

STEFAN BRUNS

**THE NEW ZEALAND FORM OF DIRECT
DEMOCRACY: THE CITIZENS INITIATED
REFERENDA ACT 1993**

**OVER TEN YEARS OF CITIZENS INITIATED
REFERENDA IN NEW ZEALAND: AN ATTEMPT TO
EVALUATE THE EXPERIENCE**

LLM RESEARCH PAPER

COMPARATIVE CONSTITUTIONALISM LAWS 503

(15,806 words excluding contents, abstract, footnotes, and bibliography)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

2004

B899 BRUNS, S. The New Zealand form of direct democracy.

Victoria

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



LIBRARY

Contents	1
I INTRODUCTION.....	4
II THE REFERENDUM.....	4
A Definition.....	4
B Referendum in the Context of Direct Democracy.....	5
C Analysis of a Referendum Situation.....	6
1 Elements of a referendum.....	6
2 Characterisation of referenda.....	7
3 Relationships in a referendum situation.....	8
(a) People towards referendum.....	9
(b) Effect of referenda.....	9
D The need for participation in a democracy.....	9
1 Participation in a representative government.....	10
2 The attempt to increase participation by direct democracy.....	11
E The Referendum under the CIR Act in New Zealand.....	12
1 History of the Act.....	12
2 Procedure of the Act.....	14
3 The last 11 years.....	14
4 Referenda in other Jurisdictions.....	14
(a) Switzerland.....	14
(b) United States of America.....	15
(c) Canada.....	15
(d) Australia.....	15
(e) United Kingdom.....	16
III ISSUES OF THE CIR ACT.....	16
A The Range of Participation: Subject Limitations.....	17
1 Possible subjects according to the CIR Act.....	17
2 Subjects of previous proposals.....	17
3 Indications drawn from subject topics and numbers.....	19
4 Subjects of referenda.....	21
5 The voice of the people.....	22
6 The meaning of 'views' of the people.....	22
7 The priority problem.....	24
8 Criticism.....	25
9 Preferences and exclusions.....	26
10 Summary: interpretation of the voice in New Zealand.....	27
11 Subject limitation and the voice of the people.....	28
12 Subject limitations in other Jurisdictions.....	29
(a) Switzerland.....	29
(b) United States of America / California.....	31
(c) Canada.....	32
13 Indications drawn from foreign examples.....	32
14 Conclusion.....	33
B The method of Participation: the Referendum Question.....	34
1 Determination of the question according to the CIR Act.....	34
2 Process of reduction.....	34
3 Situation of complex issues and two-sided answers.....	34
(a) Fundamental criticism.....	34
(b) Separate ends in a process.....	35

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

(i)	Existence of a relationship between the separate aspects.....	36
(ii)	Nature of relationship between issue and question: reduction	36
(iii)	Criticism: unwise public decisions	36
(iv)	The attempt to simplify a question.....	37
(v)	New Zealand example	38
(vi)	Practicability: a need to simplify	39
(vii)	Summary.....	41
(c)	The contradiction to representative government.....	41
(i)	Representative Government and the decision making process	41
(ii)	Role of voter in a referendum	42
(d)	The contrary element.....	43
(i)	The referendum process: reduction by deciding.....	43
(ii)	Reduction as a referendum problem.....	44
(e)	Australia.....	45
(i)	The 1999 Australian republic referendum.....	45
(ii)	Referendum question.....	45
(iii)	Referendum results.....	46
(iv)	Contrary opinion polls.....	46
(f)	Reduction and the Australian referendum question.....	47
(g)	Reduction as a legitimacy problem	48
(i)	Legitimacy in representative democracy.....	48
(ii)	Legitimacy in popular vote	49
(iii)	Obstruction of legitimacy trace by reduction decisions	49
4	Conclusion.....	50
C	The Effect of Participation: the Indicative Nature of CIR Act referenda	51
1	Effects of referenda in other jurisdictions.....	52
(a)	Switzerland	52
(b)	Canada	52
(c)	Australia.....	53
(d)	USA.....	53
2	Binding effect of referenda	53
(a)	Reasons for non binding nature of the CIR referendum.....	54
(i)	Final decisions on important issues	54
(ii)	Danger of minority rule and voter turn out.....	55
(iii)	Tyranny of the majority	55
(b)	Arguments against non-binding nature	56
3	Overseas experience	57
(a)	Canada	57
(b)	United Kingdom.....	58
(c)	Switzerland	58
(d)	United States / California	58
4	Indications from the figures	59
IV	CONCLUSION	59
V	BIBLIOGRAPHY	62

Abstract

This paper considers the experience New Zealand has made with the CIR Act as a form of direct democracy within the last 11 years. The Act has led to a number of proposals and three citizen initiated referenda. This paper addresses three issues of the CIR act with respect to its intention. One of the goals of the CIR Act was to enhance public participation in the democratic process. The issues addressed are subject limitations, problems of a referendum question and the indicative nature of the Act. The New Zealand experience shows a dominant interest of the people to participate in constitutional matters. The importance of these issues, demonstrated by other jurisdictions with forms of direct democracy and the suggested effect of governmental non-compliance with referenda results argue for the development of the CIR Act into a binding model. The gain of legitimacy by participation has to be paid for by the flaws of the referendum process. The question enables only to give a single answer to a usually complex nature of an issue. In the absence of further safeguards, which are found in other, all federal jurisdictions, a precaution New Zealand should take is found in the use of the benefits of a representative system. Intermediate decisions should be made by the elected representatives. The benefit of a binding referendum on constitutional matters has to be achieved by accepting a restriction to government initiated referendum on such issues.

I INTRODUCTION

The topic of this paper is the New Zealand form of direct democracy. The Citizens Initiated Referenda Act 1993 provides for citizens initiated indicative referenda.¹ In this paper an attempt will be made to illustrate the relationship of direct democracy vs representative government, define the relevant terms, place the CIR Act into this relationship and evaluate controversial issues with the experience New Zealand made in the last 11 years of the CIR Act's existence. As far as relevant, the issues shall be compared with other jurisdictions.

It is the thesis of this paper that the New Zealand experience with its form of direct democracy advocates a further step to enhance its direct democracy elements. This step is believed to be the introduction of a statute providing for binding, mandatory veto referenda on fundamental constitutional issues. The CIR Act has proved successful in introducing a citizens initiated participatory element into New Zealand's legal system. But the current statute does not allow for further progress. Thus, if the gained advantages of the Act shall be kept, a further development is suggested.

The first part of the paper provides the framework a referendum needs to be seen in. Further, an attempt to illustrate and describe a referendum in general is made. The procedure of the Act and a brief introduction to the situation in other jurisdictions will be presented. The second part focuses on three controversial issues of the CIR Act: Subject limitation, the question and the indicative nature. An attempt will be made to evaluate these issues on the experience to this point. The evaluation will be made in respect to the intended goal of enhancing participation.

II THE REFERENDUM

A Definition

A referendum (plural: referendums or referenda) is a form of direct vote in which an entire electorate votes on a particular proposal.

¹ In the following: the CIR Act.

B Referendum in the Context of Direct Democracy

The term democracy goes back to ancient Athens. Aristotle described democracy as:²

“A democracy is characterized by the fact that poor and rich people in principle do have the same political rights. Neither one nor the other party is sovereign [to the other]...’ (3) ... [E]veryone, who is registered as a [full] citizen may participate in holding public offices, but the law is sovereign. (4) As the previous form, but the people and not the law is sovereign.’ The fourth form was the constitution of Athens since Pericles.”

The description already reflects what today are considered fundamental democratic principles: Equality in right of the individual, sovereignty, legitimacy, participation,³ and “the sharing of power to a great or lesser extent.”⁴ Direct Democracy means that political decisions are made directly by the whole body of citizens.⁵ The democracy is direct, because the act of participation directly leads to a decision. The trace of legitimacy directly goes back to the source of power to make binding rules. The direct connection allows for a more clear expression and unaltered transformation of the will of all into the exercise of power.⁶

² Aristotle *The Politica, Book IV – VI* (Corpus Aristotelicum, 1289 b 33 – 1293 b 39); translation taken from: Ingemar Duering *Aristoteles – Darstellung und Interpretation seines Denkens* (Carl Winter Universitaetsverlag, Heidelberg 1966) 501. “Eine Demokratie wird dadurch gekennzeichnet, dass Arme und Reiche im Prinzip dieselben politischen Rechte haben, und dass weder die einen noch die anderen die Souveranitaet besitzen. Dies ist die beste Form. Es gibt aber Varianten: (1) Zur Teilnahme an den Aemtern ist eine bestimmte Belegung mit Abgaben erforderlich, jedoch nur eine geringe. (2) Alle Buerger von untadliger Geburt haben an den Aemtern teil, aber das Gesetz ist souveraen. (3) Die Abstammung wird nicht beruecksichtigt, sondern jeder, der als Buerger eingeschrieben ist, hat an den Aemtern teil, aber das Gesetz ist souveraen. (4) Wie die vorige Form, aber das Volk und nicht das Gesetz ist souveraen.” Die vierte Form war seit Perikles die Verfassung Athens. Durch Volksbeschluss wurde alles von Fall zu Fall entschieden.”

³ Nelson Lund “Rousseau and Direct Democracy (with a Note on the Supreme Court’s Term Limits Decision)” (2004) 13 University of San Diego School of Law Journal of Contemporary Legal Issues 459; see also: Albert Weale *Democracy* (St. Martin’ Press, New York, 1999) 16, 78, 167.

⁴ Keith Jackson “How should Parliament be changed?” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Victoria University of Wellington, 2000) 343.

⁵ Weale above n 3, 24.

⁶ Sherman J Clark “A Populist Critique of Direct Democracy” (1998) 112 Harvard Law Review 434.

The contrary concept is 'representative democracy'. The line between the people and the exercise of power is interrupted by representative institutions. The expression of the will of the people is channelled into the ways of representative process. "Parliament is the centrepiece of the democratic process."⁷ A smaller number of people represent the whole. They execute the functions the sum of the people would not efficiently be able to handle due the sheer number of participants. A few are elected to make decisions for the whole⁸ and in the interests of the whole.⁹

C Analysis of a Referendum Situation

For the purpose of description and explanation of the functions, mechanisms, and effects of a referendum, the following distinction is made: a referendum is separated into subjects and relationships. The subjects, or elements, are looked at according to their input or output of the situation. This includes aspects of what an element does or what is happening to it. Why a certain action has a certain outcome or what interconnections between elements exist is the content of the relationships.

1 Elements of a referendum

Elements of a referendum are the people on the one side and an individual, single decision on the other side. The people are the actors. The referendum result is the objective outcome of the action. The referendum serves as a link to both elements. It is a channel (relationship) and connection (element) between them at the same time. It is a channel in as much it provides for a method of establishing an interconnection between the people and a certain decision. The interconnection allows participation and operates by voting.¹⁰

⁷ Jackson, above n 4, 343.

⁸ Helena Catt "Citizens' Initiated Referenda" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford university Press, Auckland, 2001) 14.

⁹ WIKIPEDIA The Free Encyclopedia "Representative Democracy" <<http://en.wikipedia.org>> (last accessed 04 December 2004).

¹⁰ Clark, above n 10, 440, 442.

2 *Characterisation of referenda*

Referenda are described according to who has the authority to initiate them: Referenda can be required by a constitution or statute.¹¹ In most cases, a constitution states that for example constitutional amendments have to be put to the voters.¹²

In this paper referenda required by law on specified issues are referred to as 'mandatory' referenda. Referenda about specified issues, which are to be held if the people show desire by initiation of a petition are referred to as 'optional' referenda. Referenda can be government initiated. This means a Government decides by a non-legal motivation to hold a referendum. A third form is the referendum initiated by the people. A person or a group of people files a petition. When the petition fulfils legal requirements (a certain amount of signatures) the proposal is put to a ballot. Those referenda are called 'initiative', 'citizens initiative', 'plebiscite', 'ballot measure' or 'proposition' depending on the legislation.¹³

Referenda legislation might restrict the use of referenda for certain subjects, such as constitutional or statute matters, or proposals might be allowed to address any desirable issue.

A referendum might be restricted to be held on one issue only or cover more than one matter. Mostly voters are given a choice between two options, but referenda might also contain three or more options.¹⁴ Another distinction is made by the ballot question: A referendum proposal can be formulated as a 'yes' or 'no' question about a problem or as an alternative choice between two (or more) drafts, general suggestions, or maybe policy proposals.

¹¹ David Butler and Austin Ranney (eds) *Referendums – A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research, Washington D.C., 1978) 23.

¹² See for example: Constitution of Australia, s 128 (1); Federal Constitution of the Swiss Confederation, art 140(1), (2).

¹³ Use of other terminology than 'citizens initiated referendum' or 'government initiated referendum' should be made with care for different legislations make different use of the terms. For example in Canada a citizens initiated referendum is referred to as a 'plebiscite' while the same term in Australia is used for government initiated non-binding referenda.

¹⁴ For example two referendums held in Sweden, in 1957 and 1980, offered voters a choice of three options; WIKIPEDIA "Referendum, above n 9.

Referenda differ by their procedure to determine the question. The question might be determined by the petitioner, the government (or a government agency) or a third party. The promotion and education about the referendum issue might be the promoters or interest group's responsibility or the government might be required by law to provide educational information about the issue.¹⁵

Referenda can be distinguished by the effect they have: they can be binding on the government by law. The law can be a supreme constitution or a statute enacted for the specific referendum. In the latter case the government has the authority to determine the effect. In contrast, a referendum can be indicative in nature. Its effect on government derives from non-legal sources such as an assumed moral force¹⁶ or strategic planning in consideration of the next election.

3 *Relationships in a referendum situation*

A referendum provides for a two-way relationship between the people and the decision. The important aspect is the absence of "interference and potential distortion of representative institutions."¹⁷ The relationship "give[s] citizens a voice on questions of public policy."¹⁸ At the same time the elements are connected by a trace of political legitimacy.¹⁹ The trace of legitimacy is direct in comparison to the representative system. In the latter legitimacy of the individual decision is deviated from the legitimacy the representative body got by election. In practise, representative institutions are not totally excluded. They perform functions of administration or transformation. For example, the government is involved in conducting a referendum. It may be involved by drafting a law people vote on.²⁰ But the

¹⁵ This is the case in most Australian States. See for example: Referendums Act 1997 (Qld), s 10, 11, 12.

¹⁶ (10 March 1992) 522 NZPD 6710, 6717, 6724.

¹⁷ Clark, above n 10, 435.

¹⁸ *City of Eastlake v Forest City Enters., Inc.* (1976) 426 US 668, 673 (SC).

¹⁹ See: Lund, above n 3, 463.

²⁰ See for example: Constitution of California, art 2, s 5.

difference is that those institutions have a less active and less independent role when the people decide directly.

(a) People towards referendum

The relationship between the people towards a referendum depends on whether people are given the authority to initiate referenda (active) or whether they are confined to taking part in it by voting (reactive). It is further characterised by the promoters influence in the process such as taking part in determining the question and/or promoting/funding the referendum. The promoter can be included or mainly excluded in the process. The relationship is finally influenced by the range of subjects and choices the voter can introduce or exercise in a referendum.

