

**TOWARDS REFORM OF THE STATUTORY REGULATION OF REFERENDUMS
IN SOUTH AFRICA**

Submitted in partial fulfilment of the requirement of the degree

Magister Legum

by

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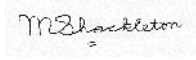
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Declaration

I, Michael Stephen Shackleton, declare that this mini-dissertation is my own unaided work, except as indicated in the references and/or acknowledgements. It is submitted in partial fulfilment of the requirements of the degree: *Magister Legum* in the University of Pretoria, Department of Public Law. It has not been submitted at any other institution.

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When I did my LLB, I was adamant that I would not undertake another degree due to the strenuous work involved.

I seem to have forgotten this and am now nearing the end of my LLM studies.

Perhaps in due course I will forget the difficulty of obtaining an LLM and will eventually enrol for an LLD.

The prospects of further education and personal development are always enticing. Life is long and despite the challenges of always moving forward, the personal rewards of being better every day are immense.

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1.1 Introduction

The topic of this dissertation, as its title suggests, is the statutory regulation of referendums, with a particular spotlight in on South Africa and a comparative overview of other jurisdictions. This introductory chapter is intended to explore this issue by providing a brief general description of the theoretical and empirical background and the general scientific approach I intend to take. More issues will be dealt with in the subsequent chapters.

A referendum, also known as a form of direct democracy implies the direct influence of the people on the political decision-making process whose outcomes gain shape in both laws and decrees of the parliament. (Sciarini & Fischer; 2015) This influence means that a modern democracy, which takes place solely through representative institutions of political decision-making, is complemented by direct-democratic institutions (Fischer; 2005:10). Such a decisive instrument of direct legislation is thought of as influencing the political outcome in favour of the preferences of the citizenry (Feld & Kirchgassner;2004, Besley & Coate, 1997).

To discuss this phenomenon, I use different countries and make the case for direct democracy through the use of referendums and how it strengthens (participatory) democracy. I also shed light on the conceptions of African democracy and how *Ubuntu* flows in our democratic systems.

I use both empirical and theoretical methods of analysis in approach to the study. The former allows an advantage of a scientific finding that is valid i.e. it is free from human bias. Comparative cases take a look at the provisions made in the Constitution for referendums both in the locale and outside.

Moreover, this dissertation contends with thinkers such as Ellis (2008) that it is crucial to determine how the referendum fits within the legal system and political culture of the jurisdiction (Ellis & Bruno; 2008, 211). The advantages of regulating referendums in the constitution or ordinary legislation are transparency and greater popular control, which contribute to the democratic legitimacy of referendums initiated by the political authorities. However, the disadvantage of regulating referendums in the Constitution is reduced flexibility, particularly if the constitutional regulation is exhaustive and prohibits any calling

of optional referendums (IDEA; 2008). It then becomes crucial that a balance has to be maintained between democratic legitimacy on the one hand and political efficiency and stability on the other.

1.2 Theoretical and Empirical Background

Referendums, many of their supporters argue, can serve as a means to discipline the behaviour of politicians and bureaucrats. Referendums are often proposed as part of a political process of transition after violent conflict, to gain or confirm popular consent for an element of nation building and reconciliation. The 1992 referendum in South Africa is a prominent example.

Direct-democratic procedures can be considered in terms of two criteria. The first is the quality of direct democratic processes that are brought to the fore; the second is to what extent these processes qualify for a public discourse. Are propaganda, public manipulation, and demagoguery central characteristics of referendums or will referendums lead to a better understanding of society and responsiveness? (Arnstein, 1969; Hatchard, Ndulo & Slinn, 2004: 57). Most investigations of direct democracy have been based only on empirical non-reviewed hypotheses. Analysis has shown that the historical arguments on the subject do not stand up empirically because they have relied on traditional prejudices against direct democracy.

Elections are the only instruments for broad mass participation (Kersting; 2007:141). Direct democracy, which is direct engagement in favour of or against certain political issues (Schiller 2002), is issue-oriented, not person-oriented (IDEA; 2004).

The use of referendums, however, brings many issues into the spotlight- such as the role of the judiciary in interpreting the constitution, the relationship between popular will/opinion and the future applicability of international jurisprudence and standards to South African law. Constitutionalism means that the will of the Constitution and not that of parliament is sovereign- the constitution in itself is the highest law and a reflection of the will of the people (De Villiers; 1996). The question that arises is to what extent the “people” have the right to ensure that their “will” is correctly expressed or understood by the constitution. The

Constitutional Court is accordingly influenced by the majority that supports a particular piece of legislation.

The powers of the courts are also limited- it may not introduce a new law nor consider a case if it has not been requested to do so and it may not decide on matters that are of a political nature. It is therefore conceivable that the Constitutional Court will constantly have to give new meaning and content to the Constitution. This is telling of a democracy that needs to constantly adapt to the evolving circumstances.

I argue, in this dissertation, that the public should have the right to express their will on subjects they deem important by means of a constitutional amendment if necessary. I submit, the Constitution is the supreme law, and if it represents the basic convictions of the general populace, then Constitutional Court Justices should be guided by having a clear idea of what people think on controversial matters. Of course, whether a certain issue has been rightly or wrongly dealt with will be a matter of contestation, one which this dissertation seeks to not pursue. However, if one accepts that the Constitution is the supreme will of the people, then the following concerns are brought to the fore:

- What is the need for a 'decision' through referendums?
- Should the constitution be amended if there is majority resistance to the way in which the courts may interpret the Constitution?
- Should the Constitutional Court take into account public opinions, norms and values systems on issues?
- What criteria should be used to interpret the Constitution?

Stutzer (2002) found that direct democracy appears to lead to an increase in so-called outcome utility, which means happiness achieved through the resulting allocation of goods and resources. Moreover, he also revealed that the major part of the increase in life satisfaction can be attributed to so-called procedural utility, i.e. satisfaction gained through mere participation in the political process. A corroboration of the positive utility impact from another perspective might be deduced from the literature on tax evasion: In more direct democratic cantons, significantly less tax evasion occurs than in more representative democratic cantons, as the studies by Pommerenhne (1989) and Weck-Hannemann assert

(1996; 21). This finding could be viewed as an indicator of the satisfaction of tax payers with the policy-making carried out by their governments and administrations (Fischer 2005; 14).

I argue, principally, from nation-wide experiences, on the grounds that referendums are unusual in South Africa, and thus their use should be encouraged on topical issues the electorate may deem need a direct vote based on the following substantive arguments:

Substantive 1: Referendums are an alternative route for political participation. Political apathy in South Africa is relatively high, as the Human Sciences Research Council (HSRC) notes that half of the 16-24 age group did not vote in the 2014 general elections (HSRC; 2016). Not everyone who registered to vote took an opportunity to cast their vote. Voter turnout for the 2014 national elections was proportionally lower than turnout from the 2009 election, according to the results released by the Independent Electoral Commission (IEC; 2014). This is indicative of the reduced confidence the electorate have in their government, not just those they elected but also the very systems that keep the elected in power. In a world where people are disillusioned with politics, there are two things which need to be done in order to restore faith. The first is to put faith on the incumbents - by making them more accountable, but the second, and the main argument of the thesis, is by facilitating 'people' power on a larger and more productive scale.

Referendums encourage people to participate in political processes as they have greater impact on the decisions formed by the government as it gives a proposal a public mandate. We should constantly seek to provide opportunities for people to have a more direct impact on the politics of their country, by offering referendums as a participation channel.

Substantive II: Referendums allow for constitutional changes. The use of referendums means that a new government will be unable to stop a policy or decision which has had public support because it has received a direct mandate from the electorate. Therefore, the uses of referendums ensure the safety of decision that is backed up by the public.

Admittedly, decision-making by referendum does not mean the best course of action but so too is the case regarding popular elections. People can elect the wrong party in much the same way that they can choose the wrong outcome in a referendum.

There are studies demonstrating that political efficacy is enhanced by direct democratic procedures (Bowler and Donovan 2002, Hero and Tolbert 2004, Mendelsohn and Cutler 2000). Moreover, a large number of scholars confirm that democratic procedures have beneficial effects on the political process as a whole. On the basis of the Swiss experience, Papadopoulos (2001) establishes, for instance, that direct democratic institutions have an integrative and legitimising function. Allowing citizens to directly participate in decision-making appears to lead to the acceptance of collective decisions and in doing so contributes to the stabilization and the legitimization of a democratic polity (see also Papadopoulos 1998).

Economists, however, suggest that a representative political system has an advantage over direct democracy because it saves information costs and profits from efficiency gains through the division of labour between specialized politicians and the electorate (Feld & Kirchgassner; 2004). A common critique is that in direct democracies there is an increased influence of even small, but well-organized interest groups on the political decision-making process and its outcome (Kirchgassner et al, 1999:20). Already during the parliamentary process of law-making the threat of taking the optional referendum - so the argument goes - is utilized by these groups to blackmail politicians (Barner et al; 1994: 129).

A Dutch authority, Bijvoet (1925) puts forward the following classification of referendums:

1) The obligator or imperative referendum: the government is compelled, usually through a provision in the constitution, to submit a question of constitutional amendment to the vote of the people. The outcome of such vote is binding upon the government.

2) The facultative referendum: this type of referendum depends on the initiative of the people. In such a case, if a certain number of the voters so request, the government is obliged to put a matter of national importance to the popular vote. In this case the government is also bound by the result of such referendum.

3) The consultative referendum: in this case the initiative originates with the government which 'consults' the people on a matter of public importance, but is not Constitutionally bound by what the voters decide.

Another authority, Nevil Johnson (1981) illustrates more on the classification:

1) The controlling referendum, which corresponds with the imperative referendum mentioned above. According to Johnson this operates as a kind of a people's veto on Constitutional amendments or revisions proposed by government. Examples of countries where this device is used are Ireland, Switzerland and various states of the United States of America.

2) The initiated permissive referendum: this is the same as the facultative referendum mentioned above where a referendum must take place if a specified number of voters so request. This type of referendum can be regarded as a means of stimulating popular participation as well as a restraint on government in ordinary legislation. An example of a country where this type of referendum is used is Switzerland where the Constitution provides that such a referendum on ordinary laws has to occur at the behest of at least 30 000 voters. He also quotes recent examples of referenda of this nature in the German state of North Rhine Westphalia and in Italy. Like the controlling referendum, the outcome of this type of referendum is binding on the government.

He also sees the plebiscitary referendum as a device to legitimise the actions of a government or political leadership. According to him this type of referendum is often used by a government anxious to establish a claim of popular support or democratic legitimacy. He sees an element of this type of referendum in article 11 of the constitution of the Fifth French Republic. A further example is the referendum in 1975 in the United Kingdom on the European Community issue, the outcome of which was seen by many as a vote of confidence or no confidence in the government.

This type of referendum can also be misused by authoritarian governments to drum up popular support in their favour. In extreme cases people vote in favour of the government's proposal because they fear to do otherwise. It is uncertain to what extent a government is bound by the result of this kind of referendum.

4) The consultative referendum, which is called for by the government to advise it on matters of national importance, but neither the legislative nor the executive branch of government need pay any attention to the outcome. An example given by Johnson is that of Sweden in 1955 where a referendum on the question of driving on the right-hand side of the road received a negative vote. However, within a decade the Swedish parliament

(theRiksdag), contrary to the result of the previous referendum, passed a law making it compulsory to drive on the right.

At the national level, referendums may have three main functions:

- *National identity, nation building and state-building:* In the process of state or nation-building referendums have a strong symbolic value, helping to legitimise new political institutions. In Africa, with its ethnically heterogeneous societies, referendums may be particularly important. Independence and the creation of new constitutions are often the result of agreements between elites. Referendums are seen as a way of democratising and legitimating these processes. Here they often have an acclamatory symbolic value, internally towards the citizen as well as outwardly towards the international community.

Referendums have been used for the purposes of nation building and in political systems in transition. Except from those in South Africa and Malawi, they have been utilized as symbolic instruments at the end process of constitutional engineering. A referendum on ending apartheid was held in South Africa on 17 March 1992, the referendum was limited to white South Africans (Scott; 1992, Christopher; 1992). In Malawi the referendum heralded the end of autocratic rule. Referendums were also a successful starting point for reconciliation and nation-building in countries such as Burundi. The referendums in Burundi in 1991 and 1992 were constitutional referendums relating to the move towards a multiparty system. In March 1992 the most controversial topics were a five-year presidential term, renewable once, and the question of a proportional representation electoral system (Kersting; 2007)

- *Strengthening incumbent authorities:* In some countries the playing field is not level and referendums appear to be predetermined. Incumbents employ controlled referendums in response to public pressure, using their power and control over the state to strengthen and extend their executive powers (Rourke, Hiskes & Zirakzadeh 1992).

