

Justice Michael Kirby

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before the appointment of Justice Kirby to the Australian High Court

Does the Australian Constitution deliver representative democracy in Australia?

Our Constitution is one of the oldest continuously operating constitutions in the world. It's operated pretty well, really. It grew out of the will of the people and that's a very important thing. It's in form, a British Act of Parliament, but in all reality it was adopted in careful debates of the Australian settlers. It excluded the Aboriginal people, it excluded the Chinese and other non-indigenous people, it excluded the Pacific Islanders from the debates, but it grew out of the will of the majority of the people on the continent at the time.

It has of course, many imperfections. It reflects earlier times. But it has evolved. It in that sense, has reflected the evolving nature of the Australian nation, the evolving nature of our position in the world, the changing nature of our relationship with the United Kingdom and the Empire. It has been a remarkably adaptable Constitution. If you live in a country under a blue sky with general peace, democracy and a general ability to influence the politics of the situation that you live in, people are very cautious about changing it.

That can sometimes be a source of great irritation to reformers and I suppose I am a reformer in my life. But if you are living in one of the most stable and peaceful countries of the world with general justice and democracy, there is a general disinclination to fiddle too much with it. Basically, that is a wise instinct. In any case it is the instinct which the Australian people have always exhibited when they have been asked to change the Constitution.

Does the Constitution need to change in any particular way?

I think there are some matters upon which the Constitution needs to change. But whatever my personal view is about change, I think it is very unlikely that it will change radically in my lifetime. That certainly is the lesson of the past and it may be that that's quite a wise approach on the part of the Australian people, irritating intensely to those who would want to tear it all up and throw it out and start again.

What concerns me is that the superficialities that have passed for a constitutional debate in this country really do not concentrate on starting again and looking afresh at the Constitution. If you were serious about a constitutional debate you would be questioning fundamental issues in the Constitution. But we haven't really done that. We have been instead treated to a froth and bubble debate about relatively minor aspects of change of the Constitution. There has been a great flight from any real debate about more fundamental changes. I think that is a great pity. It has debased what we have called our constitutional debate.

What are those areas in which change to our constitutional arrangements might be needed?

That one matter that does need to be changed is our relationship with the indigenous people of Australia. That means, not just the Aboriginal people, though overwhelmingly the Aboriginal Australians, but also the Torres Strait Islanders and the Pacific Islanders who came and lived in this continent before the settlers came. I believe that the relationship with them needs to be sorted out in a constitution that is ready for the next century. I also think it is probably timely for Australia to consider a bill of rights.

I am rather ambivalent about a bill of rights. There are some pretty strong arguments against a constitutionally entrenched bill of rights. The Americans have entrenched in their Constitution the right to bear arms. If you get matters entrenched they're very hard to excise from the Constitution. Times change and perceptions of what are right, suitable for the time, alter, I suspect, the attitude of most Australian lawyers is to be rather cautious about an entrenched bill of rights which shifts great power to the judges.

On the other hand, we are now one of the very few countries in the world that doesn't have a written constitutional bill of rights. We have seen our highest court developing implied rights from the text, which would really have astonished the founders of the Constitution. It might be a more honest, honourable and democratic way for us to get the people to endorse a bill of rights and have that included in the Constitution. But I don't underestimate the difficulty of bringing that about. Indeed, that is also something that would be very difficult to achieve in the foreseeable future.

It's been suggested that our Constitution doesn't really reflect social, legal and political reality in the 1990s. For example, there is no mention of the prime minister in the Australian Constitution. Do you have a view?

Well I can understand the feeling that it should reflect the realities. On the other hand, everyone knows the position under the Constitution of the prime minister. Our Constitution works because of many conventions. If we start to make provision for the constitutional position of the prime minister then we have got to start working out all the other conventions and consider which of them should go into the Constitution. It's not too much skin off the nose of a prime minister that he or she is not in there, when everyone knows that this power is great and the influence even greater. I don't think that's a particularly serious default.

Most people have no idea about the Australian Constitution. If they read it they would probably forget what they read anyway. If we put the prime minister in there, there would be only 1% of the community that would know that that was the case. But that doesn't make the prime minister one jot more or one jot less important than ordinary citizens know that he or she is.

Is the fact that very few people know much about the Australia Constitution something that should be remedied?

I think it should be remedied. Books and programs such as this are useful in bringing a message to a wide audience about what the Constitution is, what it says and how we can utilise it. Justice Murphy used to say to me that he always took the Constitution to bed with him and he had it on the lamp stand just beside his bed. If ever he couldn't sleep, he'd read again the passages in the Constitution. He'd find there, hidden away in between the lines, all sorts of things that were very important for the rights of the Australian people. Now when he first propounded this, the orthodox lawyers who were used to analysing and interpreting very accurately the words, and nothing but the words, would get very upset about it. Now his views about implied rights have more supporters.

Given the requirements of Section 128, do you think constitutional amendment is likely?

Well, the history of constitutional change by Section 128 of the Constitution is pretty discouraging. Out of forty-two proposals, only eight have been accepted. It's a very small number of acceptances. If you look at Australia as a stable

constitutional country, if you contrast it to other countries such as Cambodia, where I work for the United Nations, you see the great merits of a stable, continuous, constitutional government where people live under the rule of law with independent judges and with a parliament that works and is answerable to the people through peaceful changes at ballot boxes.

These are wonderful things and there has been a bit of a tendency in the debate, or what passes for the debate, about our Constitution, to fail to acknowledge the importance of one hundred years of stable constitutional government, responsible government, representative, elected government and stable judicial institutions. You can count on the fingers of your hands the number of countries in the world that can boast that. We Australians are one people who can make that boast.

