Chapter Three

Constitutional Reform: The Tortoise or the Hare?

Greg Craven

Introduction

I would like to make the point at the outset that I regard this first conference of The Samuel Griffith Society as an important event. It is important, firstly, because it comes at a time when Australians are talking more about their Constitution than at any other point in their history. Whatever one thinks should or should not be done about the Constitution, there can be little doubt that a willingness to talk about it is a far more acceptable position than the traditional attitude of Australians, which is to take their Constitution entirely for granted. The conference is also important because it represents something of a rare attempt to create a true dialogue on the Constitution. It has been common enough in Australia's history for there to be in existence some official or quasi-official body trying to reform the Constitution: thus, in recent years, we have had the Australian Constitutional Convention, the Constitutional Commission, and now the Constitutional Foundation. But the organising body behind this conference comprises, so far as I am aware, the first bid to set up a society equipped to engage independently in a vigorous general constitutional debate with what might be termed the official movement for constitutional reform. Right, wrong or somewhere in between, its efforts are thus to be applauded as contributing much needed diversity to the field of constitutional discussion.

What I propose to discuss in this paper is the `process' of constitutional reform. Consequently, I will not directly address any particular proposed measure of reform, but rather the general means by which constitutional reform as a politico-legal phenomenon in Australia is to be approached. This is a large subject, and what follows is essentially a mere sequence of connected thoughts, which I hope are relevant to the subject at hand, but which appear in no very settled or sophisticated order.

History

The logical point to begin necessarily is with a discussion of the history of constitutional reform in Australia. This discussion is not offered as the inevitable irrelevant historical introduction to any academic dissertation. Rather, it appears here because the history of constitutional reform in this country is of the utmost relevance in seeking to understand the likely future of that process. The first thing which needs to be understood is that the Founding Fathers were positively in favour of at least a moderate measure of continuing constitutional reform. They did not anticipate that their work would endure unchanged forever, and this is why they included in the Constitution section 128, which provides one of the most democratic means of amending a constitution contained in any federal constituent document around the world.

Their attitude was undoubtedly a wise one, as change is inevitable under any constitutional regime. Unavoidably, the circumstances of nations alter, and if their constitution is to survive, it must faithfully reflect the nature of these changes. Thus, for example, our Constitution as written conferred upon the Commonwealth Parliament the power to make laws for persons of any race,

other than persons of the aboriginal race. This accorded with views prevailing in 1900, but sixty years later our beliefs and values – quite unsurprisingly – had changed, and in 1967 the constitutional position was democratically altered to extend the power of the Commonwealth after the holding of a referendum under section 128. The ghosts of the Founding Fathers would have been monumentally unconcerned.

Given this inevitability of constitutional change, the real question in the present context is always going to be not `whether', but `what', `how much', `when', and `in what way'? Historically, the push for constitutional reform in Australia has nearly always come from the Left. Labor made a number of determined attempts to expand the power of the Commonwealth in the early years of the federation, and this pattern was followed under the government of Gough Whitlam, and even on a more modest basis during the administration of Bob Hawke, partly via the agency of the ill-fated Constitutional Commission. The main impetus for Labor's attempts to change the Constitution is to be found in the impediments that its federal structure places upon Labor's generally centralising agenda. Labor also has had a general dislike for a number of the other themes running through the Constitution, particularly those tending to impose checks and balances upon the exercise of governmental power, and so inhibiting the capacity of an appropriately- minded Labor government to radically re-structure society.

Correspondingly, there has been (with certain very isolated exceptions) no very resolute push for constitutional change from conservatives. Generally, they have been content to maintain the Constitution unaltered, paradoxically, even after it has been pushed in directions by such forces as the current of High Court decision-making which they would otherwise find unpalatable. Given that conservatives have tended to focus on constitutional issues only when compelled to do so by the existence of some particularly virulent push from the Left for constitutional revision, the result effectively has been a constitutional non- debate in Australia. In fact, interest in the Constitution is essentially a phenomenon of left-wing hostility, a highly unhealthy position in a democracy. One can, of course, except from this last statement the body of constitutional academics, who obviously are intensely interested in constitutional reform as a matter of professional involvement. However, as these have tended to come from a similarly Left-centralising perspective to Labor itself, they have ordinarily done little to increase the degree of diversity in the debate.

