Caroline Morris · Jonathan Boston
Petra Butler *Editors*

# Reconstituting the Constitution

## 14.6 The Recall Election

### *14.6.1 Theory of the Recall*

Recall elections are sometimes seen as form of direct democracy, and thus as incompatible with a system of representative democracy. However, this is a constraint created by a particular view of how a representative should behave; as its use in various democracies shows, it is not a legal restriction on the introduction of recall elections. Conversely, recall elections can be viewed as an additional corrective device within a system of representative democracy, to be employed where other remedies such as regular elections or disqualification provisions are not available. As Thomas Cronin has commented: "voters have generally preferred to reserve the recall for its original intended use (to weed out malfeasance and corruption) and to settle political questions at regular elections."[41]

The recall is a device premised on the delegate theory of representation. Under this theory, a close relationship exists between a Member of Parliament and her constituents. Accordingly, representatives are in Parliament to effect the wishes of the electorate. The recall sits within a model of representation that envisages a much closer relationship between the electorate and representatives than the competing trustee theory of representation, since under delegate theory what is represented is the people rather than their interests. Too much independence from the electorate is inconsistent with the delegate model. Consequently, a delegate who does not pay attention to the wishes of the electorate risks not being able to continue in the role. So, should representatives fail to meet the standards required of them or to speak properly on their behalf (without substituting too much of their own discretion), they can be "recalled" and replaced with another by their constituents.[42]

Recall elections extend the boundaries of the delegate theory of representation in two ways. First, in an electoral system involving the possibility of a recall, the judging of the representative and the consequent ties of accountability are always active, rather than just at the single moment of the election. Secondly, the representative's security of office is also weakened by this model as a seat could be lost at any stage. Both of these factors have the potential to affect the representative's behaviour during office. This does not always mean that the ever-present shadow of a recall election will act as a negative internal constraint on the Member's conduct; it might also mean that a Member seeks the approval of her constituents before acting, or communicates more frequently or in more depth with constituents about his activities.

---

[41] Cronin (1989), p. 143.

[42] I have focused only on the type of recall election where the recall can be initiated and decided on by the people. In some states, the recall is made by branch of government, usually the legislature.

### *14.6.2 The Practice of the Recall*

The recall has a history of several thousand years. It is said to have first been practised in ancient Rome, when one tribune member put forward a bill deposing another which was then endorsed by the voters.[43] In the common law world, it seems that the recall was first mentioned by the Levellers, the English political reform movement, which included it in their manifesto entitled *Agreement of the People*.[44] It also found favour with Karl Marx, who spoke of its use during the Paris Commune with approval in *The Civil War in France*.[45]

Despite this long history, the recall is not a frequent feature of western democratic systems.[46] Countries using the recall (at various levels of government) include Venezuela, Switzerland, the Philippines, Argentina, and several states of the United States, where probably its most high profile use is in California. The recall was the device that saw Arnold Schwarzenegger take the governorship of California in 2003 after Governor Gray Davis was subject to a successful recall election following a petition signed by 1.66 million voters calling for his removal from office.

In the Commonwealth, the recall is employed only in the province of British Columbia. In British Columbia, the Recall and Initiative Act 1995 provides that voters can petition for the removal of a member of the provincial legislative Assembly on any grounds. The petition will be successful (and the recall immediately effective) should it be signed by 40% of the voters who were registered in the member's electoral district at the last election. Sixty days are allowed for the collection of the signatures. A recall petition cannot be conducted in the first 18 months of a member's election.

Should the United Kingdom join British Columbia in its use of the recall, the British version, as expected to be legislated for in the 2010–2011 parliamentary session, allows "voters to force a by-election where an MP is found to have engaged in serious wrongdoing and having had a petition calling for a by-election signed by 10% of his or her constituents."[47] The remainder of this chapter considers some questions of how recall elections might be designed, as well as how it might operate outside of a FPP electoral system.

