THE AUSTRALIAN BALLOT IN NEW ZEALAND: A STUDY IN LEGAL TRANSPLANTATION

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I LEGAL TRANSPLANTS

Normally the study of legal reform confines itself to the situation in the country in which the reform is taking place. But another approach to the subject might consider the phenomenon as a species of institutional transplant since many reforms come from other countries, some within a similar political and legal system; others, more rarely, from another legal family. Australians and New Zealanders are familiar with this as the most obvious example is the transplantation of the Ombudsman office from Scandinavia to New Zealand in 1962 and to Western Australia in 1971.[1]

This paper considers the transplantation of two Australian methods of voting by ballot to New Zealand. In so doing the paper seeks to make the point that the transplantation of an institutional idea is not always a simple process because in the transfer process terminology may change, the concept may have to be adapted to a

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1 *Parliamentary Commissioner (Ombudsman) Act 1962* (NZ). The act was an adaption of the Scandinavian model however: *New Zealand Parliamentary Debates*, 26 July 1962, 1062 where J R Marshall said: 'While we cannot follow slavishly the precedents set in those Scandinavian countries we believe they do provide a useful guide for us'. Hereinafter as *NZPD: Parliamentary Commissioner Act 1971* (WA). Unless otherwise stated all acts cited are from New Zealand.

new institutional setting, and the reform may take place for reasons other than those that inspired the reform in the jurisdiction of origin.[2] The other major point of the paper is that the details of the actual transplant may depend upon idiosyncratic factors such as the origins and interests of the individual responsible for the transplant.[3] Of course a transplant may not take root right away and may even disappear for a time to be revived at a later date. The origins of a transplant and the reasons for it may not be a reason for a revival of a transplanted idea and in the process the original idea may be hybridised in the local environment.[4] Finally, the reception that a transplant receives will also depend upon other developments in the society into which it arrives. This means that the way in which the transplant is regarded will depend on the issues in debate at the time and the place of reception. One factor said to ease the transfer process is similarity between the legal and political setting from which the transplant comes with the setting into which the transplant is made.[5] In the case to be considered in this paper this was a major factor in the success of the transplant of the Australian ballot to New Zealand.

This paper concentrates on the mode of voting, although that was not the central issue in the debates about electoral reform, for the main preoccupation during the period before 1870 was with the nature of the franchise, the number, and the boundaries of seats in Parliament.[6] The mode of voting was a part of this general change wherein the main demand was for a system of voting by ballot, the

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2 See Jonathan M. Miller, 'A Typology of Legal Transplants' (2003) 51 *American Journal of Comparative* Law 839-885. At footnote 20 he notes that public law institutions are particularly difficult to transplant: 843.

3 See Alan Watson, 'Aspects of the Reception of Law' (1996) 44 *American Journal of Comparative Law* 335, 339-340.

4 Jorge Fedtke, 'Constitutional Transplants: Returning to the Garden' (2008) 61 *Current Legal Problems* 49, 51.

5 Alan Watson, 'Legal Transplants and Law Reform', (1976) 92 *Law Quarterly Review* 79, 80; Martin de Jong and Suzan Stoter, 'Institutional Transplants and the Rule of Law' (2009) 2 *Erasmus Law Review* 311, 321.

6 See D G Herron, 'The Franchise and New Zealand Politics, 1853-8' (1960) 12 *Political Science* 28-44; John E Martin, 'Political Participation and Electoral Change in Nineteenth Century New Zealand' (2006) 57 *Political Science* 39-58.

details of which were less important than the principle of secrecy itself. Nevertheless once debate on the principle of the secret ballot was joined the inevitable question aroseas to what kind of voting mechanism should be adopted. Now while it might be tempting to dismiss debates about the voting method as a mere mechanical device, the secret ballot was instrumental in a number of places in reducing, if not eliminating, the corruption that was endemic in the open voting era.[7] Of course the change did not eliminate all forms of electoral corruption immediately, but after the early decades of the twentieth century New Zealand elections have been by world standards remarkably free and fair.

II THE SPARSE SECONDARY LITERATURE

The secondary literature on the ballot in New Zealand is surprisingly thin and rather fragmentary. There are two general surveys one of which starts from 1890,[8] that is, after most of the important debates and changes had concluded. The other is an official chronology[9] that pays no attention to local or municipal election laws, which will be shown in this paper to be the level of government at which the secret ballot first took root in New Zealand. General histories do little

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7 See, eg, Cornelius O'Leary, *The Elimination of Corrupt Practices in British Elections 1868-1911* (1962). This was not the case everywhere. There was actually more corruption after the introduction of the Australian ballot in Louisville in 1888 than before it: Tracy Campbell, 'Machine Politics, Police Corruption, and the Persistence of Vote Fraud: The Case of Louisville, Kentucky, Election of 1905' (2003) 15 *Journal of Policy History* 269-300.

8 Raewyn Dalziel, 'Towards Representative Democracy: 100 Years of the Modern Electoral System', in A Anderson et al (eds), *Towards 1990* (1989) 49-63. The paper, in fairness, does refer briefly to voting practices in the 1850s: at 57.

9 'The Electoral Law of New Zealand: A Brief History', as Appendix A of New Zealand, *The Report of the Royal Commission on the Electoral System: 'Towards a Better Democracy'*, December 1986 in *Appendices to the Journals of the House of Representatives*, 1987-87, Vol IX H 3. Hereinafter as *AJHR*. The appendix, which is merely a chronology, concentrates on parliamentary elections ignoring local election laws altogether. Much of the empirical material on voting patterns is set out in Alan McRobie, *New Zealand Electoral Atlas* (1989). The leading contemporary legal work is Andrew Geddis, *Electoral Law in New Zealand* (2007).

better, though Raewyn Dalziel provides a sketch of some of the main developments before 1893 and a sense of what an early election was like.[10] The only monograph concentrates on parliamentary elections saying little of significance about municipal arrangements or the relationship between the two levels of government.[11] Specific studies of voting procedures are few and the only paper on the law of the subject is curiously ahistorical confining itself to the late twentieth century.[12] Given the existence of elections from an early date the literature on the electoral process is slight and unsatisfactory. One survey concentrated on the modern law extant at the time the book was published;[13] while another dealt in general terms with the earliest municipal legislation, but little detail is provided on the content of the statutes as they related to the mode of voting.[14] Two municipal histories have noticed that the secret ballot was first introduced in Otago by the *Municipal Corporations Ordinance 1865*,[15] but to date no study has been undertaken to examine how or why this occurred.

III THE BALLOT DEFINED

The ballot of course must be carefully defined. The term is derived from the Italian word 'ballota' which means a small ball.[16] This is a

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[10] Raewyn Dalziel, 'The Politics of Settlement', in Geoffrey W. Rice (ed), *The Oxford History of New Zealand* (1992) 95-97.

[11] Neill Atkinson, *Adventures in Democracy: A History of the Vote in New Zealand* (2003).

[12] Kirk Stephenson, 'Electoral Law: marking of ballot papers', (1983) 13 *Victoria University of Wellington Law Review* 159-169.

[13] A G Harper, 'Basis of Local Authority Elections', in F B Stephens (ed) *Local Government in New Zealand* (1949) 273ff. Passages on the method of recording the vote appear on page 286.

[14] Graham Bush, *Local Government and Politics in New Zealand* (2nd ed, 1995) 3-8.

[15] K C McDonald, *City of Dunedin: A Century of CivicEnterprise* (1965) 87-88; G W A Bush, *Decently and in Order: The Government of the City of Auckland 1840-1971* (1971) 478.

[16] For a case that explores the etymology of the term see *The Maple Valley Case* [1926] 1 DLR 808, 813. The Italian word for a ballot comes originally from an Arabic word for chestnut and acquired an election meaning in the early

reference to the mode of voting adopted in the republics of northern Italy,[17] especially Venice. In a strict sense this mode of voting bears a resemblance to voting by lot known in both Ancient Greece and Rome.[18] The word came into English in this sense in 1549[19] and was used in voting or balloting in private organisations. Thus it was common in nineteenth century New Zealand for elections to be conducted by ballot, i.e. by the casting of balls, to elect the chairman or directors of a private organisation.[20] This method of voting actually survived in New Zealand public life well into the nineteenth century when the allocation of land was conducted by a system of drawing a numbered ball out of a box.[21]

While the ballot was used in public organisations before the

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sixteenth century. See 'Ballottagio' in <http://www.latterealdirettore.iy/forum/testo/topic/6103-1.htm>. I owe this information to my colleague Dr Marinella Marmo.

17 See Arthur M Wolfson, 'The Ballot and Other Forms of Voting in the Italian Communes' (1989) 5 *American Historical Review* 1-21. The best known system was that of Venice where balls were cast into boxes for each candidate: see Frederick C Lane, *Venice: A Maritime Republic* (1973) 258-260. The seventeenth century English political writer James Harrington helped to popularise the term with his writing about the ballot in Venice: see 'The Manner and Use of the Ballot' in J G A Pocock (ed), *The Political Works of James Harrington* (1977) 361-367. See also 'Voting Through the Ages', *Evening Post* (Wellington), 20 December 1928, 26.

18 See Alexander Yacobson, *Elections and Electioneering in Rome* (1999) ch 5; James Headlam, *Election by Lot at Athens* (1933); E S Staveley, *Greek and Roman Voting and Elections* (1972); B A Marshall, '*Libertas Populi*: the Introduction of Secret Ballot at Rome and its Depiction on Coinage' (1997) 31 *Antichthon* 54-73.

19 1 *The Oxford English Dictionary* (2nd ed, 1989), 912, citing an early English book on Venice.

