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Does Australia Need a Popular Constitutional Culture?

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I. Introduction

A distinctive feature of Australian constitutionalism is the absence (or near absence) of popular constitutional culture. There is very little public deliberation about constitutional law. To the extent that issues concerning fundamental legal norms and values are subject to public debate, they are infrequently cast in constitutional terms. But is this a *bad* thing? Does Australia *need* a popular constitutional culture? And if so, how might this be cultivated?

This chapter offers a modest defence of popular constitutional culture as a desirable ingredient of constitutional democracy. In the first place, a constitutionally informed citizenry is required to ensure that the state's exercise of public power falls within the parameters of its legitimate authority. But even more importantly, I argue, popular constitutional culture is required to effectively engage the constitutional amendment process, which is itself necessary to keep the Constitution up to date and in step with contemporary needs and values so that, ultimately, the Constitution can claim authority as our primary source of constitutional law.

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After outlining this argument and addressing some possible objections, the chapter offers some suggestions for how popular constitutional culture might be cultivated. Here I argue that educative measures are insufficient: reform requires addressing key features of Australian constitutionalism that account for the lack of popular constitutional culture – the absence of a central founding moment, and the character of the Constitution as a charter of government designed for lawyers rather than a constitution of the people.

II. Australian Popular Constitutional Culture (or Lack Thereof)

It is generally accepted that Australia lacks a popular constitutional culture. By 'popular constitutional culture', I mean public deliberation about fundamental legal norms and values that is cast in constitutional terms. By 'constitutional terms', I mean where those norms and values are understood not simply as important or desirable, but as governing the validity of the exercise of public power, as well as the validity of other (ordinary) legal norms. As Elisa Arcioni and Adrienne Stone have recently observed, '[t]o an extent that would surprise many outside observers, the Australian Constitution is not understood to be a repository of shared values, is not thought to contain fundamental principles to which the citizenry agree or aspire and does not frame public debate'.[2]

Why is this so? At the most basic level, it is explained by low levels of public knowledge about constitutional law. In constitutional systems with written constitutions, public deliberation about constitutional law – where it exists – proceeds largely by reference to the written constitution, which serves as the primary source of constitutional law. However, it is also generally accepted that ordinary Australians have poor knowledge about the Constitution, and even low levels of awareness that Australia has a written constitution.[3] Recent civics education studies confirm this, indicating both low levels of constitutional knowledge among school

2 See Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14 *International Journal of Constitutional Law* 60. Arcioni and Stone's thesis is that Australia doesn't lack a constitutional culture altogether, but has a 'modest' constitutional culture, characterised by a 'disinclination of Australians to turn to their Constitution as a source of shared or aspired to values and its consequent reservation to the domain of the specialist': 63.

3 Civics Expert Group, *Whereas the People: Civics and Citizenship Education* (Australian Government Publication Service, 1994).

students and low levels of teacher confidence with constitutional law topics.[4] These studies also indicate that students leave school with only the most basic understanding of constitutional change: although most know that 'a referendum' is a process used to amend the constitution, only 3 per cent understand the significance and implications of amendment.[5]

Although this goes some way toward explaining Australia's lack of a popular constitutional culture, there is a deeper explanation based upon features of the Constitution itself. The first feature concerns the absence of a central founding moment defining fundamental Australian values. Although in comparative terms the use of procedures such as conventions and referendums at the time is noteworthy, the objects of federation were modest. As a result of its genesis as a 'pragmatic exercise in nation building',[6] as well as its historical pedigree as an Act of British Parliament, it is fair to say that the Australian Constitution failed to 'constitute' the Australian people in any meaningful sense.[7] The second feature concerns the character and content of the Constitution, and notably its lack of a bill of rights. The Constitution has been accused of being 'inaccessible',[8] and labelled a 'prosaic document expressed in lawyer's language',[9] in that it concerns topics about powers and structure that have little traction with the kind of views that ordinary members of the public hold about fundamental legal norms and values.[10]

These two features of the Constitution suggest that *even if* there were higher-levels of public knowledge about the Constitution, it would still be unlikely that members of the public would deliberate over matters concerning fundamental legal norms and values in constitutional terms.

