

BOOK REVIEW

Helen Irving, *To Constitute A Nation: A Cultural History of Australia's Constitution*, Cambridge University Press, 1997.

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Constitutional law is not the raciest of topics. In Australia until recently, study of the Constitution and its legal development was perceived as rather arcane, the preserve of fusty academics (like myself) and lacking the relevance of disciplines such as contract or property law. But since the decisions in *Wik* and *Mabo*, the implied rights cases, and even the "People's Convention", the Constitution, and constitutional law, have been thrust into the public spotlight. Helen Irving's new book *To Constitute a Nation* makes a colourful and scholarly contribution to both academic and popular knowledge on the subject. It brings constitution-making out of the closet and into the living room of public opinion.

The book makes three main claims. The first is that the movement to federate and the making of the Constitution were not the product only of political and legal events but arose from the complex cultural conditions of the period, hence the book's secondary title, "A Cultural History of Australia's Constitution". The second and related claim is that a constitution does not spring from the political and legal spheres alone; it must also be present in the (hearts and) minds of individuals involved in the process of constitution-making and the collective consciousness of the community. In the words of Benedict Andersen, whom Helen Irving follows, the Constitution, and indeed the nation itself, must be "imagined" before politics and law can bring it into existence. The final argument is that the Australian Constitution is a derivative instrument; a hotch potch of constitutional techniques and experiences, and this hybridisation is a product of the utopian environment in which the Constitution was made.

The defining feature of Helen Irving's book is that she has written a *cultural* history as opposed to a political or legal history of the making of the Constitution. Conventional legal and political histories of Federation have told a somewhat dry, but functional tale, focussed largely upon a limited group of historical participants and

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upon the economic issues which led to Federation. "The cultural side of the story has scarcely been told" (page 1) she says. By contrast Irving's first chapter "Colonial Nuptials" is a smorgasbord of the people, sights and sounds of the constituting process — a sort of "*son et lumiere*" of the event which marked the inception of the nation. The inauguration parade in 1901 is described in vivid terms with images of workers, bush-folk, country police and ethnic communities who attended, as well as the usual clutch of public officials and politicians. She conveys the atmosphere of the occasion as well as its political and legal outcomes. She tells us that the weather was hot and windy, a small but interesting detail which calls up the jerky images of the parade seen on newsreel, with men and women in full ceremonial attire inappropriately dressed under the hot Australian sun, hat plumes flying in the breeze.

The opening chapter, which sets the tone for the book, is a noisy and distinctive rendition of the images and clatter of the inauguration parade. But Irving's aim here is not merely to provide "colour" to the barren images of conventional history. The function of her methodology is to make substantive points as well. First, she widens the lens of constitutional history, as it were, by demonstrating the contribution made to it by an enormous range of people from many walks of life, as well as formal and informal organisations, community groups and religions. She suggests that the Constitution itself reflects a complex convergence of those interests.

This is emphasised by later chapters dealing with groups and issues often not discussed in detail in conventional histories. So for example Irving devotes a chapter to "Australian Natives", white Australians people born in the new country, others to women, citizenship and the people who endorsed the draft Constitution at the first plebiscite in federal history.

The second function of writing a cultural history is to contextualise the constitutional story by filling in the wide view of history with the most minute and yet revealing of details. According to this brand of historical scholarship, the latter is as historically significant as the former. The "great men" fade and the tableaux of the parade is foregrounded instead. Moreover, instead of a chronology of events (although one is contained in the Introduction), Irving's book is described by her as a series of "tales ... told together", a "unique matrix" of a political culture (page 1). There is no single history, no clear linear story of progress. A multitude of stories can be selected to form any history and so the arbitrariness of knowledge is emphasised. The contours and collaborations of new nationhood are infinite and hence the form of her history replicates the history she is telling.