In some countries like Burundi 1981 referendums have been used to strengthen the executive and legitimate one-party systems. In 1992 a referendum in Djibouti focused on the introduction of a multi-party system. The voter turnout was 75, 5 per cent, with 96, 8 per cent voting in favour. A supplementary question relating to limiting the maximum

number of parties to four was also supported by 96,8 per cent – strong support for a less fragmented political party system (Krennerich et al; 1999). A constitutional referendum was held in Ethiopia on 1 February 1987. The new constitution would allow for a one-party state with the Worker’s Party of Ethiopia as the only legal party (Clapham; 1990). In Uganda, where the president can propose a referendum autonomously, the no-party system was under pressure and, in June 2000, the people were asked to choose between it and a party system (Therkildsen; 2002).

Inclusive decision-making: In some countries the government, the executive, and the leading parties in Parliament are not strong enough to implement certain strategies. Deep internal societal divisions and controversial issues may be the motive for holding referendums. In others a stalemate requires an external judgment in the form of a referendum. In this situation the interests of ruling and opposition parties as well as other stakeholders come into play (Kersting 2007).

1.3 Structure of the dissertation

South Africa is a former colony of England and has retained much of English trial procedure. Australia, New Zealand and Canada remain colonies of the United Kingdom whilst the United States of America is also a former colony of England. There is thus much overlap in the legal system of those nations and South Africa, making for a viable comparative review.

The Republic of Ireland and Scotland also suffered under the oppression of the English and their legal and political systems are highly similar to that of England and of South Africa. A brief discussion of these nations’ referendums legislation will therefore be entered into.

Switzerland is the country of origin of the modern referendum (Egli; 2012). It is a nation of frequent referendums. Its emphasis on direct democracy is said to be a prime contributor to the nation’s stability. The referendum model in Switzerland will be briefly discussed as it relates to other models, which, for example, call for a certain number of citizens’ signatures to institute a referendum.

Referendums legislation as well as the experiences of how they have been conducted will be discussed, concerning:

- Various countries in Africa;
- Philippines and Thailand;

The ultimate aim of this project, therefore, will be to posit solutions to fill the gaps that are in the existing referendum legislation including *inter alia* that:

- There may be inconsistencies with the Constitution in existing referendum legislation, especially as the legislation dates back to the Apartheid era;
- There is no process by which citizens may petition the Presidency to consider requests for referendums on proposed matters;
- There is no process in which it is mandatory for the State Attorney to provide advice to petitioners whilst providing reasonable time frames therefore;
- There is no provision that renders it compulsory for petitioners to provide a cover page to their petition setting out their proposal/s in a comprehensive manner;
- There is no clear time frame for when a referendum will be held after the date of the announcement indicating an intention to hold same;
- It is not clear if any law prescribes that a ballot paper regarding referendums specifically must be understandable to all South Africans over the age of 18 who are able to read;
- There is no clear provision for harsh sanctions for the commission of referendum offences;
- There is no process in place whereby it is mandatory for referendum legislation to come under regular legislative review;
- There is no provision in place for referendums to be binding;
- There is absolutely no certainty as to when the outcome of a referendum will be of legal force and effect;

- The South African Referendum Act makes no provision for so-called “special votes”, i.e. for the infirm, sick, elderly and those who have other commitments on referendum voting day;
- It is unclear whether or not 2 party agents per voting station per political party, NGO, group of organised persons or other organisation that has an interest in the referendum will be allowed in terms of a referendums process (although this is the *status quo* for political parties on governmental election days);
- There is no provision stating that no person can be forced to disclose their vote by a court decision;
- There is no law at present requiring that a register must be kept of those people who are convicted of corrupt or illegal practices pertaining to the referendum;
- The current legislation makes no mention of specific hours of opening and closing of polling stations’;
- Section 11 of the existing South African Referendums Act prohibits the conduct of an opinion poll in respect of a referendum as well as the publication of the results of such a poll. This particular provision is a severe infringement on the provisions of section 16 of the Constitution – which enshrines the right to freedom of expression to all within the country’s borders – as well as a constraint on section 19 Constitutional political rights; such as campaigning for a political cause.

The subsequent chapters therefore intend to draw out recommendations for South Africa to adopt. There are four chapters – the first chapter makes a case for the need of referendums in South Africa, this leads a second chapter on the conception of democracy in the African continent thereby allow us to draw on the legal existence of democratic instruments in Africa. I then look at Ubuntu and how it intersects with the Constitution in instances of referendums. Finally, the last chapter provides a comparative overview of direct democracy on ‘Recommendations and best practices’, considers strategies that might be of relevance to those jurisdictions that are considering adopting one or more of the instruments of direct democracy or seeking to make existing institutions and processes perform more effectively. The last section also incorporates conclusions that might be drawn regarding the

applications of direct democracy in the world today, and discusses some of the considerations that might enter into the decision to adopt any particular model of referendum practices.

2.1 The need for referendums in South Africa

This chapter considers whether, when and how the use of electoral direct democracy mechanisms is appropriate to enhance democratic systems. By involving voters directly in decision-making processes, does the use of direct democracy increase voter participation? Does allowing voters the opportunity to initiate their own laws, to vote on laws proposed or enacted by others, or to propose and vote on the continuation in office of representatives whom they perceive as unsatisfactory increase their satisfaction that political outcomes more accurately reflect popular preferences? Does direct democracy reduce dissatisfaction with elected representatives? Does the existence of direct democracy mechanisms act as a discipline on the behaviour of elected representatives? Criteria by which the success of direct democracy as a component of a democratic system might be judged include levels of participation and engagement, and levels of satisfaction with the democratic system as a whole. Such judgements can only be made in the context of wider political realities, which differ between countries and localities, and also change over time.

Participation and citizenship are debated notions. The concept of participation is becoming less concerned with participation in projects and programmes, and beginning to focus more on participation in policy processes - these notions are becoming increasingly linked (Steifel & Wolfe, 1994; Fung & Wright, 2001).

Direct democracy is often contrasted with representative democracy, although in practice the two concepts are generally complementary to each other (IDEA; 2008). Under a representative democracy, the electorate chooses which candidates and parties they want to elect and empower those representatives to make decisions on their behalf. Conversely, when direct democracy is used, citizens themselves are able to decide about specific laws and do not need to delegate the decision-making process solely to their elected representatives (Baremendi et al; 2008 & Karlsson-; 1995). Indeed, voter turnout and the

quality of citizen participation in many referendums are quite comparable to those found in national elections, in other instances they may fall short of expectations. Scott (1995) believes that the two methods; direct and representative democracy may therefore have voter disengagement implications.

The use of referendums and initiatives has increased dramatically (Butler & Ranney; 2007). Both in the number of countries employing such devices and in the number of issues being put to a direct vote. These trends have occurred at least partly in response to a growing sense of dissatisfaction with democratic performance in many countries, and to a decline in participation in democratic elections in some. Referendums can be used to resolve difficult political problems, particularly where political parties are divided over an issue. Such is a case in the South African body politic on issues surrounding the resignation of the President and the e-toll saga. However, representative democracy is a limited and indirect form of democracy (Heywood; 2007:74). It is reasonable to say the majority of the developing societies have an opportunity to vote for representatives whom they share policy views with. However, it would be impossible for any political party to represent all views of its supporters, as a result parties may include certain policy promises in their manifestos that their voters do not want to see implemented (Caramani; 2008:254). Referendums reduce the feeling of alienation by the voters (Heywood; 2007).

Direct democracy requires from citizens a relatively high level of knowledge of issues that are sometimes complex. Sometimes voters may not have the capacity or information to make well-informed decisions about the issue at stake, and instead could make ill-considered decisions based on partial knowledge of an issue or the emotion of a campaign, or on the basis of unrelated factors such as feelings about a particular political party or personalities (IDEA; 2008: 28).

It can also be posited that the existence of referendums can empower minorities, because direct democracy processes provide alternative ways to raise issues that are not necessarily favoured by the majority (Garanova & Ryan; 2015), particularly the majority within a legislature or parliament. It is a case that referendums are often triggered by a small minority of the electorate. In some countries, referendums campaigns are sometimes begun

by smaller political parties or groups that have little or no representation in a legislative (i.e. Venezuela).

I concede, referendums have also been employed by authoritarian rulers, either to create a veneer of democratic legitimacy for their actions or to counter domestic political opposition. In authoritarian polities where pressures for democratization exist, referendums might provide, intentionally or unintentionally, an alternative outlet for genuine democratic expression. In modern times, referendums have been employed by regimes such as those of Augusto Pinochet in Chile, Ferdinand Marcos in the Philippines, or Park Chung Hee in South Korea (Celoza; 1997, Cawathra & Luckham; 2003, Kim; 2012), for purposes that would have been considered at the time to be anti-democratic. Yet it can be argued that some referendums may have actually accelerated the process of democratisation. Pinochet unexpectedly lost the 1988 referendum which was intended to extend his term of office, and his autocracy collapsed as a result (Cawathra & Luckham; 2003).

2.2 Africa's conception of democracy - An 'African' perspective

Alarmingly, a question being increasingly asked is whether democracy has failed in Africa, or similarly, whether democracy is unworkable or perhaps not suitable for Africa: this, given the fact that many African countries, which are supposedly democratic, are characterized by dreadful human rights abuses, ethnic conflicts, life presidents and economic chaos (Gumede; 2015). Historically, Western precepts of democratic rule and institutions such as political parties, and what they ought or should do to be a viable democratic player have marred African peoples' conception of democratization. Ohachenu (1995) suggests that African people's idea of democratisation is essentially derived from their own historical knowledge, experience, values and capabilities. Ohachenu further says that the historical values, knowledge and capabilities are important factors for mass mobilization and program on governance and democratization.

African perceptions of democracy coexist with "the other," unlike in the Western paradigm. That is, elements of African cultures such as religion, which is often viewed as antithetical or at best with suspicion to democracy in the Western framework, have a long, rich history in various African societies. For example, in the case of northern Nigeria from 1946-1966 (pre and post-independence), the creation and expansion of "modern" (a.k.a. Western) political

institutions, such as the national legislature, cabinet system and political parties were accompanied by the strengthening of the political roles played by traditional Muslim leaders known as emirs (Whitaker 1970). As Whitaker explains “far from modern institutions having simply driven out traditional ones,” “elements of the institutions of each type or origin coalesced to form a workable system of power” (Whitaker 1970: 460)

Indeed, there is an absence of democratic theory in African political scholarship in terms of providing the underlying principles, meaning, canons and criteria of democracy in African culture. Thinkers such as Schumpeter (1950) argue that democracy does not entail rule by the people, but that it is “...a method by which decision-making is transferred to individuals who have gained power in a competitive struggle for the votes of the citizens.”

Popper (1963) asserts that democracies are a system wherein one administration can be replaced by another without bloodshed, which to him indicates elections. He rejects the concept of sovereignty in favour of elections, stating that the imperfections and uncertainties of elections are preferable to the prospect of tyranny found within sovereignty (Fayemi, 2009).

As a concept and form of government, democracy is quite old. It “entails a system of government that allows the citizens freedom to decide their desires. Ancient Greece (Athens in particular) is widely regarded as the birthplace of Western democracy” (Lioba and Abdulahi 2005). Ruch (1981, 305) holds that our democracy must neither be a mere return to traditional Africa, nor a replication of Western modes of governance. Africa, he observes, cannot move from one extreme to the other without mapping out its own original path, while taking due cognizance of democratic development in other social formations.

Prior to independence, civil society groups in Africa as forms of ‘democracy’ consisted of two strands: elitist groups demanding equal opportunities with colonialists (for education, employment etc.) on the one hand, and on the other, militant groups, often comprising the peasantry and workers, who demanded higher commodity prices and political independence. Colonial states provided little or no space for civil society activism, and —sought to control the evolution, content and impact of associational life (Mamdani 1993).

Democracy in the Western sense may be opposite to Africa's brand of democracy based on communal traditions of consensus building. Claude Ake (1991) asserted that this stems from confusion between the principles of democracy and its institutional manifestation. Traditional political systems in Africa had democratic values such as patrimony and communalism, that is, a strong emphasis on accountability. Chiefs were answerable not only for their own actions but for natural catastrophes such as famine, epidemics, floods, and drought" (Ake, 1991 p: 34).

2.3 The legal basis of democratic instruments in Africa

Article 55 of the African Charter on Human and People's Rights allows non-state parties to communicate with the Commission on Human and Peoples' Rights, established in terms of the Charter to ensure the protection of rights set out in the Charter (TMALI, 2013: 15). This gives civil society organisations the opportunity to submit alternative reports to give additional information about human rights in their country when a state party reports to the commission. However, little use has been made of this mechanism in practice, as CSOs have little time to review state reports in order to formulate a substantive response.

Nevertheless, NGOs often play a role in bringing cases to the Commission, proposing agenda items for the Commission's sessions, and providing logistical and other support to the special rapporteurs, working groups and missions, and developing resolutions and new protocols to the African Charter.