(b) Effect of referenda

Another relationship exists between referendum and government. It illustrates the legally binding or non-binding effect of the referendum. A binding referendum forces government into a reactive position. The will of the people is given a legal force. This force could lead to an enactment of a law,²¹ or government could be obliged to act accordingly to a proposition.²² The referendum may also be indicative in nature only.²³ An indicative referendum can only claim a moral force. The Government remains in an active rather than reactive position.

D The need for participation in a democracy

Professor Clark said: “[A] regime is legitimate if people are made to follow only those rules to which they have consented.”²⁴ Democracy assumes that every subject has the same rights as any other subject within a social group.²⁵ No one can make rules for anyone else or enforce such rules, thus exercising power over another individual. An individual only can make rules

²¹ See for example: Constitution of California, art 2, s 8(a).

²² See for example: Referendum and Plebiscite Act RSS 1991 c R-8.01, s 5.

²³ See for example: Citizens Initiated Referenda Act 1993, Long Title.

²⁴ Clark, above n 10, 434.

²⁵ Aristotle *The Politica*, Book IV – VI (Corpus Aristotelicum, 1289 b 33 – 1293 b 39).

for themselves. Rules are applicable to the whole of the people. In theory everyone must accept those rules as made by him- or herself. Everyone must consent to them. The existence of ongoing consent is legitimacy.²⁶

In a pluralistic society unanimous consent is not possible. Legitimacy of decisions effecting the whole, the will of the majority must prevail over the will of the minority.²⁷ In theory, lack of consent is made up for by giving everyone an opportunity to equally participate in making of rules.²⁸ The right to make rules is subject to agreed restrictions such as law must be made by the correct body in the correct manner.²⁹ The correct body is an elected parliament. Only on the fulfilment of all requirements can a law be said to have a right "to demand obedience", another words: can claim legitimacy.³⁰ Participation is a central element of legitimacy.

In a representative system, not the vote for the winning party that carries consent, but the participation in the election itself. Taking part is an expression of approval. Approval is the important feature that carries legitimacy. "The essence of democracy is participation."³¹

1 Participation in a representative government

In New Zealand the degree of participation has been of concern. Representative government encounters an increasingly complex world and a political arena dominated by parties. This has led to a growing feeling among voters of disenfranchisement, scepticism and distrust of governmental institutions.³² According to a poll, the support for Parliament in New Zealand

²⁶ Clark, above n 10, 442.

²⁷ See: Aristotle *The Politica, Book IV – VI* (Corpus Aristotelicum, 1293 a 1-11); Alexis de Tocqueville *Democracy in America* (1850) (J P Mayer ed & George Lawrence trans, Harper Collins 1988) 246; Geoffrey de Q Walker *Initiative and Referendum: The People's Law* (The Centre for Independent Studies, St. Leonards, NSW, 1987) 51 and 82; Clark, above n 10, 447.

²⁸ Clark, above n 10, 442.

²⁹ H L A Hart *The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994) 60, 61.

³⁰ Hart, above n 29, 58, 59.

³¹ Jackson, above n 4, 343.

³² Hon M McCully MP (10 March 1992) 522 NZPD 6709; Hon D A M Graham MP (14 September 1993) 538 NZPD 17963; see also: Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe Ltd., Dunedin, 1992) 2; Caroline Morris "Citizens Referenda: Time to Review?" [2002] NZLJ 44.

has declined from 33 per cent in 1975 to 14 per cent in 1981, 8 per cent in 1987 to 4 per cent in 1989.³³ In 2000, politicians were placed last on a list of 23 trusted professions.³⁴ The development is believed to originate in the limits of influence representative government allows voters. Voters experience a growing distinction between what they vote for and the actual outcome of their votes. An example is the 1984 Labour Government stepped away from the "mandate theory".³⁵ The mandate theory said that by voting for a certain government, electors gave a mandate to implement a set of policies. Previously, a mandate was based on an election manifesto, gave justification for actions implementing the policies and by referring to the policies mentioned in the manifesto imposed a constitutional restraint on Government.³⁶ In 1987 Labour's election manifesto stated that New Zealand Post, Postbank and Telecom "will remain in public ownership..."³⁷ Later on they were sold to private owners.

In 1990 National's election manifesto stated that under its governance a tax surcharge imposed by the previous government will be removed. National was elected but the removal did not take place. Instead, contrary to statements in the same manifesto, government took steps to abolish Area Health Boards and cut the Health budget.³⁸

2 *The attempt to increase participation by direct democracy*

The concerns have led to a plea for a response to this situation.³⁹ Growing disrespect for public institutions is considered a reason for disrespect for law. This is considered "detrimental to the rule of law". The rule of law

³³ P A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers, Wellington 2001) 321.

³⁴ Joseph, above n 33, 321.

³⁵ Joseph, above n 33, 320; J L Caldwell "Election Manifesto Promises: The Law and Politics" [1989] NJZLJ 108.

³⁶ Joseph, above n 33, 500.

³⁷ Palmer, above n 32, 10.

³⁸ Palmer, above n 32, 10.

³⁹ Hon Doug Graham (14 September 1993) 538 NZPD 17963; Morris, above n 32, 44.

doctrine is a basic assumption in a legal structure. Disrespect for law ultimately is detrimental to democracy.⁴⁰

An adequate response is to improve the forms of participation. On the assumption "the more direct, the better", improvement is achieved by adding forms of participation. For this purpose citizens initiated referenda are considered a way to assuage voter feelings.⁴¹ People are given an additional and direct opportunity to place subjects on the political agenda that are, in their opinion, not adequately discussed⁴² or exert direct influence in issues that are important to them.⁴³ Referenda increase the acceptance of a political system, because a law originating from a referendum is more clearly and directly derived from the people's will.⁴⁴ This is seen as a prominent factor to enhance public participation.⁴⁵

E The Referendum under the CIR Act in New Zealand

The CIR Act was enacted by the New Zealand Parliament in 1993. It was intended as a suitable form of direct democracy and as an attempt to promote public participation.⁴⁶

1 History of the Act

The Act is the current result of an ongoing direct democracy debate that began with the introduction of the Referendum Bill in 1893, opting for a non-binding government controlled referendum.⁴⁷ The debate over the Bill

⁴⁰ Walker, above n 27, 51.

⁴¹ See: Penelope Brook Cowen, Tyler Cowen, Alexander Tabarrok "An Analysis of Proposals for Constitutional Changes in New Zealand" prepared for the New Zealand Business Roundtable September 1992 para 6.1.; <<http://www.nzbr.org.nz>> (last accessed 04 December 2004).

⁴² Ben Goschik "You're the Voice – Try and Understand it: Some Practical Problems of the Citizens Initiated Referenda Act" (2003) 34 VUWLR 700.

⁴³ Report of the Royal Commission on the Electoral System (Government Print, Wellington, 1986) 172.

⁴⁴ Clark, above n 10, 434; Walker, above n 27, 50.

⁴⁵ Morris, above n 32, 44.

⁴⁶ R Anderson MP (10 March 1992) 522 NZPD 6717; Hon M McCully MP (10 March 1992) 522 NZPD 6710; Hon D A M Graham MP (14 September 1993) 238 NZPD 17963.

⁴⁷ (2 August 1893) 80 NZPD 358.

ended without result in 1906.⁴⁸ Promises to establish means of citizens initiative and referendum entered the Labour Party's manifesto in 1911 and the Social Democratic Party in 1913.⁴⁹ The Popular Initiative and Referendum Bill was introduced twice, 1918 and 1919.⁵⁰ It contained an indirect initiative system⁵¹, but went nowhere. The next proposal for a form of direct democracy was incorporated into a proposed written constitution by the Constitutional Society for the Promotion of Economic Freedom and Justice in New Zealand Incorporated.⁵² It did not pass the Public Petitions Committee.⁵³ In 1975 the later called New Zealand Democratic Party included a call for (government controlled) referendums in its election manifesto.⁵⁴ In 1983 they attempted to introduce the Popular Initiatives Bill but failed.⁵⁵ It would have introduced a non-binding citizens initiated referendum system. It finally was introduced a year later,⁵⁶ and was ruled out by the Speaker of the House a year after.⁵⁷ Brought to the attention of the Royal Commission on Electoral Reform, in its 1986 report it concluded that "there should be no provision for public petitions to compel referenda".⁵⁸ By that time the ongoing debate has gained widespread support and in 1990 the National Party decided to include a proposal to establish a non-binding citizens initiated referendum mechanism in its election manifesto.⁵⁹ This led to the CIR Act.

⁴⁸ (12 September 1906) 136 NZPD 502; Hon D A M Graham MP (14 September 1993) 538 NZPD 17963.

⁴⁹ W McIntyre and W Gardner *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971) 221, 228.

⁵⁰ (13 April 1918) 182 NZPD 204; (9 September 1919) 184 NZPD 320-328.

⁵¹ (13 April 1918) 182 NZPD 204 or (15 April 1918) vol 182 NZPD 214.

⁵² Report of Public Petitions M to Z Committee 1961 [1961] AJHR 1.2A, 3.

⁵³ Report of Public Petitions M to Z Committee, above n 52, 3.

⁵⁴ See S Levine and A Robinson *The New Zealand Voter - A Survey of Public Opinion and Electoral Behaviour* (Price Millburn, Wellington, 1976) 102, 107.

⁵⁵ (9 December 1983) 455 NZPD 4746, 4757.

⁵⁶ (6 November 1984) 458 NZPD 1313.

⁵⁷ (13 November 1985) 467 NZPD 8069.

⁵⁸ Royal Commission on the Electoral System, above n 43, 176, 181.

⁵⁹ Mark W. Gobbi *The Quest for Legitimacy: A Comparative Constitutional Study of the Origin and Role of Direct Democracy in Switzerland, California and New Zealand*, (LLM Thesis, Victoria University of Wellington, 1994) 256.

2 *Procedure of the Act*

The CIR Act enables any person to submit a proposal for an indicative referendum to the Clerk of the House of Representatives.⁶⁰ Within three months of the receipt of the petition, the Clerk has to determine the final question of the referendum.⁶¹ The Clerk shall take other opinions into account⁶² and must ensure that the question clearly states the purpose and only one of two answers may be given to the question.⁶³ Then the petitioner has 12 months to collect signatures of at least 10 per cent of eligible voters.⁶⁴ The Clerk has two months to determine whether or not the petitioner has been successful.⁶⁵ If the petitioner has been successful, the actual referendum has to be held within the next 12 months.⁶⁶

3 *The last 11 years*

Since its passing in 1993 a total of 31 proposals have been made to hold a referendum. Three of them were put on a ballot. The first referendum in New Zealand under the CIR Act was held in 1995. The other two were held in combination with the general election in 1999. The New Zealand Government has not acted upon any of the three referendum results.⁶⁷

4 *Referenda in other Jurisdictions*

The use of referenda as a method to involve the people in decision making is a common instrument throughout the world.

(a) Switzerland

Of the western democracies, Switzerland, having a codified legal system, takes the leading role in terms of use of referenda. Provisions about

⁶⁰ Citizens Initiated Referenda Act, s 6.

⁶¹ Citizens Initiated Referenda Act, s 11.

⁶² Citizens Initiated Referenda Act, s 10(2).

⁶³ Citizens Initiated Referenda Act, s 10(1).

⁶⁴ Citizens Initiated Referenda Act, s 15(3), 18(2).

⁶⁵ Citizens Initiated Referenda Act, s 18(1).

⁶⁶ Citizens Initiated Referenda Act, s 22AA(1).

⁶⁷ Morris, above n 32, 44, 46.

mandatory referenda are incorporated into the Federal Constitution⁶⁸ and all of the 26 state constitutions.⁶⁹

(b) United States of America

The United States is an example of the common law world, where referenda legislation can be found in 49 US states. For example, in all those states amendments to the federal constitution have to be approved by voters.⁷⁰ Initiatives are found in twenty-four states.⁷¹

(c) Canada

Federal Canada⁷² and all but one province⁷³ have legislation concerning the holding of referenda. Eight out of thirteen provinces/territories have enacted separate referendum legislation.⁷⁴ Two provinces have referenda provisions incorporated into their electoral statutes⁷⁵ and two provinces have subject orientated legislation that call for referenda in specific instances⁷⁶.

(d) Australia

The Constitution of Australia provides for a mandatory referendum in case of a change of the constitution.⁷⁷ The situation in the Australian states is

⁶⁸ Federal Constitution of the Swiss Confederation, art 140(1), (2).

⁶⁹ See: Constitutions of the Cantons of: Aargau, art 62(1); Appenzell Ausser-Rhoden, art 60(1); Appenzell Inner-Rhoden, art 7ter10(1); Basel-Land, art 34 a-e; Basel-City, art 27, 54(1), 55, 56; Berne, art 61(1) a-d; Fribourg, art 28(1), (2); Geneve, art 56(1), 68(1); Glarus, art 69(1); Graubunden, art 16; Jura, art 77; Luzern, art 39bis (1); Neuchatel, art 44(1); Nidwalden, art 52; Obwalden, art 111,112,58(a); Sankt Gallen, art 48; Schaffhausen, art 31; Schwyz, art 30(1)-(4); Solothurn, art 35(1); Thurgau, art 23(1); Ticino, art 42; Uri, art 24; Valais, art 34(3); Vaud, art 83(1); Zug, art 31a, 32, 79 (3); Zurich, art 30(28) (1)-(4).

⁷⁰ Lund, above n 3, 461.

⁷¹ Richard B Collins and Dale Oesterle "Governing by Initiative: Structuring the Ballot Initiative: Procedures That Do and Don't Work" (1995) 66 University of Colorado Law Review 49.

⁷² Referendum Act (Canada) 1992.

⁷³ Ontario.

⁷⁴ Constitutional Referendum Act RSA 2002 c C-25, Referendum Act RSBC 1996 c 400, Recall and initiative Act RSBC 1996 c 398, Plebiscites Act RSPEI 1988 c P-10, Referendum Act RSQ 2002 c C-64.1, Referendum and Plebiscite Act RSS 1991 c R-8.01, Plebiscite Act RSNWT 1988 c.P-8, Plebiscite Act RSNWT (Nunavut) 1988 c.P-8, Plebiscite Act RSY 2002 c C-172.

⁷⁵ Elections Act SNL 1991 c E-3.1, s 217; Elections Act SNB 2000 c E-3, s 129(1).

⁷⁶ Retail Business Uniform Closing Day Act RSNS 2004 c 402.

⁷⁷ Constitution of Australia, s 128 (1).

similar to Canada in regard to the situation in the states compared to the federal level: All states/territories have some legislation, specifically dealing with referenda. Three states/territories out of eight have enacted separate referendum legislation.⁷⁸ Three states have clauses providing for mandatory referenda incorporated into their constitutions.⁷⁹ Two states/territory have enacted legislation outlining the use of referenda, in case a statute provides legal grounds for the holding of a referendum.⁸⁰ In the past eleven years federal Australia has held two referenda simultaneously in 1999. Since the enactment of its constitution in 1900, federal Australia has held 44 referenda about constitutional changes, two plebiscites as indicative referenda and one poll. The difference between referenda/plebiscite and a poll in Australia is compulsory voting for the former, optional participation for the latter.⁸¹

(e) United Kingdom

The United Kingdom, like New Zealand the only unitary state among these considered, has only recently enacted a statute specifically regarding referenda. The Political Parties, Elections and Referendums Act (UK) 2000 mainly considers financial aspects of the holding of referenda. In general, the United Kingdom enacts individual statutes for each referendum.⁸²

III ISSUES OF THE CIR ACT

Three controversial aspects of the CIR Act shall be discussed. The aim is to evaluate expressed concerns against the experience of the last 11 years in respect to participation. Similar experiences from other jurisdictions and the consequences will be considered as applicable and possible.

