The Shape of Representative Democracy

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The circumstances that gave rise to the litigation in *Bush v Gore*[1] must have shaken the confidence of some Australians who believe that we all know what representative democracy means; that even if there are minor differences between the so-called Western democracies, the essential features are common to them all; that, like natural law, the fundamental principles of representative democracy are written on the hearts of all right thinking people; and that reflection upon those principles will expose far-reaching implications in the text of the Constitution.

Such confidence was never easy to reconcile with the facts. A useful way to show that is to present a series of pictures of representative democracy, with a gradually narrowing focus.

We all notice, perhaps with amusement, perhaps with indignation, that the title of democracy is sometimes claimed by governments in countries which appear to us to be distinctly undemocratic. What is often unremarked is the extent of the differences between our system of government and the systems of other nations we regard as politically comparable. Those differences can be illustrated by considering the broad outlines of the systems of government in five nations: the United Kingdom; the United States of America; Canada; New Zealand; and Australia.

Four of those nations are governed under a system of constitutional monarchy; one is a republic. Four of them have the same monarch, but she is no longer regarded as indivisible. Only in Australia is the possibility of republicanism a significant item on the current political agenda.

In four of the five nations, the national parliament is bicameral. New Zealand is the exception. But there are major differences in the manner in which the Upper House is constituted. In the United Kingdom that position is changing, but it is broadly true to say that the Upper House is constituted by members of the nobility. There is no such class in any of the other four nations. In Canada, as in the United States of America and Australia, the Upper House in the national parliament represents regions, but in Canada, unlike the United States and Australia, the members of the Upper House are not elected. They are appointed by the Governor-General, on the advice of the Prime Minister. It is the United States system of electing members of the Senate that is closest to the Australian system; not surprisingly, because in this respect our Constitution consciously followed the United States model. That model was described by the Supreme Court of the United States as 'the Great Compromise, under which one House was viewed as representing the people, and the other, states'.[2]

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1 531 US 98 (2000).

2 *Immigration and Naturalization Service v Chadha* 462 US 919, 950 (1983) (Burger CJ).

In all five nations, the members of the Lower House (or, in the case of New Zealand, the House) of the national parliament are popularly elected, but the methods of election are radically different. All five have universal adult suffrage, but only one, Australia, has compulsory voting. It will be necessary, later, to make more detailed reference to the Australian systems of election, but for the present it is sufficient to note that we now elect members of the House of Representatives by a system of preferential voting at a secret ballot. Parliament does not meet for fixed terms. In the United Kingdom, members of the House of Commons are elected on a first-past-the-post voting system for terms of five years, subject to dissolution. Until fairly recently, New Zealand also had a first-past-the-post electoral system. This was altered to a variant of the German multiple member system, under which the parliament consists of a number of members elected in single-seat constituencies, and a number elected by proportional representation from national party lists for those parties obtaining at least a certain percentage of the national vote. A certain number of seats are also designated for Maori representation. Members of the House of Representatives in the United States, and the House of Commons in Canada, are elected on a first-past-the-post system.

The difference between preferential voting and a first-past-the-post system is important. Systems of preferential voting vary, and include full preferential, partial preferential, and optional preferential voting. A first-past-the-post system operates on a winner take all basis that can deny parliamentary representation to substantial levels of minority opinion, and can produce large differences between the parliamentary strength of the majority party and the percentage of the population supporting that party. For example, in the 1987 general election in the United Kingdom, the Liberal Social Democratic Alliance polled 22.6% of the vote but won only 3.4% of the seats in the House of Commons. In the United Kingdom, governments commonly enjoy parliamentary majorities out of proportion to their electoral support, and election results, in terms of parliamentary representation, tend to be much more decisive than in Australia. And, of course, the member elected for a particular constituency need not receive the support, either directly or indirectly, of a majority of voters, let alone a majority of electors.

