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That vague but powerful abstraction: the concept of 'the people' in the Constitution

Abstract

The concept of 'the people' in the Constitution is undoubtedly unfinished constitutional business. The concept is "vague" due to a lack of development by the High Court but also because it is an inherently fluid concept. Yet it is also "powerful" because of what 'the people' has come to signify, which is something that I suggest should be further developed by the High Court. There are two questions that I will consider in this paper. The first is: who are 'the people'? The second is: what impact do they have on our understanding of the Constitution and constitutional terms?

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That vague but powerful abstraction: the concept of ‘the people’ in the Constitution

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INTRODUCTION

The concept of ‘the people’ in the Constitution is undoubtedly unfinished constitutional business. The concept is “vague” due to a lack of development by the High Court but also because it is an inherently fluid concept. Yet it is also “powerful” because of what ‘the people’ has come to signify, which is something that I suggest should be further developed by the High Court.

There are two questions that I will consider in this paper. The first is: who are ‘the people’? The second is: what impact do they have on our understanding of the Constitution and constitutional terms?

BACKGROUND

There are several parts of the constitutional text in which the expression ‘the people’ appears. I will outline these before addressing the identity and implications of ‘the people’.

In the preamble is a reference to “the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth”. That agreement is then referred to again in covering clause 3 of the Constitution Act, where the people of Western Australia are included.¹ Covering clause 5 states that “This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth”.

Jurisprudentially, to date, the most important mention of ‘the people’ is in sections 7 and 24. Section 7 states that “The Senate shall be composed of senators for each State,

¹ This covering clause concerns the proclamation by the Queen of the unification of the colonies “in a Federal Commonwealth under the name of the Commonwealth of Australia”, extending to include Western Australia “if Her Majesty is satisfied that the people of Western Australia have agreed thereto”.

directly chosen by the people of the State”, while s 24 states that “The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth”. There is also a mention of ‘the people’ in s 53, which states that “The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.”

‘The people’ are lastly indirectly referred to through a reference to ‘the electors’ in s 128 of the Constitution, which sets out the procedure for changing the constitutional text.²

OUTLINE

These references can be understood as indications of the constitutional community, considering the historical development of the Constitution. And, as I address later, because of an important thread of discussion in High Court cases. The Court has given ‘the people’ significance in the context of federal elections, especially in a series of cases in the 1990s. The meaning of ‘the people’ has been given greater attention by McHugh J in the last couple of years of his judicial service and was taken up by a majority in *Roach v Electoral Commissioner*³ in 2007.

The latest developments give an enticing view of ‘the people’ as a substantial concept in the Constitution, deserving of attention and with possible implications for our view of the Australian constitutional system.

HISTORY

First, to a little history.

The idea of ‘the people’ as establishing membership of the community emerges from the Convention debates regarding the Constitution. For example, there was a concern to include ‘the people’ in s 128 such that both the people of the States and the Commonwealth would exercise a voice in determining changes to the Constitution.⁴ This resulted in the complicated referendum procedure with a double-majority requirement.⁵

² At various times during the drafting of this section, s 128 included the term ‘the people’. See for example, the 1897 version which stated: “And if the proposed alteration is approved by *the electors of a majority of the States, and if the people of the States whose electors approve of the alteration are also a majority of the people of the Commonwealth*, the proposed alteration shall be presented to the Governor-General for the Queen’s assent.” Section 121 of the Draft Constitution Bill (emphasis added), 12 April 1897, reproduced in John M Williams, *The Australian Constitution: A documentary history* (2005) at 524.

³ *Roach v Electoral Commissioner* (2007) 239 ALR 1.

⁴ See, for example, the discussion surrounding the counting of women’s votes in South Australia, and a reference to the ‘axiom’ of what was to become s 128, namely, that “a majority of the States and a majority of the people’s vote” was to be obtained by the referenda process: *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 22 April 1897 (Alfred Deakin) at 1206.

