

THE ABSURDITY OF REPRESENTATION

By the time this issue of the *Alternative Law Journal* is published we will have had another federal election. In a so-called 'representative democracy' such as ours, an election is the time for the citizens of Australia to exercise our constitutionally guaranteed right to choose who shall govern us,¹ supposedly on our behalf, and in our interests. This view is consistent with a proclaimed ideal of all western 'democracies': government of the people, by the people, and for the people. However, in this respect, we have been indoctrinated into believing a falsehood. Australia is not a democracy, and never has been. It is more accurately described as a two-party oligarchy.²

As a consequence, there is no uncertainty attached to the result of the election: the 'new' government will be either a Labor or Coalition government. This has been the inevitable outcome of federal elections for generations. The oligarchic nature of our political system is disguised by the continued use of the label 'representative democracy', which conventionally consists of government by an assembly of elected 'representatives' who make decisions for the electors. The moral justification for this system is that the 'representatives' are presumed to act in the interests of the electors. It is arguably a practical expression of the ancient social contract — that government is only legitimate when it has the consent of those governed, and one would only so consent if it was in one's interest to do so.

This is all well and good, but on what basis do we presume that our 'representatives' will act in our interests? Put another way, how do they know what our interests are? For the most part, our so-called 'representatives' have never met us, let alone know anything about us. It is doubtful whether they even know we exist, and it seems absurd to claim that you can represent someone you do not know exists. Of course, a candidate for election does 'know' you exist in a sense: if you are on the electoral roll, then you exist as one potential vote for that candidate. However, this still leaves unanswered how the candidate may know what your interests are.

In theory, this is where promulgated policy comes into play. By declaring specific policy, and provided the candidate is elected by the majority of electors, the candidate elected on the basis of such declarations may presume that the majority of electors agree with that policy, and their interests thereby consist in enacting, or at least pursuing, such policy. In this way, the declaration of policy arguably forms part of

the continuing social contract. Indeed, the process involved in making election promises appears to satisfy the requirements of a legal contract as well. In stating policy, a candidate for election is effectively saying: 'In return for your vote X, I promise to do action Y'. It is arguable that stated policy as inducement to vote constitutes the process of offer, acceptance, and consideration: the formation of a clear and concise contract between a 'representative' and the people they purport to represent. Regrettably, this contract is unenforceable, so you cannot hold the candidate to their promise. This fundamental defect in our political system is exacerbated by the fact that many candidates do not keep their promises once elected.³ Or perhaps it is due to this basic flaw that many candidates do not keep their promises. In any event, this failure to uphold election promises has become so commonplace among our 'representatives' that we are now told there exist 'core promises', as opposed to 'non-core promises', with it deemed reasonable that non-core promises may be broken with impunity. In effect, we have arrived at a time in our political history when our politicians are promising to uphold their promises. How long before we hear a promise to uphold the promise to uphold the promise? Or perhaps the era of the constantly deferred promise is already upon us?

Alternatively, one might argue that our 'representatives' are not elected on policy, but rather on personality or party affiliation. This view holds that, although electors are influenced by policy, ultimately they are realists and accept that many election promises will remain unfulfilled, and so vote according to characteristics purportedly possessed by the candidate, and/or the party they represent.⁴ In this scenario, the electors are effectively saying they trust their 'representative' and/or 'the party' to act in their interests; those interests being whatever the 'representative' and/or 'the party' decide them to be. This displays far more confidence in these 'representatives' than their past collective behaviour warrants, and grants them more credit and power than is wise, but, provided the particular 'representative' and the governing party within the representative assembly en masse received the approval of the majority of the electors, this concept would provide some moral support for our system of 'representative democracy'.

Here we encounter another problem. Whether candidates are said to be elected on the basis of policy, personality, or party, for our system to make any claim to legitimacy, the candidates, and the governing party

REFERENCES

1. See *Australian Constitution* ss 7 & 24.
2. This is hardly a novel idea, but worth considering immediately after an Australian election. For an in-depth discussion of the theory see, eg, Robert Michels, *Political Parties: A sociological study of the oligarchical tendencies of modern democracy* (first published 1911, 1962 ed).
3. They might also pursue policies once elected that were not even alluded to during the election campaign. Such a situation is not quite the same as breaking a promise (unless the candidate promised not to pursue such a policy), but within the conceptual framework being developed here, it is certainly a comparable event.
4. Such characteristics are not limited to objectively meritorious qualities, such as honesty, intelligence, or integrity, but may also include non-meritorious attributes that are nonetheless relevant in a classist, sexist and racist society such as Australia; for example, the class, sex, and race of the candidate may be relevant in this respect.
5. All statements in this Opinion concerning the apportionment of first preference votes and other electoral outcomes are sourced from data published by the Australian Electoral Commission, <http://aec.gov.au/Elections/federal_elections/index.htm>.
6. For example, in 1990 the ALP formed government with only 39.4% of the primary vote, while in 1998 the Coalition managed to form government with only 39.18% of the primary vote.
7. It is rare in the federal jurisdiction, having last occurred in 1940, but recently quite common at State level, with most state jurisdictions having had hung Parliaments within the last decade or so.

they represent, must be elected by *the majority of electors*. Without this endorsement from the majority, any claim to the title 'democracy' is outrageous. Due to the nature of our peculiar electoral system we have the appearance of such majority approval, but the reality is nonetheless minority rule; namely, a two-party oligarchy.