⁷⁸ Referendums Act 1997 (Qld), Referendums Act 1983 (WA), Referendums Act 2001 (NT).

⁷⁹ Constitution Act 1902 (NSW), s 7A, Constitution Act 1934 (SA), Constitution Act 1975 (Vic), s 18.

⁸⁰ Referendum Procedures Act 1994 (Tas), Referendum (Machinery Provisions) Act 1994 (ACT).

⁸¹ The Australian Electoral Commission *The Australian Referendums 1906 – 1999* CD-Rom; for further information, see: <www.ace.gov.au> (last accessed 15 December 2004).

⁸² For example: Referendums (Scotland and Wales) Act 1997 (UK), Greater London Authority (Referendum) Act 1998 (UK), Regional Assembly (Preparations) Act 2004 (UK).

The first point of interest is the range of subjects the CIR Act allows to be addressed. It will be asked whether the range of possible issues has an influence on participation. A second point of interest is connected with the referendum question. It is asked how it influences the evaluation of public participation. The third point of interest focuses on the relationship between referendum and government under the CIR Act and whether this relationship is beneficiary or detrimental to its purpose.

A *The Range of Participation: Subject Limitations*

The purpose of the CIR Act is to "indicate the views held by the people".⁸³ The following paragraphs address the past proposals and referenda, and whether this can be regarded as an expression of the views of the people. First the proposals and referenda are introduced. Then problems of direct democracy influenced interpretation of the 'views of the people' with respect to participation will be looked at.

1 *Possible subjects according to the CIR Act*

New Zealand citizens can initiate referenda on any subject. Clause 3 of the Act states that "[a] petition seeking the holding of [a] ... referendum may ... be presented to the House of Representatives". The CIR Act does not contain limitations concerning the range or topic of the subject for a referendum. The only limitation is found in clause 4 and provides that "[a] ... petition shall not relate to a matter that is or could be or could have been subject of an election petition under Part 8 of the Electoral Act 1993 or of an application under this Act."

2 *Subjects of previous proposals*

Of 31 proposals submitted to the Clerk of the House, eleven have touched on various constitutional matters (judicial power of judges;⁸⁴

⁸³ Citizens Initiated Referenda Act 1993, long title.

⁸⁴ Notice 2784 (14 April 1994) *New Zealand Gazette* Wellington 1330.

constitutional enforceability of political accountability;⁸⁵ number of MP's (two proposals);⁸⁶ national constitution/effect of the Treaty of Waitangi;⁸⁷ democracy by referendum;⁸⁸ referendum to change the voting system (three proposals);⁸⁹ written constitution;⁹⁰ and binding nature of referenda⁹¹).

Seven proposals were concerned with political issues which would have influenced the nature of the political system (free public health;⁹² free education;⁹³ government goal of full employment;⁹⁴ benefit;⁹⁵ reduction of military budget and alternative spending;⁹⁶ and request to government to reduce unemployment⁹⁷). All six proposals along with one concerning sustainable energy and energy conservation⁹⁸ would have had a significant impact on the financial situation and Governments freedom on spending.

Six proposals were concerned with justice and legal issues (equality before the law;⁹⁹ reform of the justice system;¹⁰⁰ Parenting Bill and Family Court;¹⁰¹ repeal of Prostitution Reform Act¹⁰²; appeal to the Privy Council;¹⁰³ and administration – criteria for school closures¹⁰⁴).

⁸⁵ Notice 6484 (1 September 1994) *New Zealand Gazette* Wellington 2686.

⁸⁶ Notice 4045 (02 June 1994) *New Zealand Gazette* Wellington 1843 and notice 4296 (26 June 1997) *New Zealand Gazette* Wellington 1500.

⁸⁷ Notice 1725 (20 March 1997) *New Zealand Gazette* Wellington 642.

⁸⁸ Notice 4828 (08 July 1999) *New Zealand Gazette* Wellington 1884,

⁸⁹ Notice 7918 (02 November 2000) *New Zealand Gazette* Wellington 3858, notice 180 (11 January 2001) *New Zealand Gazette* Wellington 60, and notice 3469 (21 May 1998) *New Zealand Gazette* Wellington 1580.

⁹⁰ Notice 5509 (09 August 2001) *New Zealand Gazette* Wellington 2157.

⁹¹ Notice 1026 (13 February 2003) *New Zealand Gazette* Wellington 332.

⁹² Notice 8893 (08 December 1994) *New Zealand Gazette* Wellington 4335.

⁹³ Notice 8893 (08 December 1994) *New Zealand Gazette* Wellington 4335.

⁹⁴ Notice 8893 (08 December 1994) *New Zealand Gazette* Wellington 4335.

⁹⁵ Notice 8893 (08 December 1994) *New Zealand Gazette* Wellington 4335.

⁹⁶ Notice 8893 (08 December 1994) *New Zealand Gazette* Wellington 4335.

⁹⁷ Notice 3404 (13 May 1999) *New Zealand Gazette* Wellington 1289.

⁹⁸ Notice 8893 (08 December 1994) *New Zealand Gazette* Wellington 4335.

⁹⁹ Notice 314 (12 January 1995) *New Zealand Gazette* Wellington 52.

¹⁰⁰ Notice 7159 (09 October 1997) *New Zealand Gazette* Wellington 3423.

¹⁰¹ Notice 3757 (25 May 2000) *New Zealand Gazette* Wellington 1207.

¹⁰² Notice 5853 (04 September 2003) *New Zealand Gazette* Wellington 3392.

¹⁰³ Notice 2404 (10 April 2003) *New Zealand Gazette* Wellington 947.

¹⁰⁴ Notice 2151 (25 March 1999) *New Zealand Gazette* Wellington 889.

Three proposals dealt with issues largely of industrial nature (number of firefighters;¹⁰⁵ preservation of national forests¹⁰⁶ and public ownership of forest industry¹⁰⁷).

Two proposals regarded health issues (increase of health budget;¹⁰⁸ and ban on tobacco products¹⁰⁹).

One proposal was intended as an ethical issue (ban on eggs from battery hens¹¹⁰). The one currently pending proposal concerns the design of the flag of New Zealand.¹¹¹

3 *Indications drawn from subject topics and numbers*

As a reference group for the people's views, these figures lack the popular vote on them. The evaluative value is limited, because the figures are from proposals only. In regard to the opportunity provided by the CIR Act they however do indicate the range of topics of interest to the people. In respect to the time of existence of the CIR Act these numbers also are able to make a statement about the appreciation this form of direct democracy has received in New Zealand so far.

The numbers indicate that constitutional matters in form of the precise structure of the current government system seem to have been of foremost concern with more than one third (35.5 per cent) of all proposals. Second in importance appears to be the abstract structure of the state in terms of how the political system should be shaped. However, the first five of those six proposals together with the sustainable energy proposal were all submitted by the Next Step Democracy Movement at the same time, while the ten constitutional proposals came from different promoters. The former six

¹⁰⁵ Notice 8312 (17 November 1994) *New Zealand Gazette* Wellington 3559.

¹⁰⁶ Notice 4932 (01 August 1996) *New Zealand Gazette* Wellington 2013.

¹⁰⁷ Notice 2524 (18 April 1996) *New Zealand Gazette* Wellington 1048.

¹⁰⁸ Notice 7411 (16 October 1997) *New Zealand Gazette* Wellington 3512.

¹⁰⁹ Notice 2422 (06 April 2000) *New Zealand Gazette* Wellington 792.

¹¹⁰ Notice 976 (10 February 1994) *New Zealand Gazette* Wellington 719.

¹¹¹ Notice 4986 (29 July 2004) *New Zealand Gazette* Wellington 2320.

proposals were withdrawn by the promoter.¹¹² Those six proposals each dealt with the function of government in respect to the classification of a political system (Should government be responsible for providing health care or is it the responsibility of each individual? Should the individual has to take care of his or her education or shall government provide for it? Is Government deciding how to use resources or does the individual has to make his or her choice according to the options on the market?). They had in common that their enactment would have imposed a major change in the perception of the state. They would have lead to a change in the political system.

Based on this commonality and the fact that they originate from one promoter they can be regarded as one proposal. Then the number of proposals concerning constitutional issues gives a stronger statement for the importance of constitutional issues. The percentage rises to 42.3 per cent. Next in importance are now matters of judicial and legal nature: 23 per cent (or 19.4 per cent without the 'promoter' reduction). They are similar to constitutional matters, because they touch on the relationship of the citizen vs state, however they are less abstract than constitutional matters. They deal with more specific and practicable administration of rules. Both groups are concerned with elements of the exercise of power.

Seven proposals, somewhat more than a quarter (26.9 per cent) of all proposals submitted (22.6 per cent without reduction), regard four other topics which all of them have in common that they are, in contrast to the above mentioned issues, elements of distributive administration. The remaining six proposals mount up to 15.3 per cent (or 12.9 per cent without reduction).

The figures show citizen's interest in various subjects and desire to bring their issues to the political agenda, if given the opportunity. In terms of a chance to promote one's own issues the lack of subject limitations appears to be a benefit. The figures also seem to illustrate that the issues people primarily want to have direct influence on, are constitutional issues.

¹¹² Notice 7007 (22 September 1994) *New Zealand Gazette* Wellington 2919.

The overall number of 31 proposals amounts to an average of almost 3 proposals per year. In comparison, in California, which sometimes is called the "centre of direct democracy today"¹¹³ in the period from 1991 to 2000 a total of 389 proposals were filed.¹¹⁴ Given a population of New Zealand of about 4,061,300 (estimate in June 2004)¹¹⁵ and of California of about 35,934,000 (estimate June 2003)¹¹⁶ in roughly the same time period the capital of direct democracy had one proposal per 92,300 inhabitants while New Zealand had one proposal per 131,000 inhabitants. The figures show that the existence of the citizens initiated referenda Act is recognised as an opportunity to put one's own issue on a more public agenda and that the existence of a form of direct democracy is appreciated in the New Zealand system of government.

4 *Subjects of referenda*

Three referenda have been held: on an industrial dispute (firefighter referendum), a criminal issue (reform of the justice system and treatment of offenders referendum) and a constitutional matter (members of Parliament referendum).¹¹⁷ These numbers show a success rate for proposals of about 10 per cent. In comparison, the overall figure for proposals which made it to the ballot in California is 26 per cent.¹¹⁸

Three referenda are relatively small in number to draw further conclusions from. The referenda topics seem to suggest the assumption about

¹¹³ Gail Heriot "Symposium on Direct Democracy: Introduction (2004) 13 University of San Diego School of Law Journal of Contemporary Legal Issues 313.

¹¹⁴ Initiative and Referendum Institute "A Brief History of the Initiative and Referendum Process in the United States <www.iandrinstitute.org> (last accessed 08 December 2004).

¹¹⁵ Statistics New Zealand, Top 20 statistics, estimated resident population, <<http://www.stats.govt.nz>> (last accessed 24 September 2004).

¹¹⁶ USGS Science for a Changing World, Status and Trends of the Nations Biological Resources, Part 2 Regional Trends in Biological Resources – California <<http://biology.usgs.gov>> (last accessed 22 September 2004).

¹¹⁷ Benjamin Goschzik *You're the Voice – try and Understand it: Some Practical Problems of the Citizens Initiated Referenda Act* (LLM Research Paper, Victoria University of Wellington, 2002) 50, appendix I.

¹¹⁸ This number accounts for the entire period of existence of initiatives in California. See: Initiative and Referendum Institute, above n 114.

constitutional matters drawn from the proposals is incorrect. In the referenda issues concerning constitutional matters were less represented compared to their appearance in the proposals. But experience from the states of the US, where most of the initiative states allow referenda to enact statutes or amend the constitution,¹¹⁹ indicate otherwise. For example in Oregon twenty-six of a total of thirty measures initiated by the people since 1984 concerned constitutional matters.¹²⁰ Therefore, overseas experience supports the conclusion drawn from proposals: as best as an initiative process is able to indicate, the foremost concern, the people want to take direct action in, are constitutional matters.

5 *The voice of the people*

Regarding the purpose of “indicat[ing] the views held by the people”¹²¹ the question following the figures is whether a result is able to indicate the views of the people. The term ‘views’ need to be defined.

6 *The meaning of ‘views’ of the people*

In the United States the direct democracy argumentation is able to address a definition of the views of the people from a basis of popular sovereignty.¹²² The United States Supreme Court explained: “[u]nder our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. ... [T]he people can reserve to themselves power ...”¹²³

With respect to the ‘statement’ of what people want, this paper accepts two basic premises: legitimacy is the existence of ongoing consent.¹²⁴ To be able to reach decisions affecting the whole, the will of the majority must

¹¹⁹ Collins, Oesterle, above n 71, 51.

¹²⁰ Collins, Oesterle, above n 71, 52.

¹²¹ Citizens Initiated Referenda Act 1993, long title.

¹²² Clark, above n 10, 441.

¹²³ *City of Eastlake v Forest City Enters., Inc.* (1976) 426 US 668, 673 (SC).

¹²⁴ Clark, above n 10, 442.

prevail over the will of the minority.¹²⁵ And consent is maximised by full participation.¹²⁶ Participation includes at least, but not limited to the power to make laws. In a binding referendum, this includes voting on a proposal for a law, amendment, or repeal. But exercising power in terms of making policy requires more decisions than enacting or not enacting a statute. It includes checks for coherence with other laws, checks for efficiency, decisions for political directions, and many more. That allows for the statement that in societies based on popular sovereignty, every aspect of participation is important. Participation in a broader sense than just voting can be paraphrased as everything that is said in respect to and effect on the exercise of power. As a result, 'views' are a statement of the voice of the people speaking about the exercise of power.

In New Zealand the popular sovereignty approach does not necessarily hold strong in light of the doctrine of parliamentary supremacy.¹²⁷ The differences of the doctrines become relevant regarding the fact that referenda in California are binding in nature and referenda in New Zealand are indicative in nature. In New Zealand the power to make binding laws is reserved to Parliament. It could be argued, then, that the relevant 'views' of the people are only those given in response to a government initiated specific question. The voice of the people speaks with binding force only when granted such authority. This thought might lead to the conclusion, that therefore the views indicated in a referendum would not be relevant at all, because it is indicative only. In this case, either the long title of the Act, the conclusion or both would be absurd.

The law-making power of Parliament and the enactment of a specific statute for citizens initiated referenda could also be interpreted as defining the majority decision made on a 'yes' or 'no' alternative as the relevant part in the people's views. Relevant for law-making is the 'yes' or 'no' majority decision, if Parliament chooses to put a question to the voters.

¹²⁵ Clark, above n 10, 447.

¹²⁶ Clark, above n 10, 442.

¹²⁷ Joseph, above n 33, 3.

