Introduction: ‘GLOBALISATION and CONSTITUTIONALISM’

This book began with an occasion and a need. The occasion was the 50th annual Symposium of the Fulbright Association for Australian-American Relations, hosted by the Australian Key Centre for Ethics, Law, Justice and Governance (KCELJAG), and held at Brisbane from 29 September to 1 October 1999. The need was to re-examine the challenges that Australian constitutional law, theory and practice all face now that globalisation – the unimpeded movement of people, money, information and ideas across national boundaries – is eroding the sovereignty of nation-states.

Other writers have studied globalisation, but as a political, economic, social or environmental phenomenon rather than a constitutional one. On the other hand, works on Australian constitutionalism tend to assume that the centuries-old tradition of national sovereignty, dating from the Treaty of Westphalia, will continue. This book may therefore be the first full-length Australian work to systematically discuss both topics in tandem, and to analyse how each affects the other.

Australian constitutionalism

The Australian Constitution adopts elements from both the UK and the US. Although it has operated with a high degree of success since 1901, revisions are often advocated – usually to make it either more ‘British’ or more ‘American’. But now the Australian, British and US Constitutions all face fundamental global shifts that erode some of the very basic assumptions on which those were established. This assumption, that nation-states are independent political communities in which most legal and political issues arise, and can be resolved, within the state, faces strong challenges – from greater acknowledgment (in principle) of human rights and democracy as international standards; from libertarian and economic-rationalist critiques of government regulation; from globalisation of markets (itself subject to neo-protectionist criticisms); from the power of transnational corporations; from growing appreciation of the role of civil society, particularly non-government organisations (NGOs); and from a shift from ‘effective control’ to ‘popular consent’ as the litmus of legitimate sovereignty. Although contested, these challenges suggest fresh answers – and new questions – in relation to certain long-standing Australian constitutional debates, and for contrasting differences between Australia’s Constitution and the USA’s, and between the two countries’ differing capacity to assert their sovereignty. Clearly the way that Australia (the USA, Britain, Canada, South Africa, etc) relates to the outside world will have changed drastically between, say, 1959 and 2009.
Themes

The chapters that follow are grouped into three parts, addressing shifts in power – along the ‘horizontal,’ ‘internal,’ and ‘vertical’ axes respectively – away from the executive governments of nation-states. The first part, ‘W[h]ither National Sovereignty?’, examines the declining ‘horizontal’ power of nation-states’ executive governments relative to other nation-states, to international organisations, and to NGOs. The second, ‘Constitutional Theory and Structure’, considers the declining ‘internal’ power of nation-states’ executive governments relative to their legislatures – especially Upper Houses – and to sub-national (ie, State, provincial and regional) governments. Finally, ‘Individuals, Minorities, and Their Rights’ discusses the declining ‘vertical’ power of nation-states’ executive governments relative to the citizens they govern, against the rights that those citizens (as individuals, and as members of other minority groups – in particular, of Indigenous first nations) can invoke to ‘trump’ the policies of governing majorities.

Globalisation has many aspects, and admirers of one may well dislike others. Many of those who applaud the domestic application of international law are unenthusiastic about dismantling of trade barriers – and vice versa. Some support internationalisation of law and markets alike, but a much larger bloc oppose both.


These chapters discuss the advantages (or otherwise) of democratic governance in a world where nations – and fundamentally opposing ideologies – compete vigorously; and the nature of citizenship in a world where national borders have become porous. The Westphalian settlement held that, because aggressive wars and invasions were wrong, therefore other intrusions on a nation-state’s sovereignty were impermissible too. Regarding national boundaries as ‘watertight’ was praised for extending the benefits of competition, as observed by Darwin and Adam Smith, to the international sphere. If countries experiment freely with different institutions, laws and mores, those deemed valuable will survive and be emulated; thus international diversity helps good eventually drive out bad. But now the effective (and ideological) hegemony of open world markets, while enforcing ‘survival of the fittest’ in the economic sphere, is said to erase diversity in other spheres – by pressuring governments everywhere to compete for the ‘bottom line’; by exporting a homogeneous US-derived consumer culture (‘McWorld’) that overwhelms local communities and traditions.

