Electoral Law as a Discipline

Notes from presentation by Professor Graeme Orr, University of Queensland

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It's a privilege to be asked, alongside Professor George Williams, to help launch this database. Austlii has revolutionised access to legal materials in Australia. You can't smash a bottle of champagne across the bows of something as intangible as a database. So instead I'll just say 'Bless Austlii and all who keep her, sail in her and need her', and thanks to Paul Kildea for pulling this project together.

I was asked to say a few words on the theme of 'Electoral Law as a Discipline'. 21 years ago I edited a symposium on 'Electoral Regulation and Representation'. A grand title for what was a tentative and short collection. In the editorial I said:

> From the vantage point of legal scholars, the study of electoral regulation in Australia is a Cinderella field.[i]

That was half true. The study of electoral regulation was – at the risk of milking the fairy tale metaphor – as much a Sleeping Beauty as a Cinderella. Late in the 19th century, election law was in its first boom. Driven both by the egalitarian reforms of the Chartists, and by the war on electoral bribery and corruption, legislation in the Victorian era was in ferment. The franchise was expanding, the first expenditure limits were imposed and there were newly established election courts to hear disputed returns. Primers on this law were common. The field even had its own dedicated series of case reports in the UK and Ireland.[ii]

The field went into repose through the middle of the 20th century. Political scientists knew electoral rules and norms could be important, but focused on their consequences for electoral and parliamentary outcomes.[iii] Practitioners, consultants and agents thinned out. Legal academics came to treat the area as an occasionally curious subset of constitutional law. No more. Beauty awoke and the field of election law has grown like topsy.

20 years ago, Loyola Law School in Los Angeles published a symposium hosted by now Professor Rick Hasen. It was entitled 'Election Law as its Own Field of Study'.[iv] US election law was recognised as a discipline a decade or more earlier than in Australia.[v] This is unsurprising. The US is the land of multi-year primary seasons, of campaigns costing hundreds of millions, and of elections at four levels of government including, potentially, from dog catcher to president.

Whilst the Yanks were ahead of us in time, as the pathologies of US elections show, they are not necessarily ahead of us in a normative sense. In any event, the US could never form a template for the discipline here. It has a Bill of Rights, interpreted by duelling federal courts atop of whom sits its mighty and highly politicised Supreme Court. And whilst it has a Federal Elections Commission in Washington, DC, to regulate campaign finance (when it is not mired in partisan dysfunction), the US has no tradition of centralised and autonomous electoral management.

Australia, in contrast, has no Bills of Rights, has an approach of 'strict and complete legalism' to its Constitution, and has a long tradition of independent electoral management. Indeed in Australia, the field has always and primarily been driven by parliaments, with technocratic input from the administrators. You could say Australia lies not in the Pacific, but in the north east Atlantic. Closer to the UK in our trust in parliamentary development of electoral law and in our party system, but moving towards the US in our styles of campaigning.

This is *not* to say that Australia is immune from bouts of what I call 'appellate court-it is'. Indeed one thing that has driven interest in this field in the past couple of decades is the increasing frequency of High Court litigation. Some of this court action has been inspired by judicial creativity. The Court has gifted us an implied freedom of political communication, a constitutionally protected implied universal franchise and, most recently, a constitutionally implied 'equality of opportunity to participate in political sovereignty'.

More often than not this litigation is unsuccessful. But when it succeeds, it succeeds dramatically. Legislation carefully crafted by parliaments is overturned. And a chilling effect ripples through the offices of legislative drafters and those with law reform proposals. All of this, too, came before the explosion of litigation about Commonwealth MP's qualifications. (Section 44 may have proven to be more like Frankenstein than Sleeping Beauty: but it certainly thrust electoral law into prominence.)

Yet whatever the courts do or say, the primary focus of election law here remains the ongoing evolution of law and law reform debates, centring on legislation and administrative practice. This is clear both in the scholarship and in parliamentary committees. In academics terms, many good men and women have come to the aid of the party. In the new edition of my book *The Law of Politics*, the bibliography of scholarly material now stretches across 18 pages of small font, with about 450 entries. And, as the gathering of this network is testament, the scholarly community crosses borders. It brings together constitutionalists, electoral law specialists, regulatory theorists, political scientists (both quantitative and theoretical) and engaged practitioners and administrators. If election law was once the Cinderella toiling away in the parlour of democracy,[vi] whatever Cinderella's fate, it is clear that many scholars and authors are enjoying the Ball.

In finishing, I want to pose the question "What is the boundary of 'electoral law'?" Has the term outlived its usefulness as a disciplinary marker? As a call to attend closely to the norms and systems in the code-like electoral acts in this country, the term 'electoral law' served a purpose. But there is also the broader concept of the 'law of politics'. That much was always apparent, given the relevance of the general law defamation or anti-discrimination to campaigning. Even more now, when campaign law is area in which the elephant of digital misinformation and 'fake news' is currently careering.[vii] The inadequacies of the term 'electoral law' are also obvious given the extension of legislation into not just the financial affairs of parties, but third-party political activists in Australia. The question of the scope of our discipline also manifests itself at the intersection of elections with less prominent regulatory debates about, for instance, parliamentary law or the courts' role in overseeing the rules of political parties.

Above all, the elongation of campaigning, from the formal period demarked by the election writs to something more like a permanent campaign, waged using everything from government advertising to social media, forces even black letter lawyers to think about 'the law of politics' and not just 'electoral law'. The downside of this broader concept however is captured in the old question, "Where does politics begin and end?" Election law as a discipline has a clear focus; a genuine 'law of politics' or even a 'law of democracy' is a much harder beast to define.

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[i] Orr, 'Editorial' (1998) 7 *Griffith Law Review* 166.

[ii] O'Malley and Hardcastle, *Reports of the Decisions of the Judges for the Trial of Election Petitions in England and Ireland pursuant to The Parliamentary Elections Act, 1868* (vols 1-7, 1869-1929).

[iii] None of this is to deny there was significant, ongoing attention to electoral systems. Goot's 1985 literature review includes a 25 page bibliography. But so sparse is work from law academics or practitioners, he does not mention them as a group. Instead he summarises the contributions as from 'academic political science (which only date in any very substantial form, from the mid-1960s) … historians and political geographers [and] retired politicians and propagandists.' Goot, 'Electoral Systems' in Aitkin (ed), *Surveys in Australian Political Science* (1985) 178 at 178-9.

[iv] (1999) 32 *Loyola University of LA Law Review* 1095-1272.

[v] Lowenstein was the godfather of the modern field in the US. The first text was his *Election Law: Cases and Materials* (1st ed, 1995). Issacharoff et al, *The Law of Democracy: Legal Structure of the Political Process* (1st ed, 1998) followed.

[vi] Hughes, 'Foreword' in Orr, *The Law of Politics: Elections, Parties and Money in Australia* (1st ed, 2010) v.

[vii] Hasen, 'Deep Fakes, Bots and Siloed Justices: American Election Law in a Post-Truth World', Childress Memorial Lecture (11/10/2019) and (2019) *St Louis University Law Review* (forthcoming) argues these problems are not 'court-centric' and raises the spectre of technological change being beyond the capacity of electoral law to regulate.