

## Chapter Three

### The Advance of Direct Democracy

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In 1994 this Society was kind enough to invite me to be the first speaker to address one of its conferences on the subject of direct democracy through the citizen-initiated referendum system (CIR).<sup>1</sup> This is the constitutional mechanism first introduced at the national level in Switzerland in 1874, and later adopted elsewhere, which enables a prescribed number of voters, by petition, to force the government to hold a binding referendum on whether a particular law should be introduced, retained or repealed. (Where it can be used only to repeal existing laws, not to introduce new ones, it is commonly called the “voters’ veto”.) The issue was later revisited at two conferences in 1995.<sup>2</sup>

In the nine years since the Society first debated CIR, the support for the system has continued to grow in Australia and abroad.

#### Global progress

By 1998, all the states of the German Federal Republic had introduced direct democracy. Bavarians have proved to be its most enthusiastic users, having voted on a total of 14 measures since 1967. The voters of North Rhine-Westphalia, Hessen and Rhineland-Palatinate have also invoked it, though less frequently.<sup>3</sup>

Bavaria’s experience has already vividly demonstrated one of the referendum’s advantages as identified by the 19th Century English constitutional scholar AV Dicey: that it enables the voters to distinguish between politics and personalities. They need not turn out of office a government of which they basically approve simply because they disagree with one of its legislative policies<sup>4</sup> (a great advantage from the politicians’ viewpoint, incidentally). They can simply repeal the unwanted law by referendum and leave the government in power. A large majority of Bavarians, it seems, prefer to be governed by Christian Social Union, having re-elected it for many years, but they do not support all of its legislation. They have voted to reject some of its enactments, and on other issues the threat of a referendum has forced the CSU to moderate parts of its law-making program. CIR has not only provided a salutary check on an otherwise popular party, but has also facilitated the generation of compromise solutions.<sup>5</sup> The people thus have the best of both worlds: the government they want and the laws they want. Strikingly similar results as to consensus and compromise have followed the use of referendums in Switzerland and Italy.<sup>6</sup>

Improbable as it may seem to some, even Russia has now surpassed Australia in the advance towards direct democracy. Russia’s Constitution requires a binding referendum if a petition bears the signatures of two million voters. The Greens recently collected 2.5 million on a petition relating to nuclear waste and restoration of the two environmental agencies abolished in May, 2000 by President Putin. But the Central Election Committee ruled 700,000 signatures invalid because of technical errors, such as failure to supply the voter’s passport number. According to the scientist Alexei Yablokov, former environment adviser to Boris Yeltsin, this is largely because the security services remember, and resent, the role the Greens played in the collapse of the Soviet Union.<sup>7</sup> The Russian Supreme Court granted leave to appeal against the Committee’s decision in 2001. In the end the appeal failed, but it seems unlikely that the Russian people, who are known for their patient perseverance, will be discouraged by this unsteady start from exercising their right to make their own laws in the future.

Another country now using CIR is Uruguay. Article 79 of the country’s Constitution provides for

the CIR system, and in 1989 a measure was placed on the ballot by citizen petition for the first time. The initiative sought the repeal of a law, itself adopted by referendum under the Sanguinetti government, which amnestied human rights violations committed in the struggle against the Communist Tupamaros insurgency during the 1970s. The voters' rejection of the repeal measure effectively settled the debate on the amnesty issue, a striking contrast to Chile's continuing controversy over a similar problem. Since that beginning, Uruguayans have used the referendum system a further 12 times.

Still in Latin America, an unexpected resort to a little-known direct democracy measure is opening up the possibility of introducing democratic reforms in Communist Cuba. Article 86(g) of the 1976 Communist Constitution (amended in 1992) continues an earlier provision from the 1940 Constitution providing for a citizen initiative triggered by a petition bearing 10,000 signatures. Of course, it was clearly understood that persons seeking to activate s. 86(g) against the Castro regime could expect a short and painful life thereafter. But the decline of the Cuban economy, question marks over the succession to the elderly Castro, and reports that he is planning to anoint his hated brother Raul as his successor, have unsettled the regime to the extent that it is less confident about resorting to sweeping repressive measures. That prompted an engineer named Oswaldo Paya to co-ordinate a grassroots movement called Project Varela, after Father Felix Varela, an 18th Century anti-slavery campaigner. Paya and his supporters prepared a petition demanding a referendum on the introduction of free elections, free speech and other civil liberties, and an amnesty for political prisoners. The petition, which attracted 11,020 signatures, was presented to the National Assembly in May, 2002, despite harassment of some signers and attempts by government agents to introduce false signatures into the document.

Castro has not responded to the petition, and at the time of Cuba's single-candidate "elections" in May, 2003, he said it was not worth even discussing.<sup>8</sup> Still, he has not been able to make the movement disappear, such is the political and moral power of direct democracy. His government has in recent weeks imprisoned 78 dissenters for terms of up to 28 years for advocating democracy. But it did not feel strong enough to touch Project Varela's leaders, especially Oswaldo Paya himself, who won the European Parliament's Sakharov Prize last year and has been nominated for this year's Nobel Peace Prize. Project Varela could yet be the first instance of CIR's being used to dismantle a totalitarian regime.

