A Cautionary Note on Political Equality as a Constitutional Principle

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In its 1974 decision, Buckley v Valeo, 424 US 1 (1975), the United States Supreme Court infamously ruled that:

the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.

Decades later, Buckley remains powerfully influential with the Supreme Court in McCutcheon v Federal Election Commission stating last year that:

No matter how desirable it may seem, it is not an acceptable governmental objective to ‘level the playing field’, or to ‘level electoral opportunities’, or to ‘equalize the financial resources of candidates’.

In McCloy v New South Wales [2015] HCA 34, the High Court emphatically rejected the approach of US Supreme Court as to the illegitimacy of political equality or fairness as a legislative objective. On the contrary, under the Commonwealth Constitution, ‘(l)egislative regulation of the electoral process directed to the protection of the integrity of the process is … prima facie legitimate’.
Central to the conclusion that political equality and fairness are legitimate legislative objectives was the High Court’s insistence that political equality was a **constitutional principle**. Yet, the latter was hardly necessary for the former conclusion. If elections are to be ‘free and fair’, it would seem absurd to deny Parliament the ability to regulate with the view to advancing electoral fairness, regardless of what the Constitution said about political equality. As McLachlin CJ and Major J observed in the Canadian Supreme Court decision in *Harper v Canada* [2004] SCC 33 — a decision favourably cited by the joint judgment and Gageler J:

> Common sense dictates that promoting electoral fairness is a pressing and substantial objective in our liberal democracy.

Not only does logic fail to bind these two aspects of the High Court’s judgment in *McCloy*, they also carry quite different implications in terms of legislative ability to regulate elections. The High Court’s ruling that political equality and fairness are legitimate legislative objectives permits Parliaments to regulate elections for these purposes; political equality as a constitutional principle, on the other hand, will constrain the ability of Parliaments to regulate elections, even in situations when the purported justification is one of equality and fairness.

This post sounds a cautionary note on the elevation of political equality as a constitutional principle in *McCloy*. It does so by posing three questions, questions that alert us to the fact that political equality as a constitutional principle does not necessarily result in the realisation of political equality and, in fact, poses risks to the democratic project.

### What is the relationship between political equality as a constitutional principle and the text and structure of the Commonwealth Constitution?

The first question goes to the legitimacy of characterising political equality as a constitutional principle. At one level, the relationship is reasonably straightforward. In *McCloy*, political equality as a constitutional principle informed the analysis of the judges as to whether the challenged laws breached the implied freedom of political communication. In the joint judgment, for example, this principle came to play in terms of compatibility testing (at [31]–[47], also Gordon J at [324]) and proportionality testing (at [93], also Gordon J at [344], [365]) of the challenged legislation.

It is, however, clear from the various judgments in *McCloy*, that political equality as a constitutional principle had relevance beyond the implied freedom — and it is here that matters become murkier. All judges favourably quoted Harrison Moore’s observation in 1902’s *The Constitution of the Commonwealth of Australia* that:

> The great underlying principle (of the Constitution) is, that the rights of individuals were sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power.

The joint judgment also went on to state that:

> Equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our Constitution.
In similar terms, Nettle J considered ‘equality of political power… [to be] at the heart of the Australian constitutional conception of political sovereignty’ (at [271]).

The strongest suggestion from these dicta is that the principle of political equality is derived from the constitutionally prescribed system of representative democracy. Yet, the judges fail to properly elaborate on the connection between political equality and the constitutionally prescribed system of representative democracy, giving rise to the appearance of reasoning from an understanding of representative democracy not adequately anchored in the text and structure of the Constitution. If so, there is an apparent breach of following injunction in *Lange v Australian Broadcasting Corporation* [1997] HCA 25:

> Under the Constitution, the relevant question is not, ‘What is required by representative and responsible government?’ It is, ‘What do the terms and structure of the Constitution prohibit, authorise or require?’

One possibility — not adverted by any of the judges in *McCloy* — is that the principle of political equality is implied from the words ‘directly chosen by the people’ in sections 7 and 24 of the *Commonwealth Constitution*. But if political equality were implied from these sections, how can such an implication be reconciled with the High Court decisions in *Ex rel McKinlay* [1975] HCA 53 and *McGinty v Western Australia* [1996] HCA 48 which rejected the argument that these sections guaranteed equality of voting power?

