the Transition to Proportional Representation* (Auckland University Press, Auckland, 1995) at 193.

considered the paragon of this ‘Westminster’ paradigm.<sup>15</sup> It features an indirectly elected executive government (Cabinet) drawn from and responsible to the triennially elected, sovereign Parliament. The triennial election is the principal means by which the people hold their government to account.

Nonetheless, referenda have a long pedigree in New Zealand. Liquor licensing polls were instituted as early as 1881.<sup>16</sup> Local option polls for each electorate were introduced in 1894. From 1896, they were held alongside every election.<sup>17</sup> Additionally, simultaneous national referenda on alcohol were held with almost every election from 1911<sup>18</sup> to 1987.<sup>19</sup> They offered a choice among prohibition, state control, and the status quo of licensing and regulation.<sup>20</sup> Under the Local Restoration Polls Act 1990, votes on restoring liquor licensing continue to be held in the five remaining ‘no-licence’ districts along with general elections.<sup>21</sup>

Furthermore, governments have initiated ten referenda on largely constitutional and moral topics between 1949 and 2011. In 1949, referenda were held on hotel licensing hours (defeated), off-course betting on horse races (successful), and compulsory military training (successful).<sup>22</sup> Two were held in 1967, one approving the extension of hotel licensing hours<sup>23</sup> and the other refusing to extend the parliamentary term to four years.<sup>24</sup> Another

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<sup>15</sup> John Wanna “New Zealand’s Westminster trajectory: Archetypal transplant to maverick outlier” in Haig Patapan, John Wanna and Patrick Weller *Westminster legacies: Democracy and responsible government in Asia and the Pacific* (University of New South Wales Press, Sydney, 2005) 153 at 153.

<sup>16</sup> Alan McRobie “Appendix 5: Previous Referendums” in Colin James and Alan McRobie (eds) *Turning Point: The 1993 Election and Beyond* (Bridget Williams Books, Wellington, 1993) 318 at 318.

<sup>17</sup> Leslie Lipson *The Politics of Equality: New Zealand’s Adventures in Democracy* (2nd ed, Victoria University Press, Wellington, 2011) at 160.

<sup>18</sup> At 160–161.

<sup>19</sup> McRobie, above n 16, at 318.

<sup>20</sup> Lipson, above n 17, at 160–161.

<sup>21</sup> *Laws of New Zealand Elections* (online ed) at [173].

<sup>22</sup> Nigel Roberts “Consultative referendums before 1970” (13 July 2012) Te Ara – The Encyclopedia of New Zealand <[www.teara.govt.nz](http://www.teara.govt.nz)>.

<sup>23</sup> Roberts, above n 22.

<sup>24</sup> Nigel Roberts “Constitutional referendums” (13 July 2012) Te Ara – The Encyclopedia of New Zealand <[www.teara.govt.nz](http://www.teara.govt.nz)>.

referendum on extending the term of Parliament was defeated in 1990.<sup>25</sup> A referendum on making superannuation compulsory was defeated in 1997.<sup>26</sup> The current government has had passed legislation under which referenda will be held on changing the national flag.<sup>27</sup>

Most significantly, in 1993, New Zealanders voted to replace the plurality FPP electoral system with MMP.<sup>28</sup> That followed a 1992 indicative referendum which demonstrated a desire for change and a preference for MMP, over several alternatives, to go up against FPP.<sup>29</sup> In 2011, another government-initiated referendum on the electoral system confirmed this result.<sup>30</sup> The change to MMP has reformed the way in which Parliaments, and thus governments, are chosen. It has therefore had major implications for the full spectrum of representative decision-making in New Zealand.<sup>31</sup>

It is standard practice for governments to have passed specific legislation enabling referenda to be held. Certainly, legislation is needed for the results to bind the Crown, there being no general legislative power enabling binding referenda. Naturally, Parliament, being sovereign, has unconditional authority to legislate to hold referenda. Thus, the government can hold indicative postal referenda by Order in Council<sup>32</sup> (it can also order that CIR be held by post).<sup>33</sup> Various legislative provisions exist providing for referenda to be held at the local authority level.<sup>34</sup> In addition, certain entrenched provisions in significant

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<sup>25</sup> Roberts, above n 24.

<sup>26</sup> Nigel Roberts “Referendums – Consultative referendums after 1990” (13 July 2012) Te Ara – The Encyclopedia of New Zealand <[www.teara.govt.nz](http://www.teara.govt.nz)>.

<sup>27</sup> New Zealand Flag Referendums Act 2015, s 3.

<sup>28</sup> Vowles and others, above n 14, at 1.

<sup>29</sup> Palmer and Palmer, above n 11, at 13.

<sup>30</sup> Therese Arseneau and Nigel S Roberts “‘Kicking the tyres’ on MMP: The results of the referendum reviewed” in Jon Johansson and Stephen Levine (eds) *Kicking the tyres: The New Zealand general election and electoral referendum of 2011* (Victoria University Press, Wellington, 2012) 325 at 332–333.

<sup>31</sup> Palmer and Palmer, above n 11, at 13–18.

<sup>32</sup> Referenda (Postal Voting) Act 2000, s 5(a).

<sup>33</sup> Referenda (Postal Voting) Act 2000, s 5(b).

<sup>34</sup> Local Electoral Act 2001, ss 9(1), 9(7), 19ZB, 19ZD, 29, 31; Local Government Act 2002, ss 131–132; sch 3, cls 23–25, 28; and Local Restoration Polls Act.



constitutional statutes can only be repealed by a simple majority in a referendum or a 75% super majority in Parliament.<sup>35</sup>

Moreover, Chote argues that a constitutional convention has emerged in New Zealand requiring that referenda be held to determine matters of constitutional significance.<sup>36</sup> Her conclusion that significant political actors recognise an obligation to take matters of constitutional significance to the people appears valid. Chen agrees that there is an evolving convention to that effect.<sup>37</sup> More importantly, in announcing a referendum on changing the New Zealand flag, Prime Minister John Key stated that, “It’s [sic] constitutional in my view, and constitutional matters have to be taken to the people”.<sup>38</sup> He drew an explicit parallel with the 2011 MMP referendum, saying that “in principle, it’d [sic] have to be part of a referendum just like it was for MMP”.<sup>39</sup> Clearly, at least some influential political elites believe changes to the electoral system require acceptance by the people.

At present in New Zealand, ordinary citizens can only trigger purely advisory, non-binding CIR, under the CIR Act 1993.<sup>40</sup> The Act emerged from the same disillusionment with New Zealand’s democracy as did MMP.<sup>41</sup> Five CIR have been held since the CIR Act was introduced.<sup>42</sup> Only one of the five has led to any policy change; the others were ignored.<sup>43</sup>

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<sup>35</sup> Electoral Act 1993, s 268. However, it is unclear whether the courts would enforce this section.

