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This issue of *Papers on Parliament* brings together in published form five lectures given during the period from July to November 1994 in the Senate Department's *Occasional Lecture* series. It also includes the Procedural Digest for 1994 and an updated Parliamentary bibliography.

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Constitutional Odyssey: Can Canada become a Sovereign People?

by Professor Peter Russell

‘Mega-constitutional politics’ is a phrase I coined, and I admit that it is an ugly phrase. But it is appropriately ugly, for I use it to describe a very ugly kind of politics. This is the politics of trying not just to change a constitution but to change it at one time in a large wholesale way by formal amendment, and in a context where the effort absorbs , and exhausts , the political energies of the country’s leaders and its citizens. It is ‘big bang’ constitutional politics. That is what mega-constitutional politics is and that, unfortunately, is the politics in which my country, Canada, has been embroiled almost non-stop for an entire generation.

To understand the truly pathological nature of this particular method of attempting constitutional change, it is worth considering the normal, healthy process of constitutional change. In well-established constitutional democracies, the normal process of constitutional change is incremental and evolutionary. Normal change comes about through a combination of political practice, ordinary statutes, judicial interpretation and the occasional — and I underline the word ‘occasional’ — formal amendment of the constitutional text.

Consider the constitutional development of your own country, Australia, after its founding nearly a century ago, and you will recognise how all the various instruments that I have listed combined over time to bring about major changes in the operation of Australia’s Constitution. In the realm of political practice, consider how much Australia’s acquisition of national autonomy, the working of cabinet government, bicameral legislatures and your monarchical institutions and the coordination of government activities in your federation — most recently, the establishment of the Council of Australian Governments — have been based on changing customs and conventions and new political practices.

Consider how ordinary legislation has transformed your electoral systems and introduced the protection of human rights. Your High Court too has been a veritable engine of constitutional development, licensing vast new areas of central legislative power — for instance, in the realm of foreign affairs. Recently it corrected an error of constitutional proportions in your common law heritage that denied the occupation of land by the Aborigines and Torres Strait Islanders before the arrival of the Europeans. The formal constitutional amendments, although never easy to achieve, have won the necessary level of popular approval eight times, bringing about significant changes such as the creation of a loan council and additional Commonwealth jurisdiction in social policy and in relation to indigenous peoples.

I could take you through a survey of Canada's constitutional development, accomplished through the same combination of instruments. Until we got into the big bang stuff, these were the instruments which we too primarily relied upon to develop our Constitution.

Whether or not you like the change effected through what I have called the normal process of constitutional development is not the point. The point I wish to make is to insist that great change in a country's constitutional system can and does take place without massive constitutional overhauls by formal amendment. Yet, in the past there have been those in your midst, among the chattering classes and within your political leadership, who have tried to persuade Australians otherwise. These proponents of wholesale constitutional restructuring have contended that without such major overhauls Australia, constitutionally speaking, would be a frozen continent.

Dare I remind you of one prominent enthusiast of constitutional revision, a recent prime minister at that, who suggested that Australia, like a little boy growing out of his short pants, must don a new constitutional suit befitting a grown man. All of which, I say with respect but also with conviction, is patent nonsense.

On five different occasions in Australian history, politicians and constitutional experts have launched projects designed to achieve major wholesale restructuring of the Australian Constitution. The first of these was the Peden Royal Commission on the Constitution. From 1927 to 1929 it pondered the question of whether Australia should continue to be a federal rather than a unitary state — a hardy perennial of would-be constitutional renovators on the left side of politics.

A second effort took the form of a series of intergovernmental meetings in the Depression and early war years exploring a wide agenda of constitutional reconstruction. That was followed from 1956 to 1959 by a joint committee of this Parliament which Prime Minister Menzies — somewhat mysteriously — permitted to wrestle with a vast program of constitutional change.

After that there was the Australian Constitutional Convention — do you remember it? — meeting from 1973 to 1985 once in each of the state capitals. It worked on changes to practically everything under the constitutional sun, including a codification of constitutional conventions — a veritable orgy for constitutional junkies. Then most recently — and this might be your least favourite to recall — the Constitution Commission in tandem with Attorney-General Bowen's People's Convention. This fifth effort produced two thick, well-researched volumes of constitutional ruminations that adorn academic law libraries around the world but, as you well know, produce not an iota of actual constitutional change.

These five abortive efforts at constitutional change by wholesale amendment were all based on the mistaken assumption that constitutions are like suits of clothes or interior decorating schemes that should be discarded and replaced according to the reigning fashion of the day. In a society that practices constitutionalism, constitutions are not like that. In constitutional societies, the constitution provides a set of rules and principles on how legitimate governmental power is acquired and exercised. The constitution defines the rules of the political game. When players in that game, particularly very powerful players who have just won a temporary majority, find that these rules get in their way, they should not find it easy to change such rules.

Constitutions in liberal democracies exist to qualify simple majority rule. A society that operated by simple majority rule would need no constitution. Its only rule would be: win an election and you can do as you please. It should never be easy for the players in any game, particularly those who have a temporary advantage, to change the rules of the game. This is all the more so when the constitutional rules and principles have a deep democratic root in the society, which I believe to be the case — with one major qualification — in Australia. In settled constitutional democracies, absent dire straits such as impending break-up or civil war or a euphoric new consensus, new social contracts should be left to the philosophy books.

In Australia the efforts at wholesale constitutional change that I have recounted differ in one major respect from our Canadian efforts. Your Australian efforts have been macro but not mega. They have been macro in that they have aimed at large packages of formal amendments. But they have not been mega because they have not attracted any great amount of public interest. In my writings on these Australian efforts, I have called them the ‘politics of frustration’. But it is the relatively small group of politicians, lawyers and academics involved in launching these projects who have been frustrated — not the Australian people. For most Australians, these projects of constitutional reform have been a big yawn. My efforts on arriving here to chat up taxi drivers on the latest constitutional project have attracted some pretty peculiar glances — ‘Who is this weirdo?’ We get on to the footie very quickly.

In Canada our efforts at macro-constitutional change, whether we like it or not, have been mega. When a round of constitutional politics is on in Canada, the Constitution dwarfs all other issues in public life. These mega-constitutional tussles have the two basic characteristics of soap operas: they are very boring because the old issues are hashed and rehashed but they are also very gripping — we are all on the edge of our seats because we care deeply about the outcome. Will we stay together or come apart? Will the marriage survive or will one partner finally leave? This *is* an attention grabbing question. If you want a little taste of what it is like to live through a round of mega-constitutional politics, think back to 1993 in Australia — your year of Mabo, culminating with the December cliff-hanger right in this Senate. That is mega stuff!

Our mega-constitutional politics did not really get under way until the 1960s. It began when Quebec’s provincial leaders began to press for major constitutional changes to go along with patriation of the Canadian Constitution.

Let me explain a little about our patriation problem. Starting off thirty years and a bit ahead of you, we Canadians were much more colonial in our founding. Canada’s Constitution, originally known as the British North America Act (now renamed the Constitution Act 1867), took the form of a British Act of Parliament. As such, it could only be formally changed by the British Parliament. Unlike Australia’s Constitution, the Constitution of Canada, though it was

negotiated and drafted by local politicians, was never ratified by the people. After confederation, when our politicians got together and agreed on an amendment, the British Parliament would pretty well do their bidding and enact the amendment at Westminster.

By 1926, when the imperial conference of that year declared Canada, along with Australia, Eire, New Zealand and South Africa, to be 'autonomous communities' within the Commonwealth, Great Britain was more than ready to surrender legal custody of Canada's Constitution to the Canadians. But, at that time, Canada was unable to relieve Great Britain of this burden and patriate its Constitution. Patriation would take another fifty-six years to accomplish. Even then, in 1982, it would be done without the consent of Quebec — a move which may yet lead to the break-up of our federation.

And why could not the Canadians patriate their Constitution in 1926? Because their leaders, and probably the people themselves had they been asked, could not agree on who or what should be constitutionally sovereign in Canada: what majority of people or legislatures should have the power to alter the Constitution.

Some who favoured flexibility and a strong central government wanted control of the Constitution vested in the Canadian Parliament and a majority of provincial legislatures. But others, led at that time by Ontario, viewed confederation as a compact among the provinces that could be changed only by unanimous consent of the provinces. Quebeckers who conceived of Canada as a compact between two founding peoples insisted that Quebec retain a veto over all matters vital to its distinctive culture.

Failure to agree on this question of how Canada should take custody of its Constitution was disturbing evidence that Canadians had not constituted themselves a sovereign people. They could not agree on where constitutional sovereignty should be lodged in their 'autonomous community' because they could not agree on what kind of community they were.

For about forty years, federal and provincial negotiators quietly beavered away trying to work out a constitution amending formula. In 1964 it looked as though a breakthrough had occurred. 'Constitution coming home', exclaimed newspaper headlines in October 1964. A rather rigid formula for amending the Constitution in Canada, certainly one that protected Quebec's jurisdiction, was the so-called Fulton-Favreau formula which had been agreed to by all the provinces and Ottawa. But then the Quebec government — a Liberal government at that — changed its mind. This government was responding to Quebec's so-called 'quiet revolution' which, since the 1920s, had been converting French speaking Quebec from a rural, Catholic people to a modern, secular society distinguished almost solely by its language. Quebec's provincial leaders had become constitutional radicals. Instead of seeking simply to preserve the powers secured by Quebec at confederation, they now sought new powers that would enable the Quebecois to enjoy the status of a nation within or without Canada.

At this point in our story, another Quebecker appears on the scene — Pierre Elliott Trudeau. He went to Ottawa, took over the leadership of the federal Liberal Party and, in 1968, became Prime Minister of Canada. Trudeau had never subscribed to the ethnic nationalism of the Quebecois, which he regarded as irrational and illiberal tribalism. As Prime Minister, he decided to challenge Quebec nationalism with a Canadian civic nationalism based on strengthening federal institutions and the rights of individual citizens. The fat was now in the fire and we entered our first round of mega-constitutional politics.

Trudeau orchestrated a series of constitutional conferences with federal and provincial leaders, much of which were televised. In 1971 these culminated with a cliff-hanger at Victoria, British Columbia. For a moment, we all held our breath as the first minister seemed to be reaching agreement on the Victoria Charter. At the centre of the charter was Trudeau's *pièce de résistance*: a mini charter of rights, a patriation of the Constitution but — and herein lay the rub — no significant new powers for Quebec. So the Quebec Premier, Robert Bourassa, — who will appear again in our drama — said no. At that time Trudeau did not feel strong or impatient enough to impose a constitutional settlement on Quebec. The Victoria Charter was abandoned. So ended round one.

But our respite from constitutional wars was very brief. Although it was again Quebec that was the primary cause of our constitutional turbulence in the 1970s, it is important to understand that Quebec's demands could by no means monopolise the constitutional agenda. In 1976 René Lévesque's Parti Québécois came to power in Quebec City. Its constitutional objective was to make Quebec a sovereign state economically associated with Canada. This event — the election of a separatist government in Quebec — had a riveting effect on the constitutional attention of Canadians. But by now, in the 1970s, all the talk about constitutional change had unleashed a torrent of constitutional discontents and competing visions of how to restructure the country.

Bear in mind that the most rapidly growing section of the Canadian population is of neither British nor French extraction. This part of the population, dominant in western Canada, bitterly resents the French-English bilingual preoccupations of central Canada and has zero tolerance for any special status for Quebec. By the 70s, premiers of the western provinces were pressing both to increase the economic powers of their own governments and for a stronger regional voice in federal affairs through a restructured Senate in Ottawa.

Further, Quebec's ethnic nationalism was having a demonstration effect on Canada's Aboriginal peoples. Organisations representing these peoples — Indian, Inuit and Metis; nearly a million in all — now pressed for the same right to self-determination as that claimed by the Quebecois. And Trudeau's pan-Canadian nationalism was by no means dead in the water. Much of English-speaking Canada had been won over to the Trudeau vision of a Canada bound together more effectively by a citizenship based on individual rights rather than ethnic diversity.

Now the constitutional project was to work towards an entirely new constitution as the only alternative to the break-up of the country. This era of new constitutionalism concluded with a crashing thud at the end of the 70s with the defeat of Trudeau in the 1979 federal election and the defeat of the Parti Quebecois's sovereignty-association option in the Quebec referendum of 1980. Round two was over.

But — you guessed it, folks! — within days of the Quebec referendum round three of our mega-constitutional derby was under way. Trudeau, who had miraculously risen from the political dead to win the 1980 election, had secured victory for Team Canada in the Quebec referendum by promising to overhaul the Canadian Constitution — in some conveniently unspecified ways — if Quebecers would vote down the separatists' option. This he proceeded to do. But now, as a much more seasoned constitutional player approaching what he knew would be his last hurrah, Trudeau adopted the lyrics of Paul Anka's great song and determined, 'I'll do it my way.' He adopted that as his slogan and determined to change the Constitution his way. And his way meant that constitutional reform would focus on what he called 'the people's package' — patriation of the Constitution with a charter of rights. With or without the provinces' agreement, he told the Canadian people — in Gaullist tones — that he would ask the British Parliament to make these changes.

In the end, governments of nine of Canada's ten provinces, after forcing a few concessions, accepted Trudeau's package of reforms. The one province that did not was Quebec. Its National Assembly, in a nearly unanimous vote that included the Liberal opposition as well as Levesque's Parti Quebecois government party, rejected the changes. But we went ahead with them anyway. The British Parliament, ignoring Quebec's protests, performed its last act as our constitutional custodian and enacted the amendments. The Queen came to Canada to declare them in force on 17 April 1982. Canada's Constitution was now patriated: meaning it could be amended entirely in Canada. It had a new Charter of Rights and Freedoms and it recognised and affirmed 'the existing rights' of Canada's Aboriginal peoples.

'Well,' you might sigh, 'thank God that's over.' Three rounds of that heavy Canadian constitutional stuff is enough. But, of course, it was not over. Trudeau thought it was. He retired modestly into private life with the advice that he had left us a constitution 'set to last a thousand years'. But his successors and, indeed, the leaders of all our national parties remained uncomfortable with a constitutional settlement repudiated by a province representing a quarter of the population and one of the country's founding peoples.

Quebec was not the only serious source of constitutional discontent. The Aboriginal peoples sought explicit assurance in the constitutional text that their existing rights included the inherent right to self-government — a right they had never surrendered to British, French or Canadian sovereigns.

So round three, the only round of our mega-constitutional politics that had produced any concrete results, was not the end. Round four began with four constitutional conferences from 1983 to 1987 with representatives of the Aboriginal peoples. The aim was to secure federal and provincial agreement to explicit constitution recognition of the Aboriginal peoples' inherent right to self-government. We failed. With the exception of a few extremists, Aboriginal leaders who press for this right intend that it be exercised within Canada; that it involve a sharing of Canadian sovereignty on mutually acceptable terms rather than a separation from Canada. But, after four tries, agreement on this issue could still not be reached.

So then, federal and provincial governments returned to the Quebec constitutional agenda. They were persuaded to do so by the victory of the Quebec Liberal Party, now led by Robert Bourassa, over the Parti Quebecois in the 1985 Quebec election. Bourassa presented Quebec's minimal constitutional demands. 'Recognise Quebec as a "distinct society" and make a few other modest constitutional changes and we'll bury the separatists', he said. In April 1987, at a conference hosted by Prime Minister Mulroney at the government's conference centre on Meech Lake just outside of Ottawa, the federal and provincial first ministers agreed to the Meech Lake Accord fashioned around the Bourassa program.

The Meech Lake Accord plunged us into our hottest bout of mega-constitutional politics. This was the first attempt to use our all-Canadian amending formula to make major constitutional changes. And, boy, did we louse it up!

Under the new amending process, constitutional amendments are to be ratified by the federal parliament and provincial legislatures. Most amendments require the approval of the House of Commons, the elected house of the Canadian Parliament, plus the legislatures of seven provinces representing at least 50 per cent of the people. A few amendments — principally changes to the monarchy, the composition of the Supreme Court or the amending formula itself — require unanimous approval of the Parliament and all ten provincial legislatures.

Because the Meech Lake Accord included two of these latter items — provincial nomination of Supreme Court Justices and a restoration of Quebec's veto in the amending process — and because the first ministers insisted that the Accord was 'a seamless web' that could not be taken apart, the unanimity rule applied to the whole package. Thus each provincial legislature had a veto.

To make matters even more difficult, when the first ministers emerged from their closed sessions and unveiled their Accord to an ungrateful nation, they said it was a 'done deal' which legislatures could debate all they wished so long as, in the end, they did not change a word. Well, the legislative assemblies and the delegations of citizens invited to appear

before legislative committees did not appreciate this treatment. There was as much objection to the undemocratic nature of the Meech process as to the contents of the Meech Lake Accord itself.

But the contents certainly did not help. The centrepiece of the Accord was recognition of Quebec as a 'distinct society'. You might well ask what this phrase means. We did — and got some very bewildering answers. On the one hand, it was supposed to give Quebec enough 'oomph' within the federation to enable Premier Bourassa to satisfy Quebec's quest for special powers and status. On the other hand, it was sufficiently vague to enable premiers of other provinces to tell their folks not to worry; that Quebec has not got any extra powers — the distinct society clause had only symbolic significance. The prospects of this exercise in symbolic engineering healing our country's divisions were dim indeed.

The three-year time limit for ratifying constitutional proposals under our new amending formula ran out in June 1990. At that time, two provinces — Manitoba and Newfoundland — had not ratified the Meech Lake Accord so it dropped like a stone to the bottom of the lake, dead as a dodo. So endeth round four.

But, hold onto your hats, round five was soon under way. Premier Bourassa, miffed at the rejection of Quebec's minimal demands, combined with the Parti Quebecois leader, Jacques Parizeau, to organise a Quebec 'Estates General'. This process concluded in May 1991 with a commitment to have a referendum on Quebec sovereignty or the 'best offer' from the rest of Canada, not later than October 1992. This went over like a lead balloon in the rest of Canada, which was in no mood to make any offers to Quebec. Nonetheless, the federal, provincial and territorial governments, together this time with Aboriginal organisations, proceeded with the so-called Canada Round — an attempt to come up with a comprehensive set of proposals aimed at solving all the country's constitutional issues. This produced an accord, containing sixty constitutional proposals, agreed to at Charlottetown in August 1992 by all governments, including the Quebec government, and by Aboriginal representatives.

Although there was no legal requirement to submit this Charlottetown Accord to the Canadian people in a referendum, political pressure to have a Canada-wide referendum, prior to seeking legislative ratification, was irresistible. Quebec, Alberta and British Columbia were already committed to having referendums. There was no way the Mulroney government, at what we thought then was the absolute nadir of its unpopularity, could deny this opportunity to other Canadians.

And so, on 26 October we had a national referendum on the Charlottetown Accord. It was rejected by 54 per cent of the voters overall and by majorities in a majority of provinces. Lest you think that a 54 per cent no vote represents some kind of consensus on the Constitution, let me assure you it did not. The largest majorities against the Accord were in Quebec and western Canada and were based on exactly the opposite points of view: for Quebecers, the Charlottetown Accord did not give Quebec nearly enough; for western Canadians, it gave Quebec far too much.

So we emerged from round five more divided than we were at the beginning of round one. A measure of just how divided we have become came exactly a year after the referendum in the federal election of October 1993. The election virtually wiped out the Progressive Conservatives whose leaders had spearheaded the Canada Round, reducing them from 168 to two seats. A similar fate befell the New Democratic Party on the Left which had strongly

supported the Accord. The opposition benches in the House of Commons are now dominated by the two parties that opposed the Charlottetown Accord: the Bloc Québécois committed to Quebec's independence and the western based Reform Party, so unsympathetic to Quebec it did not even run candidates in that province. The federal Liberals who managed to win a majority and form a government with slight support from Quebec are now the only effective national party. But, for now at least, they cannot touch the Constitution. Their leader, Jean Chrétien, ran on the promise that he would leave the Constitution alone and concentrate on economic problems.

You may understand now, why Prime Minister Chrétien takes that view. Whether he and millions of other Canadians will have their way on this depends entirely on Quebec. If the Parti Québécois wins the Quebec election, scheduled, I believe, now for September, and also wins the referendum it promises to hold on 'Quebec Sovereignty' some eight to ten months later, then, and only then, will we have a sixth round of mega-constitutional politics. My personal prediction is that, even if the Parti Québécois wins the Quebec election (they now have a lead in the polls), they will not win the referendum that follows.

But if I am wrong, I can promise you that our sixth round of mega-constitutional politics will be the stormiest yet. I say this because negotiating the terms of Quebec's secession will be much more difficult than is generally recognised. Not only are there thorny, practical questions such as the division of our enormous national debt burden and the avoidance of new trade barriers, but there is a much more emotive question of the Quebec territory that would be able to secede. The Aboriginal peoples whose lands are in part or completely within the provincial borders of Quebec will not agree to be yanked out of Canada against their will. The lands occupied by these Aboriginal peoples comprise not only much of Quebec's northern frontier but also urban locations in the south of the province, such as the Mohawk reserves around Montreal. The Aboriginal peoples' claims to self-determination are as well founded in law and morality as those of the Québécois. Rejection of these claims by Quebec *sovereignistes* would, for the first time in our constitutional wrangling, raise the threat of communal violence. In round six, if it occurs, we are more likely to be scared to death than bored to death!

Now you know why I am so anxious that we Canadians return to the sunnier, smoother, normal process of constitutional development. Already we are showing that this does not mean a constitutional deep-freeze. Since the end of our last mega-round, by means of a formal constitutional amendment, we have consolidated New Brunswick's status as a bicultural province; through a regional referendum and an act of parliament we have established Nunavut (85 per cent of whose population is Inuit) as a self-governing region in our north-east Arctic; elsewhere across the country we are launched on a process of implementing our Aboriginal peoples' inherent right to self-government on a people by people basis; and our federal and provincial governments have signed an agreement dismantling some of the barriers that impede the flow of trade within our federation. Not bad for twenty-one months since we aborted the last big bang effort.