It is assumed in this paper that in the CIR Act the popular sovereignty approach is intended. Relevant is more than just the majority statement on two alternatives. The long title of the Act not only refers to indicate the views of the people but also states that referenda shall be held and that these referenda are citizens initiated. It is the voice of the people in all of what they have to say that is of interest to the Act. If the interest of the view of the people would be limited to one certain response to a specified question, this purpose could have been achieved by special legislation addressing an individual topic as it is in the United Kingdom. This would be sufficient to capture the desire to hear the people and frame it in legal terms. But instead, the long title of the Act states that the voice of the people shall have a different weight in the aspect of participation. The government as a whole entity gives the people by law a means of expressing whatever they feel is important. That is the essence of providing for a citizens initiative.

The combination of the opportunity of initiative and the referral to the view of the people reasons that 'views' have to be defined as more than a 'yes/no' response. This interpretation allows for the statement that the opportunity for citizens to address any topic and bring it up to a national ballot is a valuable method to grant the people to have their say and to make it heard.¹²⁸ The corresponding intention of the Government of New Zealand is expressed by the former Minister of Justice in the introduction of the Bill: "[i]t is the responsibility of the Government to ensure that to the greatest extent possible it is the will of the people that prevails, rather than that of their elected representatives. This Bill will help to ensure that that occurs".¹²⁹

7 *The priority problem*

When the voice of the people is more than a 'yes/no' to a certain question, its content needs to be determined. Professor Sherman Clark drew

¹²⁸ Hon D A M Graham MP (10 March 1992) 522 NZPD 6703, 6704.

¹²⁹ Hon D A M Graham MP (10 March 1992) 522 NZPD 6705.

attention to what he called the priority problem.¹³⁰ In his opinion the question is "... about the full and equal input that is presumed to legitimate ... outcomes. The goal is to approximate universal consent, without violating the principle of equality that gives rise to the need to secure that consent."¹³¹ Professor Clark started out from the 'intensity problem'. According to this theory "... for each person, some issues will be more important than will others".¹³² People have preferences in varying intensity. And "single-issue votes cannot take into account" these preferences.¹³³ He then reasoned that preferences are an important part of the voice of the people: in a single referendum a majority might vote that X should prevail over not-X. In another referendum Y is voted for, in a third Z is voted for. "This does not mean, however, that the overall outcome XYZ is most preferred by the people as a whole, or that XYZ would necessarily command a majority."¹³⁴ Professor Clark argues that "what is needed is a method of allowing people ... which outcomes they want most."¹³⁵

8 *Criticism*

Criticism to the priority problem stated that it was not explained, why the ability to express and include preferences in the voice of the people is of such importance.¹³⁶ On the contrary, the priority problem theory would have to explain why "the process of obtaining a constitutional amendment in forty-nine states is (presumably) legitimate despite the fact that the process in each of those states ultimately simply 'counts heads in form of a single-issue majority vote'".¹³⁷

¹³⁰ Clark, above n 10, 458.

¹³¹ Clark, above n 10, 453.

¹³² Clark, above n 10, 450.

¹³³ Clark, above n 10, 450.

¹³⁴ Clark, above n 10, 449.

¹³⁵ Clark, above n 10, 450.

¹³⁶ Lynn A Baker "Preferences, Priorities, and Plebiscites" (2004) 13 University of San Diego School of Law Journal of Contemporary Legal Studies 322.

¹³⁷ Baker "Preferences, Priorities, and Plebiscites", above n 136, 322.

9 *Preferences and exclusions*

It is agreed in this paper that preferences are an important part of the voice of the people and that the people will want to express them. Further to Professor Clark's claim, it is believed that voters will not only want to express priorities but also exclusions. Exclusion is understood as a hypothetical situation resulting out of a specific decision, which people do not want to happen at all.

The recognition of preferences and exclusions in the voice of the people is of such importance, because of the risk of unexpected consequences and the effect on legitimacy. Assuming in theory "a pre-eminent human desire for self-preservation ... that ... drives us ... to ... agree[] to the institution of political rule"¹³⁸ and agreeing "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people..."¹³⁹ the consent of the people has its limits. In practise these limits are reached when unexpected consequences touch upon the core understanding of why people want to live together under a political rule. Some of those consequences will be excluded from what the people want at all times. In the extreme case a referendum about the 'protection of national markets' might lead to trade restrictions, might lead to diplomatic tensions. In another case this might be a referendum about the 'protection of national recourses'. It might be happening in a region like the Far East. It might concern the supply of water. Such tensions have the potential to erupt into war over the necessity of the commodity for survival. The result of such war could be that more areas to live are devastated than the decrease of water-supply would have done. Assuming this happens in a democratic system, in theory a claim could arise: "we did not want that!"

The example does not have to be a war about water. Protection of national markets and following trade sanction might lead to a higher unemployment rate due to lay offs. The people laid off are likely to rise the

¹³⁸ John Locke *The Second Treatise on Government* (reprint Thomas P Peardon (ed), The Liberal Arts Press 1952) (1690) para 19; Lund, above n 3, 472.

¹³⁹ Virginia Declaration of Rights; Lund, above n 3, 464.

claim. As a result, unexpected consequences are able to lead to situations, which in some stage, at some degree, to some extent the people will want to exclude at all cost. When ever this stage might be reached and the claim is heard, ongoing consent decreases, thus legitimacy. Depending on the seriousness of the consequences, the importance of this claim to the people will rise in proportion of the consent decreasing.

The reason why "the process of obtaining a constitutional amendment in forty-nine states"¹⁴⁰ could at least be seen as 'more legitimate' is, that, concerning the situation of preferences, there are less preferences to express. For one thing, constitutional changes are rarer in numbers. Another thing is that constitutional changes are more closely monitored, discussed and consequences predicted. The different dealing with fundamental rules also functions as a safeguard against the occurrences of unexpected consequences. Information are distributed and likely to be gathered by different interest groups. "We did not want that" will not be a valid claim, because the answer is: "yes, you did. We told you this might happen and you still voted for it."

10 *Summary: interpretation of the voice in New Zealand*

On an abstract level it "is the responsibility of the Government to ensure that to the greatest extent possible it is the will of the people that prevails..." and the CIR Act is intended to achieve this.¹⁴¹ This statement taken as a Government expression of how it sees itself in the relationship towards the people, it follows that important in the voice is every statement that influences the exercise of power, because government is making decisions for the whole. The decision is perceived to be followed, thus in this actions government is exercising power.

In terms of the long title of the CIR Act, 'views of the people' includes aspects that would alter the exercise of power. These are preferences and exclusions. The aspects are identical with the methods and procedures of

¹⁴⁰ Baker "Preferences, Priorities, and Plebiscites", above n 136, 322

¹⁴¹ Hon D A M Graham MP (10 March 1992) 522 NZPD 6705.

representative government, because those procedures have the purpose to work all the input representative institutions get from the people and the representatives inside, through to a final governing decision of the Executive or a legal decision of Parliament. This includes for example the preferences expressed by Professor Clark. The preferences are equal to political manifesto and party policy statements in representative government. It also includes opinions about the handling of unexpected consequences of a new law. This might equal the function of a court in the interpretation of a statute or a parliamentary debate about the effect of a statute. If, hypothetically, a Court in New Zealand decides that because of a statute enacted by referendum, a former statute is impliedly repealed and this repeal would touch upon constitutional principles, the views of the people would include a suggestion whether this outcome is desirable, acceptable or by which standards should be dealt with it.

11 Subject limitation and the voice of the people

A referendum is unable to capture and adequately express the complete statement of what the voice of the people expresses. The lack of subject limitation is not able to improve the situation.

Such an assumption remains a hypothesis as long as the CIR Act is indicative in nature only. But the indicative nature is not guaranteed. Future changes have already been considered at the introduction of the Bill.¹⁴² In case of a binding referendum Act, the lack of subject limitations would worsen the situation. If an attempt to take all important views into account is not made, the referendum result will not adequately reflect of what the people have to say. If an attempt will be made the people will be overwhelmed by the demand of statements addressed to them. As a practical consequence, people will be unable to oversee the complexity of the situation. Complexity makes it almost impossible to track all factors the people would consider. If the people are able to fully analyse a given proposal in its interconnection to the rest of the governing system, it makes it almost impossible to express factors as

¹⁴² Hon D A M Graham MP (10 March 1992) 522 NZPD 6703.

important to them. A lack of subject limitation allows for this dilemma to occur in every topic put on a ballot. A proposal may be on the ballot that interferes with structures, mechanisms, or laws in unpredictable areas of public life. In case of a binding referendum with no subject limitations, safeguards are needed to capture the situation and provide for mechanisms to solve such situations.

12 *Subject limitations in other Jurisdictions*

(a) Switzerland

Subject of the referendum in Switzerland are limited by law and are connected to the terms 'initiative' and 'mandatory/optional referendum'. Initiatives, as understood as proposed by a certain number of citizens in a petition, are limited to total or partial revision of the federal constitution.¹⁴³ A proposal for partial constitutional revision may be submitted as a general suggestion or a formulated draft.¹⁴⁴ In the later case, the Government can submit a counterproposal.¹⁴⁵ Alternatively, the Federal Parliament can agree to the petition and has to draft the amendments itself. It also might reject the proposal in which case the general idea of the proposal goes to a preliminary referendum.¹⁴⁶ Initiatives for constitutional revision are mandatory,¹⁴⁷ because once a petition has gathered the necessary signatures the procedure ultimately will result in a referendum.¹⁴⁸ The referendum is binding.¹⁴⁹ Other mandatory referenda, which do not include a popular initiative, have to be held about the entry into organizations for collective security or into supra-natural communities¹⁵⁰ or about federal declared urgent without a constitutional basis¹⁵¹. In contrast to mandatory referenda, an optional referendum is held

¹⁴³ Federal Constitution of the Swiss Confederation, art 138(1), 139(1).

¹⁴⁴ Federal Constitution of the Swiss Confederation, art 139(2).

¹⁴⁵ Federal Constitution of the Swiss Confederation, art 139(5).

¹⁴⁶ Federal Constitution of the Swiss Confederation, art 139(4).

¹⁴⁷ Federal Constitution of the Swiss Confederation, art 140(1)a.

¹⁴⁸ Federal Constitution of the Swiss Confederation, art 140(2).

¹⁴⁹ Federal Constitution of the Swiss Confederation, art 139 (6) argumentum e contrario.

¹⁵⁰ Federal Constitution of the Swiss Confederation, art 140(1).

¹⁵¹ Federal Constitution of the Swiss Confederation, art 140(1) d.

when 50.000 people by signature demand a popular vote on federal statutes, some federal decrees and certain international treaties.¹⁵²

All 26 Swiss state constitutions provide for popular initiatives. The subjects of the initiatives are limited to constitutional amendments, introduction, amendment or repeal of state law. Some states provide for intra-federal or international treaties to be approved or for the opportunity to contest governmental decrees. The validity of popular initiatives has to be certified by the state government in all of the 26 states.

Federal Switzerland seems to give its citizens a variety of topics to vote on. It actively seems to focus on the citizen's participation by mandatory referenda. But of all options only the general suggestion allows for the public to bring their issues with their interpretation into the process. Constitutional amendments or statute drafts imply subject limitations in a sense that the proposal is bound to the topic of the amendable statute. The proposal is restricted by additional safeguards: in 1999 Switzerland enacted a revised constitution allowing the Federal Parliament to declare an initiative invalid in case when it violates mandatory rules of international law, principles of "unity of form" or "unity of subject matter".¹⁵³ On the other side, the state constitutions do not limit the possibilities to address issues within their jurisdiction. On state level, voters are restricted in that their proposal has to be in form of a law. But the subjects of these laws are not limited by anything else than the limits of the Canton's jurisdiction within the federal system. In effect, the limitation is a formal one.

Requirements for drafting, governments ability to submit counterproposals or to declare an initiative invalid, and the limitations on jurisdictional authority imposed by the federal system all serve as safeguards to limit the voter's freedom about initiation.

¹⁵² Federal Constitution of the Swiss Confederation, art 141(1) a-d.

¹⁵³ See: Federal Constitution of the Swiss Confederation, art 173 (f), 139 (3) as amended til 15 October 2002 and Federal Constitution of the Swiss Confederation, art 173 (f), 139 (2) [new], as amended til 11 Mai 2004.

(b) United States of America / California

The Constitution of the United States of America does not allow a legal initiative by the people. The submission of constitutional amendments to the people for approval is provided for by state legislatures.¹⁵⁴ 17 US states allow its voters to propose and adopt amendments to the state constitutions, but deny them any participation in the legislative process.¹⁵⁵

California is one of the states where people can initiate laws and constitutional amendments. Proposals are limited to one subject.¹⁵⁶ The promoter has to provide a drafted bill and may obtain assistance from the legislative counsel in doing so.¹⁵⁷

California seems similar to New Zealand in respect that people theoretically can address all issues. But similar to Switzerland, in California two limitations are in effect, which are missing in New Zealand: California is part of a federal system and subject has to be addressed as a law. They make up for the disability of referenda to express preferences and exclusions adequately. Unexpected consequences usually happen only in one part of the federation – the state that tries out a new law. The consequences are limited to the area of competence. A restraint on the effect of the question is exercised by the Californian Judiciary: they can strike down legislation and even initiative that are found inconsistent with the state or federal constitution.¹⁵⁸ With this power the Judiciary is able to limit unexpected consequences or end such a situation. Drafting a law allows and demands to predict the effect of the statute and take this into account. A draft can more clearly reflect intended limitations by its purpose clause, repeals or statements of application of other statutes.

¹⁵⁴ Lynn A Baker, "Governing by Initiative: Constitutional Change and Direct Democracy" (1995) 66 University of Colorado Law Review 143.

¹⁵⁵ Baker "Governing by Initiative", above n 154, 143.

¹⁵⁶ California Constitution, art II, § 8(a), (d), § 12.

¹⁵⁷ California Secretary of State: Ballot Initiatives 2001-2002

<<http://www.ss.ca.gov/elections>> (last accessed 16 September 2004).

¹⁵⁸ Gobbi, above n 59, 173.

(c) Canada

The Canadian Constitution restricts national referenda to amendments of the constitution. At the same time, those referenda are mandatory.¹⁵⁹ On a state level, the situation is quite different: Most jurisdictions allow referenda on any subject. But unlike the New Zealand model, it is usually the state government, in particular the Executive which initiates referenda.¹⁶⁰ Citizens initiated referenda are possible only in Saskatchewan.

13 *Indications drawn from foreign examples*

These examples show a preference for mandatory referenda for constitutional amendments on federal level. Only in Switzerland, the people can take the initiative to amend the constitution. The proposal will ultimately be a draft (most likely from the Government), either as a reaction to a general suggestion as in Switzerland or as Government drafts in the first place as in the United States or Canada. Initiatives are limited to the states in federal systems, where their effects can be controlled. If initiatives are provided for, other safeguards are found: either a supreme federal constitution and a Judiciary as in California, or indicative or conditioned-binding referenda as in the Canadian Provinces and Territories.