<sup>36</sup> Alice Chote “An Obligation to Ask: A Constitutional Convention for Constitutional Referendums in New Zealand” (LLB (Hons) Dissertation, Victoria University of Wellington, 2012) at 24.

<sup>37</sup> Mai Chen *Public Law Toolbox* (2nd ed, LexisNexis, Wellington, 2014) at 1088.

<sup>38</sup> Stacey Kirk “Time to change the flag. To what?” (29 January 2014) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>. The first clause of this sentence, however, is debatable. The issue is a symbolic one, because the flag is a symbol of New Zealand. Nonetheless, it has no real effect on how we govern ourselves, that is, on how public power is exercised in this country.

<sup>39</sup> Kirk, above n 38.

<sup>40</sup> Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [10.4.1]; see generally Citizens Initiated Referenda Act 1993.

<sup>41</sup> This is the usual explanation, although Parkinson rather darkly suggests the impetus was conservative forces opposed to homosexual law reform: John Parkinson “Who Knows Best? The Creation of the Citizens Initiated Referendum in New Zealand” (2001) 36 *Gov’t & Oppos* 403 at 408–409.

<sup>42</sup> Chen, above n 37, at 1087.

<sup>43</sup> The 1999 criminal justice referendum resulted in stricter parole and sentencing conditions and increased importance being given to victims’ rights: Chen, above n 37, at 52–53.

This record has sparked calls for the Act to be reformed<sup>44</sup> or even repealed.<sup>45</sup> This paper argues instead that CIR should be made binding.

## *II The Case for Binding CIR*

The literal definition of democracy raises the questions of whom the people are and how they should rule.<sup>46</sup> I assume that ‘the people’ are the adult population of the state, enfranchised under (virtually) universal suffrage. My concern is with determining how the people should rule.

### *A The argument from individual rationality*

Respect for individual rationality, liberty, and equality suggest that individuals should have a say in collective decisions. Binding CIR would provide such a say. I start from first principles. The subjects of any politico-legal system are humans. Humanity, Aristotle tells us, “is by nature a political animal”.<sup>47</sup> That is because humanity “alone among the animals [has] the power of reasoned speech”.<sup>48</sup> Humans, in other words, are rational. Binding CIR would give greater respect to rationality, for three reasons. Firstly, BCIR would recognise that individuals are capable of making rational decisions. Secondly, BCIR would act on that recognition by giving individuals the chance to exercise their rational faculties. Thirdly, in so doing, they would encourage individual participation in the political process, thus stimulating the development of those rational faculties.<sup>49</sup>

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<sup>44</sup> Caroline Morris “Citizens’ Referenda: time to review?” [2002] NZLJ 44; and Caroline Morris “Improving Our Democracy or a Fraud on the Community? A Closer Look at New Zealand’s Citizens Initiated Referenda Act 1993” (2004) 25 Stat LR 116.

<sup>45</sup> Bridget Fenton and Andrew Geddis “Citizens initiated referenda” [2009] NZLJ 334 at 336.

<sup>46</sup> Anthony H Birch *The Concepts and Theories of Modern Democracy* (3rd ed, Routledge, London, 2007) at 111.

<sup>47</sup> Aristotle *The Politics* (T A Sinclair (translator)) (Penguin Books, Harmondsworth, 1969) at 28.

<sup>48</sup> At 28.

<sup>49</sup> See John Stuart Mill *Considerations on Representative Government* (eBook ed, Project Gutenberg, 2013) at ch 3.

From the fact of rationality, we can derive the value of political freedom. Humans are rational. Humans are therefore capable of identifying and acting in accordance with their own interests. Simultaneously, abstract moral reasoning enables us to think of others and to do what is right. Therefore, humans can and should be left free to make their own decisions and to run their own lives to the greatest degree reasonably possible. In other words, individuals should have liberty.<sup>50</sup> However, for certain purposes, humans are compelled to act collectively rather than individually.<sup>51</sup> Freedom continues to demand that everyone have a say in the decisions that affect them. Hence, the liberty afforded to individuals should be preserved on the collective plane as much as reasonably possible.

Furthermore, each individual should have an equal say in collective decisions. Modern Westerners adhere to a doctrine of universal, intrinsic human equality.<sup>52</sup> We accept the existence of fundamental human rights, defined as those rights we possess simply because we are human.<sup>53</sup> The characteristic that gives rise to humanity's special moral worth is its rational nature.<sup>54</sup> We recognise all of humanity as equally possessed of this rational human nature. Therefore, all humans are equally suited to rule. Thus, we believe in political equality. Political equality refers to a state of affairs where "citizens have an equal voice in government decisions".<sup>55</sup> Humanity's intrinsic equality should be preserved in the political sphere as much as reasonably possible.

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<sup>50</sup> John Stuart Mill *On Liberty* (Cambridge University Press, Cambridge (UK), 2012) at 21–27, ch 3; and John Locke *Second Treatise of Government* (eBook ed, Project Gutenberg, 2014) at [4]–[6], [22], [57]–[63].

<sup>51</sup> Thomas Hobbes *Leviathan* (eBook ed, Project Gutenberg, 2014) at ch 17; and Jean-Jacque Rousseau *The Social Contract and Discourses* (G D H Cole (translator)) (eBook ed, Project Gutenberg, 2014) at ch 6.

<sup>52</sup> Stefan Gosepath "Equality" (27 June 2007) Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu>> at [2.3].

<sup>53</sup> Micheline R Ishay *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press, Berkeley, 2004) at 3; and Jack Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca, 2003) at 9.

<sup>54</sup> Patrick Lee and Robert P George "The Nature and Basis of Human Dignity" (2008) 21 *Ratio Juris* 173 at 187.

<sup>55</sup> Sidney Verba "Would the Dream of Political Equality Turn out to Be a Nightmare?" (2003) 1 *Perspectives on Politics* 663 at 663.

The principles of universal human equality and individual liberty, which modern philosophy accepts derive from humanity's rational nature,<sup>56</sup> speak in favour of BCIR. Equality favours BCIR for two reasons. Firstly, BCIR give everyone a formally and substantively equal say in collective decisions. Secondly, BCIR also give everyone a formally equal opportunity to initiate proposals. Binding CIR would decrease the power imbalance between people and Parliament, increasing equality. Liberty favours BCIR, because every individual who votes in a referendum is a decision-maker, in two senses. Not only is everyone given the chance to make up their minds but also a guaranteed chance at affecting the outcome. Although one vote is of infinitesimal effect, it in principle affects the decision. Furthermore, BCIR enable the people to decide which issues they wish to decide directly and which to leave to representatives. This would increase the degree to which it could be said the people had consented to Parliament's laws, increasing freedom. Binding CIR would therefore make human individuals more free and equal.

