

## **The ideal, the reality and the shadow that has fallen over Australia: Case studies on the failing of democracy (2001)**

**By Craig Minogue**

Ideally, the social, political and legal system in Australia is a what is called a liberal democracy. Such a system is manifested by the principals of:

- ▶ **One vote one value;**
- ▶ **Minority rights and majority rule;**
- ▶ **Freedom of political participation and expression** (but this does not extend to the majority attacking minority rights);
- ▶ **Rule of law, *not* rule by law;** and
- ▶ **Separation of powers between:**
  - ▶ the legislature which makes the laws,
  - ▶ the executive which operates the day to day governing of the country, and
  - ▶ the judiciary who administer the laws when a dispute arises between the State and subject or between subject and subject.

Few people in Australia seem to understand this, it is not taught in our schools, and few if any politicians or people in public life know about the underlying philosophy of our social, political and legal system.

The way a liberal democratic system works is that the people as a whole confer their power to a few of their number who act as the representatives for the masses. Briefly put, these representatives are the people who then make the laws in the seat of power, which is called the house of parliament. The laws are then administered by government departments which are controlled by a responsible Minister who is one of the peoples representatives. Once a contravention of the law by an individual or corporation is said to have occurred, the judiciary oversees the adjudication of that matter by a jury, or by direct administration. In this way the people have input into the workings of their society at all levels, the Crown, in the form of the States or the Commonwealth represents the peoples interests, ***and this is how our democracy works.***

On the other hand, a direct democracy, like that of the myth of ancient Athens, or the *ad hoc* arrangements currently operating in Libya. A direct democracy is a system whereby the people come together in the city square or other place to voice their opinion and to vote on and influence the important administrative decisions of the day.

## Case Study 1 - The Immigration Issue

In his seminal book *An International Bill of the Rights of Man* (Columbia University Press, 1945), Sir Hersch Lauterpacht wrote:

The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties.

If people are not equal before the law, then there is no hope of there being a fair adjudicating of an alleged violation of an individuals rights. Needless to say, equality before the law is *the ideal*, and there are many subtle and not so subtle practices which lessen the standing of certain individuals within a society.

For a society to maintain that it is run by the rule of law which encompasses minority rights and majority rule, and not a mob rule by arbitrarily made laws in response to popular scaremongering, then *the ideal* of equality before the law must be maintained.

To abandon the rule of law and the ideal of equality before the law is to give into a fascist mob rule, and this of course is what is happening in Australia.

The dichotomous reality of the concept of equality before the law for people within the jurisdiction of Australia has very clearly been spelled out by Philip Ruddock, the Minister for Immigration & Multicultural Affairs, he said:

**You do not have to give people who arrive on your shores, and are in all senses foreigners, access to your courts in the same way you give your own people.<sup>1</sup>**

I have researched the term “foreigners” but it does not appear in any legal dictionary, and it is not a word that has ever been judicially considered by the High Court of Australia. Nor have I been able to quantify what the phrase “your own people” means. I wonder if it is a stretch to suppose that Minister Ruddock means “people of colour” when he uses the phrase “foreigners”, and just perhaps he means “white upper class male’s who hold political and economic power” when he uses the phrase “your own people”.

Once a person is within the jurisdiction of a State, then that person should have the protection of the law like all the other people within that jurisdiction. There are examples of State systems of the rule *by* law where certain groups of people are outside of the rule *of* law. Those States being Nazi Germany and South Africa under the system of apartheid.

The international law is well settled on the issue of equality before the law and rule *of* law and not rule *by* law. Australia is a signatory to, but a State with avoids the obligations of the Internal Covenant on Civil and Political Rights (“the ICCPR”) in relation to the ideal of equality before the law.

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1 Melissa Fyfe, ‘Law to stop asylum seeker appeals may fail’, *The Age*, 9 November 2001, p.17.

