

*Initiative and Referendum: The People's Law* by Geoffrey de Q. Walker (Centre for Independent Studies, 1987) pages i-xii, 1-220 (including index). Price \$16.95 (soft cover). ISBN 0 949769 24x.

The purpose of this monograph is to argue the case for Australia adopting direct legislation as part of its political and constitutional system. Although Professor Walker also defends the procedure of recall, which enables voters to petition for the removal of a public official, he is principally concerned with the connected mechanisms of the initiative and referendum. The initiative gives the ordinary citizen the power to both propose and veto legislation. It 'allows a prescribed number of voters to compel the holding of a binding poll on whether a proposed law of their own choosing should be adopted, or whether a particular law already in force should be repealed' (p. 11). It can be used equally in the case of constitutional amendment, and ordinary legislation.

Unfamiliar though the citizens' initiative is to Australian eyes, there is nothing new about it. As Walker points out, use of the procedure is well established elsewhere in the democratic world. For instance, the constitutional initiative operates in Switzerland, both at federal and canton level, and in 14 of the American states (p. 11). The legislative initiative is used in Italy, Austria, the Swiss cantons, and 23 American states (p. 12).

Direct legislation has an undeniable initial attraction, especially to those, irrespective of their political persuasion, who despair at the domination of democratic politics by rigid party machines and powerful pressure groups. The question is certainly raised of why, in some shape or form, the initiative and referendum should not be introduced into Australia. This question is particularly pertinent at the federal constitutional level, given the poor track record of the existing amendment procedure, set out in s. 128 of the Constitution. The Constitutional Commission has a brief to examine the issue of constitutional amendment, and raises the issue of electors' initiatives in its background paper on the subject.<sup>1</sup> At the time of writing this review, its committee on democratic rights has just recommended that it be made mandatory to hold a referendum on any constitutional amendment proposal for which a petition containing 500,000 signatures can be raised.<sup>2</sup> Previously, the issue of citizens' initiatives had been discussed by the Australian Constitutional Convention. Walker's book is certainly timely.

The author does not, however, rest content with the initial appeal of the idea, but undertakes a thorough examination of the issues involved. He traces the history of direct legislation, and puts it in the context of the centuries old conflict between democracy and various forms of elitism. As well as arguing for the initiative and referendum in principle, he shows how they could be expected to work in practice in Australia and New Zealand. He is especially concerned to meet objections, and devotes a chapter to the task of attempting to refute 'The Case against the Initiative and Referendum' (chapter 3).

One of the main arguments he examines is that the initiative and referendum would undermine the existing Westminster system of government in Australia, that it is inconsistent with the doctrines of parliamentary sovereignty and responsible government, and would subvert the authority of the political parties. Walker roundly dismisses these points. In a true democracy, it is the people, not parliament, that is sovereign, a proposition which he argues is recognized by the federal constitution. Far from being inconsistent with the doctrine of responsible government, the system of initiative and referendum gives people the opportunity of supporting a particular government, despite their finding some aspect of its legislative programme objectionable. Through an appropriate initiative and subsequent referendum, they can specifically vote against the legislation in question, while continuing to support the government. As for the threat to the existing party system, the challenge which the initiative and referendum would pose to entrenched and complacent party machines is only to be welcomed. It would make politicians far more respectful of popular opinion.

A more serious objection or set of objections appears to be that voters are not competent to judge

<sup>1</sup> Australian Constitutional Commission 'Background Paper No. 12: Amending the Constitution', 13-7.

<sup>2</sup> 'Let people demand poll on Constitution, report urges', *Age* (Melbourne) 21 July 1987.

particular legislative proposals. The electorate is liable to be one or more of the following: ignorant, prejudiced, fickle, shortsighted, and open to manipulation by sophisticated media campaigns. In short, it cannot be trusted to use the initiative and referendum system responsibly. Minorities, in particular, could expect to suffer. Take, for instance, a proposal to discontinue Asian immigration, or to reintroduce capital punishment. (Or consider the recently abandoned attempt to criminalize female homosexual conduct in Queensland.) Measures such as these would be carried in some States, if not Australia wide.

Walker argues here that where the initiative and referendum has been in operation, voters have generally behaved responsibly, and minorities have generally been treated fairly. He points out, for instance, that the Californian electorate defeated Proposition 6, which would have banned homosexual teachers from government schools (p. 73). More generally, he concludes that '[t] here appears to be no instance of a national initiative or referendum in a democratic country that has discriminated against a minority' (p. 85). He does concede, however, that there is no guarantee that the initiative and referendum 'can never be used in a tyrannical way', and therefore admits the possibility that special safeguards might be needed, that in order to protect minorities, certain matters might have to be excluded from the ambit of the procedures (p. 86).

This question here, however, is whether it is open to Walker to make this concession. He thinks that opposition to direct legislation masks an elitist fear of populism. But the contrast he endorses between democracy and elitism seems to suggest that any attempt to put constitutional limits on the will of the majority amounts not to a different, and hopefully preferable, form of democracy, but a denial of democracy. The threat to the democratic process posed by an unelected and unrepresentative court interfering with the people's will supposedly in the name of individual and minority rights seems to be far more 'elitist' in nature than that posed by other factors of which Walker is very much aware. These factors include the strength of party discipline, the influence of certain pressure groups, and the deliberate insulation of policy making from popular influence through the creation of governmental authorities (pp. 29-41). It seems that, on the notion of democracy that Walker is committed to, any form of institutionalization of political power is a question of taking political power away from the people. But the problem here is where deinstitutionalization can be anything more than a temporary phenomenon, a question of waiting to see in what forms the deinstitutionalized power crystallizes, what structures it takes. Or to put the point somewhat differently, far from deinstitutionalizing political power (at least, insofar as the process of initiative and referendum is used) — far from putting power back into the hands of the electors — direct legislation merely creates a new set of institutions and organizations. For instance, rather than diminishing the role of powerful pressure groups, direct legislation may serve only to encourage them, and indeed, foster new groups. As for trying to weaken the vice-like grip the major political party machines have on the democratic process, there is no reason why they should not swiftly learn how to dominate the initiative and referendum process, just as they dominate ordinary parliamentary elections.

To pursue these matters further here would, however, be unfair to Walker. He is not attempting to write a comprehensive treatise in liberal democratic theory, and given the wide range of issues covered, it is inevitable that some matters will be glossed over. His book is intended to stimulate further discussion on the question of direct legislation, not to be the last word on the subject, and for that purpose it is admirably suited.

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