---

[43] Zimmerman (1997), p. 6.

[44] Lilburne et al. (1649).

[45] Marx (1871).

[46] The Communist nations of North Korea, China, Vietnam and Cuba all have provisions for recall in their constitutions. See Venice Commission (2009).

[47] Conservative-Liberal Democrat parties (2010), p. 27.

## 14.6.3 Issues with the Recall

### 14.6.3.1 One-Step or Multi-Step Procedure?

The first issue in recall design is the question of how to structure the process of removing a representative from office. British Columbia appears to be unique in having the representative lose his seat upon a successful recall petition. A by-election is then held to replace the deposed member. This process has been criticised, not least by Elections BC, the electoral body responsible for administering the British Columbia process, since "any petition process will inherently lack the formality, rigor and safeguards appropriate to such a serious consequence [the loss of a seat]."[48] To avoid these issues, safeguard the integrity of the recall process, and improve voter confidence Elections BC has recommended that a multi-step process, as seen in other jurisdictions be adopted.[49]

The multi-step process as practiced elsewhere, sees a separation of the petition stage from the recall election. Some jurisdictions, such as California, hold a combined recall and successor ballot, while others hold two ballots at different intervals: one ballot on the question of recalling a particular representative, and then a second ballot at a later date on who should be the representative's successor. The latter approach has the disadvantages of adding cost and time to the process, with the added risk of creating voter ennui along the way as the ballots proceed.

### 14.6.3.2 Grounds for Recall

There is no consensus as to whether there ought to be grounds for a recall election. Some would say that any restriction infringes a voter's political rights, the expression of which should be unfettered, while others wish to protect representatives from malicious petitions or attempts from disgruntled voters to re-run an election that did not go their way.

As noted, in British Columbia, proponents of a recall petition need not put forward any reasons why a representative should lose her seat. A similar situation applies in some states of the United States, while in others, proponents of a recall petition need to frame their objections within certain statutory grounds. For example, Alaska these are lack of fitness, incompetence, neglect of duties or corruption[50]; in Kansas they are conviction for a felony, misconduct in office, incompetence, or failure to perform duties prescribed by law[51]; and in Rhode Island

[48] Elections BC (2003), p. 15.

[49] Ibid, p. 16.

[50] Alaska Statutes Title XV c 45 § 510.

[51] Kansas Statutes c 25- § 302.

they are indictment for a felony, conviction for a misdemeanour, or being found in violation of the ethics code by an ethics commission.[52]

In the United Kingdom, the recall will be activated where there is "serious wrongdoing". The first question to ask is what might be covered by this reference. Previous cases of misconduct resulting in expulsion and suspension provide us with some useful precedents. A breach of the Code of Conduct would be another possible reason for recall. Clearly misconduct of a financial nature is most likely to be one of the more frequent problems but as we have seen, MPs have shown themselves to behave sometimes in quite unpredictable ways. A recall election might have proved a useful option in the case of the New Zealand MP David Garrett, who, while he had broken no laws, fell short of generally-accepted standards of behaviour when admitted using the identity of a dead child to obtain a passport some years before entering Parliament.[53]

Requiring reasons can send an early signal that frivolous or vexatious petitions will not be entertained (although of course such petitions are unlikely to proceed to a recall election, they can still take up administrative time and money). In requiring voters to give a reason for wanting the recall of their representatives, the framers of any such restriction need to bear in mind two points: one, how much to define the restriction (and thereby enhance or weaken the representative's security of office – or put otherwise, how strong should the ties of accountability between voters and representatives be), and two, whether the courts should be allowed any jurisdiction over the question of whether the restriction applies. On the latter question, I favour the use of an ouster clause; inviting courts to consider the suitability of representatives to continue in office by permitting them to decide whether the grounds are satisfied brings the courts too close to the boundary between judicial matters which they might legitimately consider, and political matters, which are more properly the preserve of the people. This approach would be especially needed if a recall election were to be premised on a finding under privilege that an MP had fallen short of expected standards of conduct.

