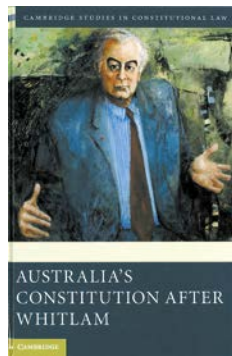




BOOK



Australia's Constitution after Whitlam

By Brendan Lim, Cambridge University Press, 2017

How does the Constitution change? It depends what is meant by 'Constitution' and 'change'. Beyond the formal text of the Constitution itself, Australian politics and public life have witnessed lasting debate and conflict as to 'informal constitutional principles' – including as to which institutions and actors have the ability to create, change or 'legitimate' informal constitutional principles. The definition and scope of these principles are potentially uncertain and are open to substantial dispute; they may be broadly defined as 'constitutional' principles beyond those set out in the *Constitution* itself, albeit while inviting greater debate as to what principles are 'constitutional' in nature.

Brendan Lim's fascinating new book reinterprets the short life and long shadow of the Whitlam government as a series of conflicts over informal constitutional principles, including whether and how popular elections can confer upon elected governments the power to declare and shape these principles. Even absent a formal constitutional referendum, Whitlam 'sought to weaken prevailing understandings of the federal balance and to expand the powers and responsibilities of the federal government' (p 1) – a profound shift in informal constitutional norms. The resistance to Whitlam challenged the notion that a popular mandate in the House of Representatives, even the election of a 'transformative national government', legitimates informal constitutional change in its own right (pp 1-2).

After introducing the book's key themes in ch 1, ch 2 of Lim's book addresses the vexed and potentially unclear distinction between ordinary and 'constitutional' legal principles. Lim identifies, amid ongoing debate, the significance (in identifying 'constitutional' principles) of 'reception' by a given constitutional community of a principle as constitutional in nature (p 24). Lim proceeds to explain the distinction between 'monist' democracy (with no inherent distinction between normal and

constitutional law-making) and dualist democracy (by which the expression of the popular will is not solely the reserve of the elected government, but is 'mediate[d] through 'more complex institutional forms' (p 30)).

In ch 3, Lim explains the 1975 constitutional crisis as a conflict between two theories of legitimacy. Under Whitlam's 'monist' theories of legitimacy, his government, as recipients of a popular mandate, were 'entitled to plenary lawmaking authority' (p 72). Under the Senate's 'dualist' theories of legitimacy, Whitlam's election was not of itself sufficient to engage in 'higher' lawmaking or to effect informal constitutional change (pp 79-80). Lim acknowledges that elements of his thesis are at odds with the self-presentation of the parties concerned – with Whitlam's lasting concern for formal constitutional change (and hence apparent conceptual distinction between different forms of constitution-making authority) and with how the Opposition themselves explained their role during 1975. But Lim's theories are nonetheless lucid, clearly-explained and compelling.

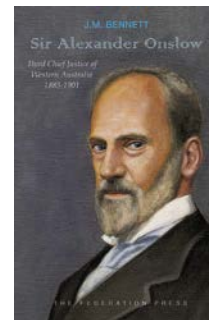
Lim examines the long shadow of this 'clash of constitutional grammars' upon subsequent events and controversies. In ch 4 he explores the constitutional views and stormy tenure of Justice Lionel Murphy, including the significance of the appointment as an expression of Whitlam's transformative constitutional agenda. In ch 5 he examines evolving ideas of the High Court's institutional role and the role played by the notion of popular sovereignty in that Mason court's self-conception – with the court adhering to the classically dualist notion that the court, a body other than an elected government, was in some sense capable of speaking 'for' the people. This idea clashed with the advent of a new monism under John Howard, and a renewed emphasis in both political and legal spheres upon the primacy of elected governments (with the court's role shifting from the expression of the popular will in its own right to a form of 'representation-reinforcement', seeking at least ostensibly to give effect to the popular will as expressed through legislative intent). Ch 6 examines the 1999 republican referendum, including the impact of the 1975 crisis (and competing monist and dualist conceptions of elected parliamentary governments) on the proposed design of republican institutions.