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4 Suzanne Mellor, Kerry Kennedy and Lisa Greenwood, *Citizenship and Democracy: Australian Students' Knowledge and Beliefs: The IEA Civic Education Study of Fourteen Year Olds* (ACER, 2002) xviii, 4, 73, 113, 114 (Table 7.10), 115, 122, 151 (Table BS.2), research.acer.edu.au/civics/1/.

5 Julian Fraillon et al, *National Assessment Program: Civics and Citizenship Years 6 and 10 Report 2013* (ACER, 2014) 43, research.acer.edu.au/civics/22.

6 Lael K Weis, 'What Comparativism Tells Us about Originalism' (2013) 842 *International Journal of Constitutional Law* 842, 850.

7 See Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart, 2011) 27 (observing that '[t]he status of Australia at the time of federation … left the idea of its people oddly inchoate').

8 The Hon Justice Ronald Sackville, 'The 2003 Term: The Inaccessible *Constitution*' (2003) 27 *University of New South Wales Law Review* 66.

9 Sir Anthony F Mason, 'The Australian Constitution in Retrospect and Prospect', in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 8.

10 But see Arcioni and Stone, above n 2.

Indeed perhaps the reason that civics lessons on constitutional law fall short is that there is too little to inspire interest in the first place: the Constitution is too disconnected from our self-understanding as a people.[11]

III. A Modest Defence of Popular Constitutional Culture

A. The prima facie case

Such is the state of popular constitutionalism in Australia. It is a further question, however, whether this is an undesirable state of affairs. Some might say that Australia gets along fine without a popular constitutional culture. For instance, Jeffrey Goldsworthy has argued that Australian experience shows why it is *not* particularly important that citizens conceive of issues concerning fundamental legal norms and values in constitutional terms.[12] At least when representative democracy functions reasonably well, such matters can be resolved through the ordinary political process – just as they are in systems without written constitutions. Furthermore, popular constitutional culture may well be a cause for concern rather than celebration insofar as it can lead to an undesirable form of constitutional politics.

Putting this concern aside for the moment, why might it be important for citizens to conceive of issues concerning fundamental legal norms and values in *constitutional* terms? One set of reasons concerns accountability. Even a federal constitutional system that consists primarily of structural guarantees cannot rely exclusively on the competition between national and subnational governments to ensure compliance with constitutional requirements. This is particularly so where there is great vertical fiscal imbalance, as is the case in Australia. If citizens do not understand what the constitution requires, then how can we ensure that state institutions operate within the bounds of power allocated to them? The 'Mr Williamses' among us are surely the exception and not the rule[13] (and the 'Mr Papes'

11 See Sackville, above n 8, 84.

12 'Constitutional Cultures, Democracy, and Unwritten Principles' (2012) *University of Illinois Law Review* 683, 684–90.

13 The Queensland-based musician and father of six who brought the landmark challenge to the Commonwealth spending power in *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.

the exceptions that prove the rule[14]). Relying on political and legal elites to perform this task seems undesirable as a matter of principle and potentially dangerous as a matter of practice.

So, having a citizenry that is equipped to hold the state accountable is one reason for thinking that popular understanding of the constitution is important. It could be queried, however, whether this really requires popular constitutional culture. This brings us to a second and more significant set of reasons for thinking that it is important for citizens to conceive of issues concerning fundamental legal norms and values in constitutional terms. This has to do with the desirability of having a constitution that reflects contemporary social needs and values.

