

**International and Comparative Perspectives on Constitutional Law:  
A 21<sup>st</sup> Anniversary Celebration for the Centre for Comparative Constitutional  
Studies**

**The Future of Australian Constitutionalism**

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**Introduction**

University Centres have been a feature of the higher education institutional landscape for at least 30 years. Not uncommonly they have been used to clothe some under-resourced, but hopefully resourceful and entrepreneurial academic, with a quasi corporate aura. And so they have come and gone according to the ruthless Darwinian laws of the academic market place.

Longevity in a Centre suggests two things: continuing excellence in its personnel and a continuing need for what they do. The 21<sup>st</sup> Anniversary of the Centre for Comparative Constitutional Studies is testimony to the quality of its people and an ongoing interest in what they have to say about Australian constitutionalism in a comparative setting.

In offering this coming of age salutation, may I also say what a delight it is to be participating in the opening session of this conference with its first director, Professor Cheryl Saunders. She has an outstanding reputation within Australia and internationally as a constitutional scholar. Our association goes back many years and includes our work together as members of the Executive of the Australian Association of Constitutional Law.

The topic of this presentation, "The Future of Australian Constitutionalism", raises two questions. What does the topic mean and how does a member of the judiciary talk about it sensibly? The second question is serious because it focuses attention upon the difference between the judicial and academic role in relation to constitutionalism. The scholar who teaches and writes about constitutionalism can range across large fields of history, political, social and economic sciences and public policy. That scholar can describe, analyse, explain, criticise, synthesise and even prophesy. Informed prophecy will give rise to new perceptions of possible future histories depending upon choices made and pathways taken by the various actors in the field. In doing these things, the constitutional scholar can stand back and reflect upon what has happened, what is happening and what is likely to happen in Australian constitutionalism without having to erect "no entry" signs between its political and legal suburbs.

Judges deciding constitutional cases do not have the liberties of the academic constitutional lawyer. It is a particular kind of decision which judges must make. Even at the highest level of constitutional adjudication in Australia, what the High Court is engaged in, in its own words descriptive of the judicial power, is:<sup>1</sup>

... the quelling of ... controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.

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<sup>1</sup> *Fencott v Muller* (1983) 152 CLR 570 at 608.

In so doing the Court follows the time honoured model which applies as much to constitutional adjudication as it does to the determination of a running down case in the Magistrates Court. It identifies the applicable rules of law. It ascertains the facts. It applies the rules to the facts and grants or refuses relief accordingly. In so saying of course it is acknowledged that the decisions of the High Court usually involve questions of general principle which may have a significance extending well beyond the bounds of the case to be decided.

What standing then does a constitutional judge have to talk about the future of Australian constitutionalism. While the constitutional judge will have a sense, sometimes informed by academic scholarship, of the larger context of the court's decisions and their implications for the future, his or her decisions are made within the four corners of the controversy to be quelled. They are necessarily conservative in the development of the law, not least because the more substantial the departure by the court from existing bodies of constitutional principle, the less predictable the outcomes may be. And constitutional adjudication represents only one aspect, by no means the totality, of constitutionalism in action.

The preceding is all by way of rather elaborate disclaimer. A judge, even a constitutional judge, is an amateur when it comes to making prophecies about the future of constitutionalism. Nevertheless, every constitutional judge should have at least some provisional working hypothesis about the future which does not include the collapse of constitutional structures under large quantities of melted ice water from the Antarctic or their crumbling away in some lifeless desert that used to be Canberra.

Before outlining a working hypothesis about the future of Australian constitutionalism it would be useful to say something about what is meant by that term.

