



CONSTITUTIONAL SYSTEMS OF THE WORLD

The Constitution of Australia

A Contextual Analysis

Cheryl Saunders

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THE CONSTITUTION OF AUSTRALIA

Consistently with the aims of the series, the book canvasses the Australian constitutional system in a way that explains its form and operation, provides a critical evaluation of it and conveys a sense of the contemporary national debate. The chapters deal with the foundations of Australian constitutionalism, its history from the time of European settlement, the nature of the Australian Constitutions, the framework for judicial review, the legislative, executive and judicial branches of government, federalism and multi-level government and rights protection. Running through all chapters is the story of the gradual evolution of Australian constitutionalism within the lean but almost unchanging framework of the formal, written, national Constitution. A second theme traces the way in which the present, distinctive, constitutional arrangements in Australia emerged from creative tension between the British and United States constitutional traditions on which the Australian Constitution originally drew and which continues to manifest itself in various ways. One of these, which is likely to be of particular interest, is Australian reliance on institutional arrangements for the purpose of the protection of rights. The book is written in a clear and accessible style for readers in both Australia and countries around the world. Each chapter is followed by additional references to enable particular issues to be pursued further by readers who seek to do so.

Constitutional Systems of the World

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In the era of globalisation, issues of constitutional law and good governance are being seen increasingly as vital issues in all types of society. Since the end of the Cold War, there have been dramatic developments in democratic and legal reform, and post-conflict societies are also in the throes of reconstructing their governance systems. Even societies already firmly based on constitutional governance and the rule of law have undergone constitutional change and experimentation with new forms of governance; and their constitutional systems are increasingly subjected to comparative analysis and transplantation. Constitutional texts for practically every country in the world are now easily available on the internet. However, texts which enable one to understand the true context, purposes, interpretation and incidents of a constitutional system are much harder to locate, and are often extremely detailed and descriptive. This series seeks to provide scholars and students with accessible introductions to the constitutional systems of the world, supplying both a road map for the novice and, at the same time, a deeper understanding of the key historical, political and legal events which have shaped the constitutional landscape of each country. Each book in this series deals with a single country, and each author is an expert in their field.

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For my family

Preface

This book is one of a series on Constitutions of the World. The aim of the series is to provide access to knowledge about the constitutional system of each of the countries concerned in a manner that explains its form and operation, offers a critical evaluation of it and conveys a sense of the contemporary national constitutional debate. The series as a whole is a contribution to the discipline of comparative constitutional law and is designed to capture many of its benefits. As it develops, it should become an increasingly useful indicator of international trends in constitutional law, as well as a tool for international understanding.

Two of the principal benefits of comparative constitutional law are to deepen constitutional knowledge across jurisdictional boundaries and to cast familiar domestic constitutional arrangements in a new light. In writing this book, I have attempted to capture both. To that end, I have tried to explain Australia from an insider's point of view in a way that also anticipates queries that those less familiar with the Australian constitutional system may have. At the same time, I have tried to reflect on Australia from a comparative perspective, in order to add some new dimensions to old themes for Australian readers. It is inevitable that neither purpose will be fully achieved, not only because of the constraints imposed by a relatively short book but also because the goals themselves are ambitious. Nevertheless, I hope that the book will be of interest to both audiences. I welcome comments, which will certainly be taken into account if a second edition eventuates.

Like any constitutional system, and in particular one that has developed organically over a considerable period of time, the Australian arrangements are distinctive in many respects. Two are worth noting in particular. The first is the evolutionary character of the Australian constitutional system, exemplified by reliance on incremental change, typically driven by opportunity rather than design, which attaches high priority to legal and institutional continuity and eschews an even mildly revolutionary legal break. While this characteristic is not unique to Australia, it takes an extreme form here. Most notably, the entrenched national Constitution predates independence, to which it has been gradually adapted over a period of at least 90 years by a combination

of constitutional practice, highly technical mirror legislation enacted in both the United Kingdom and Australia and sometimes creative judicial interpretation. Such an approach has advantages in terms of stability and a degree of flexibility, but these are achieved at the cost of complexity and opacity. Substantive consequences to which this volume draws attention include a weak constitutional conception of citizenship; some ambiguity over the source of authority for the written constitutions and hence for the organs of state that they establish; and the retention of institutions that were imperial in origin, of which the monarchy is the most obvious example, in forms that have been moulded to better reflect contemporary realities by the same evolutionary processes.

Secondly, Australia may now be the only developed country with a liberal democratic system of government that lacks a national constitutional or legislative bill or charter of rights and that places correspondingly greater reliance on the organisation of public power for the purposes of rights protection. Australia does not provide a perfect example of political constitutionalism. The Constitutions are entrenched and the framework for the institutions established by them is protected by judicial review, offering some derivative rights protection in consequence. Given the vigour of the debate on judicial review elsewhere in the world, however, much of which is sparked by judicial interpretation of constitutional rights, the Australian experience is likely to be of some interest. As readers will see, the outcomes are mixed. Australia has a reasonable record of rights protection, although no better than might be expected of a state that enjoys such favourable economic, geographic, demographic and political circumstances. The Australian judicial system is characterised by a high degree of judicial independence, although it is too simplistic to attribute this to the absence of systemic rights protection, occasional arguments to the contrary. Rights consciousness is patchy, both in public institutions and amongst the public at large. And once again, these arrangements are complex.