The authority of constitutional law has traditionally been understood in terms of popular approval: for example, as meriting approval because it reflects a political community's fundamental values, or because it resolves coordination problems that make that political community possible. However, written constitutions that succeed in providing an enduring and stable source of fundamental legal norms and values over time can become out of date, reflecting the needs and values of the past rather than the present. When this happens, constitutions can face a crisis of authority.

The Australian Constitution arguably suffers from such a deficit. It is over 115 years old, and has been amended infrequently (eight times in total). It contains provisions that no longer reflect the needs and values of the Australian people. For instance, it contains provisions that expressly confer legislative power on the Commonwealth Parliament to make racially discriminatory laws, and that tacitly accept that persons may be excluded from a state's voting franchise on the basis of race.[15] Even those who dispute the proposition that the Constitution has little to say about shared Australian values have observed that there is a clamouring for the Constitution to better reflect national identity and contemporary political values.[16]

14 The New South Wales-based law lecturer and barrister who brought the landmark challenge to the Commonwealth spending power in *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

15 Australian Constitution ss 51(xxvi), 25. Both provisions are the subject matter of current debates about constitutional amendment.

16 Arcioni and Stone, above n 2, at 16–18.

What does this state of affairs have to do with popular constitutional culture? The connection lies in constitutional amendment. The amendment procedure, section 128, is the primary mechanism for keeping the Constitution up to date. On paper it seems well-designed for that task, prescribing a procedure that is reasonably democratic and practicable. Proposing amendments only requires a majority vote of parliament (either a majority in both houses or twice in one house), as opposed to the supermajority requirements found in many other constitutions. Proposed amendments require approval by a majority of the electorate and a majority of the states at a popular referendum, as opposed to procedures found in many other constitutions that involve no direct popular involvement. In practice, however, constitutional amendment has proven extraordinarily difficult, even where there is evidence that there is broad public support in favour of change.

The trouble, I suggest, is that the amendment process cannot be successfully invoked in the absence of popular constitutional culture. The success of legislative proposal and popular referendum *both* rely on the ability of the citizenry to conceive of issues concerning fundamental legal norms and values in constitutional terms. Yet that is precisely what Australia lacks. As a result of the lack of a popular constitutional culture, there is a fundamental disconnect between the constitutionally prescribed amendment process – the mechanism designed to keep the constitution up to date – and the background conditions needed to engage that process.

This is a significant problem. In the absence of an effective amendment procedure to keep the Constitution up to date, the alternative is progressive judicial interpretation. This occurs where judges 'update' the meaning of constitutional provisions to reflect contemporary social needs and values. Progressive judicial interpretation is both unattractive as a solution to the problem of constitutional change and in practice unlikely to succeed. It is unattractive because it makes judges, not the Australian people, the agents of constitutional change. Even if we are not concerned that judges will simply substitute their own views for the views of the people, we may well doubt whether judges are very good at determining what the views of the people are. Moreover, practically speaking it is a solution that is unlikely to succeed given the well-established formalist (or 'legalist') method of constitutional interpretation used by Australian judges, which favours a modest, text-bound approach.

B. Objections and responses

Prima facie, then, there is a case for cultivating popular constitutional culture on the basis that doing so is necessary to ensure the proper functioning of the constitutional amendment process.[17] However, comparative experience suggests possible grounds for objection. Experience in the United States in particular, where popular constitutional culture is extremely robust, suggests that popular constitutional culture can lead to the politicisation of constitutional law.

The politicisation of constitutional law both blurs the line between constitutional law and other legal and non-legal norms, and has important implications for how the judicial role is conceived. This is undesirable for at least two reasons. In the first place, it undermines public confidence in impartiality of the judiciary. Members of the American public view the United States Supreme Court as a political institution where contentious moral questions of the day are decided based on the ideological preferences of the justices, and the judicial appointments process often looks more like a test of the nominee's political views than an evaluation of the nominee's credentials as a judge and a member of the legal profession. In addition, there are other costs to democracy that come with the politicisation of constitutional law. The sense of inevitability that political and moral disagreements of the day will ultimately be resolved in court as legal questions, to which there purports to be a correct and incorrect answer, may stifle public discourse and lead to polarisation. There is no need for reasoned political deliberation that aims to understand and accommodate different viewpoints if those disagreements will ultimately be resolved by judges.