Of course the one single, salient truth that emerges from any examination of the history of Australian constitutional reform, is that the people consistently vote against change. One can argue about why this has occurred, but not about the central, uncompromising fact. So far, only eight out of 42 constitutional referenda have been successful, and the last four attempts to amend the Constitution were defeated by record majorities. What this signifies above anything else, is that a person interested in constitutional reform must face the fact, and that at the very outset, that they are confronted by a formidable task.

Constitutional Myths

It is important at this point to explore some of the myths that have grown up in Australia around the concept of constitutional reform. The first is that the Constitution itself is a shambling document, cobbled incompetently together in the latter part of the nineteenth century, and in perpetual danger of imminent disintegration. This perception is entirely wrong. The Constitution is in essence a carefully thought out scheme of government which, in common with all products of human ingenuity, suffers unavoidably from its fair share of misconceptions and errors. But the basic point must be that the Constitution has presided over one of the most impressive functioning democracies in the world for 90 years, and has weathered every crisis – sometimes rocking noticeably upon its undercarriage – without serious danger of collapse. In all probability, were the Constitution to remain entirely unchanged for another 50 years, Australian democracy

as such would manage to survive under its aegis. Naturally, this rather minimally favourable prognosis is no reason why it should, as a matter of fact, be preserved from alteration.

A similar myth is that the Constitution is pitifully derivative of a British imperial past, and never really proceeded from the Australian people. This myth holds an honoured place as part of the attempt by socialist historians like Manning Clarke to fashion an alternative Australian epic history out of the unpromising facts of the past. Again, however, the myth is very far removed from the reality. In fact, the Constitution – while inevitably relying heavily on aspects of Australia's British past – departs in a highly innovative fashion from that tradition in a wide variety of its aspects, most particularly in its treatment of federalism, as well as in areas like constitutional amendment. As regards its popular basis, it must be remembered that the Founding Fathers (unlike historians) were popularly elected, and that the draft Constitution was ratified not once, but twice by the people of Australia.

Probably the most important myth of constitutional reform is that people vote `No' at referenda because they are stupid. Australia's intellectual elites sometimes try to make this charge more palatable by talking with sympathetic condescension of the difficulty experienced by `ordinary' people in understanding complex constitutional proposals, but the notion of intellectual ineptitude remains at the heart of the accusation. Author after author has recriminated the Australian population for not being clever enough to understand the incalculable benefits offered to it in the form of proposed constitutional amendments by a medley of intellectual enforcers.

There are a number of possible responses to this essentially arrogant understanding of Australia's constitutional history. In the first place, it ignores (or down-plays) the crucial feature of democracy, that everyone has an absolute right to their own opinion, and even the absolute right to be wrong. Secondly, it entirely discounts the possibility that people may have voted `No' in a particular case because what was proposed was actually a bad idea. Anyone who has studied the various proposals made at referenda will quickly appreciate that Australia has had more than its fair share of constitutional lemons for sale. Thirdly, centralising constitutional thinkers (who probably comprise a majority of those in favour of radical change to the Australian Constitution) conveniently ignore the fact that Australians have overwhelmingly voted `No' to particular sorts of constitutional proposals. Historically, these have been proposals that seek to increase the powers of Canberra at the expense of those of the States, and such initiatives have had a disproportionately high casualty rate at referendum: on my rough count, only one constitutional proposal out of twenty-five which were solely concerned with the enhancement of central power has succeeded at referendum, whereas the figure for federally `neutral' proposals is a much more respectable seven out of fifteen. Finally, to the extent that the idiocy argument may be sanitised, so as to read that people vote `No' because they are conservative, and not fully understanding proposals and their implications prefer to vote in the negative to be on the safe side, this is a far from unreasonable or irrational human response.