How about Australia? Are you prepared to do your constitutional reform retail rather than wholesale? I know you have a Constitutional Centenary Foundation and that it was launched in 1991 with a very large agenda of prospective change. As a member of that foundation, I have been following its activities with great interest. Thus far, under the able leadership of former Governor-General Sir Ninian Stephen and Deputy Chair, Professor Cheryl Saunders, the foundation has wisely, in my view, concentrated its energies on a broad based educational

program about the Constitution. In a constitutional democracy, there is much to be said for ensuring that the people know something about that over which they have the final custody.

There is also, in my view, much to be said for letting the centenary of your founding serve as a beacon for renewal and growth of your constitutional democracy rather than an occasion for its reconstruction. One constitutional amendment that would level the playing field for an incremental process of constitutional renewal is an amendment to section 128 that breaks the Commonwealth government's monopoly position in the initiation of constitutional amendments. This monopoly means that most of the proposals that reach the referendum stage, and which are submitted to the Australian people, are designed to strengthen the Commonwealth government's powers vis-à-vis the states or the Senate, whereas polling data show that the public is most opposed to strengthening the central government — more opposed to strengthening its powers than any other level of government. An amendment to section 128 that permitted four state legislatures to initiate referendums, and perhaps also removed the Governor-General's power to block Senate initiated proposals, might produce proposals that have a better chance of passing. But, knowing the enlightened statesmanship required for a Commonwealth government to support such a change, we will not hold our breath waiting for this one.

One formal constitutional change for which the time may be ripe is the adoption of a constitutional bill of rights. I am not overwhelmed by the real gains in freedom and equality that have resulted from our Canadian Charter of Rights. However a constitutional codification approved by the people of Australia may be a more appropriate way of protecting fundamental civil liberties than leaving this matter, as you are now doing, to the Commonwealth Government's discretion in using its foreign affairs power and the High Court's ingenuity in extracting implied rights from the Constitution.

As with Canada, you still have some way to go in working out a mutually acceptable political relationship with indigenous peoples. Their lack of participation in the establishment of the Australian Commonwealth is the one major departure in Australia's founding from the democratic principle of government based on consent of the people. I am doubtful whether an amendment to the Constitution is the best way of remedying this situation in my country or in yours. More fundamental, I believe, there is a change of attitude in both our countries such that the relationship can be based on mutual respect and a genuine sharing of sovereign political authority rather than its imposition by the dominant society on indigenous minorities.

In conclusion, I am going to utter the 'r' word — republicanism. I realise that for some time republicanism has been the biggest constitutional game in town. When I was here earlier in the year, I worked my way through an advisory committee report, seven paperback books and countless scholarly and newspaper articles on the subject. Without a doubt, Australians, among all the democracies in the world including Great Britain, have most thoroughly explored the alternatives to constitutional monarchy.

One point that is evident from this vast literature is that the rationale for shifting from a monarchical to a republican head of state is essentially symbolic. In other words, Australian republicanism would be an exercise in symbolic engineering. As a veteran of Canadian wars about the symbols of nationhood, the one thing I can tell you is that these symbolic constitutional battles are usually more divisive and diverting than their proponents ever expect.

To avoid an exhausting and frustrating round of mega-constitutional politics, you might well wait until there is a wide political consensus on this change. Do not worry republicans, if the new generation of royals continue their raunchy ways, you might not have long to wait. The British might even make the change for you!

Questioner — Could you make some comment on the place of the Royal Commission on Aboriginal peoples and the constitutional changes that may occur as a result of the sixth round? It looks as though the numbers are up.

Professor Russell — The Royal Commission will report next year. Its terms of reference are about as inclusive and broad as they could possibly be. They include the constitutional position of Aboriginal people, self-government, the right to self-determination and all of that. They also include all the practical policy life condition questions that are of such vital concern to our Aboriginal peoples — health, welfare, employment and education. The Commission will make recommendations on all those issues, including the constitutional issue.

I do not know what it is going to say. I am not a commissioner. I chair a research committee for the Commission and we feed in research. What the commissioners will do with it will be up to them. They are now sitting in Ottawa thinking through all these issues. From what I have seen of the Commission and its general orientation, and what you now appreciate about constitutional change in Canada, I doubt whether it will put all its eggs in the constitutional basket. It would be a pretty madcap idea to say, 'Everything we are recommending here depends on some constitutional change.'

I think there will be extensive recommendations on such things as health. One of our most recent problems is a tremendously high suicide rate among teenage Aboriginals. I know a special report on that will come out even before the main Commission report. Employment levels are very low; unemployment levels are staggeringly high. Many of the conditions are parallel conditions to the Torres Strait Islanders and the Aborigines in Australia.

I think the Royal Commission will be concerned with saying to all the governments involved, and indeed the private sector and non-government organisation sector, 'Here are our ideas about these practical problems.' So the recommendations will not be simply with regard to the Constitution. The Commission will not duck the Constitution. It will deal with it and it will be interesting to see what it has to say on that.

Questioner — I have two questions. The first concerns an amendment to section 128, which the voters are inclined not to amend. Would you consider citizen initiated referenda for changing the Constitution as an amendment to section 128? The second concerns the symbolic nature of the republican debate, which, in many ways, you seem to me to describe quite accurately. The question concerns one article of the Constitution which is, or certainly has become for most of this century, symbolic and which could be changed by amendment and which is one of the few amendments to the Constitution that I think might get through. That is section 59 of the Constitution, which gives the monarch twelve months after the Governor-General has consented to legislation by the Commonwealth Parliament to simply disallow that law. This has never been used.

I believe that in 1926 there was a British-Commonwealth convention or proposal that it should not be used in regard to any of the venues, as they were called in the dominions. It

would be simple, I should think, for the Liberal Party to propose only a repeal of section 59 as a way of dealing with the constitutional parts of the republican debate.

I believe it would be very difficult for the government to say, 'No, we won't look at such a referendum at all.' I would have thought that the present government, with its ostensible republicanism, would have found it very difficult to refuse a simple referendum of this kind. Indeed, that is one way of bringing out the symbolic or non-symbolic aspects of the constitutional debate.

Professor Russell — Let me take your first question. Citizen initiated referenda, CIR, seemed to be the flavour of last week. It was discussed at a conference in Melbourne. Professor Cheryl Saunders in this morning's *Australian* — if it is accurate — is now favouring this. I have a great regard for her; nonetheless, it is not a proposal I support. I am terribly afraid of single issue interest groups getting up whatever number of signatures it takes, 50,000 or whatever, and taking every issue — vegetarianism or whatever — that they are interested in and trying to put it in the Constitution.

I am a minimalist on the Constitution: you should hardly ever touch it. It should not deal with whatever bee every little interest group has in its bonnet. If you told me that it was going to take much more than 50,000 — it was going to take something like half the Australian electorate — then I would say it might as well go with the four state legislatures that I suggested. If any causes caught on to the extent that something like half the Australian people would sign a petition, I think you can be sure that legislatures, either Commonwealth or state, would pick up the proposal. So I do not favour it. I do not like these single issue interest groups trying to manipulate the Constitution. They would not get anywhere and they waste a lot of money too.

With regard to the second question, we have the same sort of clause in our Constitution, although it is a little more devastating. For two years the Governor-General can reserve a piece of Canadian legislation for the British cabinet to look at. It is still in our Constitution, and we find it an anachronism. We live with it and, if it were easy to control the constitutional agenda and, just as you suggest, put that one in front of the people, I might be sympathetic to it. But our experience is that it is almost impossible to control the constitutional agenda once you get a ball rolling. I would be very surprised if the republican movement in Australia would be content with that. They would want to roll a lot into a big mega-constitutional bash.

Questioner — Did you think any of the rounds of Canadian constitutional reform were going to succeed?

Professor Russell — I am scarred. I am a founding member, along with seventeen other Canadians, of the Friends of Meech Lake. We got clobbered. We thought we had a fighting chance and we were convinced that if we could win we would not have what the Canada Round turned out to be and we would not have to take the chance we are taking in the next few months in this possible sixth round. The Victoria Charter I thought might go through. Bourassa was very weak. If Trudeau had been a little stronger, I think he might have been able to carry the Victoria Charter through.

There was not any chance in the second round. The whole new Constitution was just foolishness. That was like saying that you will eliminate the states in Australia. It is just out of

touch with reality. That was not going to happen, any more than you are going to get rid of your states. So that was just nonsense. Meech had a hope. It got pretty close in the end. In the last few days, it really depended on who said what to whom. The Premier of Newfoundland, Mr Mulroney, and his colleagues had a sort of falling out at literally the eleventh hour. If they had got Newfoundland, they might well have settled the Manitoba problem. Meech was very close.

Once we were into the referendum, the Charlottetown Accord had no way of succeeding. Indeed, I would go even further. It is going to be very difficult, under our current amending system, to accomplish what I call a macro-constitutional reform once we factor in the referendum, because we have to get popular majorities in every province. For a big package it is tough. I just do not see that on the cards for a long time.

Questioner — You would be aware that the Canadian Constitution appears a much more centralist document than the Australian Constitution and that judicial interpretation in Australia has led to a very centralised system. I have often wondered why the Supreme Court of Canada has been so reluctant to take a similar course.

Professor Russell — Two reasons: the precedence on constitutional interpretation was set first by an English imperial court. The judicial committee of the Privy Council was our final court up until 1949, and in a much bigger way than it ever was for Australia. It really believed in classical federalism and in a very balanced federal structure. It set that into our constitutional law.

The Supreme Court came to be the final court in the 1950s. The judges were very sensitive to the fact that they were living in a highly federal society. Despite the Constitution, Canada is a highly federal society. You do not easily centralise power. If any Canadian politician in Ottawa stood up and said, 'I think it is time we got rid of the provinces', they would put him in a madhouse; they would lock him up.

While the judges in the Supreme Court have nudged interpretation of our division of powers in a centralist direction, they have done it very gradually — not very dramatically and not in a very big way. They are looking over their shoulders. To keep their credibility in our country, they cannot be brutally centralist. For instance, they could never do with our foreign affairs powers what the High Court has done with yours.

Questioner — Do you think that if Quebec does not win the referendum it will try to secede? Can it secede and what stance, if any, would the United States take on such an issue?

Professor Russell — If they lost the referendum, I think Quebec would not try to secede. Indeed, one of the questions is: what if they only got 51 or 52 per cent? How big a majority do you need to justify a big change like that? Even with 50.1 per cent, they might hesitate. But, if they get a majority in the referendum, one they can say is legitimate, they will press ahead with secession and we will negotiate it. The United States will not be a party. Quebec is very keen on retaining its participation in the North American free trade arrangement and would love to get an absolute promise from Washington that if Quebec separated it would still have all the benefits of participating in that agreement. Ottawa has neither confirmed nor denied what it would do — and I think that is entirely proper. It is staying out of that.

In the negotiations, I think the tough question will be the position of the Aboriginal peoples because it deals with territory — with turf. With territorial disputes, we have only to think about Bosnia and the break-up of the Yugoslav federation to have a sense of what happens when ethnic groups fight over territory. Whose territory really is it — Cree, Mohawk, Algonquian, Inuit or Quebec law? We know those are very tough issues. If they are not resolved in a mutually agreeable way — agreeable to the Quebec secessionist government, the government which won the referendum, and agreeable to the rest of Canada, including Aboriginal people — I do not think Quebec would say, ‘To hell with you, we are doing it anyway.’ If they did, it would in effect be an attempted coup. I hope my government would put a coup down — which is an ugly way to speak about it.

We have many economic and legal responsibilities to Quebec citizens. There will be at least 40 to 45 per cent who do not vote for secession. You cannot just change the Constitution by force. I hope the rule of law prevails. If a government of any of our provinces ignores the constitutional rule, I hope my government has enough guts to back up with force the maintenance of our Constitution and all the laws under it. I am hoping my government would not permit a de facto separation that was unconstitutional and illegal.

Questioner — There seemed to be a contradiction in your speech. On the one hand, you said that you are very much opposed to mega-constitutional reform, yet on the other hand you suggested that the process of constitutional amendment should be left to what you called the normal processes, which included changes in custom and convention and judicial interpretation by the High Court. It seems to me that the extension of the external affairs power in recent years by the High Court is verging on mega-constitutional reform in itself. It is certainly very substantial constitutional change.

There are other concerns that many Australians hold about the High Court taking upon itself the role of an unelected third chamber of the Australian Parliament. It seems to me that it is contradictory to say, ‘Leave it to these normal processes.’ I do not regard them as normal processes at all; I would regard them as undemocratic and potentially authoritarian processes. The fact that section 128 does not result in every proposal that is being talked about getting through does not seem to me to be an argument to say that we should not talk about them.

Section 128 is the ultimate safeguard. My philosophy would be to let everyone put forward in public debate whatever proposals for constitutional reform they wish. Let these proposals be winnowed out, because in the end section 128 means that nothing will get through unless the Australian people want it. Let us not try to dampen down the constitutional debate that is going on in Australia. I think it is a healthy debate. That should be the way we amend our Constitution in the future: public debate and then, if the proposal passes that test, a referendum as provided for under section 128. To hand the whole process over to what you called ‘normal processes’ would, I think, be very dangerous.

Professor Russell — If I can clarify my position, my normal processes include the occasional amendment to the Constitution. It is not only High Court decisions; it is also political practices. Those that really stick, particularly the conventions of responsible government, for example, really have a highly democratic root. So do a lot of the statutes that are, in my view, part of the constitutional fabric. So I would not put all this normal process on the High Court’s shoulders.

Like you, I am alarmed at how far the foreign affairs power has gone, particularly in relation to fundamental rights and freedoms. I think Australia now has a kind of ragtag, unsatisfactory way of handling the constitutional definition of citizens' fundamental rights. You are doing it primarily through the implicit rights that the High Court is carving out in a very inventive way under the Constitution and actually legislating; also through the Commonwealth government using its foreign affairs power, which is solely at its discretion, and deciding which elements of which foreign treaties will be given a fundamental status in Australia.

I do not think fundamental rights in a constitution should be treated in that ragtag fashion. I think it is time Australia got serious about a constitutional bill of rights. I am not a great charter fan. The Charter of Rights in Canada is okay — it has done some good and it has also done some bad — but I think it is the right way to go. Most of the Western democracies have done that. I support a constitutional amendment or at least a constitutional bill of rights. I think strategically that is the only way a Commonwealth government might back away from its foreign affairs power.

I have no optimism that under your current amending system the Commonwealth government would reduce, by an amendment, its foreign affairs power. I do not see governments that I have known in Australia in the last few years having any interest in reducing their power, but they might support a bill of rights. Just two days ago, I heard a member of the cabinet say that it was something that interested him. Your Minister for Foreign Affairs, Senator Gareth Evans, has been on record for a long time. He chaired a committee of your Parliament.

So there is a lot of support in the governing party here for a bill of rights. Maybe its time has come by a discrete amendment — an occasional amendment. I am not against the people talking about changes. What I am against is the politicians getting together in some sort of elaborate way and trying to do these big package deals.

Cultural Relativism and the Attitude of Certain Asian Countries Towards the Universality of Human Rights

Professor Henry J Steiner

My remarks today are part of a work in progress. My topic is the theme or argument of cultural relativism in relation to a broad presumption, held particularly but not exclusively in the West, of universalism in human rights. The examples that I shall draw on at the end of my remarks to illustrate one of my points come from East Asia, especially the People's Republic of China (PRC) and Singapore, but also from other South-East Asian countries.

In a sense, this topic has more currency and geographical relevance when examined in your country than in mine. But these issues are of a global significance. There was a great tug and pull, a contest of wills and political systems, at the recent Vienna World Conference on Human Rights on precisely these notions.

Introduction

Let me introduce my topic by telling you briefly what I mean by human rights and cultural relativism. Human rights refer to the international human rights movement that started during the closing years of the Second World War. We are familiar with the Nuremberg trial. In a sense, it constituted the movement's official launching, one of its decisive moments. Over five decades this movement has grown in ways that no one, surely not Jeremy Bentham, would have believed. If Bentham thought that rights

were nonsense on stilts for the English, what would he have thought of the even bolder imposition of this notion on many other cultures?¹

We talk today of the human rights movement as it is expressed through its so-called International Bill of Rights — that is, the Universal Declaration of Human Rights of 1948, and the two principal covenants that became effective in 1976, one on civil and political rights, the other on economic, social and cultural rights. Over 120 states are now parties to the two covenants. It is fundamentally civil and political rights that figure in this discussion.

By cultural relativism I mean a stance which can range from very strong to very mild — a stance that asserts that one or another aspect of international human rights or, some would argue, the rights corpus in its entirety, has no application to a given culture. In a typical version, relativism holds that all values are encoded in cultures. Notions of right and wrong differ throughout the world because they inhere in different cultures. Hence claims that, say, the International Bill of Rights is binding universally must be exposed as pretensions, as aspirations of one political culture to which those rights are familiar to impose on all others.

The extreme version of relativism goes well beyond describing a diversity of beliefs about right and wrong among cultures. It argues that since beliefs about rights stem from socialisation within a given culture, no culture ought to impose what must be understood as its own ideas on others, whether or not it endows its own ideas with the flattering attribute of universality. Some relativists would further argue that each culture ought to respect the values of other cultures, but such tolerance or respect does not seem to be required by the relativist position. It leads to patent absurdities; ought one to respect slavery or genocide within another culture?

Relativist arguments thus qualify or reject the trend of the postwar movement toward viewing human rights as universal; as the same everywhere. But relativist arguments are not totally at odds with this human rights corpus, this International Bill of Rights. One important aspiration of human rights norms is to preserve difference, to allow groups to maintain their own cultures, languages, religions. Each culture has the right to survive, insulated to some extent from the forces of the larger world that would uproot some of its essentials and perhaps destroy it in its entirety by absorbing it into, say, mainstream global modernisation. This other aspect of the human rights movement, the value placed on the separateness and survival of cultures, is not entirely distinct from the relativist position that I will explore today — namely, universal human rights cannot touch my culture, they are not really universal.

The fading away of the Cold War accompanying the collapse of the Soviet empire brought to an end the decades-long debates about socialism versus capitalism: we socialists have a different conception of rights that, for example, stresses the meaninglessness of many liberal rights like free speech while giving paramount importance to economic and social rights. One might have thought that the world community could at last move towards universalism and avoid diversion to these polemical exchanges between East and West. That thought turned out

¹ Harry Evans, the Clerk of the Senate, observed in his welcoming address to Professor Steiner that he thought it was Jeremy Bentham who had said that the idea of universal human rights was not only nonsense but nonsense on stilts. Evans went on, 'However, notwithstanding that statement by the distinguished philosopher, the historians of the future may well recall that the idea of universal human rights has been the most powerful idea ever to come into the human mind. It has literally brought down kings, emperors and dictators, and destroyed empires in recent times.'

in a short time to be chimerical. In place of two vast antagonistic ideologies, we now see cultural and other forms of particularism exhibited in a great range and number of ethnic conflicts. The extraordinary violence that has attended these conflicts is all too familiar to us: abhorrent actions, systematic destructiveness.

New oppositions displaced the capitalist-socialist, democratic-Marxist conflicts of the cold war period. Those oppositions included the example that I will use today: radically different views of human rights in parts of the third world and in liberal Western states. Relativist argument became resurgent. Other trends — political, philosophical, cultural — encouraged this resurgence. For example, our fragmented, ‘post-modern’ world sees everywhere the growth of multicultural societies, through demographic shifts including immigration and through cultural changes, often accompanied by a stress on the particular rather than universal. In this multicultural world of alternative understandings the cultural relativist debate fits as does a hand in one’s glove.

What international human rights are about

Let us return briefly to the meaning of ‘international human rights’ so that we can better understand what the new oppositions are. There are many ways of conceptualising and categorising the different rights involved, most of which are cast individually in the universal human rights instruments — every person shall have the right to ..., no person shall be subject to ...

A useful categorisation for our purposes, one that anticipates our later discussion of cultural relativism, starts with the core rights to physical security or bodily integrity. The second category includes the familiar due process rights, particularly those relating to police conduct and judicial trials. A third category involves a range of equal protection or non-discrimination rights, which have been of the essence in the international human rights movement. Those rights have extended beyond racism and religion to include gender relations in ways that have been controversial and challenging.

We move next to the category of associational and expressive rights, including the right to form all sorts of groups, and thus to speak with a collective and aggregated voice through pressure groups such as political parties, religious, cultural, social or athletic groups or whatever. The fifth and final category for our purposes deals with modes of political participation, including particularly elections.

These categories fit roughly on a spectrum moving from a more-or-less universal consensus over norms (such as physical security norms like the prohibition of torture), even though state practice often falls short of compliance, to much dissent over the content of norms, as with respect to free speech and the forms and substance of political participation. That is, at the level of agreement over formal norms, we move from universalisation to dissent that is often based on arguments of cultural relativism. These categories are by no means a precise tracking, but they have something of that image to it.

I want now to suggest some of the animating ideas that I understand to underlie the human rights movement, although I cannot assert that everyone would see them in this way. There is a lot of dispute. Those ideas are undeniably related to Western liberalism, and the attacks on many (not all) human rights as growing out of the Western liberal and democratic traditions

cannot be satisfactorily disposed of simply by stating, 'Yes, but you signed up. This covenant has 120 parties. Don't come and whine afterwards. If you did not like it, you did not have to sign it.'