Some suggest that change is needed to ensure that our parliament arm operates more effectively. Do you agree?

I would agree that the parliamentary arm of government is the weakest, in the sense that power has drifted in this century. It has drifted out of the hands of the representative parliament, into the hands of the cabinet. Out of the hands of cabinet into the hands of the prime minister and head of government. Out of the hands of the executive government into the hands of the bureaucracy. Out of the hands of other parts of the government into the hands of the judiciary. In that sense, the power that at the outset of federation was very much exercised within the elected parliament, has really receded. We have seen some efforts by parliament to fight back. We have seen, for example, the parliamentary committees. We have seen the change in the composition of the Senate and people's voting that have made the federal parliament and the state parliaments, more powerful. But, generally speaking there has been a drift of power from parliament. I don't think that is a good thing. It is a matter which should be addressed. Most of the debate that we have seen so far in Australia has been focused, however, on the executive and on the symbols, and not about the reality of ensuring that the legislature really controls the executive government and reflects the diversity of opinions in the community.

Is there anything that can be achieved through constitutional change to remedy the problems you have just identified?

These defects could be addressed, in part, by parliament asserting its own power. The power in the letter of the Constitution is still there and in the conventions of the Constitution it could be exerted. But so powerful are the whips of the parties and so strong is the influence of party upon parliament that the power in the representative parliament of members to speak their own minds, (as distinct from what's decided within the caucus or meeting of the party), is really diminished. There are things that could be done about this. For example, proportional representation to ensure the better representation of minor parties would probably enhance the inclination and power of parliament to speak up for minority viewpoints. We see that to some extent in our Senate. We see it, in part, because of the mixed system of proportional representation which we have in the Senate. But the weakness of the parliamentary branch of government is certainly a matter that we need to address in Australia in real debates about the Constitution.

What about citizen initiated referenda? Some suggest the Australian people should be able to initiate a referendum where say 5% in at least three states agree. Is this a system that should be part of Australia's constitutional future?

Personally I am not very much in favour of citizen initiated referenda. Unfortunately, the experience where this has operated, in the United States in

particular, has tended to suggest that it comes as a reflection of populist views that are beaten up by superficial media and by trendy opinions. The result is that you don't get a real debate about issues. You simply get a whip-up of emotion and of people's prejudices.

We have seen for example, in California, the introduction of the "three strikes and you're in" law which came about as a result of the popular referenda. That has meant that people for, relatively minor offences, though it be their third offence, go to prison for life imprisonment, which is a ridiculous way of responding to anti-social conduct. It's cruel and probably contrary to a human rights solution to the issues of anti-social conduct. So I am a bit cautious about populist referenda. I think there is a value in filtering democracy through the political process: the political parties, the parliament, the cabinet government and so on.

The lesson of democracy that we have learned in the twentieth century is that it is not brute majoritarian rule. Brute majoritarian rule delivered to us Fascism, it delivered Marxism, it delivered other extreme forms of authoritarian government. The lesson of democracy that we take into the twenty-first century is that it is the view of the majority of the people, but with due respect for minorities. Information is needed which controls the will of the majority in a fashion that leads to informed decisions. It isn't simply the brute decision of emotional responses made under the pressure of media entertainment, which unfortunately has often been the experience of the citizen initiated referenda in the United States.

With technological development, there is the possibility one day for "electronic democracy". Can technology assist to deliver democracy that is more responsive to the people?

I'm all for using technology and for consulting so long as you don't translate that into an automatic decision. For example, take capital punishment. At any particular time, if you have a particularly brutal murder, a lot of media publicity about it, a whip up or frenzy of feeling about the subject, it wouldn't be difficult to persuade the people pressing their button to say "of course I respond to this situation. Press the button 'yes'. Back to capital punishment." That really would not be an informed decision based upon the data about the impact of capital punishment on crime, the horrors of effecting capital punishment, and of the state becoming involved in actually terminating a human life.

Matters that are complicated are not really prone to instantaneous, superficial democracy. If I have a criticism of the way we practise democracy in Australia at the moment, it is that people don't look down the track. They don't inform themselves. Politicians are no longer taking bold decisions. They are looking at the public opinion polls. They are looking at what the latest surveys show, and responding immediately to that instead of thinking what is best for the country and what is the appropriate solution.

Do you have a view on the merits or disadvantages of a new constitutional convention or "people's convention"?

It is probably fair to say that any attempt to keep control of our Constitution amongst the politicians, as distinct from spreading it to a debate that includes the people of Australia in all of their variety and magnificence, is bound to fail. It's the involvement of the people that gives legitimacy and impetus to constitutional change. That, fundamentally, is the lesson of our constitutional history. It's what happened to bring about the federal Constitution at the end of the last century.

There is a great cynicism in the Australian community about politicians today. In part it may be undeserved. In part it may be the creature of the media and the way the media deal with politicians. But it is a fact. If that fact is recognised, then serious debate about our Constitution, if confined to politicians and under the impetus of politicians, is very unlikely at the critical moment to carry the day with the people when they go into the little church hall at Goondiwindi or pull aside the curtain when they go to vote in referenda in Derby or in Cairns.

The people of Australia are very cautious. If they felt they had an involvement and that the movement had a legitimacy and it wasn't a partisan approach of a particular political party, then it may be that real constitutional change could be effected. But otherwise it seems likely to have the same score rate as in the past.

How do we move to a situation where there is greater involvement by the people?