20 'New Zealand Banking Company', *New Zealand Advertiser and Bay of Islands Gazette*, 6 August 1840, 1; 'Nelson Literary and Scientific Association', *Nelson Examiner and New Zealand Chronicle*, 11 June 1842, 55; *New Zealand Colonist and Port Nicholson Advertiser*, 14 October 1842, 2: referring to an election by ballot to the Taranaki Horticultural Society. Unless otherwise stated all newspapers from New Zealand were accessed via the digital newspaper collection: *Papers Past*, National Library of New Zealand <http//:paperspast.natlib.govt.nz/cgi-bin/paperspast>.

21 See 'Balloting for Land', *Otago Witness*, 4 January 1894, 10.

nineteenth century these uses were confined to making decisions within parliament,[22] rather than as a method to constitute the legislature itself. In any case the attempts to introduce the ballot to elect a speaker in England, for instance, largely failed.[23]

In time the term acquired two further meanings. The sense in which it is used here emerged to refer to a voting paper. At the time this was a paper provided by the voter himself on which the name or names of candidates appeared.[24] The third sense of the term refers to a synonym for the holding of a poll or an election. Of course anyone who examines the historical record will quickly realise that the term 'secret ballot', while used in the nineteenth century,[25] was not the primary term used at the time. The expression actually used in the nineteenth century sources was 'the vote by ballot'.

IV THE INSTITUTIONAL SETTING PRIOR TO THE SECRET BALLOT

In order to understand the structure of election law in the nineteenth century the system of government put in place in 1852 must be briefly described. When the British parliament passed the *New Zealand Constitution Act*[26] provision was made for a two tier system of government: provincial and national, with the third tier - local government - to come under the jurisdiction of the provincial

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22 For the failed attempts to introduce the ballot into the House of Commons, see *Journal of the House of Commons* 4, 10 October 1646, 960; *Journal of the House of Commons* 16, 9 December 1710, 429.

23 See 'The History of Voting By Ballot', *Brisbane Courier*, 3 October 1868, 3. Unless otherwise stated all newspapers from Australia were accessed via the digital newspaper collection via Trove portal into the National Library of Australia website. The term ballot was used in eighteenth century American constitutions: Robert J Dinkin, *Voting in Provincial America* (1977) 133ff.

24 See, eg, Proclamation in *New Zealand Government Gazette*, 10 March 1853 clause 45; *Dunedin Town Ordinance 1855* (Otago) s 9.

25 See, eg, New *Zealand Colonist and Port Nicholson Advertiser*, 29 November 1842, 3; *North Otago Times*, 2 August 1866, 2.

26 (15 & 16 Vict c 72) (UK) s 1.

system. The six provinces[27] - later expanded to ten[28] - did not constitute a component in a true federal system though it had federal features. The provinces had a chief executive called the superintendent and an elected unicameral legislature - the provincial council.[29] There was no provincial Attorney General, but instead the chief law officer for the province was designated the Provincial Solicitor. The one element missing was a separate provincial judiciary since it was decided that the Supreme Court of New Zealand would have jurisdiction over both national and provincial matters. Thus one of the restrictions on the Provincial Council was that it could not pass a law to establish or abolish any court of judicature. As a result of this structure there were three potential levels at which institutional change could take place and two legislatures had the competence to introduce electoral changes if they wished. Specifically the Provincial Council was not constrained as to what system of voting it could lay down for local government under its jurisdiction.

V OPEN VOTING METHODS 1842-1865

The creation of a three tier system of government meant that legislation to provide for the election of public offices for each level of government was required.

A *Provincial Elections*

Following the constitution of the provincial legislatures in 1852, the Governor Sir George Grey issued a proclamation the following year

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[27] Ibid s 12: Auckland, New Plymouth, Wellington, Nelson, Canterbury and Otago.

[28] *New Provinces Act 1858* s 1: conferring the authority to create new provinces. Unless otherwise indicated all acts cited are New Zealand Acts. The original text of the national acts is at 'NZ Acts As enacted 1841-2007' on NZLII.

[29] *New Zealand Constitution Act 1852* (15 & 16 Vict c 72) (UK) s 3.

instituting an electoral system for the provinces.[30] The proclamation stipulated an open voting system whereby the elector would submit a write-in ballot, that is, a ballot delivered by the elector to the returning officer on which four pieces of information were written: the name of the person they voted for, their address, their own name and their own address.[31] Since these matters were within the jurisdiction of the General Assembly of New Zealand, as parliament was formally called, the law on the election of provincial superintendents and members of provincial councils followed the methods laid down in the law governing parliamentary elections. In 1858 this meant that the provincial electoral system mirrored the *Regulation of Elections Act 1858* and thus provided for open elections for provincial offices.[32]

B *Municipal Elections*

Before the 1852 constitutional changes the Imperial authorities permitted municipal elections, which were legislated for by national legislation. This was in keeping with the colonial practice of allowing elections to be trialled at the local level first as a way of preparing the local voters for greater responsibilities at the national level, whenever such elections were provided for. The 1842 legislation provided for what Americans would call a write-in ballot. The burgesses, i.e. the electors, would deliver a paper to the returning officer containing the names of the persons for whom he

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30 See the *New Zealand Constitution Act 1852* (15 & 16 Vict c 72) (UK) s 1. See also s 5 where the authority to provide for the details of the electoral system was given to the Governor.

31 Proclamation, 21 May 1852 clause 31 as Enclosure No 1 in Despatch No 66 from Sir George Grey to Sir John Pakington, 27 August 1852 reprinted in *Further Papers Relative to the Affairs of New Zealand* in *BPP* Vol 9, 137.

32 *Provincial Councils Ordinance 1851* s 3, 'Provided always that the mode of election be by open voting....'; *Provincial Elections Act 1858* s 5. Note that the *Provincial Councils Ordinance 1848* created councils by executive appointments and made no provision for elections: *Daily Southern Cross*, 25 December 1847, 3. On the other hand the *Miners' Representation Act 1862* s 7, regulated these elections by reference to the *Regulation of Elections Act 1858*, as did the earlier *Miners' Franchise Act 1860* s 3, also reprinted in full in the *Nelson Examiner and New Zealand Chronicle*, 24 April 1861, 1.

voted signed by the burgess and giving their address.[33] The first such elections were held in Wellington because it was the first settlement that met the statutory requirement of a population of 'upwards of two thousand souls' needed before any elections were permitted.[34] Subsequent instructions for a local electoral system were issued in 1847, being authorised by the Imperial legislation of 1846[35] and continued into the early 1850s by enactment. Voters were to be aged 21 or over, and have freehold possession of property within the districtin which they were to vote of a value of 50 pounds clear of any charges or encumbrances.[36] One of the distinctive features of the qualification required to be a burgess was a negative, that is, they did not have to be able to read and to write the English language.[37]

After 1852 while each province was empowered to legislate for local or municipal matters, most preferred to adopt the open voting system for municipal elections. Initially the election would proceed by assembling the electors and asking for a show of hands in favour of each candidate. However if any candidate or three electors demanded a poll then polling would take place the following day.[38] Municipal voting was held between noon and 4pm and would follow

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33 *Municipal Corporations Ordinance 1842* s 19. See also *Auckland City Council Act 1853* (Auckland) s 17 in Province of Auckland, *Acts and Proceedings of the Auckland Provincial Council,* Session 1, 1853-4.

34 Proclamation by William Hobson, 21 July 1842 reprinted in the *New Zealand Colonist and Port Nicholson Advertiser*, 9 August 1842, 1.

35 *Government of New Zealand Act 1846* (9 & 10 Vict) c 103) (UK) s 2. And the Letters Patent known as the New Zealand Charter reprinted in the *Nelson Examiner and New Zealand Chronicle*, 24 July 1847, 81. The act was then suspended for five years by the *Government of New Zealand Act 1848* (11 & 12 Vict c 5)(UK) s 1. For the background see, N A Foden, *The Constitutional Development of New Zealand in the First Decade (1839-1849)* (1938) ch 12; J Hight and H D Bamford, *The Constitutional History and Law of New Zealand* (1914) ch XIV. The result of the repeal of the 1846 act was to revive the Letters Patent, 16 November 1841 and the Royal Instructions of 5 December 1841 as the legal basis for the system of government in New Zealand.

36 Proclamation in *New Zealand Government Gazette*, 10 March 1854, 5, cl 22.

37 *Municipal Elective Franchise Ordinance 1851* s 1; *Municipal Corporations Ordinance 1844* s 19.

38 See *R v Mollison* [1863] Mac 71, 73 where Justice Richmond describes the process in an election in the district of Waihola for the Provincial Council of Otago.

the open system described above.[39] In practice knowledge of who voted for whom was common because the candidates often published lists of their supporters who had pledged support for them prior to the election and who presumably also voted for them.[40]

C *National Elections*

The first regulations for national elections to the House of Representatives were proclaimed by the Governor, Sir George Grey in March 1853.[41] The proclamation made provision for what it called the' mode of voting' in clause 45. The clause read:[42]

> 'Every elector for the District may vote for any number of persons not exceeding the number of persons then to be chosen, by delivering to the Returning Officer or his Deputy a Voting Paper containing the Christian names and surnames of the persons for whom he votes, together with their place of abode and description, and signed with the name of the Elector so voting, and setting forth his own place of abode and description'.

The regulations made under the proclamation were to operate for a period of five years, i.e. until 1858, unless the General Assembly shall sooner be dissolved.[43] Difficulties with the system emerged almost at once. Abuses included treating, i.e. the provision of food and especially alcohol to voters on election day. This was such a

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[39] See, eg, *Dunedin Town Board Ordinance 1855* (Otago) ss 6-7, 9; *Town Board Act 1862* (Auckland) s 4, in Province of Auckland, *Votes & Proceedings, Session XIV 1862*; *City Board Act 1863* (Auckland) s 11, in Province of Auckland; *Journals of the Auckland Provincial Council, Session XV 1862-63*; *Wellington Town Board Act 1862* (Wellington) s 8, in Province of Wellington, *Acts and Proceedings of the Provincial Council of Wellington Session IX 1862*; *Local Boards Act 1873* (Wellington) s 13, in *Acts of the Provincial Legislature of the Province of Wellington 1853-1873* (1873) 217-218.

