

LIDEWIJ OOSTERHOFF

VOTE FOR JUSTICE:

**Should New Zealand Consider Binding Citizen-Initiated
Referenda on Law and Order Policy?**

LLM RESEARCH PAPER

**LAWS 539: CONTEMPORARY ISSUES IN SENTENCING AND
PENOLOGY**

FACULTY OF LAW



2015

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Abstract

This paper examines the origins, benefits and pitfalls of the Citizen Initiated Referenda Act 1993, focusing on the non-binding justice-based referendum question put to the public in 1999. Citizen Initiated Referenda find their roots within the ideas of public participation in government, or direct democracy. This paper examines the philosophical and political theories – both in favour and against direct democracy – in order to canvas opinions relating to political participation. This is used as a basis to assess whether New Zealand should consider holding binding referenda on criminal justice related issues.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7,482 words.

Subjects and Topics

Citizen Initiated Referenda Act 1993

1999 Justice-Related Citizen Initiated Referendum Question

Public Participation in Government

Direct Democracy

I INTRODUCTION

Since the Citizens Initiated Referenda Act 1993 was introduced, New Zealanders have had the opportunity to pose political questions that meet certain prerequisites to the enrolled public. The long title of the Act states that it provides:¹

... for the holding, on specific questions, of citizens initiated referenda, the results of which referenda will indicate the views held by the people of New Zealand on specific questions but will not be binding on the New Zealand Government.

This paper will look at the history of the Citizen Initiated Referenda (CIR) in New Zealand, focusing specifically on the justice-based CIR question posed to the public in 1999.

New Zealand is the only country in the world to have indicative rather than binding CIR built into statute.² This paper will examine the non-binding nature and the other characteristics of the justice-based question to assess how effective it was.

CIR allow for public participation in government. The concept, known broadly as direct democracy, allows for varying levels of citizen participation in how the State is ruled. In contrast, a representative democracy transfers the citizens' power to a representative, who rules on their behalf.³ In order to understand the origins of political thought and the reasoning for and against varying levels of political participation, this paper will note the views of a small selection of influential philosophers and political theorists.

¹ Citizen Initiated Referenda Act 1993, long title.

² John Parkinson "Who Knows Best? The Creation of the Citizen Initiated Referendum in New Zealand" (2001) 36:3 Government and Opposition at 412-3.

³ Richard Ekins "The Value of Representative Democracy" in Claire Charters and Dean R Knight (eds) *We the People(s), Participation in Government* (Victoria University Press, Wellington, 2011) at 29.

Using this analysis, the paper will assess whether CIR are a tool of political participation that should be used more widely to determine public opinion on law and order issues; including the possibility of giving the results more weight by making them binding. The paper concludes that CIR should not be binding in New Zealand, especially on issues regarding the criminal justice system. The consequences of allowing binding CIR in this area have the potential to limit another person's liberty. Instead, public participation should continue to be encouraged on a smaller scale, for example, through local council and select committee hearings.

II CITIZENS INITIATED REFERENDA IN NEW ZEALAND

A The Citizens Initiated Referenda Act 1993

The Citizens Initiated Referenda Act 1993 ("the Act") was introduced during a period of considerable reform in New Zealand, a period that saw the country move away from its traditionally welfare-based social and economic programmes of governance towards a more neo-liberal model.⁴

In the lead-up to the 1990 election, unemployment levels were rising and political discontent was high. The National Party capitalised on this with an election promise "to enact a law which would allow referenda on questions of the public's choosing".⁵

The National Party won the election, and as promised, in February 1994 the Act came into force.⁶ It specified that if at least 10 per cent of enrolled voters sign a petition within 12 months in favour of a referendum about a particular issue, the Government must hold a referendum on that issue within the next year.⁷

⁴ John Pratt and Marie Clark "Penal Populism in New Zealand" (2005) 7 Punishment Soc at 309.

⁵ Julia Caldwell "The People's Veto put to Popular Vote: a Call for Binding Citizens' Initiated Referendums in New Zealand" (LLM Research Paper, Victoria University of Wellington, 2010) at 8.

⁶ Citizens Initiated Referenda Act, s 1(2).

⁷ Caldwell, above n 5, at 10.

In the lead-up to its introduction, the Minister of Justice emphasised that the Act aimed to increase public participation in decision-making to ensure the will of the people prevails over that of their elected representatives, thus providing for a responsive government and reduced political disillusionment.⁸

Since it was introduced, the Act has been criticised for only being of an advisory, rather than a binding, nature. The reasons given at the time for its non-binding nature were twofold: to avoid serious issues such as foreign policy being decided by the public; and to prevent tyranny of the majority.⁹

The drafting of the Act has also been criticised for not requiring that the questions are worded in a politically neutral way. In other jurisdictions that do allow for binding CIR – such as Switzerland – the legislation stipulates that the final wording of the CIR question is to be carried out by a politically neutral body with no imminent bias.¹⁰

In New Zealand, the Clerk of the House oversees the question's wording. However, they only have very limited influence in this area. The promoter or instigating individual or group always has the final say on the wording of the petition and the referendum question. Political Scientist Benjamin Goschik states “this illustrates vividly that the Clerk has little power to translate the already sparse criteria of the CIR into practice”¹¹.

⁸ Benjamin Goschik “You’re the Voice – Try and Understand it: Some Practical Problems of the Citizens Initiated Referenda Act” (LLM Research Paper, Victoria University of Wellington, 2002) at 10-11.

⁹ John Parkinson “Who Knows Best? The Creation of the Citizen Initiated Referendum in New Zealand” (2001) 36:3 Government and Opposition 403 at 413.

¹⁰ Goschik, above n 8, at 30.

¹¹ At 32.