The first Commonwealth Electoral Act in Australia provided for a first-past-the-post voting system for the House of Representatives. Preferential voting was first used at a general election in 1919. Compulsory voting for general elections was introduced in 1924. The significance of compulsory voting is a matter for a political scientist rather than a lawyer. Whatever the precise significance may be at parliamentary elections, there is little doubt that it is a major factor influencing the outcome of the referendum process in connection with proposals for constitutional change. The low success rate of proposals to amend the Australian Constitution may be attributable to a number of factors, but it is difficult to avoid the conclusion that one of them is the resistance to change that results from compelling people to vote when they feel that they are uncertain about the implications of change, and are not particularly unhappy with the status quo. The party political system provides guidance and assistance to voters at general elections, but it may be different at a referendum to consider constitutional change.

Of the five nations mentioned, three have federal systems of government, and two have unitary systems. A description of the system in the United Kingdom as unitary might now involve some over-simplification, but it is still broadly correct. A federal structure of government has a large influence upon the shape of representative democracy. In Australia, as in the United States, the two Houses of the national parliament are elected upon different lines. In each place, the members of the House of Representatives are elected to represent particular electoral divisions, and are chosen by popular vote of the people who live in those electoral divisions, although the method of election is different. Senators are elected to represent a State, and each State has the same number of representatives. In the United States, senators were originally chosen by the State legislatures, but this procedure was changed by the 17th Amendment to the United States Constitution, adopted in 1913.

Four of the five nations have a system of responsible government, under which the executive government is, in practice, entrusted to Ministers who are members of parliament (although not necessarily the Lower House) and who hold office only so long as they enjoy the confidence of the Lower House. The United States does not have a system of responsible government, executive power being vested in an elected President. It is unnecessary to explore the method by which the President is elected. That method, in itself, provides a vivid example of the complexities, and possibilities for variation, that can be associated with popular election.

This brief description of the main features of the systems of government in five nations which most Australians would, without question, regard as representative democracies, demonstrates that it is erroneous, and dangerous, to assume that representative democracy is a concept with a fixed and readily discoverable content. Writing in 1964, a commentator said:

> A political system can properly be described as a system of representative government if it is one in which representatives of the people share, to a significant degree, in the making of political decisions ... The necessary condition of representative government is therefore said to be the existence of a fair number of representatives of the people, meeting together in some kind of council or assembly.[3]

The scope for variation in the forms of representative government becomes equally obvious when attention is concentrated on Australia.

It is convenient to consider the Australian system of government at three levels: the national government; State and Territory government; and local government.

Reference was earlier made to universal adult suffrage. At the time the Australian Constitution came into effect, there was no such system. In most parts of Australia, women were not entitled to vote. In most States, women were not eligible to vote in the referendum process leading to the adoption of the Constitution. In a number of Australian colonies in 1900, adult males were only

[3] Birch, *Representative and Responsible Government: An Essay on the British Constitution* (1964) 13-14.

entitled to vote if they satisfied a residential and/or property and/or income qualification.[4] The *Franchise Act* (Cth) of 1902 provided for universal adult suffrage for British subjects, male and female, over 21 years of age although, as was noted earlier, voting was voluntary. Aboriginal Australians were treated differently. In 1962, voluntary enrolment for Aboriginal Australians was introduced, and voting was compulsory for those enrolled. Enrolment for Aboriginal Australians only became compulsory in 1984. In 1973, the voting age at Australian federal elections was lowered to 18. No one doubts the lawfulness and propriety of having a minimum age for voting. It might be interesting, however, to consider the constitutional validity of a law that fixed a maximum age for voting. Of course, it would be discriminatory, but we do not hesitate to discriminate between people aged 18 and 17. And, lest it be thought that discrimination on the ground of age is repugnant to the Constitution, let me remind you of a provision that affects me, personally and directly, and clearly discriminates on the ground of age. I refer to s 72. I am not complaining. I voted in favour of the change to s 72. And it seems reasonable to assume that, if an age limit of 70 had not been imposed, I would not be a federal judge, because Sir Anthony Mason would still be Chief Justice of the High Court, if he wanted to be. He is perfectly fit, and sits from time to time as a member of the Hong Kong Final Court of Appeal, which is a sensitive and responsible judicial office. He is younger than the current Chief Justice of the Supreme Court of the United States. He is younger than both Sir Owen Dixon and Sir Garfield Barwick at the time of their retirement. And he is younger than Sir Frank Gavan Duffy was at the time he became Chief Justice. My reference to the possibility of a law imposing an upper age limit upon voting is not intended as a proposal for change. It is intended to draw attention to the uncertainty of the limits of the constitutional phrase, 'chosen by the people'.

