A UNIFYING CONSTITUTION FOR A DIVERSE NATION

H P LEE*

It is important at the outset to recognise that the framing of the constitutional document to provide for the emergence of a new nation, the Commonwealth of Australia, was 'a remarkable achievement'.[1] Sir Robert Garran explained:

> In a time of profound peace, without the pressure of any great national emergency, six free communities had sunk their differences and agreed to come together, from a deep conviction of the advantages of union.[2]

Whilst it is appropriate for the nation to celebrate this achievement, the centenary of the *Australian Constitution* ('Constitution') should be viewed as an opportunity to consider how the fundamental document could be reshaped to reflect a new and modern Australia.

Professor Coper, in praising the work of the Constitution-makers, also pointed out that it had 'saddled us with a conservative document, difficult to amend, obstructive of social change and riddled with unresolved problems, unfilled gaps and awkward compromises'.[3] The constitutional impediments to the evolution of a national identity were ironed out by the interpretive work of one of the most respected courts in the common law world – the High Court of Australia ('High Court'). Constitutional law experts have engaged in exegesis on how the High Court has, through its interpretation of the provisions of the Constitution, assisted in the growth of Australian nationhood.[4] The first 20 years of the Constitution witnessed efforts to preserve the autonomy of the six States. These efforts gave sustenance to a doctrine of State 'reserved powers'. The jettisoning of that doctrine in 1920 by the High Court[5] provided a liberating effect on the law-making capacity of the Commonwealth Parliament. The abandoning of myopic modes of interpretation of the Constitution led Windeyer J to proclaim in the following expansive terms:

---

* Sir John Latham Professor of Law, Monash University. The comments of Professor George Winterton, University of New South Wales, are gratefully acknowledged.

1 Sir Robert Randolph Garran, *Prosper the Commonwealth* (1958) 136.

2 Ibid.

3 Michael Coper, *Encounters with the Australian Constitution* (hardback edition, 1987) 79.

4 H P Lee and Jeannie Paterson, 'Australian Nationhood in the Constitutional Interpretation of Section 117' (2000) 8 *Asia Pacific Law Review* 169; Leslie Zines, 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (1997) ch 1.

5 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (*'Engineers' Case'*).

> [I]n 1920 the Constitution was read in a new light, a light reflected from events that had, over 20 years, led to a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs.[6]

These sentiments uttered by Windeyer J were in one sense highly exaggerated, especially in the context of the proposition 'that Australians were now one people'. At that point in time, the underlying assumption of the 'one people' was a monocultural Australia. It was an assumption that was in harmony with the subsequent enactment of legislation by the Commonwealth Parliament which promoted a White Australia Policy.[7]

That a strong streak of racism was an underlying factor in the creation of the constitutional document is unrefuted. A conspicuous feature of the Constitution is the omission of a Bill of Rights from the framework. Why should this be so given that many of the framers of the Constitution were clearly fascinated and inspired by the *Constitution of the United States of America* ('US Constitution')? By the time the drafting committee of the First National Australasian Convention of 1891 was putting the final polish to the draft of the Constitution on board the Queensland government's *SS Lucinda*, the Bill of Rights provisions of the US Constitution had been in full play for a long period of time.

An explanation was offered by Sir Owen Dixon in a speech, 'Two Constitutions Compared':

> The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself.[8]

A delegate at the Convention (Cockburn) said: 'People would say "Pretty things these states of Australia: they have to be prevented by a provision in the Constitution from doing the grossest injustice"'.[9]

Such a sentiment, according to Professor La Nauze, had a 'certain innocent sublimity'.[10] He pointed out that 'there were other reasons, less sublime, for suspicion about the formulae of "rights"'.[11] It must be remembered that at that time there was in existence racially discriminatory legislation. For example, there was, in Victoria, factory legislation which included discrimination against the Chinese. In Western Australia, there was a rule that no Asiatic or African alien could get a miner's right or go mining on a goldfield. The concern that the validity of such legislation would be questioned was 'one principal reason' for the rejection of a Bill of Rights from the Constitution.[12] This factor should not detract from the fact that under the Constitution, the people of Australia have enjoyed a century of stable government based on the ideas of responsible

---

6 *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (*'Payroll Tax Case'*).

7 See Garran, above n 1, 149-50.

8 Sir Owen Dixon, 'Two Constitutions Compared' reprinted in Sir Owen Dixon (collected by Judge Woinarski), *Jesting Pilate: And Other Papers and Addresses* (1965) 102.