Moving roughly north-west, we observe that two more US States, Kentucky and Mississippi, have adopted CIR. Their recruitment to the cause of direct democracy is significant, as the relatively hierarchical social structures of the old South had long helped political élites in those States to keep people power at bay. In the United States 28 States, plus the District of Columbia, now boast CIR. Meanwhile, New York's Governor George Pataki has renewed his call for CIR in that State as a way to "renew our allegiance to the sacred principle that all power ultimately rests in the hands of the people". He has sponsored a measure in the State Senate that would allow a citizen initiative system based on a petition signed by 5 per cent of the State's voters. The Senate passed the Bill in April, 2002.<sup>9</sup>

A similar movement in Texas evoked the support of the then Governor, George W Bush:

"Initiative and referendum make government more responsive to its citizens, neutralize the power of the special interests and stimulate public involvement in State issues".<sup>10</sup>

Twelve members of the Convention that has been created to put forward new constitutional arrangements for the European Union have established a forum to advocate the incorporation of CIR in any future EU Constitution. At present EU institutions are so undemocratic (Euroscptics speak of the "Fourth Reich") that the EU would not even satisfy the minimum democracy requirements that it imposes on applicants for EU membership. The CIR forum, whose members include the Bundestag delegate Jurgen Meyer and former French education minister Alain Lamassure, contemplate at least a mandatory constitutional referendum and a right of constitutional citizen initiative. They plan to put forward a concrete draft in the coming weeks.

The United Kingdom's direct democracy movement, led by Sir James Goldsmith, has not had a

high profile in recent times. Nevertheless, the UK's experience is relevant because of the way in which concepts – or rather slogans – borrowed from British constitutional orthodoxy are used by those who seek to block democratic progress in Australia. Until the 1970s, all referendums were considered unconstitutional in Britain on the ground that they conflicted with the dogma of absolute parliamentary sovereignty, an unchallengeable article of faith until recently.<sup>11</sup> Then in 1975 the Labour government, seeking a way out of a party split over Common Market membership, decided to hold a referendum on the issue. The move was a success, and the British people made it clear that they expected to be allowed to vote on other far-reaching proposals in the future.

Since then, Britons have voted in referendums on devolution for Scotland, Wales and Northern Ireland (1979 and 1997) and in Ulster on the Good Friday peace agreement (1998). They have been promised a referendum on adoption of the euro currency. In fact, the United Kingdom now seems likely to become a frequent user of referendums,<sup>12</sup> the “constitutional” objection to them having vanished.<sup>13</sup> The dogma of parliamentary sovereignty itself has been finessed out of existence because it could not be reconciled with EU supremacy. It survives only as a kind of conventional superstition<sup>14</sup> to be used in rearguard actions against human rights consciousness and people power. It would not be surprising to see calls for CIR gather strength in Britain now, especially if CIR is incorporated in the proposed EU Constitution. *The Economist* magazine is a consistent and influential supporter of the direct democracy movement.

### **Thaw in the Frozen Continent?<sup>15</sup>**

Direct democracy has been publicly advocated in Australia since at least the 1890s, when Labor adopted the concept, not merely as policy, but as one of the founding objectives of the party. On the eve of World War I it seemed likely that Queensland would introduce CIR and that the rest of the continent would follow.

That promise faded after the war. In part, it was because Labor, after linking up with the Socialist International and later giving the dominant role in its workings to the union movement, became ambivalent in its attitude to democracy. In part also it was because, as the historian Bill Gammage has said, those killed in the war were disproportionately the generous, the brave, the public-spirited and the idealistic who believed that Australia could be made into a model democracy. Many of those who returned had become morose, haunted, uncommunicative. *The Sydney Morning Herald* wrote on the day after the 1918 armistice that:

“The flower of this generation has perished. The men who promised great things in statesmanship, in science and the arts have gone, because their sense of duty was greater than that of their contemporaries. Their loss is irreplaceable ...”.<sup>16</sup>

With the best men of their generation dead or broken, Australia sank back into a timid semi-colonialism which viewed British institutions as the perfect structure of government. When one remembers that in 1918 only half of British adult males, and no women, had so much as the right to vote (and then only for the lower House once every five years), it is obvious that the ascendancy of such a view would mean a major reverse for the dream of a truly democratic Australia. The Great War may have helped to forge an Australian nation, but it was a nation that had lost its sense of destiny.

It was not until the 1970s that the Democrats in the Senate resuscitated the idea of direct democracy, introducing the first of a number of bills to implement it. Since then, draft legislation to introduce CIR has been introduced or prepared in every Australian Parliament<sup>17</sup> except those of Victoria and the Northern Territory.

The most promising site for the possible introduction of CIR at present seems to be South Australia, where the Speaker of the House of Assembly, the Hon Peter Lewis, MHA last year introduced the *Direct Democracy (Citizen-Initiated Referendums) Bill*. This was foreshadowed as part of the “Compact for

Good Government” which Mr Lewis, as an Independent, entered into with the Rann government, which needed his vote in the House. A key element in the compact is that the government is to convene a Constitutional Convention to consider, and make recommendations to the Parliament on, several constitutional reform proposals, of which the first is the adoption of CIR. Although the government no longer needs Mr Lewis’s vote in the House of Assembly, the Convention is to take place in July or August as planned. It will consist of 300 voters chosen at random from the electoral roll – rather like a very large jury – and will consider the issues and arguments, pro and con, as set out in a 53 page discussion paper prepared for the occasion.<sup>18</sup>

I venture to predict that the Convention will recommend some form of direct democracy for South Australia. If it does, there is a fighting chance that the required legislation could pass both Houses. At this point an unusual feature of South Australia’s Constitution comes to the fore. One of the undemocratic aspects of the “Westminster system”, which is found in most colonial-era Constitutions, is that even if a Bill passes through both Houses, the Premier or Prime Minister can still veto it by advising the Governor or Governor-General not to assent to it. This is particularly unsatisfactory as the executive government (the Premier and other Ministers, plus the Governor) is not directly elected. We can speak of “the elected government” only in a loose sense.