B Norm Withers and the 1999 Justice-Based Referendum Question

In the last quarter of the twentieth century, the New Zealand public became more focused on imprisonment as a form of criminal punishment. This was reflected in the penal population, which increased by 75 per cent between 1985 and 1999.¹² This was accompanied by an increasing trend towards neo-liberalism, especially during the latter part of the 1990s, and a pervading sense of anxiety, fear and tension, especially prevalent in the area of crime and victimisation. This provided a perfect ‘breeding-ground’ for a CIR on justice-based issues.¹³

In 1997, Christchurch shopkeeper Norm Withers’ mother was subjected to a random and violent attack for which the perpetrator – who was on parole for aggravated robbery at the time and had 56 previous convictions – was sentenced to 10 years’ imprisonment.¹⁴ Mr Withers did not consider this sentence severe enough and this galvanised him into action, submitting a petition question to the Clerk of the House in October 1997.¹⁵ The following CIR question was put to the public vote alongside the 1999 general election:¹⁶

Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

Although the question was widely criticised by academics for a number of reasons (as discussed below), almost 92 per cent of voters answered ‘yes’, with a total turnout of slightly over 84 per cent of all enrolled voters.¹⁷

¹² Pratt and Clark, above n 4, at 304

¹³ At 310.

¹⁴ Stephen Church “Crime and Punishment: The Referenda to Reform the Criminal Justice System and Reduce the Size of Parliament” in *Left Turn: the New Zealand General Election of 1999* (Victoria University Press, Wellington, 2000).

¹⁵ At 192.

¹⁶ At 184.

¹⁷ At 195.

C Criticism of the Justice CIR Question

The question's wording was widely criticised because in essence it included at least three separate questions with only one possible 'yes' or 'no' answer. Goschzik suggests that "even if voters found it difficult to agree with all aspects of the question, it was equally difficult to disagree with every aspect"¹⁸. The question was also long-winded, no information was provided to voters prior to voting, it contained vague and undefined terms¹⁹ and potentially breached international obligations by demanding 'hard labour'.²⁰

III COMMENTARY ON PUBLIC PARTICIPATION IN JUSTICE

A Direct Democracy, Representative Democracy and CIR

The idea of direct democracy is that it shifts, to varying degrees, the power of the legislature from the elected representatives onto society; thereby involving them in the making of public policy decisions.²¹ Binding CIR are a vital instrument within a direct democracy model of governance.²²

Before discussing *direct democracy*, it is also important to note that the meaning of the single word *democracy* is widely debated. The word finds its origins in ancient Greek and means rule by the *demos*. The *demos* can be translated as 'the people' or 'the mob'. This makes defining democracy slightly complex because it can mean rule by the people or by the mob.²³ Plato, who was openly critical of democracy, defined it as rule of the mob, or the "rabble, the vulgar, the unwashed"²⁴.

¹⁸ Goschzik, above n 8, at 38.

¹⁹ At 38

²⁰ At 47.

²¹ Mark Gobbi "The Quest for Legitimacy: a Comparative Constitutional Study of the Origin and Role of Direct Democracy in Switzerland, California, and New Zealand" (LLM thesis at Victoria University, Wellington, 1994) at 10.

²² At 10.

²³ Jonathan Wolff, *An Introduction to Political Philosophy* (Clays Printing Limited, Oxford, 1996).

²⁴ At 73.

A very common definition of democracy is *the government of the people, by the people, for the people*, a quote largely attributed to a speech made by Abraham Lincoln at the Soldiers' National Cemetery in Gettysburg during the American Civil War. However, it is believed the phrase is a lot older and was in fact first cited in 1384 by John Wycliffe while he was preparing one of the first English translations of the Bible.²⁵ Scholars continue to debate what democracy actually means and what it looks like, this is useful to note but outside the ambit of this essay.

This essay uses the contrasting theories of direct and representative democracy as a framework to discuss the benefits and pitfalls of binding CIR. In order to do this, a number of political theories on public participation in the State are placed within either a direct or a representative framework.

1 Direct Democracy

Direct democracy maintains that the elected representative in positions of public power are bound by the instructions of their constituents; these representatives are merely in governmental positions as administrators and it should be the citizens who should have the final say on what the State does.²⁶

There are no State systems that are currently conducted in a purely direct manner.²⁷ But in its purest form the concept dictates that the government allows each of its citizens – by way of referenda or otherwise – to partake in the construction of major laws and policies, including the decision on whether these are implemented or not.²⁸

CIR are considered one of the key mechanisms and a practical instrument of direct democracy.²⁹

²⁵ Daniel Hannan “150 Years Ago Today, Abraham Lincoln praised ‘Government Of the People, By the People, For the People’ – But the Words Were Not His”, (19 November 2013) The Telegraph Blogs <www.blogs.thetelegraph.co.uk>

²⁶ Craig Joseph Press “The Case for Binding Citizens Initiated Referenda in New Zealand” (MPP, Victoria University of Wellington, 2000) at 5.

²⁷ At 71.

²⁸ Wolff, above n 23.

²⁹ Goschzik, above n 8, at 5.

2 *Representative Democracy*

Representative democracy is on the other end of the political participation continuum to direct democracy. It maintains that the individuals who hold positions of public responsibility are in these positions for a reason. Therefore, elected representatives need to be free to act in ways that they deem fit, using their own judgement. Proponents of representative democracy believe that allowing citizens the opportunity to initiate and vote in a referendum undermines this freedom and judgement.³⁰

B Main Arguments in Favour of Direct Democracy

The degree to which citizens should be able to participate in government continues to be debated both in New Zealand and overseas. Proponents of direct democracy have cited the need for a good, open and responsive system of government controlled in essence by the populace.³¹

Other arguments in favour of direct democracy are that it is developmental because the State exists only if people realise their own potential; it is educative; it protects freedom because citizens gain control over their lives and environments through participation; it is instrumental because it allows citizens without power to challenge those with power; and it is realistic because no one can govern without consent.³²

In the New Zealand context, it has been argued a certain level of direct democracy can be beneficial as a means to restore legitimacy to the holders of public power through eliminating some of the problems associated with representative democracy.³³ This is especially relevant for the current electoral system, whereby the voting public chooses a party to represent their interests, rather than an individual.³⁴

³⁰ Press, above n 26, at 5.

