Enforcing democracy? Towards a regulatory regime for the implementation of intra-party democracy

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The high-profile challenge to former leader Simon Crean in the safe Labor seat of Hotham in March 2006 presents a recent example of the importance of preselections in the Australian political system. Although this contest was cleanly fought, it follows numerous accounts of branch stacking and abuse of process that have afflicted both major and minor parties. Given the entrenched role of parties in Australian politics and the fact that such malpractices undermine the respect and confidence in parties as key representative institutions, we need to consider whether it is desirable that Australian political parties be organised democratically, whether this should be externally enforced, and to what extent legal measures should require decisions such as candidate selection and policy formulation to be taken by the membership.

The regulation of internal decision-making processes in Australian parties

In the absence of a legislative regime governing how parties organise at the federal level and in all States except Queensland, the internal decision-making processes of political parties are governed by the common law. Parties have traditionally been regarded as ‘private associations’, their internal operation beyond the reach of the law, although this status has been revised over the last decade with the introduction of party registration and public funding. ¹ This jurisdiction (and the accountability associated with it) has been accepted by the major parties, who have not yet challenged the shift in status in the High Court. However, whilst the courts can and do adjudicate intra-party disputes, they are limited to enforcing existing rules between members. Furthermore, under the federal registration regime, parties are not required to organise their internal affairs in a democratic manner, let alone submit details of key governance procedures such as the pre-selection of candidates.

Queensland is the only Australian State that has implemented legislative rules for the external enforcement of intra-party democracy. Reforms introduced in 2002 ² designed to improve transparency and accountability require parties to set out in detail key decision-making procedures, including the election of office bearers and the preselection of candidates.

² Electoral and Other Acts Amendment Bill 2002 (Qld).
candidates within their constitutions. Although parties are free to choose their method of
preselection, it must conform to the ‘general principles of free and democratic elections’. 
Oversight of this regime is entrusted to the Queensland Electoral Commission, which
may inquire into and undertake audits of party preselections. Parties that breach these
provisions are liable to deregistration and consequently the loss of public funding.

How does the legal regulation of parties in Australia compare to other democracies?
Table 1 presents comparative data on the regulation of intra-party democracy within a
diverse sample of nations selected to illustrate the range of regulatory approaches
amongst common law, civil law and emerging democracies. Both legislation and national
constitutions are regarded as sources of party law. Whilst there is a visible trend to the
stricter regulation of party finances to ensure equality in electoral competition, the
regulation of parties’ internal decision making processes still varies greatly amongst the
countries surveyed. This is partly the product of history. Countries such as Australia, the
United Kingdom and the United States, with strong liberal democratic traditions, have
been reluctant to impose external regulations on political associations, which have been
viewed negatively as a form of state interference in civil society. In New Zealand, whilst
legislation provides for democratic preselections, there has been no attempt to enforce
this clause of the Electoral Act.3

In Germany by contrast, party law is comprehensive. A product of political history
developed in response to the Nazi regime, the external enforcement of the democratic
organisation of political parties is viewed as a fundamental guard against the
centralisation of political power and a means to ensure popular control of government.
This is also true of many developing and transitional democracies, where the
constitutional recognition and the regulation of political parties is a key feature of
democratisation and institution-building (for example, Nigeria, Liberia and Nepal).

<table>
<thead>
<tr>
<th>Country</th>
<th>Constitutional Regulation</th>
<th>Regulation of Party Finance</th>
<th>Regulation of Candidate Pre-Selection</th>
<th>Regulation of other Internal Decision-Making Processes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>No</td>
<td>Yes</td>
<td>No (except Queensland)</td>
<td>No</td>
</tr>
<tr>
<td>Germany</td>
<td>Yes—parties may be freely established and their organisation should conform to democratic principles.</td>
<td>Yes</td>
<td>Yes—candidates must be selected by a properly-constituted assembly of party members (requirements outlined) by secret ballot.</td>
<td>Yes—German parties law provides detailed rules regarding membership rights, internal order, election of executives, and arbitration of internal disputes.</td>
</tr>
<tr>
<td>Portugal</td>
<td>Yes—a party must be governed by the principles of transparency, democratic organisation and management and the participation of all its members.</td>
<td>Yes</td>
<td>No</td>
<td>Yes— regulation of names and party symbols.</td>
</tr>
<tr>
<td>Finland</td>
<td>No</td>
<td>Yes</td>
<td>Yes—candidate selection must take place by ballot of the membership.</td>
<td>Yes—parties are obliged to have written rules following democratic principles in internal decision-making and governance.</td>
</tr>
<tr>
<td>Nepal</td>
<td>Yes—detailed rules regulating party registration.</td>
<td>Yes – but difficulties ensuring compliance.</td>
<td>Yes—must be democratic if codified within the party constitution.</td>
<td>Yes—democratic &amp; periodic election of office bearers.</td>
</tr>
<tr>
<td>Spain</td>
<td>Yes – the internal structure and operation of parties must be democratic.</td>
<td>Yes</td>
<td>No—constitutional provisions rarely enforced.</td>
<td>No</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>New Zealand</td>
<td>No</td>
<td>Yes</td>
<td>Yes—Electoral Acts require registered parties ‘follow democratic procedures in candidate selection’. However, there has been no attempt to legally enforce this provision.</td>
<td>No</td>
</tr>
<tr>
<td>Canada</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>United States</td>
<td>No</td>
<td>Yes</td>
<td>Yes—most preselections take place through statutorily-governed primaries.</td>
<td>No</td>
</tr>
<tr>
<td>Nigeria</td>
<td>Yes—provisions regarding party registration and restrictions on formation.</td>
<td>Yes—but rarely enforced.</td>
<td>No</td>
<td>Yes—democratic &amp; periodic election of office bearers.</td>
</tr>
</tbody>
</table>
Although not initially enacted to serve the domestic interest, the regulatory framework in Finland has been approved by both political elites and the public, which has led to its extension over time. The enforcement of intra-party democracy is viewed in the Finnish context as essential to ensure that political parties remain responsive mediators between civil society and the political establishment.4

It is interesting to note that, in New Zealand, constitutional and legislative requirements for the implementation of intra-party democracy are not routinely enforced. More research needs to be conducted as to why they have become redundant, but it may indicate weakness in the enforcement regime, or the limited utility of external regulation in nations with a particular political culture that focuses on the broader electoral contest between parties, rather than competition within them.