⁵ The relevant parts of s 128 read as follows: “This Constitution shall not be altered except in the following manner: The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and ... shall be submitted in each State and Territory to the electors ... And if in a majority of the States a majority of the electors voting approve the proposed law, and if a

In addition, ‘the people’ were given direct reference and a direct role in government under the final draft of the Constitution, in contrast to earlier versions of the text, specifically the 1891 version.⁶

That earlier preamble stated “the Australasian Colonies ... have ... agreed to unite ...”, rather than the people having agreed to do so. The earlier version of s 7 gave the House of Representatives the power to choose the senators, rather than that power residing in the people of the States. The earlier version of s 128 gave elected Conventions the power to vote on changes to the constitutional text, rather than the electors directly.

The explicit identification of ‘the people’ and their involvement in the system of constitutional government reflected the broader popular movement towards federation in the latter part of the 1890s, when the people took a more prominent role in the process of Constitution-making. They elected the delegates to the second constitutional Convention held in 1897-98, and voted in the referenda on the Constitution in 1899 and, in Western Australia, in 1900.

Historically, ‘the people’ were what we would now call the constitutional community and were a powerful force in developing the Constitution. Their political significance flowed through into colonial law and legal processes leading to the enactment of the Constitution.⁷ But that alone does not determine the current meaning of the phrase ‘the people’. For that we look to the High Court.

And when we turn to that institution, the jurisprudence shows that the concept of ‘the people’ is of current and future, not just historical, importance.

IN CASE LAW

The 1990s was the central period in which the Court addressed the concept of ‘the people’, and the concept was given a prominent place in interpreting the Constitution. ‘The people’ came to the fore with the development of the idea of popular sovereignty and discussion of representative government.

First, regarding popular sovereignty. From 1986, with the passing of the *Australia Acts*, questions were raised about the sovereignty of the Imperial Parliament, which had enacted the Commonwealth of Australia Constitution Act in 1900, as the source of the Constitution’s authority.⁸ A number of justices took the view that the source would thereafter be ‘the people’, although that view has been criticised.

majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen’s assent.”

⁶ This version is reproduced in John M Williams, *The Australian Constitution: A documentary history* (2005): see Draft Bill adopted by the National Australasian Convention, 9 April 1891 at 437-458.

⁷ For details, see the Enabling Acts, which were relevantly similar across the colonies except for Western Australia. For example, the *Australasian Federation Enabling Act 1895* (NSW) reproduced in John M Williams, *The Australian Constitution: A documentary history* (2005) at 471-474.

⁸ See for example, G J Lindell, ‘Why is Australia’s Constitution Binding? The reasons in 1900 and now, and the effect of independence’ (1988) 16(1) *Federal Law Review* 29, Simon Evans, ‘Why is the

Proponents of the popular sovereignty view include Mason CJ in *ACTV v The Commonwealth*⁹ in 1992, where he stated¹⁰ “the *Australia Act 1986* (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people”. Deane J also took to this idea in a number of cases, for example with Toohey J in *Nationwide News v Wills*.¹¹

So, ‘the people’ were treated as having significance as the sovereign, the source of Constitutional authority. However, the Court did not clearly identify who ‘the people’ were or are. Were they simply the individuals who voted in the referenda of the 1890s to accept the draft Constitution before it was sent to the UK? If so, it was a very limited group, being white men only in one colony; white men and women only in another colony; white and Indigenous men in three colonies; and white and indigenous men and women in a sixth colony. Were they the individuals *qualified* to vote, or only those who exercised the vote on the day? Or, again, only those who voted “yes” in favour of adopting the Constitution Bill? Are the people with sovereignty the current electors of the Parliament who also vote in referenda under s 128? That is still not all Australian citizens, but only those eligible to vote, and with some exclusion of Territorians.¹²

Further, ‘the people’ despite having that sovereignty did not gain any particular legal protections or freedoms. For example, they were not guaranteed a vote. It was a matter of theoretical sovereignty to some extent.