[40] A H Reed, *The Story of Dunedin* (1956) 224.

[41] The legislative Council was wholly appointed and the appointments were made for life until the 1890s when their term of appointment was limited to seven years. See W K Jackson, *The New Zealand Legislative Council* (1972) 61-77.

[42] *New Zealand Government Gazette*, 10 March 1853, 9.

[43] *New Zealand Constitution Act 1852* (15 & 16 Vict c 72) (UK) s 40. In fact the first Parliament lasted from May 1854 until September 1855, but the 1853 regulations controlled electoral matters until 1858.

problem that one later observer commented that: 'Bottles, therefore, brought in ballots'.[44]

The first national enactment on the conduct of parliamentary elections was the *Regulation of Elections Act 1858*,[45] which also provided for open balloting, an arrangement that subsisted until the passage of legislation for the secret ballot for general elections in 1870. The 1858 Act mandated an open system of voting using the poll book method. The voter, on appearing before the returning office, would be told the names of the candidates and then asked 'for which of the said candidates he intends to vote'.[46] Once the voter stated their preference the poll clerk would enter the vote in a poll book after which the 'Elector shall affix his signature to the entry'.[47] Illiterate voters were to affix their mark (usually a cross though this was not specified in the legislation) and this was to be witnessed by the poll clerk.

VI PREPARING THE GROUND: DEMAND FOR THE BALLOT 1840-1870

Demand for voting by the secret ballot emerged early as New Zealanders followed, with interest, the debate in England and elsewhere. In part the debate about the ballot was connected with demands for responsible government as a way of ensuring that a locally based administration would be answerable to the local electorate, not a British appointed Governor. Although not all advocates of responsible government were in favour of the vote by ballot, many were and resolutions were passed in public meetings in favour of the ballot as an essential part of the wider reform of the Constitution. In an address by the residents of the colony to the Legislative Council a committee demanded that 'It further appeared incumbent upon the Council to secure to the Colonists the enjoyment

[44] Leslie Lipson, *The Politics of Equality* (1948) 39.
[45] (21 & 22 Vict No 56).
[46] Ibid s 25(2).
[47] Ibid s 25(3).

of the laws of England, that that self-government by means of representatives chosen by the people'.[48] Despite this demand for representative government attempts to secure the ballot failed. In 1841, for example, the passage of a Municipal Corporations bill sparked some debate on the matter, but the proposal was not taken up. In the opinion of one editorialist the arguments in England for the ballot, namely to protect workers from over bearing employers did not apply in 'all new countries, were [sic] labour is scarce, it was the employer rather than the employed who required the protection of the ballot'.[49] The claim that conditions in New Zealand were different from those in England was a common theme in the arguments of ballot opponents who contended that as electoral abuses were fewer in New Zealand than in England there was therefore no need for the ballot at all.[50] Another frequently voiced argument by opponents of the ballot was that it was un-English to sneak about and discharge an important duty, namely to vote, in secret.[51] One reason for the discontent with the existing system of government was that the Legislative Council in the 1840s consisted of only six members, three of whom were appointees, and the other three were officials also appointed by the Governor.[52] This cosy arrangement whereby the Governor appointed all members of the legislature angered several columnists who demanded that the legislature be elected since the present system made the New Zealand colonists little better than slaves.[53] Of course an election need not mean a secret ballot in the 1850s debates, and it was possible to agree on the importance of an elected lower house

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48 *New Zealand Gazette*, 18 April 1840, 2.

49 'Legislative Council, December 29, 1841', *New Zealand Gazette and Wellington Spectator*, 26 January 1842, 3.

50 For a late acknowledgment of this argument by a proponent: see 'The Ballot', *Otago Witness*, 20 February 1869, 1.

51 *Lyttelton Times*, 1 March 1851, 4, where the editor wrote 'A system of secret voting is in itself a very great and glaring evil'. The un-English nature of the ballot was also voiced in Parliaments in the 1850s. For a summary see Alfred Saunders, *History of New Zealand* (1896-99) 359-361.

52 Despatch from Lord John Russell to Governor Hobson, 9 December 1840, cl 2: *Correspondence relating to New Zealand*, reprinted in *BPP*, Vol 3, 147.

53 See 'On the Ordinances of New Zealand', *New Zealand Gazette and Wellington Spectator*, 31 May 1843, 2; 'What are the powers of the Government and the Rights of the People of This Colony?', *Nelson Examiner and New Zealand Chronicle*, 24 August 1844, 97.

without going into the precise manner in which this would be done.

During the public debate on a self-government constitution, a meeting was held in Wellington in February 1851 that passed nineteen resolutions with respect to a future constitution. The thirteenth resolution was amended to provide 'That all voting should be by ballot'.[54] But these demands were largely ignored as the 1852 Constitution left the details of the electoral system to the Governor who was permitted to legislate for these matters by proclamation.[55]

The debate was fuelled by an awareness of Australian developments. Only a few months after the South Australian Ballot Association was formed in 1851 New Zealand readers were informedof the association's campaign for the ballot.[56] The passage of the first secret ballot legislation in Tasmania in 1856 was also well known to the reading public in New Zealand.[57] Likewise the first trial of the ballot in New South Wales was reported in the New Zealand press as a great success.[58]

Parliament did consider the matter seriously in 1858 during the passage of the Regulation of Elections Bill though the members divided sharply on the ballot question. The Government preferred the ballot and argued that the practical benefits were considerable. These included the protection of voters from 'turbulent politicians', as a check against faction and party, as well as the discouragement of corruption. These arguments were supported by the claim that the ballot had worked in clubs and other public institutions.[59] Opponents countered by noting that while the ballot existed in Australia there

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54 'Resolutions Adopted at The Wellington Public Meeting', *Nelson Examiner and New Zealand Chronicle*, 15 February 1851, 1.

55 *New Zealand Constitution Act 1852 (*(15 & 16 Vict c 72) (UK) s 41.

56 'South Australia', *New Zealander*, 15 March 1851, 2; 'Political Movements in Neighbouring Colonies', *Daily Southern Cross*, 22 April 1851, 3.

57 'Tasmania', *Daily Southern Cross*, 15 January 1856, 3.

58 'The Ballot', *Otago Witness*, 2 July 1859, 5.

59 *NZPD*, 8 July 1858, 595.

was little experience of its operation there.[60] After the bill had been introduced a Select Committee on the matter considered the bill along with seven other bills on electoral matters. In the end the Committee recommended against the ballot on the grounds that the ballot would 'produce greater evils than those which it is intended to remedy'.[61] Just what these evils were was not explained. Unsurprisingly when the matter came to the full House the vote to include the ballot in the bill was lost by 14 votes against to 11 votes for the measure.[62]

Despite existence of the open voting system some public organisations chose to resolve internal debates by ballot. In 1862, for example, the Dunedin Town Board resolved a question over building plans by holding a ballot of board members.[63] Meetings outside of the legislatures calling for the ballot were held throughout the period up to 1870.[64] One critic of the open voting system claimed that 'Grog had numerous electors - mad voters for the bottle - and I suspect, in spite of bribery Bills, will have their reign'.[65] In 1859 workmen in Masterton called for the ballot on the grounds that it was 'necessary for the protection of the timid, or those who may be obnoxious to undue influence'.[66] While none of the demands for the secret ballot were met before 1870 the debate shows an awareness of the issue and this partly explains the receptive environment into which the secret ballot was eventually introduced.

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60 Ibid 598.

61 New Zealand, *Report of a Select Committee of the House of Representatives on the Amendment of the Electoral Law*, 3 July 1858, AJHR, 1858, F1, 3.

62 *NZPD*, 8 July 1858, 604.

63 'Town Board', *Otago Witness*, 27 December 1862, 7. See also 'Auckland Provincial Council: Nineteenth Session', *Daily Southern Cross*, 13 December 1865, 5.

64 'The New Constitution-Public Meeting', *Nelson Examiner and New Zealand Chronicle*, 25 December 1852, 175.

65 'Vote by Ballot', *Daily Southern Cross*, 27 July 1855, 3.

66 *Nelson Examiner and New Zealand Chronicle*, 7 December 1859, 3.

VII THE AUSTRALIAN BALLOTS

The three Australian colonial legislatures in Tasmania, Victoria and South Australia to pass electoral acts in 1856 all adopted the same method for marking the ballot, and in so doing instituted the secret ballot in Australasia.[67] The voter was issued with an officially printed paper ballot listing the names of the candidates and instructed to delete the names of candidates they did not wish to vote for, leaving unstruck the name or names of those candidates they did wish to vote for.[68] This strike out mode of voting was also adopted in 1858[69] in New South Wales and applied in the first secret ballot election there in June-July 1859.[70] Similarly, the Queensland electoral act of 1867 also adopted the strike out system of marking the ballot paper.[71]

By general consent the ballot system introduced in South Australia in 1856 worked well in the sense that the 1857 elections were orderly and operated effectively against the dangers of bribery.[72] Despite this the ballot provisions, along with the rest of

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67 But not the first for a Westminster parliamentary system. The first legislation was the Election Act 1855 of New Brunswick: see David Clark, 'The South Australian Ballot in Australia and America 1856-1910' (2009) 11 *Flinders Journal of Law Reform* 293, 297-299.

68 *Electoral Act 1856* (19 Vict No 24) (Tas) s 63 (assented to 7 February 1856); *Election of Members Act* 1856 (19 Vict No 12) (Vic) s 36 (assented to 19 March 1856); *Electoral Act 1856* (19 Vict No 10) (SA) s 29 (assented to 2 April 1856).