We get past it by the politicians recognising that they have a very important role in stimulating the debate, and perhaps in initiating the debate. But when it comes to something as fundamental as the Constitution, it doesn't belong to the Labor party. It doesn't belong to the Liberal party or the National party. It belongs to the people of Australia. The people of Australia won't let it belong to a particular political party. They will resent attempts of political parties to claim something as important as the Constitution of the country as their own.

It belongs to all of us. There has to be respect for all of us. There has to be respect for dissent and for diversity of opinion. There must be more tolerance of those who don't want to change, or those who want further change, or those who want different change. That can't really come about in the context of the highly partisan, highly politicised, highly competitive political debates in a finely balanced political situation.

In that situation, point-scoring is likely to be antithetical to the achievement of real constitutional reform. Seriously informed constitutional debate becomes impossible. That's then a debasement of constitutional debate. And that's a tragedy. It's unworthy of the Australian people. They made their Constitution by a broad discussion and then by referenda held around the country. They did so after conventions that included people from all walks of life. That's the way it was done previously. I suspect that anything more radical than minor changes of the Constitution will not be bought about except in that way, adapted to the different society we live in today.

Can you outline the advantages you see in retaining our constitutional monarchy?

The real question is, why should we change? We have to ask ourselves, what are the arguments for change? My fundamental position is that I'm a little bit of a constitutional conservative when it comes to the head of state. I believe that we have a system which we probably wouldn't invent today, but which, having secured it by history, serves us pretty well. Basically, we get by without a head of state. Not a bad thing in my view.

If you look around the world and see the countries that are most temperately governed, they tend to be constitutional monarchies - the Scandinavians, the Netherlands, Belgium, Spain, today, the countries of the British Commonwealth that are still monarchies - Australia, New Zealand, Canada, the United Kingdom itself. There are, of course, some exceptions. But then you ask yourself, why is this so? Why are half the countries of the OECD constitutional monarchies?

The answer that comes back is: because constitutional monarchy, by an accident of history, prevents a person getting into the top job who has power and has legitimacy. It prevents that person from getting into a position where they can exert power. A message is sent out that everybody serves. That's not a bad message to send out to politicians. I've had twenty years of observing the political life of Australia. It's not a partisan thing to say that it's a good thing that politicians, judges, public servants - everybody - realises that there's something above them.

It's essentially the people. But under our system it's the symbol of the Crown representing the people. It's a symbol that has worked pretty well. The Queen comes when she's asked, and she doesn't come too often. If we have a local head of state then the concern that some people have, is that there would be an elected head of state. An elected head of state would be a potential rival to the elected head of government. That would introduce an element of instability which we don't have in the present system.

So there are many arguments. It's a complicated question. It's very difficult to get the Constitution, which the people of Australia after all did accept, explained to the people. It's important that before they ditch their constitutional arrangements they should understand that it has some merits. Those merits have to be weighed before replacing the system by something else.

The polls are indicating that the Australia people want to elect their own head of state. Is there a problem with letting the public decide who becomes head of state?

First of all it's not for the parliament to decide the question. It's a matter for the community to decide. That's reserved by the Constitution. Secondly, the polls show a high division in the Australian community on the question of the head of state. And it's a position where the polls vary considerably from time to time. Thirdly, the polls certainly show this is one of the lowest items on the political agenda for the Australian people. 1% or 2% of people say it's important. It's one of the lowest of the issues that they identify as important. Fourthly, the position so far as constitutional change is concerned, is that one should respect minority opinions.

It's very important that we ensure that our constitutional arrangements are constitutional arrangements that reflect the broad consensus of the people. Now even if the number of people who want to retain the current position is a minority, that is a minority which is sizeable. They are fellow citizens. Their point of view ought to be respected before a change is effected which throws away something which is very precious to them.

This is not something that should be manipulated by the media in opinion polls or by editorials or by the presentation of issues that really do not give the other point of view. You look at the media in Australia today. It's next to impossible to get the point of view that favours the constitutional arrangements we have. I think we've seen a debasement of constitutional debate. As a citizen I object to it, and resent it. But in that environment of so-called "debate" on this issue, it is important that we respect each other's opinions. And that we understand that in changing something which is really quite fundamental to the character of the Constitution and to the nature of the nation, we should do so in a way that moves with a broad consensus. We shouldn't say this is a subject in which we get 50% plus one and that's it. That is not the way you build a constitutional stability which is founded on respect of the opinion of all the people. The Constitution belongs to all the people, not just the 50% plus one.

What powers should a head of state have?

If there were to be a change in the position of the constitutional head of state, I find the option that has been put forward by the Republic Advisory Committee the most attractive one. But I do so because essentially it is continuing a constitutional monarchy, without a monarch. Of course there are some people who declare themselves to be true republicans who say, "you have kept the vestiges of constitutional monarchy, but you have not kept the checks and the traditions that go with constitutional monarchy and therefore the system will not be so easily transferred to the arrangement that the proposal puts forward". That would be a matter that would have to be judged in the future. But whatever I think about this subject, whatever I, as a citizen think about this subject, whatever I believe is a good thing or a bad thing, is really irrelevant.

The one thing that does come through from public opinion polls is that 80% of the people of Australia will not agree to a system which is essentially the current system. They will only agree to a change of head of state if they can vote for it. The problem with that is, as every politician knows and every person in public life, that if you have a vote, especially if you have a popular vote, but also, if you have a parliamentary vote, then you have a legitimacy for the head of state which the current system does not provide. You have the chance that the person who has this legitimacy will, just occasionally feel, that they have the call of the people to do what their legitimacy permits them.

This is not a hypothetical thing. It's happened in other countries of the Commonwealth of Nations which, having abolished the Crown, have moved to a position of giving another person elected, or appointed, the same powers as the Governor-General has and not being under the check of hundreds of years of history. It's led to the usurpation of power against the elected government. I am thinking, for example, of Pakistan.