Arguments for and Against Internal Party Democracy

It is this tension between inter and intra-party democracy that frustrates any attempt to implement democratic decision-making within parties without challenge. If we regard elections as the centrepiece of Australian democracy, internal party democracy can be undesirable as it impedes efficient decision-making within parties, precludes parties from choosing the candidates they regard as most appealing to the electorate, and transfers key political decisions to vocal party activists at the expense of the broader electorate. With low levels of party membership in Australia, transferring policy decisions to party members risks creating a party system that is unrepresentative of voters. Commentators such as Gary Johns have also argued that externally enforcing rules for intra-party decisions may also undermine a party’s right to associate freely. This is particularly pertinent for parties that seek to represent a particular section of society and appoint candidates from within it (for example, minor parties such as the Seniors and the Australian Indigenous People’s Party), or parties that wish to pursue affirmative action strategies (such as the ALP and Greens in NSW).

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Despite these concerns, there are compelling arguments for internal party democracy. Judged from the standpoint of the democratic values adopted by the Audit, internal party democracy:

- Encourages political equality by creating a level playing field in party preselections and policy debate within the party.
- Ensures popular control of government by extending democratic norms such as transparency and accountability to party organisations. It fulfils the legitimate citizen expectation that parties, which receive public funding and effectively determine who will be elected to public office, should conform to democratic principles within their own organisations.
- Improves the quality of public debate by fostering inclusive and deliberative practices within parties, creating opportunities for civic participation and political education—conducive to the establishment of a democratic culture within Australian political parties.

Options for Reform

Even if we accept the normative desirability of intra-party democracy, is legal enforcement necessary, or will self-regulation suffice? Some commentators argue that to reaffirm public confidence, any reforms must be internal as legislation may only serve to entrench distrust. The democratic election of candidates through party primaries (one member, one vote) has already been introduced voluntarily by parties such as Labour in Britain, by Fine Gael and Labour in Ireland and by Democrats in the Netherlands.

However, given the conflict between intra-party democracy and the efficient functioning of parties striving to increase electoral popularity, there are few incentives for parties to implement democratic processes within their organisations. Whilst internal party democracy may be conducive to greater membership participation, there is no clear correlation between democratic party structures and electoral success, as the uncertain

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fate of the Australian Democrats (arguably the most democratic party in Australia) illustrates. Numerous accounts of branch stacking and dubious pre-selections within Australian political parties over the last two decades suggest that without any concrete electoral incentive, self-regulation is of limited efficacy.

There are several options for externally enforcing intra-party democracy, with varying levels of intrusion into parties’ existing organisational practices. The most radical of reforms would be to establish a detailed statutory regime that prescribes a particular democratic organisational structure for political parties. Which aspects of a party’s organisation and decision-making procedures should be regulated is open to debate, but this could typically include the mandatory introduction of party primaries in candidate preselection (as undertaken in the United States and Iceland). Whilst primaries open up opportunities for membership participation, difficulties arise when considering their administration: for example, who should oversee the process and the costs of supervision?

Reforms such as those which have taken place in Queensland could be extended to other States, Territories and to parties registered at the federal level. The requirement of democratic processes could be limited to preselections, or extended to other areas of internal governance (for example, the election of office bearers). The decision of how best to implement intra-party democracy is left to the party, which need not go so far as initiating US style primaries, but which must conform to the principles of free and democratic elections. Enforcement of the regime would be tied to the receipt of public funding, providing a strong incentive for compliance.

Nonetheless, both ‘intra-party democracy’ and ‘principles of free and democratic elections’ are inherently contested concepts. There is no agreement as to whether procedures such as one member one vote elections would provide a more democratic outcome than other forms of decision making, such as party conferences. Whilst the Australian Democrats advocate the use of the one member one vote system and allow members to select party leaders and office bearers by postal vote, political scientists have
suggested that this form of intra-party democracy can be used to marginalise vocal activists and increase the centralisation of power within parties.\textsuperscript{7}

However, at the very least parties ought to codify how they are governed. The rights of party members with respect to internal decision-making procedures need to be clarified. At present, whilst there is a requirement to submit a party constitution when registering to receive public funds, pre-selection and party decision-making processes do not need to be outlined in this document. This has left considerable doubt as to the rights and responsibilities that party members actually possess. Therefore, to achieve greater levels of accountability, party constitutions ought to be made publicly available, and parties should be compelled to disclose details of pre-selection and key decision-making procedures upon registration.

Intra-party democracy is potentially an effective means of increasing political participation, awareness and strengthening the legitimacy of parties as a key linkage between parliament and the electorate. Instances of branch stacking and the appearance of parties with dubious governance structures (such as One Nation) highlight the need for the external enforcement of intra-party democracy in the absence of electoral incentives. Greater transparency and accountability than that which is currently achieved by limited common law regulation is necessary to ensure that popular control of government is extended to political parties, not simply the contest between them.

Suggestions for further reading:


