

# **The Democratic Audit of Australia: Populism vs Citizen Rights**

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*The Democratic Audit of Australia has broadened the conceptual base of the IDEA democratic audit framework by separating out the sometimes competing values associated with representative democracy. Thus civil liberties/human rights and deliberative democracy are given independent status from political equality and popular control of government. The conflict between values has been highlighted by the rise of populist forms of majoritarianism in many western democracies. Popularly elected governments are expressing impatience at the constraints imposed by non-elected tribunals and courts, particularly where the latter are situated outside the democratic polity. The strengthening of rights of citizens and minority groups under international or regional human rights regimes is seen as diminishing the power of democratically elected governments.*

*While the Democratic Audit of Australia has found many weaknesses in political institutions when judged in terms of the principle of political equality, it has also found that principle being marshalled against the principles of civil liberties/human rights and the free flow of information and debate required for deliberative democracy. Hence in the name of democracy and popular fears over national security there is a reduction in the possibility of the informed debate or transparency in government decision-making required for popular control of government.*

*This paper will summarise the principal findings of the first wave of the Democratic Audit of Australia and their methodological as well as substantive implications.*

## **Introduction<sup>1</sup>**

Democracy is itself a highly contested concept—in addition to often including the idea of contestation within its definition. The Australian Democratic Audit team spent some time considering whether in the Australian context it was adequate to present democracy as flowing from only the two principles set out in the IDEA Handbook—(1) popular control over decision-making and (2) political equality in exercising that control. One of the authors of the IDEA framework, Professor David Beetham, argues eloquently that where popular majorities threaten equality of respect and voice for citizens, the political equality value must always trump the popular control of government value. However, the Australian team has been concerned whether this qualification is sufficient to capture the tensions evident in our case between majoritarian and liberal principles or between majoritarian principles and deliberative democracy.<sup>2</sup> This paper explores some of the dilemmas arising from populist attacks

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<sup>1</sup> My thanks to Philip Larkin and Norm Kelly for helpful comments on this paper.

<sup>2</sup> See papers on values by Barry Hindess, John Dryzek, Damian O'Leary, Marian Sawer and John Uhr at <http://democratic.audit.anu.edu.au>

on the intermediary institutions required to ensure accountable government in representative democracies.

### **The populist challenge to representative democracy**

For there to be popular control over government in representative democracies there need to be a whole range of intermediary institutions which facilitate transparency and accountability and which help inform citizens as to whether governments are fulfilling their electoral mandates. Citizens cannot directly check whether, for example, public money is spent in accordance with legislative appropriations or whether public administration is conducted in accordance with statutory responsibilities. There needs to be adequate processes for parliamentary scrutiny of the Executive, which may require arms-length forms of funding of parliamentary administration as well as other means of ensuring parliamentary independence and the independence of bodies such as parliamentary research services.

There also needs to be a range of watchdog agencies, such as Auditors-General, Ombudsmen, Freedom of Information Commissioners, Human Rights Commissions, Anti-Corruption Commissions and so on. And of course there must be a range of courts and tribunals that can undertake judicial review of government decisions to ensure they are not in breach of relevant legislation. In addition, there needs to be pluralism in the media, including public broadcasters with a high degree of independence of government and commitment to a role in the chain of accountability. And there needs to be a strong non-government (NGO) sector able to advocate on behalf of those most affected by government policies. The latter two elements, diversity in the mass media and strong community-based advocacy organisations are also necessary to achieve the kind of inclusive public debate that is central to the goals of deliberative democracy.

Community-based advocacy organisations serve as forums for deliberation that enable new perspectives to be included in public debate and policy development. Many western democracies have provided public funding to strengthen the voices of

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sections of the community such as sole parents, immigrants or those with disabilities and to ensure they have effective advocacy organisations that are able to consult with their constituencies and represent their viewpoints to government and to parliament. With public support, such organisations are able to build up expertise in consulting hard-to-reach groups and in the substantive policy issues that affect them. Of course the internal governance of such organisations is an important democratic issue as is the extent to which they *do* reflect the considered views of their members.