National sovereignty is often associated with the Hobbesian doctrine that citizens have only what rights their governments permit them. But liberal democratic values also emerged in an era of ‘strong states’, states able to resolve almost all legal and political disputes within their own borders. Now these values – citizenship, democracy, welfare, community – lack clear application in a globalised world. Some claim this is a convenient reason for playing down those values. Charles Sampford (Chapter 1) advocates an alternative – that liberal democratic values should be neither abandoned, nor defended with outmoded weapons, but re-thought. In particular, we must reconsider which institutions could uphold those values, and examine ways of building these values into such institutions through basic design, management, ethics regimes and integrity systems.
Sir Anthony Mason (Chapter 2) describes how globalisation has exposed the limitations of the doctrine of national sovereignty. Problems have proliferated which nation-states can no longer solve on their own, inducing them to waive their autonomy by embracing international standards. But globalisation and the economics of competition are in tension with liberal democratic government. The existing international decision-making infrastructure is inadequate, and so too are domestic governmental arrangements; both need renovating to overcome the democratic deficit.

Globalism includes, but is not limited to, inter- or trans-nationalism: ‘There was a globalised economy between 1870 and 1914 – organised by empires rather than independent nation-states.’ Our nineteenth-century ancestors considered themselves less ‘Australians’ or ‘world citizens’ than ‘British subjects’: despite (or because of) their proud membership in one trans-national empire, they were suspicious of other peoples. As Helen Irving notes (Chapter 3), the increasing prominence of international law is not unprecedented. Australia’s understanding of sovereignty at Federation was shaped in an era when decisions in London had repercussions around the world. The Constitution itself was designed to accommodate both Imperial membership and emerging national sovereignty, as shown by its provisions on Privy Council appeals, treaty-making, and reservation and disallowance of legislation.

Australia’s original view of itself as a ‘new Britannia’ is challenged not only by globalisation from without but also by multiculturalism, adopted as government policy, from within. Peter Wong and Violeta Brdaroska (Chapter 4) examine how Australian citizenship has evolved, and whether cultural uniformity is necessary for citizenship. They conclude that although originally focused on a particular ethnicity and culture (albeit one identified with a global empire, rather than a nation-state), Australian citizenship is now based upon multicultural national identity and an ethnically-inclusive nation-state; Australia shares an evolving ‘global citizenship’ with the rest of the world.

If global citizenship exists, does it entail a global social contract? Aynsley Kellow (Chapter 5) analyses the ‘constitution’ of international civil society. If this ‘constitution’ enables NGOs to influence global decisions without sharing the costs such decisions impose, it is defective as allowing, in effect, ‘representation without taxation’. Using environmental NGOs as an example, Kellow outlines two models that international civil society could follow. The first, ‘corporatist’ model involves a federation of national peak associations. The second, operating in the United Nations, requires NGOs to be transnational to gain official recognition, yet also allows creative ways of enabling groups with no transnational basis to participate in international negotiations.

Is it utopian to hope that democracy will triumph? Tom Campbell (Chapter 6) argues that two widespread beliefs – dissatisfaction with democracy, based on optimistic hope that better systems are available; and concern for democracy’s health, based on pessimistic fear that global market forces leave little for voting to decide – both threaten the citizen participation on which democracy depends. So too does the application of market forces to the political sphere, by eroding barriers to the control of politics by finance.
Fortunately, democracy brings economic and military benefits. Roland Rich argues (Chapter 7) that transnational economic actors seek out comparative advantage around the globe. As well as traditional factors (skilled labour, raw materials, market proximity) a crucial new factor is emerging: good governance. This requires accountable government; the rule of law; transparent decision-making; a competent public service; and participation by civil society. Not only is democracy a universal value and a basic human right; we are also learning that democracy provides comparative economic advantage. Likewise, Alun Preece (Chapter 8) analyses the international ‘survivability’ of democracy, detecting the factors common to the seven nations that have maintained democracy continuously over the twentieth century. Some of the most important advantages, like geographical isolation, are not (easily) copied by other countries’ constitution-makers. However, Preece concludes that democracy has survival value from a military perspective – by promoting peace among countries, it reduces the risk of foreign conquest and internal military coup.