Article 42 of the African Charter on Rights and Welfare of the Child states that one of the functions of the committee established under the charter is to cooperate with other African, international and regional institutions and organisations concerned with the promotion and protection of the rights and welfare of the child (TMALI; 2013:15). The Charter notes that if this committee is to develop into an independent and effective mechanism for monitoring and advocating for children's rights in Africa, it needs the support of civil society.

Article 11(b) of the African Youth Charter allows the creation or strengthening of platforms for youth participation in decision-making at local, national, regional, and continental levels of governance. This is an avenue through which civil society may engage with the youth in reaching this goal (TMALI, 2013; 16).

2.4 Does Ubuntu make a case for referendums?

“The spirit of Ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole Constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.” Justice Albie Sachs (2012)

This section, will briefly set out the meaning of *Ubuntu*, its application in society and whether or not it may provide an impetus, and even a need for referendums.

Justice Sachs’ quote above provides case law to indicate how the concept of *Ubuntu* flows through the Constitutional order. *Ubuntu* was expressly included as a Constitutional value in the Interim Constitution of 1993 but was omitted from the so-called “final” Constitution of 1996. “Final” in this instance is something of a misnomer as the Constitution constantly changes according to legislative amendment.

Regarding *Ubuntu* the Interim Constitution provided as follows:

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

Khoza’s paper titled *African humanism or Ubuntu as a philosophy of life and its potential application* talks of *Ubuntu* as collective action. (Khoza; 1994). Certainly, the act of voting – either in a political election or on a matter put forward in a referendum - is a collective action in which the community is able to express their collective will.

Ubuntu connotes “supportiveness, cooperation, collaboration and solidarity” and asserts “I am because you are, and you are because we are.” It envisages a social contract that extends to all of humanity (Hill; 2006 & Khoza; 1994).

Reuel Khoza's interpretation of *Ubuntu* is instructive regarding the critique that a collectivist point of view tends to de-personalise individual thinking and identity. He asserts that *Ubuntu* does not exalt total individualism but at the same time it is a philosophy that does not endorse communalism to the point of making the concept of the individual irrelevant. Rather, it places importance on the individual becoming a valuable member of society in a spirit of working for the common good as an integral member.

Seen in the context set out above, it would appear that a proponent of *Ubuntu* would participate in a referendum because a matter in a referendum is big enough to impact on entire communities and more often than not, entire nations. It can be argued that a person not having their say in a referendum is not playing their part as an individual in the community. *Ubuntu* is not blindly collective in the sense that all members of the community must have the same points of view.

Ubuntu serves as a guiding principle for leadership and acknowledges that people may differ with the collective view and still be listened to. Interestingly, this implies that *Ubuntu* recognises minority rights and promotes democracy. Khoza (1994) affirms that the state of affairs of being able to air an unpopular view is a key element of the "ideal traditional village."

Individualism and personality certainly do flourish within its outlook and therefore the outcome of a referendum by supporters of *Ubuntu* will tend to indicate differing points of view, which is an essential feature of democracy, the South African Constitution and in fact, what referendums are all about.

Expressions such as *ha se motho* – meaning "he is no human being" – do not denote that a person is deceased but rather that they have lost their sense of humanity. One may become more or less human according to the extent to which they meet their obligations to the community. Khoza (2012) asserts that common problems must be dealt with and that "good governance and democratic participation need to find their roots in community" (Khoza; 2012). This is once, more an endorsement of the notion that democracy can be strengthened through increased community involvement. One such way, amongst many, could be participation by the community in referendums, which will also have the effect of increasing the accountability of the state to the citizenry.

Forward-looking and ever more effective methods of governance are necessary as the world and nation seek new models of leadership. *Ubuntu* can certainly provide some of the answers. *Ubuntu* requires that communities have the freedom, information and tools to make choices and decide on courses of action (Metz; 2011). Increased capacity for decision making and expanding choice is an inevitable effect of holding a referendum. On the face of it, therefore, the notion of *Ubuntu* and the referendum device appear to be interwoven in the way that they call for increased community participation.

The concept of a referendum is certainly not alien to African culture. African culture created the practice of the *lekgotla* where community decisions are arrived at by consensus and each participant at such a gathering is given a voice (Duncan & Seloane; 1998). In fact, the voices of individuals are protected in setting as each attendee is allowed to have their say and no one is allowed to interrupt another.

This practice is emblematic of community participation and the protection of individual rights to do so. The principles of a *lekgotla* are clearly evident in the practice of referendums. It is reasonable to conclude that referendums would attract the buy in and support of the majority of the population of South Africa for cultural reasons, the legal right to do so and the sad reality that poor South Africans in particular feel excluded in terms of governmental decision-making, particularly regarding economic decisions.

Ubuntu was included in the interim constitution to justify the necessity for the Truth and Reconciliation Commission. Yet, the necessity for the Truth and Reconciliation Commission cannot be said to be the expression of the will of the conquered people of South Africa. This is because the necessity was a unilateral decision by the political leadership of the conquered people. The people themselves were not consulted, by way of a referendum, for example (Ramose; 2003). From this flows a compelling view that although the decision was ‘democratic’ it was not ‘the will of the conquered. Ramose further explains that:

*“If a constitution is at bottom the casting into legal language of the moral and political convictions of a people then the mere translation of Westminster and Roman Law legal paradigms into the vernacular languages of the indigenous conquered people is not equal to the constitutional embodiment their moral and political convictions. **There is no a priori***

reason why Ubuntu should not be the basic philosophy for constitutional democracy”

(Lephaka; 2015 & Ramose; 2003).

Metz (2011) argues that there are 3 primary criticisms levelled against *Ubuntu* as a system of public morality:

- That its principles are too vague;
- That it fail to acknowledge the value of individual freedom; and
- That it fits traditional, small-scale culture more than a modern, industrial society.

Metz *supra* explains that individual rights and freedoms and *Ubuntu* are necessarily interlinked as they are both grounded in the principle of human dignity.

Metz also argues that an interpretation of *Ubuntu* that prizes what is moral and just in society, communal relationships and friendships goes some way towards negating the criticism of *Ubuntu* being an imprecise doctrine. He asserts that by grounding *Ubuntu* in a theory of morality, much precision is lent to its scope and definition. Metz goes on to posit that essentially what a human rights violation is, a degradation of friendliness and care towards others. Therefore, *Ubuntu* can be said to be inextricably woven into the fabric of human rights and vice versa.

Ultimately, Metz contends that by taking the above factors into account and incorporating them into a mainstream understanding of *Ubuntu*, it can certainly form the basis of public morality in South Africa.

Dr Malan (2014) argues that *Ubuntu’s* primary application is in the area of inter-communal relations and can also be associated with effective public service delivery where a sensitive approach is required that genuinely responds to the needs of the public and individuals concerned (Malan; 2014: 250). Malan warns that *Ubuntu* should not be used as an excuse for public office bearers acting outside the ambit of their job descriptions, in the sense of abusing public office for the sake of fostering good relations.

Certainly, misuse or convolution of the principles of *Ubuntu* must not be countenanced. The comprehensive overview of *Ubuntu* supplied by Reuel Khoza is the basis upon which I assert that *Ubuntu* and the referendum device are necessarily interlinked and that increased use of

referendums would facilitate the sense of community and accountability that Khoza's *Ubuntu* calls for.

3.1 Uganda

This chapter considers a number of issues that arise in determining whether referendums are appropriate in different political environments, and it draws on the experiences of political jurisdictions throughout Africa and the world in which the instruments and processes of direct democracy have been used at various times. It seeks to look at the many ways in which the views of citizens can be sought through an electoral process, to outline the many different alternatives available to countries and localities which are building or amending their democratic institutions, and to show the political and technical factors which are important in the design and implementation of referendums. It also seeks to do this in the context of the political realities which bear on the process of decision. I

The legislative framework and direct democracy in Uganda

The government of Uganda finances both the referendum and the recall process. All finances required to pay expenses that may be incurred in the discharge of the functions of the Electoral Commission are charged to the Consolidated Fund. The Electoral Commission's funds may, with prior approval of the minister responsible for finance, include grants and donations from sources within or outside Uganda. The Electoral Commission must 'give equal facilitation to all sides in a referendum' (IDEA; 2008).

Citizen-initiated Referendums

The voters have the right to demand a referendum. This is subject to an enabling law that must be passed by parliament as a mechanism for the citizens' demand to be accommodated and the referendum conducted. Under article 255 of the Constitution, parliament shall by law make provision:

- (a) for the citizens' right to demand the holding by the Electoral Commission of a referendum, whether national or in any particular part of Uganda, on any issue; and
- (b) for the holding of a referendum by the Electoral Commission if the government refers any contentious matter to a referendum.

The result of the referendum is binding on all organs and agencies of the state and all persons and organisations in Uganda. However, a referendum does not affect the fundamental human rights and freedoms guaranteed in the Constitution or the power of the courts to question the validity of the referendum. Rule 105 of the Rules of Parliament allows private citizens to propose new laws or amendments to existing laws by submitting to parliament a private member's bill. The parliament has passed several such bills.

Referendums to change of the political system

Under article 69 of the Constitution (1995), the people of Uganda shall have a right to choose and adopt a political system of their choice through free and fair elections and referendums. A political system is defined as being subject to the Constitution and shall include the Movement political system; the multiparty political system; and any other representative political system (IDEA, 2008). Under article 70 of the Constitution, the Movement political system is broadly based, inclusive and non-partisan and shall conform to the principles of participatory democracy – democracy, accountability and transparency; access to all positions of leadership by all citizens; and individual merit as a basis for election to political office. The Constitution also spells out when the referendum on a change of political system should be held. Article 74 of the Constitution provides as follows:

74. (1) A Referendum shall be held for the purpose of changing the political system:

(a) if requested by a resolution supported by more than half of all members of parliament;

or

(b) If requested by a resolution supported by the majority of the total membership of each of at least one half of all district councils; or

(c) If requested through a petition to the Electoral Commission by at least one-tenth of the registered voters from each of at least two-thirds of the constituencies for which representatives are required to be directly elected under paragraph (a) of clause (1) of article 78 of this Constitution;

(2) The political system may also be changed by the elected representatives of the people in parliament and district councils by resolution of parliament supported by not less than two

thirds of all members of parliament upon a petition to it supported by not less than two-thirds majority of the total membership of each of at least half of all district councils;

(3) The resolution or petitions for the purposes of changing the political system shall be taken only in the fourth year of the term of any parliament.

Referendums on amendment of the Constitution

Compulsory referendums are held to approve or reject certain types of Constitutional amendment. Article 260 of the Constitution provides that an act of parliament seeking to amend any of the provisions of the Constitution must be supported at the second and third readings in parliament by not less than two-thirds of all members of parliament, and it must have been referred to a decision of the people and approved by them. Other specific Constitutional amendments under article 261 are not subject to referendum but must be ratified by at least two-thirds of the members of the District Council in at least two-thirds of all the districts of Uganda.

The Constitution and the enabling Parliamentary and Local Government Act provide for recall of elected representative by the public (Reif; 2013). It is, however, important to note that the Presidential Election Act does not allow for recall of a president. The recall of a member of parliament has to be initiated by a petition in writing setting out the grounds for a recall and signed by at least two-thirds of the registered electors of the constituency and shall be delivered to the speaker of parliament (Angeyo & Oryem; 2008).

ARTICLE OF THE CONSTITUTION	SCOPE OF EFFECT	PROVISION OF THE LAW
84	Recall of elected members of Parliament	A member of parliament may be recalled for misconduct, desertion, or mental or physical incapacity by a petition signed by at least two-thirds of the registered electors of his or her constituency.

185	Recall of elected district chairpersons and speakers of parliament	A district chairperson or speaker may be removed for misconduct, abuse of office, or mental or physical incapacity by a resolution supported by not less than two-thirds of all members of the District Council.
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Table 1 provided by IDEA; 2008

The use of direct democracy in Uganda

Uganda held a referendum on a political system in 2000 (Angeyo et al; 2008). Angeyo further notes “Under article 271 (3) of the constitution, and during the last month of the fourth year of the term of parliament, a referendum was held on 29 June 2000 to determine the political system the people of Uganda wished to adopt. A total of 4.9 million voters participated (51 per cent); 91 percent voted for the Movement political system and 9 per cent voted for a multiparty system” (Amgeyo; 2008).

The second referendum on a change of the political system, called by parliament for 28 July 2005, was for a change away from the Movement political system to a multiparty political system. The result of this referendum was that, with a turnout of 47 per cent of registered electors, 90 per cent of those voting voted ‘Yes’ in favour of a multiparty system. A series of meetings were held, culminating in the formation of the ‘Yes’ and ‘No’ sides for purposes of the 2005 referendum. In accordance with the Referendum and Other Provisions Act 2005, and in consultation with both sides, the referendum question was formulated as follows: ‘Do You Agree To Open Up The Political Space To Allow Those Who Wish To Join Different Organizations/Parties To Do So To Compete For Political Power?’ The ‘Yes’ side chose a tree as their symbol, while the ‘No’ side chose a ‘closed house’.

