Chapter Nine

Direct Democracy and Citizen Law-Making

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My topic this morning is direct democracy. In its modern form this comprises two essential characteristics: (1) the people have the power to initiate a referendum on whether a particular law should be enacted or repealed; and (2) the result of such a referendum is binding on government and parliament.

The debate over direct democracy is part of a wider re-evaluation of constitutional fundamentals that promises to make the 1990s a time of constitutional debate and possible change unparalleled since the 1890s. A number of actual changes have been delivered by the High Court of Australia, and more are likely. The Australian Capital Television Case establishes that the Australian people enjoy a right of political communication and discourse that parliaments are powerless to take away. Justice Toohey of the High Court has proposed that the courts might identify a wider range of protected civil rights, that is, rights that could not be taken away by ordinary legislation.

Many other possible changes to the constitutional order are being canvassed by the federal Government and by such bodies as the Centenary Constitutional Conference, its successor the Constitutional Centenary Foundation, and its rival The Samuel Griffith Society. In addition, the movement for an Australian federal republic is again gathering support and momentum. The prospect of abandoning the monarchical symbolism in government is giving rise to serious debate about the arrangements that would replace it.

Pioneering Democracy

When so many competing ideas are vying for public attention and support, there is much to be said for returning to first principles. The first principle of constitutional doctrine is that the true constitution of a nation is to be found in the temper of its people. Any meaningful debate about constitutional issues in Australia must start by acknowledging that nowhere has the democratic spirit flowed more strongly than in this country. We were among the first to introduce universal manhood suffrage, well before Great Britain and the United States. We were among the first countries to introduce the vote for women. We pioneered the secret ballot, and indeed in America it is so strongly associated with this country that Americans still call it the "Australian ballot". Our Senate was from the outset directly elected by the people, whereas its American equivalent at that time was not, and the Canadian Senate still is not. The British upper house, of course, is entirely unelected. Our federal Constitution was among the first national constitutions to be adopted by a direct referendum of the people. The American Constitution was adopted by a constitutional convention, and the Canadian, New Zealand and British Constitutions have never been submitted to the people at all. In 1992, when Canadians were for the first time given the opportunity of expressing their views at a referendum on a package of 69 different amendments to their Constitution, they sent a resounding message to Ottawa that they were dissatisfied with the current process of constitutional change by political elites.

As the Clerk of the Senate, Mr Harry Evans, has pointed out, most of the radical constitutional reforms being sought in Canada, Great Britain and New Zealand are already in place in Australia. One Canadian law professor recently described Australia's federal Constitution as a

"people's Constitution", as opposed to the "governments' Constitution" that exists in his country. The formula for amending the Constitution (in our case s.128) answers, he argues, the fundamental question of where sovereignty lies.

Australians have much to be proud of in this connection, and indeed, in the early part of the century, political science textbooks the world over treated the Australians as being second only to the Swiss as innovators of practical democratic reforms. Democracy is natural in this country. Just as in some other countries there is an instinctive habit of deference, in Australia there was seen to be an instinctive habit of democracy.

Yet that central characteristic is almost unrecognized in Australian constitutional debate today. One even hears prominent people such as Mr Hawke declaring that our democratic institutions were inherited from Britain. From Britain we certainly did inherit the traditions of liberty and the rule of law, and they are priceless indeed. But the Westminster constitution, which took its basic form in 1689, was designed mainly as a check on Royal power. It was never intended to be a democratic system of government. It later became one, but only grudgingly, incompletely, and well after Australia and other countries had led the way.

Although that Australian democratic spirit is still there, and at least as strong as in 1901, it has since then almost ceased to find any outlet in proposals for reform of Australian constitutional structures. Most of the changes advocated in recent years are elitist in inspiration, resting on the premise that the problems of representative democracy stem from the restraints imposed by constitutional checks and balances and by the pressures of almost constant electioneering. One of the main elitist solutions offered is therefore to lengthen the parliamentary term. The now defunct Constitutional Commission strongly advocated this solution in its 1988 report.