In South Australia, however, the position may be different. Under s.4 of the *Constitution Act 1934* (SA), the Governor is not part of the State’s legislature. Though Bills are submitted for his or her assent,<sup>19</sup> that assent may not be essential. A Bill could possibly become law simply by passing through both Houses of Parliament.<sup>20</sup> This considerably increases the chances that South Australia, which has a long tradition as a pioneer of democratic reforms, will now pioneer direct democracy for Australia. If it does, other State and Territory governments will have a harder time explaining to their electors why they are unfit to have the same degree of control over their own destinies. If there is one thing that incenses otherwise easygoing Australians, it is the suspicion that they are being treated as second-class citizens. The Commonwealth will be the last to follow the band, but eventually it will.

Another current proposal is the *Constitution (Citizen-initiated Referendums) Bill* and the related *Constitution (CIR) Referendum Bill* prepared by the New South Wales Christian Democrats for introduction in the State’s Legislative Council. While the Bills have reasonable prospects of acceptance in the upper House, their passage through the lower House is perhaps more a matter for the longer term. Nevertheless, they remain a useful focus for discussion. Queensland’s *Community - based Referendum Bill 1999*, though currently in limbo, is also a helpful source of parallels and comparisons.

## **Will the Advance Continue?**

### **Continuing factors**

There is every reason to conclude that the momentum acquired so far will continue and grow. In part that is because the factors that relaunched the movement three decades ago<sup>21</sup> are still at work, in particular public dissatisfaction with the way parliamentary politics have been distorted by rigid party discipline and the excessive influence of organized special interest groups. Ted Mack, MHR summed up the system’s structural defects in his paper for the Society’s 1995 conference:

“The centralisation of power within the major parties, the overwhelming of parliamentary government by the rigid party system, the negativism and personal abuse inherent in adversary partisan politics, the domination of public decision-making by small élites, major party collusion depriving the public of choice, the now institutionalised ‘broken promise syndrome’, the failure of governments to be able to handle organised minority groups, and undemocratic electoral systems where only by chance, or usually in spite of devious manipulation, does the resulting government reflect the will of the people”.<sup>22</sup>

The political establishment is not unaware of these defects. The problem is that it thinks it benefits by preserving them. It has therefore responded with an assortment of devices such as community Cabinets, precinct committees, community advisory committees and improved petition procedures<sup>23</sup> which allow people to think they are having an “input” into law and policy. But the whole point of such devices is that they allow the citizen’s view to be ignored. They are cosmetic contrivances based on the paternalist goal of “bringing the government closer to the people”, when what the people want is to bring the citizen into the government, or at least the legislative arm of it.

Another continuing factor is the remoteness of the political élites from the people. Dicey observed that representative government creates “a body of representatives with wishes and interests of their own”,<sup>24</sup> Some career politicians actually hold up that perverse result as a political virtue. At Adelaide University’s Constitutional Reform conference in August, 2002 a federal politician attacked direct democracy on the ground that it would introduce into the law-making process a competing source of political legitimacy – the people.<sup>25</sup> She could hardly have exposed the remoteness of the political class more clearly than that. Most of us are under the impression that the people *are* the source of political legitimacy. The idea that elected representatives could constitute a source of political legitimacy separate and apart from those they are supposed to represent is an inversion of the democratic ideal, especially now that the key posts, at least on the Labor side, are becoming hereditary offices. That the political élite holds such a view is itself a further argument for introducing direct democracy.

### **Newer factors – empowerment and sovereignty**

*The decentralization of knowledge.* The years since the 1994 conference have witnessed a massive decentralization of knowledge and information that is empowering the individual and challenging élite control. In 1994 the Internet was still the province of computer geeks. The material available on it was limited in quality and quantity. In 2003, an estimated 30 per cent of the population now relies on the net for news and current affairs, enabling anyone to bypass the official media and discover a mass of information and opinion that the élite would prefer we did not know about.

This is a momentous development, as the mainstream media are now essentially an arm of government, manufacturing an appearance of consensus on behalf of the élite. They may favour one party rather than the other, but they are committed to the overall enterprise of keeping the people in their place and in the dark. But the net is making it harder for the media to set the agenda and define the limits of permitted debate. Of course, half the material on the Internet is false or absurdly biased, but the same is true of the official media, as witness the recent “Jakarta incident”, in which ABC News took a truthful report filed by its Jakarta correspondent, Jim Middleton, and rewrote it to mean its exact opposite in order to embarrass the Prime Minister.<sup>26</sup>

The democratization of knowledge brought about by the Internet also strengthens the trend towards empowerment of the individual. The ocean of information, including primary sources, that anyone can search in an instant through directories and search engines gives everyone the equivalent of an army of research assistants – and unlike some parliamentary research assistants, it does not attempt to suppress or ignore materials that do not conform with its personal agenda. There are also, of course, websites dealing specifically with direct democracy.<sup>27</sup>

*Networking.* The interactive aspects of the net also enable people to disseminate their own ideas, freeing the human imagination and unleashing new creative energies. They make possible the linking of disparate forces that prove difficult for governments to control or suppress.<sup>28</sup> The net thus creates a forum for disenfranchised or alternative voices. In situations where political parties fail to represent new values or constituencies (or old ones for that matter), the net can reinforce CIR’s role as an alternative “political

aggregator”.<sup>29</sup> By facilitating networks, systems and associations of all kinds it encourages and stimulates decentralization in all spheres, including that of political action.

*Constitutionalizing the people.* Another important development since 1994 has been the legal recognition that the sovereign power of the Australian nation resides with the people. That had always been the underlying reality, both political and to an extent legal, of Australia’s constitutional order, but it was overshadowed, or thought to be, by the residual suzerainty of the British Parliament. The Commonwealth Constitution was drafted by delegates directly elected by the voters to the 1897-98 Federal Convention. After elite support for federation waned after 1891, it was revived by a popular movement. The draft Constitution was approved by the people of each Colony in a series of referendums before being formally enacted by the British Parliament, which made only one change to the document, the preservation of appeals to the Privy Council.<sup>30</sup> It could be altered only with the approval of the people, voting directly in a referendum. The primary authority for the Constitution was its origin and acceptance by the people, not its endorsement by the Imperial Parliament<sup>31</sup> – which, though prudent and convenient at a time when Australia expected to remain part of the British Empire, may not have been strictly necessary.