In our electoral system we have both compulsory and preferential voting. The concern associated with compulsory voting is that electors may vote without seriously considering the issues, parties, or candidates at all — but that is their choice. The more significant fault lies with preferential voting, as it serves to obscure the reality that most of our 'representatives' did not receive the majority of the first preference vote in their electorate.⁵ For most of our current 'representatives', *it is more accurate to say that the majority of their electorate did not vote for them*, but rather voted for someone else as their first preference. It has also been the case that no government formed over the last thirty years has received *en masse* more than 49 per cent of the primary vote, and most governments formed during this period have received less than 47 per cent of the primary vote. Indeed, governments have been formed with less than 40 per cent of the primary vote.⁶

The counting of preference votes allows a 'representative', and consequently the governing party they represent, to cling to the fiction that they received over 50 per cent of the vote, and therefore represent the majority of the electorate. The maintenance of this illusion of majority support is essential to make the claim that we live in a 'democracy'. However, to say that I actually 'voted' for a candidate to whom I gave, for example, my third preference, rather than, for example, my fourth and last preference, is ludicrously distorting the concept.

If our 'representatives' do not really represent us, or at least the majority of 'us', who do they represent? Well, clearly they represent themselves, as we all do — indeed, it is arguable that one can only really represent oneself — but they also represent the interests of 'the party'. The interests of 'the party' and the interests of the citizens, or the majority thereof, do not necessarily coincide, and Australian political history more than adequately demonstrates that when conflict between these two interests occurs, it is 'the party's' interests that prevail. It is quite clear that, in contemporary Australia, we have government of the people, but it is by 'the party', and for 'the party'. If one views democracy as a worthwhile political

objective, challenging this oligarchy is the essential first step, and this necessitates exposing the real nature of 'representation': that the only interests 'represented' in our system are the interests of 'the party'.

It is time we abandoned the absurdity of representation, moved beyond our corrupted concept of 'representative democracy', and pursued a system of direct democracy. Surely the status quo is not so glorious as to merit repetition ad infinitum? Which reminds me, by the time this issue of the *Alternative Law Journal* is published we will have had another federal election... *plus ça change, plus c'est la même chose*.

MARK J RANKIN teaches law at Flinders University, Adelaide.

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Postscript

The results of the 2010 federal election now appear (as of 24 August 2010) to suggest that we will have a 'hung' Parliament. I was asked whether I wished to revise any aspect of the Opinion in light of this rare occurrence.⁷

Although grateful for the opportunity, I have decided not to do so (other than by way of this Postscript) because the election result, although unexpected, does not actually change anything of substance: the argument presented in the Opinion concerning the absurdity of representation is in no way diluted, and we remain within a two-party oligarchy. It is worth noting that out of the 150 seats in the House of Representatives, on current estimates less than 2.7 per cent of them will go to members outside the two-party oligarchy. The overwhelming majority of the 'representatives' remain the representatives of 'the party'. What is unusual about the 2010 election is not that Independents were elected to the House of Representatives (indeed, this has been the norm over the last couple of decades), but rather that the two branches of the two-party oligarchy were evenly matched on election day, with neither party likely to gain an absolute majority of seats.

The certainty of election result mentioned in paragraph 2 of the Opinion remains assured: whatever government is formed will unquestionably be either a Labor or Coalition government. If current election predictions prove correct, then such a government must govern with the support of a handful of non-party members, but this does not fundamentally alter the oligarchy; rather, it allows the governing power to switch without further election (ie without any input from the electors) between the two branches of the two-party oligarchy whenever the Independents change their allegiance in a no-confidence motion. In other words, the inevitable result of an election that creates a hung parliament within a two-party oligarchy is the same as any other election within such a system: one of the parties within that two-party oligarchy will eventually form government.⁸

8. Indeed, the fact that we even label the election result as a 'hung' Parliament is evidence of the dominance of our two-party oligarchy. That is, parliament is said to be 'hung' because no one party or formal coalition has an overall majority, yet why do we presume it necessary for one party or formal coalition to have such a majority? There is no constitutional nor democratically justifiable reason. We have 150 seats in the House of Representatives, and 150 members will be elected to take those seats, and so 76 of those members may, via voting in a no-confidence motion, 'elect' a government. What exactly is the problem with that? It is only perceived to be an issue because we have a two-party oligarchy — in other 'liberal democracies' that do not have such an ingrained two-party oligarchy, a 'hung' parliament is the norm, except that it is called a 'balanced' parliament.