Another is to propose removing the few remaining checks and balances on the near-absolute power of the Premier or Prime Minister, for example by curtailing the powers of upper houses. The Constitutional Commission advocated that expedient too. Other proposals of this kind rest on the argument that the solution is to give incentives that will induce "better" people to enter Parliament: higher salaries, increased resources, larger support staffs and the like.

Not all these ideas are necessarily bad, but they do form part of a broad elitist approach to constitutional development.

In the past few years, however, a movement has developed which follows in a straight line from the great democratic mainstream I referred to earlier. This movement argues that the remedy for the failings of our representative democracy is not less democracy, but more.

Democratic Solutions

The democratic proposed solutions to our problems broadly envisage wider use of the ballot box through the mechanisms of direct legislation by the people. This system was first introduced at the national level in Switzerland in 1874 and was later adopted in 26 of the American States. Since the 1970s it has also been used with great success in Italy. In Canada it is widely employed at the local government level.

The case of Italy is significant, because here is a country which, ever since the late Middle Ages, has been regarded as a political and economic basket case. Its fortunes started to change dramatically in the 1970s, though, when the Italian people began to activate a provision that had been inserted in their 1945 Constitution, and which allowed 500,000 citizens by petition to require a referendum on whether an existing law should be retained or repealed. It was first used to challenge Italy's new divorce law, and the pundits confidently predicted that such was the Vatican's influence over voters' minds that they would overwhelmingly reject it. Instead, they upheld the new law by a large majority. That taught the Italian people something important about themselves but, more importantly, it took hold of an issue that could have been highly divisive in Italian society and resolved it once and for all in accordance with the wishes of the majority, not

of any particular group. Also during the 1970s, direct legislation was used to modify (though not repeal) Italy's abortion law, and to uphold some anti-terrorist statutes. The availability of direct democracy lowered the entire operating temperature of Italian politics, and set the stage for an economic boom that has given Italians a higher standard of living than the British and, on some readings, than Australians.

But even those successes are minor when compared with those achieved more recently. Last year a citizen petition signed by 1.1 per cent of the voters required certain provisions of Italy's electoral laws to be submitted to a referendum. These provisions had made it possible for the Mafia and other corrupt groups to manipulate the electoral process and debase the whole fabric of government.

Some politicians adopted a policy of ignoring, then denigrating, belittling, then opposing and misrepresenting the referendum issue. Nevertheless, the Italian people turned out to vote in near-record numbers. There was not a region in Italy that registered less than 91 per cent in favour of repealing the law in question, and the average was 94.6 per cent for the reform initiative. Through direct democracy, the citizens had achieved a breakthrough in an area that politicians had avoided for a generation.

The ensuing judicial enquiries led to a wave of resignations from the Italian parliament. There was a striking correlation between the names of those who had opposed the citizen initiative measure and those of members resigning from parliament because of corruption disclosures.

A complete political, economic and social revolution has been brought about in Italy in an unprecedentedly peaceful manner and in a way completely in accordance with the wishes of the Italian people.

Direct democracy through the initiative and referendum system has been publicly advocated in Australia since the 1890s. It was one of the main objectives of the Australian Labor Party and remained so, at least nominally, until 1963. Between 1914 and 1919 a number of bills for the introduction of the system were introduced by the Queensland ALP government, but were delayed in the then upper house and eventually abandoned. After World War I, the ALP lost interest in the idea and it remained forgotten until the late 1970s, when the Democrats in the Senate began introducing a series of bills for a constitutional amendment to provide for the system.

Classifications and Rationales

There are two main forms of direct legislation. The first is the legislative petition referendum, or "people's veto". This allows a specified number of voters (usually between 2 and 5 per cent) to petition for a referendum on a bill that has passed through Parliament in the normal way but has not yet taken effect. When a petition signed by the prescribed number of voters is presented to the Government, the statute's operation is suspended until the voters have had the opportunity to approve or reject it in a binding referendum. In Switzerland this mechanism also extends to the ratification of treaties. This type of voters' veto has not been seriously advocated in Australia because of the political resistance to the idea of suspending the effective date of legislation.

The other form is the legislative initiative, which permits a prescribed number of voters to compel in the same way 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. This terminology is slightly confusing because the initiative obviously involves the holding of a referendum in the ordinary sense of the word, while the legislative petition referendum incorporates an element of citizen initiative, in the sense that the petition is launched by voters of their own motion.

