
Polling in a Pandemic: Electoral Dynamics, Administration and Law*

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Abstract The viral pandemic of 2020 has dislocated almost all aspects of social and economic life. Electoral democracy is no exception. How and when should elections to be held, under conditions of restricted movement and personal interactions, as well as against a backdrop of general fear and uncertainty? This article examines these issues from both a legal and administrative perspective. In doing so it draws on initial experience both in Australia and internationally. Some jurisdictions will be hampered more than others by lack of resources or contagion itself. But with sufficient bipartisanship and delegation of emergency rule-making power to electoral commissions, electors can be practically enfranchised, and sufficient campaign liberties be preserved, to ensure free and fair elections. Electoral politics, however, will be skewed by the pandemic in unpredictable ways.

INTRODUCTION

Within months of the start of 2020 a novel coronavirus, whose disease has been officially dubbed Covid-19, spread from its source in China across the globe. In that short time, it feels as if ‘All is changed, changed utterly’.² To the billions of us who have

¹ This article builds on online commentaries published in March and April 2020 by the author.

² W.B. Yeats, ‘Easter 1916’. Yeats would soon nearly lose his pregnant wife to the 1918 influenza pandemic: Elizabeth Outka, *Viral Modernism: The Influenza Pandemic and Interwar Literature*. New York: Columbia University Press, 2020, pp. 167-96.

been under stay-at-home orders, it can feel as if time has paused. Yet scan the news, and the world seems to be hurtling into an uncertain future. At best, politics and governance—alongside social, economic and work arrangements—are straining to adapt. At worst, they are lurching wildly.

Amongst such high concern and drama, what room is there for the ordinary functioning of electoral democracy? Elections serve two great roles. They are the seasonal regenerators of legitimacy in representative government. And they are great rituals, the only truly public gathering in a secular society.³ An unexpected contagion, and lockdowns in response, undermine each of these roles. Must elections be held, and if so when? How are they to be conducted, practically and fairly? In what follows, I will try to distil some of the principles at work and reflect on unfolding practice both near (in Australia) and far.

TO VOTE OR NOT TO VOTE: CONSTRAINTS ON POSTPONEMENTS

As to the ‘must’ and ‘when’, some elections are more constrained than others. The US presidential cycle, most obviously, is constrained by the need for there to be a new presidency every four years. The famous ‘Tuesday next after the first Monday in November’ date is not locked into constitutional stone.⁴ However, it would require an unlikely agreement between the Democrat-controlled House and the Republican-controlled Senate to delay it any deeper into winter. Even then, time would need to be left for electoral challenges, and for the Electoral College to formally cast its votes, before the terms of current the incumbents, Messrs Trump and Pence, expire on 20 January 2021.

Almost all nations seek, in some way, to fix the length of their legislative and executive terms. New Zealand, like the UK, has no entrenched ‘Constitution’. But even its three-year term, due to expire later this year, may only practically be extended with the approval of 75 percent of the Parliament.⁵ The Achilles heel of such flexibility is that the ‘when’ of an election becomes politicised. The New Zealand Labour Government

³ Graeme Orr, *Ritual and Rhythm in Electoral Systems*. Farnham: Routledge, 2015.

⁴ 3 US Code § 1 (‘time of appointing’ electors to Presidential electoral college).

⁵ *Constitution Act 1986* (NZ) s 17 (four-year term) entrenched by *Electoral Act 1993* s 286(1)(a).

is resisting calls from not just the Opposition, but its own coalition partner, to delay its September election date.

Sub-national elections are no less important at this time, than national ones. This is especially so in federalised systems, where power over health provision and movement restrictions lies with regional governments. In Australia, four-yearly general elections are due in 2020 in the State of Queensland and in the two mainland Territories, the Northern Territory and the Australian Capital Territory. In all three cases, a particular date in Spring is fixed in law. But in the two Territories, the dates are only loosely moored. Canberra's legislature can undo its election date.⁶ The Australian Parliament can re-jig the Northern Territory's cycle.⁷ (Safeguarding the health of vulnerable Indigenous communities, which make up a quarter of the Northern Territory, is a particularly vital concern.)

In contrast, Queensland is locked into an election later this year. Its Constitution allows the date to be postponed in 'exceptional circumstances', such as 'a natural disaster', provided the Leader of the Opposition agrees.⁸ But any delay is a one-off option and limited to a five-week hiatus. A longer postponement or cancellation would require a referendum,⁹ and it would be perverse to hold one state-wide vote simply to avoid another.

Local elections tend to be the least constrained in their timing. Indonesian authorities were initially determined to press ahead, in September, with regional polling for local governments and some provincial governors.¹⁰ But with electoral officials becoming infected, the polls were vacated in favour of a December 2020 date, freeing up scarce funds to address the more immediate problem of combatting the virus.¹¹ Local elections in the UK, including the London mayoral race, were postponed by an entire

⁶ *Electoral Act 1992* (ACT) s 100.