One of the effects of the *Engineers’ Case*<sup>32</sup> in 1920, however, was to enshrine until at least the 1990s a method of interpretation that overemphasized the Constitution’s formal enactment as an Act of the British Parliament. Writing at the end of that period, Justice Paul Finn declared that:

“The Australian people are the forgotten first cause of our system of government – Commonwealth and State – today. That the people are sovereign, that government and its institutions exist for them and to their ends, are ideas that exert only muted influence on the constitutional and political imagination”.

To the politician, he observed:

“There is the distinct English legacy of parliamentary sovereignty, itself probably a destructive historical inversion of popular sovereignty”.<sup>33</sup>

After the *Australia Act* 1986, that began to change. By 1996 a majority of the members of the High Court had stated (and none had denied) that sovereignty now resides in the people and derives from them.<sup>34</sup> This, Justice Finn considers, is part of a more general reconceptualizing of the Australian polity, influenced by a type of re-emerging natural law that acknowledges the human person as being an object of worth in its own right.<sup>35</sup> But popular sovereignty is the key concept:

“Through it, the Australian people are constituted the owners, not merely the beneficiaries, of our system of government”.<sup>36</sup>

All power thus derives from the unassembled electorate, who can delegate it to representative bodies or reserve it to themselves.<sup>37</sup> So direct democracy is not a delegation of power from the Parliament to the people, but an exercise of the people’s inherent right. It is clearly incongruous that the people are sovereign but are unable to enact or repeal the laws that govern them.<sup>38</sup> The onus of showing that they should be barred from doing so now lies on those who would deny the people their constitutionally recognized right.

### **The latest studies**

Empirical research has always shown that the objectors’ fears about the effects of CIR are unfounded.<sup>39</sup> The latest research and comparative studies confirm that conclusion. Elizabeth Gerber of the University of California at San Diego, in her 1999 book *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation*,<sup>40</sup> sets out to test the charge that CIR can become the tool of the wealthy. Assembling recent US data from the 1990s, she starts by pointing out that anyone seeking to have a law enacted or repealed by direct legislation needs to mobilize an electoral majority. To do that calls for two resources:

(1) money; and (2) personnel. Economic interests find it easier to raise money, but community organizations with individual members can more easily mobilize people.

These different comparative advantages lead to different campaign strategies. Community groups will rely more on labour-intensive methods using volunteer workers, while economic groupings make more use of costly media advertising. But even that financial advantage is not as great as it seems: “financial support from citizen interests translates more readily into votes than financial support from economic interests”, she finds.<sup>41</sup> On the other hand:

“..... contributions from economic groups are associated with a lower vote margin and a lower probability of success ..... Spending by economic interests signals to voters that the measure is contrary to their interests and leads them to vote against the measure”.<sup>42</sup>

Professor Gerber notes that initiative States do not spend significantly more or less on education, health, welfare or law enforcement than non-initiative States, but legislative policies in initiative States reflect voter preferences more closely.<sup>43</sup> “[E]conomic interests are severely constrained in their ability to achieve direct modifying influence”, but their low success rate under CIR is offset by their greater ability to lobby legislatures.<sup>44</sup> Where the ballot campaign comprises competitive arguments for both sides, voters cast informed votes and make good choices.<sup>45</sup>

A comprehensive study of direct democracy mechanisms and outcomes published in 2001 by Joseph Zimmerman, of the State University of New York at Albany, finds that direct democracy encourages voter participation and greater interest in the government process. It educates citizens about public problems and possible solutions, and upholds the key democratic tenet that sovereign authority lies in the unassembled electorate, who are “not apathetic, cynical or ignorant in their approach to the initiatives”.<sup>46</sup> Without the right to CIR, representative government does not work well. Of the old adage that under representative government the voter is free only on election day, he finds even that degree of political liberty to be of dubious value in a system where citizens vote to select an élite that in turn exercises every other duty of civic importance:

“To exercise the franchise is also unhappily to renounce it. The representative principle steals from individuals the ultimate responsibility for theory, values, beliefs and actions”.<sup>47</sup>

A comparative study of direct democracy systems around the world by the London School of Economics scholar Mads Qvortrup reaches similar conclusions:

“The referendum is not a panacea, yet the fears raised by its critics cannot be supported by evidence”.<sup>48</sup>

In answer to the common prediction that citizens would use CIR to reintroduce the death penalty, flogging or other harsh practices, he points out that referendums have not been used to restore capital punishment in any country except the United States.<sup>49</sup> There, 38 States have reintroduced the death penalty since the 1970s. But in only three of the 38 was it done by referendum: in Oregon (which had previously abolished capital punishment by CIR in 1917), in Colorado and in California, where the death penalty was reinstated by the legislature but a voters’ veto ballot to abolish it failed. Five US States that have CIR do not have capital punishment.<sup>50</sup> Flogging has not been reintroduced anywhere. Similarly, the Swiss have consistently rejected measures (5 since 1970) to restrict immigration.<sup>51</sup>

One could work through the whole catalogue of dire warnings about possible referendum measures with similar results, but the point is that in any case it would be illogical to judge CIR alone by whether one agrees with particular policy outcomes. No-one advocates abolishing representative government because of its legislative record over the past century.<sup>52</sup>

Contrarily to a common claim about direct democracy, Dr Qvortrup finds that it has proved to be a useful means of encouraging consensus and compromise, notably in countries such as Italy<sup>53</sup> where the spirit of political compromise had not previously been much in evidence. Democracy is an attitude towards other people, based on a mutual respect for the views of others.<sup>54</sup> Direct democracy strengthens

that mutual respect, thereby creating the conditions for accommodating different views. CIR prevents governments from ramming through legislation based purely on the party line or a consensus of the élite. It forces them to take seriously the views of others and engage in a real discussion with them, because the possibility of a referendum is always in the background. For that reason, while CIR does not block change or reform, it does make it more gradual and so accommodates the interests of majorities and minorities.<sup>55</sup> And people treat laws (even tax laws) with more respect because they have the tacit or explicit support of the majority.<sup>56</sup>

### **The weakness of counter-arguments**

A further factor that will help to maintain the momentum for direct democracy is the transparent weakness of the case against it.