Those who take a more majoritarian view of democracy distrust the role of such intermediary institutions and argue that they should not have privileged access to government or parliamentary inquiries. They see democratic values as being better served by more direct forms of consultation with citizens, including citizen-initiated referenda. Sometimes such views on the relative priority of different democratic values are flavoured by the perception that strengthening the voice of those who need public intervention for equality of life choices will result in increased public expenditure at the expense of taxpayers. This perception is fostered by market populist discourse and ultimately public choice propositions that all public interest advocacy is at heart special interest advocacy; that it reflects rent-seeking and raises excessive expectations of government. Particularly targeted here are NGOs involved in human rights, social justice or environmental advocacy.

The kind of populist discourse that has re-emerged in many of the English-speaking countries claims that intermediary organisations are populated by elites that do not share the values of ordinary people and which get in the way of elected governments that do represent the people. Populists decry the constraints imposed on 'democratically elected governments' by non-elected bodies or by houses of parliament that are not controlled by government, because they are elected by proportional representation or for other reasons. In Australia usually the lower houses, where governments are formed, are elected through single-member electoral systems (the alternative vote) while the upper houses, or houses of review, are mainly elected by proportional representation and often controlled neither by government nor opposition. This tends to be the optimal situation, as with government control such upper houses can turn into mere rubber stamps, while with opposition control they can be purely obstructionist. Nonetheless, the Independents and minor parties that often

hold the balance of power in upper houses, and who have been responsible for many initiatives to strengthen legislative scrutiny and executive scrutiny, are also denounced as the representatives of politically correct new-class elites.

This discourse and what can follow from it, including the dismantling of parliamentary processes of accountability, attacks on the courts, the muzzling of watchdog agencies, the silencing of NGO critics of government and the facilitating of media concentration, is very much a concern in Australia. Populist discourse conjures up the values of political equality (in the form of majority rule) and popular control of government, only to disparage the kind of intermediary institutions that make popular control of government a possibility in representative democracies.

### **Majoritarian government versus the rights of citizens**

The rise of populist discourses in many Western democracies has meant not only a new hostility to intermediary institutions but also new threats to the independence of the judiciary. There is increased contestation over the role of bodies independent of government in constraining executive power and protecting the rights of individuals and of minorities. In particular, there is a targeting of the role of international tribunals and of the judiciary in upholding internationally agreed-upon human rights norms. Courts and tribunals are framed as populated by liberal elites and activist judges contemptuous of the values of ordinary citizens and the governments they elect.

The recent chair of the Australian broadcasting regulator exemplifies this form of populist discourse and the kind of elite attacks on other elites it involves: ‘if the people will not accept your agenda, the elite guardians can have it adopted through the back door by a consensus among the international elites’.<sup>3</sup> The consensus between domestic and international elites at issue here is over the rights of asylum seekers—supposedly concern for the rights of non-citizens shows contempt for the attitudes of ordinary citizens. Similarly in Canada, those associated with populist politics have made sweeping attacks on the Supreme Court and on the way the Canadian Charter of

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<sup>3</sup> David Flint, *The Twilight of the Elites*, Melbourne, Freedom Publishing, 2003, p. 162.

Rights and Freedoms has allegedly undermined Canadian democracy. They claim that special interest groups have used Charter litigation to pursue policy demands rejected by elected governments.<sup>4</sup>

This hostility to the courts has been muted in the period since the Conservative Party won minority government in January 2006 but resurfaced in May when a Conservative Party MP who had been a long-time critic of judicial activism attacked the Supreme Court Chief Justice for assuming God-like powers. She had stated in a speech to New Zealand university students that the rule of law required judges to uphold unwritten constitutional norms, such as the right not to be punished without a trial, even in the face of clearly enacted laws or hostile public opinion. Such views are construed as the characteristic arrogance of liberal elites.