Lessons from Uganda

Some lessons worth considering for adoption in Uganda , or may make existing institutions and processes perform more effectively. Such lessons draw upon both positive and negative experiences with direct democracy institutions and practices. Suffice to say that procedures that work well in one jurisdiction may not necessarily be suitable in another. In some cases choices must be made between institutions, laws or procedures that involve difficult trade-offs between different objectives. For example, measures that may be intended to preserve the integrity of some direct democracy instruments may make those instruments more difficult to use. Nevertheless, the experience drawn from a wide variety of different political and social contexts around the world can help to inform those choices. Drawing on information in the preceding chapters, a number of best practices are suggested that may apply to direct democracy institutions and the administrative and electoral processes associated with them.

Each referendum in Uganda was completed successfully. Although in both referendums, the common constraint was that voter participation was premised largely on voting for individuals than for sides represented by symbols. Suffice to say that voter apathy affects turnout in these crucial stages of the process. Voters may make a last-minute attempt to turn out for activities such as registration and display of the electoral register; thus the Electoral Commission has to intensify the sending out of reminder messages and/or increase the numbers of registration venues and personnel, and/or even extend the period unless it is constrained by a constitutional deadline (IDEA; 2008).

In both referendums on change of the political system, some voices of the electorate made an attempt to halt the referendum campaigns by calling on the electorate or the parties to boycott the referendum but researcher, Angeyo (2008), noted that it did not prevent the enthusiastic section of the public from participating in the two referendums. The referendums needed an intensive voter education since a referendum process is different from that of a general election. The electorate has to be informed about the differences between a referendum and an election. Voter education channels are not accessible to everyone and usually one person per parish is appointed by the Electoral Commission to give out information. Other channels for voter education include commercial advertising through bill-boards, street poles and banners; printed materials like handbooks, manuals,

booklets, posters, fliers, leaflets and handbills; mobilization materials like mobile shows or films or drama groups (Angeyo & Byanyima; 2008).

It is important that (a) timely enactment and amendment of the legal framework of operation and (b) funding are important issues for the successful conduct of a given referendum. This also enables the stakeholders in the process to be involved at the earliest opportunity. The referendum process is much more demanding financially than the recall process. This is because a referendum is a universal adult suffrage exercise involving all registered electors in the country and key components such as the display of the electoral registers for all the polling stations, the printing of ballot papers for all registered electors, ballot box procurement, and so on. Recall processes, by contrast, involve only the electorate from a specific area. Moreover, the grounds for a recall are often not substantiated or the legal requirements are not complied with, and most attempts to initiate a recall do not succeed on grounds of non-compliance with the law. Petitions under the Local Governments Act, however, have had a degree of success, resulting in a recall, in contrast to recalls under the Parliamentary Election Act (Byanyima et al; 2008).

Direct democracy is still a ‘work-in-progress’ in Uganda and many people are yet to appreciate it especially the older and rural electorate, despite the legal framework (IDEA; 2008). Another challenge is due to the lack of resources to achieve the desired outcomes of voter education.

3.2 Switzerland

Switzerland is a federative state with 26 cantons (individual constituent states) and around 2,740 communes. Swiss voters have the right to cast their votes at the federal, cantonal and local levels. On average, four times a year there are referendums at all three levels (Braun 2008).

All Swiss citizens, whether living in Switzerland or outside, who have reached the age of 18 and who are not disqualified on grounds of mental incapacity are entitled to vote in referendums (article 136 of the Swiss federal Constitution (FC)). The issues that the people are called to vote on at the federal level are set out in the Constitution (articles 138–142 FC). There are no quorum requirements such as a turnout quorum for a referendum to be

valid. The outcome of a referendum – be it an optional or a mandatory referendum – is always binding (articles 142 and 195 FC). A basic distinction is made between mandatory and optional referendums.

A mandatory referendum must be held (article 140 § 1 FC)

- in the event of a total or partial revision of the federal Constitution;
- to join a collective security organization (e.g. the United Nations) or a supranational community (e.g. the EU); or
- to introduce urgent federal legislation without the required constitutional basis and which will be in force for longer than a year.

Such a decision requires the approval of both a popular majority and the majority of the cantons. A popular majority means a simple majority of those voting (article 142 § 1 FC). A majority of the cantons is achieved when the popular vote has been in favour of the proposal in a majority of cantons (article 142 § 3 FC). In calculating the majority, the results in six – out of a total of 26 – cantons each count as half a cantonal vote (article 142 § 4 FC).

A referendum is also mandatory (article 140 § 2 FC)

- For citizens' initiatives aimed at a total revision of the federal Constitution;
- For citizens' initiatives aimed at a partial revision of the federal Constitution which were presented as a general proposal and have been rejected in the Federal Assembly; and
- in order to reach a decision where the Federal Council (the government) and the National Council and the Council of States (the parliament) have disagreed as to whether a total revision of the federal Constitution should take place or not. In the latter three cases, the referendum is decided by a simple majority of the voters. Swiss citizens who are entitled to vote can propose a partial or total revision of the Constitution (articles 138 and 139 FC). Before a citizens' initiative can be officially validated, the signatures of 100,000 citizens who are entitled to vote (corresponding to approximately 2 per cent of the electorate) have to be gathered within 18 months.

A citizens' initiative can be formulated as a general proposal or presented as a fully worked-out text. If the initiative is qualified, a referendum on it is mandatory. An optional referendum takes place when it is requested within 100 days after the official publication of a statute either by 50,000 citizens (corresponding to approximately 1 per cent of the Swiss electorate) entitled to vote or by eight cantons. The following can be the subject of an optional referendum (article 141 FC):

- federal laws;
- federal laws declared urgent with a validity exceeding one year;
- federal decrees to the extent that the constitution or the law foresee this; and
- international treaties which

(1) are of unlimited duration and may not be terminated;

(2) provide for the entry into an international organisation (e.g. International IDEA); or

(3) contain important legislative provisions or if their implementation requires provisions in federal laws. The relevant law, decree or international treaty is approved if the people vote in favour of it (popular majority).

The organisation of referendum votes

The national polling days are appointed according to the rules laid down in article 10 of the Federal Law on Political Rights (FLP) of 17 December 1976 and article 2a of the Decree on Political Rights (DPR) of 24 May 1978). Federal referendum votes are not held during federal elections. A minimum of four months before polling day, the Federal Council (government) determines which proposals are to be submitted to the vote. The Federal Chancellery provides the cantons with the proposals to be submitted to a vote of the people and the ballot papers (article 11 FLP).

The Federal Council explains each proposal that is put to the vote in a so-called referendum booklet. It has to include the arguments of the committee responsible for the initiative or referendum (article 11 FLP). It is published by the Federal Chancellery in the four official languages and sent to the cantons for distribution to all eligible voters.

Each canton is responsible for the conduct of the vote within its own territory and has its own regulations (article 10 FLP). These regulations sometimes vary considerably. For example, four cantons have one or more centralized electoral registers, while the other 22 cantons have decentralized registers, that is, the communes keep the electoral registers. The federal law requires that all voters receive the documents required in order to cast a valid vote at a minimum three and at the earliest four weeks prior to the polling day (article 11 FLP). The cantons have to execute this provision but the way they do this is up to them and also depends – among other things – on whether the canton or a commune in that canton decides to organize another referendum vote on the same day. The management of the polling stations is also organised by the cantons or communes. After the vote, the cantons collect reports on the popular ballots from each polling station, compile the provisional results from the entire canton, and notify the Federal Chancellery of the results. The Federal Chancellery then validates the results and prepares the decision of the Federal Council, which determines the results of the overall vote.

In Switzerland, referendums on constitutional changes are mandatory.

If 50 000 Swiss citizens demand for a referendum on a law, a referendum must be held. A referendum bearing such a requirement is said to be “facultative” in nature.

If a minimum of 50 000 Swiss citizens demand a referendum on a particular law, a referendum must be held. A referendum bearing such a requirement is said to be “facultative” in nature.

The Swiss have a popular initiative device whereby 100,000 citizens may demand for an amendment of the Constitution. This is done by signing a form. The federal parliament must then discuss the initiative. The initiative may be recommended or rejected by the federal parliament. The federal parliament is also empowered to propose an alternative. Regardless of what the federal parliament decides, however, all citizens will ultimately decide in a referendum whether or not to accept the initiative, the alternate proposal or to retain the *status quo* (Schweiz; 2007).

Lessons learnt from Switzerland

The request for a popular referendum must be submitted to the Federal Chancellery before expiry of the referendum period, furnished with the required number of signatures and the certificates of eligibility to vote (article 59a FLP). Certificates of eligibility to vote are issued by cantonal or communal offices (article 59a FLP). These offices certify that the signatories are eligible to vote on federal matters. After expiry of the referendum period (100 days), the Federal Chancellery checks the validity of the signature lists and establishes whether the signature list contains the required number of valid signatures.

The frequency of signatures required for citizens' referendums and the collection deadlines have been the subject for political debate (Braun; 2008). In many instances, the government has proposed raising the signature quorums for initiatives and referendums, and initiative committees have demanded a reduction in the time allowed to the authorities to process initiatives (IDEA; 2008). The signature quorum remains the same, it has become increasingly difficult to collect the 100,000 signatures required for a national citizens' initiative. The trend towards more postal voting has adversely affected the traditional method of collecting signatures outside voting centres. The government is intending to look at the use of the internet. The first regular referendum at which e-voting was allowed took place on 14 January 2003 (Egli; 2012).

3.3 Referendums and issue campaigns in the 28 EU member states

Unlike the regulations regarding general party expenditure, there are limited regulations that govern referendum and issue campaigns. This is primarily the case because most European Union Member States do not hold regular referendums and when they do, public funding is often distributed on an *ad hoc* basis (Klingeren et al; 2015).

The key findings are as follows:

- A limited number of regulations exist with regard to party funding of referendums and issue campaigns;
- Most Member States designate public funding on an *ad hoc* basis in case a referendum is held, with the exception of UK, as it has rules regarding party funding of referendums;

- Nine countries do not allow the use of public funding for campaigning during referendums or issue campaigns.

3.3.1 Austria

There are three instruments of direct democracy in Austria: the referendum, the people's initiative, and the consultative referendum. A referendum can be conducted for any law, but this has only occurred once, in a 1978 referendum related to nuclear power. The other referendum, conducted in 1994, related to the EU. In Austria, referendums are only mandatory when a total revision of the Constitution is proposed (Rosenfeld & Sajo; 2012), which was the case for the referendum on EU membership. No public funding is explicitly allocated for referendum campaigns (Beizen; 2003).

Conditions set out for Referendums to take place in Austria are as follows:

There are three instruments of direct democracy in the Austrian institutional framework:

- 1) The referendum (Voksabstimmung): A referendum is required for a "total revision" (Gesamtänderung) of the Constitution (Article 44) or to remove the federal president from office (Article 60). The Parliament calls the people to make legally binding decisions in an exercise of direct democracy. Always binding;
- 2) The people's initiative: Used to place a bill or demand before the Parliament;
- 3) The consultative referendum (Volksbefragung): Not binding. The Parliament calls upon the people to officially record their opinion. One-third of the members of one of the two chambers of Parliament can demand a referendum on other Constitutional amendments. If the National act demands it, a referendum can be held on any other law (Article 43)

3.3.2 Belgium

In Belgium national referendums are not allowed (Vollard et al;_2014). It is possible to hold referendums and popular initiatives at the regional and municipal levels, although they are non-binding.

3.3.3 Bulgaria

In Bulgaria, the set of eligibility issues for referendums is limited and therefore, they are infrequent. Bulgaria's latest referendum, in 2013, related to nuclear energy; however, it was invalidated due to low turnout. Before that, the most recent referendum was held in 1979 and related to approval of the Constitution. No public funding is explicitly allocated for referendum campaigns.

Referendums and issue campaigns may be used for nearly all fundamental questions within the power of the national assembly, but no Constitutional referendum or referendum on taxation or state budgets is allowed. MPs can initiate a referendum; no people's initiatives are allowed. The National Assembly ultimately decides whether a referendum may be carried out, along with the wording of the question. There are two requirements for the approval of a question. The first is a quorum (half of the voters) and the second is that participating voters represent more than half of the electorate.

In terms of the Law on Direct Civic Participation in State and Local Government Art. 10(1), a proposal to the National Assembly to hold a national referendum can be done by:

1. At least one fifth of the deputies;
2. The President of the Republic;
3. The Council of Ministers;
4. Not less than one fifth of the municipal councils in the country;
5. A Nomination committee of registered voters gathered no less than 200 000 signatures of registered voters;

(2) The National Assembly shall adopt a decision to hold a national referendum where this is requested by the nomination committee with a petition containing the signatures of not less

than 500 000 Bulgarian citizens with voting rights and does not contradict the limits of art. 9, para. 2, 3 and 4.