Direct democracy's opponents rely on two main lines of defence. The first is personal abuse and sweeping denigration. Those who favour it, we are told, are "insane", "loopy populists", "single issue loonies" and "political eunuchs". The people as a whole are stupid and must not be encouraged to think about government: "a high degree of apathy may be essential to the efficient functioning of a modern democracy".<sup>57</sup>

These compliments are reassuring in a sense, because such reliance on *ad hominem* attacks and prejudice is a sure sign that the speaker has no rational arguments. It shows that we have not overlooked any real problems with CIR.

At the same time, it is a refreshing change to read Dr Qvortrup's observation that:

".....even proponents of direct democracy have been remarkably modest or realistic in their defence of the referendum device".<sup>58</sup>

The other line of defence consists of simply ignoring the vast body of experience of and evidence for CIR over the past 150 years, and simply putting forward generalities and sweeping assertions. The most heavily used of these is Edmund Burke's remark from his 1774 speech to the electors of Bristol that:

"You chuse a member indeed; but when you have chosen him, he is not a member for Bristol, but he is a member of Parliament . . . .Your representative owes you not his industry alone but his judgment; and he betrays, instead of serving you if he sacrifices it to your opinion".<sup>59</sup>

The first point to make about this élitist view of representative government is that the people have never accepted it: Burke lost his seat for that reason. The second point is that, even if that view had been adopted by the people, it in no way prohibits the use of direct democracy as a supplement to the indirect democracy of the representative system.<sup>60</sup> Indeed, if elected members see themselves as free agents in the way Burke said they should, the case for the safeguard of CIR is even stronger. And all the more so if the member is in practice a prisoner of the party line or falls prey to special interest lobbyists.

Another favourite assertion holds that CIR is inconsistent with the system of responsible government. But, as with Burke's assertion, nothing in the theory of responsible government prohibits the use of CIR as a supplement. Further, one reason why CIR is needed is that responsible government ceased to work over a century ago, when party discipline made the Executive supreme over the legislature instead of the reverse. That is one reason why the term "responsible government" itself has been largely abandoned in favour of the more nebulous phrase "Westminster system" (another reason may be to avoid provoking Australian sardonic humour). The definition of the Westminster system is highly elastic. We have noted the quiet demise after 1975 of the confident proposition that any referendum would fundamentally violate the British Constitution. Since then, the crucial concept of parliamentary sovereignty has also had to be abandoned, in light of EU supremacy.<sup>61</sup>

These and similar general objections to direct democracy are all aired in an empirical vacuum, as if CIR had not been operating in its present form since 1874. All the evidence of how the system has



actually worked (including the adjustments made to remove problems that have cropped up) is at best ignored or at worst misrepresented.<sup>62</sup> Most political scientists are parties to this suppression of evidence. That may seem odd if one assumes that they have a professional interest in discovering how political institutions work in reality, and which ones produce the best outcomes for ordinary people. But it seems that most political scientists are less interested in real people and real outcomes than in the mysteries of power and how it is wielded.

Professor Vernon Bogdanor of Oxford delivers a true verdict on the case against direct democracy: “In the last resort, the arguments against the referendum are also arguments against democracy, while acceptance of the referendum is but the logical consequence of accepting the democratic form of government”.<sup>63</sup>

### **Key practical issues**

Once we are at least interested in some form of direct democracy, we face five basic questions.

1. *Which type or types should be adopted?* Should the system allow for the adoption of new laws or constitutional amendments, or should it be confined to repealing existing laws only?

The most conservative approach is to adopt only the voters’ veto or “abrogative initiative”, the power to repeal existing laws. Politically it is the easiest to advocate, because it is so uncomplicated, and because alarmist prophecies about CIR bringing back the gallows or the birch are impossible if CIR can only be used to repeal existing laws. There is no respectable argument against the voters’ veto, even in theory. One cannot argue that the people should be subjected to laws that a majority of them reject, without arguing against democracy itself.

At the same time, as Italy’s experience shows, even the voters’ veto by itself is a very effective tool of people power.

The Hon Peter Lewis, MHA’s Bill contemplates both the enactment of new laws and the repeal of existing ones.

2. *How many signatures should be required?* At present the percentage of the electorate who must sign the petition in order to trigger a referendum ranges from about 2 to 4 per cent of the voters in Switzerland (actually they use fixed numbers, 50,000 for some purposes and 100,000 for others), to 5 per cent in California, to 8 per cent in the German state of North Rhine-Westphalia, 10 per cent in Bavaria and Rhineland-Palatinate, and an impossible 20 per cent in other German states. Experience suggests that anything over about 7 per cent makes the system unusable, but apparently German efficiency is sometimes able to overcome that barrier.

The 1999 Queensland Bill opted for 5 per cent, while Mr Lewis’s draft proposes 5 per cent of the total number of enrolled voters, or 15 per cent of at least 7 electorates if at least 5 of them are non-metropolitan. There is an 18-month time limit for collecting the signatures, a fairly standard requirement.

Queensland would also make matters easier for country residents by reducing the trigger to 2 per cent where it is obtained in a majority of electorates.