There were many reasons for signing, such as buying into an accepted and respectable international discourse when there did not appear to be the remotest chance at the time of ratification that the human rights movement would have any effect within the country concerned — say, Zaire, or the former U.S.S.R. Some of the most violent and untrustworthy people on earth were proud signatories of many human rights instruments, and had achieved until recently a formal record of ratifications way ahead of the United States. So ratifications do not mean everything. They may indeed mean nothing, although generally I believe that ratified human rights instruments exert, even in repressive societies, an internal force and persuasiveness that will over time reveal themselves — sometimes over a lot of time! Consider the transformation of Eastern Europe.

Let us continue with the identification of some animating ideas of the movement as a whole. Certainly individual dignity, autonomy, choice and self-realisation are conceptions that lie at its core. Both in national bills of rights and in the treaties, the individual remains the starting point, while the state is the characteristic bearer of the duties correlative to the individual's rights. We find only rare references to collective groups like peoples, although one of the regional arrangements, the African Charter, includes the words 'people's rights' in its very title and it is quite insistent on references to collectivities as it goes ahead.

A second notion would be that both types of the fences that John Locke talked about in relation to rights are much in evidence in these basic instruments — that is, fences between us and the government whose inviolability should be assured by the courts, as well as fences between you and me, among all of us, which government must safeguard to assure that we cannot trespass on others' bodies, reputation and property — that we no more than the state can violate an individual's rights with impunity. Governments' obligations then go well beyond a 'hands-off' idea; governments indeed must lay firm hands on society, must legislate and regulate and enforce and award compensation and punish, must act affirmatively to assure the rights that these instruments declare.

A third notion invokes the maxim of Lord Acton — power tends to corrupt and absolute power corrupts absolutely — that informs the entire human rights movement. It is distinctively relevant in today's post-decolonisation world in which many new states as well as older ones have vastly increased their powers and mastered the modern technology of repression. One could well argue that the need for the protection of the individual is all the greater today than when the world had more diffuse and less state-centric political arrangements, less concentration of power at the centre of territorially defined states, less capacity to penetrate everywhere. The anti-idealisation and suspicion of the state that inheres in human rights norms remain among the healthiest aspects of the movement.

A fourth notion is that of an open and pluralist setting in which non-governmental associations interact with government. Those associations are very much part of a complex interlocking governing process. Human rights protect the degree of collective action through associations that characterises modern societies. Indeed, the charge has always seemed to me overstated that human rights are entirely individualistic and that Western cultures are so individualistically based that they simply cannot grasp the vast differences in the Asian,

African, Latin American and Middle Eastern cultures, with their communitarian and collective trends.

Of course there is a basic truth to some of these assertions; Western states are not formed to the same degree as many other states of deep-rooted ethnic, religious and linguistic communities each of which may have its distinctive inner life and organisation. But the assertions go too far in labelling the West as entirely individualistic. People associate with others of the same ethnicity or religion in forming what may be essentially identity groups. People achieve political voice by gathering in groups, exerting advocacy and pressure, amassing funds and so on. Groups constantly interact. This group pluralist process is vital.

Finally the human rights corpus is permeated by a deep doubt. I would not say scepticism; doubt may even be an overstatement. Human rights norms assume an open field for the ongoing search for any kind of truth, imposing an obligation on those who have found their truth to leave open the processes of inquiry for others. I may be committed to my fundamentalist belief, but I cannot impose that belief on you.

One recent contentious position within the human rights movement, accelerated by the collapse of what our President Reagan called the 'evil empire', has been the emphasis on democratisation. That is, many states now assert that the human rights instruments require one more or less concrete form of political and social organisation that we know as democracy. Specific formal characteristics are stressed, such as periodic elections. This position and related pressures have provoked a sharp debate with numbers of states like the PRC, Vietnam, Singapore and others in East Asia.

Human Rights Discourse of Relativism

The aspirations of the movement toward universality are apparent on its face. One does not talk in human rights instruments of Americans or Australians, Cambodians or Bolivians, Nigerians or whatever. One talks of rights that inhere in us by virtue of our simple humanity, by virtue of being human. These are abstract postulates; they abstract human beings from their many particular contexts and treat all equally. When applied to me, Henry Steiner, these postulates mean that I am purged of my different partial identities — perhaps not in all respects such as age which puts me in some ways in a distinct category (although I increasingly think that age would be a nice thing to be purged of). I am purged of my religion, race, and in more and more respects purged almost completely of my gender. I am status free, and accorded rights as an abstract human being. That method has an implicit universality in it.

The norms of the universal treaties and declaration also make no concession to relativism as such. Even the recent human rights treaty that reaches deeply into culture to declare rights of children does not distinguish among Asian and African children, or between Christian and Islamic children. It speaks of children in general. When however you look at the regional conventions, particularly the African ones, you see some norms that are meant to be distinctive to the region rather than necessarily applicable to human beings everywhere.

The cultural relativist challenges this universal aspect of human rights. In today's circumstances of the human rights movement, what does this discourse of relativism mean? How has it changed during recent decades? What does its evolution signify?

In the debates on this topic, the concept of culture is used in a very diffuse way. In the anthropological literature, we find a multitude of pages about how to understand the mythic, symbolic or ritualistic aspects of culture. Such sophisticated questions are rarely asked in the politicised debate about cultural relativism involving human rights, whether at the world stage at the recent Vienna Conference, at the UN General Assembly or in regional or bilateral contexts.

The idea of culture in these debates may be rooted in religion or in a tradition that may shade into legal custom. In the argument over cultural relativism in the East-West debate prior to the collapse of the Soviet Union, the idea of culture was particularly applied to states by virtue of the basic political and economic ideology that they were said to express: Marxism-Leninism or democracy, socialism or capitalism. You think of it this way, we think of it differently. Hence, the Soviet Union argued, we emphasise different kinds of rights within our broad political ideology, such as economic-social rights, or we emphasise that citizens merit rights only if they perform their duties.

The idea of culture can also be used so diffusely as to mean simply a way of life. Sometimes the cultural relativist uses the concept in the broadest possible way — 'Your American or Western culture is alien in every sense to our, whatever, Islamic-based or Asian community-oriented culture.' Sometimes it is applied discretely to a given practice that is isolated from a more complex cultural web, such as a form of punishment.

The concept may also be used to defend a practice that is not state imposed but that has been institutionalised in popular culture. Consider for example female circumcision or, as it is increasingly referred to, genital mutilation. That practice is not religiously based in the parts of Africa and to some extent in the Middle East where it is prevalent, but nonetheless has become a prime debating field for cultural relativists: the strong feminist and Western challenges to these practices, the rage even of African feminists about the ways in which that attack has been made. Defences of this practice are rooted deeply in custom, in ways to which many Africans would say the West is supremely insensitive.

In current human rights debate over cultural relativism, we find a dangerous conflation of culture with state. That conflation benefits the state viewed by others as a violator, for that state can advance in defence of its practices all the traditional justifications in support of cultural diversity: the preservation of difference in an increasingly homogenised world, the respect for different ways, the protection of more fragile cultures against the cultural imperialism of the West, and so on. Indeed, it seems to me that some states today, including several in East Asia, invoke the justifications of cultural relativism in a hypocritical effort to sustain in power those who, at the moment, hold it.

Of course the assertions of large cultural differences may be incontestable; what is contestable is the implication of those differences for practices viewed by, say, the West as violating human rights. The Vietnamese are different from Americans. Well, that is not a very astute observation, but it is a starting point leading us then to ask: what do we make of that difference? Do we say that each state then goes its own way? Or do we continue to contend that there are universal norms embracing all cultures? If so, how do we justify or give specific

content to that contention? Beyond postulating universality, or drawing in a positivist spirit on the many widely ratified human right treaties, do we seek commonality of standards by looking into each culture to see what is shared among them to form a minimum common standard?

There have been well developed methods in the West to justify universality of rights. We have studied these methods and justifications in political and moral theory. They range from Locke to Kant, and then to nineteenth century and contemporary theorists like John Rawls. Postulates about rights and human beings, and related conceptions of contractarianism, states of nature and veils of ignorance, are all familiar ways of justifying individual rights in the West. That Western tradition developed within a culture with shared icons and great figures.

To apply that tradition of justification of universal rights to cultures in which contractarianism is genuinely nonsense on stilts — with all of its assumptions about a state of nature — and to argue about states of nature or veils of ignorance to a culture resting on a cosmology that hardly treats human beings as the beginning of all things may be a patently ineffective way of trying to communicate the importance of universality.

Given the complexity of developing justifications that speak to the East and South as well as to the North and West, it is not surprising that the human rights treaties are shy on justifications. Their norms rest principally on terse postulates of equal human dignity, deep elements of faith. That is all that the preambles to the covenants say. They go no further.

Challenges to the West and to Rights

The efforts to defend non-Western parts of the world against the West's cultural as well as economic imperialism is not a new phenomenon, nor of course have attacks on the part of the West toward the modern and secular come exclusively from other parts of the world. There was, for example, a strong, conservative Catholic reaction in Europe in the late eighteenth and early nineteenth centuries to the trends toward markets, liberalism, science, and secular life. Thinkers like Joseph de Maistre attacked the trends of that period on grounds that, when translated into our very different modern idiom and context, sound somewhat like the arguments of Lee Kwan Yew, who talks about the need to support Asian values in Singapore. Today, he and others argue that a traditional Asian stress on community values, discipline and duty is surrendering to atomism, individual licence, lack of common decent values, and so on. These are complex and similar notions of traditions bowing to uprooting and destabilising change in which new ideas, beliefs and faiths and new centres of power emerge. (Of course, there is an irony in such arguments issuing from a state like Singapore, which is on the forefront of numbers of trends like materialism associated with the West.)

British imperialism in its heyday moved around the world, introducing new types of consciousness accompanied by related new legal forms like the mortgage. We know that such forms, in regions like India and Burma, had massive effects in destroying traditional arrangements of land holding and creating new patterns of commerce and life. They encouraged people to act in ways totally outside their culture's traditions. Many then too attacked Western imperialism for its profound insensitivity toward cultures that had an integrity and separateness from the rest of the world. Today we confront a more complex question in considering such attacks on Western cultural penetration: how much of that inner

integrity, cohesiveness and separateness of non-Western states remain after decades of colonialism followed by decades of Western economic, political and cultural penetration?

And today arguments based on preservation of cultural distinctiveness and integrity resist the introduction of rights rather than the mortgage. Let me illustrate the kinds of deep challenges that can be made. A cultural relativist might assert that a given culture is characterised by notions of duty rather than of right, notions that both foster and reflect a very different type of social order. Or the oppositions might be between individualism and community, or secularism and religion. The duty-right contrast refers to something distinct from the notion of duties that are correlative or corresponding to rights — for example, that my right not to be tortured imposes a correlative duty on the state not to torture. The duties here referred to are generally those of individuals rather than of the state. Judaism, Christianity and Islam offer many examples of duty-based rather than rights-based notions — the individual more significantly a duty-bearer than a rights-bearer.

In different religious traditions and in many tribal societies, individual duties may run diffusely through the society. Or they may run, as in the African Charter on Human and People's Rights, concretely to family members or to elders. Indeed, in the African Charter there is an attempt to develop these conceptions to the point of imposing a large duty of loyalty to the state itself and its transient managers. The conception of right with its sense of individual possession and autonomy is alien to such notions of duty. The duty tends to socialise life by drawing us all together rather than to fragment us as some would say rights discourse does.

Rights are often linked to remedies. We think of the right and remedy together. What good to me is my right if I don't have a remedy against those violating it? In Western liberal culture, the remedy is frequently thought to be judicial. A duty orientation could be very different. The remedy may be divine, setting the world straight in a different way. A violation of some duty may be worked out informally within the community, rather than through distant institutions known as courts. Such characteristics of a duty-oriented culture may be vital to understanding the relativist objection — namely, that importing the culture of rights may tear apart community ways of settling disputes in a more traditional and culturally accepted way.

The very idea of civil society may be at odds with a duty-oriented society that tends to be more interrelated, more internally integrated. The notion of a vibrant private sector of individuals and institutions marshalling power, inventing ideas, putting pressure on the state, and displacing governments at elections may be anathema to a culture in which duties are meant to be continuous and not open to popular re-formulation.

Problems in the debate

I would like to sketch some of the problems that I see within this debate. Argument is often very broad and general so that, say, those taking the position of cultural relativism do not make particular what their claims are — whether, for example, they object to universal norms about political participation or about procedural due process in one or another form, or indeed whether they claim that a culture has the right to torture or to ‘disappear’ political opponents.

The debate can become a kind of hopeless exchange of massive insults as universal human rights are resisted without any definition of just where the sore spots in a given state are. Once you define these sore spots, you have a much better chance of coming to terms with the objections. If the culture of rights as a whole is objected to, on grounds that its introduction into a given state may radically transform that state and uproot its traditional communities, one is entitled to ask how many cultures today can claim the kind of integrity, purity and cohesiveness that could have been claimed by India or Burma of the eighteenth and nineteenth centuries in their resistance to British colonialism.

We have seen too much interpenetration of cultures during this century to be able to identify, outside of smaller and territorially coherent communities like some types of indigenous peoples, many examples of states (for, after all, cultural relativism is an argument advanced by states to resist human rights) speaking for distinct traditional, coherent and relatively pure cultures. In fact, one of the many ironies in contemporary argument is that the very states taking positions of cultural relativism may be those intent on quashing aspects of traditional culture within them that block some aspects of modernisation, national unity, or whatever may be in the rulers’ interests.

There seem to be basic trouble areas that come up time and again in arguments over cultural relativism. Perhaps the most significant is gender, related to sexuality and family and discrimination. Also, religion — apostasy, blasphemy, equal protection for religions — remains a fundamental divisive issue in parts of the world. Political participation, dissent and democracy raise further vexing problems for many countries. How is a country governed? Who holds power? How is power exercised?

Consider some aspects of the Bangkok meeting among many Asian states, prior to the Vienna World Conference on Human Rights. That meeting brought most Asian governments together, to prepare positions to be taken at Vienna. It had more of a relativist ring to it than the comparable regional meetings prior to Vienna in other parts of the world. What emerges from Bangkok is the sense that, yes, some rights are universal, but basically one must be very attentive to local tradition, custom and culture.

The first broad point is that the argument of Asian states about relativism returned to some of the classic themes of an older international law, like a stress on state sovereignty and domestic jurisdiction. The state is indeed sovereign in every respect, equal to all other states and subordinate to none, inviolable within its frontiers even with respect to international organisations. Cultural relativism here is linked to, at times almost merges into, traditional reaction against the ‘interventionist’ character of the international human rights movement — intervening with rhetoric, with resolutions and investigations, with sanctions and at times

with force. Such was China's position in its important White Paper on human rights a few years ago.

The second and related point made by the Asian states is that the West is always posturing, and that its hypocritical lecturing should cease. The record of the West from slavery and colonial domination to the holocaust, to two world wars, to massive poverty and underclasses in numbers of countries, should lead Western states to stop claiming moral leadership, and to stop insisting that rights which it failed to honour as little as a few decades ago should today be honoured by states at earlier stages of economic development.

The third point is that, to some extent, the critique of human rights growing out of the Asian challenge seems at times more relative to time than to space. As used by countries such as Singapore, the critique says in part, 'Well, maybe there is an evolution toward rights, but don't forget that you states in the West took several centuries to move in that direction.' Changes in the West that occurred a century ago or less are now considered sacred. In my country, women gained the franchise as a matter of constitutional right only in this century. Many other protections related to freedom of speech and equal protection of the laws were declared by our Supreme Court only in the decades after World War II. So, some Asian states say, do not expect us to move with great speed now toward realisation of human rights. Progress in many sectors must be made before Asia can absorb more of the West politically. At a later stage we may be able to, but now we must censor the press, control dissent and stamp out ethnic conflict through careful control. We must have preventive detention to get rid of trouble-makers; we cannot afford disruption; we need political stability.

Finally, there is a notion that economic and social rights, the welfare rights to food and shelter and so on, have such transcendent importance in these countries that civil and political rights, which remain the core issue in cultural relativist debate, simply cannot be allowed to interfere with conscientious efforts to bring a better standard of living to many people. If states allow too much popular participation, there will be chaos. The five or ten year plan may fail. There is much more that one could say, but you will be happy to learn that I shall resist the temptation to say it, so as to allow time for some questions.

Questioner — You talk about surrogate discourse in terms of the government's approach to these issues in Asia, I wondered if you would like to comment on what seems to be yet another alternative discourse on human rights, which is actually coming from the non-government sector in Asia. For example, at the meeting in Bangkok before Vienna, you referred to the declaration of states, but at the same meeting another declaration came from non-governmental organisations, from a group of people much more closely linked, it seems to me, to the kind of discourse that we are dealing with in terms of universality and indivisibility. In talking about the positions taken in countries in Asia, for example, it seems to me that it is important to recognise that that is very much a state discourse and that other discourses do exist. I wondered if you would like to comment on that.

Professor Steiner — Those are perceptive comments. One of the great problems in the relativist debate was and remains: who speaks for the culture? When, for example, the PRC in its recent White Paper asserts that non-intervention and domestic jurisdiction are the cardinal principles; and that the proper field for action in human rights should be restricted to traditional north-south issues and selected traditional issues like non-racism, whose voice are we hearing?

Why is the government entitled to speak for the entire Chinese people? Of course it is not so entitled. It remains in power pursuant to no popular mandate, no elections. It suppresses dissent ruthlessly. So in many of these cultures non-governmental organisations, such as those gathering at Bangkok, intellectuals, the dissenters and a dissenting press may take positions that, in many respects, are very congenial from a Western perspective.

The West should not be dogmatic and take the position that all other cultures must comply at once with every comma and period of the universal human rights canon. Such a position is nonsense; we took centuries and clearly other countries will take a long time as well to institutionalise the forms and spirit of popular participation, to institutionalise respect for difference. The stress thus far in the human rights movement has been on stopping torture and killings, and even at that basic level we have seen the difficulties of arresting abominations over the half century of the human rights movement. Realising notions of free speech and participation rights will not be realised overnight in these repressive countries. That we all know, and in setting their priorities, non-governmental and inter-governmental organisations act consistently with that knowledge no matter what they and the international instruments say.

One of the most revealing subjects for thinking about who has participated in the formation of positions about human rights is the status of women. In many cultures, leaders and other men speak entirely for women. But in those cultures, many women may totally accept, while other women may not accept, the structures of religious or other belief that consign women to a certain way of life.

One of the very difficult issues in the debates over cultural relativism is precisely who is formulating a position, even when you do not witness explicit political dissent. Should the position rejecting universal values — say, with respect to equal protection — be accepted if the voice of the subordinated or oppressed community is heard to say, ‘Yes, we acquiesce in what others may see as our oppression, but we see it as part of our status and part of our ordered world’? It is a tremendous issue.

Questioner — I value the idea that you put before us so clearly. I think I am a remnant of responsible citizenship. I believe that we have lost sight of the whole view of democracy and the democratic processes. It seems to me that to get back to recognising the sovereignty of the person, we need to recognise our responsibilities. When we said, ‘We, the people’ in the United Nations charter, most of us in Europe meant it, but it has not been happening. I believe that it is time we found a way to express our universal concern for human beings by arranging — through banks, not fund-raisers — a method of subscribing voluntarily for the first few years to United Nations humanitarian work so that we make it clear that we do care and we are involved.

Professor Steiner — I certainly share your view about the need to support the humanitarian efforts. The world cries out for it in place after place. I simply say: as vital as that work is, I am always torn by the choice between charitable contributions to movements which have some promise of transforming structures and those that deal with alleviating today’s miseries. Humanitarian relief work will change none of the entrenched structures of oppression, of denial of rights and the consequences of those denials. As vital as that work is, it is only a companion to the more significant work of transforming the structures of government.

Questioner — I am from Burma. I taught for almost four years in two law faculties in Malaysia. I have two comments or ‘addendum’ to what you have said and a question. I am glad you raised the issue of ‘who decides the culture’ or what is or is not consonant with one’s culture in assessing the validity and applicability of human rights norms. A few months ago at a dinner talk at a conference, the Deputy Prime Minister of Malaysia, Anwar Ibrahim, commented to the effect that he rejected the assertion that some Third World governments are using ‘culture’ as a means of enhancing State power. He said that a Japanese garden, and a Malay Islamic garden have their own beauty. I am not endorsing his statement just repeating it.

Aung San Suu Kyi my fellow country person writes that, ‘There is nothing new in Third World governments denouncing human rights norms as alien and stating that they and they alone have the right to decide what is or is not in consonance with indigenous traditions.’ Suu Kyi in effect writes that the concept of human rights can be compared with aspects of Burmese Buddhist culture such as ‘The Ten Duties of Kings’. Lee Kwan Yew contends that certain aspects of the Universal Declaration of Human Rights such as freedom of speech and freedom from culture are not in full conformity with Asian culture.

When I asked my Malay students to comment on the pieces by Suu Kyi and Lee Kwan Yew one of them wrote, ‘Lee Kwan Yew is a seasoned politician who knows about and had exercised power. Suu Kyi is an idealist and has never been in power. I would at any time take Lee Kwan Yew over Suu Kyi.’

Your mention of culture and human rights reminds me of three books written by your fellow countrymen, namely *Culture and Imperialism* by Edward W. Said, *The End of History and the Last Man* by Francis Fukuyama and *The Clash of Civilisations* by Samuel Huntington. As far as relationship between culture and human rights are concerned with whose position are you closest to or furthest from vis-à-vis the three authors’ viewpoints?

Professor Steiner — I think it is incorrect to say that Lee Kwan Yew exercised a far greater power than Suu Kyi. In the long run, hers will likely be the greater power — maybe even in the world today.