⁷ *Northern Territory Self-Government Act 1978* (Cth) s 17.

⁸ *Constitution of Queensland 2001* (Qld) s 19B.

⁹ *Constitution of Queensland 2001* (Qld) s 19I.

¹⁰ Ghina Ghaliya, 'Regional Elections to be Held as Scheduled Despite Covid-19 Pandemic: Govt'. *Jakarta Post*, 19 March 2020. Accessed at: <https://www.thejakartapost.com/news/2020/03/19/regional-elections-to-be-held-as-scheduled-despite-covid-19-pandemic-govt.html>

¹¹ Ghina Ghaliya, 'Govt, House Agree to Reschedule 2020 Regional Elections' Voting Day to Dec. 9'. *Jakarta Post*, 15 April 2020. Accessed at: <https://www.thejakartapost.com/news/2020/04/15/govt-house-agree-to-reschedule-2020-regional-elections-voting-day-to-dec-9.html>

year, rather than be held in May.¹² The Australian State of New South Wales followed suit.¹³ Parlous events in Great Britain have clearly vindicated the postponement there.

In these times, there are no crystal balls. New South Wales authorities would have fretted that a September polling date risked being engulfed by a late-winter, second wave of the virus. As it happens, Australia dramatically curtailed the first wave of the epidemic. In hindsight it would have been better to bring forward the elections there. The challenges for electoral planning, already significant, become immense if an election is already in train when the virus begins its exponential growth or re-growth. French municipal elections proceeded to their first round in March, to the chagrin of some electors. But almost immediately, the second round run-offs, which were due the following week, were put off by almost three months.

The French case is instructive as to the devilish choices to be weighed. With turnout down to around 45 percent (a 20 percent fall on the previous election),¹⁴ the freeness and representativeness of the first round of voting was questioned. Yet even with an ostensible pause in campaigning, the three-month delay has spoiled the momentum of challengers and heightened the benefits of incumbency. Can fair or informed local or regional elections sensibly take place, when public attention is swamped by national responses to an international crisis?

In contrast, Queensland ploughed on with local elections that were already in train when the first wave of the pandemic struck that State. (Its experience is described further below). In the scheme of things, local administration is of less importance in a pandemic than state and national leadership. Rather than proceeding with local elections, it may make sense to keep experienced local officials in place during challenging times, especially in countries where they are part-time officials. Similarly, postponing filling some seats in an upper house poses less legitimacy problems than

¹² *Coronavirus Act 2020* (UK) ss 59-70 (including executive power to postpone petitions for recall of Commons' MPs and by-elections for regional assemblies). 'Coronavirus: English Local Elections Postponed for a Year'. *BBC News*, 13 March 2020. Accessed at: <https://www.bbc.co.uk/news/uk-politics-51876269>

¹³ *COVID-19 Legislation (Amendment) Emergency Powers Act 2020* (NSW) Sch 2, cl 2.12 (empowering ministerial postponement). Heather McNab, 'NSW Local Elections Canned Due to Virus'. *The Canberra Times*, 25 March 2020. Accessed at: <https://www.canberratimes.com.au/story/6697699/nsw-council-elections-canned-due-to-virus/?cs=14231>

¹⁴ Manon Rescan, 'Elections Municipales: Une Participation "Faiblissime" au Premier Tour'. *Le Monde*, 16 March 2020. Accessed at: https://www.lemonde.fr/politique/article/2020/03/15/municipales-une-participation-faiblissime-au-premier-tour-de-l-election_6033168_823448.html

postponing general legislative elections. This has happened in the world's largest electoral democracy, for India's Rajya Sabha.¹⁵ And it has happened in one of the world's smallest, with the postponing *sine die* of periodical elections for two members of Tasmania's Legislative Council.¹⁶ (In Tasmania's case, the two district elections can *only* be triggered when the Public Health Director advises 'there is no longer a serious risk to public health that would make it undesirable' to hold them.)¹⁷ But to note, as we have, that fudges and delays are occurring with elections for local government or for upper house vacancies only highlights the magnified predicament when the timing of lower house, presidential or gubernatorial elections is threatened.

FINDING METHOD IN MADNESS

Enough of the 'when'. What of the 'how' of elections in these times? A scholarly assessment of the US mid-term elections held during the 1918 'Spanish Flu' pandemic noted that three issues are as important in any modern health crisis as they were a century ago: 1. neutral administration, 2. electoral law and electoral officials' emergency powers and 3. disenfranchisement of voters unable to attend the polls.¹⁸ To this we should add, of course, the overarching question of free and fair elections, including the ability to campaign.