### ***B Greater democracy***

I noted above that humans are compelled to act collectively for certain purposes. Certainly, some would argue, with Madison, that "[i]f men were angels, no government would be necessary".<sup>57</sup> Others would say, with Aristotle and St Aquinas, that the political association is natural.<sup>58</sup> Either way, I take for granted the existence of the political collective. This we call 'the people' or *demos*.

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<sup>56</sup> Immanuel Kant *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (W Hastie (translator)) (T & T Clark, Edinburgh, 1887) at 56.

<sup>57</sup> James Madison "Checks and Balances" in Benjamin Fletcher Wright (ed) *The Federalist* (Belknap Press of Harvard University Press, Cambridge (Massachusetts), 1961) 355 at 356; see also Augustine *City of God* (Henry Bettenson (translator)) (Penguin Books, London, 2003) at 874–875.

<sup>58</sup> Aristotle, above n 47, at 28; and Thomas Aquinas *Summa Theologiae (Concerning the dominion which belonged to man in the state of innocence)* (R W Dyson (translator)) in R W Dyson (ed) *Aquinas: Political Writings* (Cambridge University Press, Cambridge (UK), 2002) 1 at 4.

The most basic principle of democracy is that these *demos* are entitled to rule themselves.<sup>59</sup> Binding CIR would better enable the people to self-rule.<sup>60</sup> Rule, or government, is concerned with making decisions that affect the governed entity. An entity that makes decisions itself can be said to self-rule. The ideal form of self-government over a polity would involve the people directly shaping and deciding all policy issues.<sup>61</sup> Binding CIR provide the people the chance both to make those decisions by voting and to shape which issues arise for decision-making.<sup>62</sup> They would thus enable the New Zealand people to self-rule to a greater degree.

In other words, adopting BCIR would make New Zealand more democratic. CIR are a superior democratic instrument to general elections. Elections are fought on a wide range of policies, encompassing every area of state activity. Also relevant are the ideologies of the parties and voters, the personalities, probity, and competence of the candidates, and voters' satisfaction with their lives and government. It is extremely difficult to discern a signal to politicians from amidst all this noise. That is, it is difficult to determine what a majority of voters think on any one policy based on the results of a general election. Referenda enable us to determine the will of the people on any one issue. Additionally, but the binding nature of BCIR guarantees that they will get the result they want. It is surely odd that a self-professedly democratic country as New Zealand has no way of ensuring this already. As Saward puts it, "direct democracy is more democratic than representative democracy".<sup>63</sup>

It is entirely valid to argue that the people should not rule, at least not directly, but we should be clear that that is the argument being made. That argument is that the best form of government is not democracy but representative government. What we have now is, as Schumpeter notes, rule by politicians (namely elected representatives) not rule by the

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<sup>59</sup> Arnon, above n 8, at 21.

<sup>60</sup> See at 21.

<sup>61</sup> Arnon, above n 8, at 21.

<sup>62</sup> Kris W Kobach *The Referendum: Direct Democracy in Switzerland* (Dartmouth, Aldershot (England), 1993) at 61.

<sup>63</sup> Saward, above n 5, at 83.

people.<sup>64</sup> In theory the people rule indirectly, through representatives. However, they cannot be said to rule meaningfully when politicians can ignore CIR and make major moral/social (exempli gratia, same-sex marriage) and constitutional (appeal to the Privy Council) changes without campaigning on that basis. Binding CIR would be a modest step towards remedying this situation.

A similar argument is that public policy decisions should be as politically legitimate as possible and that direct democracy maximises this legitimacy.<sup>65</sup> Legitimacy has two aspects. Firstly, the citizenry must believe that political decisions do not exceed the bounds of substantive fairness and decency.<sup>66</sup> The people is patently unlikely to make such a decision. Secondly, the citizenry must believe that political decisions are made the right way, that is, that they are procedurally correct.<sup>67</sup> Since the people trust themselves more than politicians, they regard political decisions where everyone participates or has a chance to participate as procedurally superior.<sup>68</sup>

Essentially, anyone who values democracy should see direct democracy as an ideal. Binding CIR would bring us closer to that ideal. This argument should satisfy those who believe democracy is intrinsically valuable as an end in itself. Yet BCIR would also provide certain instrumental benefits as a means to an end.

### *C Practical arguments*

#### *1 Agenda-setting*

The promise of BCIR is that anyone who has a good idea has a chance to have that idea transformed into a law. Binding CIR would provide an opportunity for ordinary citizens to put important issues on the legislative agenda. For various reasons, Parliament refuses to

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<sup>64</sup> Joseph A Schumpeter *Capitalism, Socialism and Democracy* (eBook ed, Taylor & Francis e-Library, 2003) at 284–285.

<sup>65</sup> Butler and Ranney, above n 10, at 24.

<sup>66</sup> At 24.

<sup>67</sup> At 24.

<sup>68</sup> At 25.

deal with some issues. On some issues, cross-party consensus exists. On others, politicians refuse to deal with the issue for fear of electoral backlash.

Political actors can also make commitments to keep issues off the agenda. In February 2015, *The Dominion Post* (which usually opposes referenda<sup>69</sup>) editorialised that:<sup>70</sup>

Prime Minister John Key has killed off any possibility of progress with this problem by promising to resign rather than increase the age of eligibility [for superannuation]. That means no sensible reform during the lifetime of the National Government. A strong suspicion remains that his finance minister doesn't agree with him about this, but Key is essential to the National Government and Bill English isn't [sic]. A referendum would bypass the unshiftable obstacle of Key and return the issue to the people.

In an effort to break the “Mexican Standoff” on the issue, the ACT Party’s leader and sole MP, David Seymour, had proposed a referendum.<sup>71</sup> Doubtless, ACT is a government support party and the proposed referendum would have been government-initiated. Yet this illustrates the type of problem BCIR could resolve.

## 2 *A check on government power*

Despite the introduction of MMP, New Zealand remains at the bottom of the OECD in terms of institutional restraints on policymaking power.<sup>72</sup> While the structures that led to New Zealand being described as having an ‘elective dictatorship’,<sup>73</sup> ‘unbridled power’,<sup>74</sup> and ‘the fastest law in the west’<sup>75</sup> have been attenuated by MMP, New Zealand remains

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<sup>69</sup> *The Dominion Post* “Referendums a waste of money” (17 December 2013) <www.dompost.co.nz>; and *The Dominion Post* “‘No’ to binding referendums” (24 July 2014) <www.dompost.co.nz>.

<sup>70</sup> *The Dominion Post* “Let the people solve super problem” (26 February 2015) <www.dompost.co.nz>.

<sup>71</sup> David Seymour “David Seymour challenges political leaders to support NZ Super referendum” (press release, 21 February 2015).

<sup>72</sup> John Wilson *Parliamentary Voting Systems in New Zealand and the Referendum on MMP* (Parliamentary Library, Research Paper 2011/03, November 2011) at 12–14.