**What understanding of political equality is being adopted as a constitutional principle?**

The second question raised by this post goes to the meaning of political equality as constitutional principle. Two crucial issues arise here. The first relates to the metric of equality — equality of what? Is it equality of power, as Harrison Moore would have it? Or is it equality of opportunity to participate, as appears from the joint judgment (at [45])? Or is it freedom that is to be equalised? And if so, is it negative freedom (freedom from) and/or positive freedom (freedom to)?

The second issue concerns the constituency of equality — equality for whom? Does political equality mean equality of electors as seems to be the case with parts of Nettle J’s judgment (for example at [216])? Or is it political equality of individuals as appears from the quote from Harrison Moore? Or is it political equality of citizens, as is suggested from the High Court decisions in *Roach v Electoral Commissioner* [2007] HCA 43 and *Rowe v Electoral Commissioner* [2010] HCA 46? Or is it the political equality of the ‘people of the Commonwealth’ as stipulated in section 24 of the *Constitution*, a phrase that might go beyond citizens to extend to permanent visa-holders and long-term temporary visa-holders?

Or, even broader, is it equality of those subject to the laws of the Commonwealth, including legal entities like corporations? This is an understanding that could be inferred from the High Court’s decision in *Unions NSW v New South Wales* [2013] HCA 58; it is also one that seems to find expression in the judgment of Nettle J in *McCloy* where he disturbingly considered ‘property developers’ under the *Election Funding, Expenditure and Disclosures Act 1981 (NSW)* — which are commercial corporations — to be part of the electorate (at [266]). But if such an understanding underpins the High Court’s conception of political equality as a constitutional principle, it is one that confers equal political standing to natural persons and corporations — this is a regressive understanding of political equality.
What is the relationship between political equality as a constitutional principle and political equality as effected through legislation?

The final question raised by this post is arguably the most important of the three. The relationship between political equality as a constitutional principle and as effected through legislation will not necessarily be a happy one. Contested principles like human rights and democracy yield a range of understandings. All of these principles are, as Jeremy Waldron has convincingly argued in *Law and Disagreement* (1999), subject to reasonable disagreement. So it is with political equality — as the foregoing discussion has demonstrated — with its concrete meaning depending upon how the constituency and metric of political equality are conceptualised. Judicial and legislative understandings of political equality will not be necessarily congruent; so much is illustrated by the High Court’s decisions in *Australian Capital Television* [1992] HCA 45 and *Unions NSW* with the challenged laws in both cases enacted to ‘level the playing field’ but found to be constitutionally invalid because they disproportionately affected particular groups.

These cases also highlight a likely flash point for tensions between judicial and legislative understandings of political equality: laws that are found to discriminate in breach of the implied freedom of political communication. Discrimination figured strongly in analyses as to whether the challenged laws were in breach of the implied freedom in the judgments of Gageler J (at [136]–[137]) and Nettle J (at [222], [235]–[236], [244], [250]–[251], [257], [262]–[266], [271]) in *McCloy*, those of the Court in *Unions NSW* (explicitly by Keane J; implicitly by plurality through emphasis on how the invalidated provisions were ‘selective and ‘targeting’ particular groups and individuals) and Mason CJ in *Australian Capital Television*. These judgments evince a presumptive stance against laws that impose a discriminatory burden on the implied freedom. For Nettle J, for instance, such laws would require a ‘strong justification’ (see [222]).

Such a presumptive stance might seem rather compelling. The language of discrimination can, however, be deceptively simple and obscure key complexities. One set of complexities is perhaps surprising: When is a law said to discriminate in the context of the implied freedom? Take for instance the caps on political contributions under the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) challenged in *McCloy*. If discrimination means differential treatment, why weren’t these caps said to discriminate? True, the caps applied to all donors. At the same time, however, as the lawyers for *McCloy* correctly pointed out, the caps had a disproportionate impact on those who were able to make donations exceeding their maximums and in that sense, discriminated against the wealthy — indeed, that was their point. The caps also set different maximums for donations to registered parties, unregistered parties, groups of candidates, candidates and third-party campaigners (see s95A(1)) and, consequently had varied impacts on the political funds these various political actors could use to engage in political communication. Why didn’t such varied impacts constitute discrimination in the context of the implied freedom?