## The idea of constitutionalism

One might as well begin thinking about the meaning of "constitutionalism" by looking up the dictionary. The two Oxford Dictionary definitions of "constitutionalism" have the virtue of brevity. They are<sup>2</sup>:

1. A constitutional system of government.
2. Adherence to constitutional principles.

Beyond the dictionary, constitutionalism is variously explained in texts and academic articles on the topic and sometimes simply used without definition. A common element seems to be an adherence in theory and practice to a system of government in which governmental powers, be they legislative, executive or judicial, are limited by rules which may be written or unwritten and may or may not be justiciable. The generality of the concept in scholarly discourse is evidenced by its subdivisions which go by such titles as "legal constitutionalism" and the related notion of "rights constitutionalism".<sup>3</sup> In the United States the term "court centred constitutionalism" has been used to similar effect.<sup>4</sup> "Legal constitutionalism" is to be distinguished from "political constitutionalism". Then there is "classical liberal constitutionalism" and something called "new constitutionalism".<sup>5</sup>

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<sup>2</sup> See *Concise Oxford English Dictionary* 11<sup>th</sup> ed (Oxford University Press, 2004) 306.

<sup>3</sup> R Bellamy, *Political Constitutionalism – A Republican Defence of the Constitutionalism of Democracy*, (Cambridge University Press, 2007) 17.

<sup>4</sup> H W Arthurs, "Constitutionalism: An Idea whose time has come ... and gone?" (2008) 75 (Autum) *Amicus Curiae* 3.

<sup>5</sup> G W Anderson, *Constitutional Rights after Globalisation* (Hart Publishing, 2005) 107-115.

A law student in Australia who uses the Winterton, Lee, Glass and Thomson book of *Commentary and Materials on Australian Federal Constitutional Law*<sup>6</sup> will find constitutionalism discussed in the opening pages. The principal reference, albeit not uncritical, is to a paper by Lewis Henkin, published in 1994. The elements of Henkin's constitutionalism in paraphrase are:

1. Governmental legitimacy based on popular sovereignty and the will of the people as the source of its authority.
2. A prescriptive constitution in the form of a supreme law to which government must conform.
3. Commitment to political democracy and representative government and the exclusion of government by decree except as authorised by the Constitution and subject to control by democratic political institutions.
4. Dependent commitments to limited government, separation of powers or other "checks and balances", civilian control of the military and police governed by law and the courts and an independent judiciary.
5. Respect by government for individual rights of the kind recognised by the Universal Declaration of Human Rights and only subject to limitations in the public interest.
6. Institutions to monitor and assure respect for the constitutional blueprint, the limitations on government and for individual rights.
7. Respect for self-determination, namely the right of "the peoples" to choose, change or terminate their political affiliation.

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<sup>6</sup> L Henkin, "A New Birth of Constitutionalism: Genetic Influence and Genetic Defects" in M Rosenfeld (ed), *Constitutionalism, Identity, Difference and Legitimacy* (Duke University Press, 1994) 39 at 41 cited in G Winterton, H P Lee, A Glass, J Thomson, P Gerangelos, *Australian Federal Constitutional Law: Commentary and Materials* (Lawbook, 2007) 2.

The concept so described involves a mix of the features of a constitutional system and mental states or attitudes to such features reflected in the words "commitment" and "respect". Some of these elements, so far as they relate to individual rights, may have a stronger connection with the United States than they do to constitutionalism in Australia. There is a question whether they are a necessary element of constitutionalism in its most general sense.

The different ways of talking about constitutionalism suggest that it is a kind of conceptual envelope. It encompasses a variety of institutional mechanisms for defining and limiting governmental power in its various manifestations, adherence to those mechanisms by governmental actors and support for them by members of the relevant society. The varieties of constitutionalism under that envelope do not necessarily all have at their core the availability of judicial review or judicial enforceability of constitutional limits.

### **Australian constitutionalism**

The institutional arrangements and rules and principles which are the infrastructure of Australian constitutionalism are to be derived from the written Constitutions of the Commonwealth and the States, the unwritten conventions of behaviour under the Constitutions and the common law. Acceptance of those institutions, rules and principles by the institutional actors and wider Australian society is a necessary part of the content of our constitutionalism.