Contemporary Bills permit the electoral authorities to certify the signatures by accepted statistical sampling methods, following overseas practice.

3. *When should the ballot be held?* The cost of holding the referendum can be reduced to minimal levels by arranging for the ballot to coincide with a general election. The South Australian Bill provides for holding the vote at the next House of Assembly election, while the Queensland version envisages making use of federal elections as well. Local government elections held on a statewide basis could also be used, and this might carry the bonus of enhancing public interest and participation in local council elections.

A subsidiary question is whether voting should be compulsory. Presumably the case for forcing

people to vote on a specific question is weaker than in relation to parliamentary elections. Voluntary voting might also lessen the risk of the referendum's being used to record a protest vote against the government.

4. *What majority should be required?* Given that only a simple majority of those voting (i.e., 50 per cent plus 1) is required for amending the entrenched provisions of State Constitutions, the same should be enough for an initiative measure. Some direct democracy advocates believe, however, that in order to allay the fears (unfounded in my view) of rural voters it is necessary to add a double majority requirement, i.e., a majority of voters in a majority of electorates. The South Australian Bill so provides. On the other hand, both the Queensland Bill, and the New South Wales Bill to be introduced by the Christian Democrats, state that where the initiative does no more than repeal an existing law, a simple majority suffices. Anything else, I would suggest for the reasons already given, would countenance blatant minority rule.

5. *Once enacted, how may an initiative measure be amended or repealed?* Unless the legislative change brought about by the referendum can be protected in some way, there is nothing to prevent the Parliament from repealing it a week later, or re-enacting a law the people have just repealed.

While that may seem cynical to some, one must bear in mind that, by definition, a citizen initiative will only succeed if the Parliament has not been faithfully representing the electors. Some governments may be willing to accept the odium of thwarting the people's expressed will if the next election is anything up to three years away, by which time the voters will have other worries on their minds.

Mr Lewis's Bill proposes that amendment or repeal should, in accordance with the practice in California, itself be by referendum. There is a proviso, however, allowing the Parliament to amend the law within the first 12 months if a majority of the 400 original petitioners agree. Presumably this is to permit rectification of unforeseen problems.

Another approach is to allow amendment or repeal either by referendum, or by a two-thirds majority of both Houses during the first 7 or 10 years. After that, simple majorities would suffice. But, clearly, some effective protection is essential if the process is not to be thwarted.

### **Key to democratic renewal**

The citizen-initiated referendum system would be a powerful re-assertion of democratic principles at a time when political globalization is giving rise to a widely acknowledged and growing "democratic deficit". Sir Anthony Mason, former Chief Justice of the High Court, has pointed out that, just as in the past the States came under pressure to yield power to the Commonwealth, now Canberra in turn is under pressure to cede power to international institutions. An increasing amount of decision-making already occurs at the international level, and as Sir Anthony suggests:

"Ratification of international and regional [treaties] by Australia ... can result in a so-called contraction of national sovereignty and a democratic deficit".<sup>64</sup>

More and more power is being concentrated in fewer and fewer hands. The people wielding these powers are elected by no-one, and in practical terms are accountable to no-one.

National governments and international organizations are not the only sources of democratic deficit. A recent oblique reference by *The Economist* of London to "the shadowy power-brokers of the Bilderberg Group", and similar comments by the BBC,<sup>65</sup> highlight the concerns being expressed in a growing literature about the major part played in government policy-making by semi-secret bodies such as the Bilderberg Group and the Round Table.

Most Australians have never heard of these organizations, and their existence, membership or activities are seldom, if ever, mentioned in our mainstream media. But momentous policies, such as the creation of the *Treaty of Rome*, the *Maastricht Treaty*, the single European currency and, earlier, the partitions

of India, Palestine and Ireland were formulated and promoted by these groups, and not, as most people imagine, by the political parties or the public service bureaucracy.<sup>66</sup> The influence of these bodies behind the scenes further weakens government's accountability to the people and strengthens the case for direct democracy.<sup>67</sup>

Introducing direct democracy into the Australian States would help to offset democratic deficit in several ways. It would showcase the principle of self-government in a way that would make it harder for international bodies to ignore and for Canberra to override. It would tap the creative potential of the people at large and provide a diversified alternative to distant, shapeless, unresponsive government. And it would give the people a genuine and substantive attachment to their State's Constitution that would make them vigilant against attempts by globalizers or others to dilute the ideal of popular government. Politics and law-making should be something that is done by us, not to us.

In all, it is hard to exaggerate the legal and constitutional consequences that would flow from the enactment of such a measure. Once direct democracy is operating in one State it will become impossible for other Australian governments to pretend that "it would never work here". It will provide a wonderful opportunity for democratic advancement and constitutional renewal for the nation as a whole.

Popular choice enhances democratic participation and involvement in politics. That is a benefit in itself – in a democracy, process is just as important as outcome, because it keeps the people in training for the demands of self-government.

At the centennial meeting of federal Parliament in Melbourne in 2001, both the Prime Minister and the Opposition leader made a special point of deploring what they saw as the widespread popular cynicism about our institutions of government. The parliamentarians of South Australia are being presented with an historic opportunity to change that, to revitalize the democratic spirit and launch a comprehensive renewal of Australian political life. Experience overseas shows that, if they take up that challenge, they are assured of an honourable citation in the history books and a warm place in the memory of a grateful people.