Lim's book is an inspired synthesis of constitutional analysis and political theory to reinterpret some of the key conflicts of recent decades in Australian public life, employing theories of governance and political power to explain some of those conflicts. This book deserves to have a lasting impact on how those conflicts are understood.

Reviewed by Douglas McDonald Norman



BOOK



Sir Alexander Onslow

J M Bennett,
The Federation Press, 2018

This biography of the third chief justice of Western Australia is Dr Bennett's latest addition to his *Lives of the Australian Chief Justices*. It has the benefit of a foreword by WA Chief Justice Martin, well-positioned to put Onslow's own story in a wider theme. For current purposes – a review in the journal of the NSW Bar Association – the last paragraph of the foreword bears reprinting in full:

Dr Bennett tells me that he expects this book, the 16th, to be the last in the series. I am sure that I join his many readers in expressing the hope that his prediction of the future is less accurate than his recount of the past. But if this is the last of the series, it is fitting bookend to an exceptional body of work which spans all the then colonies of Australia, providing an extraordinary insight into colonial life through the lens of the law. Lawyers, historians and anybody with an interest in the development of Australia will join me in congratulating him upon the completion and publication of another excellent piece of literature.

In 1969, almost a half century ago, a young John Bennett edited *A History of the NSW Bar*. He is an honorary life member of the association. His contribution to legal history has been extraordinary. His particular fondness for writing the history of people who administered justice but still had time to remind themselves that they were representative of the law and not ruler of it, remains a lesson for every citizen who believes in an independent judiciary.

This reviewer interpolates that all is not quite lost. When Sir Henry Parkes's 17th child was born, a friend congratulated the 77-year-old on his last. Not my last, the politician replied, my latest. This reviewer understands that the current work is the last solo venture but that there is a final work with co-author Dr Ronald Coleman Solomon. The third Tasmanian chief justice Sir

Francis Villeneuve Smith is the subject.

So what does the tale of the third chief justice of Western Australia tell us of an independent judiciary? For an effective description of a human institution begs as many questions as it answers. The rule of law is often called the administration of justice. That's apt, so long as its rulers let lawyers, historians or anyone else keep asking 'who is administering?' and 'what is justice?'

Wikipedia's definition of 'Judicial independence' is 'the concept that the judiciary needs to be kept away from the other branches of government.' It is effective precisely because it states without resolving Juvenal's paradox *sed quis custodiet ipsos custodies*. In the case of judicial independence, who is the person who decides what is needed and when?

On Australia Day 1808, Governor Bligh found out the hard way that trying to stop rum ruling the guards was not possible. John Macarthur was the instigator of that rebellion, and his reputation remains to today very much at the whim of the politics of the particular historian. His presence lingers too, with descendants ensconced at Camden Park, near Sydney.

John's granddaughter married the eldest son of Arthur Pooley Onslow. The Onslow name was already ancient. Arthur Pooley married one of the daughters of Alexander McLeay, a NSW public servant whose career was both highly distinguished and through his affiliation with Governor Darling often controversial.

The topic of Dr John Bennett's latest contribution to his series of the lives of the Australian Chief Justices was Arthur Pooley's fourth son, Alexander Campbell Onslow. The Alexander is obvious. I expect but do not know that the Campbell may have come from his mother's sister's married name. Her husband Pieter Laurentz Campbell had a close relationship with Governor Bourke but a more difficult time with Governor Gipps.

For the meantime, Alexander Campbell Onslow was born on 17 July 1842 and educated at Westminster and Trinity College, Cambridge. He was a sportsman, being – with a curious consequence for his tale – an enthusiastic cricketer.

After an unremarkable decade at the bar, he married Madeleine Emma Tottenham. Of the same class, it appears that this was a second round for both families: his first cousin Douglas Arthur (Onslow) had married one of Madeleine Emma's elder sisters. Three years later, in 1877, Onslow opted as so many did for a career though colonial advancement.

Onslow's first posting was to British Honduras, but it did not last long. He returned to England and by late 1880, he with his family and a servant sailed on *RMS Siam* for Albany where they arrived on 2 December. By Christmas Day one newspaper reported

'the serious illness of the new Attorney-General, Mr Onslow, who is suffering from too great exposure to the sun [during a cricket game] at Albany'.