Two directions are indicated by these examples. One shows that the more all-embracing an initiative process is the more safeguards are implemented to dampen its possible effects. Those safeguards usually consist of mechanisms, which in the end take the effective decision away from the people. An initiative can be declared unconstitutional by a court. A result might not be acted upon in case of an indicative referendum. The other direction is the unconditional binding effect in limited cases. These cases exclude an initiative or rise government involvement in case an initiative is

¹⁵⁹ Referendum Act RSC 1992, s 3(1).

¹⁶⁰ Election Act RSA 2000 c E-1, s 128; Referendum Act RSBC 1996 c 400, s 1(1); Elections Act SNB 2000 c E-3, s 129(1); Elections Act SNL 1991 c E-3.1, s 217; Plebiscites Act RSPEI 1988 c P-10, s 1(1); Referendum Act RSQ 2002 c C-64.1, s 7; Referendum and Plebiscite Act RSS 1991 c R-8.01, s 3(1); Plebiscite Act RSNWT 1988 c P-8, s 3(1); Plebiscite Act RSNWT 1988 c P-8, s 3(1) (for Nunavut); Plebiscite Act RSY 2002 c C-172, s 1(1).

provided for, as in Switzerland. And these cases are limited to fundamental decisions.

The New Zealand openness for subjects does allow for referenda on constitutional issues and for referenda which results might constitute a change of the constitutional framework. In New Zealand, like in Switzerland,¹⁶¹ the Judiciary does not have the power to rule out a law initiated by referendum due to inconsistency. But lacking the safeguards implemented in the other systems, for example the restriction to government initiatives in Canada, the restriction to constitutional amendments in Australia, the supremacy of the constitution for initiatives in California or the Swiss Parliament's power to invalidate, New Zealand opted for a strict form of option one.

14 *Conclusion*

The lack of subject limitation seems to gather positive responses. This openness has been taken advantage of by the people and the form of participation by proposing and promoting has been accepted and used. The biggest group of issues considered important enough to be put to a national vote, are constitutional matters. Direct involvement in decisions of constitutional importance is the dominant feature in other jurisdictions. Forms of direct participation of the people, direct voting on constitutional issues is found in each of them. The subject limitation stands in a direct relationship to the effect an initiative has on government. Limitations act as a safeguard. Other examples show that the more a binding effect an initiative has, the more safeguards are found. These might either be a restriction to government initiation. Examples are Australia, Canada, and the United States. All are federal states and in all three nations amendments to the federal constitution cannot be initiated by citizens. For the federal level as the most influential jurisdiction, this is equivalent to no subject availability for citizens initiation

¹⁶¹ Federal Constitution of the Swiss Confederation of 18 April 1999, as amended til 15 October 2002, art 189; and Federal Constitution of the Swiss Confederation of 18 April 1999 as amended till 11 Mai 2004, art 189.

at all. On a less influential state level, initiatives have to be in form of proposals, amendments or repeal of statutes.

B The method of Participation: the Referendum Question

1 Determination of the question according to the CIR Act

The CIR Act provides for the proposal to be framed into a question which wording "[s]hall be such as to ensure that only one of two answers may be given to the question."¹⁶² The clause limits the voters to choose between two alternatives, which practically provides for a 'yes' or 'no' question.

2 Process of reduction

Assuming that a proposal has been admitted to a ballot, at least 10 per cent of the eligible voters of New Zealand have agreed that the issue should be put on a ballot. That means the issue is controversial and a solution is important. The issue poses a problem with at least two alternatives for a decision. Proposing that the 10 per cent are not a homogenous group, the issue is likely to be far reaching and complex. Being complex, usually more than one answers to a question are possible. Yet, the issue in its entire complexity has undergone a process of change to a 'this' or 'that' decision. The important difference is the number of decisions: one in the CIR referendum. The entire issue has undergone a process of reduction.

3 Situation of complex issues and two-sided answers

(a) Fundamental criticism

This scheme has received criticism. A fundamental argument is that most often complex issues cannot be compressed into black and white answers.¹⁶³ This two-sided choice given to the voters is mainly responsible for the claim that referenda are simplistic devices, which are not capable of

¹⁶² Citizen Initiated Referenda Act 1993, s 10(1)(b).

¹⁶³ Royal Commission on the Electoral System, 175; Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3rd ed, Oxford University Press, Auckland, 1997) 202; Hon Dr M Cullen MP (10 March 1992) 522 NZPD 6721.

dealing with intricate policies if they want to remain comprehensible.¹⁶⁴ Leaving out the aspect of comprehensiveness, because it is argued from the point of view of the voter, the 'not-compressable' argument seems to be correct and incorrect at the same time. Issues are complex because there are more than two alternatives to a decision and each individual decision may lead to one, two or even more other decisions. All aspects are part of the issue. Yet, referenda address issues that are complex and ask for a decision on a question with two and only two alternatives. The question of the second proposal to the CIR Act reads:

"Should a judge be given the power to decide whether life imprisonment for murder should mean a prisoner will be imprisoned for his/her natural life?"¹⁶⁵

Whether or not a judge should have such power within the structure of government is an aspect of separation of powers. Whether or not a state should have such power in regard to the human dignity of citizen concerns questions of legal, political and philosophical theory. Yet, the question itself, though, is a single decision. As a result it seems to give answers to all those aspects mentioned above.

(b) Separate ends in a process

The situation of contradicting answers can be solved if the complex issue and the question is perceived as separate aspects. The issue in its nature contains an uncountable number of variations, opportunities, choices and alternatives. Any reduction produces something else than the original issue. In contrast, the referendum question is nothing more than one answer with two choices to one single question. As a result a complex issue indeed cannot be compressed in to black and white answers. Never the less, a referendum can

¹⁶⁴ Joseph, above n 33, 188; Palmer, Palmer, above n 163, 202; John Collinge "Keeping a Watch on Democracy by Use of Public Referendums" in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992) 79, 83; Dialogue: "No Power to the People in Citizens' Referendums" (15 February 2001) *New Zealand Herald* Auckland.

¹⁶⁵ Christian Heritage Party of New Zealand, proposal notice 2784 (14 April 1994) *New Zealand Gazette* Wellington 1330.

address one question. This question can be a part of the issue. The remaining question is: What about the rest of all those choices and alternatives?

(i) Existence of a relationship between the separate aspects

Another argument is that the referendum question rules out the consideration of complex issues.¹⁶⁶ Following the picture of two different things, this argument in other words states that it is not possible to establish a relationship between the complete issue itself and the referendum as an answer to one (or possibly more) of the aspects of the issue. If the complexity of the issue at the beginning and the simplicity of the question at the end are separate characters, the argument seems convincing. Complexity is contradictory to simplicity. One cannot be changed to fit the other one. But it is misleading, because it only considers a 'compression' of issues, a 'change' of one aspect to fit another one. In consequence, by not regarding other options, it leaves an incomplete structure.

(ii) Nature of relationship between issue and question: reduction

The existence of referenda, their use in New Zealand and in other parts of the world shows that this point of view does leave out the process, which fills the gap. The critique can be agreed to and still a relationship can be established, thus completing the stages of the process, if it is defined as one of 'reduction'. Instead of 'changing' this is 'reducing' until only one question is left.

(iii) Criticism: unwise public decisions

Further criticism argues that simplifying the question often fails and the system of referenda contradicts with representative government. Because modern problems are so complex and interconnected, it takes full time thinking to be able to grasp the full range of a problem and make intelligent choices about an issue. The limited time, effort and access to the necessary

¹⁶⁶ Hon Dr M Cullen (10 March 1992) 522 NZPD 6721.

information prevents ordinary citizens from reaching this stage. Instead, representatives are paid to do just this: to devote their entire time and effort to achieve this goal.¹⁶⁷

By focussing on the process of reduction it becomes evident that a serious problem of referenda has not been properly allocated.

(iv) The attempt to simplify a question

An attempt to bridge the gap between issue and question is made by comprehension of the matter's complexity. The question is simplified. This attempt often fails. In contrast, a practical result often is a question which tends to be misleading, confusing, and ends up long-winded.¹⁶⁸ This argument leads to three different effects according to the actors involved: Promoter, receiver (people) and issue (question). The promoter could formulate questions that anticipate the answer, are emotive in nature or use question-begging language.¹⁶⁹ Such rhetorical-linguistic aspects are an undue influence into the decision making process. On the receiving side, the voter might not understand the question, which causes confusion. The confusion could lead to resentment and/or anger towards the individual referendum or the institution altogether and effect the referendum turnout.¹⁷⁰ The lack of understanding is a serious problem for the concept of democracy itself. It reveals the influence of public education as an external factor for its success. Resentment makes the voter turn away from the democratic system. Democracy suffers a low voter turnout and a loss of respect for parliaments' authority (or the government's). A vague and multi-faceted content of a referendum question could cloud, not clarify the issues the promoters have put forth for consideration.¹⁷¹ Thus neither the proposal nor the vote adds anything to bring the actual issue to a solution.

¹⁶⁷ Butler, Ranney, above n 11, 34.

¹⁶⁸ Goschik, above n 42, 718.

¹⁶⁹ Goschik, above n 42, 716.

¹⁷⁰ David B Magleby *Direct Legislation: Voting on Ballot Propositions in the United States* (John Hopkins University Press, Baltimore, 1984) 143; Bob Edlin "A Grind Exercise in Ballot-box Absurdity" (8 December 1995) *The Independent* Wellington 10.

¹⁷¹ Morris, above n 32, 45.

(v) New Zealand example

One New Zealand proposal read:

“Should the Treaty of Waitangi, being an outdated document, be set aside and replaced with a national constitution which guarantees the equal rights to all New Zealanders without favour or discrimination?”¹⁷²

The question calls the Treaty of Waitangi an outdated document. But actually only the voters decisions (if the referendum would have been binding) would have made it one. To set aside a document which is already outdated appears less significant than setting aside a document and thereby outdating it. The wording of the question seems to cloud the importance of the decision. A constitution in a unitary state is by definition national. Is the term used to clear matters or to develop a feeling of ‘nationalism’ thus approaching the voter on an emotional basis? The question, having 31 words in total, touches three different issues (importance of Treaty of Waitangi in specific, constitutional law in general, human rights in general), calls for two actions (setting aside one and enacting another document/documents) and makes three defining statements (outdated, guarantees to all New Zealanders, no favour or discrimination).

From a ‘reductionist’ point of view, these uncertainties seem to be technical aspects of the reduction process. Where ever exception, conditions, even multi-side structured sentences remain, the process has not been carried through its end. Questions have not been answered yet, to make the final question suitable for a referendum proposal. In this respect, opponents of referenda are right in their criticism that referenda question could be misleading, could be emotional, therefore could cause confusion. But for the process of reduction, they do not have to be. The aspects concern the process,

¹⁷² Mark Whyte proposal, Notice 1725 (20 March 1997) *New Zealand Gazette* Wellington 642.

but not referenda as an institution itself. Thus, concentrating on reduction, the criticism misses the point.

(vi) Practicability: a need to simplify

Proponents argue that even though simplification of complex issues might be difficult and certainly contains the danger of misleading questions, it is a necessary element of referenda, because everything else is absolutely impracticable.¹⁷³ There seems not much to argue about the claim that in order to settle any complex issue at the end of a process a final decision has to be made. In some cases this argument seems to prevail while the fears of the opponents of referenda seem to be unnecessary. For example, the questions of one referendum held in 1999 read:

“Should the size of the House of Representatives be reduced from 120 members to 99 members?” [Number of MP’s referendum]

The number of MP’s does have an effect on the size of constituencies for reasons of equal value of each vote. More important, it has financial aspects. They are likely to influence the political field (how many parties compete in parliament, how many candidates compete in the electorates...?) The voters can answer a question without exceptions, conditions etc. But from a reductionist point of view, this question is equally complicated as the other ones. More decisions have to be made alongside the track. The difference is that it is taken care of who has to make them.

The other question of the 1999 referendum read:

“Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offenders?” [justice reform referendum].¹⁷⁴

¹⁷³ Helena Catt, Paul Harris and Nigel S Roberts *Voter’s Choice: Electoral Change in New Zealand?* (Dunmore Press, Palmerston North, 1992) 134; Venice Commission “Guidelines for Constitutional Referendums at National Level” (Venice Commission, Strasbourg, 2001) <<http://venice.coe.int>> (last accessed 16 September 2004).

¹⁷⁴ Notice 7159 (09 October 1997) *New Zealand Gazette* Wellington 3423.

While the first question can be described as dealing with a relatively simple numerical constitutional issue, the wording of the second illustrates a whole set of concerns of the critics: Who would not be for a harsh punishment of violent offenders and a system that emphasises the need of victims? But do both aspects really go together? Or do they even belong together? How does one vote, if one is for a reform of the justice system but against minimum sentences? Does a reform of the justice system necessarily place greater emphasis on the needs of victims? Or are there other areas in desperate need for a reform which do not have anything to do with the treatment of the needs of victims? What about international treaties about the treatment of prisoners and 'hard labour'? What does 'hard labour' mean? How does one define a 'serious violent offence'? The number of questions demonstrates but one thing: A need for more answers.

A need for more answers creates another difficulty in the process. Each question before the final one can direct the referendum into another direction. For example, the proposal of the Royal New Zealand Society for the Prevention of Cruelty to Animals Inc. started out with the question:

"Should the inhumane practice of battery egg production be phased out within five years from this referendum?"¹⁷⁵

The petition question was determined to be:

"Should the production of eggs from battery hens be prohibited within five years of the referendum?"¹⁷⁶

The difference resulted in a legal battle between the promoter and the Clerk of the House. In the promoters' opinion the question missed the importance of relevant factors or stressed irrelevant ones.¹⁷⁷ It might be possible to simplify an issue in order to make it practicable. But at the same time this creates the

¹⁷⁵ Royal New Zealand Society for the Prevention of Cruelty to Animals Inc. Proposal, notice 976 (10 February 1994) *New Zealand Gazette* Wellington 719.

¹⁷⁶ Notice 3107 (28 April 1994) *New Zealand Gazette* Wellington 1452.

¹⁷⁷ Goschik, above n 42, 712.

difficulty of meeting the promoter's intention. Missing the intention nullifies the whole purpose of giving voters a chance to bring their issues forward. Additional to the other problems of simplifying a complex issue, the issue also might simply be missed by the question.

(vii) Summary

The debate around referendum questions focuses on comprehension of matters and simplification of questions. It is agreed that simplification is necessary to make a referendum practicable and that questions are in the danger of being misleading, confusing and not comprehending the entire complex issue. This argumentation seems to focus on the referendum as a method to solve an issue (or determine an outcome), thus as partly the same thing (the issue itself and the determination of the issue as part of it). But it seems preferable to view both of them as separate aspects. There are the complex issue and the referendum. Both are connected by a process of reduction. At its beginning there are all those questions that make the issue a complex one. At its end there is one question left to decide.

(c) The contradiction to representative government

Simplification of the question is one aspect. Another argument against referenda states that the referendum-answer as much as the referendum-concept itself contradicts the system of representative government.

(i) Representative Government and the decision making process

Opponents of direct democracy argue that a referendum is a vote which only states a numerical support for two irreconcilable alternatives.¹⁷⁸ But the goal of a democratic system is to reach a consensus.