#### Endnotes:

1. G Walker, *Direct Democracy and Citizen Law-Making*, in *Upholding the Australian Constitution* ("UTAC"), Proceedings of The Samuel Griffith Society, Volume 4 (1994) at 281.
2. Ted Mack, *Beyond Representative Government* (1995) 5 UTAC 167; Harry Evans, *Citizen Initiated Referendums: Adjunct or Antithesis to Constitutional Government?* (1995) 6 UTAC 175; Patrick O'Brien, *Sovereigns not Subjects: The Need for More Direct Democracy* (1995) 6 UTAC 197.
3. Mads Qvortrup, *A Comparative Study of Referendums: Government by the People*, Manchester University Press, Manchester, 2002, 145.
4. AV Dicey, *Ought the referendum to be introduced into England?* (1890) 57 *Contemporary Review* 489, 496.
5. Qvortrup, *op. cit.*, 145.
6. *Ibid.*, also 142-43.
7. *Chilled greens*, in *The Economist*, January 6, 2001.

8. *It's Cuban liberation, for God's sake*, in *The Weekend Australian*, May 18-19, 2002; *Castro to maintain the rage*, in *The Australian*, January 21, 2003.
9. [www.state.ny.us/governor/refreport/referendum\\_frame.html](http://www.state.ny.us/governor/refreport/referendum_frame.html).
10. [www.initiativefortexas.org](http://www.initiativefortexas.org).
11. Qvortrup, *op. cit.*, 1.
12. *Ibid.*, 1, 110, 119.
13. *Ibid.*, 1.
14. G Walker, *The Unwritten Constitution*, (2002) 27 *Australian Journal of Legal Philosophy*, 144; see also Mark Walters, *Common Law, Reason and Sovereign Will*, (2003) 53 *University of Toronto Law Journal*, 65.
15. "The frozen continent" was Geoffrey Sawer's description for federal-State relations in Australia. Its use in the present context is more apt and accurate.
16. Quoted in Bill Gammage, *The Broken Years: Australian Soldiers in the Great War*, ANU Press, Canberra, 1974, 24. See also pp. 263, 278 and esp. 275, and Les Carlyon, *Gallipoli*, Macmillan, Sydney, 2001, 533.
17. For a detailed tabular analysis of Australian direct democracy Bills up to 1994, see Peter Reith, *Review of Australian Direct Democracy Initiatives*, in *Direct Democracy: Citizens Initiated Referendums*, Constitutional Centenary Foundation, Carlton, Vic, 1996, 43.
18. Government of South Australia, *Constitutional Convention Discussion Paper*, Adelaide, 2003.
19. See ss 8, 56.
20. Under the *Australian Capital Territory Self-Government Act 1988* (Cth), there is no such requirement for assent in the Australian Capital Territory. A bill becomes law when it has passed through the Legislative Assembly: see ss 8, 25.
21. Qvortrup, *op. cit.*, 20.
22. Mack, *op. cit.*, 174-75.
23. George Williams, Geraldine Chin, *The Failure of Citizens' Initiated Referenda Proposals in Australia: New Directions for Popular Participation?*, (2000) 35 *Australian Journal of Political Science* 27, 41-45.
24. Qvortrup, *op. cit.*, 61.
25. The proceedings of that conference are expected to be published shortly. The same argument is advanced, however, by Williams and Chin, *op. cit.*, 46.
26. Mark Day, *Massacre of ABC funding hopes?*, in *The Australian*, March 20, 2003, Media 6. The case is a particularly telling one, as the usual excuses for journalistic misrepresentation – deadlines, pressure from advertisers, proprietors or government – can have no application.

Some in the media have noticed the public's drift away from the official news media to the Internet and have expressed rising alarm about it. One columnist, following the Jayson Blair episode at *The New York Times*, lamented that "the whole authority structure of mass media is being undermined", and predicted dire results if people started thinking for themselves: J Alter, *An erosion of trust*, in *The Bulletin*, May 27, 2003.

27. For example: [www.iandrinstute.org](http://www.iandrinstute.org); [www.iri-europe.org](http://www.iri-europe.org); [www.initiativefortexas.org](http://www.initiativefortexas.org); [www.ballot.org](http://www.ballot.org).
28. Ray Grasse, *Signs of the Times: Unlocking the Symbolic Language of World Events*, Hampton Roads Publishing Co, Charlottesville, Va, 2002, 84, 123, 126.
29. Qvortrup, *op. cit.*, 89.
30. Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government*, Cambridge University Press, Cambridge, UK, 25-27.
31. *Ibid.*, 24.
32. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129; see G Walker, *The Seven Pillars of Centralism: Federalism and the Engineers' Case* (2002) 14 UTAC 1; (2002) 76 *The Australian Law Journal* 678.
33. Paul Finn, unpublished paper quoted in Galligan, *op. cit.*, 29-30.
34. *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106, 137-38 (Mason CJ); *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ); *Theophanous v. Herald and Weekly Times Ltd* (1994) 182 CLR 104, 180 (Deane J); *McGinty v. Western Australia* (1996) 134 ALR 289, 343-44 (McHugh J).
35. Paul Finn, *A Sovereign People, a Public Trust*, in PD Finn (ed.), *Essays on Law and Government*, Vol. 1, Law Book Co, Sydney, 1995, 1, 7-8.
36. *Ibid.*, 5.
37. *City of Eastlake v. Forest City Enterprises* (1976) 426 US 668, 672.
38. Joseph F Zimmerman, *The Referendum: The People Decide Public Policy*, Praeger, Westport, Conn, 2001, 258.
39. G Walker, *Initiative and Referendum: The People's Law*, Centre for Independent Studies, Sydney, 1987, ch. 3.
40. E Gerber, *The Populist Paradox: Interest Group Influence and the Promise of Direct Legislation*, Princeton University Press, Princeton, NJ, 1999.
41. *Ibid.*, 108.
42. *Ibid.*, 110.