(3) The President of the National Assembly shall organise the creation and maintenance of a public register which shall contain proposals for a national referendum and initiative committees under par. 1, item 5 under par. 2 and Art. 11, para. 2.

(4) The proposal for a national referendum shall include one or more questions that people answer 'yes' or 'no.'

3.3.4 Croatia

In Croatia, referendums are not very common. The first was held in 1991 and related to the country's independence and international recognition (Magas & Zanic; 2003). The only two other referendums involved EU accession in 2012 and the definition of marriage in 2013. Public funding is not used for national referendums.

Ten per cent of registered voters must sign the referendum petition to make the referendum mandatory. The House of Representatives can call a national referendum for the following reasons: a proposed Constitutional amendment, draft law, or any other matter falling within its jurisdiction. In such a situation, the regular legislative procedure applies, that is, a simple majority is needed. Croatia's President can call for a referendum on a Constitutional amendment or on any other issue that he considers important "for independence, unity and existence of the Republic." In that case, the President must obtain the countersignature of the Prime Minister and is subject to the government's proposal. If there is a turnout of more than 50 percent, the decision can be made by the majority. The outcome of a referendum is binding. "Mandatory national referendum is envisaged for association – dissociation of Croatia with and from other States, respectively"

3.3.5 Cyprus

The only referendum to have been conducted in independent Cyprus was the referendum on the Annan Plan in 2004, which related to the reunification of the island (Pericleous; 2009). Currently, there is no Constitutional provision that allows referendums.

3.3.6 Czech Republic

In the Czech Republic, there is no law governing referendums at the national level, and there has only been one referendum related to EU accession. However, a Constitutional provision for a referendum on EU accession was passed in 2002. Accession was to be approved if a simple majority supported it, and there was no minimum turnout requirement. There was a budget of 200 million crowns (6.25 million euros) for the campaign, which was primarily operated by the Czech Foreign Ministry. There was also indirect funding in the form of subsidised media.

3.3.7 Denmark

The 1953 Constitution expanded Denmark's use of the referendum. Every Danish referendum since 1978 has concerned matters related to the European Union. Although referendums are publicly financed, there is no legal framework to determine the distribution of public funds, which is performed by Parliament on a case-by-case basis prior to each referendum.

Referendums cannot be initiated by popular initiative. According to Denmark's Constitution, once a bill passes in the Folketing (Parliament), which consists of 179 directly elected members, one-third of the members can call for a referendum, which is then submitted to voters. In other words, citizens can vote on a proposal that has been passed but not yet enacted. Denmark's monarch can also introduce a referendum by introducing bills or other measures to the Folketing. There are both mandatory and optional referendums: Mandatory referendums are called for:

- (1) amendments to the Constitution;
- (2) Changes to voting age; and
- (3) Delegating governing powers to international authorities.

Optional referendums are called for:

- (1) adopting international treaties; and
- (2) bills.

A referendum is always binding in Denmark.

3.3.8 Estonia

In the post-Soviet era, Estonia has held four referendums on the issues of independence, voting rights, the Constitution, and EU accession. Referendums are mandatory for issues involving changes to the first or last chapters of the main law, and there are various restrictions on the issues that can be the subject of a referendum. Public funding is used for referendum campaigns, but there is no specific legislation that governs finances.

The Riigikogu has the right to submit a bill or other national issue to a referendum. To do so, the vote of a three-fifths majority of the membership of the Riigikogu is required. The referendum cannot be held until three months after a resolution has been passed. The people's decision is made by a majority vote. The decision of the referendum is binding on all state institutions. If a bill that is submitted to a referendum does not receive a majority of votes in favour, the President of the Republic shall declare extraordinary elections to the Riigikogu. Issues related to the budget, taxation, the state's financial obligations, ratification and denunciation of international treaties, the declaration or termination of a state of emergency, or national defence are not constitutionally permissible subjects for a referendum.

3.3.9 France

Article 3 of the Constitution of France mentions referendums directly, stating "The national sovereignty belongs to the people who exercise it through their representatives and by means of a referendum ..."

In France there are two types of referendums:

At the national level, a legislative referendum on the initiative of President of the French Republic on a proposal by the Cabinet or the Parliament (since 1958);

Locally, a local referendum initiative (since 2003).

The French Constitutional law on the Modernisation of the Institutions of the Fifth Republic, passed on 23 July 2008 provides for a shared initiative referendum (organized on the initiative of one-fifth of the members of Parliament, supported by one-tenth of registered voters). This appears in Article 11 of the French Constitution. Such an initiative takes the form of a proposal in Parliament, meaning that the proposal to hold a referendum can be voted down in Parliament.

The ways of implementing referendums provided for in the French Constitution remain a method of semi-direct democracy as the means of enacting a referendum is subject to the Constitution and is done in a way that is dependent on elected representatives

In France, referendums were reintroduced by the Fifth Republic in 1958. However, referendums are not very frequent (only six have been conducted since 1970) and there have been high levels of abstention and rejection. Only the president can call a referendum and therefore, it is not perceived as a truly democratic tool. The executive power also has the authority to determine the amount and allocation of funding.

Only the President can put a referendum on the agenda (Parkin; 2001). New legislation has been proposed to allow members of Parliament to initiate a referendum, but that legislation has not yet been implemented.

3.3.10 Finland

Referendums were added into the 1987 Constitution. Since 1970, Finland has held only one referendum, which related to EU accession. Public funding is generally not available.

A petition to Parliament shall be submitted by at least 50 000 Finnish citizens who are entitled to vote. The Act contains provisions about the timing and choices for the referendums that are presented to Parliament.

3.3.11 Germany

In Germany, referendums are primarily used at the municipal and state levels. Approximately three hundred referendums take place every year. Regulations vary from state to state.

Such campaigns are only possible on the state level, which means that there are 16 different regulatory systems.

3.3.12 Greece

Referendums are permissible in Greece, and the decision is made by Parliament. Since Greece's 1974 transition to democracy, only one referendum has been held; it related to the abolition of the monarchy. Previously, Constitution-related referendums were held in 1968 and 1973. In general, referendums are publicly funded.

A referendum on Bills passed by Parliament regulating important social matters, with the exception of the fiscal ones shall be proclaimed by decree by the President of the Republic, if this is decided by three-fifths of the total number of its members, following a proposal of two-fifths of the total number of its members, and as the Standing Orders and the law for the application of the present paragraph provide. No more than two proposals to hold a referendum on a Bill can be introduced in the same parliamentary term. Should a Bill be voted, the time-limit stated in article 42 paragraph 1 begins the day the referendum is held (Philloppos et al; 2009).” Before a referendum or issue campaign can take place, it must be approved by 120 of the 300 members of Parliament.

3.3.13 Hungary

Hungary's 2011 Constitution limited direct democracy by abolishing popular initiatives and placing limits on the issues that can be called to a referendum. Since 1980, six referendums and six citizen initiatives have been held. Public funding is available (Schiller; 2012).

Article 8 of the Hungarian Constitution reads as follows:

(1) Parliament shall order a national referendum upon the motion of at least two hundred thousand electors. Parliament may order a national referendum upon the motion of the President of the Republic, the Government or one hundred thousand electors. The decision made by any valid and conclusive referendum shall be binding on Parliament;

(2) National referendums may be held about any matter within Parliament's responsibilities and competences". A referendum becomes mandatory if demanded by 200 000 voters, even if Parliament does not agree. Such a referendum is always binding. If 100 000 voters demand a referendum, one-third of the members of Parliament must also support it. In this case, Parliament decides if the referendum is consultative or binding. A quorum of approval of 25 percent of the voters is necessary.

3.3.14 Ireland

The Constitution of the Republic of Ireland contains provisions which set out when a binding referendum should be held.

Subsection 5 of Article 27 of the Irish Constitution states as follows:

5 1° In every case in which the President decides that a Bill the subject of a petition under this Article contains a proposal of such national importance that the will of the people thereon ought to be ascertained, he shall inform the Taoiseach and the Chairman of each House of the Oireachtas accordingly in writing under his hand and Seal and shall decline to sign and promulgate such Bill as a law unless and until the proposal shall have been approved either i) by the people at a Referendum in accordance with the provisions of section 2 of Article 47

of this Constitution within a period of eighteen months from the date of the President's decision, or

ii) by a resolution of Dáil Éireann passed within the said period after a dissolution and re-assembly of Dáil Éireann.

2 Whenever a proposal contained in a Bill the subject of a petition under this Article shall have been approved either by the people or by a resolution of Dáil Éireann in accordance with the foregoing provisions of this section, such Bill shall as soon as may be after such approval be presented to the President for his signature and promulgation by him as a law and the President shall thereupon sign the Bill and duly promulgate it as a law.

6 In every case in which the President decides that a Bill the subject of a petition under this Article does not contain a proposal of such national importance that the will of the people thereon ought to be ascertained, he shall inform the Taoiseach and the Chairman of each House of the Oireachtas accordingly in writing under his hand and Seal, and such Bill shall be signed by the President not later than eleven days after the date on which the Bill shall have been deemed to have been passed by both Houses of the Oireachtas and shall be duly promulgated by him as a law.

The *Dáil Éireann* is the lower house and principal chamber of the Irish legislature which also includes the President of Ireland and the *Seanad Éireann* (the upper house).

The provisions contained above provide an excellent and reasoned way of increasing citizens' participation and ensuring that their opinions are of a binding nature. It has become clear in South African law that all action taken by an organ of state must be rational. Section 1 of South Africa's Constitution ensures that South Africa is founded on the rule of law; while section 33 guarantees that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The Promotion of Administrative Justice Act of 2000 (PAJA) gives effect to the rights outlined in section 33 of our Constitution.

Section 8 of the Irish Referendum Act of 1942 provides that whenever a bill amending the Constitution is deemed to have been passed or has been passed, the Minister shall make an order as to when a referendum shall be held and that the referendum must be held within

30 - 90 days of the date on when such an order is made.

This provision simultaneously allows for sufficient time for the logistical and administrative requirements for holding a referendum to be met whilst ensuring maximum accountability to the public, in terms of ensuring that the referendum is held within a reasonable time.

Inclusion of a reasonable time for holding a referendum is important in all international jurisdictions. In South Africa, one can reasonably expect that the Independent Electoral Commission (IEC) will be responsible for the handling of a referendum. 30 days will not provide enough time for the Commission to organise a referendum on a national scale, owing to the administrative capacity of the Commission as well as the contrast of efficiencies between first and third world nations.

It is therefore suggested that in South Africa, referendums held on a provincial and national scale should have different required time frames in terms of when they must be held after the relevant order is made. Provincially, this could be a maximum period of 6 months and nationally, a maximum period of 12 months will ideally provide enough time for the Independent Electoral Commission to arrange the necessary.

Section 13 of the Irish Referendum Act provides that a person is only eligible to vote in a referendum if they are a registered voter and places an age limit of 21. The requirement of being a registered voter is capable of application in South Africa and is *prima facie* rational and reasoned as it will allow the Independent Electoral Commission to run a referendum using the information that they have on hand. In South Africa, you can only vote from age 18 (IEC; 2014).

Section 27 of the Act above states that “no person who has voted at a referendum shall be required in any legal proceeding to state the manner in which he has voted at such referendum.” This provision is worthy of inclusion in South Africa as it will stand as a bulwark against potential intimidation or victimisation of individuals.

In terms of section 29 of the Act presently under discussion, a register is kept of those people who are convicted of corrupt or illegal practices pertaining to the referendum. This is pursuant to the Irish Prevention of Electoral Abuses Act No. 38 of 1923. This would be ideally

be copied over to the South African setting.

Compared to other EU countries, Ireland holds relatively frequent national referendums. Thirty-one referendums have been held since 1970, on subjects including the Lisbon Treaty and social topics such as abortion and divorce rights. All referendums on revisions to the Constitution are mandatory. Voter turnout is approximately 52 percent. Following two key lawsuits against the government in 1995, public funding cannot be used for referendums.

There are three forms of referendum: abrogative, confirmative and consultative. Regulation of these referendums depends upon different normative authorities and is composed of specific norms. Referendums are not available in the case of tax, budget, amnesty and pardon laws, or in the case of laws authorising the ratification of international treaties. A referendum may be initiated if one-fifth of the members of a House, 500 000 electors, or five Regional Councils request that a referendum should be held. The referendum is valid only if there is a turnout of at least 50 percent.

3.3.16 Italy

The right to referendums and citizen initiatives is of great importance in Italy both at the national and local levels. Italy has held 70 referendums since 1974, more than any other EU country. No public funding is directly allocated for the participation of political parties in referendum campaigns, but there is no ban on the use of general public finances for this purpose. Furthermore, funding can be provided to promote a referendum.

75,000 signatures are required to initiate a referendum.