³¹ Nancy Roberts “Public Participation in an Age of Direct Citizen Participation” (2004) *State and Local Government Review* 315.

³² At 323-324.

³³ Gobbi, above n 8, at 352.

³⁴ Press, above n 26, at 6.

Those who advocate for making New Zealand's political system more direct believe that while the public may be apathetic at the moment, this apathy and diffidence is due to a lack of opportunities to be involved with political decisions. The more citizens are involved with the political process, the more interested they will become in it.³⁵

Below is a short overview of the reasoning of some of the most influential philosophers whose governance models allow for varying degrees of direct democracy.

1 Rousseau

French philosopher and political commentator Jean Jacques Rousseau (1712 – 1778) is probably the most renowned proponent of direct democracy. In the lead up to the French Revolution, Rousseau wrote *On the Social Contract* in which he described what he believed to be the perfect political regime. He proposed a political order that ensured the autonomy and protection of each citizen – a free society of equals³⁶ – and strongly criticised the idea of a representative democracy:³⁷

The people of England regard itself as free but it is grossly mistaken; it is free only during the election of members of parliament. As soon as they are elected slavery overtakes it, and it is nothing. The use it makes of the short moments of liberty it enjoys shows indeed that it deserves to lose them.

Rousseau was adamant that for a just society to exist, it must be based on the principles of freedom and equality.³⁸ The political order must find a way to protect each individual interest while still uniting itself and allowing each member to obey themselves and remain free.

³⁵ Press, above n 26, at 9.

³⁶ Joshua Cohen "Rousseau: A Free Community of Equals" (May 2010) Oxford Scholarship Online <www.oxfordscholarship.com>.

³⁷ Jean-Jacques Rousseau *On the Social Contract* (Drover Thrift Editions, edited by Drew Silver, Drover Thrift Publications, New York, 2003) at Book II, Chapter 5, 266.

³⁸ Wolff, above n 23.

Rousseau envisioned a political community where each member regards the others as equal, and thereby possessed exactly the same powers when it comes to establishing laws.³⁹ This included recognising each individual as equally subject to the law and drafting this law in a manner that would achieve *the common good*.⁴⁰ Rousseau proposed to make the will of the people supreme, “through a direct democracy, whose citizens regularly assemble to reaffirm their social bonds and decide on the fundamental laws best suited to advancing their common good”⁴¹.

Rousseau’s political model is the closest to what would be regarded as pure direct democracy. He was adamant that every citizen must play an equal role in public decision making and have an equal hand in the creation of legislation. Yet his analysis of how exactly this utopian State will function is more complex. Rousseau explained that although administrator roles will exist, these people only administer the laws they do not create them. Laws are not made in parliament but rather in popular assemblies of all citizens; “each man, in giving his vote, states his opinion on that point; and the general will is found by counting votes”⁴².

Rousseau was convinced that once people were brought together to debate and discuss potential laws and policies, the people would no longer think only of their own self-interest but of the welfare of the citizens as a whole. Then through this physical unity, people will begin to disregard their individual goals in favour of the wider needs of the State.⁴³ So, put very simply, through this unity, ideas would also unify and therefore all citizens would want to work towards the same aim, the *common good*.⁴⁴

It can only be assumed Rousseau would have advocated for the widespread use of a CIR-like model for all major legislation and policy decision, including those on law and order. However, in a purely practical sense, in the twenty-first century (or even in the eighteenth, when Rousseau was writing) it is hard to imagine how all citizens of a country or region or even town could be enticed to assemble at the same time. Apart from the practical constraints, this idea also seems difficult when one takes into account the sheer volume of people and wide public apathy.

³⁹ Cohen, above n 36.

⁴⁰ Cohen, above n 36.

⁴¹ Cohen, above n 36.

⁴² Rousseau, above n 37, at 278.

⁴³ Wolff, n 23, at 88.

⁴⁴ Rousseau, above n 27, at 225.

It is interesting to note Rousseau himself did not even envision his political model as effective. He concluded that people are not equal enough for his utopian model of the State, “were there a people of god, their government would be democratic. So perfect a government is not for men”.⁴⁵

It seems Rousseau’s own conclusion is very fitting here, although a society where everyone is free and equal theoretically sounds very admirable – as does the idea of direct democracy in its purest form – the reality is this is not tenable. Firstly, in a practical sense it would be nearly impossible to gather all citizens together and secondly, people’s decision-making abilities or capacity to pass judgement on specialised topic areas are not inherently equal.

Although, it is slightly different from Rousseau’s model, one need only look at the numerous attempts to enforce communism in the past century to see how difficult, if not impossible, it is to enforce equality.

These difficulties are probably most evident in Rousseau’s own description of the utopian society. To ensure every citizen is *free*, Rousseau suggests banning atheism and all intolerant religions; obliging all citizens to affirm the civil religion and introducing a public censor to enforce public and customary morality.⁴⁶

2 *The Democratic Theory of Law*

This Theory, also sometimes known as the Populist Theory of Law, is originally attributed to Edmund Burke (1729 – 1797) and has had a number of followers since then.⁴⁷ The Theorists view the law as a dependent variable and that the “custom and the national qualities of the governed, and not the will of the government are the makers of law”⁴⁸. This Theory would seem to suggest in favour for holding binding CIR to determine, and then enact the will of the governed.

⁴⁵ Rousseau, above n 37, at 240.