The independence, professionalism and resourcing of electoral administration varies around the world. It does not always correlate with GDP, as patchwork US experience has shown. And whatever their funding, all electoral management bodies rely on an army of far-flung casual staff to conduct polling and the count at thousands of

¹⁵ 'Rajya Sabha Elections Postponed over Coronavirus Lockdown'. *India Today*, 24 March 2020. Accessed at: <https://www.indiatoday.in/india/story/rajya-sabha-elections-postponed-over-coronavirus-lockdown-1659005-2020-03-24>

¹⁶ The elections were postponed by ministerial order, under a general power to adjust timelines, even election dates otherwise set in the pre-existing *Constitution Act 1934* (Tas). However the minister's power did not extend to lengthening the terms of office of *elected* officials: *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) s 13 cf s 16. Parliament had to reconvene to formalise the position of the continuing incumbent MPs: *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) s 9.

¹⁷ *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Tas) s 8.

¹⁸ Jason Marisam, 'Judging the 1918 Election'. *Election Law Journal* 9(2) 2010, pp. 141-152, p 142.

locations. This fact alone creates challenges for consistent application of workplace health and safety in a time of contagion.

Ultimately it is for Parliaments to decide which voting avenues will be available to electors. The great ritual of election day assumes in-person voting on a single, focused day when the polity can witness itself coming together. But viruses love mass gatherings. The simplest alternative to in-person polling would be an all-mail election. Such elections are almost unheard of at national level, although Australia managed an all-mail plebiscite in 2017, to legalise gay marriage.

All-mail balloting means a delayed count. It also raises some security issues. If every household receives ballots, the risk of fraud through ballot theft is magnified. There are also logistical challenges in the safety of the additional staff required and in handling the flood of extra paper. Each postal vote involves a physical delivery to the elector, then a physical delivery to the electoral authorities of a doubly enveloped ballot. Long ballots and multiple races add, literally, to the weight of the problem.

What of internet voting? In a few arts of the world, such as Estonia, there are well-established systems and legal protocols for all electors to vote via the internet, if they wish.¹⁹ In other parts, however, such infrastructure is lacking. Even where remote voting is available, it may have only been deployed as a limited option, not a central feature. Australia's most advanced e-voting platform is New South Wales's 'iVote system', offering internet and telephone voting. It was designed to be an adjunct to in-person voting, to assist electors who are disabled or outside the jurisdiction. Scaling up such systems (software, servers, helplines) to meet nationwide demand—whilst ensuring security (against hacking risks, and of the unique ID or password that each elector must receive)—would normally require years of planning, not months. In some countries, such an experiment in a time of uncertainty would stretch the public's trust. Voting from home, whether by the internet or post, may also endanger the secrecy of the ballot, especially for those in subordinate relationships.²⁰

Ultimately, elections in this pandemic will require 'mixed methods'. This will give options to voters who, depending on age, health or population density, have different needs and concerns. Legislating so that electors need not provide any reason to vote

¹⁹ Anna Greta-Tsahkna, 'E-Voting: Lessons from Estonia'. *European View* 12 2013, pp. 59-66.

²⁰ Jorgen Elklit and Michael Maley, 'Why Ballot Secrecy Still Matters'. *Journal of Democracy* 30(3) 2019, pp. 61-75.

early or by post is one way of diluting polling day turnout during a pandemic. But early voting is no panacea: predicting and managing early voting may present more safety issues than polling day itself. Offering multiple options to all is also costlier than focusing on a singular polling day.

Finally, partisanship may pollute such decisions. There is an unedifying wrangle in the US at present, and a spectre of state legislatures finagling electoral laws, in the name of accommodating the virus, to suit the party in power.²¹ A central focus of this wrangling is a deep spat between Democrats, who want to make postal voting an absolute right or even a norm, and elements of the Republican party who want to maintain constraints on it.²² In contrast, measures to maximise turnout appear to have multi-partisan support in Australia. Even Labor, which historically was wary of widespread postal voting, seems sanguine with its temporary extension to all.²³

As it happens, access to postal ballots for this year's US elections is expanding significantly. At the time of writing, 11 states, where postal voting requires a pro-active application citing an acceptable reason, had expanded such reasons to include concerns about contracting the virus. Another 12 had pledged to automatically send postal vote applications to all registered electors.²⁴ There is a difference, of course, in both security and likely turnout, between sending a postal vote application to everyone and an 'all mail' ballot where every elector *automatically* receives a ballot through the post. In an example of the latter, the US state of Nevada is holding a primary election

²¹ Zack Stanton, "The Nightmare Scenario": How Coronavirus Could Make the 2020 Vote a Disaster'. *Politico Magazine*, 28 April 2020. Accessed at: <https://www.politico.com/news/magazine/2020/04/28/2020-election-coronavirus-disaster-impact-215559>. These risks come on top of electoral administration already challenged by resources constrains in parts of the US, by partisan manipulation of electoral boundaries and rules, by foreign misinformation campaigns: Rick Hasen, *Election Meltdown: Dirty Tricks, Distrust and the Threat to American Democracy*. New Haven: Yale UP, 2020.