According to John Stuart Mill, representative democracy means "that the whole people, or some numerous portion of them, exercise through

¹⁷⁸ Butler, Ranney, above n 11, 35.

deputies periodically elected by themselves the ultimate controlling power, which, in every constitution, must reside somewhere".¹⁷⁹ The power resides in Parliament as the supreme assembly. The mandate of the representatives is a legally free one, once legitimately elected by the people.¹⁸⁰ The free-mandate theory assumes that the representative will be "sensitive to the opinions and interests of his constituents".¹⁸¹ But a representative also has the overall welfare of the state in mind. For both, the best decisions are obtained by the process of debate and consensus.

Supported by the modern system of political parties, the representative system passes individual views "through medium[s] of [a] chosen body[ies] of citizens".¹⁸² The representative decides on behalf of the people.¹⁸³ As a result it is the purpose of Parliament to determine public policy.

The main quality of the parliamentary process is free debate.¹⁸⁴ The debate introduces the views of the people, presents the expertise of the representatives, helps define the greatest possible benefit for the country as a whole, helps to realise the politically possible and eventually arrives at a compromise. A consensus is believed to be able to gather the greatest agreement to a certain course of action and to lead to the best solution by promoting common interests. Such a consensus can be reached best in Parliament, where for careful and considerate deliberation is provided for by rules for debate and procedure, and the necessary pool of information is concentrated and accessible to those involved.¹⁸⁵

(ii) Role of voter in a referendum

¹⁷⁹ John Stuart Mill *Considerations on Representative Government* R.B. Mc Callum (ed) (new edition, Basil Blackwell, Oxford, 1946).

¹⁸⁰ Walker, above n 27, 30.

¹⁸¹ Walker, above n 27, 30.

¹⁸² James Madison *The Federalist No. 10*.

¹⁸³ James Madison *The Federalist No. 10*.

¹⁸⁴ John McMenemy *The Language of Canadian Politics* (John Wiley & Sons, Toronto, 1980) 235.

¹⁸⁵ Butler, Ranney, above n 11, 35.

In contrast, the role of the voter in an election as much as in a referendum is to make clear-cut decisions one way or the other. The debate, the struggle of opinion, the possibility of compromise and the flexibility to reach the best solution for the national interest, is missing. Because of the missing elements referenda decisions lack the quality of parliamentary deliberation.¹⁸⁶

(d) The contrary element

It might be argued that gathering 10 per cent of signatures and bringing an issue to national recognition stirs and provides for another form of debate and a form of informal deliberation. But other important aspects are missing: the decisions which have to be made along the way and their legitimacy. The contrary element is that in a referendum the voter is supposed to make a decision about an entire issue. But what really is being decided is only the very last question.

As the previous discussion about the process of reduction only sees the end of that process, so does the argument of the importance of a debate. At the end of a reduction remains one question. At the end of a debate remain compromises. In their complexity they are able to embrace all aspects of the complex issue. But more interestingly seems to be what is in the middle. The debate allows separation and listing. Deliberation allows the discovery of interrelations. The compromise itself is a result of previous decisions by which a certain line was followed, a certain direction intended. Politicians do not comprehend a complex issue any better than the average person. The compromise, reached in Parliament and agreed on is only the enforcement of the sum of single decisions leading to the final one.

(i) The referendum process: reduction by deciding

¹⁸⁶ Wolf Linder *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (2nd ed, MacMillan, New York, 1998) 111.

The problem solving process is not bound to an institution. The process of making an issue suitable for a referendum operates the same. 'Reducing' means deciding all, but a final option of an issue. The last answer is given, and one last option is favoured, because all previous ones lead to it by their specific choice. Vice versa, the last decision influences all previous ones. The last answer is the top of a hierarchical pyramid. The complex issue which lies at the heart of the referendum is the starting point. The issue is neither squeezed, changed nor modified, but separated in the many answers needed to fully comprehend the original issue. Each single question is accounted for and decided along the course. The process continues until only one decision is left to be made. At its end all questions are answered. None is left out.

(ii) Reduction as a referendum problem

A referendum symbolises the last step of the reduction process. It is contrary to the system of representative government, because it does not state where, when and how the intermediate decisions are made. It is contrary, because these middle steps are able to influence the outcome. The 'justice reform referendum' illustrates this problem: The referendum question is in the need for more answers. The mere attempt to answer the question is like opening Pandora's box: Once opened, one cannot escape to address other issues. The transformation of a complex issue into a single 'black' or 'white' question cannot circumvent all the alternatives and crossroads which make an issue complex.

An uncertainty is added to the problem: When will the issues turn up? Do they have to be decided before the referendum question? Predetermination of certain decisions might diminish actual effects a referendum decision could have before it has even been put to the voters. The other alternative is to decide these questions after the referendum. This opens the theoretical possibility of circumventing the referendum decision by subsequent alternatives. The actual implementation of the details could produce effects not included by the intention of the referendum vote.

(e) Australia

An example of the difficulties of the reduction of a complex issue to a 'yes' or 'no' alternative is given by a recent Australian referendum. As in New Zealand, federal Australian legislation provides for proposals to be formulated as a 'yes/no' option.¹⁸⁷

(i) The 1999 Australian republic referendum

In 1999 Australia held a referendum about whether to become a republic or not. A half-elected Constitutional Convention decided that this was an issue for the people to vote on. The decision to become a republic was tied to the adoption of a so called "bipartisan appointment of a president model".¹⁸⁸ In this model the president would have been appointed by the Prime Ministers' and Opposition Leaders' motion with the approval of the Commonwealth Parliament.¹⁸⁹

(ii) Referendum question

The following two questions were put to the vote on two separate ballot papers:¹⁹⁰

"A Proposed Law

To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament."

And

"A Proposed Law

¹⁸⁷ Referendum (Machinery Provisions) Act (Cth) 1984, s 25, schedule 1, Form B.

¹⁸⁸ Constitution Alteration (Establishment of a Republic) Bill 1999 (Cth), explanatory memorandum para 1.1., <parlinfoweb.apf.gov.au> (last accessed 24 November 2004).

¹⁸⁹ Constitution Alteration (Establishment of Republic) Bill 1999 (Cth), Schedule 1, section 3.

¹⁹⁰ Australian Electoral Commission 1999 Referendum Reports and Statistics <www.aec.gov.au> (last accessed 15 December 2004).

To alter the Constitution to insert a preamble.”

(iii) Referendum results

The referendum was rejected by 54.87 per cent and the majority in all States. The result seems to indicate that Australians were opposed to the concept of a republic. But this conclusion is contrary to the opinion polls prior and after the referendum.

(iv) Contrary opinion polls

Opinion polls about whether Australia should remain a monarchy or become a republic have been held since 1953. 21 polls until 2000 indicated an overall rise in support for a republic. Since 1993 the proponents of a republic had a constant majority. In the three polls since 1997 until the referendum the majority has been above 50 per cent.¹⁹¹ The constant rise and the constant support above 50 per cent could be interpreted as strong indicators for the referendum question not being able to adequately address the issue. But it does not give a hint towards the conclusion that the result is originated in any difficulties connected with the reduction to a ‘yes’ or ‘no’ question. But while any reason for the referendum results originated in anything else than the implications made in the question would suggest a drop of support for a republic during or after the referendum, an opinion poll two weeks after the referendum in fact continued to show significant and majority support for a republic.¹⁹²

It could also be argued that the polls showed a selective count only, and the referendum failed, because the proponents for some reason remained absent from the ballot. Any doubt of the accuracy of the poll showing a

¹⁹¹ The Roy Morgan Research Centre Pty. Limited, Finding No. 3296 18 April 2000, Table 3 <oldwww.roymorgan.com> (last accessed 24 November 2004).

¹⁹² The Roy Morgan Research Centre Pty. Limited, above n 191, Finding No. 3296 18 April 2000, Table.

majority in favour of a republic would have to explain its grounds in the light of a nationwide voter turnout of 95.1 per cent of eligible electors.¹⁹³

A poll held in March/April 2000 instead showed a decline in support from 54 per cent (post referendum poll 1999) to 49 per cent. It has to be noted though, that proponents of a monarchy still gathered only 40 per cent support. Further, the poll was held during the 13th visit of the Queen of England to Australia. Polls in all states showed a support for a republic. Though in all states the Queen visited, support dropped between two per cent and 11 per cent. Only in South Australia, which was not visited by the Queen, support rose to an all time high of 55 per cent.¹⁹⁴ The time passed since the referendum and the different results in the states visited/not visited by the Queen allow for the conclusion that difference in poll and referendum results were not due to the issue of a republic but to the difficulties in reducing the issue itself.

(f) Reduction and the Australian referendum question

The reduction led to a peculiar result. The referendum question contained three further statements about the future republic: A preamble to the constitution, the establishment of a president, and a decision of who and how is to appoint the president. The preamble statement did not contain any further information, that might have said anything about the overall structure of the republic. Thus there is no indication that the preamble question could have been the origin of the diversion between the majority support in the polls and the failing of the referendum. The establishment of a president is the decisive feature of a republic in contrast to a monarchy. Support for a republic therefore includes the replacement of a monarch. The modern element of replacement is a president. In consequence, again there is no indication that a president could have influenced the original support for a republic to the negative. The question of who and how to appoint a president can differ in the

¹⁹³ Australian Electoral Commission 1999 Referendum Reports and Statistics <<http://www.aec.gov.au>> (last accessed 20 October 2004).

¹⁹⁴ The Roy Morgan Research Centre Pty. Limited, above n 191, Finding No. 3296 18 April 2000.

various types of republics. The issue is important to the general structure. It is the major difference to a monarchy, where the people do not have any possibility to influence or take part in the decision of who is to be head of state. In summary, the republic question with its three additional statements together asked the voter to decide on but two important, different, but interrelated issues: The replacement of monarchy by republic as of whether the head of state should in any way be dependent on another authority, and the appointment by the Parliament as of who shall this authority be. The continued support of a republic in the polls suggests that the second issue would have been the relevant cause for the referendum to fall short of the indicated majority. Further, since it is a decision that along the course has to be made at some point of time, but in fact was made prior to the referendum and not by the people, the result suggests that it was this decision that gave cause to the divergence between poll and result.

The outcome of the Australian referendum demonstrates the reduction problem. In the course of limiting the issue to a two alternative question, decisions have to be made. The influence of some of them on the entire issue could be so important that it diverts from the point of the actual 'last' question and reverses the outcome a referendum would show otherwise. The referendum with its single, extracted question expresses a general intent. Due to the decisions made in between, this statement could prove unable to be transferred back to the full range of the issue. The decision of the voter would be unable to have the expressed intended effect on the issue.

(g) Reduction as a legitimacy problem

Besides the problem of effect of intermediate decisions, the Australian referendum demonstrates the second aspect of the problem: Who is to make these (necessary) decisions?

(i) Legitimacy in representative democracy

In parliamentary debate all answers are given by the representatives. Each single decision carries the legitimacy of the power transferred by election for a certain time. The sum of the single decisions legitimises the whole.

(ii) Legitimacy in popular vote

A decision by referendum is argued to have a greater legitimacy, because laws instituted as a result of referendums are more clearly and directly derived from the popular expression of the people's will.¹⁹⁵ This argument would be a strong one, if the popular decision could be traced back to all effects, the referendum has. But this is not the case.

(iii) Obstruction of legitimacy trace by reduction decisions

Instead, as the Australian referendum shows, important decisions can be taken not only out of the hands of the public, but also out of the hands of the elected representatives. The decision for the bipartisan-model was made by a half-elected constitutional convention. Not only the fact of a convention only half-elected, but more the possibility of bodies without a legitimacy trace making important decisions is of concern.

This concern leads back to the contradiction caused by a referendum. One opposing argument is that referenda upset the system of accountability. Representative democracy with free mandate is based on accountability through general election only.¹⁹⁶ Its rigid version claims that the representative is absolutely free in his or her decisions once legitimately elected by the people.¹⁹⁷ From this origin the system of responsible government and ministerial responsibility has developed, which direct legislation is inconsistent with.¹⁹⁸ Against this argument is stated that both systems itself are imperfect and referenda are a valuable complement to

¹⁹⁵ Walker, above n 27, 50.

¹⁹⁶ Rt Hon J Hunt MP (10 March 1992) 522 NZPD 6715; Royal Commission on the Electoral System, 175.

¹⁹⁷ F Canavan *The Political Reason of Edmund Burke* (Durham N.C., 1960) 148, 149.

¹⁹⁸ Walker, above n 27, 61.

representative government. Both systems intend to help the people and can be carefully constructed so that they will balance the weaknesses of one with the strength with the other system.¹⁹⁹

The opposing argument states that the contradiction with representative government is caused, due to the effects referenda have or might have on the secondary aspects that is how the details of accountability are balanced and how the system is tuned to efficiency. On a primary basis representative government depends on legitimacy of the transfer of authority as its core democratic element.²⁰⁰ Proponents refer to the same grounds with the claim that a referendum enjoys an even greater legitimacy for the deciding body is the holder of the ultimate authority.²⁰¹ While the common denominator of both systems is the undisrupted trace of legitimacy – indirect or direct - both sides fail to recognise the lack of legitimacy in a referendum decision with reduction decisions made by a third party. The referendum is contrary to representative government, because the reduction process by itself is not able to secure a coherent trace of legitimacy to all decisions.

4 Conclusion

The analysis of the referendum question has shown that the process from a complex issue to a referendum question is one of reduction. Reduction is dividing an issue into its basic questions and deciding them one by one. The problem of the process is the authority to make the intermediate decisions. Democracy includes a trace of legitimacy from the holder of power to the decisions. This trace is interrupted, when an intermediate decision is made by a third party that lacks this authority.

To avoid third party involvement, the reduction process has to be limited to the two remaining actors: The elected representatives or the people as a whole. Taken the aim of the direct democracy movement as to enable the

¹⁹⁹ M D Waters "Do Ballot Initiatives Undermine Democracy?" Cato Institute Policy Report July/August 2000, 7.

²⁰⁰ See: Aristotle *The Politica*, Book IV – VI (Corpus Aristotelicum, 1296 b 14 - 16).

²⁰¹ Weale, above n 3, 24.

people to bring forward their own issues and decide them,²⁰² it seems contrary to involve representatives to 'assist' in the reduction process for reasons of possible influence as stated above. To be coherent in the struggle to allow the people to decide directly on complex issues, the entire reduction process would have to be imposed on them. In consequence, each individual aspect, in a representative system issue of debate and compromise, would have to be separated and presented to the voters. Besides the technical difficulties such as agreement on the reduction process, proposal, ballot, costs it seems arguable whether the need to answer dozens and dozens of individual questions to finally reach the referendum ballot would not reverse the intention of participation and voter turnout.²⁰³ The existence of a coherent trace of legitimacy needs to be secured.

Because of this need, the CIR Act should provide safeguards for the reduction process. Safeguards are needed for questions that are considered important. Important in the end is a question, when its result is acted upon, be it by legal or by moral force. For practical reasons such as accessibility of information, time, resources such safeguards should be government institutions.

C The Effect of Participation: the Indicative Nature of CIR Act referenda

The CIR Act allows for referenda that are indicative in nature only.²⁰⁴ Its long title expressly states that the "results of which referenda will indicate the views held by the people of New Zealand ... but will not be binding on the New Zealand Government."²⁰⁵ Its non-binding nature makes the New Zealand citizens initiative a unique one in comparison to other jurisdictions.