3.3.17 Latvia

In post-Soviet Latvia, the Constitution contains provisions for referendums and popular initiatives. Citizens can propose and make decisions at the national level. Since 1990, seven referendums and three citizen initiatives have been held. There is no legal basis for financing referendums.

There are five referendum mechanisms in the Constitution. Mandatory referendums are called for key changes to the Constitution, for the dissolution of Parliament, and for EU membership. For changes to be implemented as the result of a referendum or initiative, half of the electorate must participate. Ten percent of the electorate can present a petition for a constitutional amendment.

3.3.18 Lithuania

Since Lithuania's 1991 independence, there have been ten referendums and ten citizen initiatives. The most recent referendums concerned nuclear power (in 2008 and 2012) and EU accession (2003). Mandatory referendums are designed for Constitutional issues, but both mandatory and consultative referendums can be called on all major issues. Only mandatory referendums are binding. Referendums are publicly funded.

The most significant issues concerning the life of the State and the Nation shall be decided by referendum. In the cases established by law, the Seimas shall announce a referendum. A referendum shall also be announced if not less than 300 000 citizens with the electoral right so request. The procedure for the announcement and execution shall be established by law." The Law on Referendums (2002) established two different types of referendum:

1) Obligatory referendum: primarily designed to address constitutional issues, including Lithuania's membership in international organisations, if such membership requires the delegation of certain functions of the Lithuanian state to supranational bodies of these international organisations (for example, the EU). Obligatory referendums are binding;

2) Consultative referendums: can be held on all other issues for which it is not necessary to hold an obligatory referendum. Decisions are indicative. Both obligatory and consultative referendums can be called under identical rules, i.e. they can relate to all major issues in the life of the state and society as a result of a citizen's or parliamentary initiative. Initiatives must have the support of at least one quarter of the members of Parliament or 300 000

citizens. When constitutional decisions have been adopted by referendum, they can only be amended or repealed by referendum.

3.3.19 Luxemburg

Since 1919, the Constitution has allowed for referendums to be held. Referendums can be initiated by Parliament or by popular initiative. In the recent past, only one referendum has been held; that referendum was held in 2005 and was related to the European Constitution. Although referendums are funded by the state, there are no regulations regarding referendum finance.

According to article 114 of the Constitution, a referendum or issue campaign can be held in response to a request made by more than one-quarter of the members of the House of Deputies (The Parliament) or, in accordance with Chapter 2 of the Act of 4 February 2005 on national referendums, by twenty-five thousand voters.

3.3.20 Malta

Malta has held two referendums in the recent past. The first (held in 2008) concerned EU accession, and the second (held in 2011) concerned divorce. There are three types of referendums: Constitutional, consultative, and abrogative. Public funds are used only for organisational expenses.

The Referendums Act (Chapter 237) refers to the following permissible purposes for a referendum: a) to approve proposals set out in a resolution passed for that purpose by the House of Representatives; and b) to determine whether a provision of law should be abrogated.

3.3.21 Netherlands

In principle, national referendums in the Netherlands are not permitted. However, a referendum can be held on an *ad hoc* basis. The only referendum in the Netherlands was

held in 2005 and related to the Constitution of Europe. Public funds have been used for political campaigning. Political parties represented in Parliament can use the time allocated to them on radio and television for referendum campaigns.

3.3.22 Poland

Referendums in Poland can be called by the president or by the lower house of Parliament. Most referendums do not succeed because they do not achieve the turnout requirement of 30 percent. Nine referendums have been held since 1970, most recently on EU accession in 2014. Actors involved in referendums must use their own funding.

Article 73.1: The result of a referendum on granting of consent to ratification of an international agreement shall be valid if more than half of those eligible to vote have cast their vote.

3.3.23 Portugal

In Portugal, citizens can petition for a referendum, and a petition must be accepted by the president (de Vissier; 2013) There have only been three referendums in Portugal: two addressed abortion and the third addressed regionalisation. Referendums are binding if there is a turnout of more than 50 percent. Referendums are not publicly funded. However, Portugal has extensive legislation regarding benefits for campaigners.

3.3.24 Romania

In Romania, national referendums are required for Constitutional revisions and in the event of the impeachment of the president. Post-communist Romania has held 5 referendums: two addressed the impeachment of the president and were invalidated due to low turnout; the others addressed Constitutional amendments. The rules for regular elections apply to referendum campaigns.

The President of Romania may, after consultation with Parliament, ask the people of Romania to express, by referendum, their will on matters of national interest. In terms of Constitutional Amendment Referendum Article 151, the so-called “procedure of revision” is as follows:

- (1) The draft or proposal of revision must be adopted by the Chamber of Deputies and the Senate, by a majority of at least two thirds of the members of each Chamber;
- (2) If no agreement can be reached by a mediation procedure, the Chamber of Deputies and the Senate shall decide thereupon, in joint sitting, by the vote of at least three quarters of the number of Deputies and Senators;
- (3) The revision shall be final after the approval by a referendum held within 30 days of the date of passing the draft or proposal of revision.

3.3.25 Slovakia

In Slovakia, there are several provisions for referendums and popular initiatives. Referendums on alliances are mandatory, whereas basic rights and freedoms can never be the subject of referendum. Four referendums and eleven citizen initiatives have been held since 1990. There is little regulation of the use of public funds.

A facultative referendum may be held when proposed by at least 350 000 citizens in the form of a petition. It can also be held when agreed to by Parliament (the proposal can be made by MPs or by the government). The referendum is then proclaimed by the president within 30 days after the petition or the Parliament's resolution. Before the proclamation itself, the president may ask the Constitutional Court to assess the presented question to determine whether the subject of the referendum complies with the Constitution or constitutional laws. Referendums are binding.

3.3.26 Slovenia

Since 1990, seventeen referendums and four citizen initiatives have been held on a variety of issues, including pensions and adoption (Taggart; 2013). As the result of several concerns about referendums, a 2013 Constitutional amendment limited their broad reach of referendums and the number of eligible issues was reduced. Public funding is not explicitly allocated.

The National Assembly may call a referendum on any issue, which is the subject of regulation by law. The National Assembly is bound by the result of such referendum. The National Assembly may call a referendum on its own initiative. A referendum must be called if required by one-third of deputies, by the National Council, or by forty thousand voters. All citizens who are eligible to vote in elections have a right to vote in a referendum. If a majority of voters are in favour, a proposal is passed in a referendum. The Slovenian Constitution defines several types of referendums: On Constitutional change; Preliminary legislative (ante legem); Subsequent legislative (post legem); Consultative. The initiative for a legislative referendum can come from any voter, political party or citizens association. The National Assembly can decide on a consultative referendum before making a final decision on an issue. The National Assembly shall call a referendum on the entry into force of a law that it has adopted if so required by at least forty thousand voters. A referendum may not be called for the following types of laws:

(1) laws on urgent measures to ensure the defence of the state, security or the elimination of the consequences of natural disasters;

(2) laws on taxes, customs duties, and other compulsory charges, and the law adopted for the implementation of the state budget;

(3) laws on the ratification of treaties;

(4) laws eliminating an unconstitutionality in the field of human rights and fundamental freedoms or any other unconstitutionality. A law is rejected in a referendum if a majority of voters casting valid votes vote against the law, provided at least one-fifth of all qualified

voters have voted against the law. A 2013 constitutional amendment prohibits Parliament and the National Council from calling for referendums.

3.3.27 Spain

The transition to democracy created an important role for referendums. Spain has held four referendums since 1974. The most recent referendum was in 2005 and addressed the issue of the EU Constitution. Referendums are non-binding. Extraordinary funds can be allocated for referendums.

The referendum design has two modalities:

- 1) Referendums related to the exercise of 'constituent power' either at the national or the regional level;
- 2) Referendums that are consultative, with no mandatory character (Closa & Carbonell, 2010).

3.3.28 Sweden

The two most recent referendums in Sweden concerned introducing the euro currency in 2003 and accessing to the EU in 1994. Prior to that, votes were held in 1980 regarding nuclear power. Referendums in Sweden are non-binding. Public funding may be allocated.

Conditions for referendums and issue campaigns are provided in the instrument of government.

3.3.29 United Kingdom

In the UK, only governments can call for a referendum, and a referendum is not legally binding. Three noteworthy referendums have been held. The first referendum was in 1975 and addressed the UK's European Communities membership; the second referendum was in

2011 and addressed an alternative vote system. The regulations regarding referendums are similar to those governing political party funding for elections.

All aspects of party funding and electoral law in the UK are regulated by the Political Parties Elections and Referendums Act (PPERA) OF 2000. Only governments can realistically initiate a referendum because the opposition does not have much control over legislation and there are no popular initiatives. For Scottish referendums: The Referendum Act was designed in a similar manner to the UK's PERA; however, public funding is absent.

The so-called "Brexit" vote which took place in the United Kingdom in 2016 certainly brought referendums into the international spotlight and this dissertation would not be complete without at least mentioning it. The United Kingdom's system of governance works according to the principle of parliamentary sovereignty; where Parliament is supreme in terms of decision-making. Therefore, the outcome of a referendum outcome in the United Kingdom must be confirmed by Parliament for that outcome to be of legal force and effect. Parliament may vote against the outcome of the referendum, rendering the entire process null and void, not to mention a waste of taxpayers' time and money. In this instance, the legal status of a referendum is said to be advisory and not of a binding nature. Whether or not the reader is for or against Britain exiting the European Union, the fact remains that the referendum was an act of popular will. It must therefore be conceded that, in essence, the public scored a victory when parliament voted in favour of their decision to leave the European Union. The referendum took place on Thursday, 23 June 2016, in which the electorate voted by 51.9% to 48.1% in favour of leaving the European Union. 72% of the electorate turned out to vote. The United Kingdom does not have Constitutional provisions which require the results of a referendum to be implemented.

3.3.30 Scotland

Scotland, like the United Kingdom does not have all-encompassing referendum legislation but rather passes specific legislation pertaining to the subject matter of a referendum when the holding of a referendum is sought, the most recent of which is the Scottish

Front of ballot paper

BALLOT PAPER	[Official mark]
Vote (X) ONLY ONCE	
Should Scotland be an independent country?	
YES	<input type="checkbox"/>
NO	<input type="checkbox"/>

Independence Referendum Act of 2013. The referendum on independence for Scotland was held on 18 September 2014. The “No” vote won by 55.3% to 44.7% (Electoral Commission; 2014). After the outcome of the “Brexit” referendum referred to above – in which the majority of Scottish citizens voted to remain in the European Union – Scotland’s First Minister, Nicola Sturgeon, informed the public that a subsequent referendum for Scotland to split from the United Kingdom was something that her Party would seek (Katikireddi; 2017).

This is yet another example of how referendums continue to play a part in the modern political space as a means of ensuring the direct participation of citizens in decision-making processes.

The format of the ballot paper in Scotland, pictured above, is very simplistic and easy to understand and bears a slight difference from the Republic of Ireland’s ballot papers, which say “I approve” and “I disapprove.” The format of the Scottish ballot paper is ideal for South Africa where levels of education are disparate and the country has the largest number of official languages for any nation on the planet. Maximum understanding is essential for maximum participation as well as maximum legitimacy.

In general, most referendum Acts including the one currently under discussion – in Schedule 3 thereof – refer to specific hours of opening and closing the polling station (in this case a time period of 07h00 to 22h00 is stipulated). To allow for certainty, a specific time frame

should also be incorporated into South African legislation and for ease of administration, it is suggested that this shall follow the same time period for voting as is used on national government election day (i.e. commencement and end times of voting and not specifically that a referendum can only be held on national election day).

Schedule 7 of the Act provides a list of offences including *inter alia* electoral fraud, bribery and corruption. The schedule does not only confer obligations on participants in the referendum but also on police officers and election officials and makes allowance for summary conviction leading to imprisonment for 12 months, alternatively a fine, for most offences. This schedule provides legal certainty and clarity. It is essential that such a schedule be included in referendum legislation generally. It is fitting that electoral offences receive harsh punishments as elections are the basis for the existence of democracy and legitimate government. A fine, therefore, for an offence such as destroying ballot papers or impersonating somebody else should be proportionate to the offence and should not resemble those fines given out in cases of, for example, petty theft.

The tale of “Brexit” – really a success story of the will of the people - served to raise the impact that the concept of parliamentary sovereignty has on referendums and consequently, the notion of binding versus advisory referendums. If the UK parliament had simply voted against the results of the referendum, the people’s will would not have been implemented, which would have meant that holding the referendum was a substantial waste of money as well as time for all role players. Whilst the outcome of the “Brexit” referendum was ultimately as though it had been binding in nature, this was not inevitable. Binding referendums are necessary and creates the very purpose of holding a referendum; which is to make a decision.

The model in the Republic of Ireland places calling of a referendum in the discretion of the President, in that if he/she deems a matter to be of national importance, a referendum must be called. Unfettered discretion of the President creates the spectre of abuse, however, we know in South Africa that any action of an organ of state must have a rational basis. Inclusion of this particular provision in the South African scene could therefore create

a very real opportunity for referendums to take place more frequently which ultimately means that citizens' participation would be dramatically increased.