²² Fears or hopes of significant partisan effects appear to be overstated: Lee Drutman, 'There is No Evidence that Voting by Mail Gives One Party an Advantage: Could that Change this Fall?'. *FiveThirtyEight.com*, 12 May 2020. Accessed at: <https://fivethirtyeight.com/features/there-is-no-evidence-that-voting-by-mail-gives-one-party-an-advantage/>

²³ Matt Wordsworth, 'Coronavirus May See Full Postal Vote for Queensland October State Election, Premier Says'. *ABC News*, 10 April 2020. Accessed at: <https://www.abc.net.au/news/2020-04-10/coronavirus-may-change-queensland-state-election-to-postal-vote/12138788>

²⁴ Elise Viebeck, 'The Pandemic Has Already Altered How Tens of Millions of Americans Can Cast Their Ballot'. *The Washington Post*, 24 May 2020. Accessed at: https://www.washingtonpost.com/politics/the-pandemic-has-already-altered-how-tens-of-millions-of-americans-can-cast-their-ballots-this-year/2020/05/23/0e3c3bf8-9532-11ea-91d7-cf4423d47683_story.html

where all electors are mailed a ballot. Although approved under a Republican governor, this move has been attacked by President Trump; it has also been upheld by a court.²⁵

ELECTORAL ADMINISTRATION: THE QUEENSLAND (AND OTHER) EXPERIENCES

In the Queensland experience noted earlier, local elections went ahead on 28 March 2020, in the face of rising numbers of infections. Although those numbers were subsequently and quickly quelled, that was not knowable at the time. The election also took place at a time when stay-at-home orders were in place (except for essential business, work and shopping). Polling day itself took place just ten days after Queensland's Chief Health Officer gave broad orders to restrict movement to counteract the virus, including limiting gatherings in public to just two unrelated people, except where necessary for work.

Almost two months earlier, Queensland had been the first state in Australia to issue an order declaring the virus to be a 'public health emergency'. At the time, few hackles were raised. The emergency order was gazetted in three short paragraphs, unassumingly tucked away after a notice decreeing that Elton John's 'Farewell Yellow Brick Road' concert was to be a 'major sports facility event'.²⁶ Awareness of the virus only slowly crept up, like the virus itself. Citizens responded, including by seeking out early and postal voting options, accelerating pre-existing trends to convenience voting.

There were democratic reasons for these elections proceeding. Two local government areas needed to come out of administration. In deciding to proceed, the government heeded medical advice that queuing to poll was safer than buying groceries. Whilst

²⁵ Brett Neely, 'Trump Repeats Unfounded Claims About Mail-in Voting, Threatens Funding to 2 States'. *NPR*, 20 May 2020. Accessed at: <https://www.npr.org/2020/05/20/859333693/trump-repeats-unfounded-claims-about-mail-in-voting-threatens-funding-to-some-states>. *Paher v Cegavske* (US District Court, District of Nevada, No 3:20-cv-00243-MMD-WGC, 30 April 2020) held that automatic delivery of all-mail ballots was a reasonable measure to safeguard health and protect the franchise, and that speculation about possible electoral fraud was just that.

²⁶ Steven Miles MP, 'Public Health Emergency Order'. *Queensland Government Gazette*, vol. 383(25), 21 January 2020, p 97. The 'Farewell' concert went the way of all gatherings during the pandemic.

this caused angst in parts of the media and community,²⁷ it is fair to say there are few more orderly places than an Australian polling booth under the secret ballot.

As in the national elections in South Korea held in April, there has been no statistical evidence of a spike in infections due to the polling in Queensland. South Korea's public health authorities stated that 'not one case' attributed to the election was reported during the incubation period.²⁸ Unlike in Queensland, South Korean authorities had not instituted home confinement orders as such, so holding public polling there did not risk sending out contradictory signals. The Korean National Electoral Commission disinfected polling stations, required voters to wear masks, provided gloves and administered temperature checks. Its stated objectives were to guarantee suffrage (including of those in quarantine or overseas) whilst not exacerbating the virus.²⁹

Queensland's measures were a little more rudimentary, with some hand sanitiser provided, physical distancing practised and electors encouraged to 'bring your own pen or pencil'. In contrast, things were less sanguine in Wisconsin's primary day election, on April 7, when the virus was entrenched. Polling there was marked by chaos and queues. Voters in Milwaukee, its major city, were restricted to just three polling stations, leading to huge queues and a disparate and negative impact on ethnic minority and poorer electors.³⁰ On the other hand, evidence of a spike in infections due to in-person polling in Wisconsin is so far equivocal.³¹ The lesson seems to be that safety in running an election during a pandemic is a mixture of good election administration, good governance of the contagion in the country or state concerned, and good fortune.