9 Melbourne, *Australasian Federal Convention Debates*, 8 February 1898, vol 1, 688.

10 J A La Nauze, *The Making of the Australian Constitution* (1972) 231.

11 Ibid.

12 Ibid 232.

government and representative democracy. Indeed, Australians should look back with pride at the magnificent achievement of the framers. Professor La Nauze said:

> [Australians] could equally claim citizenship of one of the most venerable federations of the world. While many federations have come and gone in the twentieth century the four whose constitutions were framed and adopted before the end of the nineteenth – the United States, Switzerland, Canada and Australia – have, so far, survived.[13]

It is, however, also essential for the people of Australia to look forward on the occasion of the centenary of the Constitution. Today's Australian society is one with a diversity of races, languages, religions and cultures. Whilst the constitutional document continues to underpin the system of government, it is perhaps time for some fine-tuning to be effected so that it can draw together more effectively the citizens composing the changing Australian society. This poses the question of what reforms should be made to the Constitution.

It is not an inaccurate assertion to say that the Constitution is a document which has become the lucrative playground of skilful lawyers. It has become a document containing obscure provisions which evoke fascination only in judges, legal practitioners and legal academics who have an interest in the complexities of Australian constitutional law. As a whole, the document is generally incomprehensible to the general public. There is no sense of 'ownership' displayed by the people of Australia.

For a changing Australia, the Constitution must now be transformed from a document which seeks to effect the unification of six colonies into a national polity to one which seeks to strengthen the unification of the diverse Australian society. It must be the 'glue' of the nation.

In advocating changes to the Constitution, I shall focus on the general precepts which should be the foundation for these changes. First, a constitution should be viewed by the people as a compact of citizens coming together to promote a cohesive Australian society. Hence, it is essential that the Constitution should spell out clearly core constitutional values which every citizen should, under oath or affirmation, subscribe to. The current preamble to the Constitution should be reshaped to embody these core constitutional values. There may be disagreement over the full spectrum of constitutional values but it is not difficult to achieve consensus over the more fundamental of these values. For instance, it is fully accepted that representative democracy is a fundamental feature of our constitutional system and that it is vital to have a truly independent judiciary. A common language is vital for social cohesiveness. It may be necessary to spell out English as the national language without detracting from the right of citizens to use other languages.

An element of commonality among the Western democracies is the express spelling out of the fundamental rights of the people. The United States had been operating a constitutionally entrenched Bill of Rights long before the crafting of our Constitution. Canada shifted from a statutory to a constitutionally entrenched

13 Ibid v.

Charter of Rights.[14] New Zealand has followed suit with a statutory Bill of Rights.[15] The United Kingdom has been compelled to enact the *Human Rights Act 1998* (UK) to give effect to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[16] Australia remains on the sideline whilst these countries have developed or are developing their jurisprudence on fundamental rights and freedoms. The earlier less sublime reason for not including a Bill of Rights in the Constitution can no longer hold up against a modern, diverse Australian society which has remarkably absorbed into its fabric peoples from virtually every country around the globe. This diversity makes it more imperative for the inclusion of a Bill of Rights into the Constitution.

A core constitutional value is the notion of equality. It should have a place of prominence in a Bill of Rights. It is not satisfying that such an important notion should be subject to debate as to whether it is an implied aspect of the Australian constitutional system. The attempts by the High Court in constructing an implied guarantee of equality are less than satisfying.[17] This notion should be explicitly spelt out. This is particularly so given the diverse nature of Australian society. At times of crisis, especially economic crisis, those in minority groups who look 'different' are placed in a more vulnerable position. Subscription to the idea of equality signifies the common bond of citizenship.

A number of people have come from countries where authoritarian rule is the order of the day and where dissent renders them liable to prosecution or preventive detention. These people have to adjust to the notion that the efficacious working of a representative democracy must depend on freedom of speech. An explicit embodiment of free speech and the idea of responsible speech will ensure that all strands of Australian society can participate fully and meaningfully in the affairs of the nation.

The Constitution should be reformed by deleting obsolete or spent provisions and explaining in clear terms how executive government functions in reality (rather than relying on a lay person's understanding of conventions). If these changes are made, then it would be appropriate that a copy of the Constitution should be given at citizenship ceremonies to those who have acquired Australian citizenship.

Finally, to reinforce the unity of the Australian people, the idea that an Australian citizen should occupy the position of Head of State should be pursued with vigour. In summation, the Constitution was crafted with the aim of uniting six colonies to create a new federation. Whilst the centenary of the Constitution provides the occasion for celebrating the achievements of its framers, it should also be viewed as providing the opportunity for reflection on what changes should be made to it in order to promote unity in a diverse Australian nation. That unification should be based on the constitutional embodiment of certain

14 *Canadian Charter of Rights and Freedoms 1982*.

15 *New Zealand Bill of Rights Act 1990* (NZ).

16 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

17 *Leeth v Commonwealth* (1992) 174 CLR 455; *Kruger v Commonwealth* (1997) 190 CLR 1 (*'Stolen Generations Case'*).

core values, such as representative democracy, a common language, equality and free speech.