The initiative may also be used to propose amendments to the Constitution; in this case it is called the "constitutional initiative". This was the particular form supported by the Centenary Constitutional Conference.

The arguments for and against direct democracy I have canvassed in my 1987 book Initiative and Referendum The People's Law (Centre for Independent Studies, Sydney, 1987). They are summarized succinctly by Brian Beedham in The Economist of September 11, 1993.

As to its advantages, time does not permit me to list them this morning, but the main ones could perhaps be summarized. First, enormous benefits have been found to accompany the introduction of the direct legislation system. It gives back to the people the real power to determine the laws under which they live, a power that is rightly theirs but has been usurped by party machines and by pressure groups. Initiative and referendum force politicians to take more notice of the values and opinions of the people, because unpopular legislation rammed through Parliament can be promptly overturned by the people. As time goes on, resort to the referendum petition becomes less and less necessary as parliaments gradually learn that lesson. Again, controversial issues can be taken out of the hands of extremists and dealt with in accordance with the usually more moderate views of the majority, as in Italy in recent years.

Initiative and referendum are immune to the arts of electoral geometry and the other techniques used by parties to reduce the influence of the people over the legislative process. They do not eliminate political parties or lobby groups; nor should they, for these bodies have a part to play. But they do force pressure groups to persuade rather than dictate. They do check the tendency of parties to make laws that are contrary to the wishes or beliefs of the people. They also allow the people to distinguish between policies and personalities, so that they no longer need to turn out of office a government of which they basically approve, simply because they object to one of its legislative policies. This, incidentally, is also a great advantage from the point of view of elected politicians, because it increases their security of tenure. Conversely, politicians can say "no" to minority pressure groups agitating for extreme legislative solutions, while pointing out that if they really believe they have popular support, they can launch a petition drive.

Direct legislation gives the people an incentive to take an interest in public issues and so makes the best use of their talents and experience. It is sometimes said that the Australian people are politically apathetic and ignorant. On particular issues, people may well be ill-informed, and many are certainly apathetic. But that is itself a result of the present system. As modern economics has shown, information is not costless. To become well-informed or active on a particular issue takes time and effort. At present citizens have no incentive to seek full information on any particular issue, because they know that when the next election comes, they will be confronted with the same political cartel offering a choice only between two, or at the most three, inseverable packages of personalities and policies. The voter's opinion on any current issue, no matter how well informed and thoroughly reasoned it may be, will have no effect on legislation, which is the product of party policy and the activities of pressure groups.

The system of direct legislation, on the other hand, calls on the voter to express a considered opinion that will automatically count in the law-making process. This gives the voter an incentive for independent and considered thought. Most people behave responsibly when responsibility is placed upon them. As Thomas Jefferson said, men in whom others believe come at length to believe in themselves; men on whom others depend are in the main dependable. In these times of upheaval and radical change, society and government need the benefit of all the new ideas, new methods, new store-houses of personal initiative and energy that are available. The simplest way, and indeed the only way, to tap those reserves is to ask for them, by allowing direct individual participation in law-making.

Above all, direct legislation tackles the root cause of much of our constitutional and political malaise, which is fear. I do not believe that most politicians behave the way they do because of megalomania. Their subterfuges, prevarications, dealmaking, tampering with the rules and so on stem, not from a lust for power, but from a fear of what the other side will do if it comes to power. Under present constitutional arrangements and doctrines, a government that wins an election is virtually given dictatorial power for the next three or four years. In that time there is little or nothing to stop it from using its parliamentary majority to destroy society's most precious institutions or trample on its most cherished values. Those who adhere to AV Dicey's theory of parliamentary sovereignty would assert that an Act of Parliament requiring that all blue-eyed babies be killed would be a valid statute with the force of law.