The book is organised around eight chapters. The first three are scene-setting, in various ways. Chapter one outlines four foundations of the Australian constitutional system, on which the rest of the volume builds. Three of these are explained in terms of historical phases, but between them they account for many of the defining features of Australian constitutional arrangements. These features comprise, in particular, the common law origins of Australian constitutionalism, involving the adoption of typically common law constitutional institutions and principles; the

federal character of the Australian polity, which infuses all aspects of the Commonwealth Constitution, however reluctant federalists Australians may be and which also accounts for the distinctive Australian combination of aspects of United States constitutional design with institutions in the British constitutional tradition; and the various constitutional consequences of the long, slow, march to independence. The fourth of the foundations with which chapter one deals concerns the relationship of Aboriginal Australians to the rest of the Australian polity, characterised in contemporary parlance in terms of reconciliation. While in one sense this represents another trajectory of the earlier historical phases it is also treated here as a foundational issue in its own right, with constitutional as well as other dimensions.

Chapters two and three elaborate these foundations in several ways, in order to assist understanding of the rest of the volume. Chapter two examines the conception of a Constitution that is the product of Australian history and constitutional tradition, in terms of status, legitimacy, and relationship with the rest of the legal order. This chapter deals separately with the constitutions of the two spheres of Australian federal government, the Commonwealth and the States, because on this issue there are significant differences between them. A similar approach is taken elsewhere in the book, where the differences between the spheres of government are sufficiently marked to warrant separate treatment. Chapter three outlines the methods and procedures of judicial review in Australia, the substantive consequences of which become apparent in the chapters that follow. While Australian judicial review is clearly in the common law tradition, it has some distinctive features, which can usefully be explained at this point. Not the least of these is the prevalence of an interpretive method still commonly known as legalism, which offers another point of contrast with many constitutional systems elsewhere.

The remaining five chapters deal with the principal substantive features of the Australian constitutional system. Chapters four to six are concerned with the legislative, executive and judicial branches of government respectively. Chapters seven and eight deal with the organising principles for federalism and rights protection. All but the last of these chapters follow a broadly similar pattern, insofar as in each the opening part canvasses the principles at stake before the manner in which they are given effect is examined in greater detail. In this way, the book explains and explores the main principles on which the Australian constitutional system rests: representative democracy; responsible government;

separation of powers, with its umbilical link to judicial independence and the rule of law; and federalism. Chapter eight necessarily is somewhat different, given the Australian approach to the protection of rights. The function of this chapter is to draw together the various threads of rights protection that have emerged from the earlier institutional chapters; to augment them with some new material, including the meaning and operation of the few entrenched constitutional rights, the contribution of the common law to rights protection and the impact of international human rights law; and to attempt an assessment of the whole. In effect, chapter eight thus serves as a conclusion to the volume.

The stability of Australian government is made possible through and nurtured by incremental change. Even as this book was being finalised a series of changes of this nature were in train. The federal election of 2010 resulted in the first minority government at the national level for 70 years; the independent Members on whom the government was forced to rely in order to continue in office demanded a degree of parliamentary reform as the price of their support; the High Court confirmed that the Commonwealth Constitution protects a right to vote, although its reasons for decision are not available at the time of writing. Continual minor but significant developments in constitutional law and practice are a hazard of any constitutional scholarship and readers should bear the potential for these in mind. Similarly, it may be expected that many of the general trends identified in this book will continue, including the insistence by the High Court that Australian constitutional law must now be traced to Australian sources, which in turn places increasing demands on the spare terms of the Commonwealth Constitution.

In the circumstances, major change is less likely. Nevertheless, as the analysis in the substantive chapters shows, many of the features of the Australian constitutional system are under a degree of pressure, which ultimately may be relieved in some way. The weight placed on electoral democracy in the Australian approach to representative and responsible government already is a target of parliamentary reformers in the wake of the 2010 elections. Whatever the future of these particular initiatives, there is enough unease about the dominance of a single governing party between elections to suggest that a somewhat more participatory and deliberative approach to government needs to be worked out. The messy compromise over the way in which the monarchy is accommodated in the Australian constitutional system makes it inevitable that the need to establish a republic will be examined seriously again at some

stage although whether the opportunity will be taken to consider the broader implications of republicanism, at least to the point of rethinking monarchical forms, is far less clear. The continuing tension over Australian federalism, fuelled by the weakening of the States through a severe fiscal imbalance, demands a solution of some kind. Ideally, this would involve some rebalancing of power, coupled with revitalisation of the State sphere of government, which also would benefit democracy. As long as this remains in the too-hard basket, however, progressively deepening instalments of intergovernmental co-operation respond to particular immediate needs while exacerbating the overall problem. The introduction of legislative bills of rights in Victoria and the Australian Capital Territory raises the possibility that other States will follow suit; if this movement continues, which remains to be seen, it will throw the lack of systemic rights protection at the national level into relief eventually, perhaps, prompting more effective action than has been proposed so far. Like many other states that adhere to a form of dualism, Australia is grappling with the increasing interdependence of domestic and international law, both generally and in the constitutional context. While major rationalisation is unlikely, this phenomenon already has affected the operations of all branches of government and can be expected to continue to do so.

Many people have assisted with the writing of this book, sometimes without being aware of it. In this regard I should mention in particular my colleagues in the Centre for Comparative Constitutional Studies and at Melbourne Law School generally, who provide an intellectually challenging but collegial atmosphere in which constitutional ideas can be frankly explored and who responded generously to occasional requests to read parts of the manuscript. I am also grateful to Corpus Christi College at the University of Oxford, where I spent two peaceful terms as a Visiting Fellow in 2009, enabling writing to get underway. I have learnt a great deal from colleagues in various international constitutional networks over many years, enabling me to acquire an understanding of many other constitutional systems as well as insights into what is distinctive about the Australian experience that I almost certainly could not have gained on my own. I appreciate the support and advice of the editors of this series, Andrew Harding and Peter Leyland and I owe specific thanks to Peter for his detailed comments on successive drafts, which unerringly highlighted parts of the manuscript that required further attention. My thanks also to Putachad Leyland, who made the

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Cheryl Saunders
September 2010

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