69 *Electoral Act 1858* (22 Vict No 20) (NSW) s 43.

70 See, 'Plain Directions for Voting by Ballot', *Sydney Morning Herald*, 9 June 1859, 4e, pt 6.

71 Before 1867 Queensland relied upon the New South Wales Electoral Act 1858. Queensland statutes from the *Elections (Parliamentary) Act* (31 Vict No 37) 1867-68 (Qld) onwards provided for the strike out voting method. See also Acting Governor O'Connell to Earl Kimberley, 24 January 1871, enclosure No 7 in *Papers relative to the Operation of the System of The Ballot in the Colonies* in *BPP Australia*, Vol 26, 20. Western Australia adopted the cross in the square system in 1877 before abandoning it for the strike out system in 1889: see *Municipal Institutions Act 1900* (WA) s 102.

72 John Blackett, *History of South Australia* (1911) 290. See also 'The Ballot in Australia', *The Times* (London), 21 July 1871, 12e, where Henry Strangways,

the *Electoral Act 1856,* did not survive and were repealed in January 1858.[73] There were technical problems with the requirement that voters delete all the names on the ballot they did not wish to vote for. In the first place it favoured the literate who could read all of the names to be struck out, and, of course, it took time to cross out the names. A further complication arose from the fact that most electoral districts for the lower house elected multiple members. Thus electors in the City of Adelaide seat were entitled to elect six members, which meant that the voter had to delete all but six names on the ballot.[74] Another problem with the 1856 legislation was the cumbersome requirement that voters both register to vote and bring proof of registration on election day. Many voters forgot to bring their proof of registration with them and, given the distances to be travelled and the modes of transport at the time, they were unable to return home to get the required proof of registration, and thus they could not vote at all. In his speech opening the session of the new bicameral Parliament in 1857 the Governor noted that the electoral law 'has been found to be cumbrous and costly in its present form…'.[75] One further defect of the cross out system was that many voters mistakenly crossed out the name of the candidate they wished to vote for or even deleted the names of every candidate thereby nullifying their ballot paper.[76]

In 1858 the Attorney-General Richard Davies Hansen asked the Chief Returning officer for South Australia William Boothby[77] to

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a former Premier and Attorney-General of South Australia, wrote: 'The result of the ballot in South Australia has been to put an entire stop to bribery and to cause the elections to be conducted in a most quiet and peaceable manner, and it enables a man to give his vote as he thinks fit, without fear either of his employer or of his fellow-men'.

73 Repealed by the *Electoral Act 1858* (21 Vict No 12) (SA) s 1.

74 See the return of members for the election held in 1857 in *South Australian Government Gazette*, 26 March 1857, 266.

75 South Australia, *Minutes of the Proceedings of the Legislative Council*, No 1, 22 April 1857, 4 Item 12, para 13.

76 *South Australia, Parliamentary Debates*, House of Assembly, 4 August 1857, col 453.

77 William R Boothby (1829-1903) was the Chief Returning Officer for South Australia, i.e. the chief election commissioner in modern parlance, from 1856 to 1903. See J J Pascoe, *History of Adelaide and Its Vicinity* (1901) 303-304;

redraft the electoral act and in the course of so doing Boothby suggested an important change to the ballot provision. Initially he proposed a radical idea: the replacement of the ballot paper and ballot box by a voting machine. This was 34 years before the first trial of a voting machine in upstate New York in 1892.[78] Although a voting machine was built and Boothby demonstrated its use for the South Australia lower house, the Government was concerned that because each machine would cost 10 pounds and 100 would be needed that the scheme was financially unrealistic.[79] Boothby next recommended the replacement of the strike out system with a ballot paper on which a square appeared opposite each candidate's name.[80] The voter then only had to place a cross in the square opposite the candidate of their choice in order to record their vote. The cross in the square method of voting proved to be an influential change retained in a variant form from 1858 to this day in South Australia,[81] and was even adopted after the federation of the Australian colonies by the new Commonwealth Election Act in 1902.[82] The greatest

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Advertiser (Adelaide), 14 July 1903, 4c-d; *Register* (Adelaide), 14 July 1903, 6c-d.

78 See Douglas W Jones, 'Technologists as Political Reformers: Lessons from the Early History of Voting Machines', <http:www.cs.uiowa.edu/-jones/voting/SHOTslides.pdf>. The New Zealand government rejected a voting machine proposal: *NZPD*, 4 November 1914, 864. The first patent for a voting machine was lodges by Thomas Edison in 1869: see 'Voting Through the Ages', *Evening Post* (Wellington), 20 December 1928, 26.

79 For the details: *Melbourne Argus*, 26 January 1858, 6, reprinted in the *Nelson Examiner and New Zealand Chronicle*, 19 March 1858, 3. See also the description of the machine Boothby gave in an interview in *South Australian Register*, 7 February 1893, 6.

80 *Electoral Act 1858* (21 Vic No 12) (SA) s 31. See also the second reading speech on the new electoral bill, *South Australian Parliamentary Debates*, 4 August 1857, col 453 where the cross in the square method was described.

81 See *Electoral Act 1861* (14 & 15 Vict No 20) (SA) s 49; *Electoral Act 1870* (32 Vict No 18) (SA) s 64; *Electoral Act 1879* (42 & 43 Vict No 144) (SA) s 58; *Electoral Code 1896* (59 & 60 Vict No 667) (SA) s 126; *The Electoral Code 1908* (8 Edw VII, No 971) (SA) s 144(a); *Electoral Act 1929* (20 Geo V No 1919) (SA) s 109(1) sch 4; *Electoral Act 1985* (SA) s 76.

82 *Commonwealth Electoral Act 1902* (Cth) ss 150-151. A copy of a sample ballot paper appears in the Act as Form O. See also *Commonwealth Parliamentary Debates (Senate)*, Vol VII, 31 January 1902, 9534 where Senator O'Connor said: 'In the first place we have adopted the form of the ballot-paper which is used in a place from which a great many things come-

impact of the new system took place in the United States where 40 out of 44 states adopted this voting method between 1888 and 1910.[83] But the new system was not without its problems. For one thing as the lists of candidates grew, and since the party affiliation of the candidates was not printed on the ballot paper, unlike in the United States, voters were often unsure as to whom they should vote for.

VIII THE SOUTH AUSTRALIAN BALLOT ARRIVES IN OTAGO

In 1865, Otago was the first jurisdiction outside Australia to adopt a cross in the square method of voting.[84] The circumstances leading to this development arose out of the discovery of gold in central Otago in 1861 by the Tasmanian Gabriel Read, which sparked a huge influx of new migrants, many from Australia, especially Victoria.[85] By the early 1860s Dunedin was governed by a town board, which was dissolved by legislation in April 1865,[86] in preparation for the introduction of a municipal corporation. The ordinance passed through the provincial council with few amendments and none of

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South Australia. We have adopted a ballot-paper with a little square opposite the name of each candidate'.

83 John H Wigmore, *The Australian Ballot System (*2nd ed, 1889); Eldon C Evans, *A History of the Australian Ballot System in the United States* (1917); David Clark, 'Law Reform as a Legal Transplant: The South Australian Ballot in Australia and in America, 1856-1910' (2009) 11 *Flinders Journal of Law Reform* 293-325.

84 *Otago Municipal Corporations Ordinance* 1865 (Otago) s 27 also reprinted in *R v Bagley* [1870] Mac (NZ) 836, 840-841.

85 Aside from prominent Victorian arrivals fully half of the new migrants who arrived in Otago to seek gold came from Australia: see J H M Salmon, *A History of Goldmining in New Zealand* (1963) 61; A H McLintock, *The History of Otago* (1949) 476, 479-480. Keith Sinclair, *A History of New Zealand* (1968) 107 notes that during 1861-3 Otago received 64,000 Australian immigrants compared with 8,600 from Britain. Many of the Australians left after the first winter however.

86 *Dunedin Town Board Dissolution Ordinance 1865* (Otago) s 1.

them dealt with the electoral provisions in the original bill.[87] The resultant *Municipal Corporations Ordinance 1865* was a long and comprehensive piece of legislation running, as one contemporary summary put it, to 122 clauses and was intended to modernise the governance of the city during a period of rapid expansion. The new legislation provided for an elected mayor and four wards with two elected councillors each. Elections for the mayor were annual and one councillor in each ward faced the electorate each year.[88] The first election under the ordinance passed off with little difficulty although it did involve some changes to existing practice. Under the previous open voting system candidates gave long speeches both setting out their policies and as a way of attracting votes. One candidate for the mayoralty was so confused about the newly introduced secret ballot system that he apparently thought that speeches to the electorate were inappropriate under the new system as they were contrary to the spirit of the 'vote by ballot'.[89] Nevertheless the first election by which voters marked their ballot with a cross in the square opposite the name of their chosen candidate went off peacefully although only a third of the electorate chose to vote.[90]

Although the ordinance was passed by the provincial legislature it nevertheless ran into trouble because it was found to be beyond the powers of the provincial council. Under the law the provincial council had limited legislative powers and provincial legislation could be disallowed by the Governor. Although the Governor assented to the ordinance,[91] the Attorney-General advised that the ordinance was invalid because it created a tribunal contrary to statute.[92] In order to rescue the legislation the General Assembly

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87 'Provincial Council', *Otago Witness*, 20 May 1865, 9; Province of Otago, *Votes and Proceedings*, Session XX, 1865, xiii, 84.

88 'City of Dunedin Incorporation', *Otago Witness*, 13 May 1865, 18.

89 'The Mayoralty: The Nomination of the Candidates', *Otago Witness*, 21 July 1865, 15.

90 'The Election of the Mayor', *Otago Daily Times*, 22 July 1865, 4.