Section 8 of the Irish Referendum Act of 1942 provides that whenever a bill amending the Constitution is deemed to have been passed or has been passed, the Minister shall make an order as to when a referendum shall be held and that the referendum must be held within 30 - 90 days of the date on when such an order is made.

In South Africa, one can reasonably expect that the Independent Electoral Commission (IEC) will be responsible for the handling of a referendum. 30 days will not provide enough time for the Commission to organise a referendum on a national scale, owing to the administrative capacity of the Commission as well as the contrast of efficiencies between first and third world nations.

It is therefore suggested that in South Africa, referendums held on a provincial and national scale should have different required timeframes in terms of when they must be held after the relevant order is made. Provincially, this could be a maximum period of 6 months and nationally, a maximum period of 12 months will ideally provide enough time for the Independent Electoral Commission to arrange the necessary.

Section 27 of the Act above states that "no person who has voted at a referendum shall be required in any legal proceeding to state the manner in which he has voted at such referendum." This provision is worthy of inclusion in South Africa as it will stand as a bulwark against potential intimidation or victimisation of individuals.

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The format of the ballot paper in Scotland very simplistic and easy to understand which say "I approve" and "I disapprove." The format of the Scottish ballot paper is ideal for South Africa where levels of education are disparate and the country has the largest number of official languages for any nation on the planet. Maximum understanding is essential for maximum participation as well as maximum legitimacy.

In general, most referendum Acts refer to specific hours of opening and closing the polling station (in this case a time period of 07h00 to 22h00 is stipulated). To allow for certainty, a specific time frame should also be incorporated into South African legislation and for ease of administration, it is suggested that this shall follow the same time period for voting as is used on national government election day (i.e. commencement and end times of voting and not specifically that a referendum can only be held on national election day).

It is essential that a schedule of referendum offences be included in referendum legislation generally. It is fitting that electoral offences receive harsh punishments as elections are the basis for the existence of democracy and legitimate government. A fine, therefore, for an offence such as destroying ballot papers or impersonating somebody else should be proportionate to the offence and should not resemble those fines given out in cases of, for example, petty theft.

3.4 The Philippines

Referendums in the Philippines are governed by the Initiative and Referendum Act of the Philippines No. 6735 of 1989.

The Act provides for both initiatives and referendums and provides definitions of each in section 3 thereof and provides as follows:

(a) "Initiative" is the power of the people to propose amendments to the Constitutions or to propose and enact legislations through an election called for the purpose. There are three (3) systems of initiative, namely:

a.1 Initiative on the Constitution which refers to a petition proposing amendments to the Constitution;

a.2 Initiative on statutes which refers to a petition proposing to enact a national legislation; and

a.3. Initiative on local legislation which refers to a petition proposing to enact a regional, provincial, city, municipal, or barangay law, resolution or ordinance.

(b) "**Indirect initiative**" is exercise of initiative by the people through a proposition sent to Congress or the local legislative body for action.

(c) "**Referendum**" is the power of the electorate to approve or reject a legislation through an election called for the purpose. It may be of two classes, namely:

c.1. Referendum on statutes which refers to a petition to approve or reject an act or law, or part thereof, passed by Congress; and

c.2. Referendum on local law which refers to a petition to approve or reject a law, resolution or ordinance enacted by regional assemblies and local legislative bodies.

As one can see from the above, the scope for citizens' participation is very broad in the Philippines, allowing for input at all spheres of government. The broad manner in which the term "indirect initiative" is defined, allows citizens to make their voices heard and play a meaningful role on the issues affecting their lives at grassroots level.

The power of initiative and referendum is available to all registered voters in the Philippines. As envisaged in Section 4 of the Initiative and Referendum Act of the Philippines of 1989 This clause appears to be the generally accepted norm worldwide when taking the studies of legislation of other countries above into account.

Section 5(a) of the Act provides that in order to exercise the power of initiative or referendum, a petition must be signed by 10% of the total registered voters in the country, which must include 3% representation from each legislative district. This provides a significant limitation on citizens' participation. Although the limitation is not total and is a law of general application and appears *prima facie* to be workable in the Philippines, applying the same restriction in South Africa would severely curtail the ability of citizens to make their inputs and would impose a severe administrative burden on both the State and the public.

The requirements for an initiative to amend the Constitution of the Philippines are more stringent and require 12% of the country's registered plus, plus 3% representation of every legislative district to have signed the applicable petition in terms of section 5(b). A further proviso is added that this may only be done 5 years after the Constitution was enacted and

subsequently, only every 5 years thereafter. This particular clause is certainly interesting. One may not necessarily penetrate the minds of the drafters, however, the intention appears to be *prima facie* to limit Constitutional changes by creating difficulty for anyone desiring to change it so as to keep its provisions relatively consistent.

In South Africa, one can reasonably expect that the Independent Electoral Commission (IEC) will be responsible for the handling of a referendum. 30 days will not provide enough time for the Commission to organise a referendum on a national scale, owing to the administrative capacity of the Commission as well as the contrast of efficiencies between first and third world nations.

It is therefore suggested that in South Africa, referendums held on a provincial and national scale should have different required time frames in terms of when they must be held after the relevant order is made. Provincially, this could be a maximum period of 6 months and nationally, a maximum period of 12 months will ideally provide enough time for the Independent Electoral Commission to arrange the necessary.

4.1 Towards A New Referendum Act

The existing legislation in South Africa is exceedingly sparse. It was necessary to engage in a study to obtain as much information as possible on referendum legislation so as to be able to make solid, practical suggestions from an informed position.

Central to this dissertation are the themes of enhancing:

- Legal certainty;
- Citizens' participation; and
- Direct democracy

The first point of departure in the creation of all legislation in the Republic of South Africa is its benchmarking against the precepts of the Constitution, as in terms of section 2 of Act of 1996 thereof all law that is inconsistent with the Constitution is invalid. Under the Apartheid government, the majority of the South African population was barred from voting and from

playing a meaningful role in political life. The Constitution ushered in a new era of hope and of enhanced and entrenched political rights.

Referendums decided under the previous governmental regime, which incorporated a system of parliamentary sovereignty (Scott; 2011), accordingly denied voting access to millions of people, essentially to all black members of the population.

On 2 November 1983, for example, the government of the day held a referendum to gauge the opinion of white voters on the tricameral parliament. The outcome of the referendum also served to abolish the position of prime minister and created the post of executive president, which entailed many enhanced decision-making powers.

The Referendums Act 97 of 1992 served to allow voting rights regarding referendums to all members of the South African population (Strauss; 1993). This exposition places South Africa in its historical context; so as to understand that South Africa is a young democracy as well as a nation that needs to enhance citizens' participation and give as many people as possible a voice in their own future.

The referendum of 1983 was a victory for legal positivism and certainly not a victory for natural justice. In terms of legal positivism, law and morality are conceptually distinct (Dworkin; 1965). Nazi Germany is perhaps the most haunting example in modern day history of how legal positivism took root and led to numerous human rights abuses, such as segregation and mass murder numbering into the millions.

Legal positivism is distinct from the theory of natural law which says that law should be tested against universal values of morality and justice. Proponents of this theory would argue that if there is any law at all, surely there must be a set of universal laws. The 1983 referendum excluded much of the population from taking part and was thus patently undemocratic.

The Tricameral Parliament presided over the last decade of Apartheid (Lotter; 1997). It allowed for parliamentary representation for Coloureds and Indians in one of three separate chambers. This was presented as an apparent "reform" of the Apartheid-era "Whites-only" system of representation. The Tricameral Parliament excluded Black Africans from its ranks and Indians and Coloureds were represented in a racialised manner (Ferree; 2010).

South Africa now operates under a Constitutional ethos within the boundaries of a democratic system that has extensive checks and balances on the exercise of governmental power.

Chapter of 5 of the Constitution of the Republic of South Africa sets out in Section 84 precisely what the powers and functions of the President are. They are as follows:

1. *The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.*
2. *The President is responsible for -*
 - a. *assenting to and signing Bills;*
 - b. *referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality;*
 - c. *referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality;*
 - d. *summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;*
 - e. *making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;*
 - f. *appointing commissions of inquiry;*
 - g. *calling a national referendum in terms of an Act of Parliament;*
 - h. *receiving and recognising foreign diplomatic and consular representatives;*
 - i. *appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;*
 - j. *pardoning or relieving offenders and remitting any fines, penalties or forfeitures; and*
 - k. *conferring honours.*

For the purposes of this dissertation, section 84(2)(g) is instructive. It sets out that (i) the President is responsible for calling referendums in South Africa and (ii) that this must be done according to the precepts of an Act of Parliament.

The creation of a new Referendums Act is precisely the “Act of Parliament” that the Constitution calls for.

Taking the above into account, due consideration of what the existing Referendums Act states should be brought to bear so as to determine which provisions should be retained and which should be discarded.

Section 2(1)(a) of Act 108 of 1983 stipulates that the State President may call a referendum. There is no provision for the President being petitioned by the public to call a referendum on a particular matter. The discussions above are rife with proposals to allow a system where citizens can propose a referendum. Certainly, it remains the President’s prerogative to ultimately accept or reject the terms of a proposed referendum but it is necessary to allow citizens the opportunity to present their case for same.

A debate could also be had as to ensuring that a separate Referendums Committee calls for referendums independently. The adoption of such would, however, necessitate a Constitutional Amendment, which would be very complex to obtain both legally and politically. A new Act, however, can provide for the advice, suggestions or submissions that the President takes into account when making a final decision to call for a referendum.

It is therefore submitted that the new Act should explicitly state that the President may call a national referendum and may do so taking the submissions of petitioners into account.

Rights can be limited in terms of the Constitution of the Republic of South Africa as long as they meet the requirements of the so-called “limitations clause,” as Section 36 of the Constitution of the Republic of South Africa points out including *inter alia* that a law limiting rights must be a rule of general application.

A filing fee for submitting a petition to be considered for referendum can be entertained, but should not be excessive. Many South Africans live below the poverty line (StatsSA; 2017) and this reality must be taken into account. 200 people can certainly pool resources to fund a filing fee. It is submitted that a filing fee of R2 000 is reasonable based on 200 people signing to request that the referendum be heard. If 200 people each contribute R10, R2 000

is feasible and this money can also be used to subsidise the state at a time when the government is in high levels of debt.

The amount above can be amended when necessary as the economic climate in the country shifts from time to time, by including the amount mentioned above in regulations annexed to the Act. The Presidency can accordingly release new regulations as is required.

Cronin (2011) also proposes that the advice of a state attorney must be obtained by the petitioners, but that such advice should not be binding. This suggestion should be duly incorporated into the new Referendums Act, as envisaged by this dissertation. This can be done through an automatic administrative process – whereby as soon as reasonably practicable after a petition is submitted to the Presidency regarding a request for a referendum it shall be referred to the State Attorney’s office through the government bureaucracy. The State Attorney should then call a meeting of the primary initiators of the petition to guide them through the legal ramifications of their request, which they shall in turn convey to their fellows who have signed the petition. Reasonable time frames should be provided in regulations which will determine:

- (i) The time frame for submission of the petition by the Presidency to the State Attorney;
- (ii) The time frame thereafter for when the petitioners may be expected to be contacted by the State Attorney’s Office;
- (ii) The time frame thereafter in which the petitioners shall inform the State Attorney of their decision whether or not to proceed with the request for the referendum, alternatively to alter their proposal in accordance with the State Attorney’s advice.

Section 5(c)(6) of the Initiative and Referendum Act of the Philippines sets out that a petition must include an abstract or summary containing an explanation of what the petition is about, of not more than 100 words, to appear the top of every page of the petition. The concept of including a legible explanation of what the petition is about is eminently sensible. The proposition of a word limit may limit cogent argument and the requirement of including the same exposition on every page is onerous and may have the effect of limiting the willingness of citizens to submit requests for referendums at all. It is therefore submitted here that every petition must contain a cover page providing detail as

to what is being requested by the petitioners. As much detail as possible is in fact the ideal, which will assist the State Attorney in compiling their recommendations as well as the President in his or her final decision regarding whether or not to call a referendum pertaining to the petitioners' concerns.

It was also discussed above that 30 days will not present enough time for the Independent Electoral Commission to organise a referendum on a national scale.

It is therefore suggested that in South Africa, referendums held on a provincial and national scale should have different required timeframes in terms of when they must be held after the relevant order is made. Provincially, this could be a maximum period of 6 months and nationally, a maximum period of 12 months will ideally provide enough time for the Independent Electoral Commission to arrange what is required. The Apartheid-era Referendums Act, section 2(1)(e), provides that the State President may appoint a Chief Referendum Officer who then appoints administrative staff to conduct the referendum.

