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## Parliamentary Comings and Goings

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We are not acquainted with the learning of elections,  
and there is a particular cunning in it . . .

Gould J, *Ashby v White* (1703)

This book is about a certain small part of the ‘learning of elections’ and its ‘particular cunning’. As Mr Justice Gould reminds us in the great voting rights case of *Ashby v White*, the law of elections is unique. Its political nature and the attendant consequences at stake mean that it has long been the subject of a fierce battle for control between the judiciary and Parliament. Eventually jurisdiction went to the courts in the form of election petitions, and Parliament contented itself with very occasional reforms of eligibility law. The great election law contests of the past were seen largely as settled. And, for most of the last century electoral law was not often challenged, revised, or even much thought about. Electoral law concerned few and was studied by even fewer.

But in the last decade or so, the law relating to one aspect of elections in particular has begun to feature much more often in statute books and law reports. A flood of litigation was triggered by an unhappy unsuccessful party candidate who had missed out on selection because he was not female; Parliament enacted a series of amendments making it easier to stand for election; and election petitions burst back into prominence after nearly 100 years as electoral fraud was increasingly unmasked.

The point of electoral law is generally understood to be the creation and then regulation of the means for translating the popular choice of representatives into a working legislature and representative government. In short, elections are a necessary precondition for democracy.

Underpinning this functionalist yet aspirational conception of electoral law is the view that it also serves to legitimate the exercise of state power. As Graeme Orr has put it:

Public or state power in a mass democratic state . . . ultimately rests [on,]and owes its legitimacy not just to motherhood notions of the sovereignty of the people, but to the detailed mechanisms and regulations by which elections are conducted and managed.<sup>1</sup>

<sup>1</sup> G Orr, ‘The Cinderella Status of Electoral Law as a Field of Study in Australia’ (1998) 7(2) *Griffith Law Review* 166, 167.

Electoral law, or the law of making and unmaking representatives, is fundamental to our constitution – this field of law provides the framework within which political conflict is channelled into constructive legislative results. Indeed, electoral law can in large part provide the foundation for the operation of the constitutional system: determining how many representatives there are, their respective proportions in the legislature, affecting the formation of government and whether it be single-party or coalition. All these factors which affect the exercise of public power can rest on the technicalities of election law.

Despite its importance and long history, electoral law is but a newly-established field of legal inquiry. Although it has overcome the doubts expressed by Austin as to whether, with regard to the law concerning candidates' eligibility to stand, it is properly constitutional law at all,<sup>2</sup> at the present time, the law of elections has few scholars devoted to figuring out its puzzles, a small number of specialist texts and is rarely offered as a subject for legal study in the universities.<sup>3</sup>

But even within that context, 'electoral law' is usually understood to be the law relating to participation in the electoral system – texts on electoral law discuss the legal aspects of boundary drawing, the voting system in use and its alternatives, the law relating to who may or may not vote, the development and delineation of electoral offences, and the regulation of political expenditure.

In this book we look at electoral law from a different perspective, taking it to mean the law of being elected to Parliament. This process involves a series of steps, each of which involves some aspect of legal regulation.

Before entering Parliament, those hoping to become members must pass through three stages of election regulation. First, they must, if they hope to represent a political party, be chosen and nominated by that party as its representative. Secondly, after selection but before the election is held, they must then have their nomination accepted by the appropriate electoral official, having satisfied him or her that they possess the qualifications prescribed by law (or have not incurred the disqualifications) for candidates. Thirdly, they must win the electoral contest, and survive any challenge to their win in the form of an election petition. Having then taken their seat in Parliament, the journey is not yet over. Members of Parliament (MPs) may yet find themselves disqualified and removed from Parliament, either by incurring one of the statutory disqualifications or through the exercise of Parliament's privilege of regulating its own composition.

<sup>2</sup> See FW Maitland, *Constitutional History of England* (Cambridge University Press, Cambridge, 1908) 531.

<sup>3</sup> See DH Lowenstein, 'Election law as a subject – a subjective account' (2002) 32 *Loyola of Los Angeles Law Review* 1199, tracing the evolution of interest in election law from academics and practitioners in the US.