Constitutional guarantees, protecting what in international discourse might be referred to as "rights" but are probably better characterised as "freedoms", have an important part to play in Australian Constitutionalism. They are, however, not centre stage. There is neither a constitutional Bill of Rights nor a statutory Bill of Rights which might be constitutionalised to the extent that it would invalidate inconsistent State laws. There are of course common law freedoms protected to a degree by conservative rules of statutory interpretation developed as a part of the common law.

The common law and these rules have been accorded a kind of constitutional status recognised in their characterisation as "... the ultimate constitutional foundation in Australia".<sup>7</sup> They are subject to parliamentary override. We have not yet developed nor do we seem likely, in the near future, to develop, the recently bruited notion of a common law declaration that a statute offends against common law "constitutional norms".<sup>8</sup>

There are justiciable constitutional guarantees in the Australian Constitution. However they are limited in scope and, for the most part, operate as conditions on legislative power rather than as enforceable rights. Trial by jury<sup>9</sup>, freedom of religion<sup>10</sup> and freedom from discrimination by one State against residents of another<sup>11</sup> are the survivors of Inglis Clark's rights proposals in his draft constitution considered by the Constitutional Conventions in 1898. Additional guarantees include the prohibition against civil conscription in laws relating to the provision of medical and dental services<sup>12</sup>, the requirement for just terms as a condition of the acquisition of property by the Commonwealth<sup>13</sup>, freedom of trade, commerce and intercourse among the States<sup>14</sup> and protection of the rights of a State or its residents to the reasonable use of water or

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<sup>7</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182.

<sup>8</sup> D Jenkins, "Common Law Declarations of Unconstitutionality" (2009) 7 *International Journal of Constitutional Law* 183-214.

<sup>9</sup> Constitution, s 80.

<sup>10</sup> Constitution, s 116.

<sup>11</sup> Constitution, s 117.

<sup>12</sup> Constitution, s 51(xxiiiA).

<sup>13</sup> Constitution, s 51(xxxi).

<sup>14</sup> Constitution, s 92.

rivers for conservation or navigation.<sup>15</sup> Section 75(v) of the Constitution effectively guarantees a constitutional remedy against excess of official power by officers of the Commonwealth, including ministers of the Crown. Also conditioning the validity of legislation is the implied freedom of political communication. Other provisions of the Constitution which may be seen as having an analogical resemblance to internationally recognised human rights and freedoms include those relating to the franchise and elections, and to non-discrimination in laws relating to trade, commerce and revenue.<sup>16</sup>

Legal constitutionalism in Australia depends in part upon the existence of justiciable constitutional limits on governmental power. The limits are to be found in the federal distribution of powers, express constitutional prohibitions and guarantees of the kind just mentioned. Between the Commonwealth and the States and Territories constitutional issues seem increasingly to be the subject of negotiation and resolution under the general rubric of co-operative federalism. The growth of this phenomenon might be viewed as a tendency to political constitutionalism perhaps at the expense of legal constitutionalism at least in federal/state relations.

The prominence of cooperative arrangements in Australia reflects agreement that issues which not so long ago would have been treated as entirely within the province of the States are now regarded as national. The trend may be seen as enhancing in an extra constitutional sense, central power. The constitutional enhancement of central power began many years ago. The Commonwealth entered, through grants made under s 96, the regulation of a range of areas including health and education which were, and still are, constitutionally within the province of the States. Those uses of s 96 were

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<sup>15</sup> Constitution, s 100.

<sup>16</sup> See generally P Bailey, *The Human Rights Enterprise in Australia and Internationally*, (LexisNexis, 2009); P Bailey, *Human Rights: Australian in an International Context* (Butterworths, 1990) 84-105.



sanctioned by the High Court. The application of the external affairs power to enact laws affecting trade, commerce and interpersonal relations in connection with race, sex and disability discrimination and human rights generally was another example.