91 *New Zealand Gazette*, 11 July 1865, 210. Required by the *New Zealand Constitution Act 1862* (25& 26 Vict c 48) (UK) s 4(4), also reprinted in the *New Zealand Gazette*, 15 November 1862, 323.

92 New Zealand, *Memorandum on the Validity of Provincial Ordinances by the Attorney-General*, in *AJHR* 1871, A7 where the Otago Ordinance was said to

passed the *Otago Municipal Corporations Empowering Act 1865*, which permanently validated the ordinance. One effect of the validating legislation was to preserve the results of the first election held under the ordinance.[93]

IX THE IMPACT OF AN INFLUENTIAL INDIVIDUAL

In fact the South Australian voting method arrived in Otago in 1865 as a result of the influence of a former mayor of Adelaide, John Lazar.[94] Lazar had been the mayor of Adelaide from 1853 to 1858[95] and later a returning officer for parliamentary seat of the City of Adelaide.[96] He also provided information on the ballot system of South Australia for the Ballot Society in England,[97] and gave evidence to a South Australian parliamentary committee on the operation of the 1858 Act.[98] When he moved to Otago in 1863 he

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be contrary to the decision in *Bagge v Sinclair* [1866] 1 NZCA 50. The reference seems to be to the *New Zealand Constitution Act 1852* (15 & 16 Vict c 72) (UK) s 19 (2), which prohibited the Provincial Council from making any law or ordinance for 'The establishment or abolition of any court of judicature of civil or criminal jurisdiction….'. For further background on the case see 'The Late Decision of the Court of Appeal on the Blenheim Improvement Act', *Daily Southern Cross*, 20 August 1867, 3.

93 'Otago Municipal Corporations Empowering Act', *Otago Witness*, 11 November 186, 5.

94 For Lazar's biography, see the Australian Dictionary of Biography (online) <http://www.adb.online.anu.edu.au/biogs/A020084b.htm>. See also his obituary in the *West Coast Times*, 11 June 1879. 2; Hirsch Munz, *Jews in South Australia 1836-1936* (1936) 47-48; L M Goldman, *The History of the Jews in New Zealand* (1958) 96-97; Odeda Rosenthal, *Not Strictly Kosher: Pioneer Jews in New Zealand* (1991) 54; 'Mr John Lazar', in City of Adelaide, *Municipal Year Book for 1920*, 40-42.

95 *The Official Civic Record of South Australia* (1936) 49-50.

96 *South Australian Government Gazette*, 9 April 1857, 306; *South Australian Government Gazette*, 31 July 1862, 632.

97 *South Australian Advertiser*, 18 May 1861, 2.

98 South Australia, *Report of the Select Committee of the House of Assembly appointed to prepare an Amended Electoral Act*, as South Australian Parliamentary Paper No 60 of 1861, 14-18. Lazar thought that it would confuse

became the clerk to the Town Board[99] and later clerk to the city council and was instrumental in drafting the Municipal Corporation Ordinance 1865. The ordinance incorporated the South Australian cross in the square voting method for parliamentary elections in that colony, later extended to municipal elections in South Australia by the *Ballot Act 1862*(SA).[100] Lazar's role in 'drafting and passing the Municipal Corporations Act' [sic] in Otago was specially acknowledged in 1866 when the Corporation granted him a gratuity of 200 pounds in recognition of his service to the city of Dunedin.[101] The other evidence for his influence over the 1865 ordinance is internal to the legislation itself. A direct comparison between the text of the ordinance and the *Municipal Corporations Act 1861* (SA) shows that both had an interpretation section that defined the same terms in exactly the same manner. This is hardly a coincidence and confirms Lazar's impact on the Otago enactment.[102]

Lazar was also the returning officer for elections in Dunedin under the same legislation an appointment reflecting his direct knowledge of the South Australian voting system[103]. After he moved to Hokitika in late 1866 to become the Town Clerk in October,[104] he also became a deputy returning officer for the municipal elections under the laws operating there, even though in the 1860s these mandated open voting.[105] Lazar's knowledge of both municipal administration and experience in electoral matters shows that a key individual can account for a particular institutional transplant. If Lazar had come from Victoria one suspects that the Otago voting method of the cross in the square adopted in 1865 would have been

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the voter to go back to the strike out system of voting as the cross in the square had been used for three elections: at 17, Q 160.

99 'City Commissioners', *Otago Witness*, 29 April 1865, 15.

100 (15 & 16 Vic No 13) (SA) s 7.

101 *Otago Witness*, 21 April 1866, 7. See also *Otago Daily Times*, 12 April 1866, 5 where it was noted that Lazar had guided the Council on many matters.

102 See also *Otago Daily Times*, 21 July 1865, 5 where one councillor stated that he believed that the Ordinance was to a great extent copied from the South Australian Act.

103 *Otago Provincial Government Gazette*, 12 July 1865, 157-158; *Otago Witness*, 21 July 1865, 15; *Otago Witness*, 5 August 1865, 3.

104 He remained in office until 1873.

105 *West Coast Times*, 17 January 1868, 2; *West Coast Times*, 18 January 1868, 3.

different. But the fate of the Lazar innovation depended on wider forces at work in the New Zealand polity and these forces account for the fortunes of the South Australian ballot in New Zealand after 1870.

One indirect effect of the new system was that it gave rise to an important legal case that laid down a principle of election law still followed in New Zealand. *R v Bagley*[106] arose out of a disputed election in Dunedin in August 1870 in which the two candidates for the Bell Ward were separated by only one vote. The loser William Woodland, who secured 210 votes, challenged the winner Benjamin Bagley, who had garnered 211 votes in the election, by way of an information in the nature of a writ of quo warranto.[107] The election was conducted under the *Otago Municipal Corporations Ordinance 1865* and utilised the cross in the square voting system.[108] Nothing in the case turned on the mode of voting however, for the main issue before the court was whether the voting method was directory or mandatory given that the returning officer had rejected as informal two voting papers said to be in Woodland's favour. One of these papers had a straight line in a square opposite Woodland's name, the other had a cross in the square opposite Woodland's name and also a cross, then erased, in the square opposite Bagley's name. If the number of votes were equal there would have to be a fresh election since there was no provision in the ordinance for a casting vote by the returning officer. If both votes were formal then Woodland would be declared the winner of the election.

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[106] [1870] Mac 836.

[107] Quo warranto - by what warrant - was the standard method of challenging the right of a public office holder to their office at the time. The remedy was used in the election cases during this period in New Zealand. See *R v Mollison* [1863] Mac 71; *R ex rel Hutchinson v Charles De VereTeschemake*r (1873) 1 NZ Jur 78; *R v Jones* (1876) 2 NZ Jur (NS) 45; *R v Allen* (1876) 2 NZ Jur (NS) 123; *R v Colclough, ex rel McGinnis* (1883) LR 1 SC 129. All cases from Otago. For the results of the election see the *Otago Witness*, 6 August 1870, 16.

[108] Section 27 of the Ordinance dealing with the mode of voting is reproduced in the law report at 840-841 and summarised by Justice Chapman at 843.

The case was conducted by counsel and heard by a judge all of whom had had Australian experience with the secret ballot. George Burnett Barton, who appeared for Bagley had been admitted to the Middle Temple in 1857[109] and to the New South Wales Bar in 1861.[110] In other words he was present in New South Wales during the passage and first use of the secret ballot by the strike out method of voting in that colony in 1858. Junior counsel for Woodland, James Macassey had trained in South Australia, having been a pupil with Edward Castries Gwynne, later Justice Gwynne, and had been in Adelaide during the passage of and first use of the cross in the square voting method.[111] The case was presided over by Justice Chapman who, after he ceased to be a judge in New Zealand between 1843 and 1852,[112] had commenced a varied career in Australia. After a stint as the Colonial Secretary in Tasmania, he went on to become a member of the Victorian Parliament. While serving as the member for South Bourke, Evelyn and Mornington,[113] he drafted the ballot clauses in the Victorian Electoral Act 1856,[114]

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[109] See 'Barton, George Burnett (1836-1901)' in *Australian Dictionary of Biography* (online) <http://adbonline.anu.edu.au/biogs/A030107b.htm>.

[110] 'The New South Wales Bar 1824-1900: A Chronological Roll' <http://www.nswbar.asn.au/docs/about/history/c19thbarristers.pdf>.

[111] See 'Obituary: The Late Mr James Macassey', *Otago Witness*, 15 May 1880, 12. Gwynne was a member of the Parliament of 1857-8 that passed the electoral acts providing for the strike out then the cross in the square voting system: *The South Australian Government Gazette*, 26 March 1857, 266; see also the entry in <http://adbonline.anu.edu/biogs/A040354b.htm>; Howard Coxon et al, *Biographical Register of the South Australian Parliament 1857-1957* (1985) 91.

[112] See his 'Letter to the Colonial Secretary', 22 February 1875 giving these dates, in New Zealand, *Changes in Distribution of Judges of Supreme Court*, in *AJHR* 1875, Vol II, No H-28, 5, No 16; 'H S Chapman, Esquire (New Zealand)' a paper printed by order of the House of Commons, 17 February 1846 in *BPP*, Vol 5, 446-450 announcing his appointment in 1843. For a modern study see Peter Spiller, *The Chapman Legal Family* (1992).

[113] For his Parliamentary service in Victoria, see the entry on him in Re-member: A Database of all Victorian MPs since 1851 <http://www.parliament.vic.gov.au/re-member/bioregfull.cfm?mid=279>; Kathleen Thomson and Geoffrey Serle, *A Biographical Register of the Victorian Parliament 1859-1900* (1972) 35. The primary evidence is in Victoria, *Election Returns*, as Victorian Parliamentary Paper, No C 52 of 1856-7.