The whole of section 84(2) of the Constitution of the Republic of South Africa is excluded from the definition of administrative action by section 1(i)(b)(aa) of the Promotion of Administrative Justice Act (PAJA) 3 of 2000 except 84(2)(j), which regulates presidential pardons. Although not governed by the PAJA, it is noteworthy that all conduct of the President has to be rational. It is therefore plausible that the President's appointment of the Chief Referendum Officer may be set aside by a competent court if the court decides that the President did not apply his mind when he made his appointment, as in the now famous *Simelane* case, *Democratic Alliance vs President of the Republic of South Africa CTT 122/11*.

Referendums are found in all regions of the world, although their usage varies considerably from one country to another. Many countries have provisions for one or more direct democracy procedures in their laws or constitutions, but make use of them only in exceptional circumstances. Throughout the world today, use of the instruments of direct democracy is increasing. In this instance the patterns of legal provision for, and the practice of, direct democracy in Irish is examined, highlighting that Irish has the most experience of using referendums processes. Section 13 of the Irish Referendum Act provides that a person

is only entitled to vote in a referendum if they are a registered voter and also imposes an age limit of 21. The requirement of being a registered voter would be ideal and will allow the Independent Electoral Commission to run a referendum using the information that is available to them. In South Africa of course, the voting age is 18 (Independent Electoral Commission SA; 2000). To this end, information as to who is already registered to vote in the preceding national government election should be utilised so as to ease the administrative burden. It is, however, submitted that the Independent Electoral Commission may want to consider creating additional registration days or weekends for people who are not yet registered voters, who may want to vote in the referendum. Such a decision should ultimately be left in the hands of the Chief Referendum Officer.

Section 27 of the Irish Referendum Act stipulates that “no person who has voted at a referendum shall be required in any legal proceeding to state the manner in which he has voted at such referendum.” This provision is worthy of inclusion in South Africa as it will stand as a bulwark against potential intimidation or victimisation of individuals. In fact, Section 15 of the existing South African Referendums Act also contains a similar provision, namely that “No person who voted at a referendum shall be required in any legal proceedings to state how he has voted.” It is submitted therefore that the wording section 15 of the existing Act can be carried over as is to be included in the new Act. Whilst the existing legislation is scant, credit must be given where it is due and this particularly provision is sensible and does indeed pass Constitutional muster.

The format of the ballot paper should be as simplistic as possible. Preferably, an example of the format of the ballot paper should be included in a schedule to the Act. The Scottish ballot paper is ideal for South Africa where the quality of education is low (Taylor; 2017). Maximum understanding is essential for maximum participation as well as maximum legitimacy. Legitimacy entails wide acceptance by the population and this can only be possible if the population are not only eligible to vote, but also understand what it is that they are voting on.

Section 11 of the existing South African Referendums Act prohibits the conduct of an opinion poll in respect of a referendum as well as the publication of the results of such a poll. This particular provision is a severe infringement on the provisions of section 16 of the

Constitution – which enshrines the right to freedom of expression to all within the country’s borders – as well as a constraint on section 19 Constitutional political rights; such as campaigning for a political cause. Section 11 of the Apartheid-era Act should therefore not be retained at all as it is anathema to South Africa’s Constitutional project. It is also highly possible that by not allowing an opinion poll, a fictitious referendum result could ostensibly be released and the general population would be none the wiser as to its veracity.

Just as no campaigning is allowed within the marked boundaries of voting stations on election day in South Africa (ETU; 2014) the same rules should apply *mutatis mutandis* as far as referendums are concerned.

In terms of section 29 of the Irish Referendum Act, a register is kept of those people who are convicted of corrupt or illegal practices pertaining to the referendum. This is pursuant to the Irish Prevention of Electoral Abuses Act No. 38 of 1923. This would be ideal if carried over to the South African experience as electoral offences strike at the very heart of what democracy is about.

A schedule of offences should be annexed to the Act providing for incarceration as well as hefty financial consequences. The existing South African Referendums Act which took effect in 1983 and makes provision for fines of R1 000, is hopelessly out of sync with the economic realities of 2017. Bribery, fraud, corruption, impersonation, destruction of ballot papers, attempting to sway voters to vote a specific way while within the boundaries of the voting station should all attract fines of at least R25 000, possibly going up to R100 000 or R200 000 depending on the seriousness of the offence or to imprisonment not exceeding 5 years. Ideally, such fines could increase with inflation, alternatively be frequently reassessed through a process of legislative review.

Another interlocutor may give a differing view as to the period of imprisonment or the fines imposed. This interlocutor, however, believes that the integrity of independent institutions and the voting process stand at the core of what democracy in South Africa is and what protects it. If institutions and the voting process become corrupted, there is no chance of defending the Constitution or holding legitimate elections.

Section 40 of the Canadian Referendum Act of 1992 provides that the Act shall be reviewed every three years. The explicit provision of legislative review is ideal as it would have obviated the criticism above, for example, that fines for referendum offences in South Africa are tied to the value of the currency in 1983.

There is no legal certainty as to which Act, if any, applies to referendums in South Africa and that the Referendums Act in South Africa of 1983. A system of regular legislative review could easily have prevented this issue from arising. I submit that referendums in South Africa to be of a binding nature.

The Referendum Act of British Columbia, Canada of 1996, which is cited above, provides for binding referendums and for the government to take immediate action upon the outcome of a referendum.

The Act provides:

“Some referendums are binding on the government

4 If more than 50% of the validly cast ballots vote the same way on a question stated, that result is binding on the government that initiated the referendum.

Duty if referendum is binding

5 If the results of a referendum are binding, the government must, as soon as practicable, take steps, within the competence of the government, that the government considers necessary or advisable to implement the results of the referendum including any and all of the following:

(a) changing programs or policies, or introducing new programs or policies, that are administered by or through the executive government;

(b) introducing legislation in the Legislative Assembly during its first session after the results of such a referendum are known.”

It is submitted that clauses 4 and 5 above should be copied exactly as is into a new South African Referendums Act, except for the deletion of the word “some” as the title of paragraph 4. This will ensure that all national referendums declared by the President possess a binding character.

Sections 14 and 15 of the Tanzanian Referendum Act allow for party agents to be registered and for two such party agents from each “referendum committee” to observe proceedings in a given polling area. Applied to the South African situation, this is much like how political parties have party agents during municipal and national elections. In the case of referendums, affected parties such as non-governmental organisations should also be allowed to have party agents if they so desire, subject to a non-cumbersome registration process.

Section 34(1) of the Tanzanian Referendum Act provides for the release of the referendum results within 72 hours of when the referendum is finalised. This is certainly a sensible provision and entrenches accountability. It should be incorporated into the new South African Referendums Act.

Section 37 of the Tanzanian Referendum Act anticipates that persons may be unable to vote due to special and unforeseen circumstances, such as employment obligations, pregnancy, infirmity and sickness. For the sake of practicality and administrative ease, the provisions pertaining to special votes in South Africa – in terms of which a special voting day is arranged for such people and the IEC conducts visits to old-age homes to assist in the voting process – should be assimilated into the new Referendums Act.

Voting should not be compulsory. Despite the provisions of the Constitution of Brazil and legislation in some other nations, I am of the view that freedom entails the expansion of choice. Just as an act includes an omission, the concept of choosing includes the decision not to choose.

In the Philippines, the approval/rejection/amendment/enactment of national legislation is approved by a majority of registered voters by way of referendum (Lazo; 2009 & Munoz; 2002). The outcome of the referendum then takes practical force and effect 15 days after

the publication thereof (either in the Official Gazette or a newspaper of a general nature). South African legislation should certainly contain a similar clause.

In addition to this, in the Philippines, a decision regarding the Constitution becomes effective on the same day that the referendum process is completed. Constitutions are based on legitimacy, i.e. the will of the people. Such decisions must, of necessity, take immediate effect and a similar provision must be included in South African legislation.

Section 10(b) of the Initiative and Referendum Act of the Philippines sets out that statutes involving emergency measures may not be subject to a referendum within 90 days after which they have been enacted. This is very reasonable as it protects the government from interference in its attempts to provide emergency services to its people and thus enables government to fulfill its mandate.

Ultimately, the core themes of a new Referendums Act for South Africa must be the following:

- An Act that contains no provisions that are inconsistent with the Constitution;
- A process by which citizens may petition the Presidency to consider requests for referendums on proposed matters;
- A process in which it is mandatory for the State Attorney to provide advice to petitioners whilst providing reasonable time frames therefore;
- A provision that renders it compulsory for petitioners to provide a cover page to their petition setting out their proposal/s in a comprehensive manner;
- A clear time frame for when a referendum will be held after the date of the announcement indicating an intention to hold same;
- A ballot paper that is understandable to all South Africans over the age of 18 who are able to read – with blind people either to be assisted or for ballots to be provided in braille depending on budget constraints;
- Provision for harsh sanctions for the commission of referendum offences;

- A process of regular legislative review – in Canada this is every 3 years and would ideally be carried over into the South African context;
- Provision for referendums to be binding;
- Certainty as to when the outcome of a referendum will be of legal force and effect – legislation in the Philippines is instructive in this regard and is set out on the two preceding pages;
- Provision for so-called “special votes”, i.e. for the infirm, sick, elderly and those who have other commitments on referendum voting day;
- Allowance of 2 party agents per voting station per political party, NGO, group of organised persons or other organisation that has an interest in the referendum;
- Free and fair campaigning amongst all parties (individuals, political and non-political organisations) that have an interest in the subject matter of the referendum;
- Provision that no person can be forced to disclose their vote by a court decision;
- A requirement that a register is kept of those people who are convicted of corrupt or illegal practices pertaining to the referendum;
- Explicit reference must be made of specific hours of opening and closing of polling stations.

If the principles above are incorporated into a single Act, South Africa will at last have legal certainty and accountability as far as referendums are concerned. Moreover, the country would then possess a Referendums Act simultaneously adhering to Constitutional values as well as international best practice; which would certainly then be the best Referendums Act that any nation could possibly have, in as far as the rights and freedoms of citizens are concerned.

The Republic of South Africa already possesses a Constitution that is deemed to be unrivalled the world over. Taking into account that the proposed “new” Referendums Act envisaged by this dissertation is aimed at expanding the rights therein as well as rejecting the dictatorial manner in which the referendums process in countries such as Zimbabwe and

Thailand have been held, then certainly the principles above stand as a paragon for how to create legislation and successfully run a referendum according to values of ethics, integrity, honesty, responsibility, accountability, transparency and service to the populace of any nation that would incorporate the principles as articulated.

Ultimately, only a government that is attuned to the concept of servant leadership will readily embrace the principles above and utilise them, for the binding nature of the referendum and the proposed advanced role of citizens' participation would compel governments to act in service to the very people who elected them, through a system of direct democracy.

Ubuntu is indelibly interwoven into the fabric of direct democracy, as Khoza adds, “[*Ubuntu* requires] communities have the freedom, information and tools to make choices and decisions on course of action.” (Khoza; 2014). A government willing to listen to its people is not only a government adhering to legal principles or looking at its image to the outside world; it is a government deeply intertwined in the African roots of *Ubuntu*.

4.2 Conclusion

Referendums are usually restricted to what are generally considered very important political issues. Too many referendums may reduce both the efficient working of the polity and political stability. Referendums are expensive and require a great deal time and political consciousness. It is important to determine how the referendum fits within the legal system and political culture of the jurisdiction. The regulation of referendums in the Constitution or legislation allow for increased transparency and greater popular control, which contribute to the democratic legitimacy of referendums initiated by the political authorities.

Regulation should be considered on how referendums are to be organised and who shall be responsible for ensuring that voting procedures are executed in a free and fair manner. In general, in order to avoid deliberate manipulation by the political authorities, good practice is to apply the same rules in national elections and referendums.

The wording of a ballot text can influence results and their legitimacy. In general, the ballot text should be as precise and clear and free from error or manipulation as possible and

should have only one goal and one possible interpretation. I suggest a 'rulebook' to be published that illustrates technical aspects of a vote.

The question of appeal should also be given attention. If there is possibility of appeal against the way in which the ballot text has been constructed and if this option is adopted, it must be precisely established who can appeal, for instance, a Chapter 9 institution like the Independent Electoral Commission different from the one which wrote the ballot text, or a certain number of citizens, and within what duration. Consideration should also be given to which body shall be called upon to decide upon the matter. In the same way, there should also be a clear regulation about the period of time the body will have to resolve the conflict.

Disseminating information to the public about the main content of a referendum question is crucial for the legitimacy of the referendum outcome. The main principle of good practice in this respect is to ensure a level playing field between those in favour and those opposing the proposal. In addition, a fundamental principle of freedom of expression also has to be respected. A minimum six-months period must be conferred to ensure time for proper public discussion.

Referendums must be seen as instruments for consolidating the democratic system, and which complement but do not replace the institutions of representative democracy. Political parties and legislators must be strengthened in order to improve the quality and legitimacy of democratic representation (IDEA;2008).

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