#### 14.6.3.3 Thresholds

In all jurisdictions there is a minimum number of voters needed to express their desire for a recall election before it can occur. Thresholds vary, but they generally fall in the range of 12–25% of voters within the relevant constituency.[54] (British Columbia and Kansas are unusual in requiring 40%.)

[52] Constitution of the State of Rhode Island Art IV § 1.

[53] NZPA (2010). He resigned from his party and then Parliament in quick succession.

[54] An exception is Switzerland, which requires an absolute number of voters in a canton (ranging from 30,000 in Berne to 1,000 in Schaffhausen), rather than a percentage: Venice Commission (2009).

Regardless of the threshold chosen to trigger a recall election, an added complication to the determination of a suitable threshold in New Zealand is the existence of Members of Parliament who owe their seat in the House to their placing on the party list. This does not mean that they do not have a constituency. While it may not be the easily-defined geographical constituency held by the electorate MPs, party list MPs represent other types of constituencies: sectoral interests (for example, farming or business), communities based around identity (for example, ethnic or sexual orientation), general location (for example, rural or urban) or ideological (for example, environmental or neo-conservative). However, a further complicating factor in these non-geographical constituencies is that MPs elected via the party list do have different accountability mechanisms from those elected to particular electorates. The former are primarily accountable to their party, which will decide where to place them on the party list, thus effectively deciding their electability (barring any unexpected electoral success or failure at the national level). Those voters in the non-territorial constituency of the list MP can hold their MP accountable in an indirect way only. How might party list MPs be subject to the recall process?

Venezuela appears to be the only jurisdiction which so far combines an MMP electoral system with recall elections. It has had an MMP-type system since 1993, and introduced the principle of recall into its new constitution in 1999.[55] Regulations governing recall elections were made in 2003, and the first recall election (concerning the President, Hugo Chavez) took place in 2004. To trigger a recall election, a petition in favour of recall has to be signed by 20% of the voters the individual represents.[56] Unfortunately the regulations do not contain any assistance in defining how this process might operate in the case of representatives who are elected via the party list.

One solution, like that taken with the ill-fated Electoral (Integrity) Act, is to leave the fate of errant party list MPs entirely in the hands of the party rather than the voters. This would however, disenfranchise those voters who voted, albeit indirectly, for that MP, and furthermore, leave them less able to censure those MPs' misconduct than those MPs who have been elected to a constituency. It is not clear why two different methods of arrival in Parliament should affect the voters' ability to effect their departure.

A possible way of settling the question of recall is through the idea of the "notional constituency". This recognises that party list MPs do have constituencies, but that, as noted above, they are not the traditional geographical type. The number of voters in each New Zealand geographical constituency is approximately 57,500 (±5%). Depending on the threshold chosen, an equivalent number of voters nationwide could be required to sign a petition seeking to recall a party list MP.

The question then arises of how to deal with the actual recall election (be it a combined or two-stage ballot). It is hard to envisage how an actual election of

[55] Constitution of Venezuela, Art 72.

[56] National Electoral Council (2003), Art 13.

the type usually seen in FPP jurisdictions would work with a list MP as the membership of the "notional constituency" entitled to vote on the recall would be impossible to draw up. Who could claim to be part of the chosen few? How could their claims to vote be decided? (I would, for the reasons given in British Columbia, reject the system whereby a member would lose his seat upon a successful petition.) In cases such as these, my view is that at this point, with the member's place in Parliament in question, the matter would have to go back to a party selection committee, or become a question for party members to decide. These are the people who placed the member on an electable position on the party list, and, in the absence of a workable method of holding a recall election, or one consistent with one for an MP representing a geographical constituency. This proposal represents a compromise between the two accountabilities a list MP has – one to the party, and the other to his or her constituency, be it a sectoral, ethnic, ideological, or identity based one. In this proposal, the MP's placement on the party list is determined by the party and her electability decided by the nation.