A third function of this evocative technique is to emphasise the hybrid nature of Australian constitutionalism. In her description of the weather Helen Irving deftly reminds the reader that our Constitution is a sometimes unhappy marriage of British and Australian constitutional mores living within a strange new environment. The incongruity of grafting old constitutional culture onto new, is emphasised by Irving's description of the imaginative processional arches which dotted the parade. An aboriginal arch was adorned with animal skins and weapons; one from Queensland with oxen heads and pineapples. The attendance of choristers singing is noted, as are food preparations and even the provision of bottles for the disposal of sanitary waste. Quoting from the *Sydney Morning Herald* she says "the faded ropes of foliage" (page 20) were removed at the end of the procession conveying the sense of tired exultation which must have accompanied the conclusion of this defining constitutional moment.

Another major theme of the book concerns the imagination. As noted above, Helen Irving adopts Benedict Andersen's metaphor for imagining a community and argues that the cultural preconditions to Federation were more extensive than the usual explanations emphasising better transport and communication and a desire for economic unity. "For Australia to become a nation, Australia had first to imagine a nation", she says (page 25). She analyses the way Australians of the time saw themselves as both part of the British Empire and yet uniquely Australian. She describes the interconnection between the cultural nationalism of the burgeoning Australian arts and letters movement, and the movement for Federation. Many participants may have had day jobs as drafters of Australia's basic law, but they "moonlighted" as writers of literature history (John Quick) and poetry (Robert Garran) (page 34). These themes are further elaborated in Chapter Three when she shows how the Federation movement and the Constitution produced a proliferation of literature and music. Songs and odes were "in abundance". The making of the Constitution was not a simple political and legal act but the culmination of a deeper, even lyrical desire to express ourselves as a nation.

Paradox is another key feature of Australia's constitutional genesis, according to Helen Irving. Colonial society, including liberal republican like Andrew Inglis Clark, and utopians like William Lane, shared the same fear of Chinese infiltration of "British" (read white) society. However constitutional players such as Henry Parkes, went out of their way to appear even-handed, because it was considered not British to do otherwise. But, paradoxically, these same Australians (Henry Parkes again) were keen to describe themselves as "natives" and to imagine a link between themselves and the native environment (Vida Goldstein) and yet were loathe to extend this communion with the peoples of that environment.

The role of imagination in the political and legal articulation of the nation is further explored in Chapter Five which takes as its theme the division of legislative power. Here Irving points to many examples of various forms of intergovernmental arrangements on matters such as defence, customs and postage, and argues that Federation was about something other than a mere desire to make more efficient the material bases of the intercolonial community. It was, importantly, about "political and strategic control" (page 83). Also linked to Irving's argument about the need to "imagine" a nation before it is made, is the desire for kinship and community. Hence the conjoining of material bases alone could not form a nation. "However much material interests motivated the promoters of Federation, the nation was to be more than a treaty" (page 84).

Irving examines the history of earlier attempts to co-operate amongst the colonies. Chapter Five contains nice insights into the internecine goings on of the Australasian Federal Council which were sometimes reminiscent of the Mad Hatter's tea party rather than a political meeting. She comments that the Federal Council, with its limited powers of legislation and absence of any executive power, was a lesson in "how *not* to go about federating" (author's italics) (page 91).

The Chapter also contains some interesting history about why certain powers were vested in the States and the Commonwealth respectively. It opens up the intriguing question of the characterisation of powers as domestic, or local or private, and therefore primarily the concern of women and thus best left to the States, taking social welfare (charities) as an example.

The hybrid and utopian nature of the Australian Constitution is a third theme of the book. One of the powerful and sometimes frustrating features of Australian constitutional law, is the tension between federalism and representative democracy expressed especially in the series of High Court decisions on the extent of territory representation in the Senate. Chapter Four describes the way hybridisation such as this occurred. Drafters rifled principles and powers from other federal systems in the hope of building a new and better Constitution. So the separation of powers was derivative of the United States model, central legislative power over old-age pensions from the German, and the referendum procedure from the Swiss. The influence of and ambivalence towards following the Canadian model is noted as are the home-grown constitutional developments such as the inclusion of a power for States to refer a matter to the Commonwealth.