Cooperative federalism is driven by political imperatives. It yields results on a consensual basis which exceed those achievable by the exercise of Commonwealth legislative power and the separate exercise by the States of their powers. They exceed those achievable by adjudication. They may be seen to overshadow expansive judicial interpretations of Commonwealth power. And although cooperative and thus respecting the federal distribution of powers, cooperative federalism contributes towards centralisation.

Although cooperative schemes may appear to lack legal robustness because they depend upon consensus, the political reality is likely to be that once in place they have a kind of ratchet effect. A topic designated as one of national significance requiring a cooperative approach is unlikely with the passing of time to lose that status and be relegated to the provincial.

The mechanisms of cooperative federalism are various and sometimes complex. Some of them involve reference by the States of powers to make laws in relation to the relevant subject matter. Such references tend to be underpinned by ministerial agreements and to have escape or sunset mechanisms. They give rise to Commonwealth law and to the establishment of Commonwealth agencies. Other mechanisms may involve the enactment by one State of a model law which is adopted by others and implementation coordinated by a representative national body. It may be, for example, that a national regulatory framework for the legal profession will involve a model along these lines.

I draw attention to this phenomenon merely to indicate that there is a significant process which can be characterised as constitutional development outside the framework of adjudication reflecting the growing importance of political

constitutionalism within Australia. That is a growth which I suggest is unlikely to diminish or be reversed. Against that background it is useful to refer to the state of legal constitutionalism within this country.

### **Legal constitutionalism and constitutional litigation**

Legal constitutionalism is prominent in Australian constitutionalism. This is not only because, to quote Dicey, "[f]ederalism ... means legalism – the predominance of the judiciary in the Constitution – the prevalence of a spirit of legality among the people".<sup>17</sup> It is also prominent because of a well established tendency of persons other than State actors to invoke constitutional guarantees regardless of their connection to the federal distribution of powers.

A guide to the nature of our legal constitutionalism may be the extent to which constitutional disputes are resolved by litigation, the identity of the initiators to that litigation and the kind of litigation they initiate. There have been virtually no cases in the last three years in which a State government has initiated a challenge to the constitutional validity of a Commonwealth law or vice versa. Nevertheless, there has been a continuing line of cases before the High Court in which a number of important judgments have been delivered dealing, inter alia, with federal/state relations and in which the States and Territories have intervened. These have been brought by non-State actors invoking constitutional guarantees. The constitutional adjudication of the High Court in the last 12 months illustrates the point. The first constitutional judgment of the year, *Wurridjal*, held that the just terms requirement conditioning the acquisition of property by the Commonwealth applied to acquisitions made pursuant to s 122 in the

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<sup>17</sup> A V Dicey, *An Introduction to the Study of the Law of the Constitution*, 10<sup>th</sup> ed (Macmillan, 1959) 175.

Territories.<sup>18</sup> In *Pape*<sup>19</sup> the Court held that the provisions of ss 81 and 83 of the Constitution requiring parliamentary appropriation of funds before expenditure were not sources of a constitutional spending power. In *Lane v Morrison*<sup>20</sup> the system of military courts established by the Commonwealth Parliament was found to offend against Ch III of the Constitution. Recently, in *International Finance Trust Co Ltd*<sup>21</sup> the Court held invalid a provision of a New South Wales law which would have required the Supreme Court of New South Wales to hear ex parte an application brought ex parte by the New South Wales Crime Commission for an interlocutory freezing order under the *Criminal Assets Recovery Act 1990* (NSW). Earlier, the Court had upheld the validity of provisions of a South Australian law relating to receipt of secret criminal intelligence evidence in the Licensing Court of that State.<sup>22</sup> It is notable, but perhaps not surprising, that Ch III figured prominently in some of these cases and continues to do so in litigation pending before the Court.