The modest institutional role currently occupied by the High Court of Australia makes these kinds of concerns seem remote. Nevertheless, it is worth taking them seriously. Here we can note two sets of existing features of the constitutional system that mitigate the possibility that popular constitutional culture would lead to an undesirable constitutional politics. First of all, there are features that lower the stakes for judicial appointments. These include; a mandatory retirement age for federal judges, which prevents strategic retirement to ensure that the appointment

17 This is not, importantly, to claim that popular constitutional culture provides *sufficient* conditions for effective engagement of that process.

of a new judge occurs when a particular political party is in power; and an executive appointment process that does not involve heavily politicised legislative procedures, such as interview-style hearings.

Second, the amendment process prescribed by s 128 itself mitigates risk by lowering the stakes of constitutional interpretation. Comparison with the United States is fruitful here. The US Constitution is also very old and has been infrequently amended. This is typically blamed on the onerous amendment procedure prescribed by Art V, which imposes super-majority requirements for proposing and adopting amendments, and which does not prescribe direct involvement by the people. Article V greatly raises the stakes of judicial interpretation of the US Constitution: since the amendment process is not designed to effectively enable the people to amend the constitution, it is largely up to judges to update the constitution to reflect contemporary needs and values. By contrast, when functioning properly, s 128 promises to have the opposite effect. Indeed the amendment procedure it prescribes is frequently cited as a reason in favour of a modest, textualist approach to constitutional interpretation.[18] To the extent that popular constitutional culture would facilitate the proper functioning of the amendment process, then, popular constitutional culture has a built-in safeguard.

IV. Cultivating Popular Constitutional Culture

I conclude with thoughts about the cultivation of popular constitutional culture. Although better civics education could go some way toward improving knowledge about the constitution, given the limited role that the Constitution currently plays in public discourse the potential of educative measures alone seems necessarily limited. What is needed, I suggest, are measures that address the two underlying features of Australian constitutionalism that account for the lack of a popular constitutional culture in the first place.

Starting with the lack of a founding moment, what is needed is a (re)constitution of the Australian people. Opportunities for such a 'constitutional moment' include the movement toward a republic, if and when that gains momentum. They also include the current possibility

18 See Lael K Weis, 'Constitutional Amendment Rules and Interpretive Fidelity to Democracy' (2014) 39 *University of Melbourne Law Review* 240.

of Indigenous recognition, but if – and *only* if – recognition takes a form that requires a deeper reconfiguration of the Australian body politic and shared Australian values than most current proposals on the table appear to contemplate.

With respect to the prosaic and lawyerly character of the constitution, the adoption of a bill of rights is the most obvious and most promising prospect for engaging public deliberation on matters of fundamental legal norms and values. It has been suggested that the Constitution's lack of a bill of rights cannot be blamed for the lack of a popular constitutional culture, on the basis that rights provisions and structural provisions are functional equivalents.[19] Even if that is correct, the *subject matter* of the Constitution's structural provisions presents a problem: overwhelmingly, it does not extend to topics that engage the public imagination. Adopting a bill of rights would change that, allowing more accessible, constitutionally-articulated norms and values to serve as anchoring points in public debate.

The modest defence of popular constitutional culture offered in this chapter thus presents a paradox for constitutional reform. The cultivation of popular constitutional culture appears to require engaging the very amendment process that I have just suggested cannot function properly in its absence. Pursuing one of the lines of reform indicated above, then, is essentially an act of constitutional faith: faith that the Australian people will rise to the occasion if and when it is presented.

19 Arcioni and Stone, above n 2, 65–67.

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