We have no problems of that kind at the moment. What we have to ask ourselves is, at least at this stage in our history, at least when our people are divided around fifty-fifty on this issue. Is this a timely change or is this a distracting issue? Are there more important constitutional issues on which we can get a broader consensus than a fifty plus one? I think there possibly are. That's why, it seems to me, this is not really an urgent matter in the constitutional debate.

What key constitutional issues are more important?

There are many matters of detail. The Constitutional Commission, which looked into the Australian Constitution, came up with a large number of ideas, some of which are quite worthy of study and acceptance. For example, I myself supported all four referenda that went to the people in 1988, in the referendum of 1988 that we "had to have" for the Bicentenary.

I'm very suspicious of referenda "we have to have" for a particular year. When the referenda went to the polls and the people went into the church-halls to vote, only 31% of them supported the referenda. It was very low support. For my own part, providing for local government in the Constitution, providing for freedom of religion and protecting religious belief in the States was an important and useful step. But I was in the minority, a small minority eventually.

One of the changes that the Constitutional Commission put forward, was the idea of a national judiciary and having protections that presently exist for the federal judiciary in respect of the State judges. State judges can quite easily be removed and sacked and we have seen in Victoria, with the Accident Compensation Tribunal. The government simply got rid of twelve undoubted judges. These things can't happen under the federal Constitution, in respect of federal judges. That

prohibition could be transferred and we would have the protection of the tenure of all Australian judges.

There are many matters of detail of that kind, where you could possibly, by proper explanation get a national consensus. Whereas on other issues, in respect of which the matter is not purely one of the mind, it's also one of the heart, people feel, perhaps irrationally, rather deeply about such matters. Their fellow citizens will respect their point of view if they are looking to a political system and a Constitution which is a Constitution for all Australia and not simply the possession of a particular political group, particular political party or particular political movement. The Constitution has to be the basis on which we all live together in relative peace on this continent.

Is there anything we can do to change our Constitution to prevent a recurrence of 1975?

The greatest guarantee against a recurrence of 1975 is to stick with the present system. So vehement was the outburst and so lasting the damage that occurred, that it is inconceivable that a Governor-General, lacking the legitimacy of popular vote, would ever do again what Sir John Kerr did in 1975. But if we have an elected head of state, who has the legitimacy of selection, through a parliamentary process and election, it is much more likely that that person will conceive that the people have called him or her to exercise the powers that Sir John Kerr felt he had.

The reason why most Australians were shocked with what Sir John Kerr did, was because it was an anti-constitutional monarchy thing to do. It was not acting with complete propriety for the whole people. This is my own opinion. And the way he went about it, of having the Leader of the Opposition at the back of Government House waiting for the call. It wasn't the right way to go about it. It offended us, because that is not the way we would conceive that the Queen would act in such a situation. It's an offence to our system and our notion of our system of government. That is why the system of government we have is less likely to deliver a repetition of that problem, than is a system where the head of state is elected.

Can we ensure that any head of state, whether selected or elected, remains above politics?

I think it is possible. There is after all a long tradition in our country of the head of state and the head of state's representative, being above politics. In fact if you think of our system, we have a very interesting combination under our Constitution, between what one might call the permanent government - the Crown, the judges, the public servants - and the democratic government which is the executive in the cabinet, the prime minister, ministers and the politicians in parliament. It is a very, very interesting and really a wonderful inter-mixture of stability, change, responsibility to the people and permanent government. We've got these features. In the past I think it has been the fact that the Governor-General is not elected that has meant that there is this strong tradition: appointment by the Crown, acting for all the people, being above party politics.

There is a risk that if you change that there will be this feeling of a "call of the nation", an obligation to respond. If a person is elected, whether by the people or by the parliament they may feel in emergencies that they have to step in because they have "the call". That is less likely under our current system. Whether we have the constitutional monarchy or the republic which is a republican form of constitutional monarchy, it seems to me that the strong tradition being immune from partisan party politics will remain. The judges after all, do that in the United

States, which is a constitutional republic. The federal judges certainly have kept out of party politics. I think there would be strong pressures in Australia to do so. But only the future will tell whether that is what happens.

Is the monarchy entrenched in the covering clauses of the British Constitution Act?

That's a legal question. It would have to be given an answer after full argument and careful reflection. I've seen legal opinions that say that the words of the union, provide for an indissoluble federal union under the Crown - that they are the core and that they can't be easily changed. In a general sense if the people of Australia want a change, they should be able to have it. If the people of Australia want to vote at referenda for a change, they should be able to secure the change. That is after all a democratic system. I don't believe that in the end, if the people of Australia wanted to change the head of state or other aspects of the Constitution, that they would not, eventually, be able to secure their will. That still leaves the question of whether the changes under Section 128 are designed for changes of detail in the Constitution, as distinct from changes of the fundamental nature of the polity.

That is a question which would ultimately have to be decided, if necessary, by the High Court of Australia. But so uncomfortable is the notion of having a federal republic and State monarchies that my own hope would be that the change, if it is to come about, would come about uniformly, across the whole nation, as a result of a conviction that that is what is best for Australia. It should come after a thorough debate that isn't timed to meet a sporting event or a particular accidental date of history. It has to be timed to allow for full and proper debate of all Australians and to reflect the will and consensus of the overwhelming majority of the people of Australia in all parts of this continent.

Is consensus between the States and the Commonwealth an essential pre-requisite to constitutional change?