²⁷ Ben Smee, 'Queensland Elections: Coronavirus Poses "Lethal" Risk to Voters, Experts Say'. *The Guardian* (Australia), 27 March 2020. Accessed at: <https://www.theguardian.com/australia-news/2020/mar/27/queensland-elections-coronavirus-poses-lethal-risk-to-voters-experts-say>

²⁸ 'South Korea Records No New Domestic Cases Due to Covid-19 for First Time Since February'. *The Guardian*, 30 April 2020. Accessed at: <https://www.theguardian.com/world/2020/apr/30/south-korea-records-no-new-domestic-cases-of-covid-19-for-first-time-since-february>

²⁹ National Election Commission of the Republic of Korea, *Election Management in Response to COVID-19*. Seoul: National Election Commission, 11 May 2020, p. 2.

³⁰ Shruti Banerjee and Megan Gall, 'COVID-19 Silenced Voters of Colour in Wisconsin', *Demos.org*, 14 May 2020. Accessed at: <https://www.demos.org/blog/covid-19-silenced-voters-color-wisconsin>

³¹ Alana Watson, 'Did the April 7 Election Impact Covid-19 Cases in Wisconsin? Researchers Have Mixed Views'. Wisconsin Public Radio, 20 May 2020. Accessed at: <https://www.wpr.org/did-april-7-election-impact-covid-19-cases-wisconsin-researchers-have-mixed-views>

National elections in Mali also proceeded in March and April,³² using the two-round system, with the decisive second-round on April 19. Polling went ahead with in-person voting, overshadowed as much by the kidnapping of the Opposition Leader as by the early stages of the virus outbreak. Again, the democratic instinct trumped health fears. After being long delayed by civil unrest, Mali's elections were seen as crucial for hopes of a return to political stability.

Elections, as with much else in government in a pandemic, require deft and swift executive agency rulings. Giving electoral officials emergency powers involves embracing enhanced administrative discretion and powers of direction. In ordinary times, electoral commissions would run a mile from such powers, to preserve their perceived independence. They tend to see themselves as administrators rather than regulators: as umpires implementing detailed rules laid down by parliaments, not as designers of the game. To make electoral rules is to invite criticism, especially when the rules have (unintended) partisan effects or (inevitable) impacts on liberties.³³ But when expertise and a rapid response is required, delegating specific powers to commissions, rather than relying on parliaments to legislate, can enhance the law-making process rather than detract from it.

In any crisis situation, rule of law issues arise. Normal law-making processes are considered, considerate of public consultation, and accountable to elected representatives. In a health emergency, these ideals are upended. Executive power reigns supreme, but it is channelled through a complex chain of delegation and experts. In the case of Queensland's local elections, hurried legislation delegated some issues directly to Ministers, other specific issues directly to the Electoral Commission and, as a catchall, allowed other matters to be dealt as they arose through ministerial regulations.³⁴ Those regulations were permitted to have retrospective operation. If necessary to the timely and safe conduct of the election, they could even override the

³² 'Polls Close in Mali amid Coronavirus Threat, Security Fears'. *Al-Jazeera*, 30 March 2020. Accessed at: <https://www.aljazeera.com/news/2020/03/polls-open-mali-coronavirus-threat-security-fears-200329081850465.html>

³³ Michael Maley and Graeme Orr, *Developing a Legislative Framework for a Complex and Dynamic Electoral System*. Melbourne: Electoral Regulation Research Network (Working Paper No 64), November 2019, paras 1.4 and 3.14-3.15.

³⁴ *Local Government Electoral Act 2011* (Qld) Pt 9A.

electoral act itself, Henry VIII-style.³⁵ Such regulations either take the form a ministerial decree on a topic, or they could delegate power (subject to conditions) to the Electoral Commission.³⁶

Alongside this, the public health emergency order awakened the broad powers of the Chief Health Officer: she quickly issued a detailed public health direction for the election.³⁷ All of this, like much in any emergency, was necessarily *ad hoc* and variable. Even a seasoned lawyer or electoral official would have found it difficult to trace and keep up with the various changes to the law and their sources.

An example of an Electoral Commission directive governing the Queensland local elections was a strict limit on all campaign activities, and paraphernalia, at polling places.³⁸ Although a staple of Australian campaigning, such paraphernalia had come to be seen by many voters as wasteful, even prior to present concerns about viral transmission via the handling of such material. As a result, few eyebrows were raised at what, in normal times, could have been seen as an unconstitutionally draconian limit on political communication. A second Electoral Commission directive was issued to candidates and scrutineers.³⁹ To the upset of some candidates, this directive limited scrutineering, to maintain safe physical distancing at the election night count.