Part 2: ‘Constitutional Theory and Structure’

The chapters in the second part examine the ‘internal’ organisation of national governments, particularly relative to their legislative branch and to sub-national levels of government under the same Constitution.

In contemporary Australia, ‘republicanism’ means removing legal links to the British monarchy. John Williams (Chapter 9) contends that understanding of Australia’s Constitution is often limited by failure to acknowledge that its clauses were animated by a definite theoretical ideal – one, moreover, with a trans-national pedigree: ‘small-R’ or civic republicanism, derived by Andrew Inglis Clark from the US Constitution. Although the Australian document reads as a dry, practical framework for government, its forgotten republican heritage (expressed in its provisions for checking power and ensuring deliberation) offers ideals richer than either legalistic interpretation or bare anti-monarchism.

Although the national/regional and legislative/ executive division of powers has been debated for a century or more in Australia, Britain and America, globalisation changes the debate radically. When national sovereignty was strong, the question was simply which branch or level of an all-powerful sovereign state would make a particular decision. But now that nation-states’ power to regulate and tax is diminishing, all branches and levels of government find their writ runs less and their revenue cake is smaller. This makes the distribution of taxing powers more acute, and raises issues of whether the national and regional governments should compete for investment, or instead co-operate to ensure they all fare better in global competition.

Cheryl Saunders (Chapter 10) and Glyn Davis and Naomi Sunderland (Chapter 11) re-assess the state of the Australian federal union, examining respectively its balance of legal and political powers. Saunders concludes that globalisation and other factors make it harder to allocate power legally among different governments. Decentralised federalism offers such benefits as democracy, checks and balances, economic performance, and peace for divided communities; but at the same time, centralisation promises impartiality, equality, broader vision – and, now, international
competitiveness. Global standards on matters from trade practices to environmental pollution to human rights are a new, powerfully centripetal force. Saunders explores Australia’s actual and potential responses to this dilemma, referring to comparative developments elsewhere, particularly US Supreme Court judgements. Davis and Sunderland note that Australian federal practice has shifted from the balance intended by the original Constitution, as legislative and financial power gravitate to Canberra. While not necessarily bad (constitutional arrangements should be adaptive), this centralisation raises concerns. How can citizens and interest groups participate in policy choices if responsibility is shared among different governments? And what scope is left for local involvement if policy-making and implementation are enmeshed in complex intergovernmental and international agreements?

Since Federation, many have doubted whether Australia’s powerful US-style Senate can coexist with the Westminster tradition of executive responsibility to the Lower House. But despite its constitutional power, the Senate normally follows Westminster convention. The US Senate has never sought to use its budget veto to remove the Executive, but asserts control over foreign relations through its power to reject treaties.

Two Australian Senators offer distinct views on the role their chamber should play in a globalised future. Helen Coonan (Chapter 12) asks whether Australia’s ‘Washminster’ hybrid of US and British constitutionalism is ‘washed up’. The Senate’s powers and electoral basis make it hard for governments to ensure their legislation is passed. Many consider an unwieldy Senate, resistant to change, an institutional roadblock to Australia’s progress – particularly with globalisation placing pressure on national governments. Coonan argues that an institutional overhaul is overdue, to better meet the challenges facing a modern democracy. Andrew Bartlett (Chapter 13) defends the Senate’s role and record, arguing that the Senate has not been ‘hostile’ to the executive since 1975; that Senators review legislative proposals in good faith, seeking constructive improvements in the national interest; and that voters deliberately choose to give neither Government nor Opposition a majority of seats, instead using its proportional voting system to keep the Senate an independent watchdog.