Another measure of legal constitutionalism is the extent to which constitutional adjudication is accepted as legitimate by governments and wider Australian society. Generally speaking decisions of major importance for government have been accepted without serious challenge to their legitimacy, although they will no doubt have their critics as do most, if not all, constitutional decisions. In the case of the recent decision in *International Finance Trust Company Ltd* declaring invalidate s 10 of the *Criminal Assets Recovery Act 1990* (NSW), judgment was delivered on 12 November. Remedial legislation was enacted on 24 November by the New South Wales Parliament. The

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<sup>18</sup> *Wurridjal v The Commonwealth* (2009) 237 CLR 309.

<sup>19</sup> *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

<sup>20</sup> *Lane v Morrison* [2009] HCA 29.

<sup>21</sup> *International Finance Trust Company Ltd v New South Wales Crime Commission* [2009] HCA 49.

<sup>22</sup> *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

Second Reading debate in both Houses was notable for its civil and measured discussion of the Court's decision. Here it may be said there is an example of the acceptance by political actors of that legal constitutionalism which has for so long been an important part of Australian constitutionalism. That acceptance is part of a long tradition well exemplified in the response to the decision of the High Court in the *Communist Party case* in 1951.<sup>23</sup>

There are some countries in which governments simply ignore inconvenient court decisions. Australia is not one of them. On the other hand, the courts and the High Court are not exempt from trenchant and sometimes strident criticism of their decisions based on the outcome rather than reasoning. Such criticism also has a long history. When Billy Hughes was Attorney-General in 1914, the government sought to introduce curative amendments pursuant to a suggestion made by Isaacs J following the second *Tramways case*.<sup>24</sup> In that case the Court had declared invalid the attempted resolution by the Commonwealth Court of Conciliation and Arbitration of an industrial dispute which had been in existence for three years. In Mark Aronson's doctoral thesis published in 1973, he gives an account of Hughes' gloomy prognosis, in the Second Reading debate, of the likely fate of the proposed amendment to the legislation:<sup>25</sup>

We throw the High Court an amending Act, and they hurl back its shattered remains. Then, spurred on by the demon of eternal hope, we pass another; again it is thrown back...

<sup>23</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

<sup>24</sup> *Tramways Case (No 2)* (1914) 19 CLR 43.

<sup>25</sup> 75 Parl Deb 653 quoted in M I Aronson, "Statutory restrictions of remedies in English and Australian administrative law" (PhD Thesis, Oxford, 1973) Ch 3at 23.

After its native title decisions in *Mabo*<sup>26</sup> and particularly after its decision in *Wik*<sup>27</sup> the Court was subject to political and industry sector criticism which, amounted at times, to crude abuse. However, that passed. The sky did not fall in and governments, industry and indigenous people learned to work with the new common law and statutory frameworks. There have, of course, been cases particularly in the sensitive area of immigration where governments have sought to limit and even exclude for the most part judicial review of asylum seeker decisions. In its decision in *S157* the Court effectively held that a widely expressed privative provision in the *Migration Act* did not exclude the jurisdiction of the Court to review the relevant decisions for jurisdictional error.<sup>28</sup> The Court's finding was accepted and legislative adjustments made.

The traditions of constitutionalism are strong. However, those traditions should not be taken for granted. For, as Dr Ambedkar, Chairman of the Drafting Committee of the Indian Constitution said on the day before that Constitution came into effect:<sup>29</sup>

I feel, however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.

<sup>26</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>27</sup> (1996) 187 CLR 1.

<sup>28</sup> *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

<sup>29</sup> Address by the Prime Minister of India, Shri Atal Bihari Vajpayee on the occasion of the 50<sup>th</sup> Anniversary of the Republic of India (27 January 2000) citing Dr BK Ambedkar participating in the Constituent Assembly Debate November 1949  
<<http://parliamentofindia.nic.in/jpi/MARCH2000/CHAP1.htm>>.

### **Approach to interpretation of the Constitution**

Interpretive methodologies are the subject of frequent discussion in scholarly writing and sometimes in polemical exchange about the proper role of the Courts. They are sometimes seen as boundary markers of legal constitutionalism. Changes in the composition of the Court are sometimes scrutinised to ascertain whether a change of methodology or a particular balance of methodologies will follow. That kind of scrutiny, as we know, gives rise to far more acute debates in connection with the selection process for Supreme Court judges in the United States. Most of the interpretive methodologies end with the letters "ism".