⁴⁶ Wolff, above n 23.

⁴⁷ Geoffrey de Q. Walker *The Rule of Law: Foundations of Constitutional Democracy* (Melbourne University Press, Melbourne, 1988) at 361.

⁴⁸ At 361.

The Theorists regard the mental aspect of law as extremely important, the public must consent or partake in the making of laws, for if “law is imposed against the will of the people ... it is not law at all but power, force and suppression”⁴⁹. Therefore, holding non-binding or indicative CIR would go against the Theorists’ reasoning because if the CIR results are not implemented then the government is consciously imposing *power, force and suppression*.

3 John Stuart Mill

Like Rousseau, British utilitarian philosopher and civil servant John Stuart Mill (1806 – 1873) believed a just society should be based on the concept of liberty. He expressed that individual freedom should be the paramount concern within a community and each member of society should be “absolutely independent and sovereign”⁵⁰.

Mill argued that for a stable society to flourish the State has no right to limit freedom of speech or the private actions of individuals, and that those individuals must be protected from the tyranny of the ruling class.⁵¹ It would seem Mill would approve of using binding CIR or at least some form of CIR to help the individual inform the ruling class of what is important to them.

However, Mill strongly disagreed with Rousseau’s conclusion that when people gather together to debate laws, they will disregard their self-interest and the *common good* – that aligns with the general interests of all of the citizens – will emerge. This assumption, Mill states, is wrong.⁵² It is ridiculous to consider the people as one homogenous mass, with similar goals, interests and plans. It is therefore important a more tempered model of direct democracy is adopted that looks not to enforce this *common good* because it does not exist. Rather the State must attempt to enforce laws that bring about the most happiness, freedom, wealth and justice.⁵³

⁴⁹ de Q. Walker, at 361.

⁵⁰ Joseph Hamburger *John Stuart Mill on Liberty and Control* (Princeton University Press, New Jersey, 2001) at 7.

⁵¹ Clark W. Bouton “John Stuart Mill: On Liberty and History” (1965) *Political Research Quarterly* 18:569 at

⁵² Wolff, above n 23, at 70.

⁵³ At 70.

Both Rousseau and Mill emphasised that democracy should be led by the people and it must be the citizens, not the State administrators, who decide what laws and policies to enact. But unlike Rousseau, Mill concedes that in certain circumstances, the law can be enforced against a person's will:⁵⁴

The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

Mill believed the State should be guided by the will of the people in so far as it brings about the most freedom, wealth and justice, and when it does not harm other people. When the 1999 justice-based referendum question is analysed in respect of this brief summary of Mill's theory, it suggests Mill would not have insisted that the question's results be binding. Mill does not directly define what *harm* the State is justified in preventing against others. However, it is suggested that the will of the people in requiring hard labour in today's social setting would be inflicting the type of harm that citizens have the right to be protected from by the State. In other words, while having the duty to protect its citizen's liberty, the State also has a duty to protect them from undue harm.

Mill was also very concerned about protecting the majority from imposing their interests on the minority; this idea of the 'tyranny of the majority' is cited by Mill and interestingly, is often also cited by opponents of direct democracy as a consequence of it and more importantly as a consequence of allowing for binding CIR.

⁵⁴John Stuart Mill *On Liberty* (edited by Alan S Kahan, Bedford Publishing, Boston, 2008) at 135.

C Main arguments in favour of Representative Democracy

Many of history's most influential political theorists and philosophers have been openly critical, or even outright hostile, of the idea of direct democracy.⁵⁵

Those who argue the political system should be based on a representative model believe the public is too ill-informed, too apathetic and too punitive. Therefore it would be inefficient to involve them in policy making, for example through the use of binding CIR. In its purest form, those who advocate for representative democracy, advocate against direct democracy and for the purposes of this essay it shall be looked at this way.

Other arguments against direct democracy are that it is based on a false notion because the common person is not rational and self-motivating; it would be too expensive, slow and cumbersome; it is politically naive; it is unrealistic because most citizens are uninterested in political participation; and it could heighten political conflict.⁵⁶

The following analysis looks at a number of influential figures whose political theories are more in line with a representative democracy and therefore are less likely to advocate in favour of binding CIR, especially on complex issues such as law and order.

1 Plato

Greek philosopher Plato (circa. 400 BC) is well known as an early proponent of a more representative style of governance that he referred to as a *meritocracy*, where those of merit rule on behalf of the rest of the citizens.⁵⁷

⁵⁵ Thom Brooks *Hegel's Political Philosophy: A Systematic Reading of the Philosophy Of Right* (2nd ed, Edinburgh University Press, 2013) at 114.

⁵⁶ Roberts, above n 31, at 324 – 326.

⁵⁷ Wolff, above n 19.

In *The Republic* Plato suggested the “greatest penalty is to be ruled by an inferior”⁵⁸ and that it is the duty of the virtuous and superior members of society – ‘the guardians of the city’ – to take office and govern the other citizens, ‘the artisans’ and ‘auxiliaries’.⁵⁹ Plato explains that from a young age, children must be observed by the guardians to establish who among them will become rulers and who will be ruled. He stressed this selection will not be based on a hereditary basis but on one of merit; people that are “intelligent and capable, and moreover, careful of the city”⁶⁰ will be chosen to rule.

Plato viewed ruling as a craft and a skill possessed only by a select few and therefore the success of the State should be judged not on how well it allows its citizens to participate but on how well it achieves desirable consequences.⁶¹ In short, binding CIR do not fit within Plato’s view at all.