Steven Churches argues (Chapter 14) that with Australian lower houses tightly controlled by governments (and able to veto upper houses), the function of keeping officials accountable falls by default on the judiciary. Yet our courts’ reluctance to engage in ‘judicial activism’ means that unsound common-law rules – themselves the product of judicial creativity in centuries past – remain in force. In particular Churches critiques the traditional presumption that statutes are not intended to bind the Crown (a domestic analogy to Westphalian sovereignty), because this generates unequal laws unjustifiable in a modern democracy. He shows how constructive attention to precedents from other jurisdictions offers judges the guidance and legitimacy they need to keep government a ‘public trust’.

**Part 3: ‘Individuals, Minorities, and Their Rights’**

The final part examines the ‘internal’ balance of power between a nation-state and its citizens, and the rights they can assert (as individuals or as minority groups) against their government. Too often the question of protecting rights is reduced to the single
issue of importing US-style constitutional rights. However, we must remember that the US Bill of Rights guarantees only court-enforced restraints on governments; it was established before rights protection was considered an international issue; and before social, economic, cultural and environmental rights were articulated. Australia has pioneered alternative methods of protecting rights, particularly legislative scrutiny and specialised commissions.

Alice Tay (Chapter 15) offers a perspective drawn from her experience as both a legal academic and a practitioner in the concrete business of protecting rights, as President of Australia’s Human Rights and Equal Opportunity Commission (HREOC). Tay argues that ‘rights talk’ is too easily cheapened when wants are presented as matters of right; and that laws are less important than supportive cultures for ensuring rights are respected in practice. Heinz Klug (Chapter 16) describes the drafting of the property rights clause in South Africa’s Constitution to illustrate the complex ways in which ‘universal’ principles interact with the particular socio-economic, political, historical and legal cultures in which these principles find concrete application. International precedents frame the range of options available, but they must be moulded to suit domestic circumstances – and in turn, particular national adaptations provide further clarification of the principle, each offering one more interpretation of the principle’s meaning.

Proposals for entrenched constitutional rights are often criticised as subordinating the sovereign people (more precisely, their elected representatives) to a wish list of ‘natural rights’ preferred by some elite, whether long-dead Founders or today’s judges. John Pyke (Chapter 17) offers an alternative conception. Popular sovereignty (of the whole nation, not just of those in the majority) means one’s sole ‘fundamental’ right is to participate equally in public decisions. Thus a Constitution should guarantee every citizen’s right to vote, and ensure (eg, via petition- or convention-initiated referenda) that significant changes in public opinion are reflected in the Constitution. Voters may still decide to entrench non-participative rights, but any Bill of Rights so enacted would remain a subject of democratic debate and possible amendment. Pyke address two likely objections: that popular democracy is anachronistic in the light of countries’ increasing subjection to international law and/or markets, and that populist mechanisms might be (ab)used to enact discriminatory laws with xenophobic intent – morally objectionable in any era, but especially unwise in a globalised world.