At around the same time, the Court affirmed the significance of ‘the people’ as at the centre of representative government established by the Constitution. Sections 7 and 24, among others, were the source of the Court’s conclusion that the system of representative government was enshrined in the Constitution. That occurred in numerous cases from *McKinlay*¹³ in 1975 and *McGinty*¹⁴ in 1996, to *Mulholland*¹⁵ in 2004.

In each case, the Court identified ‘the people’ as being central to that system given that sections 7 and 24 require the choice of members of Parliament to be directly chosen by ‘the people’. But again, the identity of ‘the people’ was not given much attention. Due to the nature of the cases that came before the Court, the Court focused on electors. It was electors who chose the MPs.

So are ‘the people’ simply ‘the electors’? But does that mean that the Parliament can decide who ‘the people’ are, given that the Parliament has the power to determine the

Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25 *Adelaide Law Review* 103.

⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

¹⁰ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138.

¹¹ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

¹² It was only in 1977 that any territorian voters gained the right to vote in referenda, due to a change to the text of s 128 to include them. Even so, it is not all territorian electors who can exercise that right, and those that can have their vote counted only in the ‘majority of votes’ calculation, not in the ‘majority of votes in a majority of States’ count.

¹³ *Attorney-General of the Commonwealth; ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1.

¹⁴ *McGinty v Western Australia* (1996) 186 CLR 140.

¹⁵ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

franchise? There have been a number of statements arguing against reading the electors as the same as ‘the people’. For example, in *Langer* in 1996, McHugh J stated that:¹⁶

[T]o read the words “the people” as always being equivalent to the eligible electors would be to miss the high purpose of s 24. That purpose is to ensure representative government by insisting that the Parliament be truly chosen in a democratic election by that vague but emotionally powerful abstraction known as ‘the people’.

This echoed the words of McTiernan and Jacobs JJ who stated in *McKinlay* in 1975, that:¹⁷

[T]o argue ... that “people” merely means “electors” is to subtract an essential feature from the constitutional requirement if thereupon it is argued that s 24 in its opening words says no more than that choosing of members shall be by direct vote of electors. The section says much more than this.

But not much more was done to identify who ‘the people’ were, against which to test whether or not the election in question had in fact been a choice by ‘the people’. And if we look at the implications of ‘the people’ having such a central role in constitutional government, not much seemed to turn on it, or at least, most of the legal challenges to federal election processes failed. For example, twice the Court concluded that votes do not have to have equal value. In most of the cases, the Parliament’s choice of detail regarding electoral systems was upheld. The only real effect of the significance of ‘the people’ was the identification of an implied freedom of political communication.

In a series of cases, culminating in *Lange v ABC*¹⁸ in 1997, the Court established that ‘the people’ choose their representatives, and are therefore the centrepiece of representative government under the Constitution. In order for that choice to be effective and informed, those ‘people’ would have to have freedom of political communication. Therefore, the Parliament’s legislative power and the common law have to accommodate this freedom.

So ‘the people’ are clearly important as central to constitutional government, but the Court still had not said whether there was a coherent or consistent definition of ‘the people’ nor had the Court identified more precisely who ‘the people’ are or what else would flow from their identity.

The latest ...

Although not fully developed yet, I say that, considering the significance given to ‘the people’ either through the contested idea of popular sovereignty or the more secure idea of representative government, ‘the people’ can be understood as a reference to constitutional citizenship. McHugh J, in this last couple of years of service on the High Court bench, gave an indication of how that could occur, but I say it has also

¹⁶ *Langer v The Commonwealth* (1996) 186 CLR 302 at 342-3.

¹⁷ *Attorney-General of the Commonwealth; ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 35-37.

¹⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

been taken up, albeit in a different form, in the recent majority decision in *Roach* in 2007.