Direct legislation changes all this. A government that used its temporary majority to enact outrageous statutes would find itself facing referendum ballots on them. It is interesting in this context to notice the incidence and success rate of referendum petitions (the "people's veto" type) over time. In Switzerland (and the American experience is similar), when the petition referendum was first introduced, about 12 per cent of all statutes were challenged. Of these, a high proportion was rejected by the people over 60 per cent in Switzerland and around 90 per cent in some American States. These results are the best possible proof of the need for the petition referendum, for they make it quite clear that representative assemblies do not always represent the voters. But between 1950 and 1974, the proportion of acts challenged fell to 4 per cent. In California no people's veto referendum qualified for the ballot between 1942 and 1982. The main reason for this decline seems to be greater voter satisfaction with the output of legislative assemblies.

Parliamentarians in states where the referendum is available have become more respectful towards public opinion. They have learned to give more thought and care to legislative proposals, and to avoid passing any bill that is vehemently opposed by a substantial portion of the population. In Switzerland, the referendum in fact accomplished a political revolution. This single institution led to the development of what has come to be called "consensus democracy", in which the ranks of the government are opened to members of the opposition parties by a proportional allocation of Cabinet positions. This is the basis for the extraordinary stability of Swiss Governments and the long tenure of elected representatives in that country. But even apart from that, direct legislation takes some of the life-or-death character out of parliamentary elections, because the winning party no longer gains near-absolute power. It dispels the climate of fear that surrounds party rivalry and reduces the incentive or pressure to engage in unscrupulous or arbitrary behaviour.

The Case against: Does it Fit the Facts?

When one considers the arguments against direct citizen legislation, one is first of all struck by the way in which the same arguments have been put forward again and again each time another state or country moves to adopt the system. No systematic regard is had by critics to experience since 1874. The points raised today by opponents are identical to those put forward by the Swiss opposition in the 1860s, with the exception that in those days it was possible to raise the objection, no longer available today, that if direct legislation was such a great democratic advance, how was it that it had never been introduced in the United States, which was the birthplace of modern democratic practice?

Again, time does not permit me to canvass all the counter-arguments in detail (in any case I have done so in the book cited earlier), but some of the main ones should be mentioned.

It is sometimes objected that direct voter participation in the law-making process is inconsistent with the supremacy of the Westminster-style Parliament, and especially with the theory of parliamentary sovereignty elaborated by AV Dicey in his 1885 classic Introduction to the Study

of the Law of the Constitution. Today, Dicey's extreme and absolutist formulation of the supremacy theory, which was and is unsupported by any binding authority, is being increasingly criticized by academic writers and by some judges. But in any case, the argument overlooks the fact that Dicey himself was a life-long advocate of the Swiss referendum system. Along with other British constitutional luminaries such as Lord Balfour, Sir William Anson and Viscount Bryce, he strongly advocated adoption of certain forms of direct legislation in Great Britain.

A simpler variant of this argument is the general proposition that initiative and referendum are "inconsistent with the Westminster system". But if Australia had been content passively to follow the Westminster system, we would not have adopted universal manhood suffrage or the vote for women when we did, because in both these important matters we were well ahead of Westminster; we would not have pioneered the secret ballot, and we would have unelected upper houses consisting of Dukes, Earls and life peers; we would not have made the extensive use of referendums that has long been a distinguishing feature of our political life; nor would we have introduced proportional representation, universally acknowledged as the fairest method of parliamentary representation, into the Senate; nor, for that matter, would we have written Constitutions at all. Indeed, experience suggests that if we adopt the direct legislation system, Westminster might well follow us.

It is sometimes said that direct legislation could never work in this country because Australians always vote "no" in referendums. Of course a "no" vote is a decision, not a failure of the referendum process, but the assertion is in any event a misconception. If we look at the record of State referendums held since Federation, we find that two-thirds have been carried. At the federal level, it is true that of the 42 proposals for alteration of the Commonwealth Constitution that have been put to referendum, only 8 have been approved. But all of the rejected measures were calculated to increase the power of the Commonwealth executive, judicial, or legislative government. Now one can agree or disagree with the voters' position on this, but to say that people do not want to give more power to Canberra is not the same thing as saying that they always vote "no" in referendums. Further, the 1967 referendum reforming the Constitution in relation to the position of Aborigines attracted a "yes" vote of 90.8 per cent, one of the highest affirmative referendum votes ever recorded in a democracy. In 1977, of the four amendments simultaneously put to the voters, three were carried by majorities averaging 3 to 1. Further, the electors displayed no tendency to vote "yes" or "no" on the four measures en bloc, but showed a clear propensity to differentiate between them. This is striking in itself, as all political parties had campaigned for a "yes" vote on all four questions.