2 Immanuel Kant

Although German philosopher Immanuel Kant (1724 – 1804) started at a similar point to Rousseau, namely that every person is a free and autonomous subject, yet he concluded that “man becomes an autonomous subject in a double sense: he is free – and, he is also the legal subject, subjected to the law”⁶². This creates a dichotomy: Kant viewed *reason* as the driving force on which a State should be based, yet within this he stressed that the State should be the supreme power and its authority and reason cannot be questioned by the citizens.⁶³

Reason’s authority is logically unquestionable and questioning the law’s authority is prohibited. The Origin of the Supreme Power is practically inscrutable by the People who are placed under its authority.

From this it can be concluded that Kant would not advocate for binding CIR that could restrict and question the actions and power of the State, let alone allowing citizens to question and amend the criminal law.

⁵⁸ Roberts, above n 31, at 23.

⁵⁹ At 23.

⁶⁰ At 92.

⁶¹ Wolff, above n 19 at 84.

⁶² Costa Douzinas and Adam Gearey *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing, Oregon, 2005).

⁶³ At 125.

3 *Georg Hegel*

German philosopher Georg W. F. Hegel (1770 – 1831) argued that it would be irresponsible to allow citizens without sufficient knowledge to exercise responsibility over public decision making.⁶⁴ His model for selecting public administrators closely reflects Plato's:⁶⁵

... potential ministers are formally educated on state affairs, as well as ethics, and they are rigorously tested. Their education is thought to best allow for their dispassionateness, integrity, and polite behaviour to flourish. A pool of qualified candidates are [sic] drawn up based upon evidential proof of their abilities.

However, Hegel argued – contrary to Plato – that the State must still be responsive to the public and a government cannot be just without the favour of the people;⁶⁶ the people must always be in agreement with how the experts make the laws and regulations.⁶⁷ It seems Hegel would not advocate for binding CIR but contrary to Plato, one could imagine he would find favour for advisory referenda, or some other mechanism that allows the State to gauge public opinion.

4 *Frederich Nietzsche*

German philosopher and academic Frederic Nietzsche (1844 – 1900) advocated for the aggrandisement of humanity and pushed against the concepts of direct democracy prevalent in Europe at the time of his writing.⁶⁸

In his book *The Antichrist*, Nietzsche compared the law to religion, arguing the law is something sacred and “that law is synonymous with a culture defined through values held in place by religious faith”⁶⁹.

⁶⁴ Douzinas and Gearey, above n 63, at 122.

⁶⁵ At 122.

⁶⁶ At 123.

⁶⁷ At 127.

⁶⁸ Jordan Douglas Kokot “Nietzsche and Governance: Meritocracy, Democracy, Agonal Oligarchy” (MA Dissertation, Boston University, 2013).

⁶⁹ Douzinas and Gearey, above 63 at 53.

Nietzsche strongly rejected the concept that democracy should simply be achieved by a government “which takes into account the needs, values, opinions and status of each of its citizens in a roughly equal manner”⁷⁰. Instead – similar to Plato – he argued for a society where the worth and opinion of the mediocre masses is sacrificed for the value and ruling abilities of the exceptional few.⁷¹

He suggested that the goal of the State is not to treat its citizens as equals but rather to maximise the *good* – the common good that all of mankind should be striving towards. He even implied the majority of the population only exists in order to promote the good of the special few.⁷²

Like Rousseau, Nietzsche suggested the State must try to achieve the *common good*, yet their method of doing so could not be more dissimilar.

By describing law as something divine, Nietzsche makes this an area that is untouchable except by the chosen few and therefore would not allow this sacred concept to be meddled with through taking the views of the *mediocre masses* as binding on the State.

⁷⁰ Douzinas and Gearey, above 63, at 4.

⁷¹ At 8.

⁷² Will Kymlicka “Rawls on Technology and Deontology” in Will Kymlicka (ed) *Justice in Political Philosophy: Volume I* (Edward Elgar Publishing Limited, Vermont, 1992) at 103.

5 *John Finnis*

Contemporary Australian legal scholar and philosopher John Finnis (1940 –) argues authority and governance are essential, urgent and practical necessities in public affairs.⁷³ He argues that encouraging direct democracy, by granting members of society the chance to consent or dissent from how government is conducted, is not favourable. Instead public power should ensure the:⁷⁴

... promotion of those considerations of justice, of concern for common good, which include the general principles of legality and law common to *civilized* peoples and make law salient as a means of governance and a reasonable exercise and acceptance of authority.

It would seem Finnis would not support giving every citizen an equal voice through binding CIR on public policy matters – especially in an area such as the criminal justice system that people normally study many years to be involved with – because it in no way benefits the State or the citizens. Instead the State should focus on promoting justice and exercising its power in a reasonable manner.

D Direct Democracy in the Current New Zealand Context

The degree to which citizens should be allowed or encouraged to participate in the making of government decisions continues to be debated in New Zealand.

It is helpful to try to understand exactly what ‘direct democracy’ actually means in the twenty-first century. This will allow for a better understanding of what a binding CIR process may look like in New Zealand.

⁷³ Jeremy Waldron “People Participating as Peoples: Interests, Ideas and Identity” in Claire Charters and Dean R Knight (eds) *We the People(s), Participation in Government* (Victoria University Press, Wellington 2011) at 229-230.

⁷⁴ John Finnis “On Hart’s Way: Law as Reason and as Fact” (Notre Dame Law School Legal Research Paper, Notre Dame University Indiana, 2008) at 31-32.

New Zealand graduate and Law Professor at Oxford University Richard Ekins describes direct democracy as the direct exercise of power by the people, where what the people want is in line with the actions the government takes.⁷⁵ Ekins explains the appeal of this type of governance is obvious on paper; each person counts as an equal and the State does what the people (or the majority, should they disagree) dictates. Therefore, allowing the people to rule *directly*.⁷⁶

Yet, Ekins stresses this is only the *theory* of direct democracy; in reality this type of governance is untenable. “That is, the people cannot directly exercise power without difficulty – it is too costly and time consuming to meet and act jointly – and so instead they instruct representatives to act for them”⁷⁷.