First to McHugh J. In 2004, he gave a dissenting judgment in *Singh*.¹⁹ In that case, which was a challenge to the application of the migration legislation to a young girl, born in Australia of Indian parents, McHugh J considered whether Singh was constitutionally an ‘alien’ subject to deportation. He disagreed with the majority regarding the concepts of allegiance and alienage, and in doing so, articulated a view of ‘the people’ as constitutional citizens. His position was that a person born in Australia owes allegiance to the Queen, is therefore a subject of the Queen, so cannot be an alien under s 51(19) of the Constitution. And he went on to include the concept ‘the people’ into that mix.

He stated that those who are subjects of the Queen are members of the Australian community and among the people of the Commonwealth.²⁰ McHugh J treated the idea of ‘the people’ as coterminous with the Australian community and also introduced an idea of “constitutional citizenship”, which appeared to be yet another term to refer to the same individuals.²¹ ‘The people’ were therefore not seen as merely those qualified to participate in federal elections, but as the constitutional citizens who are immune from deportation.

Then, in what looked like the beginning of a re-run of *Singh*, in October 2005, in a single judgment of *Hwang v Commonwealth*,²² McHugh J returned to this idea. McHugh J asserted a connection between ‘the people’ and the constitutional community, and from there to citizenship. He stated that the references in the Constitution to ‘the people’ are synonymous with citizenship of the Commonwealth.²³ And that Parliament has the power to legislate regarding that citizenship. However, he limited that by the following:²⁴

[A]s long as [the Parliament] does not exclude from citizenship, those persons who are undoubtedly among ‘the people’ of the Commonwealth’, nothing in the Constitution prevents the Parliament from declaring who are the citizens of the Commonwealth, which is simply another name for the constitutional expression, ‘people of the Commonwealth’.

Although this passage is not completely clear, what we can see from it is that McHugh J says ‘the people’ are the constitutional citizens, who cannot be removed from that group via legislation. ‘The people’ therefore are a protected group under the Constitution, despite the absence of references to “citizens” or “citizenship” in the Constitution, and Parliament’s power to legislate in areas such as immigration and citizenship.

So, in these two cases, McHugh J opened the door to the idea of ‘the people’ being a reference to citizenship, suggesting significant consequences regarding the legislative power of the Parliament. But who is ‘undoubtedly’ among that group, ‘the people’? What parameters are relevant? And what flows from such constitutional identity?

¹⁹ *Singh v Commonwealth* (2004) 222 CLR 322.

²⁰ *Singh v Commonwealth* (2004) 222 CLR 322 at [133].

²¹ *Singh v Commonwealth* (2004) 222 CLR 322 at [139].

²² *Hwang v Commonwealth* (2005) 222 ALR 83.

²³ *Hwang v Commonwealth* (2005) 222 ALR 83 at [14].

²⁴ *Hwang v Commonwealth* (2005) 222 ALR 83 at [18].

There was no need to answer those questions in *Hwang*, so McHugh J left it for a future bench.

The bench that was to begin that analysis was the majority in *Roach* in 2007.

Roach v Electoral Commissioner

*Roach*²⁵ involved a challenge to an amendment to the Commonwealth Electoral Act, in which the majority struck down the attempt by the previous federal government to disenfranchise all prisoners serving full-time detention. The key to the majority's decision was the statement in ss 7 and 24 of the Constitution that the members of Parliament are to be chosen by 'the people'.

Taking a broad brush to the majority judgments, we can see that 'the people' in that case was treated as an indicator of membership of the constitutional community. This then limited Parliament's ability to exclude members of 'the people' from voting. Gleeson CJ is clearest in this respect but the joint judgment is generally consistent with his argument. Essentially it goes as follows: The Parliament has the power to determine the franchise pursuant to ss 8 and 30 of the Constitution, but that franchise has to be consistent with it making possible a choice by the people. In order to exclude someone from what the majority describes as participation in the community through voting, there has to be a rationale that is connected to the identification of community membership.²⁶ That is, the basis for exclusion from voting has to be connected to the criteria for membership of 'the people'.