Around the same time, Ireland's Seanad elections proceeded.⁴⁰ These are generally low-key affairs: they do not involve a mass electorate and have long been by postal vote. But one Irish innovation of note during that country's first wave of the virus was how the counts, from Dublin Castle and the two university constituencies, were streamed live over several days. Whilst a soporific to the average viewer, the streaming

³⁵ *Local Government Electoral Act 2011* (Qld) ss 200A, 200L.

³⁶ *Local Government Electoral (2020 Quadrennial Election) Regulation 2020* (Qld).

³⁷ *Local Government Election and State By-Election Direction (No. 2)* (Qld), 27 March 2020. This updated and replaced a first direction issued just 5 days earlier.

³⁸ Electoral Commission Queensland, *Direction about Display of How-to-Vote Cards and Election Material*, Version 3, 25 March 2020.

³⁹ Electoral Commission Queensland, *Direction about Candidates and Scrutineers at Polling Places*, Version 1.3, 29 March 2020. In what may have been a typographical error, the direction was said to apply from midnight *after* polling day.

⁴⁰ Houses of the Oireachtas, 'Seanad General Election 2020'. Accessed at: <https://www.oireachtas.ie/en/elections/seanad-general-election-2020/>

of the counts was accompanied by explanations from the returning officers and offered a visual token of the public openness of the electoral process.

FREE AND FAIR ELECTIONS: THE FRANCHISE AND THE CAMPAIGN

To focus on the nuts and bolts of the when and how of elections, as we just have done, is one thing. But it can risk losing sight of the broader question of what makes an election ‘free and fair’. As Mackenzie wrote in the 1950s, this question can be answered in this way: ‘the election depends on the voters’ choice’.⁴¹ As he also observed, there is no ideal way to conduct a free and fair election. Given the many contested conceptions of democracy, people typically can only agree on ways to prevent the machinery of elections going wrong, rather than on a single right way to conduct elections.⁴² There is no ideal healthy democracy, but many pathologies to be avoided in practice.⁴³ How then can the franchise be ensured and, in particular, disenfranchisement be avoided, during a time of crisis?

Calling off an election would be the ultimate disenfranchisement. But holding one in an ongoing pandemic will affect turnout. It may be practically or psychologically harder for certain groups—the elderly, the afflicted, those in mandatory quarantine and those stuck overseas—to turnout to poll. Cynics might say that elections are already skewed by higher turnout amongst older citizens. But that sociological fact will not mollify the individuals who miss out. As mentioned earlier, a technologically simple option would be to broaden the entitlement to postal ballot to all electors or even to mandate that every elector receives a postal ballot. But how will all-postal voting pan out, in a time of high contagion? Will everyone feel safe venturing out to find that increasingly rare beast, the local post-box? Are younger people, stuck at home and relying on online shopping, growing more familiar with the old-fashioned postal service?

South Korea’s national election, mentioned earlier, was widely seen as a success. Turnout, at two-thirds of the electorate, was the highest for many years in that country.

⁴¹ W.J.M. Mackenzie, *Free Elections*. London: Allen and Unwin, 1958, p. 12.

⁴² Mackenzie, *Free Elections*, p. 169.

⁴³ Graeme Orr, ‘The Law of Electoral Democracy: Theory and Purpose’, in Alan Bogg, Jacob Rowbottom and Alison Young (eds.), *The Constitution of Social Democracy*. Oxford: Hart, 2020, pp. 161-177. This chapter generally explores the contested conceptions within the law of electoral democracy.

Given the pandemic, and that the election proved a no-contest, this speaks well of the resilience of that country's population. At Queensland's local elections, turnout was down 8 percent, but still reached just over 75 percent. Of that, nearly 50 percent voted early but in-person, 30 percent turned out in person on polling day and 20 percent voted by post.

Compulsory voting of course applies in Australia. Is such *forced* enfranchisement fair, where there may be personal risk? Seventy-five percent turnout for a mere local election demonstrates the power of compulsion to habituate voting. But the other quarter of the Queensland electorate will have to receive 'show cause' penalty notices for not turning out. The State's Deputy Premier at the time weighed in, expressing a hope that any registered elector citing virus concerns would have the fine for not voting waived.⁴⁴

Voting is the ultimate purpose, of any election. But it is the culmination, not the entirety, of the process. The campaign period is also important, and it serves a complex amalgam of purposes. Campaigning is meant to set the agenda. It may sharpen (as well as muddy) popular deliberation. It certainly enacts partisan antagonism. And it is a focal point for political expression. But like all other forms of social interaction, campaigning is both stymied and re-routed by epidemics.

