

## BOOK REVIEW

### *Ritual and Rhythm in Electoral Systems: A Comparative Legal Account*

**Graeme Orr (2015) Ashgate. ISBN 9781409460763. Hardback, 197 pages.**

Those of us who count ourselves amongst the card-carrying members of the international electoral law fraternity/sorority tend to think of what it is that we do along these lines. We describe and critically analyse the various enactments, court cases, administrative rulings, conventional practices and participant behaviours that ‘establish a set of ground rules for the operation of the democratic process, which will identify the government officials authorized to make the regular laws for society’.<sup>1</sup> We do so against a background assumption that those various enactments, cases, administrative rulings, conventional practices and participant behaviours exist for a reason: ... the purpose of election law is ‘to obtain an honest expression of the will or desire of the voter’.<sup>2</sup> How election law best can manage that, or whether it can manage it at all, is something we debate at length:

Assuming that the purpose of election law is to provide for responsible choice, including, at a minimum, reasonable consideration of alternatives, and for an accurate reflection of the public decision, can that best be done by rules and regulations which narrowly circumscribe the process, by example, or by encouraging personal involvement? What role can law properly play?<sup>3</sup>

And sometimes we even wax philosophical about what it is that elections (and thus the electoral laws that establish the ground rules for the democratic process) are all about: ‘the legal rules that create and order the electoral process must operate in a way that legitimates granting the winner public decision-making power. They must structure the election process in such a way that it provides good reasons for all participants – losers as well as winners – to accept and abide by the outcome.’<sup>4</sup>

Graeme Orr has now written a book – *Ritual and Rhythm in Electoral Systems: A Comparative Legal Account*<sup>5</sup> – that tells us card-carrying members of the international electoral law fraternity/sorority that, while what we are doing is not necessarily *wrong*, it misses a large part of what elections actually are. By limiting ourselves to just patting the trunk of an elephant, we have mistakenly described an extremely large

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<sup>1</sup> Edward B. Foley, ‘An Introduction’ (2007) 68 *Ohio State Law Journal* 733, 734.

<sup>2</sup> *State ex rel. Carpenter v. Barber*, 198 So. 49 (Fla. 1940); cited in Mitchell W. Berger, and Candice D. Tobin, ‘Election 2000: The Law of Tied Presidential Elections’ (2001-2002) 26 *Nova Law Review* 660.

<sup>3</sup> Stephen E Gottlieb, ‘Election Law and Election Reform: Strategy for the Long Run’ (1976) 79 *West Virginia Law Review* 237, 238.

<sup>4</sup> Andrew Geddis, *Electoral Law in New Zealand: Practice and Policy* (LexisNexis NZ, 2<sup>nd</sup> ed, 2013) 14.

<sup>5</sup> Graeme Orr, *Ritual and Rhythm in Electoral Systems: A Comparative Legal Account* (Ashgate, 2015).

quadruped mammal as being a snake. We have fallen into this error because the prevailing ‘instrumentalist’ approach,<sup>6</sup> to adopt Orr’s terminology, fails to recognise that ‘elections should be understood as rituals conducted with their own inbuilt rhythms’.<sup>7</sup> That is to say, the *social meaning* of the electoral process lies not (only) in it being a ‘fair’, ‘equal’, ‘free’, ‘legitimate’ or other purposive way of choosing political leaders from amongst all the various supplicants for the public’s favour. Rather, to fully understand what elections are and the role that law plays within them, we must consider the experience of participating in a set of recurrent, ritualised proceedings that ‘simultaneously represent, and play out, certain values and social meanings’.<sup>8</sup> These values and meanings then spread across the constitutive (i.e. by marking us as actively participating members of a wider community), the symbolic (i.e. each voter undergoing the same process as all others) and the practical (in the sense of establishing a set of formal collective practices that participants engage in). The great bulk of Orr’s book is spent examining how the law has worked to shape and form these electoral rhythms and rituals across a wide range of topics: from establishing a set timetable of electoral events (which in turn imprint themselves on our societal histories when we think of ‘eras’ of government); to prescribing how those participating in the electoral event must experience it; through to bringing the drama to a close in public pronouncements and spectacles.

I think, for the most part, Orr is right on the money with his basic argument and analysis. We card-carrying members of the international electoral law fraternity/sorority know that there are big holes in the story that we tell about what elections are all about. To take the most basic example, as Orr himself notes<sup>9</sup> the instrumentalist account struggles to explain why on earth it is that people even bother showing up to vote. If an election were meant simply to tally up preferences in order to allocate public power, only an idiot would bother to take the time and effort to participate. The chances of your vote making any difference whatsoever to the outcome is so miniscule that it cannot possibly, on a straight cost-benefit analysis, warrant a trip down to the polling station and the associated time involved in getting and filling out a ballot paper. Therefore, stripped of the ritual meaning that we attach to it, the very act of voting – the thing that lies at the heart of elections as decision-making processes – does not make any sense. And then there are numerous other examples, many of which Orr also unpeels for us. Take New Zealand’s complete prohibition on any form of polling day campaigning, punishable by a fine of up to \$20,000.<sup>10</sup> What *instrumental* reason can we give for such a wide-ranging ban on (for instance) even wearing a Green Party T-Shirt on the street, especially as the Electoral Act 1993, s 218 already prohibits the use of ‘undue influence’ to sway a voter’s intentions? Without understanding how this ban creates a particular polling day ritual – how it is ‘an attempt to encourage a calm repose in any electors who remain undecided on some questions and to erect an aesthetic of quietude’<sup>11</sup> – we cannot really know what is really going on with the law.