Majoritarian democrats are generally impatient with both domestic and international legal tribunals that constrain the actions of popularly elected governments. A Canadian study of candidates in the 2004 federal election found, for example, that 86 per cent of Conservatives believed that the Parliament should be the final arbiter of constitutional questions, whereas a majority of candidates of all other parties believed this should be the role of the courts.<sup>5</sup> Interestingly, three quarters of the Conservative candidates in 2004 also believed that the under-representation of women was not a serious problem unlike the majority of candidates in other parties. This is consistent with a general downgrading of the value of deliberative democracy or inclusive deliberation by populist democrats.<sup>6</sup>

Some of the tensions between the values of representative democracy were exposed in a more reasoned way in *The Norwegian Study of Power and Democracy*, commissioned by the Norwegian Parliament on 11 December 1997. Five years later, after a massive investigation of all levels of the polity, the final report was submitted.

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<sup>4</sup> Morton, F. L. and Rainer Knopff. 2000. *The Charter Revolution and the Court Party*. Peterborough: Broadview Press.

<sup>5</sup> The Canadian Conservative Party emerged in 2003 from the swallowing up of the former Progressive Conservative Party by the populist Canadian Alliance.

<sup>6</sup> Jerome H Black and Bruce M Hicks, 'Strengthening Canadian Democracy: The Views of Parliamentary Candidates', Institute for Research in Public Policy, Montreal <<http://www.irpp.org>>

It was not however a unanimous report and one of the grounds of dissent is particularly germane to the concerns of the Democratic Audit of Australia.<sup>7</sup> The majority report described the new international framework of human rights law as partially responsible for a decline in the decision-making power of the national legislature. Such inroads into the scope of decision-making grounded in popular consent represented, in their view, a diminishing of democracy. In particular, the majority recommended that the incorporation of supranational law into national law be repealed, on the grounds that the democratic cost of handing over power to courts above and outside the democratic polity was too high.

The two dissenting reports were by women, one of whom, Hege Skjeie, contested the notion that improvement of the rights of minorities and of women through the application of international human rights norms could be regarded as a loss of democracy. While signing up to international human rights instruments did bind the hands of legislators and transferred some power to international tribunals, it also increased the power of citizens. The strengthening of the rights of individual citizens could not, in her review, be regarded as lessening democracy. Clearly there are different and competing democratic values at stake here.

To think about representative democracy simply in terms of the principles of political equality and popular control of government may play into the hands of populists who justify in these very terms their dismissive attitudes to intermediary bodies, accountability mechanisms, inclusive deliberation and human rights. One of the widespread sources of concern since 2001, for example, consists in the constraints placed on civil liberties and on transparent government in the name of national security. While security might be construed as a majority concern, and hence a priority of democratically elected governments, the priority given to security also serves to restrict the freedoms that make individual rights, popular control of government, and well-informed debate a possibility.<sup>8</sup> National security justifications for reducing the transparency of government and making inroads into civil liberties

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<sup>7</sup> For an excellent summary and discussion of this Report see Stein Ringen, 'Where Now Democracy?', *Times Literary Supplement*, 13 February 2004.

<sup>8</sup> See for example, Justice Michael Kirby, 'Terrorism and the Democratic Response', Democratic Audit of Australia, November 2004, <http://democratic.audit.anu.edu.au>.

compound the impatience with constraints on executive government already emanating from populist discourses. In Australia there was even a revival of sedition law in 2005, used in the past against political opponents of the government of the day such as members of the Communist Party.

### **Reflecting value conflict**

As a result of considering current developments within English-speaking democracies as well as value conflicts of longer standing, the Democratic Audit of Australia decided to identify separately, rather than subsuming, the principles of (1) popular control, (2) political equality, (3) civil liberties and human rights and (4) quality of public debate. The civil liberties/human rights value is taken to encompass not only expressive freedoms but also the equal opportunity principle, whereby all citizens have an equal moral right to realise their potential and to participate in the life of the community. While some would see this as the necessary foundation or extension of the political equality principle, not all those who have espoused political equality have seen it as entailing equal opportunity. The human rights value is also extended to non-citizens resident in Australia and to non-citizens who can rightfully look to Australia for protection in accordance with international law.

The fourth value is the deliberative democracy value, stressing the importance to democratic legitimacy of public debate that is inclusive of different perspectives, particularly those of previously excluded citizens (and hopefully non-citizens). As well as being open to all viewpoints, such debate should be informed by diverse sources of information. The deliberative democracy value entails a commitment to a process of public reasoning and non-manipulative dialogue, as a defining feature of democracy. It rejects the assumption of pre-given interests that are exogenous to the political process and can simply be aggregated by policy actors. Auditing against these principles as separate values has already revealed significant conflicts over which democratic values should provide the measuring stick for institutions such as political parties and NGOs.