It's the consensus of the people of Australia whose Constitution we are talking about. The notion that you can push this through for a particular deadline came a cropper in 1988, in the referenda we had to have, but only secured 31% of the vote. The notion that we have to push change through for a sporting event, such as the Olympic Games, would reveal an unappealing aspect of our civilisation that I hope is not present.

We are talking about the fundamental law of our country, of a continent, of a people who've lived in one of the most stable constitutional systems of the world, generally well governed. These are not matters to be set to a timetable of millennial madness or of the Olympic Games. They are matters upon which we should have a serious debate. It should be a debate in which all points of view are expressed, allowed and encouraged, especially in the media.

I regret to say that the media really is, in Australia, debasing the constitutional debate. It is highly regrettable. I happen to think it will ultimately be counter-productive to those who want to have change, because the people are not stupid. They will realise that they are being manipulated. They will not like that. They will go and do what they did in 1988 and vote against it.

If we want change, it's got to be by patient, careful, thorough debate, with all points of view, all cards on the table and not just on superficialities. The realities of how we live together and how we work together in a democratic society - these are things that have been sadly missing from the debate up till now.

How do Australians become more informed, given the constraints of the media that you have outlined?

Well, they become concerned. They do things. They don't just sit there with their chips and watch the media at night. They get out and they join political parties or political movements. They join the Australian Republican Movement. They join the Australians for Constitutional Monarchy. They join their local branches of the political organisations and they express their point of view. They don't just leave it to others to do so. They write letters to the newspapers. They join non-governmental organisations. This is a civil society and what it involves.

I recently saw a survey that shows that the countries that enjoy the greatest freedom are the countries in which there are the most non-governmental organisations - church societies, choral societies, the bodies where citizens come together and express their points of view. That's what people should do. They should think about the Constitution.

Perhaps some of them should have it beside their bed, like Lionel Murphy. They should have it there to peer into it. Who knows what they might find in the Australian Constitution? I mean, this is what Lionel Murphy said so many years ago. Only belatedly did the Justices of the High Court find there some of what he had earlier seen.

Should basic fundamental rights and freedoms be legislated by parliament?

I do believe we should have fundamental freedoms legislated by parliament because that would then tend to be rather detailed, rather specific. It will have the legitimacy of the vote of the people's representatives in parliament. It will go through a public debate, political debate. That will, I think, be useful. We do have a lot of such legislation and it increases every year.

I support parliament enacting specific laws on matters of fundamental human rights. It would be not a bad thing if the State parliaments began to introduce their own bills of rights. The Australian Capital Territory Assembly has done that. It is the way in which we tend to do things in Australia. We experiment. We try. We find that the heavens don't fall in and it's actually quite a useful thing. Then we move on to something on a higher plane. I believe that that is probably the way we will go in Australia.

What about the protection of fundamental rights and freedoms by the Courts and the common law?

We have seen in Australia in recent years, the High Court declaring that in the Constitution, hidden there between the lines, are fundamental principles and fundamental rights. It's not really such a radical idea. Every lawyer will tell you that if you look at a document, there are not only the words, but there is the purpose of the document and the implications from the document and from its structure. A constitution that is intended to last for centuries is bound to have implications.

The High Court has said that it has found some implications there that are protective of fundamental human rights, such as free expression on political matters. Now these are views that were advanced in the past by Justice Lionel Murphy. They tended to be derided at the time and regarded as heresy. I remember how lawyers used to laugh at them. Now, to some extent, they're orthodoxy. So they've come along.

My own view is that it's better if they can be adopted by the people because the people are the democracy. It's a lovely thing for judges to give from on high implied constitutional rights to the people and to say that these were in the people's document, when certainly those who framed the document, didn't think they were. It would be much better, in terms of political theory and in terms of democratic legitimacy, if the people gave those rights to themselves.

The problem we have had in Australia is, basically, that the people have been rather reluctant to write fundamental rights and liberties into their constitution. That's why we've had to find other techniques of the common law and of constitutional interpretation to find rights there which were certainly not intended to be put there by the founders, but which are in keeping with the needs of the time.

What we have to do is get greater synchronisation between what we need in terms of fundamental rights and what we are getting in the document which we have. My own preference, as a democrat, is that it should be in the words of the document approved by the people, rather than discovered by people like myself, the judges.

Some have suggested that what the High Court has done in cases like the Political Broadcast case is fundamentally undemocratic. Can you comment on that?

Well my duty and respect to the High Court of Australia prevents me from saying that what has been done is undemocratic. In the theory of what the High Court has done, it is merely a matter of applying orthodox principles of construction to a document, the Constitution, and finding the implications in the constitutional document. Justice Dawson says, in his dissent, that if the founders had intended to put a bill of rights there, they would have done so. They had this debate. They decided not to do it. Here we now are "finding" the rights that are there, when they weren't intended.

Constitutions have to move with the times. In fact it has been one of the glories of the Australian Constitution that over a century, it really has survived remarkably well. It's adapted. It's been given new, fresh interpretations. In every decade there is a new look at it, a new judicial interpretation is found for it. That is as constitutional interpretation is bound to be. But if we are talking of matters so fundamental as democracy and human rights, it seems to me that, other things being equal, it would be better if they came expressly from the people, and were not "discovered" by the judges.

The problem is that our levels of public debate in Australia have been so poor and our levels of public knowledge about our Constitution so inadequate, and our teaching in our schools so superficial that there hasn't been the body of debate and opinion and thinking about this subject amongst the people. So that when politicians come forward with proposals, the people are very suspicious. They tend not to agree to them. What we've got to do is to engender a culture of debate, of genuine debate, respectful of differences, supportive of diversity, and get from that debate what we want to be our liberties and freedoms. Once we've settled on them, to put them in the Constitution. Better that way than judges searching there with their magnifying glasses and finding it in implications of the text when it was not expressed and possibly deliberately so.