[114] For these clauses see the paper entitled 'Victoria Electoral Bill (Proposed Ballot Clauses)' in the file entitled 'Australian Ballot' MS-Papers-8670-160,

when the then Attorney-General William Stawell refused to do so since Stawell was strongly opposed to the secret ballot.[115] Chapman, in consequence, is in some quarters regarded as the father of the Australian ballot.[116] While this is not strictly true since the first statute to enact a secret ballot mechanism in Australia was passed in Tasmania in January 1856,[117] he did draft the strike out system of voting for Victoria. In April 1864,[118] he was appointed the resident Supreme Court judge for Otago and Southland and served in that capacity until his resignation in 1875.[119]

Initially Justice Chapman leaned in favour of holding that the voting system was essential, but 'on more mature consideration' he held that the object of the Ordinance was to ascertain the voter's

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Alexander Turnbull Library, Wellington. See also F R Chapman, 'Origin of the Australian Ballot' Ms in the Chapman-Eichelbaum-Rosenberg Collection as MS-Papers-8670-249, a handwritten MS of 14 pages, Alexander Turnbull Library, National Library of New Zealand. Also published as 'The True History of the Australian Ballot', *Otago Witness*, 26 January 1893, 46. I wish to thank Professor Peter Spiller and Ben Rosenberg for helping me track down the Chapman Papers to the National Library of New Zealand. Vincent Pyke, another Victorian, who became the Goldfields Commissioner in Otago and was a colleague of Chapman in the Victorian Parliament, confirms Chapman's role in his article: 'True History of the Australian Ballot', *Otago Witness*, 5 January 1893, 33. William Boothby commented on this article in an interview in the *South Australian Register*, 7 February 1893, 6.

[115] J M Bennett, *Sir William Stawell* (2004) 83. There are two other accounts: see John McIntosh, *Sir William Foster Stawell* (1989); Charles Parkinson, *Sir William Stawell and the Victorian Constitution* (2004) 52-54.

[116] For other references see: 'Remembering H S Chapman', *Sydney Morning Herald*, 3 October 1998, 36a; Mark McKenna, *Building a 'closet of prayer' in the New World: the Story of the Australian Ballot* (2002) 28; Marian Sawer, 'Inventing the Nation through the Ballot Box', *Papers on Parliament, No 37: For Peace, Order and Good Government* (2001) 71; Ray Wright, 'A Blended House: The Legislative Council of Victoria, 1851-1856', in Victoria, *Papers presented to Parliament, Session 1999-2001*, Vol 17, No 106, pl 5, 124; R S Neale, 'H S Chapman and The Victorian Ballot', (1967) 12 *Historical Studies* 506-521.

[117] See Terry Newman, 'Tasmania and the Secret Ballot', (2003) 49 *Australian Journal of Politics and History*, 93-101. But as Newman points out, Tasmania may have taken the idea from the Victorian bill, though he provides no source for this claim: at 97.

[118] *The New Zealand Gazette*, 6 April 1864, 138.

[119] *The New Zealand Gazette*, 1 April 1875, 220.

intention. As he put it:

> 'The Ordinance was designed to facilitate, not to obstruct, the recording of every citizen's vote, and therefore it should receive such an interpretation as is favourable to the free exercise of the franchise, having regard to every provision necessary as a security for the certainty of the vote'.[120]

Thus a vote that was free of ambiguity should be accepted though not strictly in the form of a cross. The judge noted other features of the Ordinance that clearly indicated that strict compliance was not an essential condition. Section 27, for instance, required the voter to indicate their Christian name to the returning officer before voting. Justice Chapman asked if this would mean that the election of a Jewish candidate could be questioned because he did not have a Christian name.[121] In his decision the judge preferred the primacy of securing to every citizen 'his right of election'. The judge also held that erasures of a vote mark were clear expressions of a voter's intention in this case.

The decision has been followed in subsequent New Zealand cases where the question was whether there had been compliance with the rules prescribing an election process.[122] The case then decided a major principle of New Zealand election law and has had a continuing influence on election law ever since.

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[120] [1870] Mac 836, 843.

[121] Ibid 844.

[122] See *R v Jones* (1876) 2 NZ Jur (NS) 45, 48 (cited by counsel G B Barton); *R v Allen* (1876) 2 NZ Jur (NS) 123, 125 (cited by counsel James Macassey); *Re Logan and the Otago Waste Lands Board* (1876) 2 NZ Jur 179, 186 (cited by counsel G B Barton); *Simson v MacDonald* (1909) 4 MCR 106, 108; *Lee v Macpherson (No 2*) [1923] NZLR 1307, 1313; *Wybrow v Chief Election Officer* [1980] 1 NZLR 147, 156.

X LIMITING THE REACH OF THE INSTITUTIONAL INNOVATION

Despite the Otago precedent, proposals to consider the ballot in most other municipalities in the 1860s failed. Opponents argued in Hokitika on the West Coast, for example, that there was no legal basis to make the change[123] and successfully moved for successive postponements of the matter.[124] Proponents thought that the open voting system was obsolete and commended voting by ballot as it existed in Victoria, South Australia and in America.[125] These references to a variety of other ballot examples show that the debate in New Zealand was concerned less with the specific mechanics of balloting than with the principle of voting by ballot as such. National legislation was passed in 1867 to allow localities to opt to acquire more powers than the provincial legislatures could create. The legislation was based on the Victorian municipal legislation, and one of its features was an open election system.[126] Thus if Otago had adopted such a measure, which it did not, it would have had to abandon the secret ballot, and would also have lost other powers that existed under the provincial legislation.

After the passage of the Otago measure in 1865 advocates of the ballot, especially from Otago,[127] pressed parliament to consider the matter. The Otago provincial council passed motions in 1867 and 1868 asking that the ballot be adopted in national legislation and the 1867 resolution was published by parliament.[128] More than one

[123] 'Municipal Council', *West Coast Times*, 23 January 1868, 2.

[124] 'The Municipal Corporation', *West Coast Times*, 27 April 1868, 3. It should be noted that there were also supporters of the ballot: *West Coast Times*, 17 January 1868, 2.

[125] 'Hokitika Borough Council Election', *West Coast Times*, 2 October 1868, 2.

[126] 'The Municipal Corporations Act 1867', *Otago Witness*, 27 December 1867, 11.

[127] W H Reynolds from Dunedin led the debate and when, in 1870, the ballot was included in *the Regulation of Elections Act* he was consulted as 'the father of the bill': *NZPD*, 10 August 1870, 429.

[128] Otago, *Votes and Proceedings of the Provincial Council*, 20 April 1868, 20-21; New Zealand, 'Resolutions of the Provincial Council of Otago Relating to

member of Parliament referred to the Otago Municipal Corporation Ordinance as a suitable precedent and commented that 'He knew that the system worked well'.[129] In other instances the Victorian system introduced there in 1856 requiring the voter to strike out the names of candidates on the ballot paper they did not wish to vote for was cited with approval, as it was in 1865,[130] and in detail in 1868 when W H Reynolds of Dunedin set out a proposal that mirrored the Victorian voting system.[131] The Australian system also came in for favourable review in New Zealand reports of the British inquiry into election law (called the Hartington Committee) in 1869, where evidence of the working of the ballot in various Australian colonies, especially in Victoria and in South Australia was explained to readers.[132]

Although the three parliamentary debates on resolutions for the ballot were defeated in 1865, 1867 and 1869,[133] the Legislative Council in 1869 considered an amendment to the Electoral Bill that included the South Australian cross in the square voting method. When the bill was sent up to the Legislative Council in July the clause providing for the voting method was subject to an amendment to provide for the cross in the square system.[134] But that bill was

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Regulation of Elections Act and Duty on Gold', *AJHR*, 1867, A 7; 'Provincial Council', *Otago Witness*, 1 June 1867, 5.

129 *NZPD*, 16 August 1867, 494. See also *NZPD*, 18 July 1867, 122 where Mr Vogel commented that the house had affirmed the Otago model when it passed legislation to authorise the 1865 Ordinance.

130 *NZPD*, 17 August 1865, 317 (Mr Brodie). George Brodie was another Australian immigrant having been a member of the Victorian Parliament from 1859 to 1861: see Re-member: a database of all Victorian MPs since 1851 available, <http://www.parliamewnt.vic.gov.au/remember/bioregfull.cfm?mid=240>.

131 *NZPD*, 2 September 1868, 115; *NZPD*, 11 June 1869, 78.

132 'Australians Testifying to The Ballot', *Grey River Argus*, 9 September 1869, 4.

133 See New Zealand, *Journal of the House of Representatives*, 17 August 1865, 53*; Journal of the House of Representatives*, 18 July 1867, 22 (motion withdrawn); *Journal of the House of Representatives*, 27 August 1868, 91-2 where the vote in favour of the ballot was won 28 votes to 23. The bill however lapsed: see the *Journal of the Legislative Council 1868*, XIX.

134 For the text of the proposed amendment see New Zealand, *Journal of the Legislative Council*, 16 July 1869, 35-36. For advocacy of this proposal in the Legislative Council see Mr Bonar: *NZPD*, 14 July 1869, 466.

withdrawn,[135] and when the matter was taken up in 1870 several models were discussed. As in the earlier debates, several members of Parliament showed an awareness of the South Australian system and again cited the South Australian evidence given to the recent Hartington committee in Britain on election laws,[136] but the Victorian Electoral Act of 1856 was the preferred model. One reason for this was undoubtedly the support in the House for that system by ex-Victorians who had used it before migrating to New Zealand. Several members with such experience cited the Victorian system in their arguments in favour of the ballot.[137] The resultant 1870 legislation was said to have worked well from the outset and the Governor pronounced his satisfaction with the new Victorian inspired method of marking the ballot in his speech opening the first parliament to be elected under the new system.[138] The change made in 1870 was optional in that a secret ballot was not automatic and only applied if there was a call for such a poll in each electorate.[139] It was only in 1890 that the law was changed to make the secret ballot universal.[140]

XI THE MAORI EXCEPTION[141]

Curiously the 1870 Act did not require the secret ballot for Maori voters. Although Maori males had been legally entitled to enrol and vote in the 1850s, since it was the view at the time that the *New*

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[135] See Schedule of Public Bills Introduced into the House of Representatives in the Session of 1869 in New Zealand, *Journal of the House of Representatives 1869*, XXVI.