<sup>73</sup> Richard Mulgan “The elective dictatorship in New Zealand” in Hyam Gold (ed) *New Zealand Politics in Perspective* (3rd ed, Longman Paul, Auckland, 1992) 513 at 513–515.

<sup>74</sup> See generally Geoffrey Palmer *Unbridled Power* (2nd ed, Oxford University Press, Auckland, 1987).

<sup>75</sup> At 139.

remarkably centralised. The Parliament is unicameral, and the state itself is unitary. The Bill of Rights Act (NZBORA) is neither entrenched nor supreme, and there is no supreme law of any kind.

BCIR would bring about a diffusion of political power over the widest possible range of persons; as Lord Acton so famously said, “Power tends to corrupt and absolute power corrupts absolutely”.<sup>76</sup> BCIR would enable the people to veto statutes, regulations, and government policy decisions. They would therefore provide a check on the power of the government—broadly defined as including all three branches of government, Parliament among them. Dicey himself, the most famous exponent of parliamentary sovereignty, advocated the use of veto referenda to prevent the passage of fundamental constitutional changes.<sup>77</sup> Now, Dicey opposed CIR.<sup>78</sup> However, while CIR undoubtedly have the potential to be of wider application, they could perform the role of veto referenda. Were Parliament, for instance, to extend the term of Parliament unilaterally, a petition could be launched and a CIR held on repealing the offending statute. Even better, the fear of a CIR being held could dissuade Parliament from doing so in the first place.

### 3 *A check on the influence of other groups*

Various sectional interest groups wield power over the government. By lobbying and pressuring the government and other MPs, these groups can influence the policy process. This is not necessarily democratically illegitimate; such groups have their place. Indeed, interest groups are at the heart of the ‘pluralist’ conception of democracy<sup>79</sup> in which our MPs believe.<sup>80</sup> On the other hand, it is strongly suspected that such groups can, out of self-interest, pressure the government into refraining from legislating in the public interest.

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<sup>76</sup> B J Palmer *The Concise Oxford Dictionary of Quotations* (2nd ed, Oxford University Press, Oxford, 1990) at 1.

<sup>77</sup> Rivka Weill “Dicey Was Not Diceyan” (2003) 62 CLJ 474 at 486.

<sup>78</sup> At 486.

<sup>79</sup> Raymond Miller *Democracy in New Zealand* (Auckland University Press, Auckland, 2015) at 232–238; and Xavier Marquez “Pluralism” in Janine Hayward (ed) *New Zealand Government and Politics* (6th ed, Oxford University Press, Oxford, 2015) 74 at 74–76.

<sup>80</sup> Miller, at 232.



Indeed, Marquez writes that pluralism is essentially incompatible with the populist notion that the people can manifest themselves in a unified manner in pursuit of a common good.<sup>81</sup> While Marquez appears sceptical of this idea,<sup>82</sup> the very point of having political authority is to pursue the common good.

Often, various groups can influence the government by threatening electoral punishment. The electors, of course, are quite immune to such threats. They are also far less susceptible to wealthy lobbyists. Their sheer number makes it impossible to lobby them.

There is also the international factor. Treaties can place effective substantive limits on New Zealand's ability to govern itself. In an increasingly globalised world, more and more constraints are being placed on the country's ability to govern itself. Establishing an additional locus of power would counterbalance this tendency.

### *III The Case against Binding CIR*

The paradigmatic mode of democracy in the present era is representative. That being so, there are good arguments for this state of affairs, which cannot simply be dismissed as elitism and self-interest.

#### *A Referenda are impractical*

Mill once wrote that "since all can not, in a community exceeding a single small town, participate personally in any but some very minor portions of the public business, it follows that the ideal type of a perfect government must be representative".<sup>83</sup> This view retains currency among those who see direct democracy as an ideal.<sup>84</sup> The argument seems quite outdated. Indeed, Mill had earlier written that contemporary means of mass transport and

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<sup>81</sup> Marquez, above n 79, at 76.

<sup>82</sup> At 76–77.

<sup>83</sup> Mill, above n 49, at ch 3.

<sup>84</sup> Arnon, above n 8, at 21; and Kobach, above n 62, at 56.

communication (newspapers and railways) had the potential to “enable the people on all decisive occasions to form a collective will, and render that collective will irresistible”.<sup>85</sup> Technology, of course, has vastly improved since then. Thanks to “the ease and speed of transmission of information we enjoy today”, writes Manzo, who adopts an unfavourable attitude to direct democracy, “the issues of geography and citizen numbers can be taken care of easily enough”.<sup>86</sup>

While it is true that the people cannot deliberate in the same manner as MPs can,<sup>87</sup> they can approximate legislative deliberation. Referendum proposals will tend to emerge from out of a period of spirited public debate. The fact that a referendum, let alone a binding referendum, is to be held on the subject will also tend to foster debate. During the course of such debate, the contours of the arguments on both sides will be repeatedly canvassed.

### ***B ‘The clarion call’: The voters are incompetent***

“Again and again,” Kobach writes, “one hears the clarion call of opponents of direct democracy: the people are not competent to govern themselves”.<sup>88</sup> Thus, Butler and Ranney argue that public policy issues are too “numerous, complex, and demanding” for ordinary voters to understand properly.<sup>89</sup> Only fulltime politicians have enough time to devote to casting informed votes.<sup>90</sup> The facts are otherwise. After reviewing seven recent books on referenda, Qvortrup concludes that voters can make complex and informed decisions consistent with their preferences.<sup>91</sup> Even if voters lack a comprehensive

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<sup>85</sup> John Stuart Mill “Civilization” (1836) 3 London and Westminster Review 1 at 7.

<sup>86</sup> Whitney Ross Manzo “Implications, Benefits, and Impacts of Direct Democracy” (PhD Dissertation, University of Texas at Dallas, 2014) at 93.

<sup>87</sup> Jeremy Waldron “Representative Lawmaking” (2009) 89 BUL Rev 335 at 352–353; and Richard Ekins “A Government for the People: The value of representative democracy” (October 2009, Maxim Institute Guest Paper) at 9.

<sup>88</sup> Kobach, above n 62, at 62.

<sup>89</sup> Butler and Ranney, above n 10, at 34.

<sup>90</sup> At 34.

<sup>91</sup> Matt Qvortrup “Power to the People! But How? The Different Uses of Referendums Around the World” (2015) 13 Political Studies Review 37 at 41.

understanding of the issues, they can use cues, heuristics and information shortcuts that grant them the discernment to “see through propaganda and spin” and make rational choices.<sup>92</sup> For instance, they can rely on knowledge of the preferences of others. This enables them to emulate voters possessed of greater factual understanding and thus cast votes in the same ways they would if they had fully informed themselves about the issue.<sup>93</sup>

Remember that MPs are generalists and Ministers are amateurs. That is not a criticism. The government and opposition have access to empirical evidence provided by, respectively, the expert public service and the Parliamentary Library. This of course can be disseminated to the public. Additionally, however, because “public policy is inherently normative”, there is no such thing as purely evidence-based policy.<sup>94</sup> If there were, we could abandon democracy in favour of rule by the public service or some other technocratic elite, such as Plato’s philosopher king.<sup>95</sup> All political decisions involve the application of values. Values are something for which it cannot be said that politicians are more qualified. Those who believe that one can arrive at a set of objectively right values through reasoning might be tempted to say that a legislature is better equipped to discern them than the people. However, by the time an MP reaches Parliament, his or her values will be largely set in stone. Parties only choose candidates whose ideology is known to be consonant to their own.