Your question is an amplification of the question put initially. Just as one cannot speak authoritatively for all people in a given state, how can one speak for all Asians, with the astonishing diversity of a region including India, Burma, Thailand, Vietnam, the PRC and Japan?

The claims of those who would speak broadly and abstractly about African or Asian culture are not illuminating. That abstraction blocks progress. Discussion has to be made more concrete and contextual, so that to an African who says, ‘We believe in a communitarian interacting culture where we help each other’ — as is true I think in the customary notions of African society — ‘and we will reach out and help our relatives because that is part of our interlocking duty’. I would answer, ‘Yes, that is different from the West, where we tend to be profoundly neglectful in the private sector of those around us. Yet just what does that justify in the way of exceptions from universal human rights principles?’ We have to go past the broad cultural differences and identify where the objections to universal human rights lie. It cannot be that communitarian concern for your neighbour or distant relatives permits torture. What then does it encourage or permit that offends universal human rights? Does it

permit traditional leadership or oppressive rule rather than popular participation? Why? We have to get into that debate, but the positions here are not yet joined.

As for the three books, suffice to say, I have deep disagreements with each, which is perhaps inevitable.

Questioner — I have just spent a month in north-east India. Rupert Murdoch's *Star TV* has been there for a year or two. I was alarmed when told of the effect this has had on the culture of young people and the way that it has distanced them from the older people. The sorts of programs they are getting are some of the worst of our Western junk. Does this alarm you? I do not know whether there is an awareness of the impact of Western media on other cultures. Is there any way that this can be investigated?

Professor Steiner — It is really a searching question. In terms of world news, Murdoch or CNN undoubtedly have serious effects in shaping what people know and understand. Take the American insistence on protection of freedom of speech, our First Amendment. It has been used very strongly, particularly in recent decades. When the United States ratified the International Covenant on Civil and Political Rights, it reserved that covenant's clause requiring states to outlaw warmongering speech or speech that incites racial or religious discrimination or violence. We could not accept that consistently with our Constitution. Nonetheless, it would seem to me to be patent arrogance and nonsense to claim that our exact ideas of free speech should govern all parts of a world where millions die because of ethnic hatred and all forms of discrimination.

Similarly, an episode like Salman Rushdie — which was properly strongly condemned by the West when the Ayatollah issued his death sentence to be carried out anywhere — nonetheless raises difficult questions. A blanket prohibition of blasphemy, broadly conceived, would again violate the American conception of free speech, and properly so in American culture. But I would not view censorship with respect to material in a more religious and unified culture that is considered deeply blasphemous by that culture as offending a deep conception of universal human rights. The punishment, precisely what is done to the author, that is a serious issue. Other cultures surely need not follow the constitutionally based doctrines of certain states in the West, including my own.

For the rest, the corruption of cultures — including I would say my own, through the extraordinary degree of violence and vulgarity that dominates so much TV — is a global problem. Where is the will or power to control, with faxes and e-mail and internets and TV now telling everyone about everything, from pornography to human rights violations to popular material culture to high level philosophical discourse? Information seems to have escaped all national barriers — a phenomenon that was so relevant at the time of Tiananmen Square. That astonishing flow serves many valid purposes, but I agree with you that it also can foster the worst kind of modernisation, and can compromise the claim to a cultural integrity that seeks protection.

So I have not effectively responded to your very good question about where the world is heading under these new related impulses of media and markets. How long can we stay on this path without reaping terrible consequences, including the dangers of a media-bred global homogenisation which the populations of many Third World countries often seem to desire, at least by what their populations look at? Seduction by the West. I do not think that human

rights instruments would or could serve as an affirmative instrument justifying exclusion of foreign ideas and culture. The problem is one that the entire culture must wrestle with.

Questioner — It seems to me that an underlying theme is what can the West and human rights with a universal perspective give to other cultures? What of the reverse? Is there any work being done in looking at the positive aspects of non-state, perhaps community based, participation and citizenship, in asking about how that works in terms of human rights? It is much the same as a Western view of ethics as being an export. What are we taking back? Are we even looking for positives in other cultures?

Professor Steiner — I am not quite clear who the 'we' is. I do not know if it is your country and mine or a broader notion. The answer empirically would be no, except to the extent that we — countries like yours and mine — absorb ethnic communities from different cultures that struggle to maintain their own integrity and way of life in our countries. This integrity and way of life — including the extended family, strong notions of an inner morality and almost a family-centric rather than a state-centric conception of what the relevant unit is in social life — stand apart from and may inform the prevailing culture. Distinct ethnic groups have such a hard time existing as they move into a culture like my own, with its massive tendency to absorb culturally in some ways and with the great attractions to the young who are starting out and competing and achieving.

For Parliament or Party: Whose Democracy is it, Anyway?

Senator Cheryl Kernot

‘Whose democracy is it anyway?’ — I guess we often ask that question. When Graham Richardson resigned from the Senate earlier this year, his valedictory speech contained some rather extraordinary insights into the internal workings of the Labor Party. For those of you who did not whip up the enthusiasm to stay up until two o’clock in the morning to hear it, one of Senator Richardson’s more interesting comments was his revelation that Paul Keating had once said to him that ‘the best party officials are those who chloroform the party and make sure we do not have to fight any more’. Senator Richardson went on to tell the Senate — with obvious regret — that his ‘days of chloroforming were over’.

I found this little revelation fascinating because Graham Richardson told it as such a positive story. He clearly agreed with the Prime Minister that the best political party was a nice, quiet, anaesthetised one. He did not see anything particularly wrong with that. In fact, he took a great deal of pride in his role as chief chloroformer. It was a comment which not only said a lot about Graham Richardson, Paul Keating and the Labor Party — it revealed a great deal about what some people think is wrong with our parliamentary democracy.

It raises the question: whose democracy is it, anyway? Do we really have the sort of vibrant, participatory, parliamentary system we like to imagine we have? Or do we spend most of our time excluded from our own democracy, breaking out in a mad burst of democratic fervour every few years at election time before sinking back under the chloroform? My thoughts on this matter are no secret.

In my view, we are moving away from a system of parliamentary democracy where the executive arm of the government is responsible to the lower house and towards a system of *party* democracy where the majority party expects to control both the machinery of government and the Parliament in between elections. That has led to the House of Representatives becoming little more than a rubber stamp for a largely unaccountable executive.

The House of Representatives these days is not much more than a soap opera — and a rather mediocre and predictable soap opera at that. It sometimes produces good theatre, but we all know at the end of the day exactly how it is going to turn out. It is like being in some sort of endless karmic loop, constantly winding up at predetermined destinations with no ability to influence the course of events along the way. Just think about it — the House of Representatives as a metaphor for life: what a depressing thought.

Australians generally do not give too much thought to the notion of democracy. Yes, we feel quite proud of ourselves for living in a democracy and we see democratic principles as the cornerstone of our society, but I do not think we give enough thought to what these concepts actually mean in practice. If, by 'democracy', you mean a political system with regular elections, but with no serious challenge to the government between elections and no inconvenient appeals to the Supreme Court as in Victoria, for example, then you are probably perfectly happy with the way things are. You are probably also a Victorian businessman with a financial interest in racing very fast motorcars and with an 'I love Jeff' sticker on your refrigerator. But if you consider democracy to be a system in which ordinary citizens have the opportunity to play some meaningful role in the management of our society, then you probably feel we are moving further and further away from that sort of society.

It is a dangerous age for democracies everywhere. It is an age where, as the American philosopher Noam Chomsky has pointed out, the hallmark of the so-called 'free' societies is the abdication of rights by the majority of the population through the manufacturing or the engineering of their consent. That is a bleak view of democracy; a view which says that elections do not really mean all that much and that we are being indoctrinated to accept the concentration of political and economic power in fewer and fewer hands.

I do not feel quite so bleak about our own democratic processes, but I think we would be well advised to heed the warning signs. One of those warning signs is the increasing failure of our parliaments to act as protectors of democracy. This state of affairs goes completely against the original central notion of parliamentary democracy, which was that the executive arm of government was *responsible* to the lower house. In other words, the lower house was supposed to keep the executive — the cabinet — in check. But that no longer occurs.

Although I am not as critical of disciplined parties as other people, I do think some of the blame for this situation can be slotted home to the rigid control exercised by the major parties over their parliamentarians. In effect, as Harry Evans, the Clerk of the Senate, has pointed out, 'we no longer have parliamentary government, but party government'. We have a system where the electorate chooses between two very similar big parties at election time and then the majority party controls the whole machinery of government until the next election.

This view of democracy is an interesting one because it is not unrelated to the economic rationalist view of the world. In this scenario, Parliament becomes a 'political prize'. Geoffrey Brennan and Alan Hamlin summed up this view in an article last year in the *Australian Journal of Political Science* in which they said:

The basic idea here is that control over the parliament is the prize awarded to the winner of an electoral competition. Seen in this light, the details of parliamentary procedure are of derivative interest: attention should focus on the electoral competition itself as the major determinant of political outcomes

... Parliament is reduced to a window-display of policy alternatives [and] parliamentary procedure is reduced to window-dressing.

In other words, electoral competition is the be-all and end-all. The operation of that competitive process becomes the primary focus of the system and we all become obsessed with polls rather than policy. Some people call this, rather quaintly, the 'public choice' analysis of democratic institutions. It is a sort of 'economic rationalism for politics'. It is intellectually bankrupt, unprincipled and nothing more than ideology masquerading as some sort of respectable theory. This is also the theory much loved by that great intellect of American politics, Ronald Reagan. It is the theory which sent America's deficit into orbit — so why we should be even remotely interested in picking up any of it, is well and truly beyond me.

But, whatever label you want to put on it, this is essentially the same approach as muttering about getting rid of the Senate or dismissing criticism by saying that government should just be allowed to 'get on with it' between elections. This approach effectively relegates Parliament to a minor role in the democratic process, a relegation which — in Australia — has had two significant effects.

Firstly, the role of Parliament has been seriously eroded. These days, it seems, a prime minister or a premier considers Parliament to be not much more than a relatively minor and time consuming nuisance which has to be dealt with before getting on with the *real* business of running this country.

Secondly, at the federal level it has resulted in a clear shift in the role of scrutiny of the Government from the House of Representatives to the Senate. Earlier this year Les Carlyon in the *Age* newspaper commented:

The best check we have on elective dictatorship is the Senate, where the Government lacks the numbers to turn the Senate into a rubber stamp. There is much to be said in favour of Cheryl Kernot and her Democrats, and of the Gumnut Twins, and of Senator Bishop and other free and feisty spirits. If they don't keep the bastards honest, they at least keep them edgy.

But whether you are talking about the nuts and bolts of legislation or the sheer pleasure of irritating the Prime Minister on a regular basis, the Senate's role has become — and I think the presence of the Democrats has had a lot to do with this — one of promoting accountability. That is a crucial role in a democracy. The very essence of a democracy is not just the right to choose who is going to govern you, but also to have some opportunity to scrutinise, amend and even reject the measures chosen by those who are doing the governing. Shoring up executive power at the expense of parliamentary responsibility and public accountability is a dangerous game to play.

The Treasurer's refusal earlier this year to release to the Senate the Foreign Investment Review Board advice on the sale of Fairfax is a case in point. Mr Willis claimed — and still claims, in fact — that publication of that advice would deter bureaucrats from giving frank and candid advice.

The truth is that secrecy is more often a recipe for sloppiness at best and corruption at worst. I believe that public exposure encourages accuracy and ethical behaviour. I do not accept that

Australians do not have any rights at all to see the documentation and advice on which crucial decisions about the future of this country are being made.

The Auditor-General — not currently a wildly popular man in government circles — says that there are minimum standards which the public can rightly expect from government. These are that: administrative processes be fair and open; decisions be based on principles supported by documented reasons; and those involved in making decisions be accountable for their decisions.

I agree with the Auditor-General. I think these principles can apply to executive government. I can see no advantage in encouraging or perpetrating a system which is founded on secretive decision making. That path leads to cronyism, corruption and a loss of confidence in our democratic and parliamentary processes, to say nothing of WA Inc., the Bjelke-Petersen years in Queensland and the fiasco of the State Bank in South Australia.

This problem of the release of documents is not confined to the Keating Government. 'Public interest immunity' is a bit of new jargon which seems to be popping up all over the place. I notice that Premier Jeff Kennett in Victoria has suddenly discovered several new and exciting ways to use the phrase 'commercial confidentiality'. In my state of Queensland, Premier Wayne Goss has resorted to wheeling trolley loads of documents through a cabinet meeting in order to give them retrospective cabinet status.

Many of you will be familiar with my efforts to tackle the government on this question of the release of documents. That is because the Democrats believe that Parliament has the right to obtain any information which is not classified as secret or private by a law passed by Parliament. I do not want to see people's tax records or their social security files. Even if I were so inclined, I could not do so because there are some very specific pieces of privacy legislation covering that sort of information. But there are no such provisions, for example, in the *Foreign Acquisitions and Takeovers Act*.

The Government can make all sorts of claims about material it wants to keep secret — that it is not in the public interest, it is commercially sensitive, it would prejudice the government's business dealings or negotiations or whatever — but ultimately it should not be able to withhold that information from the Parliament. That view accords with all the legal advice we have seen on this topic and with the practice of courts in dealing with claims of crown privilege. Interestingly enough, Gareth Evans got the same advice in 1982 when, as shadow attorney-general, he tried to obtain certain tax evasion documents from the Fraser Government.

As my second attempt to resolve this impasse, I have just proposed the setting up of a committee of party leaders in the Senate — currently that would be Senator Gareth Evans, Senator Robert Hill and myself — to look at documents the Government has refused to release to the print media inquiry. The idea is that the committee, under very strict secrecy requirements, would look at the documents in camera, obtain whatever advice it needs and then report back to the Senate recommending either full disclosure or disclosure with conditions attached. This is a far from satisfactory outcome — but it does give the Government some leeway in that it provides a screening process, similar to that used in civil courts, without cutting Parliament out of the process altogether. It may also lead beyond the print media inquiry to a permanent committee with power to look at the disclosure of documents in general. As I said, it is not my ideal way of getting a government to be

accountable, but it does demonstrate that there are a variety of ways in which the Senate has some prospect of calling the executive to account.

In my view, we can set up processes within the Parliament which promote accountability. We can set up structures which avoid the excesses of unrestrained and unaccountable executive governments. Unrestrained and unaccountable executive government is not democracy. It might be a system which fits nicely into some theory or analysis of institutional behaviour, but it is taking us further and further away from a participatory political process and into the realm of what American Professor Mark Petracca has called 'the professionalisation of politics'. He argues very strongly that 'the professionalisation of politics is incompatible with the essence of representative government'.

In a similar vein, the American historian Daniel Boorstein argues that the professionalisation of politics threatens to undermine what he calls 'the vitality of the amateur spirit' — a spirit he sees as being essential to the survival of, in his case, American democracy. He says that 'amateurs' are being excluded and alienated from the political process and that the process is becoming more and more removed from ordinary Americans and becoming more the province of a kind of 'class' made up of professional politicians, political journalists and lobbyists. This is a dramatic view, but I think it points to some of the real dangers which lie behind the push for executive government at the expense of parliamentary democracy.

For a start, we have to be aware that there is a growing feeling in Australia of dissatisfaction with the processes of government. I found it very interesting recently when I got up on a platform with Peter Reith and Ted Mack to talk about citizen initiated referenda. Despite being unanimously unpopular with professional politicians, lobbyists, political journalists and all of the other 'political game players', the idea of at least a limited form of citizen initiated referenda strikes a positive chord with a lot of Australians. I think it strikes that chord because a lot of people are simply fed up with the increasing power of the executive government and with their increasing alienation from our political processes. They know that something needs to be done.

I am the first to concede that there are obviously some problems with citizen initiated referenda, but I think the notion at least deserves some consideration. I point to the *New Zealand Citizens Initiated Referenda Act 1993* because I think it contains some worthwhile features. It makes provision for referenda to be held where the signatures of at least 10 per cent of registered voters are obtained within twelve months of a proposal being lodged with the Clerk of the House of Representatives. That is quite a high proportion of voters and is aimed at ensuring that any proposal put forward is of concern to a substantial section of the community.

Secondly, the New Zealand act has several procedural 'checks and balances' built into it, one of which provides for the referendum to be delayed for up to two years on the vote of two-thirds of the New Zealand Parliament. The result of the referendum is non-binding, that is, the government is not legally required to give effect to the result. The New Zealand Minister for Justice, Douglas Graham, recently said that the government had opted for non-binding citizen initiated referenda because it 'gives people the freedom to engage the entire nation in debate on any topic of their choosing', while at the same time ensuring that Parliament retains 'the flexibility to protect fundamental freedoms and the essential powers of government'.

I am not suggesting the New Zealand approach is an ideal one. I am not even suggesting that it is one that could be successfully transposed onto the Australian parliamentary system. But I do think it demonstrates that it is possible to have a mature and sensible debate about citizen initiated referenda and to come up with a practical piece of legislation. I think the concept has merit precisely because it sets up an avenue whereby ordinary people, those with the true 'amateur political spirit', get some direct access into the parliamentary process.

That is surely an important and desirable feature of any functioning democracy. We need to start talking about what we want the cornerstones of our democracy to be. That is going to involve discussion about a whole lot of things which take us well beyond the issues of parliamentary processes and public accountability. I do not think we should be afraid to look at electoral reform; perhaps at the possibility of multi-member electorates for the House of Representatives.

I see multi-member electorates and forms of proportional representation for the House of Representatives as offering us the best opportunity for a diverse political system in Australia, because those sorts of reforms also offer women, minority groups, smaller parties, independents and new parties a fairer and more equal shot at political representation. Some people would think they might be more democratic than quotas.

I do not think we should be afraid to look at constitutional reform; to examine our Constitution to see whether or not it remains relevant to Australians in the 1990s. For example, the Democrats have been arguing for some time for an environmental head of power in the Constitution. It seems absurd to me that, despite the concerns of many Australians about the environment, the Commonwealth still lacks the constitutional clout to bring the states into line on a range of environmental matters of national importance. That is the significant thing — national importance. In fact, the Australian Constitution does not even mention the environment — an omission which considerably weakens the Commonwealth's ability to protect the environment in the national interest.

I do not think we should be afraid to talk about whether or not we need three tiers of government; whether we should rearrange responsibilities between the Commonwealth and the states; and whether it is time to even redraw state boundaries or increase the number of states or move to regional government, or whatever. I think we should also be talking about citizenship; about what it means to be an Australian.

I noticed that the National Centre for Australian Studies at Monash University in its paper *How to be Australia* has called for a pause in the republic debate 'to consider that what most Australians share in common is not a *national identity* but a *civic identity*'. The Centre says we need a basic public declaration of what it means to be an Australian and it talks of shared civic ideas such as a commitment to the rule of law, a commitment to the principles of parliamentary democracy, a commitment to equality and 'a commitment to the custodianship of the land we share'.

Other writers are concerned about what they see as an attempt to return to a 'privatised view of citizenship'; a view which reduces citizenship to a question of replacing *entitlements* with *obligations*. We have privatised everything else, why not privatise citizenship? Others have talked of the need for a more pluralist emphasis; one which recognises diversity and difference as the cornerstones of citizenship. All of these things should be on the public and political agenda.

I meet with, talk to and get a lot of letters from people who are very angry at what they see as the erosion of representative democracy in Australia. They are not of the mindless ‘if it ain’t broke, don’t fix it’ school of thought. They think it *is* ‘broke’, in more ways than one, but unfortunately they do not want to be the ones to fix it. They do not want to be the ones putting up radical or even challenging new ideas for change. They do not want to be responsible for the future. But, of course, we are all, at some level or another, responsible for the future; and part of taking that responsibility, is to be unafraid to debate and discuss new ideas.

After all, it is not just a question of parliamentary or electoral reform: it is a much bigger question about what sort of nation we want Australia to become. It is also a question of what James Walter, Professor of Australian Studies at Griffith University, called ‘the failure of political imagination’ when he gave a lecture here in Parliament House a few months ago. It is about moving on from our current ‘lowest common denominator’ politics where, if a new idea sticks its head up out of the middle ground, you either run a mile in the opposite direction, or bash it on the head until it is dead. It is about fostering a representative democracy and a parliamentary process in which alternative voices can be heard.

A time is coming in the not too distant future when we will really have to fight for the future of minority parties and alternative views. We will have to fight for the right of those alternative voices to be heard in our parliaments. We will have to fight for the right to representation for those Australians who do not want to vote for the major parties. In short, this battle is not just about the existence of the Senate, or its future as an important check on executive power — although the Senate is likely to be one of the battle grounds — this fight is about the future of a vibrant, participatory Australian parliamentary democracy. An increasing number of us think that is worth fighting for.

Questioner — I think that the level of debate in the House of Representatives would be greatly increased if there were a Speaker who was not on the government side; someone who perhaps was towards the end of his parliamentary career and had the respect of all sides. Is there any way that action could be taken towards such a thing?

Senator Kernot — Not easily in the House of Representatives. It would probably be slightly easier in the Senate to work towards the independence of the President. There has already been quite some discussion about the person maintaining a role in a major political party, but not taking an active role in any of that party’s committees, subcommittees, or caucus committees. But we still have a long way to go to get to a negotiated outcome on that.

I think that would be harder to do in the House of Representatives because of the two major parties. There is always the problem of an opposition thinking that one day they might be in government and they might want the same control themselves, so they do not push the party in power as hard as they might or ought to.

Questioner — In the 1990 elections, why did the Democrats not adopt the policy in every electorate of recommending that the incumbent be put last in the House of Representatives vote and the other major party’s candidate be put second last. You would be in power if you had done that.