[136] *NZPD*, 14 July 1870, 414-417.

[137] See, eg, Mr Bonar: *NZPD*, 9 October 1868, 241 and *NZPD* 14 July 1869, 465. Bonar was a member for the West Coast having arrived from Melbourne in 1863. See the entry in the New Zealand Dictionary of Biography (online), <http://www.dnzb.govt.nz/dnzb/>; Mr Graham in *NZPD*, 11 June 1869, 76; Mr Holmes in *NZPD*, 14 July 1870, 415.

[138] *NZPD*, 15 August 1871, 5.

[139] *Regulation of Elections Act 1870* s 22.

[140] *Electoral Acts Amendment Act 1890* s 14. See also J B Ringer, *An Introduction to New Zealand Government* (1991) 143.

[141] See generally W K Jackson and G A Wood, 'The New Zealand Parliament and Maori Representation', (1964) 11 *Historical Studies* 383-396.

Zealand Constitution Act 1852 did not exclude anyone from the franchise on the basis of their race,[142] in practice few Maori qualified for the franchise because the property franchise applied to individually owned property, and since most Maori property was collectively owned they were unable to vote. In 1867 provision was made for four Maori seats and the property rule was removed to allow Maori males to vote.[143] This apparently enlightened measure may have been intended not so much as to guarantee Maori representation, as to isolate Maori voters from the general electorate so that they could not 'swamp' pakeha voters, a recurrent obsession in the nineteenth century.[144] In any case the 1867 act did not require the secret ballot since it was not then the rule in Parliamentary elections, rather as the Act put it rather vaguely voters were to choose by votes.[145] In practice this meant the open voting system, which was retained until 1937, when secret balloting was introduced for Maori.[146] Thus Maori voters would vote orally, usually in their own language via an interpreter, and the vote recorded usually by a pakeha election officer,[147] though there were also Maori deputy returning officers as well.[148] One vivid account of the operation of the pre-1937 law in an election for the seat of Western Maori in 1909 showed that the act was not strictly carried out. For example voting papers were signed, but no names of candidates were entered producing an invalid ballot. In the Watetuna area voting took place on the open road as there was no booth. Even more alarming was the

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142 See the opinion by the Colonial Secretary, E W Stafford, 30 December 1856 in New Zealand, *Correspondence relative tothe Registration of Native Voters*, *AJHR*, 1858 No E 2. See also Herron above n 6, 32-33 for evidence of actual enrolments by Maori. See also the ironically entitled 'Equal Rights for both Races', in *Nelson Advertiser and New Zealand Chronicle*, 27 August 1862, 3 where it was alleged that there was a scheme to swamp the Europeans by enrolling Maori in certain districts.

143 *The Maori Representation Act* 1867 s 5 created the four seats.

144 See, eg, 'Maori Voting', *Bay of Plenty Times*, 18 July 1877, 3; 'The Maori Dual Vote', *Hawke's Bay Herald*, 15 July 1884, 2; 'Enrolment of Maoris', *Poverty Bay Herald*, 9 October 1893, 2; 'Pakeha and Maori: The Question of Native Representation', *Evening Post*, 23 August 1905, 2.

145 *The Maori Representation Act* 1867 s 6.

146 *Electoral Amendment Act 1937* ss 3(4), (5).

147 For a particularly vivid account see 'In a Maori Polling Booth', *Timaru Herald*, 28 December 1893, 4.

148 Such as HeremiaTe Wake for Northern Maori in 1884: see Dictionary of New Zealand Biography (online) <http://www.dnzb.govt.nz/dnzb/Print>.

fact that no notice was given that an election was even being held.[149] Despite these irregularities the court held that compliance with various provisions of the act was not a condition precedent for the validity of the poll and, since the petitioner, Pepene Eketone, could not discharge the onus of showing that the irregularities affected the outcome, the petition was dismissed.[150]

An attempt in 1924 to provide for the secret ballot for Maori and thus bring the voting methods for all under the same system, was unsuccessful, as was a request by Maori leaders in 1925 to remedy the situation.[151] The complaints were not merely about the absence of a secret ballot, for voting irregularities and inefficiencies abounded. Critics noted that in practice the queues to vote were very long - one member of parliament informed the House that in one case 500 Maori were lined up at a single polling place -, no ballot papers were supplied in some instances, all voting was highly public, and in some cases because Maori had both a Maori name and an adopted English name they voted twice.[152] Under the secret ballot system introduced by the 1937 amendment to the Electoral Act Maori were permitted by administrative decision to either strike out the name of those they did not wish to vote for or could put a cross opposite the name of the preferred candidate, as long as the returning officer was satisfied as to the intention of the voter.[153]

[149] 'The Maori Election', *Taranaki Herald*, 12 May 1909, 3; 'Maori Voting', *Poverty Bay Herald*, 12 May 1909, 3.

[150] *In re Western Maori Election Petition* (1909) 28 NZLR 843. Justice Edwards provides a very good summary of the legislation governing voting by Maori between 1867 and 1909: at 847-849.

[151] *NZPD*, 2 December 1937, 888-889.

[152] Ibid 891. See also 'Native Roll Need for Compilation', *Evening Post*, 15 September 1944, 4.

[153] *NZPD*, 2 December 1937, 890.

XII TRANSMUTATION OF THE INNOVATION: VOTING METHODS 1870-2001

The Otago experiment with the South Australian cross in the square voting method was, however, brief and lasted only five years. It was replaced by the strike out mode of voting in 1870 to bring the municipal system of voting in Otago into line with the newly introduced national system, which was based on the Victorian strike out mode of voting.[154] The question of the relationship between national and municipal voting methods was not settled however, and unlike the British who legislated in 1872 for the same mode of voting for both levels of government, New Zealand did not provide for uniformity of voting methods on a consistent basis, and the different voting methods for the two levels of government were to confuse electors for over a century. The problem was that voters sometimes used the voting system in use in local elections in national polls and vice versa.

While there was a general sentiment that local or municipal elections should follow the same voting method as used in parliamentary elections to avoid confusing the voters, in fact the voting method for local elections was changed several times. For much of the nineteenth century the voting method in most local elections followed the parliamentary system of striking out the names of those the elector did not wish to vote for.[155] Despite the drive to uniformity there were situations that echoed the pre-secret ballot era. Thus in 1871 the Otago Provincial Council authorised open voting by a show of hands as a means of holding a poll to elect a roads board.[156] In 1904 the *Local Elections Act* was amended to provide for the cross in the square.[157] The object of the change at the

[154] *Municipal Corporations Amendment Ordinance 1870* s 5, in G B Barton (ed), *The Practical Ordinances of the Province of Otago, New Zealand* (1875) 186. Barton was, of course, the elder brother of Edmund Barton who later became the first Prime Minister of the Commonwealth of Australia.

[155] *Regulation of Local Elections Act 1876* s 32.

[156] *Otago Roads Board Ordinance 1871* s 99.

[157] *Local Elections Act 1904* s 21(1), sch 5.

time was to provide an incentive to amend the law for parliamentary elections to bring it in line with the cross in the square method of voting used in local elections.[158] But this did not happen.

Nevertheless the cross in the square voting method for local elections did persist and was reaffirmed in 1925,[159] but a year later the legislation was amended to provide for the strike out method[160] on the grounds that a uniform voting method for both parliamentary and local elections was desirable.[161] This was in spite of justified complaints about the complexities of the strike out system in local elections. One member of parliament who had been a returning officer for local elections in Auckland pointed out that he had had to hold the ballot paper up to the light to see if the voter had put a mark through a candidate's name.[162] Another complication was that in Auckland at recent local elections there were 44 names on the ballot paper and the elector was obliged to vote for 21 councillors leaving 23 names to be struck out.[163] This complexity necessitated time and considerable powers of concentration on the part of the voter, and was prone to haste and error. In 1941 the local electoral legislation was changed again bringing back the cross in the square where it has remained ever since.[164] The change made in 1941 fully recognised the risks in having two different modes of voting since a voter might use the wrong method at the wrong election and thus invalidate their vote.[165] By 2001 local government authorities were entitled to

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158 *NZPD*, 28 September 1904, 543. See also 'How to Vote' in the *Wanganui Herald*, 22 April 1905, 4, for a lucid account of the new cross in the square voting system.

159 *Local Elections and Polls Act 1925* s 25(1).

160 *Local Elections and Polls Amendment Act 1926,* sch (1).

161 *NZPD*, 25 August 1926, 885.

162 Ibid 886. Not quite a hanging chad al la Florida in the US presidential election of 2000. See the case *Gore v Bush* 531 US 98 (2000).

163 Ibid 885. A problem in local bodies without wards at least until the early 1980s: G G Simpson, 'New Zealand Local Government Elections: Participation and Voting Procedures' (1980) 4 *Auckland University Law Review*, 32, 44. See also *NZPD*, 27 March 1941, 254 for another example from Auckland.

164 *Local Elections and Polls Amendment Act 1941*(No 2) s 4; *Local Elections and Polls Act 1976*.