### *C Unpalatable results*

Some oppose referenda on the basis that they tend to favour political positions with which those opponents disagree. However, Butler and Ranney preliminarily conclude that “the referendum is a politically neutral device that generally produces outcomes favoured by

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<sup>92</sup> At 39–40, 44.

<sup>93</sup> Arthur Lupia “Shortcuts versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections” (1994) 88 *Am Polit Sci Rev* 63 at 72.

<sup>94</sup> Richard Shaw and Chris Eichbaum *Public Policy in New Zealand: Institutions, processes and outcomes* (3rd ed, Pearson, Auckland, 2011) at 9–10.

<sup>95</sup> Plato *The Republic* (H D P Lee (translator)) (Penguin Books, Harmondsworth, 1963) at ch 7.

the current state of public opinion”.<sup>96</sup> Thus, both the left and right can be found to oppose and support referenda.<sup>97</sup> More recent evidence bears out this conclusion: direct democracy reorients policy towards the median vote’s preferences rather than any particular outcome.<sup>98</sup>

For instance, one frequent objection to direct democracy is that Switzerland failed to introduce women’s suffrage until 1971.<sup>99</sup> Male voters had rejected a 1959 attempt by the legislature to introduce the measure.<sup>100</sup> Less well known is the record in the United States. Between 1867 and 1918, 49 state-level referenda on women’s suffrage were held in the US.<sup>101</sup> Thirteen succeeded, and 36 failed. Colorado was the first to approve equal suffrage, in 1893 (following a defeat in 1877). In 1912, Arizona and Oregon passed CIR establishing women’s suffrage.<sup>102</sup> Moreover, those successful referenda played an indispensable role in driving the passage of the Nineteenth Amendment,<sup>103</sup> which enfranchised women nationally.<sup>104</sup>

#### ***D Tyranny of the majority***

This counterargument is largely self-explanatory. The majority will use its numerical superiority to benefit itself at the expense of the minority.

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<sup>96</sup> David Butler and Austin Ranney “Summing Up” in David Butler and Austin Ranney (eds) *Referendums: A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research, Washington, 1978) 221 at 224.

<sup>97</sup> At 224.

<sup>98</sup> Ian Budge “Direct and Representative Democracy: Are They Necessarily Opposed?” (2006) 42 *Representation* 1 at 9.

<sup>99</sup> Brian Rudman “Mob rule no substitute for democracy” (18 November 2009) The New Zealand Herald website <[www.nzherald.co.nz](http://www.nzherald.co.nz)>; and Interview with Louisa Wall MP and Colin Craig (Rachel Smalley, The Nation, TV3, 4 August 2012) transcript provided by Scoop.co.nz (Wellington).

<sup>100</sup> David Altman *Direct Democracy Worldwide* (Cambridge University Press, New York, 2011) at 46.

<sup>101</sup> Kris W Kobach “Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments” (1994) 103 *Yale LJ* 1971 at 1982.

<sup>102</sup> At 1982.

<sup>103</sup> At 1993.

<sup>104</sup> Brian P Smentkowski and Michael Levy “Nineteenth Amendment” (2015) Encyclopaedia Britannica <[www.britannica.com](http://www.britannica.com)>.

Firstly, majoritarian decision-making inevitably entails that the minority will not get the result it wants. As Roberts observes, “All democracies are based on the premise that, in the end, the votes are counted and one side wins”.<sup>105</sup> The losing side will naturally have a partial view of whether the result constitutes tyranny. In reality, I believe that reasonable people of goodwill can disagree on most issues. To some extent, tyranny may be in the eye of the beholder. Thus, *Obergefell v Hodges* has been, on one hand, praised as a bulwark against the tyranny of the majority,<sup>106</sup> and on the other, decried as judicial tyranny<sup>107</sup> and a harbinger of majority tyranny.<sup>108</sup>

Moreover, on the other side of the equation, CIR can be and have been used to check tyrannically majoritarian Parliaments.<sup>109</sup> Furthermore, in Switzerland, many referenda proposals are submitted not in an attempt to gain victory at the polls but “with the intent to offer [their] withdrawal when bargaining for desired policy changes”.<sup>110</sup> That is, they can be used to reach a compromise or, to put it another way, to extract concessions. This argument is unlikely to satisfy those who believe referenda are somehow more likely to produce tyranny than legislatures. Still, it should be taken into account when weighing the arguments for and against binding CIR.

In New Zealand, Maori are the most obvious potential victim of majority tyranny. The simplest solution would be to make use of the existing dual electoral rolls and require a double majority from both the general and Maori electoral rolls to pass any referendum. This would give those who choose to identify as Maori a veto over any CIR, even those

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<sup>105</sup> Steven V Roberts “America is not South Africa” *US News & World Report* (online ed, United States, 14 June 1993).

<sup>106</sup> New York Times Editorial Board “A Profound Ruling Delivers Justice on Gay Marriage” (26 June 2015) The New York Times website <[www.nytimes.com](http://www.nytimes.com)>.

<sup>107</sup> John Yoo “Judicial Supremacy Has Its Limits” (6 July 2015) National Review Online <[www.nationalreview.com](http://www.nationalreview.com)>.

<sup>108</sup> The Federalist Editors “Gay Marriage Is Here – Now What?” (27 June 2015) The Federalist website <<http://thefederalist.com>>.

<sup>109</sup> Lijphart, above n 3, at 31; see also Kobach, above n 62, at 60.

<sup>110</sup> Kobach, above n 62, at 104.

which did not peculiarly affect Maori interests. Thus, I would not favour such a provision. Yet it is one possibility.

Another would be to allow a veto by all three branches of government. Suppose that, under this system, the Attorney-General delivers an adverse s 7 NZBORA report on the CIR. He or she can then apply to the High Court for a declaration that the CIR unjustifiably breaches human rights. The judicial declaration triggers a parliamentary vote which, if adverse to the CIR, invalidates it. Requiring the concurrence of the three branches would minimise the risk of any one branch vetoing a policy on which reasonable people can disagree, in the name of protecting minority rights. Given the choice between no direct democracy and direct democracy with human rights safeguards, I would of course choose the latter.