Fears that direct democracy would install a tyranny of the majority have been shown by experience to be unfounded. Quite apart from direct legislation, it is difficult to think of a single historical example of a democracy operating under the majority rule principle that could generally be characterized as a tyranny. But there have been innumerable tyrannies by absolute rulers and oligarchies. One can think of cases where democratic governments have performed a particular act or acts that we might describe as tyrannical, but a striking feature of these is that they are almost invariably done immediately after an election, and sometimes after an election campaign in which the winning party has specifically denied any intention of doing the act in question. So the winning party is acknowledging that democracy is not favourable to tyranny: the government can act tyrannically only when it knows there is a long time until the next election.

Specifically in relation to direct legislation, there does not appear to be a single recorded instance in which the initiative and referendum have been used in any State or country to enact legislation oppressing minority groups, to effect massive and uncompensated expropriations of property, to dissolve or persecute trade unions or to do any of the other extreme acts predicted by opponents. Nor is there any observable tendency for voters to support measures that give selfish short-term

benefits. In fact, they have proved far more responsible than politicians, whose main preoccupation, after all, is re-election. California's famous Proposition 13 in 1978 put an end to the rapid escalation of property taxes in that State, which had trebled in 5 years and led to a revenue surplus of US$7.5 billion, but more extreme tax reduction measures were later rejected by the voters as unpractical. The same pattern appears in other American States and other countries. For example, in 1985 Italian voters rejected an indexation measure that would have given many people higher wages in the short term, but at the expense of longer-term dislocations such as we have experienced in Australia. In 1993 the Swiss voted to increase their petrol tax.

Studies of voting behaviour in direct legislation ballots show that people's values and convictions remain politically middle-of-the-road and do not consistently favour either the left or the right. A 1984 study of initiative and referendum ballots in the United States over the previous eight years found a nearly identical number of initiatives sponsored by the left (79) and the right (74). There was an almost identical voter approval rate for both sides: 44 per cent for the left and 45 per cent for the right. Of a third category of 46 initiatives that could not be classified as left or right, exactly half were approved by the voters. Overall, it was found that the more moderate and reasonable the approach of the initiative measure, the more likely it was to succeed at the polls, whether the subject matter were nuclear waste disposal, tax reductions, business regulation or anything else.

Contrarily to the fears of opponents, people cannot be manipulated by costly advertising or biased media coverage used in the period before the ballot. No researcher has ever been able to find any correlation between advertising outlays and the chances of an initiative succeeding at the polls. At one time there did seem to be a correlation between spending against a measure and its chances of being defeated, but in recent years even that connection has weakened as heavy campaign spending has tended to become an issue in itself. This brings us to the fundamental insight, or re-discovery, of direct legislation practice, namely, that the people are not stupid. They are perfectly capable of noticing a one-sided and obviously costly advertising campaign, and immediately tend to ask where the money came from. So heavy advertising expenditure tends to rebound on those who use it. Conversely, some successful initiatives that have relied on voluntary canvassing have been able to succeed at the polls with very little expense. One successful California environmental initiative involved a total expenditure by proponents of only $9,000, while the opponents of a marijuana legalization initiative were able to defeat it with the expenditure of only $5,000, a mere fraction of the expenditure in favour of the measure.

Similarly, the influence of media comment has been greatly exaggerated. One study of over 1,000 actual ballot papers in Los Angeles found no-one marked a ballot paper in accordance with the recommendations of the Los Angeles Times. Again, the almost unanimous media condemnation of Proposition 13 was to no avail.

Naturally there are costs involved in all this, but there are structural and procedural ways of minimizing them. One of the most expensive parts of the process is the checking of thousands of petition signatures for genuineness, absence of duplication and voter qualifications. This item can be made more manageable if recognized sampling techniques are permitted, as in California, where some 8 per cent of signatures are actually checked. The costs of the ballot itself can be reduced by synchronizing referendum ballots with general elections, as is commonly the case in the American States. At each biennial election in California there is an average of 2.7 citizen measures on the ballot paper.