## I. Thinking About Electoral Law

This book examines three related questions in the field of representation and electoral law. The first is: What are the concerns of the law in the field of representation? The second is: What is the nature of the law on representation? The third is: How should it be reformed? Taken together, these interlinked questions cover the little-investigated field of determining entries to and exits from Parliament, that is, how parliamentary representation is achieved and maintained through law.

As to the first question, we must recognise that achieving (and retaining) the goal of election to Parliament is not a matter of a single closed transaction. Rather, it is better conceived as a series of steps from aspiring candidate to fully-fledged MP. Along the way, those hoping to become representatives must overcome the hurdles of eligibility, nomination, selection, any petition and avoidance of disqualification or expulsion. As these are examined, the opportunity has been taken to subject to critique some aspects of electoral statutes and the common and parliamentary law dealing with election matters.

As we look at each of these stages, a theme will begin to emerge: the thread which runs through these stages is a question about the nature of electoral law. How has it been conceived of throughout history, and more importantly, how should it be conceived of? Is it best seen as a form of private law, outwith the State and its concerns, or is the opposite the case?

In *The Idea of Public Law*, Loughlin wrote that public law is a singular and distinct field of inquiry with its own peculiar attendant concerns.<sup>4</sup> Loughlin claims that what sets public law apart is that it is concerned with the activity of governing the State.<sup>5</sup> While this may seem trite, he notes, it is because this context is 'taken as a given rather than treated as an issue of inquiry'.<sup>6</sup>

This book seeks to apply Loughlin's insight to a sub-field of public law: the law of election. Thus, the thread that binds this investigation into the different stages of the process of becoming an elected representative and maintaining that status is the view that electoral matters are quintessentially public law matters. As with the comments about public law itself writ large above, this may seem obvious, especially when we consider the political background against which electoral law plays out and the political result it is designed for; but surprisingly, it is not the assumption upon which electoral law has often rested. A peculiar feature of the law's approach to the questions which crop up at the various stages of the electoral journey is a reluctance at times to acknowledge their public nature. Certain aspects of the electoral experience are characterised as private events: action over candidate selection is seen as akin to a private club dispute; the challenge to an election outcome, a contest between two private individuals.

<sup>4</sup> M Loughlin, *The Idea of Public Law* (Oxford University Press, Oxford, 2004) 153.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

One particular tool of analysis employed here is human rights law. When the two major UK texts on electoral law were written, Hugh Rawling's *Law and the Electoral Process* in 1988, and Robert Blackburn's *The Electoral System in Britain* in 1995, human rights jurisprudence did not have a high profile in electoral law. Now, with the incorporation of the European Convention on Human Rights (ECHR) into domestic law via the Human Rights Act 1998, human rights have the potential to become the dominant lens through which the legal issues pertaining to elections are viewed. Human rights laws affect many aspects of the process of becoming elected – restrictions on candidate eligibility may interfere with a voter's freedom of electoral choice or a potential candidate's right to stand for election; candidate selection processes may implicate freedom of association or anti-discrimination provisions; election petition rules may offend access to justice rights. Where possible, reforms are suggested to bring electoral law closer to human rights compliance.

The main means of investigation is historical analysis of the law. In each chapter there is some discussion of varied length of the historic position taken by the law before the present law was adopted by statute or evolved to its current common law position. The discussion at times refers to the unique form of law known as parliamentary privilege – the law relating to the customs, powers and privileges of parliamentarians – for the law of electing has not been the preserve only of judges and legislators.

Where appropriate, the law is analysed for consistency with the principles purporting to govern it – be they drawn from treaties, such as the ECHR, or be they embedded principles of constitutional law such as separation of powers or judicial independence. The question of internal and international consistency is also considered – does the legal position accord with the position in other aspects of electoral law or other similar jurisdictions (and, of course, should it)? In some cases, of course, there is no consistency, the law being in some places (as Jennings said of constitutional law as a whole) 'not a system at all but a mass of disconnected rules depending on historical accidents'.<sup>7</sup> This is particularly the case with election law, which, because of its subject matter, has had its development driven by political concerns and events more so than most other branches of law.