The Constitution provides for representation of the Territories in the Senate on such terms as the Federal Parliament thinks fit (s 122). It is left to Parliament to decide what that representation, if any, will be. In that respect, the rights of residents of the Territories are less than those of residents of the States. This is a clear form of inequality.

The method of alteration of the Australian Constitution is also a factor basic to the structure of our system of government. In brief, s 128 provides that a proposal for a referendum to change the Constitution must originate from the Federal Parliament, and must be supported by a majority of voters in a majority of States. We do not have a system, of the kind that exists in some other countries, of citizen initiated constitutional change, nor does a State legislature have the power to initiate such a proposal. It is no coincidence that proposals for change have shown a tendency to increase Commonwealth power.

The requirement that change needs the approval of a majority of voters in a majority of states represents federalism at work; and shows the flexibility of democracy. A topical example illustrates the point. Whatever one's opinion on the republican question, the outcome of the recent referendum was mercifully clear-cut. Suppose that a significant majority of Australians had voted yes, but the result in majority of States had been the other way. Legally, the outcome

[4] See *Attorney-General (Cth); Ex rel McKinley v The Commonwealth* (1975) 135 CLR 1, 19.

would have been clear, but it is interesting to speculate on the political consequences. Such a result is possible in any referendum for constitutional change. It shows that references to 'the will of the majority' involve over-simplification. Since the Constitution itself cannot be changed by a simple majority of the Australian people, and voters in the less populous States can defeat the will of a majority of Australians, what does that say about the safety of drawing constitutional implications concerning equality of voting power?

The tension between federalism and democracy, like the tension between federalism and responsible government, was well understood by the framers of the Constitution, and by politicians generally at the time of federation. Writing in relating to an early proposal that senators be elected by the State parliaments, Professor La Nauze said:

> The Labour parties had generally been indifferent or hostile, if not to federation, at least to federation as proposed in 1891. They had had more immediate and more urgent objectives to be gained through legislation in their local parliaments. But when Labour men had discussed the Bill of 1891 they had invariably criticized its 'undemocratic' features: the absence of provisions for 'one man, one vote', and for a uniform federal franchise; the election of the Senate by parliaments whose upper Houses enshrined privilege.Whether as a result of expediency or conviction, a Constitution framed in 1897, and subject to the verdict of a referendum, was bound to be less open than its predecessor to the charge of being 'undemocratic' if its framers sincerely hoped to see it adopted. Nevertheless, the formal requirements of pure democracy would at some point be confronted with those of federalism. The objections of the radicals of the two large States to equal State representation in the Senate, and to equal powers for the two Houses, were in fact objections to federation on terms to which the majority of States would agree.[5]

A defining feature of our Constitution, and hence of our system of government, is federalism. The Australian nation, as it ultimately evolved, was originally the product of an agreement between the people of a number of British colonies. Those colonies were at various stages in the development of self-government, and their systems of government, at the time, would not satisfy current Australian ideas of what is democratic. The Imperial government, in theory, may have had the power to put an end to the existence of the Australian colonies and impose a unitary Constitution. But it never had the will to do so. (In that respect, it is worth remembering that participation by New Zealand in the new federal union was once regarded as a possibility). The fact that the new union was to be a federal union, emerging from a negotiated agreement between the people of separate colonies, frustrated, and in some respects continues to frustrate, those whose political opinions about democracy, and equality, are at odds with federalism. It frustrates some people on other grounds as well. But that is a political, not a legal, problem. When political values are confused with legal principles, constitutional misinterpretation results.