Those who prioritise the deliberative democracy value also prioritise intra-party democracy, as creating a sphere for deliberative debate over policy and for democratic



citizenship. By contrast, those working from economic models of politics tend to place less emphasis on political parties as forums for deliberation or for socialisation into democratic values. Rather, they argue that intra-party democracy has anti-majoritarian effects and also makes parties less competitive in the democratic marketplace. On the first point, they argue that party leaders should be responsive to voters rather than to party members, who may have a different set of policy preferences. In particular, they suggest that there will be a considerable gap between the preferences of party activists and those of the median voter.

On the second point, relating to competitiveness, public choice theorists argue that intra-party democracy will get in the way of effective inter-party competition for votes and be irrelevant to the selection of the most saleable candidates and policies. Without a meaningful role, party membership is likely to dwindle and to be replaced by the role of pollsters, advertising agencies and other professionals. However, from this perspective the essence of democracy is effective competition between parties for a majority of votes and not democratic accountability or forms of debate within parties. There is a privileging of non-deliberative majority opinion over deliberative processes for policy development. These issues are canvassed in the focussed audit report: *Australian Political Parties in the Spotlight*.<sup>9</sup>

Those who prioritise deliberative democracy also emphasise the importance of supporting community-based advocacy organisations to ensure a wide range of voices are heard in public debate and policy-making and not just the wealthy or powerful. As we have seen the populist distrust of intermediary organisations combines with public choice distrust of public interest advocacy to produce policies designed to limit the amount of advocacy NGOs can engage in and limit their access to the policy process. While from the deliberative democracy perspective it is essential that the voices of those most affected by government policy be heard, from the majoritarian democracy perspective NGOs are unelected and unrepresentative bodies compared with elected

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<sup>9</sup> Dean Jaensch, Peter Brent and Brett Bowden, *Australian Political Parties in the Spotlight*, Report No. 4, Democratic Audit of Australia, 2004, <http://democratic.audit.anu.edu.au>. See also Anika Gauja, 'Enforcing democracy? Towards a regulatory regime for the implementation of intra-party democracy', Democratic Audit of Australia, April 2006.

governments; the latter should make policy for the 'mainstream' undistracted by the pressure of 'special interests'.<sup>10</sup>

From these examples we can see that while there might be broad agreement that all four values that we have identified are important to democracy, differing priority may be assigned to these values or differing interpretations of the way they interact. The Democratic Audit of Australia seeks to reflect this complexity while also providing comparative evidence of the choices made by other democracies on the basis of these values. We chose for our international comparators Canada, New Zealand and the United Kingdom; our domestic analysis is comparative across our nine jurisdictions. The departure from the way we frame our underlying principles does not mean abandoning the IDEA Democratic Audit framework, which we have found to be extremely valuable to our work. We have made some requests for changes, for example the strengthening of indicators relating to parliament and the inclusion of indicators relating to, for example, government machinery for the promotion of gender equality. But in general the framework has provided a very useful entrée to evaluating the health of Australian democracy.

## **Conclusion**

Our major problem for the Democratic Audit of Australia has been not the quality of the Democratic Audit framework but the discursive shifts in our own country, which have made it difficult for issues such as democratic accountability to gain a hearing. For example in February 2006 the Audit held a workshop on political finance that brought together electoral commissioners, former auditors-general, party and media representatives and international experts. We released a draft audit report on political finance and related expert papers<sup>11</sup> and followed up with a number of opinion articles in newspapers and radio interviews. All of this was well received and quoted in parliamentary debate but made not the slightest impact on the government's changes

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<sup>10</sup> Bronwen Dalton and Mark Lyons, *Representing the Disadvantaged in Australian Politics: The Role of Advocacy Organisations*, Democratic Audit of Australia Report No. 5, 2005; Joan Staples, 'NGOs out in the cold: The Howard Government policy towards NGOs', Democratic Audit Discussion Paper 19/06 (June 2006).