In traversing these issues, help is sometimes drawn from other jurisdictions. No one legal system can claim to have contained within it all the answers to its electoral law choices. Two jurisdictions in particular which are referred to are Australia and New Zealand. These were chosen because their legal heritage is based squarely on the English common law, enabling relatively easy comparison. Both countries also inherited the English law of parliamentary privilege, which has at times played a significant role in determinations over representatives' abilities to remain in Parliament. The Australian and New Zealand Parliaments are closely based on the Westminster Parliament, and they have either used, or continue to use, the same electoral system as the UK. New Zealand once used First-Past-the-Post exclusively,

<sup>7</sup> I Jennings, *The Law and the Constitution*, 5th edn (Hodder & Stoughton, London, 1959) 71.

and now employs a hybrid system of list proportional representation and First-Past-the-Post for its Parliament; Australia also used First-Past-the-Post until it adopted the Alternative Vote system for its lower House in 1918 and the Single Transferable Vote system for the upper House in 1948. These political and legal similarities play out against a common cultural background.

## II. The Chapters

In its role of the regulator of a political activity, electoral law stands at the juncture (or, as some have said, the periphery<sup>8</sup>) of two disciplines: law and political science. Chapter two comprises an examination of the theories about political representation employed by political scientists and lawyers. It concludes that each discipline has a different focus. While political theorists seek to explain what representatives do and are for, legislators, jurists and judges mostly ask: 'What is the representative like?' or 'What should the representative be like?' In addition, legal approaches to regulation still revolve around the trustee/delegate conceptions of representation, while political science and politics itself have embraced new ways of thinking about and acting on representation. This disciplinary divergence may have significant implications for the regulation of this inter-disciplinary field, and could possibly explain the rather less than coherent state of electoral law. These theories about representation are also provided as a backdrop for the stages of the electing process the later chapters address.

Chapter three is a critical overview of the eligibility rules for parliamentary candidacy and membership in the UK. It explores whether there is a common theme or set of principles which underlies these restrictions, and discusses whether these should be amended in light of overseas models. It also looks at recent changes in eligibility rules and the impetus therefor. Assuming one meets all the criteria, chapter three then considers the tricky issues surrounding nomination: the point at which qualification or disqualification should be decided, and by whom.

Chapter four discusses the prior and current means for determining the outcome of a controverted election. The transition from the courts to Parliament's privilege of regulating its own composition and then back to judicial control of disputed elections through the election petition jurisdiction is traced, and the issues and concerns of this aspect of electoral law are teased out. A series of reforms addressing the deciding of disputed elections along with more stringent regulation of corrupt electoral practices accompanied the voting reforms of the 1870s. By the early years of the twentieth century, election petitions were becoming a curiosity. However, in light of the increasing litigation over election results in the last decade, coupled with a rise in corrupt activity surrounding elections, it may well be that election petitions are seen in the courts more frequently. This chapter therefore

<sup>8</sup> Lowenstein, above n 3, at 1199, commenting that 'Junctures are also peripheries'.

contains some suggestions for reform of the current law on election petitions. These proposals are driven by the need to acknowledge the underlying public nature of the electoral petition.

Chapter five embarks on analysis of the different legal models used to challenge candidate selection processes in the courts. This sort of litigation has become more common as the real election battle transfers from the seat itself to the party selection for the seat. It concludes that the current UK approach, which is based on contract law, is insufficient and does not acknowledge the public law element of candidate selection. It is argued that a second model, seeing candidature as a form of employment, which has enjoyed some vogue in the UK since the mid-1990s, is flawed, agreeing with the House of Lords' recent view that it be abandoned. This chapter concludes that both of these regulatory approaches should be replaced with the quasi-public law Australian model.

Chapter six considers the position of MPs who find themselves facing removal from Parliament during the parliamentary term. Outside some limited statutory disqualification procedures, traditionally, removal has been effected by Parliament itself, which has the ability to expel errant and unworthy members using parliamentary privilege. The history and recent developments, in light of the MPs' expenses scandal of 2009–10, of what might constitute unworthiness are examined for their impact on Parliament's powers. This chapter also analyses the new Conservative–Liberal Democrat proposals to introduce 'recall elections', whereby electors can force a by-election in the case of MPs who have committed misconduct.

Lastly, in chapter seven, the findings of the preceding six chapters are synthesised around two distinct points. The first is what has been revealed in this bringing together of the various aspects of the legal regulation of the process of becoming elected and remaining so. The second point is that this area of law should be viewed as public in nature. This second conclusion leads us to the need for a reconceptualisation and reform of our current electoral laws.