We saw (above) a simple example of that from Queensland, with strict restrictions on the number of activists and type of paraphernalia permitted at polling stations. Such measures may do more than cast a quiet blanket over a polling place ritual. They impede the flow of information and advocacy that some electors, compelled to vote and to vote preferentially, may rely on, especially at non-parliamentary elections where party cues are typically absent.

Besides any direct electoral strictures, social distancing rules and norms will transform campaigning. Rallies and indeed any large-scale meeting will be deterred, if not prohibited, in a pandemic. In Queensland, street stalls and the inevitable waving of electoral corflutes (posters) from the side of roads proceeded as normal. But with both foot and road traffic low, stalls and posters ceased to be a cost-effective way of gaining attention. Doorknocking was almost non-existent. In severe lockdowns, such activities

⁴⁴ Matt Dennien, 'Trad Vows to Go into Bat for Queenslanders Who Failed to Vote in Council Poll'. *Brisbane Times*, 1 April 2020. Accessed at: <https://www.brisbanetimes.com.au/politics/queensland/trad-vows-to-go-in-to-bat-for-queenslanders-who-failed-to-vote-in-council-poll-20200401-p54g7l.html>

may even be subject to police restraint or fines, where they are not included in lists of permissible activities.

Australia has an implied freedom of political communication, crafted by the High Court, that provides protection for both expression,⁴⁵ and participation.⁴⁶ The freedom is not as broad as the first amendment liberty in the United States of America (USA). Australian courts instead apply a 'proportionality' test to see if restrictions on political communication are justified, rather than a 'strict scrutiny' approach.⁴⁷ Courts in any event may not be the ideal place for 'second-guessing' governments or Parliaments over scientific and economic advice.⁴⁸ This is especially so when assessments of risk are clouded in a pandemic, as they are epistemologically, by the economic and epidemiological difficulties of modelling and data collection, and inherently by the uncertain and shifting nature of a novel virus. Examples of such uncertainties include modes of transmission, medical effects and morbidity, and the dynamic interaction of governmental responses with human behaviour and vectors of contagion.

Yet a court *must* make a ruling, when asked to do so by a plaintiff whose ability to campaign or communicate politically is restricted by law or administrative practice. The German Constitutional Court recently held that freedom of association forbids any blanket ban on public protest during this pandemic.⁴⁹ Instead, such gatherings must be permitted on a case-by-case assessment, provided organisers cap the size of the gathering, given the physical forum available, to allow physical distancing between individual protestors to minimise the risk of viral transmission.⁵⁰ In the first case on point in the US, on the other hand, a federal judge upheld California's ban on mass gatherings. The case was brought by a candidate who wished to hold a political rally

⁴⁵ Adrienne Stone, 'Expression', in Cheryl Saunders and Adrienne Stone (eds.), *The Oxford Handbook of the Australian Constitution*. Oxford: OUP, 2018, pp. 952-78.

⁴⁶ Joo Cheong-Tham, 'Political Participation', in Saunders and Stone (eds), *Oxford Handbook*, pp. 979-1012.

⁴⁷ *McCloy v NSW* (2015) 257 CLR 178.

⁴⁸ Jonathan Liberman, 'COVID-19 and Administrative Powers in Australia'. *adminlawblog.org*, 30 March 2020. Accessed at: <https://adminlawblog.org/2020/03/30/jonathan-liberman-covid-19-and-administrative-powers-in-australia/>

⁴⁹ Bundesverfassungsgericht, 1 BvR 828/20, 15 April 2020 and 1 BvQ 37/20, 17 April 2020.

⁵⁰ Joseph Nasr, 'Germans Have Right to Protest During Coronavirus Pandemic: Court', *DW* (Deutsche Welle), 16 April 2020. Accessed at: <https://www.reuters.com/article/us-health-coronavirus-germany-protests-idUSKCN21Y220>

and an employee of a gun club who wished to hold a rally protesting gun law enforcement.⁵¹

Even if restrictions on physical distancing are lifted, face-to-face mobilisation will not spring back to previous levels. On top of any formal legal norms, there is the reality that people themselves will restrain their interactions voluntarily. Such inhibitions, whether legal or social, have indirect effects on political equality. Groups such as Get Up! and unions, which had turned to face-to-face political mobilisation in the past decade, will need to pivot to other forms of political outreach. Micro-parties, independents and community organisations that lack resources (and rely on face-to-face campaigning or physical manifestations to attract media attention) will also be particularly challenged.⁵² These restraints will also reinforce the ongoing trend towards electronic campaigning. On the upside this may encourage more creative use of social media; on the downside it may also prompt the bigger parties to direct an even larger share of their spending to broadcast and online advertising.