## 14.7 Conclusion

It would be a vain hope indeed to think that the United Kingdom and New Zealand Parliaments are entirely reformed places following the recent scandals. History has shown us that as long as there are Parliaments, some of its members will behave in ways unworthy of the institution, its role in the constitution, and of the trust placed in them by the electorate.

Given the inevitability of future misconduct, the time has come to revisit the methods for dealing with these instances. First of all, it is inarguable that there must be a system in place. Relying on a party's internal disciplinary measures runs the risk of nothing being done at all, or action being taken too late, or being too ineffectual, to restore trust in Parliament.

There is no one perfect system suitable for addressing misconduct – the type of misconduct will affect the response so it is important not to discount any one form in advance. There are at present four options for monitoring and sanctioning parliamentarians' misconduct: Codes of Conduct, parliamentary privilege, external regulatory bodies, and the recall election. While the Westminster Parliament has brought in the first three and has promised to institute the fourth, the New Zealand Parliament has to date only a partial Code of Conduct and parliamentary privilege at its disposal.[57] But the choice of disciplinary system or systems is not simply a

[57] Although see the suggestion from a former Speaker of the New Zealand House of Representatives, the Hon Margaret Wilson, that "the time may have come in New Zealand for an independent body to take responsibility for the setting and administration of members' and parties' entitlements.": Wilson (2010), p. 566.

question of administrative ease or historical tradition. It involves a choice about the redistribution of power (or not) within our constitution, and how that power should be retained. Each system has a different locus of control – be it Parliament itself, an independent institution, or the electorate. Each also has different standards of behaviour to which an MP should adhere. Wherever we end up, the final destination will say a great deal about the kind of constitution we hope to aspire to.

## Appendix

### *The Seven Principles of Public Life*

#### Selflessness

Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

#### Integrity

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.

#### Objectivity

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

#### Accountability

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

### Openness

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

### Honesty

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

### Leadership

Holders of public office should promote and support these principles by leadership and example.

## References

Barratt D (2009) MPs' expenses: how they milked the system. Daily Telegraph, 30 August

Beckford M, Bingham J, Prince R (2009) MPs' expenses: Andrew George claimed for £308,000 flat used by daughter as 'bolt hole'. Daily Telegraph, 12 May

Cabinet Office (2008) Cabinet manual 2008. Cabinet Office, Department of the Prime Minister and Cabinet, Wellington

Cheng D (2010) Red-blooded dude but not a sex fiend – Jones. The New Zealand Herald, 11 June

Conservative-Liberal Democrat parties (2010) The coalition: our programme for government. Cabinet Office, London

Cronin T (1989) Direct democracy: the politics of initiative, referendum and recall. Harvard University Press, Cambridge

Daily Telegraph (2009a) MPs' expenses: the most bizarre claims. Daily Telegraph, 13 May

Daily Telegraph (2009b) MPs' expenses: NEC to discuss mass deselection of Labour MPs. Daily Telegraph, 19 May

Elections BC (2003) Report of the chief electoral officer on the recall process in British Columbia. Elections BC, Victoria

Geddis A (2002) Gang aft a-gley: New Zealand's attempt to combat "Party Hopping" by elected representatives. Elect Law J 1:557–571

Hope C (2009) Michael Gove 'flipped' homes: MPs' expenses. Daily Telegraph, 11 May

House of Commons (2003) Disciplinary and penal powers of the house. House of Commons Information Office, London

House of Commons (2009) The green book: guide to members' allowances. House of Commons, London

Joseph P (2001) Constitutional and administrative law in New Zealand, 2nd edn. Brookers, Wellington

Lilburne J, Walwyn W, Prince T, Overton R (1649) An agreement of the free people of England

Marx K (1871) The civil war in France. In: Draper H (ed) Karl Marx and Frederick Engels: writings on the Paris commune. Monthly Review Press, New York, p 74

