
REVIEWS

Learning to Love Australia's Constitution

Brian Galligan, A Federal Republic: Australia's Constitutional System of Government, Cambridge University Press, Melbourne, 1995

Reviewed by Tony Rutherford

IN a number of romantic Hollywood comedies, there comes a point at which the boss (always male) turns to his long-suffering secretary (always female), removes her forbidding spectacles, murmurs 'Miss Pennyfeather, you know you are really *very* attractive without those glasses', takes her in his arms, and bestows a more than appreciative kiss on her. Thus rehabilitated into the world of normal, attractive females, Miss Pennyfeather can continue as the hero's object of love, affection and respect.

In much the same way, Brian Galligan, the Cary Grant *de nos jours* (and also Professor of Politics at the University of Melbourne), sets about rehabilitating the Australian Constitution. In some circles, at least — circles which include most of Australia's intelligentsia, many of whom were never able to see beyond the glasses — the Constitution very much needs rehabilitation. No one likes it much. For most of this century, it has been seen as an obstacle to every kind of progressive policy: to the implementation of the fully-fledged welfare state, to bigger and better macroeconomic management, to the achieving of a truly unified national identity. Even its birth is derided as the product of boring and unimaginative log-rolling among a bunch of provincial colonial politicians.

Galligan — significantly, a member of that intelligentsia — aptly draws out much of this. Referring in particular to Crisp and Sawer, he reminds us how the post-World War II generations grew up with the intellectual habit of regarding federation as a shabby halfway house on the road to true nationhood. This is, of course, an important part of the intellectual background to the current 'republican' controversy, in which replacing the monarch is seen not least as a significant step forward on the same road.

The book's thesis is simple. Galligan maintains that in all essential respects — minus, that is, the superficial trappings of monarchy — Australia already is a republic. At the heart of this lies the sovereignty of the people, as clearly expressed not only in the making and adopting of the Constitution, but also in the way in which the Constitution can be changed only by full reference to the people. Australia is, moreover, organised as a republic, with both federalism and division of powers as integral parts of the Constitution.

Galligan is much concerned, and rightly so, to contrast these arrangements with the simple majoritarian version of representative democracy which has been the creed of Australian 'progressives' for the last century. Much of the contrast emerges with a particularly apt perspective in his chapter on 'Labor and the Australian Constitution'. It is a pity that he did not include a similar chapter on the Liberal/conservative parties, which might have provided the focus of an equally incisive account of parliamentary sovereignty.

The book is patient, well-argued and thorough, and succeeds on the whole in placing each key subject or institution — the Senate, the High Court, amending referendums, fiscal federalism and so on — within the constitutionalist framework. It comes at a particularly opportune time. It now seems clear that Australian federalism reached its lowest ebb somewhere in the mid-1980s, and has been recovering fairly steadily ever since. This has, perhaps, been largely due to the intellectual and political energies of a few key individuals like Nick Greiner and (occasionally) Bob Hawke. So far, the intellectual backing has not been conspicuous, even though federalism — seen under such guises as subsidiarity — has much to offer deracinated intellectuals looking for a substitute for progressivism and statism. The parallel reassertion of constitutionalism by Galligan is equally welcome.

All this is not to say that the book is without its weak points. Perhaps because of an eagerness to defend and extend his thesis, to explain the status quo as an organic federal landscape, Galligan is less than resolute in confronting some of the institutional problems now facing Australia. Particularly in the context of the present reform agenda largely shared by the State premiers, the chapter on intergovernmental relations is useful and interesting. Galligan sums up the difficulties over roles and responsibilities within the federation as essentially a dispute between the concurrent and coordinate approaches. In this context, concurrency describes what we see — the simultaneous occupation of policy roles by more than one level of government — whereas coordinacy describes a system whereby roles tend to be more or less exclusive.

Galligan is right not to be obsessed with the 'overlap and duplication' problem. But his advocacy of concurrency is based too much on the notion that it enhances democratic participation: '. . . concurrency gives the people dual representation in most policy areas' (p. 202). It does, indeed, but does it do so in a very useful way? And is simple 'representation' enough? Surely it is more authentic if there is a clearer relationship between taxing and spending? In fact, given the prevailing relationship between taxation and expenditure at all three levels of Australian government, this blurring of roles is not in fact useful. It is not clear, for example, how participating citizens would try to sort out for themselves the current policy mess in health (to name perhaps the most conspicuous area of concurrent policy). The borderline between 'dual representation' and rational ignorance becomes a very fine one indeed. (It may well be that one method of sorting out the 'overlap and duplication' problem is to ask if, in any given case, overlap and duplication are productive. But this raises the question of competition between jurisdictions; and Galligan is strangely muted on the notion of competitive federalism. Given that the premiers

have themselves now agreed to an undefined commitment to competitive federalism, this reticence is less than helpful.)

Galligan's discussion of the role of the High Court might also have been more full, and less accepting of the status quo. In a republic more truly reflective of Montesquieu, we might, for instance, ask for a better separation of powers, one which more clearly included the judiciary. There is, after all, ample evidence for the belief that bodies such as the High Court reflect, on the whole, the prejudices of their appointers (a point which has not gone unnoticed in the smaller States). Now that the pretence of strict legalism has been cast off, and the Court is engaged in more-or-less open policy-making and legislative activity, it is not enough to say that the Court will have to be more transparent. If nothing else, the hurt and defensive response to criticism in the wake of *Mabo* showed that transparency will have its limits. But its members must surely be as accountable for their policy-making as are any other legislators. At the very least, this means that the process of appointment must itself be a great deal more open.

At the same time, Galligan is acute and correct in pointing out that the High Court's next task — a long-term one — is to find a way of interpreting the Constitution which fully accommodates, perhaps even nurtures, our federal structure. As he hints, the Court may well find a tool by developing further the doctrine of implied democratic process. It seems likely that this area will be receiving a good deal of attention in years to come. Because a good deal of federalist renovation and experiment can happen without constitutional alteration, the role of the High Court in constraining or enabling that process becomes crucial, and the States would do well to consider what might be the vital arguments that would begin to swing the balance.

Caution is, again, the prevailing tone of Galligan's balanced and thorough survey of fiscal federalism. Here, however, the facts speak for themselves so loudly that to abjure conclusions seems almost perverse. Galligan sums up his survey by noting that there are at issue 'two conflicting models of governability', centralist and federalist (p. 238). In the book's context, it would have seemed only natural to prefer the latter and to offer some way forward from the prevailing political and fiscal impasse.

A Federal Republic is an elegant and intelligent map of the federation as now constituted, one which will introduce many to our constitutional culture, such as it is, and persuade them to see our institutions in a better light. It will make solutions to Australia's many problems easier to find to the extent that it promotes constitutionalism as a habit. Yet, given our present constitutional window of opportunity, it surely could have gone further.

Tony Rutherford is Director of the States' Policy Unit of the Institute of Public Affairs.