Of course, none of this goes to deny that there are real problems in the present amendment process. One of the most obvious of these is the fact that virtually every proposal for constitutional reform quickly becomes a partisan issue. The result is that just as the government of the day will support such a proposal, so the opposition will oppose, almost regardless of whether the matter in question is a good or bad idea. These, and many other difficulties, have to be confronted by would-be constitutional reformers.

Constitutional Realities

Having discussed the myths, we may now turn to the realities of constitutional reform. In the first place, however fascinating the subject may be to politicians and academics, the fact has to be faced that it is hard to get the population at large interested in any aspect of the topic. This is not necessarily because they are bovine or unperceptive. In any particular case, it may be because the

people as a body feel that the system works at least reasonably well, and perceive no need for change. It has also to be accepted that every attempt at major constitutional change in Australia has failed miserably. The mega-attempts of the Commonwealth to radically alter the federal balance of power during the period 1911 to 1946 were completely unsuccessful. The Constitutional Convention, whose agenda for constitutional change was comparatively modest, met with only limited (though nevertheless significant) success. The Constitutional Commission, which was peddling by far the most ambitious program of constitutional change in Australia's history, was also the most spectacular failure.

Paradoxically, there has been a good deal of informal change to the Commonwealth Constitution, notwithstanding the repeated failure of referenda. This has occurred mainly through the agency of the High Court, which has substantially rewritten large portions of the Constitution in its judgements. It is a mere common-place of Australian constitutional history that the Court has, for example, fundamentally re-drawn the federal division of power. Nor has the High Court been the only agent of informal constitutional change. The intricate processes of fiscal federalism, which have operated to produce indigent States heavily reliant upon Commonwealth grants, and so highly susceptible to Commonwealth pressure, have also altered the practical operation of the Constitution.

It needs to be understood that there is indeed a real need for appraisal and change in relation to our Constitution, even (oddly enough) from the point of view of anyone who is essentially a constitutional conservative, and who wants to keep the Constitution as it is, or at least as it was meant to be. This is because certain fundamental aspects of the existing Constitution are currently under serious threat. For example, the federal character of the Constitution is undermined both by the centralising tendencies of the High Court, and by the vertical fiscal imbalance that has grown up in the Australian federation. The rights of Parliament are challenged by the dominance of the executive, as exhibited by such distressing phenomena as the debasement of Question Time, and the undermining of the office of Speaker. Judicial independence is in grave danger of erosion, both from widespread executive contempt, and from the tribunalisation of justice. General respect for human rights is also a potential casualty of executive instrumentalism. Thus, notwithstanding the fact that the Constitution could probably muddle along indefinitely without any real danger of total collapse, there is undeniably a need for some action if we wish to ensure that it fully retains its essential character. Naturally, it goes without saying that if one is in favour of radical change in Australia's constitutional structure, the case for constitutional reform is compelling.

Approaches to Constitutional Reform

We may now turn directly to the question of approaches to constitutional reform. By this is meant not particular mechanisms adapted to the end of changing the Constitution, but general attitudes to the entire process of constitutional reform, which attitudes will in turn determine which specific technical courses are to be adopted. Naturally, this assumes that some degree of constitutional reform is in fact desirable.

It is possible in Australia to discern at least two general approaches to constitutional reform. One may be labelled constitutional `gradualism', while the other may be referred to as constitutional `adventurism' or (perhaps less pejoratively) constitutional `experimentation'. Proponents of constitutional gradualism accept the need for constitutional reform, but argue that this is a process which unavoidably takes a good deal of time. They are never in a hurry. They believe that it is necessary to carefully isolate each separate constitutional problem, to study it in depth, and then to take the requisite step of constitutional reform cautiously and deliberately. The entire approach is one of taking one step at a time, making sure that at every point one can predict the precise consequences of the change being made. To a significant extent, this was the approach of

the old Australian Constitutional Convention, which tended to be suspicious of dramatic constitutional initiatives.