The suffix "ism" in many fields and not least the law, indicates definitional difficulty. Once one "ism" is admitted into the circle of discussion, others will follow. The taxonomy of interpretive methodologies includes "originalism", "moderate originalism", "intentionalism", "textualism", "literalism", "progressivism" and a term not yet sullied by "ism" namely "contemporary meaning". They may be helpful descriptors for particular approaches adopted by particular judges or scholars from time to time. As universal solvents for constitutional problems they have the consistency of snake oil. They are perhaps in the same category as theories of everything in physics which have attracted the comment that "there is more to everything than meets the eye". In saying these things, I speak of course only for myself. However in a case decided earlier this year concerning the interpretation of s 51(xxiiiA), Gummow J and I observed that:<sup>30</sup>

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<sup>30</sup> *Wong v The Commonwealth* (2009) 236 CLR 573 at 582.

... diverse and complex questions of construction of the *Constitution* are not answered by adoption and application of any particular, all-embracing and revelatory theory or doctrine. (Footnotes omitted)

In his illuminating paper, published in 2003, on "Methodologies of Constitutional Interpretation in the High Court of Australia" the late Justice Brad Selway identified the approach to interpretation which he then attributed to a majority of the High Court Justices in the following terms:<sup>31</sup>

The primacy of the constitutional text has been asserted and maintained. The approach is fundamentally conservative and legalistic, based upon precedent and logical analysis. But the approach is not rigid or 'tied to the past'. Where it is clear that the Constitution needs to develop then this has been achieved.

Speaking for myself, I see little evidence of "isms" in the current methodology of the Court. One looks to the words of the Constitution and to their possible meanings and application. The interpretive choices or choices of application presented will be informed by established principles developed in previous decisions of the Court. They will also be informed by the history and historical context of the words or phrases in issue and by their functions within the structure of the Constitution. The way in which these and other factors present themselves for consideration will depend upon the nature of the case which falls for decision. The consideration which this approach necessitates is impatient of interpretive "isms".

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<sup>31</sup> B Selway, "Methodologies of Constitutional Interpretation in the High Court of Australia", (2003) 14 *Public Law Review* 234 at 250.

To the extent therefore that approaches to constitutional interpretation define at least in part the content of Australian constitutionalism, it might be thought that the future is likely to hold more of the same. However, the future is an unknown country and the interpretational problems which will confront the court will not be within its own control. They will depend upon the nature of the cases which are brought to it.

An interesting question arises whether the enactment of a Human Rights Act establishing an interpretive rule applicable to statutes favouring their compatibility with a list of human rights and freedoms, will change the shape of Australian constitutionalism. As to that I offer no view. The current debate about the Act seems to emphasise its possibilities for enhancing legal constitutionalism over political constitutionalism. Such an Act is, of course, not constitutional itself. It might be constitutionalised by operation of s 109 of the Constitution if it is of general application such as to render invalid inconsistent State laws. I suspect that the question whether such an Act would enhance legal constitutionalism depends upon its invocation in litigation relative to its invocation in administrative practice and parliamentary scrutiny of legislation prior to enactment. Plainly, these are matters for ongoing debate.

## **Conclusion**

The future direction of constitutional litigation which informs the content and character of our legal constitutionalism is not a matter within the control of the Court. The Court has no program for constitutionalism. It necessarily responds to the cases that are brought before it. Of course those cases may well reflect contemporary issues of significance in Australian society. The decisions of the past year relating to indigenous issues, fiscal federalism, the applications of judicial power were not invented by the Court. They were brought to the Court by parties closely involved in them. Ongoing trends in constitutional adjudication are difficult to predict. For the time being however, Australian constitutionalism will continue to be characterised by a healthy political and legal constitutionalism although the balance may change from time to time.