Australia's highest court backs anti-democratic election laws

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In what amounts to a deep-going attack on democratic rights, the Australian High Court has unanimously dismissed a challenge to federal legislation denying registration to political parties that do not hand over to the electoral authorities the names and addresses of 500 members. The seven judges announced their decision in May, but only released their reasons this month, just weeks away from the 2004 election.

The court rejected an appeal by the Democratic Labor Party (DLP), which argued that the laws discriminated in favour of incumbent parliamentary parties, which are exempt from the 500 members rule, and were an unconstitutional interference with basic political rights, including freedom of association and communication, voters' privacy and the right of electors to cast a free and informed vote.

The DLP is an anti-communist formation that functioned as a prop for Liberal governments from the mid-1950s to the early 1980s. The objections it raised to the party registration regime, however, are entirely legitimate. The High Court's sweeping dismissal of the DLP's arguments has far-reaching implications for the fundamental rights of ordinary people to politically organise, nominate candidates and contest elections, free of state monitoring and interference.

The unanimous decision in *Mulholland v Australian Electoral Commission* demonstrates the lack of any constituency within the judiciary, together with the rest of the ruling elite, for even the most essential democratic rights. Echoing similar sentiments expressed by the US Supreme Court when it handed the 2000 presidential election to George W Bush, Chief Justice Murray Gleeson and several other judges deliberately cast doubt on the existence of the right to vote under the Australian Constitution.

Gleeson observed that judicial opinion was divided on whether the Australian Constitution guaranteed universal suffrage. He referred to a 1975 case, in which judges pointed out—accurately enough—that when the Constitution was adopted in 1901 it contained no explicit guarantee of voting rights, but instead permitted the states or federal parliament to set franchise qualifications. At Federation, in fact, most women had no right to vote; many states imposed property or income qualifications, and also barred Aborigines and Pacific islanders from voting. Most Aborigines were denied the right to vote at federal elections until 1962.

But it is one thing to record the undemocratic birth of the Australian nation and its shameful record; it is quite another to declare openly in 2004 that the officially entrenched parliamentary parties can overturn basic voting rights. These rights—extended to 18-year-olds in 1972—are the result of decades of political struggles. Yet, Gleeson and several of his colleagues (notably Justices McHugh, Gummow and Hayne) have now called them into question. Gleeson insisted that the Constitution did no more than impose "a basic condition of democratic process", leaving "substantial room for parliamentary choice, and for change from time to time".

The immediate effect of the High Court ruling is to uphold laws first introduced in 1983 by the Hawke Labor government, with the support of the Liberals, to make it as difficult as possible for ordinary people—without access to large funds and staff—to register new political parties and stand for election. The clear purpose of the so-called "500 rule", which was reinforced in 2000 and 2001, was to shore up the declining position of the major parliamentary parties, whose electoral bases have nevertheless continued to fracture ever since.

Under the 500 rule, existing parliamentary parties and MPs enjoy automatic registration, which entitles them to nominate candidates nationwide and to have their party name printed on all ballot papers. By contrast, non-parliamentary parties cannot have their names on ballot papers, and must obtain nominations by 50 voters for every seat they wish to contest, unless they hand over 500 members' names to the state. This is on top of raising $350 per lower house candidate and $700 per Senate candidate.

By requiring rank-and-file party members to publicly identify their political persuasion, these lists directly infringe on the right to vote in secrecy. Members are exposed to victimisation and intimidation by the electoral authorities and other government agencies, including the intelligence services. One of the judges, Justice Michael Kirby, admitted that public indications to government officials of political allegiances could, in the coming period, lead to personal, political and property disadvantages, as happened when the Menzies government moved to outlaw the Communist Party in 1950. Yet, he joined the rest of the bench in declaring the 500 rule to be a "reasonable" infringement of electoral rights.

The DLP mounted several strong arguments. First, it contended that the 500 rule prevented voters from exercising a "free and informed choice" as required by sections 7 and 24 of the Constitution, which specify that parliament must be "directly chosen" by electors. It pointed out that the rule denied voters important information by barring the inclusion of a candidate's party affiliation on ballot papers.

Second, the DLP argued that the measures discriminated in favour of large and parliamentary parties, to the disadvantage of small, new and non-parliamentary parties. It said the laws expressed the partisan interests of the established parliamentary parties, which enjoyed the advantages of incumbency. These parties unfairly benefited from having their names on ballot papers and from being able to register "above the line" voting tickets for the Senate—enabling voters to simply fill out one square, rather than a square for every candidate (sometimes as many as 70) in order of preference.

Third, the party said the rule infringed the implied constitutional freedoms of political communication, and associated freedoms of association and participation in federal elections. Non-parliamentary parties were denied the right to equally communicate the affiliations of their candidates. Finally, the DLP pointed to the flouting of the freedom of political privacy. It said potential members were intimidated by the risk of disclosure to government officials of their private political opinions.

The judges dismissed these arguments with a mixture of sophistry and

anti-democratic assumptions, underpinned by an explicit concern to shore up the present system in the face of mounting popular disaffection. The court reiterated several recent rulings that the Constitution's implied freedom of political communication did not create any rights at all—it merely prohibited "disproportionate" official regulation of political discussion.

Chief Justice Gleeson described the ability of a registered party to have its candidates' affiliation recorded on ballot papers as a "privilege", not a fundamental democratic or constitutional right. It was a privilege created by parliament, he insisted, and therefore parliament could simply take it away.