²⁰² See: Ian Budge *The New Challenge of Direct Democracy* (Polity Press, Cambridge, 1996) 2, 3.

²⁰³ Hon D A M Graham MP (14 September 1993) 538 NZPD 17963; Morris, above n 32, 44.

²⁰⁴ Citizens Initiated Referenda Act 1993.

²⁰⁵ Citizens Initiated Referenda Act 1993, long title.

1 *Effects of referenda in other jurisdictions*

(a) Switzerland

Referenda on a federal level in Switzerland are binding on the government.²⁰⁶ The binding nature is accompanied by a set of features, which form the standing of direct democracy in Switzerland: The Swiss Constitution provides for mandatory²⁰⁷ and optional²⁰⁸ referenda. The former is limited to issues of total or partial revision of the Constitution, entry in international organisations and urgent legislation. The latter one depends on a citizens' initiation and deals with all Federal Statutes, certain urgent Federal Statutes, Federal Decrees to the extent the Constitution or a statute foresees this and some international treaties. The Constitution does not impose any restrictions on legislation passed or failed by referendum, except for urgent legislation, which may not be renewed if it was not adopted in a popular vote.²⁰⁹

This model is carried on in all 26 Swiss state constitutions.²¹⁰ Binding referenda are mandatory in case of a partial or total revision of the constitution. Introduction, amendment or repeal of state laws either depends on mandatory or optional referenda. Some constitutions make the spending of state funds above a certain amount dependent on approval of the people.

(b) Canada

In Canada on a federal level and in most state legislations referenda are indicative. Only in Alberta, British Columbia and Saskatchewan results may be binding under certain conditions.²¹¹

²⁰⁶ Federal Constitution of the Swiss Confederation, art 139 (6) *argumentum e contrario*.

²⁰⁷ Federal Constitution of the Swiss Confederation, art 140.

²⁰⁸ Federal Constitution of the Swiss Confederation, art 141.

²⁰⁹ Federal Constitution of the Swiss Confederation, art 165 (4).

²¹⁰ See the constitutions of the Swiss Cantons <<http://www.verfassungen.de/ch/kantone.htm>> (last accessed 29 November 2004).

²¹¹ Tim Mowrey and Alain Pelletier "Referendums in Canada – A comparative overview" in: *Electoral Insight* – January 2001 (Elections Canada), <<http://www.elections.ca>> (last accessed 10 November 2004).

(c) Australia

In Australia all referenda are binding. Federal Australia and three states/territory have mandatory referenda.²¹² In three other states referenda are government initiated.²¹³ In the Northern Territory referenda are initiated by the Legislative Assembly.²¹⁴

(d) USA

Referenda in the states of the United States, as far as the form is adopted, are binding.²¹⁵

2 *Binding effect of referenda*

The binding nature is the dominant aspect of referenda in other jurisdictions, except in Canada. Whereas all but one Canadian jurisdiction²¹⁶ share with Australia the absence of referenda initiated by citizens. Unlike Australia, Canadian referenda even on national level are mostly indicative. Those Canadian jurisdictions that provide for binding referenda have incorporated provisions, which allow the government to eventually determine the binding nature of a referendum.

This divides the mentioned jurisdictions. In one group a referendum is binding and government or citizens initiated. In the other group a referendum is not binding but government initiated only. Only Saskatchewan has a model that provides for citizens initiative which may be indicative: even though the effect of an initiative can be determined by the government, the model still provides for the possibility of an ultimately binding referendum, once

²¹² Commonwealth of Australia - Constitution of Australia, s 128 (1); New South Wales - Constitution Act 1902 (NSW), s 7A, B; South Australia - Constitution Act 1934 (SA), s 88 (2)b; Victoria - Constitution Act 1975 (Vic), s 18; Australian Capital Territory - Referendum (Machinery Provisions) Act 1994 (ACT), s 5(1) for all laws required to be submitted to a referendum under Subsection 26(2) of the Australian Capital Territory (Self Government) Act 1988 of the Commonwealth.

²¹³ Queensland - Referendums Act 1997 (Qld), s 4(1); Tasmania - Referendum Procedures Act 1994 (Tas), s 5(1); Western Australia - Referendums Act 1983 (WA), s 4(1).

²¹⁴ Northern Territory - Referendums Act 2001 (NT), s 6(1).

²¹⁵ Collins, Oesterle, above n 71, 49.

²¹⁶ Saskatchewan - Referendum and Plebiscite Act RSS 1991 c R-8.01, s 7(1).

government has made a decision.²¹⁷ In contrast, New Zealand allows its citizens to take the initiative but has not enacted any provisions for an initiative to be binding. The only way for a New Zealand referendum result to become binding on government is by self-imposed commitment enacted through legislation. In further contrast to government initiated referenda, where the binding nature is determined by legislation before the referendum is held, any self-imposed legislation concerning a citizens initiative would be enacted after the referendum had been held.

(a) Reasons for non binding nature of the CIR referendum

According to the former Minister of Justice, the Hon. D A M Graham MP, two reasons lead to the introduction of a non binding referendum for New Zealand: first, the importance of some decisions. Second, the possibility to make decisions which are actually supported only by a minority of citizens, which overseas experience has shown to happen.

(i) Final decisions on important issues

The Hon D A M Graham MP explained that “[m]atters relating to the security of the country, of foreign policy, or even relating to fiscal policy, are generally of such importance as to require the Government to make the final decisions.” Such “issues must always remain the responsibility of the Government of the day.”²¹⁸ The statement implies that a binding effect would extend to all issues addressed. The alternative of excluding issues, which are thought to require a final decision made by Government, was considered, but rejected. The benefit of “allowing the public to express its views on any topic rather than having a restricted list” thought to be greater than the benefit of making binding decisions about limited topics.²¹⁹

The reason given why some matters had to remain in Governments exclusive competence was that in such matters “only the Government is likely

²¹⁷ Mowrey, Pelletier, above n 211.

²¹⁸ (10 March 1992) 522 NZPD 6704.

²¹⁹ (10 March 1992) 522 NZPD 6704.

to be in possession of all of the information on which decisions have to be made.”²²⁰ This statement touches two aspects of promoting direct democracy: the process by which decisions should be reached in a democracy and the intellectual ability of the public to understand the referendum proposal itself and comprehend the underlying issue. The argumentation about the contrary concepts of direct democracy vs representative government, debate, deliberation and consensus in parliament and voter confusions as stated above, apply.²²¹

(ii) Danger of minority rule and voter turn out

The main argument was that overseas experience has shown that referenda attract a low voter turn out, even when it is binding.²²² The Hon D A M Graham MP argued that in case of a voter turn out as low as perhaps 35 per cent a simple majority (perhaps only 51 per cent) would amount to less than 20 per cent of those eligible to vote. Such a minority would be able to pass a decision, which would be imposed on the whole. The result would claim legitimacy due to a majority vote. In consequence, a minority would be able to impose their will.

(iii) Tyranny of the majority

This argumentation leads to another concern expressed by the minister: minority groups might be oppressed.²²³ Opponents of direct democracy call it the tyranny of the majority.²²⁴ Referenda are considered to be more dangerous to minority rights than legislative assemblies.²²⁵ Reasons for this are that the voting mass is less considerate of those rights than representatives. The need to reach a consensus and the subsequent process of debate, deliberation and consideration as much as the reflection on intensities of beliefs makes the representative body more sensitive to the overall

²²⁰ (10 March 1992) 522 NZPD 6704.

²²¹ See III C 3 (b) ff.

²²² (10 March 1992) 522 NZPD 6704.

²²³ (10 March 1992) 522 NZPD 6705.

²²⁴ Collins, Oesterle, above n 71, 60.

²²⁵ Butler, Ranney, above n 11, 36.

situation. Voters lack this motivation. In contrast, without careful deliberation the factor 'emotion' gains more weight. As a result, referenda tend to target rights of such groups more vigorously the smaller the group is or the stronger negative emotions against such groups generally are. Examples are the adopted initiatives barring legal protection for gays and requiring Catholic children to attend public schools in Oregon, or a law disabling Japanese farmers from owning land in California.²²⁶

(b) Arguments against non-binding nature

On the contrary, the New Zealand non-binding option has been criticised. Arguments from within the legislature stated that the effect of a non binding referendum was argued to be fraudulent and discouraging to those people who believe in the instrument of referenda.²²⁷ People were frustrated, because they had the feeling that their parliament and government were not listening to them. To improve this situation, the people wanted a binding referendum.²²⁸ The CIR referendum, on the other hand, is a "toothless wonder".²²⁹ Parliament in some instances was acting contrary to popular belief. This was a reason for the declining development of public opinion for politicians.²³⁰ Academic argumentation focussed more on theoretical inconsistencies: a non-binding referendum is not coherent, thus not true democracy (but an illusion) when ordinary people are allowed to choose governments by means of regular elections, if one does not grant them the capability to make important direct decisions on particular issues.²³¹ Interesting but not surprising, politicians did not pick up on these theoretical issues and their practical consequences for the entire concept of the introduction of a citizens initiative: Not participation but effective participation with the CIR Act is an illusion. Governmental non-compliance with referenda results unfolds the nature of the CIR Act as an illusion. The illusion could provoke a feeling of helplessness about influencing the state of

²²⁶ Collins, Oesterle, above n 71, 58.

²²⁷ Rt Hon D Lange MP (10 March 1992) 522 NZPD 6708.

²²⁸ G Hawkins MP (10 March 1992) 522 NZPD 6718.

²²⁹ P Hodgson MP (14 September 1993) 538 NZPD 17958.

²³⁰ I Peters MP (14 September 1993) 538 NZPD 17961.

²³¹ Budge, above n 202, 2, 3.

the nation. Contemplating about the governmental commitment to lessen the gap between the people and its representative institutions and experiencing the practical results, the people might become more frustrated and disappointed. As a result the gap might become even bigger. Instead of enhancing participation as intended, frustration could provoke the exact result, which the referendum initially attempted to cure: Disappointed people remain absent from the ballot. The voter turn out could become lower than without a non-binding referendum. A governmental policy or specific decisions ultimately would rest on even less votes. Contrary to the main argument of the direct democracy debate, a non-binding, citizens initiated referenda could even lessen the legitimacy of the exercise of power.

In New Zealand the three referenda attracted a voter turnout of 27.7 per cent in 1995 and 83.1 per cent for two referenda in 1999.²³² The New Zealand Government has not acted upon any of the three referendum results.²³³ The voter turnout for general elections was: 78.6 per cent in 1990, 79.6 per cent in 1993, 83.1 per cent in 1996, 76.1 per cent in 1999, and 72.5 per cent in 2002.²³⁴

3 *Overseas experience*

(a) Canada

In Federal Canada, a total of three referenda have been held so far: in 1898, 1942, and 1992.²³⁵ The voter turn out to this last referendum was 71,8 per cent.²³⁶ In the period from 1945 to about 1988, the voter turn out in the general Canadian election averaged about 75 per cent. Two significant

²³² See statistic on the database of C2D – Research and Documentation Centre on Direct Democracy of the University of Geneva, <<http://c2d.unige.ch>> (last accessed 14 December 2004).

²³³ Morris, above n 32, 44, 46.

²³⁴ Figures are based on population old enough to vote (VAP). Voter turn out based on registered voters: 85.2 per cent in 1990, 85.2 per cent in 1993, 88.3 per cent in 1996, 84.8 per cent in 1999, and 77.0 per cent in 2002. Data from IDEA International Institute for Democracy and Electoral Assistance, Voter Turnout New Zealand, <www.idea.int> (last accessed 14 December 2004); see also: Ministry of Social Development “The Social Report 2004 – Voter Turnout” <<http://socialreport.msd.govt.nz>> (last accessed 20 December 2004).

²³⁵ Mowrey, Pelletier, above n 211, Table 1.

²³⁶ Mowrey, Pelletier, above n 211, Table 2.

exceptions in 1974 and 1980 were believed to rest on grounds of a climate of relative public dissatisfaction with politics in general.²³⁷ From around the period of the last referendum the voter turnout continuously declined: 69.6 per cent in 1993; 67.8 per cent in 1997, and 64.1 per cent in 2000.²³⁸

(b) United Kingdom

Between 1990 and 2004 the United Kingdom has not held a nationwide referendum. Voter turnouts on general elections were: 75.4 per cent in 1992, 69.4 per cent in 1997, and 57.6 per cent in 2001.²³⁹

(c) Switzerland

Since an average voter turnout around 58 per cent until World War I, this average has constantly declined.²⁴⁰ Voter turnout in the last four federal elections were: 39.7 per cent in 1991, 35.7 per cent in 1995, 34.9 per cent in 1999, and 45.8 per cent (registered voter) in 2003.²⁴¹

(d) United States / California

The voter turnout for the presidential election in the United States was: 55.2 per cent in 1992, 47.2 per cent in 1996, and 49.3 per cent in 2000.²⁴² The individual California turnout in the national general election was: 49.4 per

²³⁷ Elections Canada "Explaining the Turnout Decline in Canadian Federal Elections: A new Survey on Non-voters" (Online publications).

²³⁸ Figures are based on registered voters. Voter turn out based on the population old enough to vote (VAP) was 63.9 per cent in 1993 and 56.2 per cent in 1997; see: Andre Blais, Agnieszka Dobrzynska, Louis Massicotte "Why is Turnout Higher in Some Countries than in Others?" Elections Canada online-publications (March 2003), appendix B; <www.elections.ca> (last accessed 14 December 2004).

²³⁹ Figures are based on VAP. Voter turn out based on registered voters: 77.3 per cent in 1992, 71.5 per cent in 1997 and 59.4 per cent in 2001. Data from IDEA International Institute for Democracy and Electoral Assistance, Voter Turnout United Kingdom, above n 234.

²⁴⁰ Butler, Ranney, above n 11, 45.

²⁴¹ Figures are based on VAP. Voter turn out based on registered voters: 46.0 per cent in 1991, 42.3 per cent in 1995, 43.2 per cent in 1999, 45.8 per cent in 2003. Data from IDEA International Institute for Democracy and Electoral Assistance, Voter Turnout Switzerland, above n 234.

²⁴² Figures are based on VAP. Voter turn out based on registered voters: 78.2 per cent in 1992, 63.4 per cent in 1996, 67.4 per cent in 2000. Data from IDEA International Institute for Democracy and Electoral Assistance, Voter Turnout United States Presidential Election, above n 234.

cent in 1992, 43.9 per cent in 1996, 44.0 per cent in 2000 VAP.²⁴³ Between 1990 and 2000 the Californian people voted on 72 referenda.²⁴⁴

4 *Indications from the figures*

The New Zealand figures show a rise in voter turnout through out the first years of experience New Zealanders made with the CIR Act. This trend was reversed on a general election that followed after it became clear that the New Zealand Government would not act according to the result of the first referendum. The decline continued during the two referenda 1999. The government did not act according to their results either. This trend could indicate that the governmental response to a referendum has more effect on voter turnout than the actual introduction of a citizens initiated referendum was able to generate. But if a binding effect would be the dominant factor to influence participation, voter turnout in nations with binding referenda should have risen or at least kept steady. This was not the case. The figures from all other examples with non-compulsory voting show a constant decline, too. But a comparison between Canada with only one recent referendum and the direct democracy capitols Switzerland and California show a large difference in the level of decline: while Switzerland and California many referenda have a voter turnout below 50 or even 40 per cent, the voter turnout in Canada is despite its decline above 64 per cent. Excluding the consideration of other factors, this indicates that the possibility to participate by referenda has a positive effect on participation in the long term. Factors that negatively counter-effect this benefit are governmental non-compliance and a referenda overload.