It was this event that premises Onslow's life in the colony and Dr Bennett's record of the man as its chief justice. In particular, Onslow's relationship with Sir Frederick Napier Broome, who described his lieutenant as 'a confirmed official mischief maker and contriver of the worst type... so constitutionally irritable, and so affected by a sunstroke as to be hardly responsible for his actions.'

A colonial constitutional crisis between the local chief executive and the local chief justice is never an insignificant thing, still less when there is preparation for responsible government. There is no doubt that personality conflict was a cause but, and much of Bennett's work is directed to this, there can also be, in one or other of the officers, a misunderstanding of and importantly a misconception of the unwritten boundaries of, their own role.

It is a delight for any student of Australian history that another player in the crisis, the local chief legislator, went by the name of Malcolm Fraser. Onslow's assessment was that he was little assistance to the cause of right (i.e., Onslow's) but as the author of Fraser's ADB entry notes:

An able administrator, especially during his early years in Western Australia, he merits notice as one of the few who were able to work in harmony with Sir Napier Broome, an achievement which his contemporaries in the colony found difficult to understand and his superiors in the Colonial Office quite amazing.

It must have been boring being a clerk in the Colonial Office penning notes for superiors, and opportunities to spice things up would have been seized. My favourite is the clerk who dealt with Onslow's predecessor, Sir Henry Wrensfordley. The Office having decided they needed someone who didn't go into debt with responsible government in the foreseeable future appointed him CJ in Fiji. His debts were dangerous, but the clerk managed to both fan and douse the fire of fear when he noted that the CJ's debts were 'not a credit to us'.

The reader receives glimpses of colonial life away from political unrest. Onslow and his wife were musical. Sir William Robinson, the younger brother of a NSW governor, served three separate terms as WA governor and composed a number of well-known songs. Onslow arrived during his second term and they didn't get on. Things changed by Robinson's third term, and music was no doubt a large factor.

As an aside, for those interested in the stage at which competence becomes irrelevant, Robinson's own experience informs. I mean that line in the sand where the job in

question is not only a professional high but a political prize, with the result that merit may make the wrong kind of difference. Each of us thinks we know the paradigm example of a person appointed to a diplomatic post or a judicial post or a quango without any cause except 'be'cause he/she is connected to x, to y or to z. As we age, we realise there are so many paradigm examples because government, like most things, is a human invention.

The gift of gubernatorial rank was serious business in an expanding empire. With a broad brush we can say that 18th century appointments were often military or naval, with a glut coming into the next century as Napoleonic wars climaxed. The 19th century saw the managing class take over. Robinson was a bit of both: the son of Admiral Hercules Robinson (a junior office at Trafalgar), he was himself a well-regarded career officer. After his second term in WA, he served with great distinction in South Australia and had hopes, after an interim role, of being appointed to Victoria, a class gig. As his biographer in the ADB notes:

He was not permanently appointed though both he and the local politicians expected it; to his chagrin, the British government had adopted a 'new departure' of appointing inexperienced noblemen to prestigious gubernatorial posts.

This policy reached its own climax when Britain in a threat far greater than Napoleon had to find something, anything, for a pro-Nazi ex-monarch, and got him the governorship of the Bahamas. Maybe Robinson penned three of his Australia-wide hits after his own bad news: 'Remember me no more', 'Imperfectus' and 'Severed'.

Broome also enjoyed music. Unsurprisingly the Onslows boycotted Perth's annual performance of *The Messiah* while it was under his patronage. Which means they would have missed, and Broome doubtless loved:

O death, where is thy sting? O grave, where is thy victory?

The sting of death is sin, and the strength of sin is the law.

Juvenal's paradox of the unguardable guard was penned in a patriarchy no modern reader would respect. It was directed to protecting the morality of women; who will protect them from the protectors? Onslow's approach to the problem was in a hierarchy no modern Australian would appreciate, the hierarchy of the Crown colony. But the paradox itself is timeless. Dr Bennett's gives an effective glimpse of a man indubitably of his own time but able to impress real change for the benefit of those who followed.

Review by David Ash, Frederick Jordan Chambers