Essentially, in New Zealand's liberal political culture, there is little chance of anything which could genuinely be labelled tyranny. I do not think there is any greater risk of tyrannical referenda than a tyrannical Parliament. Not a single instance of this country's long history of mistreatment of Maori resulted from a referendum. All such instances, following the beginning of representative government in 1854,<sup>111</sup> can be attributed to those representative institutions.

### ***E Incompatibility with current governing arrangements***

Caldwell suggests that BCIR would be incompatible with representative democracy and parliamentary sovereignty.<sup>112</sup> It is unclear why. Certainly, the fact that New Zealand democracy currently expresses itself by representation is not in itself an argument against BCIR. Dicey writes that ensuring that the will of the sovereign (that is, the law) and the will of the people coincide is the purpose of representative government and the reason

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<sup>111</sup> John Wilson *New Zealand Sovereignty: 1857, 1907, 1947, or 1987?* (Parliamentary Library, Parliamentary Library Research Paper 2007/04, August 2007) at 3.

<sup>112</sup> Julia Caldwell "The People's Veto put to Popular Vote: A Call for Binding Citizens' Initiated Referendums in New Zealand" (LLB (Hons) Dissertation, Victoria University of Wellington, 2010) at 26.

Parliament became sovereign.<sup>113</sup> If there be a better way to ensure that the law and the people's will coincide parliamentary sovereignty and representative democracy cannot, on this basis, constitute a reason not to adopt this method.

Caldwell continues: "Representative democracy would be undermined by referendums as the government would lose control of particular decisions and policies. Accountability for these decisions would also be lost if given over to popular vote."<sup>114</sup> This argument is echoed by Palmer,<sup>115</sup> and Butler and Ranney.<sup>116</sup> Yet this is precisely the point of BCIR. Of course the government would not be accountable to the people for the decisions the people made and the government did not. It would still be accountable for all of the decisions it did make. It would also be accountable for implementing the people's will. Indeed, it ought to be easier to hold the government to account if there be a narrower range of outcomes for which it is responsible.

The Royal Commission on the Electoral System, however, argued that the frequent use of referenda would "blur the lines of accountability and responsibility of Governments and political parties".<sup>117</sup> Another argument that has been elided with the accountability argument is that referenda would diminish the effectiveness of elected governments.<sup>118</sup> The argument seems to be that it would not be clear for which outcomes the government was or was not responsible. Thus, the government will be held responsible for outcomes for which it is not responsible and/or not be held to account for outcomes for which it is responsible. However, our democracy is built on the premise that the people have the ability to appraise a government's performance. The people must be presumed to have the discernment to determine whether the government is to blame for a certain outcome or

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<sup>113</sup> A V Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Indianapolis, LibertyClassics, 1982) at 34–35.

<sup>114</sup> Caldwell, above n 112, at 27.

<sup>115</sup> Geoffrey Palmer "Referendums endanger our democratic system" *The Dominion Post* (Wellington, 24 December 2013) at A11.

<sup>116</sup> Butler and Ranney, above n 96, at 225.

<sup>117</sup> *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (H3, 11 December 1986) at [7.30].

<sup>118</sup> At [7.30].

whether some other factor—the opposition, a previous government, international economic conditions, or a referendum—is responsible.

Ekins is concerned that the people would not be accountable as a lawmaker.<sup>119</sup> One wonders why this should matter. An agent is required to account to its principal, but here there is no agency relationship. The people are still accountable, however, because their decisions affect them. If they were to make a foolish economic decision, they would bear the consequences. Also, where accountability for a wrong is required, the state, as the institutional embodiment of the people, will still be liable in the courts. Any compensation will come from the people's taxes.

### *F The intractability of parliamentary sovereignty*

Explicitly putting to one side the merits or otherwise of BCIR, Geddis points out that the doctrine of parliamentary sovereignty renders BCIR an impossibility.<sup>120</sup> He is right that, orthodoxly, Parliament cannot bind itself. However, here we must distinguish between parliamentary sovereignty as an empirical (if socially constructed) fact—as a legal doctrine accepted by all major constitutional actors and which the courts will enforce—and parliamentary sovereignty as something normatively valuable. To the extent that parliamentary sovereignty does have normative worth, it must stand or fall on the merits of representative legislation. I have already dealt with that aspect.

This leaves parliamentary sovereignty as brute fact. Yet no one would argue that the dead hand of the Glorious Revolution should rule our society for all of eternity, simply because it is impossible to abrogate. It cannot be that, if ever a polity should adopt parliamentary sovereignty, it is forever “imprisoned by a doctrine”.<sup>121</sup> If we reach a new constitutional settlement, constitutional actors will simply have to adapt to the change, even if it means

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<sup>119</sup> Ekins, above n 87, at 8.

<sup>120</sup> Andrew Geddis “Colin Craig is asking for the impossible” (19 July 2014) Pundit <<http://pundit.co.nz>>.

<sup>121</sup> See generally Vernon Bogdanor “Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty” 32 OJLS 179.



acquiescing in a legal revolution. Parliamentary sovereignty is constituted by its acceptance by senior legal officials in all branches of government<sup>122</sup>—and by the people.<sup>123</sup>

### ***G Referenda discourage compromise***

Butler and Ranney find referenda disturbing because they force voters “to choose between only two alternatives: they must either approve or reject the measure referred. There is no opportunity for continuing discussion of other alternatives, no way to search for the compromise that will draw the widest acceptance. Referendums by their very nature set up confrontations rather than encourage compromises.”<sup>124</sup> The idea is that offering a binary ‘yes/no’ choice is somehow too Manichaeian and discourages consensus-building. I do not find this a convincing argument. To make a decision, one must choose either to accept or reject it. That is the same whether it be a ‘yes’ or ‘no’ vote in a referendum or an ‘aye’ or ‘no’ vote in Parliament. If the argument be that referenda allow decisions to be made by bare majority, then it is really a criticism of majoritarian decision-making and can also apply to Parliament.

However, the argument may relate to the process leading up to the decision. A BCIR proposal can be crafted by a single person; the question remains static until the decision is made. In contrast, parliamentary decision-making can be characterised by bargaining, such that the proposal for decision itself reflects a compromise. However, I would point out that the operative word in the previous sentence is ‘can’. Governments can seek compromise. They also can and do force legislation through the House under urgency, without compromising, and with a simple majority. Indeed, this is one of the very problems which BCIR could check. While MMP requires that more than one party assent to a law, statutes still require only simple majorities.

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<sup>122</sup> Jeffrey Goldsworthy “Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty (2005) 3 NZJPIL 7 at 14–15.

<sup>123</sup> At 15.

<sup>124</sup> Butler and Ranney, above n 96, at 226.

Both Parliament and referenda have the potential to produce majoritarian decisions. While Parliament may be more likely to produce consensus, it has not been demonstrated that this is superior to majoritarian decision-making. Questioning majoritarianism calls into question the entire basis of our democracy.