Can you tell us why you advocate a bill of rights?

My position on the bill of rights is probably rather similar to that of most lawyers in Australia. I went to law school. I was taught that we don't need a bill of rights

because the common law provides all the rights that we need. Experience has taught in this century, even in our own country, that sometimes in the rush of events in parliament, fundamental rights are overlooked. Unless then you have a constitutional guarantee which can override what the parliament or the judges do, you're likely to find that you wake up and your rights have gone. Then they're rather hard to get back. That's why there is this notion that we should put certain matters above the political debate. We should say, "we Australians live together in this continent upon the basis that we respect each other's fundamental rights and here they are".

The difficulty of course, is not in that concept. It lies in the fine print: getting agreement about what those fundamental rights are, and recognising that they don't stand still. They are constantly evolving. Perceptions of what are fundamental rights for the twenty-first century are going to be radically different from the fundamental rights of previous times. This is the problem. But we won't solve this problem by talking in generalities. We'll only solve it, if, as a nation, we have a will to provide the mechanism, probably constitutional conventions, that will allow for debate of these things, and if possible, an agreement on what a bill of rights or charter of freedoms should be for the Australian people.

What rights would you include in any bill of rights?

Work for the United Nations in Cambodia and in other parts of the world has taught me that the sort of things that we, in Western countries, tend to think are the most important issues for human rights, are often not the most important things that the people consider to be human rights. Lawyers tend to think that the most important rights are civil rights - the right to a competent lawyer, to have your warning at the time of your arrest, the right to be given access to the courts rapidly, and so on. But if you ask a person in Cambodia what are the most important fundamental rights, they'll say "getting a clean glass of water, getting education for my children, having appropriate health care".

Economic, social, cultural rights are often overlooked in the debate in Western countries, such as Australia, about human rights. So, my own view is, that if we are serious about debating fundamental human rights, we should be debating the whole gamut of them and not just civil and political rights. We should be looking to be a leader in constitutional development. We should be looking to set the objectives of fundamental rights in our Constitution and not just concentrating on arrest powers and matters of that kind, but lifting our sights to the more important and long-term issues of fundamental rights of people living together in peace.

The exact content of a bill of rights would depend upon a proper public debate about that issue. We haven't really had that debate in Australia. At least we haven't had it in recent times. We haven't had it on a broad basis. It's tended to be a debate of the elite. That's probably why change hasn't come to pass. What is needed is a broad discussion of this issue in the Australian community. After all, the Canadians got a Charter of Rights. The New Zealanders have moved towards a bill of rights. Even the English, who resisted this for so long, now have the *European Convention on Human Rights*. We have the *International Covenant on Civil and Political Rights* and the other covenants. But we don't have our own home-grown, Australian statement of our fundamental rights.

I do not accept that it is beyond the wit, will, imagination and moral strength of the people of Australia to find, define, state and accept those fundamental rights. But we've left it awfully late. We've taken an awful long time. We've devoured a mountain of experts' words about the matter without too much action. It's possibly time that we stopped the generalities and got down to the issue of really defining

what those basic rights will be. I believe that we can do it. But we certainly won't do it at the current level of what passes for constitutional debate in Australia.

Why do we need a bill of rights when we already have federal human rights legislation introduced under the external affairs power and anti-discrimination legislation in most States?

The problem with depending upon the international instruments is that if it comes to the crunch and you have a clash between what an international instrument says and what a statute or a decision of a court says in Australia, then the instrument, at the crunch-point, won't matter a jot. The instrument is not part of our law. Even if incorporated, it does not have a superiority over the decision of parliament or the decision of a court. When one is talking about constitutionally entrenched rights you are talking about including in the fundamental charter by which we live together, certain rights which are higher than the rights or the duties that can be imposed by courts or by parliament. We've had cases in my own court, where certain official action has been challenged and undoubtedly conflicts with the *International Covenant on Civil and Political Rights*, for example. Because that is not part of our law as such, and because even if it were, it doesn't have the overriding power of a constitutional charter of rights a court may not give effect to it. The law made by parliament or made by the courts has to be observed and the fundamental right goes out the window.

Is a statutory bill of rights a viable alternative?

The notion of having legislated bill of rights, as distinct from a constitutional bill of rights, is a step on the journey. It is one of the steps that should be taken on the way towards a constitutional bill of rights. Of course, this doesn't fit into the agenda of millennial madness and having everything done by the year 2000. We would not proceed to entrench a bill of rights in our Constitution within such a short space of time.

We have to look at the alternative models. The idea of having a legislatively enacted bill of rights is the path that has been taken in Canada and in New Zealand. It's probably a path that is suitable for Australia. Then we can see that it is not only not destructive of our society, but may occasionally be useful. After all, this is the way in which, in Australia, we achieved reform in matters relevant to human rights, in matters relevant to the rights of women, in matters relevant to the rights of gays and lesbians and of other groups in the community. A law was passed in one part of Australia. It was enacted. It was found that it not only didn't destroy society, but was actually quite useful, proper and just. Then other parts of the nation copied it. That will probably be the way that we will move, gradually and in a very Australian, and rather slow way towards a constitutional bill of rights.

What did the provisions of our Constitution concerning Aboriginal people originally say about Australia as an emerging nation?

At the time of federation, Australia was quite a racist nation. As we look back on it now, we can see so. I don't think we should be too flagellatory about this. As I perform my duties in a number of countries for the United Nations, I see that in the reality of Australia today, we are a much more tolerant society and much less racially prejudiced than most societies of the world. This includes many countries from which the people have come whom we were trying to keep out of Australia in those bad old days.