Constitutional adventurism is a very different approach, and one whose proponents are inclined to view gradualism as simple cowardice. Constitutional adventurists – who frankly frighten the present author – favour the constitutional equivalent of the king-hit. They are characteristically inclined to the dramatic, and believe that if one gets the principle right, the practicalities will surely follow: it is not necessary to be able to predict all potential ramifications of a constitutional amendment before becoming convinced of its wisdom. This conviction grounds a corresponding belief that it is possible effectively to make sweeping changes to the Constitution. Naturally, adventurists tend to assume that a great deal is wrong with the Constitution, and that there is a correspondingly grave need for fundamental constitutional revision.

Constitutional adventurism is far from unknown in Australian history. It naturally has been most popular with Labor, which has seen a need for radical constitutional change in a variety of contexts. It is also popular with constitutional academics, who often seem to suffer from what could be called `Founding Fathers' syndrome. This is the tendency in the context of constitutional reform to wish to do something, anything, so long as it is spectacular, and will ensure that its author will be remembered. After all, who wants to fail to go down in history as the person who made a number of modest changes to the Constitution, when you could be remembered as a second Edmund Barton?

The Dangers of the Two Approaches

Obviously, constitutional gradualism and constitutional adventurism are the tortoise and the hare of the title to this paper. The question is, what dangers are involved in each? The difficulty with constitutional gradualism is that it may be so slow that it will achieve nothing at all. Indeed, it may be a convenient front for those who are working for precisely this end. Certainly, constitutional gradualism will be a hopeless course if the need for reform is urgent and profound – in such circumstances, gradualism will be next to useless. In fact, constitutional gradualism is useful as a strategy of constitutional reform only if one believes that one's constitutional system is at least sufficiently sound (even if significantly vulnerable) as to allow the time necessary for renovation. This is the position adopted by the present writer, but he acknowledges that he conceivably may be wrong.

A variety of dangers attend constitutional adventurism. The first concerns the unpredictability of its results. The drawback of doing something big because it seemed like a good idea at the time is that one will all too often be free to repent at leisure. A good example of this phenomenon is the inclusion in the Canadian Charter of Rights and Freedoms of a clause which allowed Parliaments to override the operation of the Charter. This was seen as a sufficient sop to those concerned by the potential of the Charter to undermine Parliamentary democracy. Yet time has proved that Parliaments are politically incapable of solemnly declaring that they intend to override the Charter, with the consequence that the override clause is next to useless outside Quebec. A major supposition and safeguard of the Charter has thus proved to be substantially without foundation.

A second danger is that of exceeding community consensus. Constitutions depend absolutely upon their general acceptance by the populations over which they preside. The more dramatic a particular constitutional reform, the greater the danger that it will alienate large sections of the community. In this connection, it is not enough for a major constitutional change to be able to scrape together a transitory majority: a far firmer grounding in community consensus is required if future trouble is to be avoided. Again, the example is the Canadian Charter. Pierre Trudeau was determined to secure the passage of the Charter, and in so doing rode rough-shod over the objections of Quebec. This harsh treatment went a long way towards causing the present

resentment of Quebec, which has resulted in Canada having to face the grave threat of secession. Trudeau had a charter for his federation, but the question remains whether he has a federation for his charter.

It must also be accepted that constitutional adventurism readily lends itself to grandiose, ill-thought out schemes. It is always going to be the chosen medium of those constitutionalists who shoot first and ask questions later: those inclined to this approach towards constitutional reform are inherently intolerant of the counsels of caution and moderation. It needs always to be remembered in this context, that if once one succeeds in amending a constitution, then no matter how bad the results may be, it will frequently be extremely difficult to undo the alteration.