The hybridisation theme fits nicely with Irving's claim that the way in which Australia chose to represent itself at its inauguration was unique for its informality and innovation. "Young Australia was not stiff and military. It was self-consciously informal, hatless and shoeless" (page 9). Australia's self-image reflected a facility to conceive old legal structures in new ways. The grafting of new forms onto old structures is, according to Irving, an example again of the paradoxical nature of the Australian spirit, the tension between romanticism and pragmatism which characterises our history. It was part of the utopian spirit of the time which led, amongst other things, to the Paraguayan experiment of William Lane.

Ultimately it is a quote from Alfred Deakin talking about the Australasian Federal Council which best captures Australian pride in the ability to improvise new legal forms. The Council was, he said as "indigenous" as "that extraordinary animal" the platypus "a perfectly original development compounded from familiar but previously unassociated types". "[H]e might well have been speaking of the Constitution" comments Irving (page 132). Irving concludes that although economic interests influenced the colonial shift to co-operative governance the "seedbed of Federation" was "Utopian" (page 213).

Despite the considerable merit of the book it contains three minor weaknesses relating to terminology, legal precision, and a tendency to mythologise Australian history. One problem, in view of the importance of Irving's claim that she is writing a *cultural* history, is the lack of definition of culture. In legal literature the term seems to be used in a number of senses including to describe: things other than politics and law; things non-Western; things associated with the arts; and the way stories can be told in different ways, often non-chronologically with different accompanying meanings. At times Irving draws upon each of these definitions, but fails to explain them clearly or to explain why they are significant. The difference between a *political* and a cultural history is never fully articulated.

Second, for constitutional lawyers, one of the frustrations of the book may be that at times it strays into imprecision. The claim is made in Chapter Two, that in 1901 Australia was "sovereign in all domestic matters" (page 26). In relation to the Commonwealth it is arguable that full legislative sovereignty was not present until the passing of the Statute of Westminster Adoption Act 1942, and for the States the old hindrances of the Colonial Laws Validity Act of 1865 were not abolished until 1986 with the enactment of the Australia Acts. Then there is the reference to Edmund Barton's claim that a constitution is not a dog licence, without mention of the infamous

Privy Council dictum that, according to British common law, the constitutions of the Australian States were, in terms of amendability, of the same status as a dog Act. Finally to a lawyer in the United States or Canadian tradition of rights interpretation Irving's claim that rights were excluded from the Constitution because "inspirational" words would place a "severe strain on law" (page 58), may require clarification.

Wherever possible Irving ties her cultural history to specific legal developments. So for example in discussing the Australian Natives Association she canvasses their influence upon draft provisions concerning citizenship and eligibility to stand for the Senate (page 126). In echoing Henry Reynolds on "protection" of Aboriginal people she discusses the role of this policy on the Commonwealth Franchise Act. In discussing the role of women in Australia's constitutional development she acknowledges their link with s 41. However there are occasional, partial oversights, such as the chapter on white Australians which contains no mention of the role of s 117 of the Constitution in preserving the States' ability to discriminate against non-white Australians, although this topic is dealt with in depth in a later chapter .

In addition to these quibbles there is something vaguely unsatisfying about Irving's claim to challenge conventional history in view of her reliance upon a number of typical historical images. She refers to paradoxes of the new Australian spirit, with its mixture of romanticism and pragmatism, of destiny and kinship (page 29) of the pragmatic and the visionary (page 43), the utopian desire for social experiment which impelled the new beginnings. These visions may well be correct but my question would relate to how they make this cultural history markedly different from standard political history.

To Constitute a Nation is a refreshing departure from more conventional essays. Helen Irving has written a generally novel and evocative account of Australia's constitutional formation which contains both new information and new ways of seeing some old events. It is an extremely readable and well-researched account of the factors which produced the Australian Constitution. By putting some cultural flesh on some dry legal bones, Helen Irving has produced a valuable contribution to the broader debate about the re-thinking of Australian constitutional history — past, present and continuing.