McAngus S, Sinclair F (2009) You can't expect me to do my shopping in 99p stores! Edinburgh Evening News, 22 May

Ministerial Services (2008) Ministerial office handbook. Department of Internal Affairs, Wellington

National Electoral Council (2003) Guidelines to regulate the procedures of referenda recalling the mandates of popularly elected officials (trs Eva Golinger-Moncada)

NZPA (2010) Garrett: "It is untenable for me to remain". The New Zealand Herald, 23 September

Office of the Auditor-General (2010a) Auditor-general's inquiry into certain types of expenditure in vote ministerial services. March. Office of the Auditor-General, Wellington

Office of the Auditor-General (2010b) Terms of reference for an inquiry into certain types of expenditure in vote ministerial services. 2 March. Office of the Auditor-General, Wellington

Prince R (2009) MPs' expenses: Douglas Hogg to stand down at general election. Daily Telegraph, 19 May

Privileges Committee (1997) Report on the question of privilege referred on 22 July 1997 relating to the status of Manu Alamein Kopu as a member of parliament. New Zealand House of Representatives, Wellington

Privileges Committee (2008) Report on the question of privilege relating to compliance with a member's obligations under the standing orders dealing with pecuniary interests. New Zealand House of Representatives, Wellington

Staff Reporters (2010) Ministers spend our money on booze, porn, spas, golf and flowers. Dominion Post, 11 June

Standing Orders Committee (2008) Review of standing orders. New Zealand House of Representatives, Wellington

Venice Commission (2009) Report on the imperative mandate and similar practices. Venice Commission, Venice

Wilson M (2010) The role of the speaker: perceptions and reality. Public Law 3:565–582

Winnett R, Watt H (2009) Elliot Morley claimed £16,000 for mortgage that did not exist: MPs' expenses. Daily Telegraph, 13 May

Zimmerman J (1997) The recall: tribunal of the people. Praeger, Westport

# Part 6
# Australia: Involving Civil Society in Constitutional Reform

# Chapter 15
# Involving Civil Society in Constitutional Reform: An Overview of the Australian National Human Rights Consultation and the Proposed National Human Rights Framework

**Frank Brennan SJ AO**

## 15.1 Introduction

A year ago I was here learning from you about the operation of your Bill of Rights Act. Your hospitality and generosity of shared insights were of great assistance in the preparation of our trans-Tasman report on the Australian National Human Rights Consultation. I accepted the invitation to this conference, in part to thank you for your generosity and to provide some feedback on how things are looking across the ditch following a very broad ranging community consultation about the effectiveness of Australia's arrangements for the protection of human rights and promotion of corresponding responsibilities.[1]

---

Frank Brennan is a Jesuit priest, Professor of Law at Australian Catholic University and Adjunct Professor at the Australian National University College of Law and National Centre for Indigenous Studies.

[1] I am particularly grateful to New Zealand Chief Human Rights Commissioner Rosslyn Noonan and her staff, to Dame Sian Elias, Professor Paul Rishworth, Sylvia Bell, the Hon Margaret Wilson, Jared Mullen, Stuart Beresford, Belinda Clark, Claudia Geiringer, Petra Butler, Andrew Butler, Ben Keith, Dr Claudia Orange, Judge Eddie Durie, Attorney-General Christopher Finlayson and their colleagues for giving so generously of their time when we came to New Zealand in 2009 to study the operation of New Zealand's Bill of Rights Act. Needless to say, none of them bears the slightest responsibility for what Professor Tony Smith has identified as the broad-brush and slightly unnuanced description we gave of the New Zealand experience in our report (see Smith 2010, p. 172).

F.B. SJ AO
122 Empire Court, Yarralumla, ACT 2600, Australia
e-mail: frank.brennan@acu.edu.au

C. Morris et al. (eds.), *Reconstituting the Constitution*,
DOI 10.1007/978-3-642-21572-8_15, © Springer-Verlag Berlin Heidelberg 2011