IV CONCLUSION

New Zealand's experience with non-binding, indicative citizens initiative referenda is that government has not acted upon the results of three referenda. A dominant aspect about the introduction of the CIR Act was the

²⁴³ Center for Voting and Democracy, American Elections <www.fairvote.org> (last accessed 14 December 2004).

²⁴⁴ IRI Initiative & Referendum Institute: State wide initiatives – California <www.iandrinstitute.com> (last accessed 14 December 2004).

intention to enhance participation. The CIR Act seemed to have had the intended effect for participation measured in a voter turnout in general elections rose. This trend was reversed, when government did not act upon the first result. Support for the beneficial effect of participation by referendum can be drawn from the fact that, despite the same tendency of voter turnout decline in other jurisdictions, the use of binding referenda throughout the world is increasing instead of decreasing. In contrast, declining voter turnout is also found in the United Kingdom, where no national referenda were held in the recent past. No jurisdiction with binding referenda has abandoned them.

The theoretical bases for the attempt to increase participation is legitimacy of government. While a decision is considered 'more' legitimate, because it can be traced directly to the will of the people, the intermediate steps in a referendum process are a significant danger to a continuous trace of legitimacy. Non-legitimised, third party influence can lead to an implementation or interpretation of the referendum result, that was not intended by the people. The Australian republic referendum illustrated this. On the bases that participation is necessary for the axiom of legitimacy, safeguards for the interruption of the trace of legitimacy within the process of reduction have to be taken. For practical reasons, this means that intermediate decisions should be made by representatives and supported by the benefits of the representative system, such as deliberation in parliament.

The New Zealand experience has shown that people are most interested to take action in issues of constitutional nature. Overseas experience seems to support this trend. In all other jurisdictions considered, the possibility to participate in constitutional changes by referendum are found. Only in Canada, this form is not binding in nature. But as much as other jurisdictions allow for participation in fundamental matters constituting their societies, there are also equivalent safeguards present. They are formal (draft, proposal) or material (federal system, power to declare invalid) in nature.

The interpretation of the voter turnout results and the continuous development overseas suggest, that if New Zealand chooses to use referenda

as an democratic element to effectively enhance participation, the adoption of a binding model is preferable. The interest of New Zealanders according to the participation exercised in connection with the CIR Act suggests that a first step a binding model should focus on, are constitutional matters. Safeguards of a federal system or a supreme constitution are not found in New Zealand. Overseas experience shows that other jurisdictions have not extended the range of participation to the initiative about constitutional matters. Only in Switzerland, people can initiate a constitutional revision, but cannot make specific suggestions. In order to implement similar safeguards, to secure the intended effect of participation – legitimacy – and to use the benefits of the representative system, the participation of the people should be limited to the last decision. A gentle step to enhance the CIR would be to leave the process of reduction in the hands of the representatives for the aim of keeping a coherent trace of legitimacy. In consequence, without a written constitution is should be Parliaments authority to define the matters of constitutional nature. A further definition by for example a specified catalogue of such issues which the people could approve by vote, could be a further step. Until such, a binding but government initiated referendum on constitutional matters seems to be the preferable step towards further development of the CIR Act.

V *BIBLIOGRAPHY*

A *Legislation*

1 New Zealand

Citizens Initiated Referenda Act 1993

2 Other

(a) Australia

Constitution of Australia

<<http://scaleplus.law.gov.au>> (last accessed 15 December 2004)

Constitution Act 1902 (NSW)

<<http://www.legislation.nsw.gov.au/>> (last accessed 15 December 2004)

Constitution Act 1934 (SA)

<<http://www.parliament.sa.gov.au>> (last accessed 15 December 2004)

Constitution Act 1975 (Vic)

<<http://www.dms.dpc.vic.gov.au>> (last accessed 15 December 2004)

Constitution Alteration (Establishment of a Republic) Bill 1999 (Cth)

<parlinfoweb.aph.gov.au> (last accessed 24 November 2004)

Referendums Act 1997 (Qld)

<<http://www.parliament.qld.gov.au>> (last accessed 15 December 2004)

Referendums Act 1983 (WA)

<<http://www.parliament.wa.gov.au>> (last accessed 15 December 2004)

Referendums Act 2001 (NT)

<<http://scaleplus.law.gov.au>> (last accessed 15 December 2004)

Referendum Procedures Act 1994 (Tas)

<<http://www.thelaw.tas.gov.au>> (last accessed 15 December 2004)

Referendum (Machinery Provisions) Act 1994 (ACT)

<<http://www.legislation.act.gov.au/>> (last accessed 15 December 2004)

(b) Canada

Canadian federal and state legislation: <<http://www.e-laws.gov.on.ca>> (last accessed 20 December 2004)

Constitutional Referendum Act RSA 2002 c C-25

Elections Act SNL 1991 c E-3.1
Elections Act SNB 2000 c E-3
Plebiscites Act RSPEI 1988 c P-10
Plebiscite Act RSNWT 1988 c.P-8
Plebiscite Act RSNWT (Nunavut) 1988 c.P-8
Plebiscite Act RSY 2002 c C-172.
Recall and initiative Act RSBC 1996 c 398
Referendum Act (Canada) 1992
Referendum and Plebiscite Act RSS 1991 c R-8.01
Referendum Act RSBC 1996 c 400
Referendum Act RSQ 2002 c C-64.1
Referendum and Plebiscite Act RSS 1991 c R-8.01
Retail Business Uniform Closing Day Act RSNS 2004 c 402

(c) Switzerland

Swiss federal and state legislation: <<http://www.admin.ch>> (last accessed 16 November 2004)

Federal Constitution of the Swiss Confederation [18 April 1999; as of 15 Oct 2002]

Constitutions of the Cantons of: Aargau, Appenzell Ausser-Rhoden, Appenzell Inner-Rhoden, Basel-Land, Basel-City, Berne, Fribourg, Geneve, Glarus, Graubunden, Jura, Luzern, Neuchatel, Nidwalden, Obwalden, Sankt Gallen, Schaffhausen, Schwyz, Solothurn, Thurgau, Ticino, Uri, Valais, Vaud, Zug, Zurich, see: <<http://www.admin.ch>> (last accessed 16 November 2004)

(d) United Kingdom

<<http://www.parliament.uk>> (last accessed 02 December 2004)

Referendums (Scotland and Wales) Act 1997 (UK)

Greater London Authority (Referendum) Act 1998 (UK)

Regional Assembly (Preparations) Act 2004 (UK)

(e) United States of America / California

Constitution of California

<<http://www.leginfo.ca.gov>> (last accessed 15 December 2004)

B Cases

City of Eastlake v Forest City Enters., Inc. (1976) 426 US 668, 673 (SC)

C Parliamentary Materials

New Zealand Parliamentary Debates (Hansard) (Government Print, Wellington)

Report of Public Petitions M to Z Committee 1961 [1961] AJHR 1.2A

D Government Publications and Documents

Ministry of Social Development "The Social Report 2004 – Voter Turnout"
<<http://socialreport.msd.govt.nz>> (last accessed 20 December 2004)

New Zealand Gazette (Government Print, Wellington)

Report of the Royal Commission on the Electoral System (Government Print, Wellington, 1986)

E Other Publications

Penelope Brook Cowen, Tyler Cowen, Alexander Tabarrok "An Analysis of Proposals for Constitutional Changes in New Zealand" prepared for the New Zealand Business Roundtable September 1992 para 6.1.; <<http://www.nzbr.org.nz>> (last accessed 04 December 2004).

"Dialogue: No Power to the People in Citizens' Referendums" (15 February 2001) *New Zealand Herald* Auckland

Bob Edlin "A Grind Exercise in Ballot-box Absurdity" (8 December 1995) *The Independent* Wellington

Statistics New Zealand, Top 20 statistics, estimated resident population, <<http://www.stats.govt.nz>> (last accessed 24 September 2004)

The Roy Morgan Research Centre Pty. Limited, Finding No. 3296 18 April 2000 <oldwww.roymorgan.com> (last accessed 24 November 2004)

F Texts

Aristoteles *The Politica, Book IV – VI* (Corpus Aristotelicum, 1289 b 33 – 1293 b 39)

Ian Budge *The New Challenge of Direct Democracy* (Polity Press, Cambridge, 1996)

David Butler and Austin Ranney (eds) *Referendums – A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research, Washington D.C., 1978)

F Canavan *The Political Reason of Edmund Burke* (Durham N.C., 1960)

Helena Catt, Paul Harris and Nigel S Roberts *Voter's Choice: Electoral Change in New Zealand?* (Dunmore Press, Palmerston North, 1992)

Ingemar Duering *Aristoteles – Darstellung und Interpretation seines Denkens* (Carl Winter Universitaetsverlag, Heidelberg 1966)

H L A Hart *The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994)

P A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers, Wellington 2001)

S Levine and A Robinson *The New Zealand Voter – A Survey of Public Opinion and Electoral Behaviour* (Price Millburn, Wellington, 1976)

Wolf Linder *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (2nd ed, MacMillan, New York, 1998)

John Locke *The Second Treatise on Government* (reprint Thomas P Peardon (ed), The Liberal Arts Press 1952) (1690)

David B Magleby *Direct Legislation: Voting on Ballot Propositions in the United States* (John Hopkins University Press, Baltimore, 1984)

W McIntyre and W Gardner *Speeches and Documents on New Zealand History* (Clarendon Press, Oxford, 1971)

John McMenemy *The Language of Canadian Politics* (John Wiley & Sons, Toronto, 1980)

John Stuart Mill *Considerations on Representative Government* R.B. McCallum (ed) (new edition, Basil Blackwell, Oxford, 1946).

Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe Ltd., Dunedin, 1992)

Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3rd ed, Oxford University Press, Auckland, 1997)

202 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3rd ed, Oxford University Press, Auckland, 1997)

202

Alexis de Tocqueville *Democracy in America* (1850) (J P Mayer ed & George Lawrence trans, Harper Collins 1988)

Geoffrey de Q Walker *Initiative and Referendum: The People's Law* (The Centre for Independent Studies, St. Leonards, NSW, 1987)

Albert Weale *Democracy* (St. Martin' Press, New York, 1999)

G Journals

Lynn A Baker, "Governing by Initiative: Constitutional Change and Direct Democracy" (1995) 66 U. Colo Law Review 143

Lynn A Baker "Preferences, Priorities, and Plebiscites" (2004) 13 University of San Diego School of Law Journal of Contemporary Legal Studies 317

Andre Blais, Agnieszka Dobrzynska, Louis Massicotte "Why is Turnout Higher in Some Countries than in Others?" Elections Canada online-publications (March 2003), Appendix B; <www.elections.ca> (last accessed 14 December 2004).

J L Caldwell "Election Manifesto Promises: The Law and Politics" [1989] NJZLJ 108.

Sherman J Clark "A Populist Critique of Direct Democracy" (1998) 112 Harvard Law Review 434

Richard B Collins and Dale Oesterle "Governing by Initiative: Structuring the Ballot Initiative: Procedures That Do and Don't Work" (1995) 66 University of Colorado Law Review 47

Ben Goschik "You're the Voice – Try and Understand it: Some Practical Problems of the Citizens Initiated Referenda Act" (2003) 34 VUWLR 700

Gail Heriot "Symposium on Direct Democracy: Introduction (2004) 13 University of San Diego School of Law Journal of Contemporary Legal Issues 313

Nelson Lund "Rousseau and Direct Democracy (with a Note on the Supreme Court's Term Limits Decision)" (2004) 13 University of San Diego School of Law Journal of Contemporary Legal Issues 459

Caroline Morris "Citizens Referenda: Time to Review?" [2002] NZLJ 44

Tim Mowrey and Alain Pelletier "Referendums in Canada – A comparative overview" in: Electoral Insight – January 2001 (Elections Canada), <<http://www.elections.ca>> (last accessed 10 November 2004)

H Books of Essays

Helena Catt "Citizens' Initiated Referenda" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford university Press, Auckland, 2001)

John Collinge "Keeping a Watch on Democracy by Use of Public Referendums" in Alan Simpson (ed) *Referendums: Constitutional and Political Perspectives* (Victoria University Press, Wellington, 1992)

Keith Jackson "How should Parliament be changed?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Victoria University of Wellington, 2000)

I Unpublished Seminars and Papers Presented at Conferences

M D Waters "Do Ballot Initiatives Undermine Democracy?" Cato Institute Policy Report July/August 2000

J Unpublished Theses and Research Papers

Mark W. Gobbi *The Quest for Legitimacy: A Comparative Constitutional Study of the Origin and Role of Direct Democracy in Switzerland, California and New Zealand*, (LLM Thesis, Victoria University of Wellington, 1994)

Benjamin Goschzik *You're the Voice – try and Understand it: Some Practical Problems of the Citizens Initiated Referenda Act* (LLM Research Paper, Victoria University of Wellington, 2002) 50 (Appendix I).

K International sources

I Government sources

The Australian Electoral Commission *The Australian Referendums 1906 – 1999* CD-Rom <www.ace.gov.au> (last accessed 15 December 2004)

Australian Electoral Commission 1999 Referendum Reports and Statistics
<www.aec.gov.au> (last accessed 15 December 2004)

California Secretary of State: Ballot Initiatives 2001-2002
<<http://www.ss.ca.gov/elections>> (last accessed 16 September 2004).

Elections Canada "Explaining the Turnout Decline in Canadian Federal
Elections: A new Survey on Non-voters" (Online publications)
<www.elections.ca> (last accessed 14 December 2004)

2 Other sources

Center for Voting and Democracy, American Elections <www.fairvote.org>
(last accessed 14 December 2004).

IDEA International Institute for Democracy and Electoral Assistance, Voter
Turnout New Zealand, <www.idea.int> (last accessed 14 December 2004)

IRI Initiative & Referendum Institute: State wide initiatives – California
<www.iandrinstitute.com> (last accessed 14 December 2004)

James Madison *The Federalist No. 10*

Research and Documentation Centre on Direct Democracy of the University
of Geneva <<http://c2d.unige.ch>> (last accessed 14 December 2004).

USGS Science for a Changing World, Status and Trends of the Nations
Biological Resources, Part 2 Regional Trends in Biological Resources –
California <<http://biology.usgs.gov>> (last accessed 22 September 2004).

Venice Commission "Guidelines for Constitutional Referendums at National
Level" (Venice Commission, Strasbourg, 2001) <<http://venice.coe.int>> (last
accessed 16 September 2004).

WIKIPEDIA The Free Encyclopedia < <http://en.wikipedia.org>> (last accessed
04 December 2004)

LAW LIBRARY

A Fine According to Library
Regulations is charged on
Overdue Books.

VICTORIA
UNIVERSITY
OF
WELLINGTON

LIBRARY

A
V
A
B
20

AS741
VUW
A66
B899
2004

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00833327 8