ELECTORAL POLITICS AMIDST RADICAL UNCERTAINTY

The account of the pandemic's challenges to electoral democracy given here is, at most, a preliminary one. International IDEA is currently compiling information about elections both delayed and proceeding, around the world.⁵³ Others more expert than I, such as Australia's chief psephologist Antony Green, are laying out templates for specific contexts.⁵⁴ My account is in any event rooted in the contours of the present epidemic in particular jurisdictions, most of them well resourced. It assumes

⁵¹ *Givens v Newsom* (US District Court, Eastern District of California, No 2:20-cv-00852-JAM-CKD, 8 May 2020). For criticism see Floyd Abrams and John Langford, 'The Right of the People to Protest in Lockdown'. *New York Times*, 19 May 2020. Accessed at: <https://www.nytimes.com/2020/05/19/opinion/coronavirus-first-amendment-protests.html>

⁵² So too will any laws designed to encourage such campaigning. An example is the very low expenditure limits at Tasmanian Legislative Council elections: *Electoral Act 2004* (Tas) s 160 (currently \$17,500 for a candidate, with no party spending).

⁵³ International IDEA, 'Global Overview of COVID-19 Impact on Elections'. Accessed at: <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>

⁵⁴ Antony Green, 'How to Manage the Eden-Monaro By-Election in a Time of Covid-19'. 1 May 2020. <https://antonygreen.com.au/managing-the-eden-monaro-by-election-in-a-time-of-covid-19>

controllable paths of contagion and continuing social order, neither of which can be guaranteed.

It also leaves out broader political considerations. Chief amongst these is how something as all encompassing as a pandemic will skew electoral politics itself. Will incumbents enjoy an undue advantage in such times of upheaval, if electors become exceedingly risk averse and media outlets focus on the threat of the virus to the point that opposition voices are sidelined? There is evidence of this happening during the first wave of the virus. The South Korean Government was returned in a landslide. Not a single office changed stripe in the vast local government area that runs Queensland's capital of Brisbane. And the New Zealand Labour Government has enjoyed a 27 percent shift in its fortunes, relative to the Opposition National Party. Between those opinion polls, New Zealand managed to contain the virus as well as anywhere in the world. (This turnaround in polling may also explain why the New Zealand Government, as noted earlier, has no present interest in postponing the general election, whilst the Opposition does.)

An alternative scenario to such incumbency entrenchment involves antagonistic politics resuming relatively quickly. How quickly this may happen will differ depending on the political culture, level of government and stage of the outbreak concerned. Dissidence and critique in liberal democracies has already been evidenced in libertarian protests against lockdowns in the USA and in Germany, and in sharp investigative journalism into policy failings in the United Kingdom.⁵⁵ Where such disgruntlement is present, it is likely to intensify as the economic impacts of the virus and measures to control it depress economic activity.

Between the spectre of societies rallying round incumbents and the alternative scenario of their lashing out at them, lies a middle ground. Electors may reward administrations who, whether through good luck or good management, have seen the virus contained, whilst punishing those where its effects are most profound. Such a crude application of strict political accountability, however, would only highlight the virus's overweening effect on politics. What room is there for sustained public debate on other pressing issues, such as climate change, when the virus has spread through all aspects of social, medical, industrial and economic affairs? The answer may lie in the

⁵⁵ Jonathan Calvert, George Arbuthnott and Jonathan Leake, 'Coronavirus: 38 Days When Britain Sleepwalked into Disaster'. *The Sunday Times* (UK), 19 April 2020, pp. 6-7.

old line, 'Never waste a crisis'. Governments of different stripes, and lobbyists from different interest groups, are readying themselves to sell policy reforms as 'necessary' responses to the virus rather than as ideological choices.⁵⁶

The Plague (La Peste) has returned to the bestseller lists. Its author, Albert Camus, intended it as an allegory of Vichy France, rather than a study of life in a time of contagion. But Camus would have shared the melancholy many of us feel in the present, as fear washes through our days and radical uncertainties challenge our personal and societal choices. In the book, Camus wrote that 'each of us had to be content to live only for the day, alone under the vast indifference of the sky'.⁵⁷ This is the existential dilemma we all face, as individuals, at present.

Collectively, though, we live under far from indifferent systems of government, systems growing vaster as they seek to protect us and grapple with radical uncertainty. Whether this future will accentuate nationalism and authoritarianism, democratic socialism, or technocratic liberal-centrism, is hard to say. But one thing is certain, electoral democracy will play the ultimate role in deciding our political fates.

⁵⁶ Already, the Australian Government has flagged its intention to push deregulation in taxation and industrial relations, alongside its delayed October budget, issues not canvassed in its 2019 election platform. Elsewhere, administrations of different hues are contemplating making permanent some of the more social democratic measures that were introduced as interim protections and Keynesian stimulus to counter the initial shock wave of the virus.

⁵⁷ Albert Camus, *The Plague*, trans. Stuart Gilbert. Harmondsworth: Penguin, 1960, p. 63.