Senator Kernot — I do not think so, but it is a nice thought. The answer is because our members vote before every election on the form our voting recommendation will take. Our

decision for the last couple of elections has been that second preferences go to like-minded groups and then after that it is up to the individual. We do not recommend one above the other. We say we would like to believe that voters are intelligent enough to make up their own minds about where they want their preferences to go. We want them to vote for us first, but under a preferential system, in the event that the second preference becomes important, then your first vote flows on at full value to its second preference.

In the 1990 election that you refer to, over one million Australians voted for the Democrats as their first vote on the ballot sheet. That did not translate into any seats in the House of Representatives. That is not because of what we did, it is because of the electoral system. Because of the preferential voting system, the National Party had less than 600,000 first votes which translated into something like seventeen seats. Electoral reform is a really important ingredient for thinking about better representation in the future.

Questioner — On the subject of electoral reform, at this stage do you have a preferred model for the House of Representatives?

Senator Kernot — Yes. I would like to see a form of multi-member electorates — probably the Hare-Clark system. It is as simple as that. Australia is no longer neatly divided into Labor and Liberal — capital and labour. It is a complex, diverse and multi-faceted society. A lot of people do not feel comfortable with being reduced by the language of politics — and the language of opinion polling in particular — to, ‘Here are your two choices. Take it or leave it.’

I would love to change the language of politics in this country. I am starting my crusade with the word ‘bipartisan’, which implies a choice of two. There are more than two political party groupings of significance in this country from which we can choose. The next time that you go to use the word ‘bipartisan’, I appeal to you to think of other terms such as ‘cross-party’, ‘multi-party’, or even ‘diverse’ will do. We have to challenge the language of politics.

Questioner — I would like to refer to citizen initiated referenda. It seems to be that too little attention is given to the complexity of public issues and, therefore, to the nature of the questions that are put. The focus tends to be on the number of people that are needed to sign an original notification that a referendum is required. For CIR to be viable, it should be recognised that public issues are complex and voting should operate on a preferential basis between alternatives.

Senator Kernot — That is a very sound suggestion which should form part of the ongoing debate. Some countries suggest that perhaps citizens cannot be trusted to vote on economic matters because they may not recognise the effect that a decision made in isolation may have on the wider budget decisions. That is a legitimate view that we should consider. That does not mean that we have no say. We have got to find the right way through it. The New Zealand example is certainly worthy of further discussion.

Questioner — My question also relates to citizen initiated referenda on a more basic level. The ACT’s Legislative Assembly has a bill presently before it for citizen initiated referenda. Some independent voices in the Assembly have referred that to committee for consideration — apparently not just on the mechanics, but because they have doubts on the idea in principle. Of the three members you mentioned as speaking on the platform of CIR, Ted Mack has now announced his retirement and Peter Reith has been advised not to make any further

statements on the matter. I wonder whether you, as the one survivor, see yourself as having any input into that process, perhaps by suggesting to people on the Legislative Assembly that it is a good idea and that they ought to proceed with a bill on this subject?

Senator Kernot — I have had a look at Kate Carnell's bill and I think it is pretty innocuous. In terms of the principle of citizen initiated referenda, I think it would be worth pursuing. What I say to members of your assembly would not make a huge difference one way or another. It is their right to assess the legislation on its merits as they see it.

Questioner — Would you also advocate looking at reforming the parliamentary process by having a full vote for the Senate, rather than having the situation where the small states, such as Tasmania, have the same number of people elected to the Senate as New South Wales? Could there be some reform in that area?

Senator Kernot — Yes, I would. We pretend that the Senate is a states house — actually, we do not even pretend anymore. Occasionally, a bill comes in which would have a different effect on one state from another. We are an extension of a party house; to say otherwise would be dishonest. But the concept and function of an upper house remain as important as ever.

The issue then becomes whether we look at demographically equal regions, rather than the existing demographically defined states. I do have some problems with the present unequal representations in terms of the number of people in the population who are represented by twelve senators in each state. I certainly do not subscribe to the view that therefore an upper house is undemocratic or unnecessary.

Questioner — I would like to express some doubt about citizen initiated referenda and the idea of an expendable pluralistic democracy. In the case of citizen initiated referenda, surely the result would be an undermining of the coherence of the government policy. The result is to bring in an avenue for the most emotive issues to come up. For instance, the death penalty would quite possibly be supported by a majority of electors. We see this in America. In fact, I would suggest that America is a warning against some of your proposals. I am not personally objecting to the underlying tenet of them, but in practice America has a great deal of pluralism. We see the result at the moment where the present presidency is being undermined by an excess of access to information about the way the government is run.

Senator Kernot — I do not agree that there is always a coherence of government policy in the first place, because very often it is the end result of an incredible balancing of competing vested interests where money sometimes plays an important part. I could point to an equal number of American examples which include the propositions to outlaw the use of nuclear power and propositions that have been carried by majorities against tobacco advertising when tobacco companies have spent a fortune trying to persuade voters to do the opposite.

We should not have a lowest common denominator view of what Australians might, or might not, vote for. It is the principle that is important. How do citizens, between elections, have any opportunity at all to influence the agenda of this country? Thank goodness we do not talk about mandates quite as much as we used to. The recent elections have been reasonably close; in fact, the last election was very close. The incredibly diverse and complex range of issues which a parliament debates are never canvassed in an election campaign.

It is very difficult for the government of the day to gauge how citizens feel about these issues. We cannot undermine confidence in public institutions, but at the same time we must guarantee the rights of citizens to have an input into the decision making which decides the direction of this nation. Unfortunately at the moment that right is given to electors at the ballot box on a limited range of issues once every three or four years. I mentioned citizen initiated referenda as an example of something that we should not be afraid to discuss. That is what we are doing.

Questioner — If you were to change the Democrats' policy on compulsory voting, would you adopt the same set of standards that you apply to citizen initiated referenda to voter initiated legislation? While talking about things Roman, what is your response to the proposal of Frank Brennan, the Jesuit lawyer, to bring an Aboriginal representative into the Senate?

Senator Kernot — We recently reviewed our compulsory voting policy and our members voted to retain it, so I will not be changing it. That is the first point. As to your last point about an Aboriginal member of the Senate, that is an example of affirmative action that I would be prepared to consider.

Questioner — You spoke earlier about the fact that Australians are losing their democratic rights, in many cases without even knowing it, and that some of that is being done through the manipulation of their consent. I see that as a real problem in today's world. How can the general public fight through the very biased reporting of selected issues?

Senator Kernot — I do not see bias to be the problem as much as omission. It is very hard sometimes, given the orchestration that surrounds an issue, for the journalists of the day to decide that the issue is the issue, rather than what surrounds the issue is the issue. It concerns me that the agenda is set notionally in the House of Representatives, where the government introduces its legislation. The government has the numbers and very often the opposition does not even put up any amendments. It waits until the legislation gets to the Senate. The cultural and political focus of the press gallery is still very largely on the House of Representatives.

We have started to challenge that culture to the extent that I no longer get phone calls asking, 'Are you going to block it?' as the first question. There is a little more interest concerning the issues that we disagree with in the upcoming legislation. I would like to encourage you by saying that I think it is improving slightly. At the same time, citizens have to be much more demanding of their members of parliament. You do not have to fall for the old trick of members saying, 'Oh, I really disagreed with it, but I had to vote for it.' Why did they? Citizens have to demand to see the *Hansard* and look at the votes. Look at the record of your elected representative. Have more dialogue with him or her. It is a two-way process. It is not just the media, it involves your participation and vigilance as well.

Questioner — What would you think of a proposal for a female Senate and a male House of Representatives?

Senator Kernot — It nearly is!

Questioner — It would be better the other way around.

Senator Kernot — You think it would be better the other way around: better if we were setting the agenda. I think there are a lot of reasons for women being represented in greater numbers in the Senate, and long may it be that we will increase in numbers to the point where we will become equally represented. It is much harder in the House of Representatives. I do not know what a gender exclusive house of parliament would be like, but I thank you for that challenging thought.

Questioner — Could you explain in more detail what you mean by accountability. For example, what do ministers have to do to meet a criterion of accountability?

Senator Kernot — When we were debating an accountability package as a result of the sports rorts affair, one of the things we thought was lacking, and something that was evidently lacking in the Marshall Islands issue as well, was a contemporary and agreed upon code of ministerial conduct. One of the outcomes we achieved in the accountability package was to revamp the workings of a committee which was set up to look more closely at that issue. That committee is still meeting and considering this, and I have seen some drafts of their suggestions. Missing from those suggestions was the matter of writing references for relatives. Should that be included in a code of conduct for all politicians or ministers? Or is that the right of our members of parliament as ordinary citizens anyway?

I think that since the early notions of Westminsterial systems, responsibilities of ministers and accountability, we have had the information revolution and the mini-skips of paper across the desk. At the same time we have also had a growth in the use of consultants, personal advisers and party advisers in addition to departmental officers. Nowhere have we codified and sorted out appropriate delegation of powers and responsibilities for each of these layers which make up a part of a ministerial scope. So I cannot give you a definitive answer.

Questioner — Recently a second chamber has been introduced in the House of Representatives to cope, I think, with the flow of legislation — all these bills that they want to pass. Is it necessary to have this avalanche of bills and, if so, who is generating it?

Senator Kernot — I think we ask that question between now (September) and December every year: where do these hundred bills come from? A lot of them come from the budget processes, in order to outlay moneys on particular programs in quite complex ways, with predetermined start-up dates such as 1 January or 1 July of next year. Others are ongoing. We have a long list of levies for honey and fish and beef and so on, and these are reviewed. The level of levies is reviewed or increased every year, so there is a whole range of those that come through as a matter of course. But the second chamber of the House of Representatives, as I understand it, is to speed up the workings for non-controversial legislation. In the Senate we have a different system. We have a system of committees which meet on Fridays. Any bill which has any element that warrants greater scrutiny can be referred to the so-called Friday committee. We can call witnesses, and we do. I am in the middle of a hearing on the Aboriginal Land Fund Bill at the moment.

The idea of using a Friday committee is that in that committee we talk about the amendments we may be moving when we get back into the committee of the whole on the floor of the Senate. It is supposed to save time, but it does not exclude you from raising further issues or moving different amendments once you get there. It is an attempt to balance the time that is

necessary for complicated and often controversial legislation to be adequately scrutinised without taking a week in the Senate itself.

As to your question on the origin of the requests for all this legislation: we do not have citizen initiated referenda, so we cannot blame you. I would have to go away and have a closer look at the names of everything before I could tell you, but a huge bulk of legislation comes from each year's budget.

Questioner — A lot of criticism of electoral reform in the House of Representatives suggests that one of the problems would be instability and inability to cope with government. Can you comment on that?

Senator Kernot — We are a funny lot in Australia. We say, 'We have to have the system we have in the House of Representatives or otherwise we might get Italy.' But until recently, if you examined the number of elections we had had in Australia in the last twenty years you would have found that we had had more elections than Italy; so you have to question the notion of what stability involves. I think the time will come when we will have more than two-party representation in the House of Representatives. It is inevitable. We will then have to cope with whatever consequences that brings. I do not think that is a bad thing. I think a third and a fourth voice in the Senate has strengthened the outcome rather than destabilised it. I often think how challenging it would be to have that other voice or voices in the House of Representatives. I think it is possible to have challenge without instability.

Parliament, Democracy and Political Identity in Australia

by James Warden

Parliament House is a place of the imagination. It is something to conjure with. It was built to contain the grandest aspirations of the nation and of the people. It was intended to express the noblest ideals of democracy and equality. It was deliberately created and crafted to reflect the national identity and to exemplify representative government as an elevated ideal.

The building makes bold, ambitious and deliberate claims about the nature of political identity in Australia. An enormous effort has been directed into capturing the imagination of the people and holding the imagination of the nation. It is a monument to representative government, and is intended to rank with the great legislative buildings of the world.

The architecture of political power has a celebrated lineage. We readily associate great buildings with great regimes and the architecture of power looms at us as a lived experience. History lives through the tangible fabric of colossal buildings. The Parthenon, Notre Dame, the United States Congress, the White House, the Kremlin, Buckingham Palace, Windsor Castle, Westminster, Saint Paul's Cathedral, the Vatican, the Pentagon, Versailles, are all expressions of Western political power in which values and ideas are written into the architecture. The architecture is intended to be awesome. Such buildings are created in order to intimidate.

Or, like the ruins of Ozymandias King of Kings, such megalomania stands abandoned and broken in the vast indifferent desert sands, or it is ridiculed and condemned like the edifices of Stalin, Ceau escu and Franco. The facades of Albert Speer still stand, although the Thousand Year Reich was demolished, but then again so were Dresden and Guernica in the process.

Power was once assembled in hand-hewn stone. Now the concrete expression of power is concrete — ready-mix concrete. The Parliament House fact sheet tells us that there are 300,000 cubic metres of concrete in this building which, we are told, converts to twenty-five Sydney Opera Houses. The Opera House is consistently used as the measure of Parliament House. This is not an inappropriate comparison because, after the Opera House, Parliament

House is the most visited and visible building in Australia. The two buildings are iconic. They are bound together in the national imagination as defining expressions of the nation, of culture and of politics.

Indeed politics, mediated by television, becomes an opera without a musical score. Parliament becomes a political simulcast. It is about villains, heroes, love, loss, slaughter, loyalty, betrayal, pathos, comedy, melodrama and long knives. This is perhaps what the Prime Minister meant when he said, 'I like to whack a bit of Wagner into me.' Politics televised for the citizen is spectacle and drama played out on the vast and expensive marble, glass and stainless steel set, which is this building.

Such a caricature of the building as an operatic set is one analogy for the novice to understand what goes on here, for there is an anxiety that the Parliament is not well understood. Surveys indicate that people have a limited understanding of governmental systems. Members of parliament rightly want to be understood. This anxiety is linked to the long-standing and rather tedious lament that Parliament is in decline. That argument can be traced back at least to Magna Carta.

Nonetheless, the visitor who does not understand this place needs certain cultural cues. The visitor, uninitiated to the mysterious rites, arcane rituals, the open spaces and the closed corridors of the Parliament, needs familiar ways of interpreting what is seen and heard. For visitors — the citizens who come for a look — there are prefigured frameworks of reference and modes of recognition into which the Parliament can be fitted to be understood and imagined. The range of cultural institutions which tourists routinely consume include the memorial, the monument, the museum, the gallery, the church, the theme park and the shopping mall. Motifs of all these places dwell in this building.

Apart from the opera set, the Parliament can be imagined in a variety of familiar guises. One imaginary guise is the space station, hermetically sealed against the outside world, as the Cabinet commanders remotely control far-flung bits of the empire. Parliament House is a self-contained futurist citadel, serviced by docking vehicles — the Comcars — which bring tribunes from distant places from the twilight zone of far-flung electorates. The image of the space station Parliament would have been enhanced immeasurably if the original plan for computer controlled robots, working as little internal delivery vehicles, had not, alas, lapsed for technical and financial reasons.

There are other guises of this place. Those with experience of a prison system — and this was related to me by a senator — have likened Parliament House to a modern gaol. The feel and the look are similar. Guards in grey, watching and waiting, the pass system, doors, routines, announcements, an obsession with telephones and mail, trolleys, locked doors, ringing bells, small cells and common yards. Visitors come in and out in vans and secure cars, which pass through swinging gates or underground entrances. There are security cameras, and video recorders; there are inmates exercising in the yard for an hour a day or jogging once around the perimeter. There is a pervasive feeling of surveillance. Parliament House is Jeremy Bentham's panopticon with privileges. It is the prison house of government.

Or Parliament House is the Holy See of the Australian apostolic state — a separate state within a state dedicated to the glories of a higher Being and with a frisson of historical and potential schism. There is the hierarchy of the Pope and the cardinals, the curia of the cabinet, the battalions of clerics, the stainless steel steeple and the triangulated cupola which reaches to

the heavens. There are the texts, libraries, artworks, altars, confessionals, entourages and images of the saints. There is the over-arching scripture of the Constitution, a deathless, timeless truth, subject to constant seamless shifts and occasional radical revision. There is the cabal of the corridor — Michel Foucault calls it the *cameral* of politics.

When Jim McKiernan, Chair of Caucus, appeared after the ALP party room meeting on 20 December 1991, there could have been a little puff of white smoke to announce the election of a new pontiff, Paul John I. Cardinals in identical suits sweep across the polished floors. Clerks huddle in the corridors in conversation. Audiences are granted. Texts interpreted. Doctrine debated. Rosaries repeated. Sermons delivered. Prayers offered. Saints invoked. Inquisitions held. Heretics burned. Icons are mounted on walls. Holy relics are kept under glass. Law and doctrine are handed down while a Swiss Guard, the Australian Protective Service, stands and patrols. In penance for its sins, the Liberal Party this week must say fifty 'Hail Menzies'.

In the absence of absolutist government, and after the excesses of the architectural propaganda of fascism and Stalinism, State architecture is now dedicated to the people. We are all democrats now. The grass over Parliament House allows the people to stand symbolically over government — a rather trite and quaint point. But does that truth hold equally for the several hundred sheep which were let loose on the lawns overhead in 1989?

Parliament House is a place of the historical architectural imagination, but it is also a place of the contemporary political imagination as it houses political leaders who seek, what James Bryce called, an 'Olympian dignity'. Politicians are vested with the authority and responsibility of legislating for the nation and of representing the people, thus politics still retains what Aristotle referred to as a noble calling. Yet those same parliamentarians also manage at times to portray the meanest human behaviour and indulge the most cynical motives in the pursuit and exercise of power. But manipulation and intrigue are as much a part of politics as the noble gesture and the occasional triumphal act of kindness. That is indeed the nature of politics and we should not be too squeamish about it, as a politician will always have, what the redoubtable Baldrick calls, 'a cunning plan'.

Only one text of classic political theory is on permanent reserve in the Parliamentary Library. Permanent reserve means it cannot be borrowed because it is in high use, precious to the collection or a reference work. To my delight, I found that Machiavelli's *The Prince* is considered a reference work. Some politicians know that Machiavelli was right; that while it is best for the Prince to be both loved and feared, if forced to choose, it is better to be feared than loved. Or, as the prince of Australian politics remarked, 'it is better to be right than to be popular'.

One way of imagining this building, Parliament House, is as the fifteenth century court of the Medici. As one critic and architect Peter Corrigan wrote about the building in 1988:¹

Form does not address itself to moral questions. Once a Pope or a Medici wanted palaces: now a Labor government or a BHP wants them too.

¹ Peter Corrigan, *Transition*, RMIT, 1988, p.37.

All that Italian marble helps with the Medici association. Italian marble is perhaps like Gough Whitlam and French champagne. After a strenuous speech on Australian national identity, Gough was standing with his retainers and subjects enjoying a glass of champagne. One subject approached and challenged him by asking why, after having delivered such an emphatic speech about Australia and national identity, would he drink French champagne? After the slightest pause, Gough replied, 'Yes it's French, but when it touches my lips it becomes Australian'. So it is with Italian marble.

For citizens, tourists and visitors — the people — there is a degree of mystification and awe about the building. When I arrived here in January I spent some days wandering about the building, wondering what I was doing here and trying to work the place out. I took the admonition of the United States political scientist Charles Goodsell seriously in that as political scientists we should take architecture seriously. This building is very serious architecture indeed. I will remind you that the final annual report of the Parliament House Construction Authority put the cost of the building at \$1,079,000,000, which I think is a round figure. As the then Prime Minister Mr Hawke said on opening day, 'It has cost a very large sum indeed'.

But for \$5 you can buy a three dimensional cardboard representation of the building, known in the trade as 'origami architecture'. These cards pop up as you open them; the great veranda of Parliament House pops out. You can trade a \$5 note in the Parliament House gift shop for that origami architecture. The \$5 note, of course, has a plan of Parliament House on one side and the Queen on the other side. I think it was the Romans who invented numismatic propaganda and this is the most recent Australian version. Some will recall that the old ten shilling note had Old Parliament House on one side and Matthew Flinders on the other.

The importance of the card is not the thing in itself but the accompanying text which interprets both the building and the little cardboard totem which represents it. The text says, 'Australia's Parliament House is a symbol of national unity and commitment to the democratic process of government.' The designers of the card have lifted the text from one of the handbooks, which the Parliament has produced, to explain the building and Australian government.² The text speaks of spirit and image.

The building with its integrated works of art, craft and furnishings reflect the history, cultural diversity, development and aspirations of Australia. Together they project the image and spirit of the nation.

The little totems, like the pop-up card with its accompanying text, are not just idle souvenirs of Canberra or Parliament House — they are small artefacts of political structures, constitutional principles and systems of belief. Scholars pay much attention to weighty, learned texts about parliament, democracy, constitutions and law. But the souvenir — the \$5 totem of democracy — should not be ignored in the interpretation of power. Souvenirs serve a purpose in the popularisation of constitutional culture as they are readily available and accessible to the citizen who comes to Canberra for a look. Most people do not read Quick and Garran's *Annotated Constitution of the Australian Commonwealth* or *Odgers' Australian Senate Practice* or even the \$2.50 little green constitution, but they may well buy a card. Unfortunately, citizens cannot buy snow domes of Parliament House in the gift shop on the

² *Australia's Parliament House: The Meeting Place of our Nation*, Joint House Department, Canberra, AGPS, 1987, p.2.

spurious grounds of good taste, but you can get one at the newsagency by the interchange in Civic. They cost \$4.75 and I brought mine today.