Furthermore, Ekins argues representative democracy should not be considered the ‘second best’ alternative to direct democracy; an alternative that is only imposed because direct democracy is technically too difficult. Instead Members of Parliament are responsible for making decisions on behalf of New Zealand’s citizens; “Members of Parliament, I contend do not act wrongly just because they depart from what the people want. Indeed it is their duty to think carefully and to legislate as they think best”⁷⁸. He uses this argument to conclude that the introduction of binding CIR would be unwise because the elected representative “should make the law, after careful public deliberation”⁷⁹.

New Zealand political scientist Mark Gobbi explains the debate around whether New Zealand should adopt a more direct democracy governance model – including a binding CIR framework – has centred on the same principles that have been debated globally for millennia. These arguments include that it encourages a good, open and responsive State that can be held to account for its actions, promoting a feeling of national pride and prosperity amongst its citizens.⁸⁰ On the other hand, it can be regarded as an invitation to “mob-rule characterised by oppression of minorities, ill-informed decision making, the loss of parliamentary sovereignty and economic chaos”⁸¹.

⁷⁵ Ekins, above n 3, at 29

⁷⁶ At 29

⁷⁷ At 26.

⁷⁸ At 26.

⁷⁹ At 26.

⁸⁰ Gobbi, above n 21, at 16.

⁸¹ At 16.

Gobbi's description outlines the two extremes of the direct democracy continuum. However, contemporary political commentators tend to use these extremes to find a middle-ground, allowing some participation in government without full direct democracy. This is where the argument regarding binding CIR comes in; theorists that lean towards a more direct form of democracy are more likely to suggest a binding CIR framework and vice versa.

Joel Colon Rios, lecturer of law in New Zealand, says the divide is between the participatory democrats who insist that mechanisms of direct democracy allow all citizens a decisive role in State affairs, versus deliberative democrats who allow for deliberation by representatives on behalf of the public.⁸²

New Zealand legal philosopher and political theorist Jeremy Waldron on the other hand chooses not to distinguish between citizens and their representatives – between direct and representative democracy – at all.⁸³ Instead, he distinguishes between people who have an interest in a subject and those who do not. For example, men should not be given the option to vote on issues pertaining to women's rights.⁸⁴ It is important to note Waldron does place a number of caveats on this rule; these are outside of the scope of this essay.

Within this framework, he stresses every person should be given the opportunity to participate, because if "some are excluded from the process, or if the process itself is unequal or inadequate, then both rights and democracy are compromised"⁸⁵.

A good example of two academics who have a similar starting point but sit on either side of the middle-ground of the direct democracy continuum are Waldron and Richard Mulgan. Mulgan also suggests a governance model based on an individual's interest in an issue. However, he stretches this idea further, insisting that individuals must have a *legitimate* interest if they are to have a say in it. The degree of power a person may then exercise in this decision is relative to the level of interest and is adjusted accordingly.⁸⁶

⁸² Joel Colon Rios "Notes on Democracy and Constitution-Making" (2011) 9 NZJPL at 24.

⁸³ Cecile Fabre "The Dignity of Rights" (2000) 20 Oxford Journal of Legal Studies 271 at 274.

⁸⁴ At 277.

⁸⁵ Jeremy Waldron *Law and Disagreement* (Oxford University Press, Oxford 1999) at 283.

⁸⁶ At 26.

Mulgan is adamant that this right to participation should not be given indiscriminately to all who appear to have an objective interest. As mentioned above, participation is dependent on subjective interest. “It is not equitable to overlook all differences of immediacy and give all citizens an equal say regardless of how close or how remote they may be. If the views of all who are affected are treated equally”⁸⁷, the results will always weigh in favour of the majority.⁸⁸

Furthermore, he stresses the State is there for a purpose, to protect its citizens’ interests and to enforce the conditions and social arrangements that ensure its member are able to live in the best circumstances possible. Representative democracy is the more beneficial model because it ensures the government is working towards the common goals, while direct democracy aims to work towards each citizen’s individual goals.⁸⁹

Therefore, it is suggested that Mulgan would not support binding CIR, but instead some sort of participatory framework – for the purposes of this essay we shall say referenda – that gives individuals a different number of votes based on their level of interest.

IV THE BINDING JUSTICE QUESTION

A What Would a Binding CIR Achieve?

1 In Favour of Binding CIR

The results of the 1999 justice-based question were not binding on Parliament. However, its advisory nature is believed to have had an impact. Three pieces of legislation introduced at the start of the twenty-first century find their roots in the 1999 Norm Withers’ CIR question: the Parole Act 2002; the Sentencing Act 2002 and the Victims Rights Bill 2002.⁹⁰

⁸⁷ Richard Mulgan *Democracy and Power in New Zealand* (Oxford University Press, Auckland, 1984) at 25-26.

⁸⁸ At 25-26.

⁸⁹ At 30-31.

⁹⁰ Phil Goff, Minister of Justice “Victims’ Rights Critical” (press release, 23 July 2002).

As mentioned above, the CIR Act is widely criticised for its non-binding nature. It is suggested the current scheme carries no legislative weight and is therefore not taken seriously;⁹¹ that non-binding CIR are a waste of time by completely undermining the participatory ethic of politics;⁹² and that non-binding referenda are undemocratic.⁹³

British professor in political science Vernon Bogdanor has urged New Zealand to consider making its CIR scheme binding. He says it is important for maintaining an effective system of governance, and acceptance binding CIR “is but a logical consequence of accepting a democratic government”⁹⁴.