As such, Orr’s work is to be generally commended and recommended. Which is not to say that it entirely drives the instrumentalist approach to electoral law from the field, its banners in tatters as it stumbles away in defeat. In some ways, the book reads

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<sup>6</sup> Ibid 8.

<sup>7</sup> Ibid 9.

<sup>8</sup> Ibid 14.

<sup>9</sup> Ibid 71-75.

<sup>10</sup> *Electoral Act 1993* (NZ), s 197(1)(g).

<sup>11</sup> Orr, above n 5, 119.

as an elegy to something that is passing away from us. Part of this may have to do with how it is written. In keeping with its message about the importance of rhythms in social life, Orr's language is truly beautiful, almost liturgical in cadence. His work certainly contains none of the dry legalese one often associates with academic monographs. However, in an era where the Dead Kennedys' scathing commentary on consumerist society – 'Give me convenience or give me death!'<sup>12</sup> – has come to sound more like an imperative demand than a critique, much of what Orr values in terms of electoral ritual looks to be going the same way as the friendly neighbourhood fruit monger. For example, Orr cautions against the spread of 'convenience voting', arguing that measures such as postal voting, early voting and electronic voting undermine the ritual nature of '[v]oting from the peaceable communal grounds of a schoolyard ... a practice as rich as any yet devised'.<sup>13</sup> But at the 2014 New Zealand General Election, some 30% of those who cast ballots took advantage of the fact that they may advance vote up to 17 days before 'polling day'; more than double the number that did so at the previous election. The New Zealand Government also has just released its requirements for a trial of electronic voting at the local government level.<sup>14</sup> The convenience-voting genie is thus well and truly out of the bottle here, as it is elsewhere throughout Western liberal democracies, and no amount of warning about the value of voting-in-person on one common day is going to reverse the trend. That trend will, as Orr notes, 'transform [the voting ritual] practically and profoundly, and with it the way it is experienced and the social meaning it frames'.<sup>15</sup> Orr disapproves of this change,<sup>16</sup> but it is tempting to say that while the past was his, the future is instrumental.

Furthermore, there is perhaps a reason why we card-carrying members of the international electoral law fraternity/sorority see value in taking an instrumentalist approach to analysing issues of electoral reform. Take the issue of presenting identification at the polling place in order to receive a ballot paper. Orr notes that laws requiring some form of voter ID may have good (my term) ritual consequences: 'it may symbolically add to the understanding of the ballot as a valuable public right and not merely another instance of form filling'.<sup>17</sup> Equally, such voter ID laws may underpin bad (my term) rituals if they 'turn[] the franchise, a freedom designed to place citizens at least momentarily above government, on its head, by signifying government control and mistrust of citizens'.<sup>18</sup> But to my perhaps overly instrumental mind, such a ritual-focused analysis seems somewhat secondary to questions such as what is the evidence that fraudulent votes are being cast, such that voter ID is considered necessary? What will be the effects on particular voter groups of requiring ID at the polling places? Which parties (or candidates) do those most affected voter groups tend to support, and hence what is the likely impact on election outcomes of adopting the new law? Or, to put it another way, if a politician from a right-leaning political party suddenly were to announce the need to introduce voter ID laws into New Zealand (which presently has none) in order to 'symbolically add to the understanding of the ballot as a valuable public right', I do not think it *unduly* cynical to note that the effect of that move would be to lead to less votes being cast for parties on the left-side of the political spectrum and so question the motivation behind the

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<sup>12</sup> Dead Kennedy, *Give Me Convenience, Or Give Me Death!* (Alternative Tentacles, 1987).

<sup>13</sup> Orr, above n 5, 124.

<sup>14</sup> Department of Internal Affairs, *Online voting trial requirements* (2015) <<http://www.dia.govt.nz/online-voting>>.

<sup>15</sup> Orr, above n 5, 124.

<sup>16</sup> Ibid 189.

<sup>17</sup> Ibid 26.

<sup>18</sup> Ibid 26.

proposal.

Now, I hasten to note that this does not mean that the ritual created by presenting ID at the voting place is irrelevant or of no interest at all. Orr's work is not an either/or proposition. So while he chides us card-carrying members of the international electoral law fraternity/sorority for ignoring the forms of electoral ritual that give meaning to the social practice, he is not saying that this is *all* that we ought to be focusing upon. And he is right to note that in many areas, not looking to the ritual meaning of electoral practices means we have an at-best partial understanding of the subject we are examining. But by the same token, elections *are* processes that distribute public power according to their outcomes, and as such are ripe for gaming by those who seek to capture that power for themselves. So, while we ought not to forget that elections are important occasions of social ritual that are replete with meaning, and Orr is quite right to remind us of this fact, we also ought not to see them *only* as being this.

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