The manner in which the Senate is constituted is influenced by the method of voting for senators. This method of voting is determined, from time to time, by

5 *The Making of the Australian Constitution*, (1972) 95.

legislation of the Federal Parliament, not by the Constitution. Before 1948, the method of voting for senators meant that the political party that dominated the House of Representatives also enjoyed a majority in the Senate. Between 1946 and 1949, there were only 3 Opposition senators facing 33 Government senators. As the result of legislative change in 1948, since 1949 senators have been elected on a basis of proportional representation. This in itself produced a change in the membership of the Senate. But an equally significant change occurred as a result of legislation in 1984, which increased the number of senators from 10 per State to 12 per State. In party political terms, this change was brought about by an alliance between the Australian Labor Party and the National Party, and was opposed by the Liberal Party. When combined with the system of proportional representation that applies to Senate elections, the practical result has been to make it easier for independents, and members of minor parties, to be elected to the Senate, and to make it difficult for a major party to obtain a majority in the Senate. The people best at explaining this are politicians, but expressed in simple lawyers' terms, and related to half-Senate elections, it is easier for a party to get 3 out of 5 candidates elected than it is to get 4 out of 6. The consequence is that at the present time, and for the foreseeable future, the party which controls the House of Representatives does not control the Senate, and is forced to negotiate with independents, and minor parties, to secure the passage of legislation opposed by a major party.

The method by which the Senate is constituted, and the provisions of the Constitution relating to amendment of the Constitution, have a bearing upon the slogan 'one vote, one value'. Exactly how a vote is valued is not clear to me. But it is certainly arguable that, within the Australian federal structure, a vote in Tasmania is worth more than a vote in Victoria, and a vote in Victoria is worth more than a vote in the Australian Capital Territory. This is the direct consequence of the manner in which the Senate is constituted, and the method which the Constitution provides for its own amendment. It is the federal compact. It is the price that had to be paid for federal union. Whether we like it or not, it exists in the express provisions of the Constitution. And the express provisions of any instrument, including a Constitution, have a controlling effect upon any possible implications.

There are differences between the systems of government that operate in the various Australian States. Most State parliaments are bicameral, but that of Queensland is not. The Upper Houses in the State parliaments are now generally representative of the community, but that was not the case at Federation, or for a good part of the 20th century. When the Constitution first took effect, the Upper Houses of some States were, by modern standards, notably undemocratic. That, again, has a bearing on the scope for Constitutional implication. Tasmania has a distinctive system of voting for the Lower House, the House of Assembly. The so-called Hare-Clark electoral system is quite unlike any other State system.

There is even greater variation at the level of local government. The powers of local government authorities are determined by State legislation, and differ from place to place, and from time to time. Some local government authorities are elected. Others are appointed, at least on occasion. Electoral systems and procedures vary. One of the most important local government authorities in Australia is the Sydney City Council. Within the last 30 years, there have been

repeated alterations to the method by which the Sydney City Council is elected or, from time to time, administered. Boundaries have changed, as have voting entitlements. The constitution of such a Council can be altered depending upon whether the voting strength lies with the Central Business District, or densely populated inner suburban areas.

A feature of the Australian Constitution is how little it has to say about the election of members of the Parliament; and how much choice it leaves to the Parliament itself in determining, from time to time, the form of representative democracy to be enjoyed by Australians. That is not surprising, bearing in mind the context in which the Constitution was framed. Most Australian women were not entitled to vote. No one was compelled to vote. Aboriginal Australians were not counted. The Upper Houses of State parliaments were not democratically constituted. The framers of the Constitution did not approach their task with a rigid view of what constituted representative democracy; and that is just as well for us. Democracy is always in a state of evolution, and adaptation to changing ideas and circumstances. The Constitution does not seek to entrench more than the bare minimum of conditions for democratic government; it is left to the Parliament to fill in the details, and to alter them from time to time in response to public opinion expressed through political pressure and conflict.