2 *Against Binding CIR*

Through legislating for binding CIR, the New Zealand Government would essentially be agreeing with the majority public opinion on the particular referenda questions, as this will prevail. This will discriminate against minorities or allow a ‘tyranny of the majority’ and the results will always be weighted overwhelmingly in favour of the popular interest.⁹⁵

It is also suggested the New Zealand public is not well enough informed to make decisions that have the ability to restrict a person’s liberty through incarceration. If the results of the 1999 justice-based referenda question had been binding, the ‘hard labour’ section would have been disastrous for New Zealand and could have breached international human rights obligations.⁹⁶

⁹¹ Church, above n 14, at 199.

⁹² George Williams and Geraldine Chin “The Failure of Citizen’s Initiated Referenda Proposals in Australia: New Directions for Popular Participation?” (2000) 35:1 Australian Journal of Political Science 27 at 28.

⁹³ Vernon Bogdanor *The People and the Party System: the Referendum and Electoral Reform in British Politics* (Cambridge University Press, New York, 1981) at 93.

⁹⁴ At 93.

⁹⁵ Mulgan, above n 87, at 25-26.

⁹⁶ Goshzik, above n 8, at 47.

Legislating on issues relating to law and order is difficult and should not be left up to the general public; rather it is a complex task requiring detailed knowledge of criminology, the law and public administration. Ekins says a good legislator will be able to track the public's preferences and draft laws accordingly.⁹⁷ On the other hand, "the average voter responds to available information and has little fact-finding capacity. There are often large gaps in public knowledge"⁹⁸.

Research shows the less someone knows about how the criminal justice system operates, the more punitive their attitude is likely to be.⁹⁹ This means popular public attitudes are likely to prefer a system that focuses on seeking revenge on the offender and are more partial to long prison sentences as punishment rather than exploring the possibility of rehabilitating the offender.¹⁰⁰

Even without allowing citizens to have their say about crime and order policy through binding CIR, New Zealand is already relatively punitive. In 2011, 199 people per 100,000 people were in prison; this was the eighth highest rate for the 34 countries in the OECD.¹⁰¹ It is predicted that allowing binding CIR on this subject will only result in a more punitive justice system.

The New Zealand Public Perceptions of Crime Survey 2014 found New Zealanders receive their main source of information about crime through television news (85 per cent) or online newspapers (83 per cent).¹⁰² People generally believe this is a 'very' or 'somewhat' reliable' source of information about crime (more than 80 per cent for television news and more than 70 per cent for newspapers)¹⁰³, yet more than 60 per cent of respondents said they only knew 'a little' or 'nothing at all' about crime.¹⁰⁴

⁹⁷ Ekins, above n 3, at 36.

⁹⁸ At 40.

⁹⁹ Gerry Johnstone "Penal policy making: Elitesit, populist or participatory?" (2002) 2 Punishm Soc at 165.

¹⁰⁰ At 171.

¹⁰¹ Peter Clayworth 'Prisons: New Zealand's prisons' (updated 3 February 2015) Te Ara - the Encyclopedia of New Zealand, <www.TeAra.govt.nz>.

¹⁰² Ministry of Justice "Public Perceptions of Crime and the Criminal Justice System Survey – 2014 Results" (December 2014, Colmar Brunton, Wellington).

¹⁰³ At 29.

¹⁰⁴ At 8.

As at December 2014, the total recorded crime rate is 18 per cent lower than it was in June 2011; this equates to approximately 67,246 fewer recorded crimes.¹⁰⁵ However, despite this, 61 per cent of New Zealanders still believed that the national crime rate rose in 2014.¹⁰⁶

It seems some of the responsibility for this public misconception about the prevalence of crime can be attributed to the New Zealand media. Contrary to the results of the Public Perceptions of Crime Survey, the media is not academically viewed as an impartial public education tool about law and order in New Zealand.¹⁰⁷

Legal academic Matthew Palmer is very critical of the media in New Zealand, stating the media does not “pull the constitutional weight that it should”¹⁰⁸. Although the media undeniably has a vast amount of power, this is not always used responsibly.¹⁰⁹ It would seem the media prefer to report sensationalistic crime stories rather than stories about successful rehabilitation initiatives, stimulating the erroneous view that crime rates are increasing in New Zealand.

V DISCUSSION

Given the reasoning provided above, it is not recommended that New Zealand adopt binding CIR for questions on law and order policy. Decisions of this nature carry much responsibility because the outcomes can affect another person’s liberty and it would seem that the New Zealand public is currently not well enough informed about the criminal justice system to make decisions about how it operates.

¹⁰⁵ Amy Adams, Minister of Justice “Govt sets itself tougher crime targets” (press release, 19 April 2015).

¹⁰⁶ Public Perceptions of Crime Survey, above n 102.

¹⁰⁷ Pratt and Clark, above n 4, at 312.

¹⁰⁸ Matthew S R Palmer “Open the Door and Where are the People?” Claire Charters and Dean R Knight (eds) *We the People(s), Participation in Government* (Victoria University Press, Wellington, 2011) at 66.

¹⁰⁹ Richard Mulgan *Politics in New Zealand* (3rd ed, updated by Peter Aimer, Auckland University Press, Auckland, 2004).

Research shows that in general the public is overly punitive and places too much emphasis on using the justice system as a means for victims to gain revenge through harsher sentencing, rather than rehabilitation for the offender. This is clearly evident in the overwhelming ‘yes’ vote in the 1999 referendum proposed by Norm Withers.

It is not suggested Members of Parliament are always more informed and understand issues better than laypeople. However, politicians have the policy making apparatus of the public sector to support them in proposing legislation and voting on its implementation. Thousands of people, trained in various areas, work across a number of public bodies associated with the justice sector to assist politicians in making decisions that relate to law and order policies. These advisors are able to make recommendations based on national and international research about what is and is not effective in terms of rehabilitation, the penal system, the drivers of crime and all other areas of the criminal justice system.