Another version of the literature which demands image, spirit and democracy in national identity is the heavy *Conditions for a Two Stage Competition*, which was the formal guideline for the entrants wanting to win the competition to design this building. It was published and distributed in 1979 by the Parliament House Construction Authority. So from the outset, the controlling authorities of this building emphasised the imperative that the building should be significant and capable of being responsive to cultural and political change. The guidelines to architects stated:

Parliament House will, by virtue of its function, be one of the most significant buildings in Australia ... It will stand for a long time and its architecture must endure through cultural and political change.³

This was a very high order stipulation. So the conditions were set; candidates entered the field; finalists were selected; and plans and models toured the nation.

The race was run and Mitchell/Giurgola and Thorp won. Romaldo Giurgola was the principal of the firm and is credited with the concept and design of the building. In the program for the opening of Parliament House on 9 May 1988, he stated his intentions for the building.

Through the welcoming gestures of its forms, the building implies direct connections with a long cultural tradition which we have all implicitly made by living in a democratic society as individual parts of a whole.

In the use of materials, the configurations of the exterior forms, the symbolic sequence of the major spaces, the openness of the Chambers and in the habitability and efficiency of the offices, the architecture intends to elucidate to all the meaning of the democratic process.

It is intended to be an architecture moulded by the presence of the unique effect of Australian sun, shade and light: symbolising, for generations to come, the universal ideas through which this nation contributes to the destiny of the world.⁴

The point here is that the more recent modes of legitimating the role of Parliament and the place of democracy have changed from the past. The earlier defining statements on the Parliament are full of the Westminster tradition; the Crown, the Mace, the Black Rod, the Serjeant-at-Arms and the royal presence. The legitimations of the Australian Parliament and its authority were historical and imperial.

A new series of booklets produced from 1987 onwards departed from this approach and concentrated on the processes of the institutions not the artefacts of the Parliament. A

³ Parliament House, Canberra, *Conditions for a Two Stage Competition*, Parliament House Construction Authority, vol.2, April 1979, p.6.

⁴ *'Program of the Opening of Australia's Parliament House by Her Majesty the Queen, 9 May 1988'*.

deliberate shift took place in the portrayal of Parliament, looking at how the institutions work, rather than emphasising lineage and imperial connections. The dignity and authority of the Parliament once lay in the long historic association with the Crown and Westminster. Westminster was the mother of parliaments in the empire; Queen Victoria was the mother of the empire. Together they were the legitimators of the Australian Parliament, its habits and customs. That legitimation is less employed these days. The new themes relate the Parliament to the people, the symbols of Australia and the appropriateness of the institution to Australia's current and future needs. They are about democracy and accessibility rather than empire and tradition.

The building is also an emphatic restatement of the old and central identifying myths of the nation. Anglo-Celtic and Saxon masculinist and loyalist aspirations are deliberately and comprehensively denied and surpassed in this building.⁵ A root and branch reconstruction has occurred in Australian history over the last generation. This has provoked a reconstruction of the Australian consciousness. This is evident in this building. The construction of the past determines not only the formations of identity, but also of architecture and symbol. The construction of history is not a matter of assembling facts to tell the truth, as any such selection demands questions about *which* facts and *who* counts. Our understanding of what matters is constantly recreated and the past is constantly remade. This is an elementary point about ideology, power and *all* versions of history.

Just as the War Memorial is ambiguous about remembrance and glorification, so the institutions of representative democracy are problematic. Symbol easily becomes propaganda when the lived experience is distorted. The stated ideals embodied in Parliament House on the one side and the War Memorial on the other promise much to the citizen of the Australian nation.⁶ Parliament House is a big building which makes bold claims about democracy and national identity. Does the building tell the truth?

In the English-speaking world — since the Restoration of Charles II or, alternatively, the coup against James II in 1689 — the Parliament has been the key institution of the state, however ill-assembled. According to David Judge, 'So comprehensively did Parliament occupy its central position in the state's institutional structure that in 1689 its legal supremacy was asserted ... thus effectively consigning the monarch and the courts to a subordinate position.'⁷ Gradually the methods of assembling the Parliament have been reformed and opened — democratised — yet most people seem worried about the Parliament. Those in the trade, such as political scientists, constitutional lawyers, political journalists, parliamentarians and parliamentary officers are seemingly all cautious about the operations and effectiveness of parliamentary government. As Tom Paine said of the English constitution, 'Every political physician will advise different medicine'. Poor general health is often the diagnosis and chronic illness is often the second opinion.⁸

⁵ See, Marilyn Lake, 'The Politics of respectability: Identifying the masculinist context', *Historical Studies*, vol.22, no.86, April 1986.

⁶ George Mosse, *Fallen Soldiers*, Oxford, 1990.

⁷ David Judge, *The Parliamentary State Sage*, London, 1993, p.195.

⁸ 'The constitution ... is so exceedingly complex, that the nation may suffer for years together without being able to discover in which part the fault lies, some will say in one and some in another, and every political physician will advise a different medicine.' Tom Paine, *Common Sense*, 1776, p.69.

The main argument being put is that modern liberal parliamentary systems, including Australia, are not delivering what they promised. The tendency to treat the Parliament as an effective, self-contained institution, free to determine outcomes, ignores the imperatives of international political economy and the leviathan of bureaucratic state power. The claims for 'democracy' and 'representation' so earnestly made by legislatures and legislators can, therefore, be no more than statements of good faith and sound intention.

Parliament serves many functions but that of principally representing the people, as somehow a distillation of democracy, is not a role which can be plausibly maintained. But the analysis of Parliament forensically continues. I think we are asking the wrong questions. The mistake we make is to continue the obsession with the entrails, organs, limbs, mind, psyche and soul of the parliamentary body rather than ask: 'What does democracy mean?' Democracy is messy. It is fluid, contingent and culturally dependent; the Parliament is concrete, glass and numbers. So the diagnosticians of democracy examine the Parliament for stress fractures and transparency. Instead, we should ask more insistently: 'What is democracy?'

In his 1990 book *The Return of Scarcity*, Nugget Coombs asked, 'Is democracy alive and well in Australia?' He said:

There is no doubt that Australians have been given opportunities almost unique to determine their own form of government and to mould it to their heart's desire, and that they are inclined to think of their system as one embodying the essential principles of democracy. It is much less certain that we have used those opportunities wisely and generously, and there are grave doubts about whether our democracy is more than a matter of legal forms and empty processes.⁹

Coombs expressed a concern that despite all the historical advantages that Australia has enjoyed in creating a political system there remains doubt about the democratic nature of government and society. The formal and symbolic attainment of democracy could still leave a hollow centre. The architecture of democracy, in the decorated building and the elaborate institutional arrangement, may remain a shell if the values of democracy are neglected. Coombs has had a longer involvement in public life in Australia than perhaps any other living person. I think he has advised twelve prime ministers.

Democracy and representative parliamentary governments, Coombs reminds us, are not synonymous. Defining the meaning of representative government is simple compared with defining democracy. Representative government in Australia is given in sections 7 and 24 of the Constitution.¹⁰ Under the Commonwealth Electoral Act, which stipulates the method of election, the Australia Electoral Commission manages the boundaries and conducts the elections. From time to time the people vote. Thus, representative democracy in a

⁹ H.C. Coombs, 'Is Democracy Alive and Well?', *The Return of Scarcity*, Cambridge University Press, Cambridge, 1990, p.130.

¹⁰ 'The Senate shall be composed of senators for each state, directly chosen by the people, voting, until the Parliament otherwise provides, as one electorate.' Whereas: '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.'

parliamentary system is minimally achieved, but we also must appreciate its limits. I would like to say something about the limits of representative democracy in terms of the control of political decision making.

The shifts which have taken place in the control of political decision making have diminished the significance of the Parliament in the political process — at least according to David Held, the British political scientist. In trying to account for the changes in Britain over the last generation, he has argued that three major reasons for that shift are evident, and I think they translate to Australia.

First, the recent tendency to include extra parliamentary bodies in policy decision making diminishes the central controlling role of the Parliament.¹¹ This point is pertinent in Australia perhaps because of the Accord and that form of corporatism which has been employed in Australia since 1983.

Second, according to Held, territorial representation in the Parliament is no longer the most significant way to represent interests. Other bodies of an extra parliamentary character organise and express interests and exert pressure on government and members of parliament. In Held's words, 'Extra-parliamentary forces have become the central domain of decision making'. In *The End of Certainty*, Paul Kelly interpreted this as merely a political strategy rather than a crucial institutional change.

Third, the scope for individual members of a territorially organised representative institution to exercise influence is diminished. Citizens have less chance of influencing political outcomes as political participation becomes organised around policy making élites which maintain direct links with the executive or exert direct pressure on the governing parties. In short, the Parliament and the citizen are 'undermined by economic changes, political pressures and organisational developments'. Law making is shaped by what Held calls 'flexible', informal processes which are not regularised by constitutional arrangements.

I think there are seven specific reasons for the failings of the Australian Parliament, or at least for its sense of being under duress. I will state them briefly. The first is that a disillusionment with government and Parliament has developed. Coombs certainly found this on the royal commission. The second is the well-known dominance of executive government. The third is the well-known dominance of party government over Parliament. The fourth is the power of bureaucracy over Parliament. The fifth is the peculiarity of Canberra and its remoteness, both geographical and conceptual, from what people like to think is the *real* Australia. The sixth is the perceived and actual surrender of the economy to international market forces, the internationalisation of law and the complexity of the administered state. The perceptions of those things remove Parliament from a capacity to act. The seventh is the media portrayal of Parliament, especially question time, which is said to bring the institution into disrepute.

Is Parliament in decline? No! The question is wrong. Parliament, just like cricket, never had a golden age of grace, elegance and fair play on a level field. There was always cheating, sledging, ball-tampering, secret betting and imaginative interpretation of the rules. In both sport and politics, television cameras expose the sleights of hand more readily as, in times past, the perpetrators were seldom caught in the act. Parliaments have always operated under

¹¹ David Held, *Models of Democracy*, Polity Press Oxford, 1987, p.217.

considerable constraints and have been coerced or influenced by immensely powerful external political-economic forces. Any critical analysis of power, institutions, class interests and power-élites will contradict the simplistic notion of representative government as an expression of the people's will through their elected representatives. However, this simple version is still relentlessly advanced by the official organs of the Parliament, that somehow the people's will is expressed through an institution which symbolises democracy. Seemingly another simple account of the Parliament cannot be stated in the brochures and the introductory texts which say that the Parliament is a legitimating theatre which ritualistically and symbolically approves or marginally alters decisions which are made by the Executive under the influence of extra-parliamentary bureaucratic political and corporate forces. The institution cannot be placed in that light as its legitimacy is then undermined and the alleged decline continues. Thus, parliamentary 'manque' is a more persuasive explanation than decline. 'Manque', that which could have been but is not.

If these are fatal flaws, what remains of the argument about democracy?

Australia has achieved a democratic condition and maintains it through two factors, apart from the sheer existence of the Parliament. First, a culture of democracy has developed and, second, a set of democratic institutions and practices exist outside the Parliament. The interpretative practices of political scientists tend to run these two points together with the sheer fact that the Parliament exists as if there were a necessary relationship between them. Democracy is considered in the abstract, but rarely is the Parliament and Australian democracy analytically considered jointly.

We should give up on the question, 'What is the place of Parliament?' and ask, 'What is the place of democracy?' Once that question is posed and adequately answered, then the next or prior question can be asked, 'How is the Parliament working?' Democracy is assumed too easily and we need to disaggregate the question. I would like to say something about democracy in Australia.

Australia is one of the oldest continuing democracies and one of the few countries to have maintained an unruptured constitutional history. Australia was second only to New Zealand in adopting a universal franchise. The reform of electoral systems has continued. By contemporary and historic standards, Australian government is peaceful. The parliamentary process works smoothly enough. There is no threat of military involvement in Australian government. Changes of government happen routinely. Members of parliament, individually, are highly valued by the electors in performing crucial specific problem solving tasks. Riots are rare and political protest is mostly non-violent.¹²

There is a rule of law; free, fair, regular elections; constitutional balance of powers; right to a fair trial; the assumption of equality before the law; a jury system; open access to the citizens to public office; and accountability of government in a variety of ways. If these are measures of a good state, then the Australian political system is an outstanding success. The continuing challenge is to allow change without rupture and to open the access to redress and protection more effectively.

¹² James Warden, 'Jacking up: Styles of Protest in Australia', in *The Abundant Culture: Meaning and Significance in Everyday Australia*, David Headon, Joy Hooton and Donald Horne (eds), Allen and Unwin, Sydney, 1995.

The characterisation of Australia as a democratic society rests in the arrangement of a diverse set of institutions. The multiplication of institutions to protect and promote democratic values has unintentionally contributed to diminishing the place of the Parliament. Other functions and legitimations for the Parliament then become relatively more important such as political theatre — not to be underestimated — accountability, recruitment of political leaders and law making. The frequent plea to revive the Parliament, to increase its importance, is therefore forlorn.

Democracy in Australia has developed multiple forms or layers. The ideal of democracy being secured through a majoritarian centralised parliamentary state — a view once fervently held by the ALP — has now been completely surpassed, I hope, as the elective dictatorship is understood to be the lamentable consequence. If an accessible Parliament was once the sum of democracy it is now only a prerequisite. The institution of the Parliament is a necessary but not a sufficient condition, as its existence does not of itself amount to democratic government.

To my mind, the democratic character of the Australian polity has four indicators. Firstly, political violence. The sustained absence of political violence in Australia is a strong indicator of the success of government and of Parliament in creating what Aristotle said was a good society and, as Paul Keating said on election night 1993, contributes to 'making Australia a nice place to live'. Violence systematically directed against the state and its officers is rare.

Edward O'Farrell shot the Duke of Edinburgh in 1876 and was then hung by the New South Wales government in a loyalist frenzy against Fenianism.¹³ Peter Kocan shot Arthur Calwell in 1966, without great harm, was convicted, goaled and became a leading Australian minor poet. I wrote quite a lot about the absence of political violence in Australia prior to 5 September when John Newman, member for Cabramatta, was murdered by unknown assailants outside his home. Thus Australia tragically experienced the first assassination of an elected person to public office.

Regardless of this tragedy, the historic and comparative lack of politically motivated violence is a good indicator of a good society. We should not, however, be complacent about the seemingly entrenched institutional violence in prisons or the ill treatment of the mentally ill, as the Human Rights and Equal Opportunity Commission has reported, but that is institutional violence of a different order.

The second point is the elaborate mechanisms that we have for creating a Parliament and a government, including free elections, fair electoral systems and open access to office. On those measures, Australia is an effective democratic polity and is politically peaceful. On the one hand the Australian Electoral Commission is a mundane bureaucratic agency, yet on the other it is a spectacular and precious institution which helps define a democratic society.

Prior to the 1993 election David Malouf spoke about election day as a festival of democracy and as his favourite national day. The great electoral machinery rolls out in school halls, church halls, town halls and memorial halls — halls all across Australia — accompanied by cake stalls, endless cups of tea, grocery shopping and an air of expectation. All day we are surrounded by spruikers and posters of smiling hopefuls. For David Malouf, the quiet significance of the peaceful achievements of democracy should not be underestimated. I for

¹³ Keith Amos, *The Fenians in Australia 1867-1880*, University of New South Wales Press, Sydney, 1988.

one had certainly not thought of elections as a national day of festival until Malouf told Kerry O'Brien on *Lateline* about it one night.

The third point is what I have referred to as a web of protective institutions which have developed. Democracy in Australia was once identified wholly with the Parliament and its surrounding myths. In the nineteenth century democracy was about the representation of men. In the early to mid-twentieth century it was about the female franchise and reforming electoral systems. Latterly, it has been about the development of systems and institutions which create and maintain equity, as Parliament is increasingly unable to secure democratic values of itself. Parliament is only a prerequisite for democracy. The institution of the Parliament is a necessary, but not sufficient condition and does not of itself amount to democratic society.

In response to democratic and bureaucratic imperatives a web of representative and protective institutions has developed in Australia. Just as government has created a phalanx of government business enterprises — because competing demands and the complexity of the market are beyond the means of the conventional departmental arrangements — so the institutions of democracy have been hived off. These include institutions such as the Ombudsman, the Aboriginal and Torres Strait Islander Commission (ATSIC), the Human Rights and Equal Opportunity Commission, various royal commissions, the Administrative Appeals Tribunal and the Auditor-General.¹⁴ Similarly, the representative roles of the state governments and local governments should be estimated in this.

Other more ambiguous protections exist such as freedom of speech, which the High Court is seemingly determined to read into the Constitution, freedom of religion, freedom of information, whistle-blowing protection, a potential bill of rights, international treaties and UN charters, legal aid and guaranteed freedom of movement under section 92. Most importantly, however, there is a cultural expectation of fairness and equality which underpins the rationale of these institutions and includes the practices of investigative journalism, access to welfare, affordable justice and the evolution of a viable and tolerant multiculturalism.

Thus in Australia there is a cultural assumption of democracy, and this is my fourth point. The gift to Australia by the Returned Services League (RSL) to mark the 1988 bicentenary is a sculpture by Peter Corlett. It is placed in the north-eastern corner of the Parliament House block. It is on the left approaching from Kings Avenue. It is a big, black, broken square of granite decorated with the four bronze hats of the armed services. The inscription reads:

Look around you, they fought for this — A gift to the people of Australia in honour of the fallen for the bicentenary, 1988.

The point of the RSL black block, which resonates with the sentiments of the larger memorials across the lake, is that egalitarianism and democratic values are taken as the basis of Australian society.

Australians have an expectation of democracy and a guarded faith in the capacity of Parliament to deliver what is promised, along with a certain ambivalence about the

¹⁴ As a result of the sports rorts affair, the Auditor-General's powers were strengthened on 20 June 1994.

constitution. Electors have a willingness to suspend disbelief at election times, even if a continuing dubiousness lingers about parliamentary government. Parliament seemingly cannot meet popular expectations and new institutions have been deliberately created to fill the vacuum. The transparency of the executive and the bureaucracy have also been enhanced by federal and some state legislation providing for freedom of information. At the same time the courts have, over the past two decades, greatly expanded their powers to review executive and administrative action and to reduce the scope of the executive to refuse to disclose documents and other information on the ground of some greater alleged public interest.

The tendency, therefore, has been to look outside the Parliament to supervise and control the executive and bureaucracy. The argument here is that the changes in Australian culture and the complexity of government have necessitated changes in the organisation of political institutions. Many other avenues of redress and protection have been opened, apart from the conventional parliamentary ones.

To conclude, the Parliament may be the symbol of democracy in Australia, but it is no longer the single exemplary institution of democracy. Democracy more properly understood is a cultural attribute which rests in a plethora of bodies, laws, customs and relationships. The role of Parliament is more adequately seen as an institution of political theatre, accountability, law making and recruitment. These are all legitimate and necessary functions for the Parliament, but they are centrally concerned with the reproduction of institutions and are not connected directly with the citizenry.

The current debates are missing an important point partly because it is not in the interests of executive government to pursue it. Citizenship, the centenary of the Commonwealth, the recollection of the bicentenary, the meaning of the Constitution, the meaning of republicanism, the place of women in Parliament and public space, the role of the High Court, the importance of international obligations, the values of multiculturalism, the integrity of the reconciliation process and the shape of the welfare state, plus an Australian historical attachment to egalitarianism, are all crucially important, but surely the missing question is, 'What is the nature of democracy in Australia?'

It is no use worrying over the role of Parliament and the struggle between the executive and the legislature if we are not clearer on how these institutions fit into a democratic society. We should not continue to ask the question, 'How does the Parliament express democracy?' We have exhausted that question and must now turn it around. We should be asking, 'What is the nature of democracy in Australia and how then does the Parliament fit into the larger principles, ideals and practices?' That is a nebulous and difficult question which is precisely the reason why we should ask it. This building makes claims about democracy and we should not take it at face value. We should exercise our democratic imagination more richly.

In 1988 the convict origins of Australia were censored in favour of the celebration of a nation. In my view we should understand more clearly the world historic significance of the transformation of Australia from a brutal convict prison — what Robert Hughes called 'the sketch pad of the twentieth century gulags' — into an open and tolerant democratic society.

Questioner — If the building is a monument to parliamentary democracy, why do you think we have replaced the Kings Hall of the Old Parliament House, where the public and the parliamentarians could and did mix with each other, with the Members Hall? Here we may

not share the same space with our parliamentarians but may only gaze down upon them from above?

Dr Warden — I think the vast polished floor down below is an architectural mistake. The intention was that it would be a meeting place where parliamentarians from both sides — the Senate and the House of Representatives — would mix and presumably do those things that I described. Clearly, for a variety of reasons, it is not used for that purpose. People pass through it. One reason is that it is very public and people can see what is going on down there. It is a fairly alien space as well. It is spectacular, but it is alien. People do not use it.

Constitutionally, perhaps it marks a post-1975 division between the Senate and the House of Representatives. Symbolically, there is an empty space between them whereas Kings Hall was a place where members from both chambers and parties blended much more. My observation of it, as someone who takes architecture seriously politically, is that that was a flaw in the design and a failed architectural device.

Questioner — I do not know if you have been down in the basement, but the character of the basement is very different from what stands aboveground. I work in the Joint House Department and it has many of its workers down in the basement. I wonder how you interpret that.

Dr Warden — I think this is perhaps another mistake. I have been down there and it is a dreadful place to work. It does create a structured underclass. The way that the old parliament building was managed, and similarly with this new building, was to celebrate parliamentarians and the big people — the visible public people — and to render invisible all the workers who inhabit the building for most of their time.

One of the first things that occurred with the Old Parliament House was that the old kitchens were pulled out when they were debating what to do with the building. Therefore, they removed one of the real hearts of the old building. Kitchens are where things happen. People stand in kitchens at parties. I am sure that people stood in the kitchen of the old parliament building as well.