While admitting that the 500 level was "arbitrary", the chief justice declared that parliament could set any "reasonable" membership requirement for party registration. This could pave the way for even more onerous restrictions. Gleeson claimed that such rules were needed to demonstrate "a certain minimum level of community support", asserting that their purpose was to assist voters to identify genuine parties, rather than impede political communication.

Made in the name of democracy, these arguments are completely anti-democratic. The purpose of elections is meant to be to allow voters to consider and assess an array of political programs and perspectives, and freely decide which parties they support, on the basis of equal access to information about their policies. In other words, it is up to the voters to decide who has "community support". Instead, according to the court, the established parties—and the judges—have the power to pre-determine which parties have support. This is the antithesis of genuine democracy.

Justice Ian Callinan, appointed to the court by the Howard government as a "big C" Conservative, further demonstrated the anti-democratic logic behind the ruling by stating that parliament had every right to insist that only "real political parties of relevance" should enjoy various electoral "privileges". In this view, it is up to the parliamentary establishment, and the courts—not the voters—to determine which parties are "relevant", even to the extent of restricting access to ballot identification by potential challengers.

Justice Kirby, generally regarded as the court's most "liberal" judge, observed that many parties, including the Labor and Liberal parties, had been launched with far smaller memberships than 500. He acknowledged that newly-established, marginalised or less popular parties would be directly disadvantaged by the 500 rule. Nevertheless, he endorsed the erection of such obstacles today, saying they were necessary to reduce confusion in the size and form of ballot papers, discourage the creation of phoney political parties and "protect voters against disillusionment with the system of parliamentary democracy, reliant as it is so heavily in Australia on the organisation of political parties".

In another revealing and highly political passage, Kirby expressed concern that recent Australian elections, at both federal and state levels, had seen large numbers of parties field many candidates, "producing extremely unwieldy ballot papers".

The proliferation of parties and candidates is a symptom of the increasing distrust and disgust felt by many voters, particularly young people, toward the existing political set-up. Over the past decades, widening social inequality, the destruction of secure jobs and working conditions, and the erosion of public health, education, housing and welfare, under both Labor and Liberal governments, has seen the vote for the major parties decline steadily. Over the past two years, the essential bipartisan unity on the Iraq war and the accompanying assault on democratic rights have only intensified these sentiments.

The High Court has, in effect, rubberstamped the response of the political elite, which is to further narrow, stifle and limit political debate, seeking to paint all non-registered parties as illegitimate. The mass media has been fully complicit in this political censorship, giving saturation coverage to the mainstream parties while imposing an almost complete blackout on other parties. True to form, the media barely reported the DLP case, and provided no indication, let alone criticism, of its anti-democratic logic.

The judges' assertion that the 500 rule was designed in 1983 to help voters make informed choices is absurd, and flies in the face of the political record. The 500 rule was imposed, and has been maintained, with the full support of all the parliamentary parties, including the Australian Greens and Democrats, as part of a wider scheme of state funding of registered political parties. State funding was introduced in order to bolster the declining finances of the old parties, make them increasingly financially dependent on the state and give the authorities immense powers to pry into the affairs of new parties.

Under the federal Electoral Act, whether registered parties apply for funding or not, they must file extensive annual returns, right down to the local branch level, and publicly name their financial contributors. In the guise of checking financial returns, the Electoral Commission can carry out highly prejudicial public raids on party offices, seize documents and records, and interrogate party members under oath. It can insist on a detailed timetable of a party's activities and by scheduling inspections and audit meetings, constantly monitor and disrupt these activities.

As revealed by the highly-orchestrated five-year police and media operation against One Nation co-founders Pauline Hanson and David Ettridge, culminating in their jailing last year, even the most technical breaches of these provisions can be used to slander, discredit and silence opposition parties and railroad their leaders to prison. Last November's acquittal of Hanson and Ettridge by the Queensland Supreme Court confirmed that they had been victims of a high-level political witchhunt, backed by a series of legal travesties.

Notably, not one of the High Court judges even referred to the Hanson case. Notwithstanding One Nation's reactionary politics, the jailing of its leaders was aimed at setting a precedent for the use of electoral laws to criminalise any political organisation that threatened to destabilise, in any way, the existing political set-up.

The DLP case is the second major High Court decision on democratic rights in the past month. In early August, the court declared that the federal government can, without any form of trial, detain rejected asylum seekers indefinitely—perhaps for life—even if they cannot be deported to any other country and irrespective of the intolerable conditions inside the government's immigration detention centres.

These rulings are part of a broader assault. Backed by Labor, the Howard government has seized upon the so-called "war on terrorism" to introduce unprecedented measures that can be used to victimise government opponents and outlaw traditional forms of political dissent. These measures include detention and interrogation without trial, the banning of political groups by executive fiat, the abolition of the right to remain silent, and life imprisonment for "terrorist" acts—defined so widely that they can include anti-government demonstrations that damage property or even block traffic.

A new political movement, armed with a socialist perspective, is needed to defeat this offensive—which mirrors developments in the United States and around the world. In order to take forward the struggle to build such a movement, the Socialist Equality Party is standing candidates in the 2004 election and advancing a genuinely democratic and socialist alternative. Because of the anti-democratic electoral laws, our candidates will appear on ballot papers without the SEP's name alongside them. We call on all working people, students and defenders of civil and political rights to vote for the SEP and to demand the immediate repeal of every restrictive ballot access law.

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