Unlike laypeople, these policy makers are constantly looking for new and innovative ways to rehabilitate offenders into the community to prevent reoffending in future, alongside treating the underlying causes that have motivated the individual to offend in the first place. Take for example addiction problems: an estimated 65 per cent of imprisoned offenders have some sort of alcohol or other drug dependency and more than 50 per cent of serious violent crime is committed while the offender is under the influence of alcohol.¹¹⁰ However, it seems that the public does not show much desire to address these drivers of crime; rather they wish to punish its consequences. On the other hand, the justice sector is implementing a number of initiatives to address this driver of crime, including the Alcohol and Other Drug Treatment Court that helps offenders deal with their addiction issues that have motivated their offending before sentencing.¹¹¹

Aside from the social arguments, rehabilitation measures are also fiscally beneficial. Operating prisons is expensive (just over \$90,000 per prisoner per year)¹¹² and as the cost of living increases, the cost of housing prisoners will only rise. It is more economical to try to reintegrate these people into society effectively so that they are able to work and pay tax.

¹¹⁰ Ministry of Justice “Justice Sector Report 2013” (March 2014, Ministry of Justice, Wellington) at 29.

¹¹¹ Judith Collins, Minister of Justice “NZ’s first Alcohol and Drug Court launched” (press release, 1 November 2012).

¹¹² Te Ara Encyclopedia, above n 101.

The Public Perceptions of Crime Survey shows the New Zealand public relies heavily on mainstream media to obtain their information about crime and how the criminal justice system operates. The media is not impartial, especially not when it comes to reporting crime. Sensationalism sells, whereas stories about prisoner employment and education schemes such as the Out of Gate programme – aimed at helping prisoners find work and accommodation after release – do not. The media often seeks to fuel the public's fear of crime rather than dispel it and it holds a lot of power in this regard. It is not suggested that the media lose its independence or that the State is given a say in how crime is reported. Rather it is suggested the public is encouraged rely on other means aside from the media to gain their information about New Zealand's criminal justice system. A proposal for how this information will be provided is outside the ambit of this essay.

Binding CIR are an integral part of a direct democracy governance model, where the citizens dictate the actions of the public administrators and have the final say in what legislation and policies are enacted.

In theory, direct democracy looks very appealing but not so much when one considers its actual consequences in practice. Rousseau's utopian model of the State suggested that when everyone gathered together the common good would prevail and slowly – as citizens participated more with State affairs – the need for State control would start to dissipate. This analysis appears to have been echoed in Marxist legal theory,¹¹³ yet history tells us the more a State tries to ensure equality, the more State control is required.

Direct democracy in its purest form is not tenable in New Zealand as people's judgement abilities are not inherently equal. Instead it is suggested New Zealand retains its more representative model of governance and continues to allow for participation within this model. However, binding CIR are not the recommended mechanism for this.

Instead it is recommended New Zealand retains its option to participate in select committees. Apart from budget-sensitive legislation, most legislation is first debated in an open select committee, allowing members of the public to express their views. These and other public submission processes provide a significant platform for interested persons to share their view on draft legislation.¹¹⁴

¹¹³ Arun K Patnaik "Theological Marxism" (22 October 2011) 4:20 Economic and Political Weekly.

¹¹⁴ Palmer, above 108, at 67.

Another way to participate is through one of New Zealand's 78 local or regional government areas. Local governments encourage citizens to participate in decision making about the issues that affect them most and directly consult their constituents about a majority of these.¹¹⁵

As suggested by Mulgan, New Zealand could consider giving citizens an option to express their views on particular pieces of legislation or policy, relative to their interest in the issue. This appears to be a satisfactory method, provided that it is handled properly. Defining exactly how this would occur is outside the ambit of this essay yet it is important to note there are a number of issues that should be taken into account. These include considering how to measure a person's interest and what kind of participation levels should then be given.

But as conceded by Plato, Hegel and Nietzsche, it is very important that the people who hold power within the State are the people of merit, with appropriate levels of education. The justice system is a complex area and making decisions that affect the people who come in contact with it should be left up to those educated in this area. Judges, lawyers and other public policy makers study for many years and are required to continue to do so for the course of their working life. Members of Parliament on the other hand have the whole apparatus of the justice sector's staff to advise them. Given this, it seems rather absurd to allow laypeople to vote on how the criminal justice system should be run, including how offenders should be sentenced.

On the above reasoning, it is concluded that before binding CIR questions on law and order policy can be posed in New Zealand, the public would need to be sufficiently informed about how the criminal justice system operates in order to be trusted with such a grave responsibility. This education would need to be provided through a different manner than the currently trusted means of the media. Alongside this, a method must be found to remove public apathy and ensure that the public is sufficiently interested in the operation of the justice system.

As it currently stand New Zealand should not consider introducing binding CIR questions on law and order policies. Rather, these decisions should be left to the trained professionals, should the public wish to participate this can continue to be done through the avenues of local bodies or select committees.

¹¹⁵ Ministry of Internal Affairs "Participate in Local Government" (2011) Local Government in New Zealand <www.localcouncils.govt.nz>.

It is further recommended that New Zealand consider the option to abolish the current CIR scheme altogether. The current scheme does not carry much weight because it is not binding and there are no legislative guidelines to dictate how a question should be worded. As a result, the 1999 justice-based question was emotionally charged and in essence asked three questions to which people could only give one 'yes' or 'no' answer.

VI CONCLUSION

Introduced in 1993, CIR allow New Zealanders to vote in favour or against a question of policy. This form of direct democracy is not binding on Parliament rather the results are indicative.

It is suggested that binding CIR are not introduced in New Zealand for questions relating to law and order policies because the public is not adequately informed to make decisions about another person's liberty. Legislating is a difficult task that should be left up to those who are trained in this field and not to the apathetic and unqualified public.

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