So, how is membership to be determined? The Court considered whether, and to what extent, a person has a relevant connection to the community, or has severed that connection, to justify the loss of the right to vote. In the case of *Roach*, the connections to the community included whether people subject to a prison sentence had shown such civic irresponsibility as to have temporarily removed themselves from the constitutional community. Or, in the words of the joint judgment, whether the basis for exclusion reflected a lack of what was required for participation in the public affairs of the body politic.²⁷ If so, then those individuals could be excluded from voting, with voting being constitutionally connected to their identity as the people of the Commonwealth.

In the end, the majority in *Roach* show that the concept of 'the people', at least with respect to its relationship to the franchise, reflects membership of the community. And, that such membership may be affected by participation and connection of the individuals in question, to the community. What is not so clearly established is how that community is to be identified, how connection or participation to the community is to be ascertained and what other consequences there may be for this conception of 'the people'.

Things that might be relevant in answering those questions include the history of the relevant legal right or procedure in question. In *Roach*, the rationale for prisoner disenfranchisement and the legislative history of such disenfranchisement certainly

²⁵ *Roach v Electoral Commissioner* (2007) 239 ALR 1.

²⁶ *Roach v Electoral Commissioner* (2007) 239 ALR 1 at [8].

²⁷ *Roach v Electoral Commissioner* (2007) 239 ALR 1 at [62].

played a role in determining the outcome. But that brings us to the vexed question of who will decide whether the connection with, and participation in, the community has been established such as to make someone a part of ‘the people of the Commonwealth’ who may exercise the right to vote? The Court made the ultimate decision, but in doing so, relied heavily on legislative action by earlier Parliaments. Does that mean that the Court will defer to the will of earlier parliaments to determine the validity of current legislative action? And considering the differences between how the majority and the dissentients dealt with the legislative history, can any consistency or predictability result from such an approach?

Roach was clearly not the end of the story regarding the concept ‘the people’. But what it does do is use the phrase ‘the people’ as co-terminous with the constitutional community, who have some protections which flow from being that special group. This invites further questions about the status of the phrase ‘the people’ not only in sections 7 and 24, but also in the other provisions in the Constitution in which that phrase appears.

WHERE TO FROM HERE?

I return to the title of this paper – the people as ‘that vague but powerful abstraction’.

Vague

Is ‘the people’ a vague concept? A majority of the Court has now directly stated that ‘the people’ is a reference to the community under the Constitution. While still somewhat vague, there is at least the hint in *Roach*, as well as in earlier statements, that the community is to be identified in accordance with determining who is part of the group who has the ability and legitimacy to be involved in constitutional government. In *Roach* it was the act of voting that was at issue, so the Court looked to what it means to vote and what is required in order to be involved in that process.

It is unrealistic to suggest that there is going to be a clear identification of either the exact identity of ‘the people’ or the criteria for their identification. The identity of ‘the people’ is going to remain vague, or at least fluid. This is because the identity of the constitutional community will change over time, as can be seen in the history of who is accepted as part of the community.

In colonial times, the constitutional community was not every person in Australia, but a more limited group – predominantly white men. In the early part of federation, the constitutional community could be considered to be all British subjects resident in Australia, with some racial exceptions (although these were not consistently applied). Over time, British subjecthood was no longer a true label for the constitutional community, just as the High Court recognised the separation between the UK and Australia in *Sue v Hill*²⁸ in 1999 such that the UK is now considered a foreign power. Australian citizenship seems an obvious identifier of ‘the people’ in the Constitution, but it cannot simply be in the hands of the Parliament to determine who fall within the group ‘the people’ by legislating for citizenship.

²⁸ *Sue v Hill* (1999) 199 CLR 462.