165 *NZPD*, 25 March 1941, 164.

choose between the first past the post-election system, in which case they were obliged to construct voting papers that provided for the tick in the box; or, if they adopted the single transferable vote electoral system, preferences were to be indicated by numbers.[166]

After the introduction of the secret ballot in 1870 the Victorian strike out mode of voting method of voting was retained for Parliamentary elections until its removal in 1990.[167] At least one inquiry into the electoral system in the twentieth century recommended a shift to the cross in the square voting method for parliamentary elections. In 1979 the Wicks inquiry recommended the cross in the square noting in passing that the 'x' was often used by illiterate persons in place of their signature.[168] The inquiry grew out of the same elections that led to the case of in *Re Hunua Election Petition,*[169] in which one of the questions was whether ballot papers marked with ticks or crosses were valid, given that the prescribed statutory method was still the strike out system. The court decided that the *Electoral Act 1956* required strict compliance with the voting method laid down in the act and invalidated the votes indicated by ticks or crosses.[170] The court did note that the voting

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166 *Local Elections Act 2001* s 75(1)(b)(i).

167 For statutory reiterations of the strike out voting system after 1870 see: *Regulation of Elections Act 1881* s 32; *Electoral Act 1893* s 102; *Electoral Act 1902* s 124(1); *Electoral Act 1905* s 121(1); *Legislature Act 1908*s 130(1); *Electoral Act 1956* s 106(1). The same mode of voting was also used in other elections within New Zealand such as voting at a licensing poll: *Alcoholic Liquors Sale Control Act Amendment Act 1895* s 7(1)(h).

168 New Zealand, *Report of the Committee of Inquiry into the Administration of the ElectoralAct* (1979) 153-156, 179-180. A suggestion first made in New Zealand by Justice Chapman in *R v Bagley* [1870] Mac 836, 843 referring to a cross in a square he added '...as the Legislature may have adopted that as the common mode of signature, and, therefore, of assent, used by unlettered persons...'. In practice such marks were used in an election in Tasmania in 1856. See 'Election by Ballot', *Courier* (Hobart), 14 October 1856, 2.

169 [1979] 1 NZLR 251.

170 Ibid 302, where the court wrote 'The preponderance of the New Zealand cases is against any system of voting by ticks and crosses and by any method other than that authorised by the statute. We think that approach is right and any suggestion that any other method of voting is authorised and acceptable does not find favour with us'. The Court went on to disapprove of the earlier decision in *O'Brien v Seddon* [1926] GLR 141, that had concluded that a cross

system for general elections was different to that used in local elections and commented '...it seems to this Court a pity that the same method of voting could not be used in parliamentary and local elections and thus resolve some of the confusion which may exist and lessen the opportunity for querying the method of voting used in any one election'.[171] The court observed that between 1926 and 1941 the same method of voting was used in both types of elections. Certainly there were earlier cases in which voters used the cross in a parliamentary election, indicating that the two different modes of voting caused confusion in the minds of electors.[172] One reason for the lenient attitude in the early cases towards the mode of marking the ballot in the older cases on parliamentary elections was the realisation that between 1904 and 1926 the cross in the square had been used in municipal elections.[173]

The subsequent decision in *Wybrow v Chief Electoral Officer,*[174] retreated somewhat from the strict compliance test laid down in *Hunua,* and permitted the returning officer greater latitude to allow ballots that, while not in strict compliance with the Act, nevertheless indicated the voter's clear intention. The Court in *Wybrow* followed the decision of Chapman J in *R v Bagley* discussed earlier in this paper.[175]

Despite the retention of the strike out system doubts began to be expressed about the suitability of this mode of voting in later inquiries into the electoral act. The major impetus for change arose out of the Royal Commission on the electoral system, which recommended in December 1986 that New Zealand should adopt the

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beside a candidate's name was acceptable despite the instruction to strike out all names other than the name of the preferred candidate.

171 Ibid 297. The court added '...it does appear that a standard method of voting in all elections is to be preferred as it very much lessens the chances of mistake and subsequent argument': at 298.

172 See *O'Brien v Seddon* [1926] GLR 141, 142; *Hogan v Stewart* [1932] NZLR 714, 720-721.

173 *McAulay v Rushworth* [1929] NZLR 149, 151.

174 [1980] NZLR 147. Followed in *Re Taupo Election Petition* [1982] 2 NZLR 244, 259.

175 [1870] Mac 836.

Canadian method of placing a mark in a circle, rather than a square, though it left the precise details of the ballot paper to the Select Committee on Electoral Law.[176] In 1987 a report responding to the recent Royal Commission on the Electoral System noted that ascertaining the intention of the elector might be made easier by switching from the strike out system, which was a rather negative way of indicating the elector's preference, to a positive indication of their choice by directly marking the name of their preferred candidate by a tick rather than by a cross.[177] In 1990, an amendment to the Electoral Act effected this change[178] and this was re-affirmed three years later. In 1993 an electoral reform bill was introduced that included in clause 173 a tick in the circle method of voting.[179] The focus at the time of the debates on the bill in parliament was on the introduction of a multimember proportional election system. Such remarks as were made about the ballot paper and the voting method endorsed the proposals in the bill without much comment.[180] At the committee stage, clause 173 providing for the mode of voting, was simply agreed to.[181]

The tick in the circle was an adaption of a Canadian innovation first suggested in British Columbia in 1978[182] and partially adopted in the *Canada Elections Act 1985.*[183] The 1985 Canadian act actually provided for a cross in a circle. Historically Canadian electoral acts

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176 New Zealand, *Report of the Royal Commission on the Electoral System: "Towards a Better Democracy"*, December 1986, *AJHR*, 1986-87, Vol IX, H 3, 255.

177 New Zealand, *Report of the Electoral Law Committee*, in *AJHR*, 1987-90, Vol XVII, I 17B, 88-89.

178 Election Amendment Act 1990 s 56.

179 Electoral Reform Bill, in New Zealand, Bills 1993 E.

180 *NZPD*, 3 August 1993, 17097.

181 Ibid 17231.

182 British Columbia, *Royal Commission on Electoral Reform 1978*, Vol III, 180-181. Despite the recommendation a change to a tick or a cross was not made until the *Election Act 1995* s 91(1) (SBC ch 51).

183 RSC Chapter E-2 s 132(1) and Annexe 1 Form 3. See also *Electoral Act 1990*(Ontario) s 34(3); *Lukaszuk v Kibermanis* (2005) 250 DLR (4th) 577, 586 where the Alberta Court of Appeal noted that the electoral act there now requires a cross in a circle.

had adopted the cross in the square mode of voting.[184] The cross in the circle was a modification on the cross in the square first adopted in Canada in 1874,[185] following its adoption in the *Ballot Act 1872* (UK), which in turn took the idea from South Australia.[186] Thus by 1990 New Zealand had adopted a variant on the South Australian ballot originated there in 1858.

XIII CONCLUSION

This paper has shown that the transplantation of the South Australian method of voting by a cross in the square arrived in Otago through the influence of a former South Australian - John Lazar - with expertise in both municipal administration and electoral law. While this idiosyncratic element partly explains the transplant it does not wholly account for it. For one thing the Otago innovation only lasted for five years before being overtaken by national legislation based on the Victorian Electoral Act of 1856, which allowed for the strike out method of voting. There were in fact two transplants and the Victorian model dominated the law on general elections until 1990 in large part because, at least initially, Victorian influence prevailed in the New Zealand parliament of 1870, and also because New Zealand legislators were more concerned to cement the secret ballot into local law than with arguments about the merits of particular voting methods.

After 1870, misgivings arose in the local government arena about the practicality of the strike out system, especially in councils with large numbers of candidates both on the ballot and to be elected. This practical concern led to the re-instatement of the cross in the

[184] See *Election Act 1995* (BC) s 91(1); *Election Act 1980* (Alta) s 97(1); *Electoral Law 1987* (Man) s 98(1); *Election Act 1988* (PEI) s 53(8); *Election Act 1990* (Nfld) s 73(3).

[185] *Dominion Elections Act 1874* (Can) s 45.

[186] See House of Commons, *Report of the Select Committee on Parliamentary and Municipal Elections, 1868*-69, in *BPP: Elections*, Vol 4, XIX. Also known as the Hartington report after the chair the Marquess of Hartington.

square in 1904 and in 1943 for local elections, but both measures were overtaken by a desire to ensure uniform voting methods for both levels of government, and, at least until 1990, it was assumed that the method in use in general elections should always determine the character of the voting method in use in local election laws.

In 1990 a third transplant, the tick in the circle - in practice a local adaption of a Canadian idea, the cross in the circle - was adopted for Parliamentary elections. In fact this transplant was an adaption of the cross in the square ultimately derived from South Australia. As this latest iteration of the voting method shows even a transplantation may be hybridised or domesticated in the transplantation process. Thus later adoptions of a transplanted institution may be based not on the historic original, but an adaption of an adaption. It is also clear from this study that the transplant had different rationales at different times. In the 1860s and 1870s the emphasis was on establishing the principle of secrecy and at that time the mechanics of recording the vote was a second order issue. But by the twentieth century with the principle of the secret ballot well established, attention shifted to the practical arrangements in operating the ballot in the interests of efficiency, and to more reliably ascertain the voter’s intention.

The evidence in this paper shows that a transplant may succeed if the same issue is being discussed for roughly the same reasons in both the originating and the receiving jurisdiction. Thus the question of voting by ballot arose in both the Australian colonies and in New Zealand in the same decade when settlers in both places were seeking to establish responsible government. Such a system required the election of lower houses and thus election practices were central to such debates, even if the particular details were different. It also greatly promoted institutional transplantation that both jurisdictions were English speaking, and in the British Empire, and that there was a significant flow of people and ideas between them.

It is also clear that while the literature has focused on the initial reception, the success and subsequent history of a transplant requires an investigation into the hybridisation of the transplant in the receiving jurisdiction and the shifting basis for the debate. The reasons for adoption may be transmuted in the course of the history of the transplant and a new rationale may emerge. The other point is that all levels of government in the receiving jurisdiction need to be investigated and not merely either the national level alone or a single local instance where the transplant actually permeates the legal system as a whole.