Finally, there is no principled reason why a referendum must be a yes/no choice. There is nothing to prevent a referendum question from offering multiple options, under a plurality or preferential vote system. That was the case under the national liquor licensing referenda. Indeed, we could adopt a system whereby the legislature produces a counter-proposal, as in Switzerland.<sup>125</sup> This counter-proposal could itself represent the result of a compromise.<sup>126</sup>

#### *IV How BCIR would work in New Zealand*

I shall now set out an example of what institutional form BCIR might take. I do not commit myself to any particular instantiation. However, I shall demonstrate how proper institutional design can answer some of the counterarguments. In doing so, I draw in part from overseas experience with CIR and partly from my own thinking.

##### *A The referendum process*

The referendum process would begin with some group or individual identifying a public policy issue and deciding to resolve that issue with a BCIR. This person or group would then formulate a referendum question and submit it to the Clerk of the House for approval. Once approved, the sponsor could then begin collecting signatures.

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<sup>125</sup> Bruno Kaufmann, Rolf Büchi and Nadja Braun *Guidebook to Direct Democracy in Switzerland and Beyond* (4th ed, Initiative & Referendum Institute Europe, Switzerland, 2010) at 150.

<sup>126</sup> At 52.

I suggest that four per cent of registered voters<sup>127</sup> would be an appropriate threshold. I consider the current ten per cent threshold to be too high. It is arguably causative of,<sup>128</sup> and at least correlated with, the fact that only five CIR have been held in the decades since the CIR Act came into force. Comparatively, polities with a threshold of ten per cent or more have very few CIR, while those with a threshold of five per cent or less encourage greater participation in the process.<sup>129</sup> Any threshold is inevitably arbitrary. However, four per cent is the level of support the Royal Commission on the Electoral System<sup>130</sup> and the MMP Review panel<sup>131</sup> determined to be an appropriate level of popular support for a political party to be represented in Parliament. It seems as good a threshold as any for determining the appropriate level of public support to place an issue on the popular legislative agenda.

Ekins warns that professional signature gatherers could enable wealthy special interest groups to capture the agenda.<sup>132</sup> This objection can easily be overcome. Restrictions or a prohibition could be placed on the use of professional signature-gatherers if this were considered desirable. Some polities have already done so.<sup>133</sup> The referendum campaign process would be subject to campaign finance rules, which would dispatch the objection<sup>134</sup> that referenda results can be manipulated by the wealthy.

Having obtained the requisite signatures, the next step would be for the promoters to work with the Parliamentary Counsel Office to produce a workable draft Bill. This would be a significant change from the present system, where the referendum question alone is put to

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<sup>127</sup> An alternative standard would be a certain percentage of the number of voters at the previous election. This would make it somewhat easier to force a referendum.

<sup>128</sup> Virginia Beramendi and others *Direct Democracy: The International IDEA Handbook* (International Institute for Democracy and Electoral Assistance, Stockholm, 2008) at 75.

<sup>129</sup> Beramendi and others, above n 128, at [115].

<sup>130</sup> *Report of the Royal Commission on the Electoral System*, above n 117, at [2.190].

<sup>131</sup> *Report of the Electoral Commission on the Review of the MMP Voting System* (E9, 29 October 2012) at 12.

<sup>132</sup> Ekins, above n 87, at 7.

<sup>133</sup> Beramendi and others, above n 128, at [173]; and Richard J Ellis "Signature Gathering in the Initiative Process: How Democratic Is It?" 64 *Mont L Rev* 35 (2003) 35 at 83.

<sup>134</sup> Ekins, above n 87, at 7.

voters. However, most polities with CIR require drafts, and some also provide official assistance in the drafting process.<sup>135</sup>

Presently, it is entirely up to the discretion of Parliament and the government to determine how the result is to be implemented. While this may provide flexibility, it also provides added scope for government attempts to subvert the result. Also, it will be much clearer that the implementation is the will of the people if the form of that implementation be published beforehand.

After the draft Bill is prepared, it would then go before a Select Committee within whose ambit the subject matter of the Bill falls. Again, this would be a major point of difference with the present system. However, subjecting the Bill to Select Committee scrutiny would preserve some of the virtues of representative lawmaking. The submission process could also provide a focal point for the public debate. The attention of legislators and other submitters should ensure that the final draft is technically workable and accomplishes the object of the referendum question. The Select Committee's recommendation, report, and any minority opinions would further help guide public debate. The Attorney-General's office would, before the Select Committee process, provide a s 7 Bill of Rights Act report. This would no doubt receive attention in the debate and help to prevent any (at least unwitting) majority tyranny.

The Select Committee process would also help work out any intricacies and nuances in the Bill's implementation. Suppose, for instance, that the referendum question asked simply, 'Should euthanasia and physician assisted suicide be legal?' The draft Bill may well leave important questions to be resolved, such as provisions for ensuring informed consent and protecting the consciences of doctors who adhere to Hippocratic ethics. It would be up to the Bill's promoters to accept any recommendations. It would be in their interests to accept any recommendations that would improve the Bill's workability—or the likelihood of its passing.

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<sup>135</sup> Beramendi and others, above n 128, at [168].

The Bill would finally be put before the Committee of the Whole House. The Committee would only have the power to make recommendations, which the Bill's promoters could accept or reject. Subjecting Bills to the legislative process would help to ensure only the highest quality Bills went before the people. However, this would ensure that the Bill's promoters, as representatives of the petitioners, retain control over their proposal. The final decision of course would be made by referendum.

The Electoral Commission would issue an information pamphlet setting out the objective facts about the debate. The pamphlet would additionally set out the major arguments on either side, as in some US states.<sup>136</sup> It would also contain recommendations on how to vote from all political parties represented in Parliament. It could also contain recommendations from major interest groups on either side. Thus, for instance, a euthanasia question may contain recommendations from groups such as the Catholic Church and Family First on the one side and the Voluntary Euthanasia Society on the other. The pamphlet would also contain links or information on how to access the extended reasoning behind each argument and position.

If the referendum accepted the law change, the Bill would become law as per the usual process. I would leave the question of whether the Governor-General could refuse assent to unjust laws to be conducted on the same terms as the debate<sup>137</sup> with regard to ordinary legislation. The government would be required to implement the law, just like any other.

### ***B Interpreting BCIR***

Finally, there is the question of how courts should interpret Bills passed by CIR. After all, the courts determine what the law means in practice. Currently, the courts' aim in

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<sup>136</sup> Beramendi and others, above n 128, at [23].

<sup>137</sup> Joseph, above n 40, at [19.9]; Palmer and Palmer, above n 11, at 57; and John E Martin "Refusal of Assent – A Hidden Element of Constitutional History in New Zealand" (2010) 41 VUWLR 51 at 55–56.

interpreting statutes is to determine Parliament's intent.<sup>138</sup> This is a subset of the general rule that, "The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument".<sup>139</sup> It would follow, then, that the purpose of interpreting laws passed by referendum ('direct laws') would be to determine the will of the people as expressed in the statute. This must be determined objectively; it would be practically impossible to determine what voters subjectively intended.