43. *Ibid.*, 125, 136.
44. *Ibid.*, 138, 140.
45. *Ibid.*, 145.
46. Zimmerman, *op. cit.*, 235.
47. *Ibid.*, 227, quoting Benjamin R Barber.
48. Qvortrup, *op. cit.*, 158.
49. *Ibid.*, 75.
50. Gerber, *op. cit.*, table 7.2, p. 127; cf. table A.1, p. 147.
51. Qvortrup, *op. cit.*, 15.
52. *Ibid.*, 157, quoting S Bowler and T Donovan.
53. *Ibid.*, 142.
54. *Ibid.*, 7.
55. *Ibid.*, 94.
56. *Ibid.*, 66, 139.
57. These comments and others are quoted by Evans, *op. cit.*, 189; Mack, *op. cit.*, 170-72.
58. Qvortrup, *op. cit.*, 153.
59. Quoted and discussed in Walker, (1987), *op. cit.*, 31.
60. Qvortrup, *op. cit.*, 8.
61. Walker, (2002), *op. cit.*; *Factortame Ltd v. Secretary of State for Transport (No. 2)* [1991] AC 603.
62. Thus, the political columnist Laurie Oakes in *The Bulletin*, July 26, 1994, claimed that CIR had become unworkable in California because, at the 1998 polls, citizens were faced with 29 CIR questions. In fact, there were 12 (indeed a larger number than the usual average of 2.7), the other 17 being government measures proposing minor amendments to the State Constitution or seeking approval for bond issues. Nor, contrarily to Mr Oakes's assertion, did "three-quarters of Californian voters in a survey on the State's referendum system believe[d] it had got out of hand". On the contrary, 73 per cent still supported CIR, though a similar majority did favour some minor procedural changes. And CIR supporters still outnumbered its opponents by 10 to 1: *Initiative and Referendum: The Power of the People*, Spring 1989, Winter 1989.
63. Vernon Bogdanor, *The People and the Party System: The Referendum and Electoral Reform in British Politics*, Cambridge University Press, Cambridge, UK, 1981, 93.

64. Sir Anthony Mason, *The Constitution in a Contemporary Context*, in *Selected Proceedings of the Federation into the Future: Government in a Global Era Convention*, Committee for Economic Development Australia, 1998, 2; G Walker, *Why Sovereignty Matters*, in *National Observer*, No. 51, Summer 2002, 33.
65. *The party's over*, in *The Economist*, February 1, 2003. The BBC's comments are on its website: Emma Jane Kirby, *Elite power brokers' secret talks*, www.bbc.co.uk, May 15, 2003.
66. The Bilderberg Group reportedly comprises senior representatives of politics, finance, the media and European royalty. It consists of an outer circle which is largely a talking-shop for eminent persons, and an inner committee which apparently does the "power-broking". Prime Minister John Howard attended the annual meeting of the outer circle in Portugal in 1999. Selected journalists are invited to these meetings on condition that they do not report anything about them. George McGhee, former US Ambassador to West Germany and himself a Bilderberger, acknowledged that "the *Treaty of Rome*, which brought the [European] Common Market into being, was nurtured at Bilderberg meetings". Likewise the euro currency: J. Marrs, *Rule by Secrecy*, Harper-Collins, New York, 2000, 42; and see generally 39-44.
- The Round Table network has a similar two-tier structure: JE Kendle, *The Round Table Movement and Imperial Union*, University of Toronto Press, Toronto, 1975, 165, 305; Marrs, *op. cit.*, 85-89; Carroll Quigley, *Tragedy and Hope: A History of the World in Our Time*, Macmillan, New York, 1966, 131-32. The inner group was established in 1891 by Cecil Rhodes, Alfred (later Lord) Milner, Lord Esher, WT Stead, Arthur (Lord) Balfour, Victor (Lord) Rothschild and Albert (Lord) Grey, while the outer circle came into existence in 1908-1911 (Quigley, *op. cit.*, 131-32, 950-55).
- One of the Round Table members' projects from 1884 to 1915 was to federate the British Empire, and ultimately the English-speaking world including the United States, in a single entity, perhaps with Washington as capital of the whole organization. The Round Table abandoned that idea in 1916 and later gave the chief impetus to transforming the Empire into the Commonwealth of Nations (Quigley, *op. cit.*, 133, 144-48). British support for the Australian federal movement was apparently seen as part of the Imperial union project (Quigley, *op. cit.*, 133), but for some reason that project envisaged separating Western Australia from the Australian federation (Kendle, *op. cit.*, 306).
- The eminent historian Professor Carroll Quigley of Georgetown University (whom President Bill Clinton described as his "mentor"), who had close links with the Round Table's offshoots in the United States, wrote in 1966 that:
- "The power and influence of this Rhodes-Milner group in British imperial affairs and in foreign policy since 1889, although not widely recognized, can hardly be exaggerated. ...[T]he whole group was so secretive that, even today, many close students of [Empire and Commonwealth affairs] are not aware of its significance" (Quigley, *op. cit.*, 133, 146).
- For example, the Round Table prepared the draft proposals for Indian self-government and sent them to Lord Chelmsford, at that time Governor of New South Wales. Chelmsford believed the proposals had come from an official committee of the India Office. After he accepted the proposals, he was made Viceroy of India in 1916, and the proposals became the *Government of India Act 1919* (UK) (Quigley, *op. cit.*, 165-66).
- The Round Table also provided the main impetus for the partitions of Ireland, India and Palestine (Quigley, 1049). The strife caused by those partitions continues today, as does the Round Table itself.
67. It is not necessary to take a conspiratorial view of these organizations. Lord (Denis) Healey, a

former UK Chancellor of the Exchequer and a founding member of Bilderberg, made that point in a recent interview: “That isn’t a conspiracy! That is the world. It is the way things are done. And quite rightly so”. See *Who pulls the strings?*, in *The Guardian*, March 10, 2001 (extract from Jon Ronson, *Them: Adventures with Extremists*, Picador, London, 2001). It is the secrecy in which these bodies are able to exert their influence that is of concern to advocates of democratic government.