Systematically and architecturally, the way that certain workers in this building are rendered invisible is a mistake. To condemn hundreds of people to work underground is a practical solution in terms of the design of the building, but socially and occupationally it is regrettable. You can play with that in terms of the hierarchical relationship, but I will not elaborate on that.

Questioner — I am interested in your thoughts on the political process. In particular about your comments on the policy process, who actually takes part in it, what those players think they are doing and what others think they are doing. I am thinking of the next step in that process where you might be asked at some future venue to advise seventeen and eighteen-year-old aspiring politicians in Australia where best to start their careers.

What I am reading from your comments is that quite a few of those young people would be better off not looking at a career which develops through the backbench of the Parliament House of Australia, but rather in organisations, non-government organisations and other very active groups who are well organised, often well funded and so on. Would you like to comment on that?

Dr Warden — The transition of policy issues made inside the Parliament to outside the Parliament has become a real feature of the political process since the early eighties. Indeed, it has become celebrated. One of the great advertised virtues of the Native Title legislation was that parliamentarians were not really consulted. All the consultation happened outside and the bigger the consultation outside with ATSIC or the aboriginal leadership, then the more authoritative the legislation. I think that is a spectacular example of the way that outside extra-parliamentary representative bodies were used and the merits of that can well be argued. The Parliament was deliberately used as a vehicle to rubber stamp or legitimate legislation which was more broadly consulted outside.

There is clearly a party difference as well which the ALP and the Liberal Party have both discussed, that is, the training ground is different. It is a well-known fact that the ALP has a better way of bringing people up through its organisation and learning about political processes, policy making and the brutality of politics; whereas the Liberal Party still maintains that amateur quality that Robert Menzies made a virtue of. We are watching that debate unfold once a week on television with the showing on Wednesday nights of 'The Liberals' and through newspaper articles about the Liberal Party.

In terms of advising seventeen and eighteen-year-olds where to go to find out about Parliament, I would firstly suggest the Parliament House gift shop. That is a very good place to find out about it. Secondly, I would direct them into these peak bodies. A few years ago it was the green movement, but they seem to have lost a little bit of their political influence in favour of other sorts of groups. Clearly, that is where the training grounds are and where the direct impact on senior members of government and parliamentarians can be made. These extra-parliamentary institutions can be used both as a training ground and as a way of exerting policy making influence.

Questioner — Parliament House is divided along two planes of division with four lobes. There are very deep divisions between those four lobes. The Senate and the House of Representatives are hived off to the side of the main body, which are also divided by the public section and the ministry. I wonder whether you might discuss that in relation to politics.

Dr Warden — An invisible line runs down the middle of this building. If you are on the House of Representatives side, you can pass — sometimes you do not need a visa — across to the Senate side.

One of the criticisms or remarks made about the building when it was first designed and constructed was that it entrenches the federal system used in the Parliament. There is a binary opposition that equally divides the House of Representatives and the Senate. It then becomes the concrete expression of the federal system whereby the people are represented and the people of the states are represented. It is written into the architecture. Remember that this building was designed and built in the immediate aftermath of 1975 when there was some discussion about these kinds of principles.

The other criticism or remark about the building is that the executive is right in the parliamentary building. It intrudes into the parliamentary building or, alternately, it is the most convenient place to put it. I was told the other day — I would be interested to verify this, but I think I heard it on good authority — that the executive needs more space, so some of the officers who serve the Parliament are moving out to East Block and West Block. The executive is claiming greater space in this building, which is a parliamentary building, not an executive government building. Gradually and by not so small steps, the building is being turned into an executive building with the Parliament added. Perhaps that is the character of the current administration. I am not sure. I am told that that process has hastened in the last three years. It is an important constitutional issue that the Parliament be kept separate from the executive.

When officers of the Parliamentary Education Office speak to people coming in — and students particularly — who ask, ‘Who runs this building?’, the belief is that the Prime Minister runs this building, instead of the Presiding Officers. The public apprehension is that this building is for the Prime Minister. It is a parliamentary building.

Questioner — I would be interested in your comments on the flagpole. At what stage of the design process was the pole brought in and what was considered the importance of its symbolism?

Dr Warden — The flagpole was in the original design. There was a lot of criticism of the flagpole because it was a very bold expression of the nation. The architects were American. The American flag, except in some southern states, is an unambiguous expression of American national pride and authority. Every day the flag on top of the US Congress is given to a school somewhere in the United States. A new flag is flown every day. For these American architects coming into Australia, putting the flag on top was a clear expression of the nation.

The Australian flag, as we know, is a much more problematic icon than that. The Irish, Aboriginal groups, republicans and others have long held debates about the flag. So it is not an unambiguous statement of authority. Some were critical because it was like Joe Rosenthal’s famous photograph of US marines putting up the flag in Iwo Jima. The expression was that it was ‘just another American mission in the Pacific, scalping the hill and sticking the flag on top’. This was the degree of bitterness that nationalist architects were feeling about the design not going to Australian architects.

I remember on the building’s opening day, which was televised nationally, Bob Hawke asked Lloyd Rees, ‘What do you think, Lloyd?’ Lloyd, with his raspy old voice said, ‘I think the building is fine, but that flag has got to go.’ Hawke was very taken aback and moved on quickly.

Clerk of the Senate — I will tell you a story about the flagpole. There was a review of this building in an architectural magazine, which made a ferocious attack on the building, calling

it a fascist building, representing the megalomania of some of our leaders. It concluded by asking what the flagpole reminded us of, and pointed out that it bears a strong resemblance to the fasces, the bundle of rods with an axe in the middle, the symbol of fascism. So, the article said, we have a fascist building with this fascist symbol sitting on top of it. But people who know about symbols will know that if you go to the Congress in Washington, you will find a representation of the fasces on the wall of the chamber of the House of Representatives. The reason for this is that the fasces were a republican symbol long before they were taken over by the fascists. They have since been rehabilitated as a republican symbol, and appear, for example, on French banknotes. In thinking about this, it must be remembered that the architect was an Italian-American.

Who are the Founding Mothers? The Role of Women in Australian Federation

by Dr Helen Irving

The great historian of the Australian Constitution, J.A. La Nauze, commented in 1968 in a paper entitled 'Who are the Fathers?', that the identity of the nation's 'Mother' must be left up to 'political sociologists to determine'.¹ While the sociological task he had in mind here may not be obvious, La Nauze's statement does clearly capture the commonly held view that there is nothing for historians to find, no historical evidence that women contributed towards 'founding' the nation.

We hear this claim frequently today. In current debates about the need for constitutional revision, as well as in discussion about the means of increasing women's representation in politics, it is often asserted that women were not involved in writing the Constitution or that they were left out of the processes of federation. For this reason, the argument goes, Australia's political institutions were not designed to encourage or represent women's interests. There may be much truth in this conclusion, but it rests upon a set of assumptions which themselves need to be questioned.

There can be no argument that women's representation in Australian politics does need to be actively fostered in the present; this should indeed be one of the goals of constitutional re-thinking in the years leading up to the centenary of Federation. But we should argue for this, I suggest, not on the basis that women did not 'build' the nation, but by learning from the ways in which they did.

How is it possible for a nation to be born, without a female presence? How can we have fathers without mothers? Contrary to the commonly held view, there were several interrelated ways in which women did play a role in the Federation Movement and significantly influenced the Australian Constitution's drafting. To recognise this fully we need, ultimately, new ways of understanding what it means to 'found' a nation and this must inevitably involve identifying a complex process, much more than simply writing the words

¹ J.A. La Nauze, 'Who are the Fathers?' *Historical Studies*, Vol.13, no. 51, 1968.

of a constitution; even La Nauze after all was compelled to include among his 'Fathers' men like Robert Garran who did not directly shape the Constitution's wording.

We also need to continue exploring the historical evidence of women's political activity in the 1890s which, for one reason or another, has never been researched before. Research now undertaken unequivocally reveals both direct and indirect participation by women in the federation processes of one hundred years ago. The story of women's role as 'co-founders' will be one in which this involvement and the influence of women's issues are inter-woven with a new concept of 'nation-building' in which the national community and the political culture this has shaped, rather than just the prominent political players, are foregrounded.

The Federation Movement entailed at least three clear stages.² Australian women came into this movement in what may be identified as its third stage. It was unlikely they would have entered it earlier. Since the first stage, from the establishment of the Federal Council in 1885 up to the first Constitutional Convention of 1891, was almost exclusively the work of prominent colonial politicians. Women, having neither the right to vote nor to stand for parliament in any colony, could have found no direct place in the movement at this time.

The second stage, beginning with the establishment of the Australasian Federal League and the Corowa Conference in 1893 and lasting until the 1895 Premiers' Conference in Hobart, offered more opportunities perhaps for women's involvement. But the dominant role played by the Australian Natives' Association in the movement at this time presented obstacles, since the ANA excluded women members. During these early years of the 1890s, however, separate women's organisations were beginning to grow, almost out of a total absence, into a significant number in most Australian colonies. These organisations would provide, as we step into the third stage, the seedbed for federation activity.

When, following the 1895 Premiers' Conference, enabling bills were passed in the majority of colonies providing for the election of delegates to a new Constitutional Convention and a referendum on the document they would write, a process was set in train where broader popular participation was not only possible, but necessary. Women immediately recognised, and in many cases took the opportunity for involvement. It should not be forgotten in this centenary year of 1994 that women in South Australia had by then obtained the vote. This alone would change the whole character of Australian women's role in politics.

Apart from the Woman's Christian Temperance Union (WCTU) which was established in most colonies in the 1880s, almost no women's political or cultural organisation had existed anywhere in Australia until the 1890s. By the middle of the decade, alongside a growing number of women's benevolent and charitable organisations, women's literary societies and discussion groups had been formed, and all colonies except Tasmania had Womanhood Suffrage or Franchise Leagues.³ In Perth, the Karrakatta Club, possibly the first women's political discussion group in Australia, was established in 1894 and its first secretary, we may

² La Nauze identifies two earlier phases, beginning in the 1840s and leading up to the third stage which he dates from the establishment of the Federal Council, but these, I suggest, are really stages in what La Nauze calls the 'Federal idea', rather than the movement which ultimately gave rise to the Federation. See J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972.

³ Audrey Oldfield, *Women Suffrage in Australia*, Cambridge University Press, 1992. Tasmania did, however, have a 'Franchise Department' in its WCTU branch.

note, was Edith Cowan, the first woman to be elected to an Australian parliament. Later in the decade, many of these women's societies in a number of colonies joined each other in National Councils of Women, and among their other activities, sent delegates to a meeting of the International Council of Women in America.⁴

All of these groups — in particular the Suffrage Leagues and the WCTU — served as avenues for debate about Federation, and in some cases were the framework for women's federal or 'anti-Billite'/anti-federal organisations. We see this in particular in 1898 and 1899 in NSW, where a battle was fought within the Womanhood Suffrage League (WSL) over whether or not the League should hold a public position on Federation and where, as we shall see, a women's federal organisation was developed during this battle from among the WSL membership.

But earlier than this, in South Australia where the female franchise had been gained in 1894 and already exercised in one general election, women were to participate directly in the federation process. In 1897 elections were held in four of the colonies, including South Australia, for ten delegates each to the forthcoming Constitutional Convention. The first sitting of this Convention took place in Adelaide early that year, and the fact that South Australian women had the suffrage was to feature importantly in its debates. Not only did the women of that colony exercise the vote in the convention elections, they also had a female candidate, none other than the 'grand old woman' of South Australian politics, Catherine Helen Spence. By then she was seventy-two years old and a champion of proportional representation, or 'effective voting' as its advocates called it, which she made her platform for the election.

As a respected figure and an elderly spinster, Spence was probably the closest a woman could come at this time to being an ideal political candidate. In particular she could avoid the charges often made by suffrage opponents that the families of women involving themselves in politics would be neglected, that the women would lose their femininity, that their husbands would be left to wash the dishes or mind the children. Spence, who had already recently gained campaigning experience during the 1896 South Australian election, was nonetheless initially reluctant to be the first ever woman candidate in Australia. But she overcame her doubts and received several thousand votes, being placed twenty-second out of a list of thirty-three. She did, indeed, remarkably well, given the combined disadvantage of uncertainty about the ultimate legality of her candidature as a woman⁵, and the failure of any party or newspaper to list her on their 'ticket'. Although she was not a temperance advocate, the Woman's Christian Temperance Union had endorsed her in their own circles and, according to their calculations, would have seen her elected if all women had voted as the WCTU did.⁶

Spence's example was, among other things, to feature in the convention debates on the issue of the Commonwealth franchise and in the shaping of what became section 41 of the

⁴ The importance of the international networks forged by women's suffrage organisations is emphasised by Ellen Carol DuBois in 'Woman Suffrage Around the World: Three Phases of Suffragist Internationalism', in Caroline Daley and Melanie Nolan (eds), *Suffrage and Beyond*, Auckland University Press/Pluto Press, 1994.

⁵ *South Australian Register*, 8 March, 1897; C.H. Spence, *Autobiography* (1910), facsimile, Adelaide, 1975.

⁶ *South Australian Register*, 1897; Minutes, WCTU Convention, Brisbane, 26 April-3 May 1897.

Constitution. Did her election result confirm that a woman candidate would not succeed, even that women did not want the vote? Mr Fraser, MLC, a Victorian delegate, thought so: 'I have as much admiration for the women as any man', he declared, 'I mean in their proper places ... A lady presented herself — a very estimable and eligible candidate stood for the Convention — but the people of South Australia did not elect her. Her own sex voted against her, probably.' 'Well?' interjected South Australia's Mr Kingston.⁷

Or did Spence's result demonstrate the reverse, as others thought? She had stood on a platform of 'effective voting', not as a woman, and it is now impossible to know what role her gender played in voters' minds. When the votes were counted she was placed a third of the way up the list, ahead of eleven men. Women's Suffrage organisations in other colonies and the WCTU found her result encouraging and sent their congratulations. History, I think, must be on their side, but we may only now speculate upon the impact her presence may have had on the Convention and on the shape of Australia's Constitution had she been elected.

Once the Convention began sitting, women's groups were among its many petitioners; they asked in particular for women to be included in Commonwealth suffrage and for this to be written into the Constitution. Through the WCTU and other temperance organisations, women also demanded that the states should retain the right to control the importation and sale of alcohol and opium (this was to appear in section 113 of the Constitution) and they featured in the numerous petitions — indeed a veritable bombardment of petitions — asking for the recognition of God in the preamble to the Constitution (giving rise to 'humbly relying on the blessing of Almighty God' as we find it today, as well as, indirectly the secular codicil, section 116).

The very first petition presented to the Convention, indeed, was a women's petition from the central committee of the WCTU, urging that the Constitution should include the provision 'that all voting by electors for federal parliaments be upon the basis of equal voting rights for both sexes.' Further pro-suffrage petitions came from NSW and Tasmania. Petitions also appeared, from the National Defence League of South Australia and from 'citizens of Tasmania' opposing the grant of adult suffrage and arguing in the latter case that the women of Tasmania 'do not desire political responsibility to be thrust upon them', their interests being guarded well enough by men in parliament. 'How many signatures has it?' asked the Victorian liberal John Quick. 'Ninety-six' replied the clerk. 'From the whole of Tasmania!' said Quick.⁸

The Woman's Christian Temperance Union, whose various branches also sent petitions on all three constitutional subjects — the suffrage, state control of alcohol, and the recognition of God — must be counted among the most significant of women's political organisations in this period. It had an estimated 8,000 members across Australia and its membership overlapped with many other Australian women's organisations, as well as representing part of an international network. The WCTU also had important links with temperance members in colonial parliaments and seems to have pioneered the technique used many decades later by the Women's Electoral Lobby, of assessing male candidates on the basis of the position they held on the temperance question. Its members were tireless activists, both on the matter of

⁷ *Official Report of the National Australasian Convention Debates* (Adelaide, 1897), Legal Books, Sydney, 1986, Vol.III, p.720.

⁸ *ibid*, p.637.

temperance and, through the WCTU's Franchise Departments, in the suffrage campaign. They corresponded with the press and with politicians, formed delegations to lobby members, demonstrated and petitioned.

The WCTU was also a strong advocate of Federation. It was itself a federated association, to which its members proudly made reference in their advocacy of Australian Federation.⁹ They saw the advantages of Federation as lying in greater national cooperation and uniform welfare standards and thus, it was assumed, in greater social and political harmony. The likely immediate gain from Federation of the federal female suffrage would, the WCTU was confident, give women the chance to influence politics directly. The ultimate goal of prohibition might even be achieved, if not nationally, at least in one or two individual states. On top of this, the creation of a new federal capital held out the promise of its beginning as an alcohol-free zone. 'The members of the Federal Convention have been called "Nation Builders"', said the WCTU National President, Elizabeth Nicholls, in 1897, 'and we all admit their right to the title if they agree on a [just] constitution', but 'representatives of the organised motherhood and sisterhood' of the Woman's Christian Temperance Union, 'are equally entitled to the name of "Nation Builders"', for without temperance principles, alcohol and vice 'will eat away national prosperity, and cause ... decay and death. And unless Australia is federated in the interest of women as well as men, our national life will be one-sided, inharmonious and dwarfed.'¹⁰

In 1898 and 1899 and in Western Australia in 1900, the Australian Constitution, in the form of a Bill for an Act of Parliament, was put to the electors as a referendum question. The greatest evidence of women's organisation and activity around the federation question appears during the referendum campaigns of these years, in particular in those colonies where popular opinion on the merits of the Constitution was sharply divided, and where the referendum result was unpredictable.

The Bathurst People's Convention of 1896 had included a women's organising committee which may perhaps be counted as the first women's pro-federal organisation, but the first group specifically formed to involve women in the overall campaign appears to be that established in Sydney in early 1898 in preparation for the constitutional referendum held in June that year. This organisation — the Women's Federal League — was formed from within the Australasian Federal League (effectively the men's organisation), by Maybanke Wolstenholme, a prominent member of the Womanhood Suffrage League of NSW and its immediate past president. Given that the women of NSW did not themselves have the franchise, the goal of the Women's Federal League was principally to canvass for men's 'Yes' votes in the referendum by arguing for the virtues of Federation and by encouraging 'Men who are indifferent or hostile to the Bill, to at least give it serious consideration.'

'Let us look to the near future,' urged the Women's Federal League, 'when Australia, the new-born nation, may proudly take her stand among her Elders, helped to her great position by the slender hands, but staunch, true hearts, of our countrywomen! Women of New South Wales,

⁹ For example, editorial, 'Australian Federation', *The White Ribbon Signal*, April, 1897. There was not, however, a common policy on whether the WCTU should publicly advocate a 'Yes' vote in the referendums. See letter from the South Australian WCTU committee to *Adelaide Advertiser*, 3 June 1898.

¹⁰ Minutes, WCTU Convention, Brisbane, 1897, op.cit.

YOU may turn the scale!’¹¹ Women should make efforts to understand the Constitution Bill and its debates, to set up WFL branches, to organise small groups of canvassers, and obtain promises from male voters of support for the Bill. They would be sent copies of ‘The Federalist’ newspaper, the organ of the Australasian Federal League in which around this time a ‘Women’s World’ column had begun to appear.¹²

Where the original idea for this League came from is uncertain. One of the prompting factors may well have been the campaign being waged around this time *against* the Constitution Bill by the Secretary of the Womanhood Suffrage League, Rose Scott. Scott appears to have been one of the most frequent speakers on Federation in NSW during the referendum years of 1898 and 1899. She appeared many times on platforms in Sydney and Newcastle with other prominent anti-Billites, including J.H. Want, William Lyne, and George Dibbs, and her speeches were reported in both the daily papers as well as the labour movement press.

At first Scott offered a particular attraction as a curiosity, a ‘lady orator’ at a time when women did not even attend official banquets, let alone speak at political meetings. ‘I had never heard a lady speak before,’ wrote one journalist, herself a woman, ‘and in my mind’s eye I saw a large, florid, tall, aggressive, not to say vinegary, person with a loud voice and ultra-offensive, assertive manner and spectacles, carrying fire and sword into the enemy’s country’. Instead, she found a ‘nice lady, not too large, with demure, not to say, quakerish ways’ whose meek presentation was occasionally coloured with humour and with ‘sly digs at the men’. The men in the audience sat back, she reported, their arms folded, their legs crossed, ‘quiet as mice’, as if they were ‘prepared to hear “mother” talk’.¹³

Having fairly quickly got over the novelty, press reports, especially as might be expected in the anti-Billite *Daily Telegraph*, gave full coverage to her arguments. Essentially these revolved around the proposition that Federation under the terms of the Constitution would increase taxation and the cost of living in NSW, would expose Australia to a greater risk of war, and would create an undemocratic institution — the Senate — in which the smaller states would adversely dominate the larger. Federation would be a financial disaster, Scott concluded, unless the federal treasurer was a woman.¹⁴ Throughout this campaign, Scott’s most distinctive theme was her appeal against the sway of sentiment and her call for a rational examination of the Bill, as if it were a business contract.

In contrast, Maybanke Wolstenholme’s campaign, as new Secretary of the Women’s Federal League, stressed the centrality of the ‘sentimental’ side of the question: pride, love of country and home, and self-sacrifice. Very surprisingly, little comment can be found in the press at this time which reflects upon the supposed essential nature of women and their likelihood or not to favour sentiment in such a question. Although clearly a curiosity, the women’s arguments were mostly treated seriously. This was, perhaps, a legacy of the earlier struggles of women suffragists and a small, encouraging sign of a change in the political culture.

¹¹ WFL pamphlet, Rose Scott papers, Mitchell Library, Sydney.

¹² WFL open letter, 25 April 1898, Mitchell Library, Sydney, MSS 38/63.