A marked departure from the long-time average occurred in 1988, however, when California electors were invited to vote on 12 citizen measures not 29, as Laurie Oakes stated in The Bulletin of 26 July, 1994 (the other 17 questions were government measures proposing minor amendments to the State Constitution or seeking approval for bond issues). The larger than usual

number of questions led some observers to resuscitate the old "ballot clutter" objection to direct democracy, predicting that large numbers of voters would be discouraged from voting on the ballot propositions. No such problems materialized, nor, contrarily to Mr Oakes' report, did "three-quarters of Californian voters interviewed in a survey on the State's referendum system believe[d] it had got out of hand". On the contrary, 73 per cent still supported the initiative process. A similar majority did, however, support the procedural change of requiring the Secretary of State (Chief Secretary) to review initiatives for conformity to existing law and clarity of language before they are circulated by proponents. And supporters of the initiative process still outnumbered its opponents by 10 to 1 (Initiative and Referendum: The Power of the People, Spring 1989, Winter 1989). The procedural suggestions mentioned have already been taken on board by those formulating the outlines for possible Australian direct legislation systems.

In 1989, the number of California citizen initiatives dropped to more normal levels, which suggested that the 1988 phenomenon was a short term one, perhaps a reaction to conspicuously poor performance by government and legislature.

Any form of democracy always seems at first glance to be more cumbersome and costly than a less democratic option, but that is true only in the short run. The more democratic a State or country is, the less likely it is to be plagued by build-ups of resentment, sullen defiance or passive resistance. These undercurrents bring heavy costs of their own, either by exploding violently, by requiring heavy enforcement expenditure or simply by undermining the will to engage in productive activity. It is no coincidence that democratic societies have higher living standards than undemocratic ones. The Swiss, who make freer use of direct legislation than anyone else, and whose referendum costs are inflated by the need to print everything in three languages, have seen their nation change from being the most poverty-stricken and strife-torn country in Western Europe in 1874 to being the world's most prosperous and stable nation today. I have already mentioned the Italian economic miracle that has taken place almost unnoticed since the 1970s. There is of course more than one factor at work there, but the role of initiative and referendum in creating a more stable political climate cannot be denied.

The misgivings that attended its introduction in other countries have been seen to be unfounded. Dire predictions of demagoguery and mob rule have proved utterly without foundation; and indeed, direct legislation has made such phenomena less likely. After all, who has ever heard of a Swiss demagogue? The people turn to demagogues and their quack remedies only when they are frightened, confused and desperate, when they feel there is no other way they can reassert control over the direction of the state and over their lives.

As public dissatisfaction with the Australian political scene has certainly not decreased in recent times, support for direct democracy has quietly followed. It is growing both among members of our Parliaments and among the people. I have found quite consistently in my conversations with people of all kinds over recent years that as soon as they learn that such a system exists, and has previously worked successfully for over a century overseas, they become quite indignant that no-one has previously brought it to their attention, and demand to know what can be done to introduce it here.

The result of this growing support is that in every State of the Commonwealth and in the Australian Capital Territory there are, or recently have been, draft direct democracy bills in existence or in preparation.

A factor that may add intellectual impetus to moves for direct democracy is the growing understanding of public opinion and the way in which people reach judgments on public affairs. An influential book by Daniel Yankelovich, Coming to Public Judgment (Syracuse University Press, 1991), noting a growing gulf, indeed an adversary relation, between expert policy making

and public opinion, has identified a basic misunderstanding of public opinion and of the way in which it develops and becomes public judgment. Public opinion, he argues, improves in quality as it moves from snap opinion to public judgment, as people hear the other side of the argument and become aware of the consequences of their preliminary opinions. Views arrived at in this way are stable and responsible, though not always in harmony with elite views.

That public opinion should follow this path from initial impression to considered judgment should not surprise us such a progression underlies the jury system, and indeed the whole of the system of justice in courts. For that matter, it is the assumption that underlies the process of parliamentary debate. Nevertheless, the failure to distinguish between the stages through which opinion develops, and the preoccupation of the media with quick polls that identify mainly snap opinions, has led to a view that public opinion is fickle and irresponsible. Studies such as Yankelovich's are challenging that view and thereby strengthening the case for direct democracy.