Section 7 of the Constitution provides that the Senate shall be composed of senators for each State 'directly chosen by the people of the State'. Each original State is to have equal representation. The method of election is to be as Parliament provides. Subject to such constraints as are embodied in the expression 'directly chosen by the people', it is for Parliament to devise, and alter, where it thinks appropriate, the method by which the people of a State express their choice. What has been said earlier demonstrates the range of choice that is available to Parliament. Since Federation, there have been large alterations in the method of election of Senators, and those alterations have resulted, not from amendment to the Constitution, but from legislation. Parliament is given, by s 7, the power to alter the number of senators for each State, provided equal representation between the original States is maintained. The increase in the number of senators in 1984 which, together with the system of proportional representation, produced the result that the party majority which controls the House of Representatives will almost certainly not be reflected in the Senate, has had a major influence on the alignment of political power. From a legal perspective, it is beside the point to argue about whether it is democratic that the party that controls the popularly elected House should have to negotiate with independents, or representatives of minor parties, for the passage of all contested legislation. The point of legal significance is that it is within the power of the Parliament itself to create, or to do away with, that outcome. It is not a matter determined by the Constitution. To accept that position, but at the same time to deny to Parliament some area of discretion about the size of electorates for the House of Representatives might be described, in Biblical terms, as straining at a gnat and swallowing a camel.[6] It is the Constitution that determines the powers of the Senate, and requires that there be equal representation for each State, but it is the Parliament that, subject to the constraint earlier mentioned, determines the

[6] See *Attorney-General (Cth), Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140.

method of election of senators. Because of the way in which the party political system works, which is a matter outside the purview of the Constitution, the current dispensation has resulted in a practical consequence of great significance for the balance of power between the House of Representatives and the Senate. Thus, the shape of our representative democracy is moulded, not only by federalism, reflected in a bicameral Parliament with a Senate set up to provide representation on a State basis, but also by the provisions made by Parliament as to the size of such representation and the method of election.

In the case of the House of Representatives, there is a similar discretion given to Parliament as to the form of representation. Section 24 provides that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators. The number of members chosen in the several States is to be in proportion to the respective numbers of their people. Again, the expression 'directly chosen by the people' introduces a constraint upon the discretion of Parliament, but the comments earlier made apply equally here.

Decisions of the High Court have established certain propositions.
First, 'chosen by the people' does not require that all voters can please themselves whether to vote and whom to vote for. A right to choose may exist even if the available choice is only between unpalatable alternatives. Compulsory voting is lawful,[7] and Parliament may prescribe a method of preferential voting which requires ballot papers to be marked in a certain fashion.[8]

Secondly, the words 'the people of the Commonwealth', in s 24, do not include the people of the Territories.[9]

Thirdly, the Constitution does not require the number of people, or the number of electors, in electoral divisions for the purposes of the House of Representatives, to be equal.[10]

There has been a division of judicial opinion as to whether the Constitution guarantees universal adult suffrage. In 1975, a majority of the High Court said that it does not. A minority took the view that the requirement of direct choice by the people of the Commonwealth might now import that minimum condition.[11] This question, in turn, raises wider issues of constitutional interpretation, because the Constitution came into effect in a context which did not have universal adult suffrage. Indeed, when the position of Aboriginal Australians is taken into account, Australia did not have universal adult suffrage until 1962. I express no view on the question, which might again come before the High Court for decision.

What all this shows is that representative democracy can take many different forms; and that the Constitution leaves it to the Federal Parliament, and State and Territory Parliaments, from time to time to decide most of the matters affecting the shape of our democracy.

7 *Judd v McKeon* (1926) 38 CLR 380.
8 *Langer v The Commonwealth* (1996) 186 CLR 302.
9 *Attorney-General (NSW); Ex rel McKellar v The Commonwealth* (1977) 139 CLR 527.
10 *Attorney-General (Cth); Ex rel McKinley v The Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140.
11 *Attorney-General (Cth); Ex rel McKinley v The Commonwealth* (1975) 135 CLR 1.

In his reasons for judgment in *McGinty v Western Australia*,[12] Gummow J quoted from the writings of John Stuart Mill in 1861. Mill said:

> In treating of representative government it is above all necessary to keep in view the distinction between its idea or essence, and the particular forms in which the idea has been clothed by accidental historical developments, or by the notions current at some particular period.
>
> The meaning of representative government is, that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves, the ultimate controlling power, which, in every constitution, must reside somewhere.[13]

The necessity of distinguishing between the essence of representative democracy, and the forms of representative democracy resulting from accidents of history, or ideas fashionable at particular times, is demonstrated by the survey I have earlier undertaken. The Constitution has left it to Parliament to decide the essentially political question of the form of representation which in Australia, at any given time, best accords with our current ideas of democracy. That the issue is chiefly political cannot be doubted. Consider the following questions. Is a first past-the-post system of voting more or less democratic than a system of preferential voting? Is the current system of electing senators more or less democratic than the previous system. Is our method of altering our Constitution democratic? The law does not provide an answer to any of those questions. They are legitimate subjects of political disagreement. The democratic method of resolving those differences, to the extent to which they are capable of resolution, is through the political process.