The Way Forward – The Constitutional Foundation?

The Constitutional Foundation is currently the reigning body of constitutional reform in Australia. It arose out of the conference held at Sydney to commemorate the 1891 meeting of the Founding Fathers, and which comprised a variety of community leaders, academics, trade unionists, business people, and (on its final day) politicians. The Foundation's designated task is to ferment discussion of constitutional reform and to educate the public, and it eschews any political agenda. All here would realise that the creation of The Samuel Griffith Society is largely a response to the existence of the Foundation.

It must be accepted that the broad role of the Foundation in promoting constitutional discussion is entirely appropriate, and worthy of support. Nevertheless, the following cautions concerning its future role and operation need to be born in mind. For a body like the Foundation, there will always be temptations towards constitutional adventurism. There is an understandable desire on the part of such bodies to do something truly memorable in order that their impact upon Australian society may be both large and readily recognised. There will be pressures upon the members of the Foundation – both internal and external – to seize the opportunity to be Australia's second generation of Founding Fathers. Such pressures are not necessarily conducive to careful, cogent constitutional reform.

The attempt of the Foundation to be non-political is also fraught with difficulty. So far, it largely has been able to avoid controversy simply by taking no overt position on any divisive constitutional issue. Yet it seems most likely that a series of positions will sooner or later have to be adopted, at least by implication, and at that point, the usual difficulties of partisan politics will inevitably arise. Of course, it might be argued that the Foundation will never have to adopt any set position, but in this case, it is difficult to see what it hopes to achieve. Education is all very well, but seminars and pamphlets alone will never be able to carry the day for the cause of constitutional reform.

As it happens, my own guess – based on the nature and composition of the Foundation – is that it will eventually adopt a whole series of constitutional positions. Indeed, it may already be perceived as beginning to lean tentatively towards certain constitutional outcomes, something which is perfectly appropriate in itself, however much it may in the future compromise the `neutrality' of the Foundation. Thus, it appears to me likely (though by no means certain) that the Foundation is moving in the direction of support for a judicially enforceable constitutional bill of rights, some form of treaty or formal instrument of understanding with the aborigines, and a republic. All these things are highly controversial (though arguably desirable) constitutional options, advocacy of which will arouse passionate political debate and division. The view of the present author is that any proposal for a bill of rights, in particular, readily lends itself to an adventurist agenda of constitutional reform.

In any event, it can be argued that the attempts of the Foundation to be absolutely apolitical have been doomed virtually from the outset. The very choice made by the Foundation as to which aspects of the Constitution should or should not be discussed as being in need of reform

necessarily carries with it a series of suppositions as to the desirable shape of a future Australian Constitution. Thus, the Foundation's evident willingness to open up the republican debate, while laudable enough as a means of broadening constitutional discussion, gives at least some hint that the body is not entirely enamoured of the monarchy.

A final difficulty of the Foundation flows from its nature as a body composed very much of Australia's intellectual elites. At its most ambitious, the Foundation sometimes seems to be aiming at beginning, conducting and resolving the current constitutional debate. It does not appear (or at least it is not clear) that the Foundation is primarily concerned to identify issues for discussion, and then to hand them over to some body in the nature of a constituent assembly. My own belief has always been that if one is to engage in `macro-constitutional reform', it is necessary to adopt the same mechanism as that preferred by the Founding Fathers, and to have a constitution written for Australia by a democratically elected body charged with that specific task, rather than by a self-appointed intellectual elite.

Conclusion

There can be little doubt that Australia is facing a testing constitutional time. This is not a cause for concern: we are long overdue for a careful examination of our constitutional assumptions and suppositions. We have much to think about and to debate. But the first thing we must consider is the question of our general approach to constitutional reform. Are we to be gradualist tortoises, or adventurist hares? My own preference is in broad terms for the former, but the one thing that is imperative is that there be a serious debate. This is the reason that a body like The Samuel Griffith Society should exist.