This brings us to another — more foundational — set of complexities: why should laws that discriminate in the sense of providing for differential treatment be presumptively illegitimate? As caps on political donations illustrate, laws that discriminate against the wealthy are necessary to ‘level the playing field’ when political ‘capital’ is unequally shared. A presumption against laws that discriminate might then reflect an adherence to equality of formal freedoms blind to societal inequalities. More than a century ago, Anatole France mocked the poverty of such a view:
The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.

**The balance between legislative competence and judicial oversight**

Reasonable disagreement on the meaning of political equality — including between the legislature and judiciary — brings the question of the balance between legislative competence and judicial oversight in the area of electoral law to the fore. While the joint judgment did discuss ‘the boundaries between the legislative and judicial functions’ in terms of the implied freedom, none of the judges except Gageler J considered what the specific boundaries were to be when it came to the particular context of political equality and electoral law.

Various approaches can be discerned when considering the jurisprudence in the Anglosphere. At one end of the spectrum, there is the approach adopted in US First Amendment jurisprudence with political equality and fairness considered constitutionally illegitimate as legislative objectives. As Scalia J forcefully put it in *Austin v Michigan Chamber of Commerce*, 494 US 652 (1990):

> the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the ‘fairness’ of political debate.

At the other end would be the position taken by Lord Bingham in the UK House of Lords’ decision in *Animal Defenders International* [2008] UKHL 15 — a decision favourably cited by the joint judgment and Gageler J in *McCloy* — that:

> it is reasonable to expect that our democratically-elected politicians will be *peculiarly sensitive* to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that others, including judges, will be more so (emphasis added).

The Australian equivalent here would be the following statements of Barwick CJ in *McKinlay* (at [38] and [44]) that:

> the *Australian Constitution* is built upon confidence in a system of parliamentary Government with ministerial responsibility.

> …

> [T]he confidence reposed in the Parliament by s 30 and s 51(xxxxvi) has not, in my opinion, been misplaced.

The quote from Harrison Moore, in fact, would be in keeping with Barwick CJ’s position. It was a quote made at the end of a paragraph on how the Commonwealth Constitution differed from the United States Constitution by *not* being imbued by a ‘spirit of distrust’ of government with ‘guarantees of individual rights conspicuously absent’.

The approach of Gageler J in *McCloy* sits somewhere in between these opposites. For his Honour, restrictions on political communication in the conduct of elections for public office would involve ‘close scrutiny’ with the standard of justification being one of a ‘compelling justification’. This was because of (at [115]):
The ever-present risk within the system of representative and responsible government established by Chs I and II of the Constitution … that communication of information which is either unfavourable or uninteresting to those currently in a position to exercise legislative or executive power will, through design or oversight, be impeded by legislative or executive action to an extent which impairs the making of an informed electoral choice and therefore undermines the constitutive and constraining effect of electoral choice.

For Gageler J (at [116]):

The judicial power, insulated from the electoral process by the structural requirements of Ch III of the Constitution, is uniquely placed to protect against that systemic risk. Here, as elsewhere within our constitutional tradition, ‘the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive’.

A difficulty with Gageler J’s position is that the independence of the judiciary merely removes a negative — the very real risk of that those holding legislative and executive power will seek to insulate themselves from the discipline of elections. Such independence, however, say very little as to the institutional competence of the judiciary to adjudicate over the substance of electoral laws. It was conscious acknowledgment of the limits of such competence that led the Canadian Supreme Court in the Harper case to ‘approach the justification analysis with deference’ when it came to electoral law for, in its view, ‘the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement of expenses, reflects a political choice, the details of which are better left to Parliament’ (at [87]).

By characterising political equality as a constitutional principle, the High Court in McCloy has brought about an increased constitutionalisation of politics with its concomitant shift in power from the political process to the legal process, from the legislature to the judiciary. Whether this development will genuinely enhance Australia’s democracy is moot — a range of trajectories are possible including a dystopian vision of political equality insufficiently anchored in the text and structure of the Constitution with constitutional scrutiny exceeding the institutional competence of the judiciary; corporations on the same footing as natural persons; and formal freedoms consecrated to the neglect of societal inequalities.

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