The Constitution makes no reference to the political process or political parties. The party system has changed significantly over the century since Federation, and will continue to change. The Constitution says nothing about such important features of our system as Cabinet or the offices of Prime Minister or Leader of the Opposition. (If we became a republic, would there continue to be a Leader of the Opposition?). The Constitution makes no mention of Local Government, and it deals with the Territories very briefly.

One explanation of the difference between our constitutional arrangements and those of the United States, in relation to the degree of choice left to Parliament about to the shape of our democracy, was given by Sir Garfield Barwick in the case of *McKinlay*.[14] A similar point was later made in relation to the difference between the Canadian and United States Constitutions by the present Chief Justice of Canada.[15] The United States Constitution was the outcome of a revolt against British institutions and methods of government. It reflected a deep distrust of concentration of power. It was accepted on the understanding that it would be amended to include a Bill of Rights. The Australian Constitution took legal effect as part of a statute of the United Kingdom Parliament. It was framed with the encouragement of the United

[12] (1996) 186 CLR 140, 272.
[13] *Considerations on Representative Government* (1861) 557.
[14] *Attorney-General (Cth), Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 22-4.
[15] *Dixon v Attorney General for British Columbia* (1989) 59 DLR (4th) 247, 262.

Kingdom government, by people, most of whom regarded themselves as British, and who generally admired and respected British institutions. They were anxious, in the interests of their own security, to be seen as part of the British Empire. The British institutions they set out to emulate included parliamentary supremacy and Ministerial responsibility to Parliament, to the extent to which those institutions were compatible with federalism. It is not surprising that our Constitution in large measure leaves it to Parliament to determine, from time to time, most of the issues that affect the shape of representative democracy in Australia. Bearing in mind how our Constitution came into being, it would be surprising if it were otherwise.

This, it may be thought, is not merely understandable; it is also democratic. One thing the Constitution says about the Parliament is that its members are to be chosen by the people. It is through the political process, and the exercise by the people of their choice in the selection of parliamentary representatives, that responsiveness to the popular will exists.

There is something paradoxical about an idea that our democracy is best secured by the prescriptions of a current generation of lawyers, because such an idea is undemocratic. Our system of representative government depends as much, for its health and vitality, upon an open and vigorous political process, a free press, and a concerned and informed public, as it does upon legal principles and institutions. And the capacity of the framework of government to evolve, and adapt to changing values and circumstances, depends upon its not being fettered unduly by the opinions or standards of the people of a particular time.

An examination of what the Constitution says, and what it does not say, about representative democracy demonstrates the effect of two great formative influences: federalism; and British institutions. Not all the framers of the Constitution were federalists; but most of them were. Not all admired the British system; but most did. Now, a century later, there may be many Australians who regret federalism, or who wish we had more closely followed the American, or some other, model. But those are political preferences, and their proper place is in the political arena. To understand what the Constitution says, and to understand why it is silent on some matters, it is necessary to take account of the context from which it emerged. The framers were not given, and most of them did not want, a clean slate to write on. The only union that was available to them, as a practical possibility, was a federal union: a body politic organized along federal lines, with the colonies in their new capacity as States, as integral components. So their agreement reflected compromises about States' interests. The framers' regard for British institutions powerfully influenced their approach to what should be included, and what should be left out. Regard for such institutions is not now as widespread among Australians. But it helps to explain the present form of our Constitution, and many other aspects of our system of law and government. The Constitution is a living and dynamic instrument of government; but it is often necessary, for an understanding of its meaning, to pay regard to its history.

The ground rules for government are set out in the Constitution; but they leave a lot to be filled in by Parliament. There are Australians who do not like some of the rules as stated; there are some Australians, who would prefer that the Constitution said more, and left less to be decided by Parliament. The

democratic and legitimate way to resolve such issues is through the political process, including public debate about constitutional and legislative change.