¹³ Emily Soldene, ‘Sydney Week by Week’, March 1899, Rose Scott papers, Mitchell Library, Sydney, MSS 35/63.

¹⁴ Notes for speech, 1899, Rose Scott papers, *ibid*, MSS 38/27.

Rose Scott's rapid rise to prominence in the anti-Billite campaign may well have led to concern within the pro-federal camp, and contributed to the resolution to form a Women's Federal League. Maybanke Wolstenholme soon joined Edmund Barton and other federalist advocates on the platform, and she was probably the author of the Women's World column in their paper, 'The Federalist'. The public attention drawn to Rose Scott's position also set off a dispute within the Womanhood Suffrage League of NSW itself. Scott was, it appears, frequently taken as a representative of this League at anti-Billite meetings where she spoke, and some fellow members seem to have believed she had permitted this confusion, even encouraged it. The WSL declared that it did not take a political position on any matter other than suffrage, and Rose Scott herself made the point (whether voluntarily or not we do not know) of publicly announcing this.¹⁵ Having done so she added the comment, as if by afterthought, that the most democratic members of the WSL happened (like herself) to oppose the Constitution Bill. In the midst of this dispute, her fellow anti-Billite within the suffrage movement, Belle Golding, announced that the Newtown branch of the WSL had in fact adopted an anti-Billite position, and so the dispute went on.¹⁶

Women's views on the Bill and the federal question were tossed about in the newspapers, with the *Daily Telegraph* running articles on 'Women as Critics of the Bill' and the *Evening News* conducting a two-part survey of prominent NSW women, most, but not all of them, pro-federal.¹⁷ Overall, it would appear that a majority of women, both outside and within the WSL supported Federation and the Constitution Bill, although some concerns had been held by suffragists in 1897 in particular, that the focus on the Convention and the federal question would distract from and delay the achievement of women's suffrage in NSW.¹⁸ While there is no obvious, 'gendered' difference between the position Australian women took on the Bill as a whole and the position held by men, the promise offered in the 1898 draft of the Constitution of a uniform female Commonwealth suffrage (and thus the thin end of the wedge for the state franchise), seems to have consolidated women's support for Federation towards the end of the decade.

Belle Golding, however, resolutely anti-Billite, was scathing in her rejection of this promise. Barton, Wise and others, she wrote, are now appealing 'in their extremity' to women, yet they ridiculed and opposed the women's suffrage at the Convention. 'How dare Barton now say that Federation would bring about women's franchise, and hold up to public admiration what he so bitterly opposed and tried to defeat. Women of Sydney, be not used as tools [!]'¹⁹

The 1898 referendum was defeated, however, when in NSW the special required majority of 80,000 votes was not achieved. An amended constitution, negotiated among the Premiers, still failed to satisfy the anti-Billite campaigners, but the negative result in NSW led to renewed efforts among its supporters, including the women of that colony. With the approach of a second referendum almost exactly one year later, and still without the vote, new Women's

¹⁵ Press cuttings, April-May 1898, Rose Scott papers, *ibid.*

¹⁶ Report of WSL meeting, *Sydney Morning Herald*, 21 April 1898.

¹⁷ *Daily Telegraph*, 3 May, 1899, *Evening News*, 8 February 1897.

¹⁸ WSL Annual meeting, minutes, 1897 (Rose Scott papers, *op.cit.*).

¹⁹ 'An appeal to the Women of NSW', *Daily Telegraph*, 14 May 1898.

Federal Leagues were set up again to influence the male electors. The most remarkable of these was in the little town of Hay in the Riverina, a region where pro-federation feeling was intense. Suffering from the combined affliction of prolonged drought and distance from Sydney, the people of the Riverina believed that their interests would have been better served had their region been part of Victoria. Federation was the next best solution to this disadvantage.

In May 1899, with the prospect of a second defeat in NSW, a meeting of almost eighty women (some already members of the WCTU and the Hay Benevolent Society) formed the Hay Women's Federal League. They went on to hold functions, raise money, to agitate and canvass for a favourable referendum outcome. It was the first taste of political activity for the majority of these women, the first demonstration to themselves and to many men, that women were capable of such responsibility, able to exercise judgement and capable of holding further political rights. They also demonstrated, no doubt, what one suffragist had earlier noted, that 'the dinner [got] cooked on election day'.²⁰

This time the referendum was successful and the energy and courage of these women was rewarded by the visit to Hay of Edmund Barton and Mrs Barton three weeks after the referendum, and by the many toasts made in their honour. A consummate politician, Barton told his audience that Federation would have been lost except for the Riverina, and that the women of Hay were a model for all the women of NSW.²¹ Mrs Barton, who did not speak on this occasion, despite the presentation of a bouquet from the Hay WFL, sent a private telegram of thanks to the women on her return to Sydney. In this simple contrast between the public performance and the private act (the record of which has survived only by chance), we glimpse not only the division between the political realms of men and women, but also one of the reasons (simple lack of historical sources of this kind) for women's apparent absence from the federation campaigns. We are also able to recognise the unusual nature of the public activity of women like Rose Scott, in the public silences of women like Jean Barton.

Shortly after the Hay League was set up, a second Women's Federal League, including Mrs Barton among its members, emerged in Sydney. 'Women may have the honour of materially helping this great cause,' the new League announced, 'if each woman can only induce even one man to vote in the right direction.' 'Anti-Federalist women', it noted 'are already well in the field, holding meetings, and using their influence widely against the Bill'.²² Belle Golding, speaking only days later to an audience of three hundred at an anti-Billite women's meeting in Sydney, referred to this Women's Federal League as the '*Ladies*' Federal League' and the 'Society League', mocking at the same time its pro-federal politics and its establishment membership.²³

The League's members were indeed mostly known in NSW by the position of their husbands: Mrs Harris, wife of the Mayor of Sydney, was the President and Treasurer, and a diplomatically long list of vice-presidents included Mrs Barton, Mrs Reid and Mrs Wise. Their

²⁰ Minutes, WCTU Convention, Brisbane, 1897, op.cit.

²¹ Reported, *Riverine Grazier*, 14 July 1899.

²² Letter announcing formation of the Women's Federal League, signed by Mrs Harris, 9 June 1899, National Library of Australia, Dowling papers (Series 6).

²³ *Daily Telegraph*, 14 June 1899.

manner was certainly genteel, and they adopted a behind-the-scenes, non-confrontationist approach to political activity. But there is no reason to assume that these women were less sincere than their critics, or that they acted purely as handmaidens to their husbands' political aspirations. No doubt they, like other women, found the experience of organising a politically educative one, both in developing their own skills and in providing a perspective on men's politics.

It is hardly surprising in any case that middle class women tended to dominate the political and philanthropic societies of the 1890s. These women had the obvious advantages of time, education and access to political networks. What is significant is their contribution to an emerging analysis of Australian politics based on gender rather than class, as well as their role in the evolution of twentieth century feminist organisations.²⁴ However, while speakers and organisers in the movement tended to be middle class, accounts of audiences suggest that many working women did take a close interest in Federation and sought to inform themselves on the issues.²⁵

As the decade came to a close, women's federal activity increased. We find the greatest evidence of women's organisation in Western Australia, the last colony to agree to federate. There, by mid 1900, when the Western Australian referendum was finally held, women had been recently enfranchised. A special arrangement (on which the WCTU had petitioned the Premier) was made to allow women to register for the referendum, even where they were not yet on the colony's electoral rolls. Women did enrol, and made great efforts both to educate themselves on the federation question and to encourage others, both men and women to register and to vote. The Karrakatta Club invited pro- and anti-federation speakers to address their meetings, and women's federal committees were formed in Fremantle, Kalgoorlie, Boulder and Menzies.

The women of these local committees knocked on doors, canvassed the mines, held meetings, provided guides to voting and escorted other women to the polling booths. There were anti-federal campaigns as well, most strikingly in the animated addresses given on separate occasions by two women at the Perth Town Hall in July 1900. One, Mrs Bateson, captivated her audience with a combination of satire, mockery and serious argument. She poured scorn on the do-good motives of the WCTU, as well on the morals of male politicians, who had, she said, 'skeletons not only in their cupboards but in their cradles'. She mocked the politics of the Convention delegates (as well as their looks) and she argued that Federation would undermine the power Western Australian women had already gained with the suffrage. Mrs Bateson concluded by advising West Australians 'to keep Federation out as well as rabbits.'²⁶

It is hard to appreciate now how far women of the 1890s had to go to force themselves into such campaigns. Even attending a polling booth was an alarming prospect for many, when anti-suffrage images were drawn of the degrading effect of 'mingling the sexes' in such

²⁴ Marilyn Lake, 'Between Old Worlds and New: Feminist Citizenship, Nation and Race, the Destabilisation of Identity', in Caroline Daley and Melanie Nolan, *Suffrage and Beyond*, op.cit., makes this point in relation to the apparently racist and imperialist politics of Australian suffragists in the same period.

²⁵ For example: 'As far as I could judge, most of the women present were workers': Report of Anti-Billite meeting, March 1899, press cutting, Rose Scott papers, op.cit.

²⁶ *The West Australian*, 30 July 1900.

public locations. Some, including a Convention delegate,²⁷ suggested that women should be allowed the postal vote to avoid this experience. But gradually, in this and in other areas, women began to gain confidence and to make their mark upon the Federation campaigns. Like 'the Coming Man', the 'New Woman' was becoming an increasingly familiar part of the political culture of the time.

Describing how it had taken her thirty years to gain the courage to speak up politically, the Convention candidate Catherine Helen Spence told an audience, 'including many ladies', at the Victorian Trades Hall in 1899 that she had waited in vain all that time for men to take up her political cause. 'It is said of us women,' she noted, 'that we keep waiting and waiting for the coming man, and very often he doesn't come at all — and sometimes when he does come we would be better [off] without him.' Hear, hear, shouted the ladies.²⁸

By the end of the 1890s the women could no longer be overlooked as they had been at the Convention of 1891, when the first draft constitution was produced. Although that draft served substantially as the framework for the debates in the 1897 and 1898 Conventions, certain very significant modifications were made to it, some of which reveal the emergence of women into politics. Even if no women's federal organisation had existed, the Mothers of Federation would still have left their traces in our Constitution.

There are at least two obvious sections of the Constitution where this is so. Section 113 ('All fermented, distilled or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State'), bears the unmistakable influence of temperance groups, among which the WCTU was a major player. The women of the WCTU had been, as we noted, prominent petitioners to the Convention on this matter. In arguing for the inclusion of section 113, Alfred Deakin urged other delegates to recognise that 'a very large section of the population who are amongst the most active politically' were represented in the temperance movement and their support for the Constitution should not be jeopardised.²⁹ He might well have had in mind, among others, the enfranchised women of South Australia where temperance politics was notably strong.

But it is above all in section 41, that the presence of women is most clearly identified. It is here that the contribution of women can be recognised, even by those who are only convinced of contribution by direct 'black-letter' evidence. The very fact of Federation being referred to popular election and ratification, after its failure as a purely political movement, had raised quite starkly the question of why women were not permitted to vote: 'The people' are to decide the issue, commented one suffragist: 'Are women of the people? Are they not half the people and are their claims not to be considered?'³⁰ During the Convention elections, a NSW newspaper responded to such questions with a rhyme:

²⁷ Charles Henry Grant, *Official Report of the National Australasian Convention Debates*, op.cit, p.722.

²⁸ Lecture to Melbourne Trades Hall, *The Federalist*, 17 June 1899.

²⁹ *Official Report of the National Australasian Convention Debates* (Sydney, 1897) op.cit, p.1042.

³⁰ 'A Woman's Powerful Plea for the Federal Female Franchise' Miss A. Golding, press cutting, Rose Scott papers, op.cit, MSS 38/35.

Pray Lovely Woman, cease to tease
The Candidates with tearful pleas
About your suffrage matter.
Give us a chance, pray, if you please
To Federate the colonies,
Without your endless chatter.³¹

But the fact that South Australian women had gained the vote before the elections took place was to mean that this question could not be ignored in 1897.

Section 41 tells us that no adult person already holding the right to vote for the Lower House of a state shall be deprived by the Commonwealth of exercising that right in federal elections. Effectively, South Australian women had to be granted the Commonwealth vote, and since the Commonwealth, it was agreed, must have a uniform franchise, all women in its first electoral act would have the vote, regardless of whether they held it or not in any other colony.

The long, convoluted arguments across the three Convention sittings and the continuous re-wording and re-working of this section before the present formulation was reached, make this one of the most fascinating parts of the Convention debates. Its debate is also unusual in forcing the delegates to touch upon matters they normally avoided. They grappled to find the right words for this section, so that South Australian women would not be disenfranchised; that the other states would not be forced to grant their women the vote; and that neither 'Chinamen' nor 'infants of sixteen' (Edmund Barton's particular, idiosyncratic concern) could be enfranchised. At the same time they argued about the nature of rights, the experimental character of Federation, the identity of the new Australian citizen, and the nature of representation.

A number of the South Australian delegates sought, as the women petitioners did, to have the uniform franchise enshrined in the Constitution at the start. They presented arguments to the Convention very similar to those found in Suffrage League manifestos: that women were taxpayers, that they were bound by law and they contributed equally to the country. They repeated the point so often made by female suffragists, that the Queen was herself a woman, at the head of a great Empire, representative of the potential of all women to participate politically. It is 'most fitting', argued Frederick Holder, who reminded his fellow South Australian delegates that they had been elected to the Convention by women, 'that when Federation comes into effect it will come ... broad-based, not only on the will of the male electors, but upon the will of the adults throughout Australia.'³²

Opponents argued along familiar lines, that the states should retain the right to decide this matter for their own elections, and that the Constitution should not be used 'to venture upon an experiment'. A few of them clearly struggled to couch their obvious disapproval of the principle of women voting at all in terms of states' rights and general caution. Bernhard Wise made the bizarre claim (as Belle Golding later pointed out)³³ that female suffrage was dangerous, since in America for example, it would have led to 'a complete disruption of the

³¹ *Australian Star*, 17 February 1897.

³² *Official Report of the National Australasian Convention Debates*, op.cit., Vol.III, p.717.

³³ *Daily Telegraph*, 14 May 1898 (see fn 19).

Union' with women supporting the abolition of slavery without having the physical force to carry this into effect. Aye Douglas reported that he had read in an Adelaide newspaper an account of a domestic row caused by a woman's participation in election campaigning. Simon Fraser added that he was *not* disparaging female suffrage, but he knew of a town in New Zealand with a Lady Mayoress, and he did not think there would be another Lady Mayoress in New Zealand. Mr Grant from Tasmania thought that women were more 'subject to emotional or hysterical influences' than men, although he had *always* been, he assured them, in favour of female suffrage since 'before many members of the Convention were born'.³⁴

Surprisingly, but significantly, almost all came to accept by the end that the first Commonwealth electoral act, through the force of section 41, would have to provide for women's enfranchisement. Perhaps opponents believed they could hold off the movement in their own states. Perhaps they were convinced by commonly heard arguments that women were more inclined than men to vote along conservative lines. Whatever the case, the constant suffrage work of women in most colonies had taken effect.

A nation which begins with a citizenship that encompasses a true majority of its people, when in most of the established nations this was far from accomplished, is a nation with much promise, with many battles already settled, with at least the potential to take further steps towards a more inclusive and representative polity. The suffragists, many of whom were also active in the Federation Movement, may claim perhaps more than any others, to be Australia's Founding Mothers.

One hundred years after these events, we can learn a good deal from this example. Among other things, the assumption that women were not involved in Federation indicates that Federation does not yet have a comprehensive history, written from the perspective of those outside as well as within its official arenas. This must surely be an important task of the centenary celebration project.

We can also learn that politics in the 1990s must, if we wish to broaden political representation, offer something its newcomers can identify with, something related to their own experience and interests, as the suffrage question did for women in the 1890s. The opportunities for popular participation provided in the later stages of the federation process gave women a chance to enter the movement, to use their vote in the colonies where they held it, and to begin the very long process of political education which has still not been completed today.

Above all, the lesson of the Founding Mothers, is that women should not wait for the Coming Man. Whether pro- or anti-federation, the women of the 1890s agreed on this point, but they had not yet fully found the means to stop waiting. One hundred years later we are still completing their search.

Questioner — In the latter part of your speech you alluded to two women who were prominent in the women's movement just before the turn of the century. You mentioned that one of them was Mrs Bateson. Who was the other one?

Dr Irving — I do not know anything about Mrs Bateson. She was an anti-federalist in Perth who gave that extraordinary speech. The other person you may be thinking about is either

³⁴ *Official Report of the National Australasian Convention Debates*, 1897, op.cit., pp. 718, 724, 720, 721.

Rose Scott or Maybanke Wolstenholme. They are the two people in New South Wales. One spoke against and one in favour of federation.

Maybanke Wolstenholme, now known as Maybanke Anderson, spoke in favour of federalism in the 1890s. Her biography, *Maybanke Anderson*, was written by Jan Roberts.

Questioner — I want to touch on one theme you raised in your lecture, the importance of female institution building. What we found in the 1890s is that women created their own public space. They created their own organisations within which very important debate went on.

It is that creation of their own public space which gave those new women the confidence to participate in the other public debates. I am not going to say that the other debates were broader, because the kinds of topics that were being discussed by women in their institutions, topics such as the philosophy of John Stuart Mill or the economics of Oliver Shrine, were just as broad as anything else that was going on in society at the time. We need to keep this in mind today. It is female institution building that provides the springboard and the political base for women within the broader political arena.

Dr Irving — I can only agree.

Questioner — I have found that there are many important issues that we should have been paying attention to but have not because the powers that be direct our attentions so that we join groups of this against that and that against this. It is terribly important that we try harder to work together. One of the important things is the amount of political correctness today both in Melbourne and Canberra. Groups which get a grant as an incorporated group seem to consider that if they do not toe the line to a party political politician who has the power to give them the grant then they will not get it.

Dr Irving — I want to comment on the view that people are, in a sense, manipulated by the strings that pull them. It does an injustice to the women we are talking about and groups to suggest that they have not made up their own minds and have not arrived at or reached their own conclusions on questions and that they were not themselves just as capable of making political decisions and being politically active as anybody else.

Questioner — What was the thinking of these organised women and suffragettes towards Aboriginals? As you know, when the franchise bill came into effect in 1902, some of those who championed the exclusion of Aboriginals, very much tied it to the inclusion of women in the franchise. One would have hoped that women, particularly the more active ones, would have had an opposite view. Have you done work on this? What is the evidence on it?

Dr Irving — No, I have not. I cannot really comment much on the historical evidence on this. I think Pat Grimshaw has done some work on this in the department of history at Melbourne University. History is full of contradictions and paradoxes and historical characters do not always do the things one would like them to have done, which is not the reason why I have overlooked it or failed to mention it. I really wanted to address the question of women's organisations around Federation. I would not be necessarily confident that you would find that the women were progressive along those lines in the 1880s in terms of what we regard to be progressive in the 1990s, unfortunately.

Questioner — You mentioned Catherine Helen Spence as the first Australian female political candidate, but it is Mary Lee who is the hero in terms of her indomitable campaign for votes for women in South Australia. Is there any record of Mary Lee's opinion of Federation and in what respect, if any, did she influence the referendum in South Australia?

I might take an educational opportunity inspired by the previous questioner. In South Australia we have been very frustrated by the media's inability to understand that there were no suffragettes in South Australia. The word was not coined until 1906, when an English journalist of the *Daily Telegraph* aimed to use the diminutive to put down the English women campaigning for the vote. Of course, South Australian women and women throughout Australia by that time had obtained the vote by the means of the suffragist campaigns, which embraced men and women working together.

Dr Irving — If I can comment on that second point first. I hope you did not think you heard me say 'suffragette', because I did not. I very carefully avoided that. I did not focus on Mary Lee and the details of the development of the womanhood suffrage and franchise leagues in my paper, because that has been done elsewhere. I wanted to draw their activities beyond the suffrage question, or at least to make the links with the suffrage question and the federation question. In my research, I have not found any documents that would throw specific light on Mary Lee's attitude to Federation.

Unfortunately, the documentation is very sparse and it has not been easy to research the role of women in Federation for a range of reasons. It has required a lot of very fine detective work. I have the most wonderful research assistant who has followed through a lot of traces and trails. But a lot of the papers of the prominent women suffragists of the 1890s do not reveal anything very fruitful or useful in that direction.

Rose Scott was extraordinary in keeping all her papers, speeches and newspaper cuttings which ever mentioned her. Then she lodged them in the Mitchell Library, which was established on the basis of the collection of her cousin, David Mitchell. It is a treasure trove. It is one of the few substantial sources which throw light on women's involvement in Federation. I have not come across anything on Mary Lee, unfortunately.

Questioner — You mentioned the confluence of the women's movement and the temperance movement. On the subject of institutions that may help women's representation, the temperance movement was one of the big movers behind the adoption of proportional representation in Tasmania, and women were highly involved in that. Was there any similar movement at the federal level, because proportional representation has been a crucial factor in many countries in getting women into parliament.

Dr Irving — I do not know and it is a very good question. That is a very interesting research topic as well. Of course, when proportional representation was introduced in the Senate, which was not until 1948 for the 1949 election — and this extends a bit beyond the area I have been looking at — whether the Woman's Christian Temperance Union or other similar women's groups were involved, I do not know.

The Woman's Christian Temperance Union is still active, but it does not have the mainstream prominence that it had in the 1890s, where many wives of politicians and women who were

important professional women in their own right were established with it. It really had, in many cases, quite a lot of access to male politicians. But my feeling is that the Woman's Christian Temperance Union is a much smaller mainstream organisation now. The campaign for proportional representation in the Senate went on for many years before that. There is no doubt about it, but I do not know the answer.

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