The Court will need to expand on what they mean by being a member of the community under the Constitution. The parameters need to be explored because of the possible implications that such identity has for our understanding of the Constitution. Yet such development is obviously going to be a sensitive and contested exercise and my guess is that it will be a case of incremental development before a clear outline of 'the people' is revealed by the Court.

Yet powerful

Despite the vagueness of the identity of 'the people', 'the people' is nevertheless a powerful constitutional concept. This has been shown most recently in *Roach*, where the concept of 'the people' led to the striking down of legislation which restricted prisoners' voting rights. Given the significance of the people both in history and in High Court jurisprudence, the concept has the potential to go further than being a symbolic reference to the source of the Constitution's authority.

It certainly has the ability to further affect the franchise, along the lines of the reasoning in *Roach*. Further areas for contestation include a consideration of who else is included or excluded from the vote. Apart from horror hypotheticals of the Parliament excluding all people of a particular gender or race, there are the more realistic challenges to the franchise as it exists today. For example, the exclusion of some Australians living overseas. Australians living overseas may be deprived of the right to vote if they remain or intend to remain outside Australia for more than six years.²⁹ Or, there might be a challenge to the voting age being 18. In the future, there may be a challenge from some under-age individuals, who have the same ability and maturity as those over 18. Just as the voting age changed from 21 to 18 in 1973, could it be that some people between the ages of, say, 16 and 18 should be entitled to vote?³⁰ Or the question of permanent residents, who may be as involved in Australian life as citizens – should they continue to be denied the vote?

However, I suggest that the significance of 'the people' could go further than the franchise. As hinted at by McHugh J, as well as by Kirby J in a number of cases, such as *Patterson* in 2001, there may be the development of constitutional citizenship, not confined to the current legislative definition of citizen, which insulates individuals from attempts at deportation or being categorised in a class such as 'alien'. The concept of 'the people' could be used in the future to challenge citizenship legislation, which is treated as the current indicator of membership of the Australian community. And, by extension, to challenge migration legislation, which operates on the basis of individuals being 'non-citizens', with non-citizen being used as an equivalent to the constitutional status of 'alien' in s 51(19).

²⁹ *Commonwealth Electoral Act 1918* (Cth) s 94. See Bryan Mercurio and George Williams, 'The Australian Diaspora and the Right to Vote' (2004) 32(1) *University of Western Australia Law Review* 1. The Australian position is less generous than that in other countries, such as Italy, which provides for electorates to specifically represent Italian citizens resident abroad. See Simone Battiston and Bruno Mascitelli, *Full voting rights for Italian citizens overseas : citizenship gone global, Italianness or Italian party politics?* (2008), Elisa Arcioni, *Discussion Paper 37/06: Representation for the Italian Diaspora* (2006) Democratic Audit of Australia <<http://democratic.audit.anu.edu.au/>>.

³⁰ See the discussion in Robert Ludbrook, 'Children and the political process' (1996) 2(2) *Australian Journal of Human Rights* 278, Bruce Simpson, 'Democracy: give children the vote' (1993) 18(4) *Alternative Law Journal* 190.

CONCLUSION

‘The people’ has become more than a symbolic reference to the authority of the Constitution, or the group who has freedom of political communication in order that there be fully informed elections. It is a powerful force, symbolically and legally. It was the rallying cry for successful federation, and a reference to the group at the heart of constitutional government.

‘The people’ can be understood as a reference to the constitutional community. That is, as a reference to the individuals who make up the Australian population under the Constitution and therefore to the ones who have a claim to involvement in constitutional government and the possibility of protections or freedoms under that Constitution. As a phrase approximating constitutional citizenship, the Parliament’s power may be limited with respect to ‘the people’ in areas such as the franchise, citizenship and deportation, which are all areas that intersect with membership of the constitutional community.

If we are to know who we are and how we relate to our foundational document, the Court needs to take ‘the people’ further than a vague notion into a real expression of the constitutional community with clear rights and responsibilities under our Constitution and with respect to our representative institution, the Parliament.