The courts would, as always,<sup>140</sup> start with the plain meaning of the words. This is especially appropriate apropos referenda, for the ordinary meaning of the words is most likely to be the meaning understood by ordinary voters. The public are unlikely to be aware of special legal meanings.

Where difficulties arise, the Act would be considered as a whole and in context. The referendum question would be an important part of that context. So, too, would the problem the referendum sought to address. The courts could also turn to extrinsic evidence, such as campaign materials and voter education pamphlets.<sup>141</sup> Anything that could play a role in shaping voters' intentions would be relevant.<sup>142</sup>

Note that, as Arnon argues, a narrow construction is more likely to reflect the people's will than a wider interpretation.<sup>143</sup> Some voters will interpret the statute more broadly than others.<sup>144</sup> A narrow construction would ensure that only the interpretation accepted by everyone is applied.<sup>145</sup> In other words, the lowest common denominator must be accepted. The sponsors may well want a broader meaning but draft the statute such that the voters approve more than they realise or would be prepared to accept.<sup>146</sup> The question must always

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<sup>138</sup> *Laws of New Zealand Statutes* (online ed) at [122].

<sup>139</sup> At [122].

<sup>140</sup> At [122].

<sup>141</sup> Arnon, above n 8, at 77.

<sup>142</sup> At 80–81.

<sup>143</sup> At 87.

<sup>144</sup> At 87.

<sup>145</sup> At 87.

<sup>146</sup> At 88.

be what the voters intend. The sponsors' aims are relevant only to determining the voters' intent.

However, Arnon argues, this consensual understanding should receive higher normative treatment than ordinary statutes.<sup>147</sup> Where a referendum conflicts with a statute, the former prevails.<sup>148</sup> A general direct law should prevail over a specific statute.<sup>149</sup> Also, a later statute should not prevail over a law passed by the people.<sup>150</sup> Effectively, this would abrogate the doctrine of implied repeal to disallow a statute to repeal or amend a law passed by the people. The other side of the coin is that a direct law need not be quite so explicit about amending or repealing prior statutes.<sup>151</sup>

That is not to say that it should be impossible to amend or repeal a direct law. Parliament should not be able to thwart the will of the people by undoing what the people have wrought. However, Parliament should have some capacity to make changes as problems with the law arise or circumstances change. The solution may be that Parliament can amend a direct statute, or suspend it pending repeal, but that that action would be subject to a veto referendum called by the original petitioners, or by anyone else with a lower threshold than ordinary.<sup>152</sup>

### *C The importance of context*

Gregorczyk concludes that CIR are not intrinsically good or bad. Rather, they draw their character from the socio-political context in which they operate and the motives of the

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<sup>147</sup> At 88–89.

<sup>148</sup> At 94–95.

<sup>149</sup> At 94–95.

<sup>150</sup> At 94.

<sup>151</sup> Arnon, above n 8, at 95.

<sup>152</sup> Say, one per cent, which, rounded up from 0.83... per cent is approximately the level of popular support that would be required to elect an MP were there no threshold.

political actors involved.<sup>153</sup> The success of BCIR would thus depend on the form the process took. The Devil, as they say, is in the details. That being said, the precise form does not matter so long as it remains consistent with the arguments I have advanced in favour of BCIR. This process I have sketched is far from the only possible form BCIR could take. The simplest would be simply to take the current CIR process and make it binding on the government. It would, presumably, then be left to the courts, at the suit of the promoters, to oversee the implementation of the CIR. If push comes to shove, I would prefer my example, for the reasons I have provided. However, the ultimate form would inevitably be decided upon by our elected representatives. If indeed they are as wise and enlightened as proponents of representative government believe, our representatives can surely be relied on to come up with a proposal that works. That proposal would then presumably be put to the people in a referendum. Thus, the very process of implementing BCIR would provide a model for future relations between the people and their Parliament.

## *V Conclusion*

I have argued that CIR should bind the Crown. I made two main principled arguments. Firstly, I argued that implementing BCIR would accord greater recognition to individual rationality, freedom, and equality. They would make citizens more free and equal. Secondly, I argued that BCIR would make New Zealand more democratic. I next made a number of practical arguments. Firstly, BCIR could perform an agenda-setting function, which could see progress made on public policy issues not being dealt with adequately by representative institutions. Secondly, BCIR would provide a check on government power. Thirdly, BCIR could also check the power of various non-government actors that wield influence over the policymaking process. That concluded the positive case for BCIR.

I then defended my position against various counterarguments. Space precluded me from responding to every conceivable counterargument (and from making every conceivable positive argument). However, I tried to cover the most common counterarguments. I demonstrated, firstly, that direct democracy is not impractical in large societies. Secondly,

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<sup>153</sup> Helen Gregorczyk *Citizens Initiated Referenda* (Queensland Parliamentary Library, Research Bulletin No 1/98, February 1998) at 31.



the voters are competent enough for direct democracy. Thirdly, referenda are not biased in favour of certain results. Fourthly, direct democracy would not produce a tyranny of the majority. Fifthly, CIR would not be incompatible with current constitutional arrangements. Parliamentary sovereignty would not preclude the possibility of binding CIR. Finally, I exposed the flaws in the argument that referenda are incapable of producing compromise.

Next, I exemplified how a system of BCIR could work. It differs significantly from the process under the current CIR Act. The referendum question should be accompanied by draft legislation. Once the promoters had collected the required signatures, the draft Bill would then be subject to the parliamentary process. The Electoral Commission would inform voters by setting out the facts and summarising the arguments about the proposal. If the referendum passed the Bill, it would become law. The courts would adopt a special approach to interpreting laws passed by referendum. This example is not meant to be set in stone, but rather to show how my theoretical argument could be given effect to in the real world. I leave it to those whose fulltime job it is to enact thoughtful legislation to determine the final form.

One argument on which I have not yet touched is that in New Zealand, as in other Western countries, political participation is declining.<sup>154</sup> The nonbinding nature of CIR only intensifies the people's disillusionment and disengagement with the political process.<sup>155</sup> If humans indeed be political animals, a lack of engagement with politics is a serious problem. Political institutions must not remain static in the face of changing trends in citizen engagement. Winston Churchill once said that democracy was "the worst form of Government except all those other forms that have been tried from time to time".<sup>156</sup> He was right. However, it does not follow that the representative democracy of which Churchill spoke is the best possible form of democracy. A higher state of democracy may yet await us. Binding CIR could be part of such a state. That, ultimately, is what I have shown in this essay.

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<sup>154</sup> Miller, above n 79, 231.

<sup>155</sup> At 241.

<sup>156</sup> (11 November 1947) 444 GBPD HC 207.

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