We shouldn't be too critical of the settlers at that time. They were reflecting a point of view of protecting their race in what was thought of as a hostile and very

distant environment, a long way from the metropolitan power and in an environment of geography in which they felt threatened. But whatever the reason, Australia, at the time of federation, was a country that did not treat Aboriginal people right. Australia did not treat the Chinese and other Asian people in ways that we would now regard as acceptable. It did not treat the Pacific Islanders, who we ensnared off their islands in the Pacific, took to work in the Queensland sugar fields and then, when we realised there were an awful lot of them, we tried to throw them out. So we did not have a particularly good history at the beginning of the century in terms of race. Everyone knows this. But we have really made heroic and marvellous strides to change that. We deserve a lot of credit as a country for doing that and for coming to terms with our geography and with our moral obligations.

The penny has finally dropped. Australia is in the Asia Pacific part of the world. We are very close to the Asia Pacific region. We are not, ourselves Asian and we don't fool any Asians by saying that. We debase our own contribution to our region if we negate our own distinct culture. We have come to terms with this. We have really done very well. But it's not there in the Constitution. It is vulnerable to the sorts of ethnic pressures that we see in so many parts of the world. It would be a good thing if this principle on which multicultural and tolerant Australia lives together were there entrenched in the Constitution.

What would you do say to the suggestion of a revised preamble to the Australian Constitution?

Well preambles don't count for all that much usually. I'd rather see matters in substantive text. I believe that could be done. Indeed, upon one construction of the provisions of the Constitution, you could say that there are already provisions in the Australian Constitution which forbid discrimination of any kind. That could require an enlargement of the construction of provisions in the Constitution forbidding interstate discrimination (s 117). But the possibility may be there.

A better way and a more candid way and a more modern way, and a way more congenial to multicultural Australia today, would be to incorporate these principles of non-discrimination and of racial harmony in the substantive provisions of the Constitution. I believe that that is one measure that we should certainly consider in the real debate about the Australian Constitution and its revision one hundred years after it was adopted.

Would this be met by having a guarantee of equal treatment irrespective of race?

This could be met by a general guarantee of equal treatment in respect of race. But a modern constitution, addressing what are the real challenges to equal treatment, would not stop at race. It would also look at equal treatment on the grounds of gender. It would look at equal treatment on the grounds of age. It would look at equal treatment on the grounds of handicap of sexual orientation, and many other grounds that in our modern enlightenment we see the illegitimate bases of discrimination that have existed in the past.

How does the legal system presented by the Australian Constitution compare with other constitutional systems in the world?

In terms of international relations and international affairs, we've done very well, in the sense that the construction of the Australian constitutional provision to make laws with respect to external affairs has been given such a large ambit that the outer parameters of it are sometimes difficult to see. This is not something new. This isn't the achievement of the recent times. This was established in the

1930s when the High Court very presciently, saw that in matters such as air navigation and international labour principles, it would be necessary for Australia, as a nation, to join the world. I get a little bit impatient with those people who really would rather go back to island Australia, fortress Australia, down here in the south seas, having nothing to do with the rest of humanity.

Telecommunications, jumbo jets, global problems such as global warming and HIV/AIDS link us to the world. Fortunately our founders put in there a provision which has been given a very ample construction and a very sensible one. One that has developed with Australia's place in the international community. It's a strength of the Australian Constitution. I believe it is to the credit of the High Court that that was seen as long ago as the 1930s.

Are there any features of other constitutional systems that we should consider within a broader constitutional debate?

One matter in the international field that we really do need to consider is the question of ratification, because in a sense, the executive government of the Commonwealth has inherited the King's power and the Queen's power to ratify treaties and to do so by executive act. That doesn't, at the moment, constitutionally require submission of the international measure to the parliaments generally, or even the federal parliament.

The problem with that is that our country is a federation. Some international conventions do challenge elements of the federal compact. Our country is one in which, at the moment and in the foreseeable future the government of the day rarely controls the entire parliament. Therefore, there are very powerful arguments for a better system of ratification of international treaties. Given that they are already having a big impact on our law, they are likely to have an even bigger impact in the future. Whether we should go to the position of the United States and require advice, consent and votes in the Senate or the parliament is another question. But that there ought to be a better system for ratification is beyond doubt.

How do we get to a position where there is greater involvement and consultation with the various parliaments in the process of treaty making?

It's very unlikely that we would change the external affairs power in the Constitution. It's such a sensitive question that that's the sort of matter upon which the people would be likely to be extremely conservative and the parties might be divided. Therefore it's most unlikely that there would be a change in the actual grant of power. It's probably unlikely that there would be a vote of the people to incorporate advice and consent provisions, such as in the United States Constitution. What we need is something which is in between the current situation where the executive government of one part of the Australian political system can, in an afternoon, decide to lodge its instruments of ratification and not submit them to parliamentary scrutiny in the federal parliament, still less for the opinions of the State parliaments which might find their powers affected.

We want to avoid that. But at the same time we want to avoid what has really been a partial opting out of the international system by the United States because of the difficulty of getting treaties through the Senate. Somewhere in between those two options lies a more democratic and sensible system than we have at the moment. We have struggled towards that half-way system in Australia. Prime Minister Menzies, for example, in 1961 said that his government would always adopt the principle of laying a treaty before parliament for a period in each session before it was ratified. That practice tended to be followed until the 1970s.