Current Australian Examples

Most of the current direct democracy bills in Australia are private members' bills with uncertain prospects of passage in the short term, though they could become harder to ignore as time goes on. Among them is the set of two bills introduced in the House of Representatives by Mr Ted Mack MHR, independent Member for North Sydney, and seconded by the ALP's Hon. Frank Walker MHR.

There are also some significant bills in State and Territory legislatures. (For a comprehensive analysis of Australian bills on this subject, see Peter Reith MHR, Direct Democracy: The Way Ahead, Canberra, 1994.)

Australian Capital Territory

The Liberal Opposition in the Australian Capital Territory plans to introduce a CIR bill in the Territory's Legislative Assembly, partly in order to pre-empt a private member's bill which an independent member has tabled. The Liberal bill has not yet been printed so it is not available for study, but it has good prospects of being enacted as Australia's first direct democracy Act. In general terms it is said to be similar to the Tasmanian measure, which we may now briefly look at.

Tasmania

The Tasmanian bill is interesting, not because it is particularly comprehensive, but because it came close to being enacted and may yet be. Direct legislation is a matter of steady political debate in Tasmania, and the local media, especially the press, take it seriously and are generally supportive. The movement gained a substantial boost when Burnie Municipal Council adopted its own system, which requires a petition bearing 500 ratepayers' signatures and a deposit of $500. The mechanism is not provided for in the Local Government Act, and therefore has no legally binding force, but the Council treats the results of the referendum as conclusive. Several referendums have already been held, one on the subject of saving a small park in the municipality, another concerning the establishment of a pulp mill. Polling takes place over a period of a week, and the Council sent a mobile polling booth into the more remote parts of the quite large municipality.

The bill provides essentially for a system under which citizens could seek the repeal of any legislation except appropriation or tax Acts. The trigger is 18,000 electors (about 5 per cent of the enrolled voters), of whom 20 per cent or more must be enrolled in each of three House of Assembly electorates. Petitioners have 12 months to collect the signatures, and the chief electoral officer is under an obligation to make reasonable inquiry as to the genuineness and validity of signatures. Sampling techniques may be used for this purpose. The petition may seek the repeal of more than one enactment. The referendum is to be held on the same day as the next election, if such election is due within twelve months, otherwise a special date may be set.

The chief electoral officer is required to circulate a summary of the arguments for and against. But, in an appalling provision inserted at the insistence of the Greens, all other citizens were originally to be prohibited from publishing or circulating any arguments for or against once the date of the referendum was notified. This clause was removed from a later version of the bill and might now be unconstitutional in light of the High Court's decision in the Australian Capital Television Case.

The bill then proceeds in clause 33 to state the effect of the referendum results. Again at the insistence of the Greens, the bill originally required a double majority a majority of voters and a majority of voters in a majority of electorates, a provision unknown in any other country where direct legislation is in use for ordinary legislation. It is notable that in all Australian States, even constitutional amendment referendums are determined by a simple majority of voters in the State. The proponents removed this provision from the later version of the bill and returned to a simple majority requirement.

Constitutional Theory for a Free People

Modest though the Tasmanian bill is, it is difficult to exaggerate the legal and constitutional consequences that would flow from the enactment of this or similar measures. It would change the entire constitutional order of the country by showing that it is possible in Australia to move away from the servile constitutional doctrines that have stifled our democratic tradition and helped to distance the Parliaments from the people.

The old Diceyan theory of parliamentary omnipotence would be finally banished. Similarly the old theory of the British constitution according to which all power flowed from the Crown, not from the people. It was the duty of the citizens (or rather "subjects") to submit to the Crown, and not vice versa. With the advent of de facto republicanism under the Australia Acts 1986 and the clear possibility of de jure republicanism within the decade, that could be a dangerous theory, in that it might tend to give an additional element of spurious legitimacy to the already extreme concentration of power in the hands of Premier or Prime Minister.

With the enactment of any direct democracy legislation in Australia, however, we would begin to move towards the democratic doctrine of delegation, under which the institutions of government are conceptualized as agents or delegates of the people. That would be nothing less, on the theoretical plane, than a democratic revolution.