Two US scholars are more pessimistic about the value of judicially-enforced constitutional rights. However laudable its intentions, says Gerald Rosenberg (Chapter 18), the world-wide clamour for Bills of Rights gives little critical attention to whether constitutions will achieve this goal. Supporters claim that entrenched guarantees plus independent courts will protect human rights and educate the electorate to respect them. But even in countries that (like the USA) meet these criteria, there is little evidence that this happens. Rosenberg argues that constitutional guarantees are neither necessary nor sufficient for advancing human rights. In fact, judicialisation poses risks – of giving veto power to the wealthy; of enervating public involvement in the civil liberties struggles; and of turning questions of justice into debates over abstract legal distinctions. Rosenberg suggests that ordinary legislation is a more prudent and effective way of protecting human rights.
Applying the ‘dismal science’ of economics to legal and political institutions, Neil Komesar (Chapter 19) offers conclusions that sound dismal to those tempted to believe that ‘writing it down will make it happen’. Komesar argues that law – being the product of an adjudicative process involving complex litigation dynamics and limited physical resources – is itself subject to ‘law’s laws’ of supply and demand. Judicial intervention is most needed when other decision-making mechanisms (political processes, markets and informal communities) work badly – but the same factors that ‘clog’ these other mechanisms, numbers and complexity, also make it difficult for courts to do any better. Globalisation increases complexity and therefore aggravates these problems. Defining a meaningful role for courts means facing these structural limitations.

While national sovereignty is challenged from ‘above’ through demands for open borders and greater international coordination, it also faces challenges from ‘below’ – specifically, demands for self-determination and legal recognition for Indigenous peoples and other minorities, often inspired by international law declarations and by Indigenous campaigns in other countries. The rights of Indigenous peoples in Australia and the USA were long disregarded, but globalisation now amplifies the voice of minority groups who formerly were ‘locked up’ inside nation-states that claimed to ‘represent’ them.

Garth Nettheim (Chapter 20) contrasts Australia’s and the USA’s historical record of respecting Indigenous rights, and observes that Indigenous peoples around the globe share a remarkably similar agenda – particularly recognition of their equality with the non-Indigenous majority, and of their distinctive collective rights as the first peoples of their country. International human rights standards declare the rights of everyone to self-determination, to territory and culture, and to freedom from racial discrimination; while recent and evolving developments apply these standards in detail specifically to Indigenous peoples.

Peter Jull and Helena Kajlich, Bede Harris and Bertus de Villiers also examine comparative constitutional, statutory and administrative models of Indigenous policy from other nations, particularly Canada and South Africa. Jull and Kajlich (Chapter 21) examine Canada’s progress and conclude that Australia may have better prospects than many today expect. They argue for a broader understanding of ‘constitutional’, because many options are available other than re-wording the Constitution itself; moreover, process and debate are valuable even if the document is not amended. Bede Harris (Chapter 22) notes that acknowledging the rights of its Indigenous peoples would require Australia to recognise their law, if not necessarily their sovereignty. If so, South African experience offers legal precedents for reconciling conflicts of Indigenous laws with each other, with general laws, and with fundamental human rights. Bertus de Villiers (Chapter 23) compares the systems adopted for joint management of national parks in Australia and South Africa, and their compatibility with international standards of Indigenous rights. Restoration of land rights is a key facet in the transformation of South Africa, yet its complexity is often underestimated, and the clash of interests can make the process drawn-out and emotional – especially when land claims affect national parks and other conservation areas held dear by the mainstream.
Finally, Christine Morris (Chapter 24) addresses common misunderstandings about what Aborigines and Torres Strait Islanders want when they call for recognition of their law and sovereignty. Far from demanding ‘rights without responsibilities’, as often caricatured, Indigenous Australians want to carry out their responsibilities under their law – a ‘full law’ which acknowledges the sacred and unseen as well as the material world. To deal with globalisation, mainstream Australians could benefit by learning from pre-1788 Indigenous governance of this continent, with over 200 peoples and languages – as the US Founders learned from the Iroquois.

Conclusion

Important questions about globalisation remain unanswered. At what crucial point (if any) did it begin? Can it be slowed, halted, or even reversed, by anything short of another dark age of technological regression? Should it be? These authors offer distinct perspectives, yet their chapters all confirm the rationale of this book – that globalisation requires, for better or worse, that we reconsider and re-justify our national institutions, if only to defend our decision to retain them unchanged. How fitting that a book and symposium so generously sponsored by the Commission bearing his name should seek to apply the vision of Senator James William Fulbright to the era of Albright.