The ICCPR's Article 26 states:

All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

The ICCPR's Article 2 states:

2.1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

2.2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

2.3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

The ICCPR's Article 50 states:

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Despite all of this the Minister for Immigration & Multicultural Affairs in Australia talks in terms of "foreigners" who should not have the same status as persons before the law as "your own people"; this is reminiscent of when the Aboriginal people in Australia were counted on the national census with dogs and cats.

## **Case Study 2 - The Political Power Vacuum and Mob Rule**

When in a liberal democracy, a group of people or an unelected organization like the military, police, *a newspaper*, or a myopic interest group like the "victims of crime", decide that they will seek to directly influence the administrative decisions of government agencies or the judiciary by a popular show of hands within their group, then this is a subversion of our liberal democratic principles.

In a liberal, or parliamentary democracy, to impose direct democratic decision making of the citizens or an interest group, ***or for political leaders to follow the opinion of the majority against a minority***, this is very much akin to mob rule.

A case in point of direct decision making can be found when the *Herald-Sun* newspaper ran a voteline poll to ask if a prisoner should be able to participate in a leave program. It should be

appreciated that the leave program is mandated by the law, the *Corrections Act and Regulations*, and administered by a statutory body. To ask the people to make such a decision is a challenge to democracy. And those people who voted “No”, that the prisoner should not have day leaves, are those people who advocate direct involvement of the people, a kind of mob rule of aggrieved parties.

In a way mob rule is understandable - it is because it's the prison system personified. When criminals have a dispute, they shoot it out in the street, or they commit some other violent act against the person they feel aggrieved with; this behaviour in the criminal world is called revenge. Taking the *Herald-Sun* voteline as an example, the ignorant general public, informed as they are by the media, refer to this type of popular action not as revenge, but as justice and democracy.

What makes the voteline situation worse is that the Government then stood by while the *Herald-Sun* coopted the powers of the *Corrections Act and Regulations* so as to effectively make administrative decisions in relation to the Sentence Management of a prisoner. ***And please note that it does not matter who asked them to do it!*** This is not to say that an interest group, like victims of crime, cannot criticise a government decision once made, they can, and the representatives can respond to that. However, the interest group cannot effectively seek to make the decision or have a direct input into the decision making process via the voteline of a newspaper; this is an illegitimate form of participation because it is not in tune with our ‘liberal’ democracy.

The Government of Victoria has allowed the *Herald-Sun* to subvert the democratic principles under which our system is supposed to operate. A lynch mob was mustered on the front page of the *Herald-Sun* and all sorts of critters came crawling out of the woodwork. Those people who belong to victims groups and who voted “No” are most probably Hansonite's, i.e., simple-minded people who hunger after simple solutions to complex issues. What they do not realise is that they are the mob, they are akin to the criminals they are opposing. In fighting the criminal, they have in fact turned into one; they are the social criminals.

The most disturbing thing of all is that the Government and Correctional officials did not defend their own processes, they did not defend the law and the administrative structures which administer it. What they did was to ignore section 30 of the *Corrections Act* and rush to join the mob mustered by the *Herald-Sun*.

The last word on the voteline fiasco which exposed the anti-democratic activities of our social and political institutions, should be about the use of the thumbs up, thumbs down graphic to represent the decision making process, a process which they call “the verdict”. This is reminiscent of the mob at the Colosseum of ancient Rome. The amphitheatre of Vespasina at Rome is no doubt seen as a beacon of direct democracy, and one which the *Herald-Sun* and victim's groups are harking back to. It was simple in those days, the people voted to decide if the slaves and prisoners should be killed or live for their entertainment with a show of thumbs. Perhaps the *Herald-Sun* could campaign for jury verdicts to be made in this way in the future seeing as the “feed them to the lions” mentality is in tune with the will of the general public, and we can do away with the pretence that Australia is a democracy.

T.S. Elliot wrote: 'Between the ideal and the reality falls the shadow'. And the sun is well and truly setting in Australia.

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