<sup>11</sup> See Sally Young and Joo-Cheong Tham, *Political Finance in Australia: A Skewed and Secret System?* Draft Democratic Audit Report No. 7, and related papers by Keith Ewing and N.S. Ghaleigh, Andrew Geddis, Graeme Orr, Andrew Murray and Peter van Onselen.

to the electoral act, which make it easier to donate secretly to political parties, harder to get onto the electoral roll and disenfranchises completely one group, namely prisoners.<sup>12</sup>

At least the Audit, thanks to its comparative perspective, is able to highlight to what extent Australia is going backward compared to our three comparator democracies. For example, under the 2006 amendments to the Commonwealth Electoral Act the Commonwealth Electoral Roll will be closed to new voters a minimum of 33 days before polling day, disenfranchising many young people who only take action to get onto the roll after an election is announced (which is unpredictable at the federal level). By contrast, in New Zealand the roll closes the day before polling day and in Canada voters can enrol at the polling place itself. Similarly, while in Australia there are no limits on either the source or size of corporate donations these are completely banned under the 2006 amendments to the Canada Elections Act and individual donations are limited to \$1000 in a given year. And in Canada no prisoners are disenfranchised thanks to a Supreme Court decision in 2002 that such disenfranchisement contravened the Canadian Charter of Rights and Freedoms (*Sauvé v. Canada*). In Australia the disenfranchisement of all prisoners will have disproportionate impact on Indigenous Australians, who are 14 times more likely to be in prison than non-indigenous Australians.<sup>13</sup> The new evidentiary requirements for enrolment will also have disproportionate impact on Indigenous Australians living in remote communities.

We have been asked whether NGOs should be formed to focus on issues of democratic accountability and electoral fairness and to promote the kind of issues raised by the Audit. Like our comparator democracies we have had since the 19th century groups promoting proportional representation (currently the Proportional Representation Society of Australia), but these only focus on electoral systems (and their institutional impacts) and not the broader range of issues that concern us. We do have many organisations of lawyers who focus on issues of human rights and civil

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<sup>12</sup> Marian Sawyer, 'Harder to vote, easier to donate, harder to vote', *Canberra Times* and *Australian Policy Online*, 8 June 2006,

[http://www.apo.org.au/webboard/results.shtml?filename\\_num=80993](http://www.apo.org.au/webboard/results.shtml?filename_num=80993)

<sup>13</sup> Australian Bureau of Statistics Corrective Services data, September 2005.

liberties, but again not the full range of democratic issues. At present, however, the public policy actors most engaged with the issues that concern us are the minor parties and Independents in our parliaments.

Those who sit on the cross-benches are never likely to be part of government in our system and have a vested interest in strengthening the role of parliament in executive scrutiny and legislative review as well as a vested interest in creating a more level playing field for electoral competition and limiting the role of money in electoral politics. They also have a vested interest in promoting media diversity and independent public broadcasters and other elements contributing to deliberative democracy. The websites set up over the past year by minor parties and Independents to monitor the role of corporate donations in our political system is one healthy sign, although under the decreased disclosure now required they will have less information for analysis.

In general accountability issues barely surface in the commercial electronic media and do not rate highly on the agenda of the swinging voters in the marginal mortgage-belt seats that are of greatest interest to both Government and Opposition. It is easy to become depressed about the future of representative democracy in an environment in which many citizens are disengaged and rightly disenchanted. Nonetheless, Australia has a federal system and while things are going backward at one level there may be some forward momentum elsewhere. In 2006 one Australian jurisdiction (Victoria) will, for the first time, elect its upper house by proportional representation, thus almost certainly ensuring it will become a more effective house of review, controlled neither by Government or Opposition. In another jurisdiction (the ACT) blind people have been able to cast a secret ballot for the first time, thanks to new information and communication technology. The same two jurisdictions have introduced Australia's first Bills of Rights. One important function of the Democratic Audit is to monitor these different trajectories and the uneven pattern of democratic development across our own system and those of similar countries. And hopefully at some point not only to inform debate but to contribute to change and reform at the national level.