But governments of all kinds, when they don't have to do something, are rather disinclined to give more power to parliaments. This is part of the erosion of the power of parliament. It may be that the halfway house is to be found by parliament asserting itself, and parliament providing mechanisms whereby treaties will be examined and by which provisions can be disallowed or at least put up for debate.

The very debate of treaties is itself a useful contribution to the public understanding of the role and importance of international law and of Australia's part as a member of the international community. Now I reflect and ask, would that have meant that the *International Covenant on Civil and Political Rights* would never have been ratified? Or the first optional protocol to that Covenant? Would the *Racial Discrimination Convention*, and the *Convention on the Rights of the Child* or other conventions have been adopted by Australia? If they had not, that would have been a tragedy in my own estimation. This is the hard question. My own view is that we would ultimately in Australia, muddle to the right conclusion. But at the moment we don't even muddle. It's a system which is a very weak system for ratification of treaties. To say that we would not have a democratic component in the ratification of treaties is basically to say, well governments know best, and we don't trust the people on this.

I think a better compromise between the two extremes is to have a greater parliamentary involvement, to reserve the final say to the executive government, but to encourage a public and parliamentary debate about matters that are so important. They are matters which are likely to become increasingly important in the decades ahead.

Would you say that these kinds of constitutional challenges present global challenges?

Well, we like to think of ourselves as living in a country where we can make our own home-grown constitution and that that can look after us. But the reality is, whether we like it or not, that we are living in a world where everything is changing. It's changing very rapidly. Largely, it's changing because of technology, the inter-communicating computers, the great international banking system, financial system, insurance system and market system. The fact is that we are very small players, in Australia, in these great world markets. The fact is that the problems of the environment are global and not just limited to our country or even to particular regions.

Problems such as AIDS and malaria are international problems which can't be solved in one particular community. If one looks into the future, there is a dichotomy between, on the one hand, the outburst of ethnic feeling which has come at the end of the twentieth century, which is so out of kilter with the global pressures of the economy, and problems that need solution.

Resolving where we go in Australia is a very important issue for us in our constitutional debate. It's one of the reasons why I have an anxiety about the debate of the head of state issue in terms of nationalism. In my view, nationalism is really a model of the nineteenth century and it's persisted into this century. But as we launch ourselves into the twenty-first century, we should really be thinking of ourselves, as Australians, in a wider context.

After Hiroshima the notions of nationalism were outdated. I see the future as a call to a world of global problems and global solutions in which our nation, a continent, has a very important role to play. That's what I would like to see the

constitutional debates about. Unfortunately, I see few glimmerings that this is on the agenda in Australia in the 1990s.

How can Australians contribute to this global debate?

The most important contribution which we could make at the moment to the global debate, in our reflections on our Constitution, is to lift our sights from becoming just another country which is pursuing ethnic images of itself and nationalistic images of itself and worrying itself to death about its head of state, or its flag or matters of symbols of that kind. Instead we should see ourselves as we are - a very interesting, post-imperial society, with a great mission and a great opportunity in a part of the world which is the centrepiece of the future global economic advancement of the twenty-first century.

We happen to have been given this great chance to be a country with stable constitutional government in a part of the world which *The Economist*, newspaper says is going to be critical economically in the twenty-first century. That provides us with new opportunities, if we can see them for ourselves. But we won't see them if we think in narrow, nineteenth century nationalistic terms. We will only see them and seize the opportunities if we think of ourselves part of the world and put behind us the siren call of nationalism. It really is very out-moded. It is not suitable to a people who have the privilege of living and governing a continent.

Will technology will have a greater role to play in the process of constitutional change through, for example, new forms of electronic democracy?

Well I'm a bit cautious about the notion that technology will deliver instantaneous democracy. That really is the superficiality of the opinion polls that we see in the newspapers on a whole range of issues today. The opportunity of the modern technology of information is to provide to every citizen, or every citizen who wants it, knowledge of the constitutional debates, the knowledge of the real variety of the constitutional debates, a removal from the superficialities that pass for our constitutional debates and debates about our fundamental rights and freedoms.

This is something which we Australians, as a country with a very advanced economy and an advanced technological infrastructure, can really achieve if we set our minds to it. But if we are dependent upon the general media, I'm afraid that we are dependent upon outlets which are devoted to entertainment and not to serious reflection upon the issues which are important to our good government in the century ahead.

I don't dismiss the possibilities of technology because the lesson of our generation is that anything can happen. I was asked, for example, by the Human Genome Organisation to become a member of their think-tank which is advising them on the issues of the law and ethics of the human genome. This involves charting the markers on the human body, the human genome, which indicate the possibilities of particular genetic disorders or diseases. Now, potentially, we could look at our generation as the moment in history when it was suddenly realised that human beings could create a super-species. This is a potential of the world we live in. It's therefore impossible to say that anything is beyond the capacity and imagination of humanity. We who are locked in the mindset of the past and who are the creatures of our own educational system, and our existence and our understanding of the world can't even hope to perceive where the world will be in a hundred years because technology is escalating and it's difficult to conceive where precisely it will take us.

Who could have conceived the atomic bomb, the jumbo jet, the laser, and the information technology of today, just seventy years ago? It would have been impossible. So who knows where electronic democracy or electronic governments will go? It is a great potential. But if we are talking of serious Australian constitutional debate, I think we will do well if we attend to some old-fashioned problems.

It's a bit like the debate about information technology in Asia which led to the response of POTS (plain old telephone systems). If we can get our constitutional POTS in order, and attend to some old-fashioned nineteenth and twentieth century problems then that will be no bad thing. It would be an achievement that we could hand to the next century. Just as those who were struggling on these issues with different technology at the end of the last century did their best and gave us a Constitution which has, on the whole, worked pretty well.