Constitutionalism and the Inclusive/Exclusive Society

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We live in a constitutional society. The Australian *Constitution*,[1] as contained in section 9 of the *Commonwealth of Australia Constitution Act* 1900, and no doubt also the *Australia Acts* 1986[2] and the various State constitutions,[3] are an essential part of the constitutional fabric and constitute the basic law of Australia. Australian governments and society are established under and in accordance with these basic legal documents by application of the rule of law. These documents, in whole or part, are constitutionally entrenched, subject to change by the Australian people voting at national or State referenda or by other special mechanisms.[4] Constitutionalism is alive and well in Australia (although perhaps comparatively less so in Commonwealth territories).[5]

By and large, these constitutional documents are uninspiring documents, reflecting an age perhaps long gone, and more notable for what they do not say rather than what they do. They do not comprehensively attempt to set forth the fundamental core values of our society, the necessary elements of the Australian brand of civilisation. They offer instead very limited and uncertain guidance and direction. While the High Court may to some extent be engaged in a search for these core values by way of constitutional interpretation, including the perilous course of implied constitutional rights,[6] and by the process of molding the common law of Australia,[7] guidance as to

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[1] The Constitution of Australia is in fact section 9 of the *Commonwealth of Australia Constitution Act* of 1900, and an Act of the Imperial UK Parliament.

[2] These Acts comprise the *Australia Act* 1986 of the Commonwealth Parliament, enacted at the request of all the States, and a United Kingdom Act of the same name in equivalent terms. These Acts, together with the Imperial *Statute of Westminster* 1931 as adopted in Australia, effectively terminate the constitutional links with the United Kingdom other than in the person of the Queen.

[3] Each State of Australia has its own State constitution, formerly their colonial constitutions as continued in force by section 106 of the Australian *Constitution*.

[4] The Australian *Constitution* in section 128, requires a special form of national referendum for any express change. State constitutions have parts that are entrenched, in some cases requiring a State referendum for change, but other parts can be amended by ordinary State legislation.

[5] This is because Commonwealth territories are in effect dependencies of the Commonwealth and fully subject to the national Parliament's plenary and virtually unlimited legislative powers in section 122 of the Australian *Constitution*.

[6] See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 and subsequent cases, the most recent being *Lange v ABC* (High Court, unreported, 28 July 1997) and *Levy v Victoria* (High Court, unreported, 31 July 1997). Editors Note: This article was written by the author in 1997 and reflects the case law at that time.

[7] See, for example, *Mabo v Commonwealth (No 2*) (1992) 175 CLR 1.

most of the real fundamentals of our society must usually be sought elsewhere – in existing common law rules and principles, in a variety of ordinary legislation and its administration, in various constitutional conventions and understandings, in the statements of our leaders (such as they may be), in our heritage and our upbringing, through the media, and perhaps in our general thoughts and feelings about the ethos of our society as it has uniquely evolved , as well as by reference to principles arising from our common humanity. Increasingly some Australians are likely to find certain common values in this regard with peoples of other countries through the ever increasing number and range of international agreements and arrangements to which Australia is a party and our ever expanding trans-national relationships. There may often be a lack of widespread agreement as to what are these Australian core values, a reflection of the growing diversity of Australia. But the absence of such agreement may itself present the opportunity for choice in core values, enabling emphasis to be given to qualities such as tolerance and the acceptance of diversity.

There seems to be a growing sense of urgency to identify these core Australian values. There is some enthusiasm to establish an independent and self-confident Australian identity, as indicated, for example, in the republican debate. Australians also seem to be concerned to find a meaningful place in the world and to seek and maintain good global and regional relationships within the family of nations, and particularly with Asia and the Pacific. At the same time, there is a desire to maintain the unique Australian character and way of life. The acquisition of full national status and the severance of British links has no doubt acted as a spur in these quests.

It is of course a matter for debate as to the extent to which the core values of Australian society should be reflected in some way in the basic constitutional documents, and correspondingly as to the extent to which they should be excluded from these documents. Some matters may be seen as being appropriately left to the field of ethics or religion, citing the old debate on the so-called division between law and morality. Others may be left to custom or common practice, perhaps being too vague or fluid to warrant express legal provision. But there will be a remainder, often with connections to our cultural diversity and democratic freedoms, which could potentially be the subject of express constitutional provisions.

In the post-Cold war global age, this is a matter that must be considered on a wider stage. Australians are participants in a much wider global search for human societal values. The anticipated battles of the 21st century are more often likely to be concerned with a clash of principles and ideas (good or bad) rather than a clash of arms. This is part of the course of history, as the nations and peoples are drawn ever closer together, and the concerns of one become the concerns of all. Australians have no option but to seek a meaningful and secure place in the world even though it is suffering from many defects. This does not mean that the available choices are narrowly confined or are predestined. Australians have a wide range of choices, both within the national society and as it relates externally. It is fortunate that this country still has a well established, relatively free and democratic process that permits a substantial element of personal choice in this regard.

One of these choices, and one the subject of current debate, is whether to wholeheartedly embrace the concept of the *"inclusive"* Australian society, made up of a multi-cultural diversity of people, an outward-looking society which welcomes all people as equals irrespective of race, background, religion, etc., or whether to retreat to the "*exclusive*" Australian society, based on majoritarian "*white*" cultural values and not freely and openly acceptive of diversity, an inward-looking society which looks down with suspicion and mistrust on others who might wish to break into that exclusive society. Australians should treasure the right to make this choice, and should reject those from either perspective in this current debate who might seek to silence the others, by violence or by any other anti-democratic means.

In this particular debate, the basic constitutional documents of Australia offer virtually no guidance. From my perspective, this is to be regretted, although I recognize an alternate point of view which states that the *Constitution* should be silent on this issue. In this regard, it is noteworthy that the policy of exclusion was previously entrenched, to some limited extent at least, in the Australian *Constitution* by the express exclusion of people of the *"aboriginal race"*,[8] but these provisions were deleted in the successful 1967 national referendum. Australians were left with a virtually

[8] Section 51 (26) of the Australian *Constitution*, prior top its amendment in the 1967 national referendum, excluded people of the aboriginal race in any State from the legislative powers of the national Parliament under that provision. Section 127, before its repeal in the 1967 referendum, provide that in reckoning the numbers of people of the Commonwealth or a State or other part of the Commonwealth, aboriginal natives were not to be counted.

neutral national *Constitution* on this issue, apart perhaps from the racially-excluding and (in contemporary terms) relatively unimportant provision in section 25, allowing any State racially-based disqualifications from State electoral franchise to flow over into the federal arena.[9] These constitutional documents have conveniently accommodated the "*White Australia*" policy in the past, and have more recently facilitated an accommodation of a policy more based on non-discriminatory immigration, multiculturalism and, to some extent, affirmative action. Thus the choice in this regard, constitutionally speaking, is left open. The prevailing domestic legal view is that the direct impact of international human rights law in Australian law remains a matter of domestic parliamentary and judicial choice, unfettered by Australia's international obligations,[10] thus effectively excluding any relevant international provisions on equality and non-discrimination unless an Australian legislature decides otherwise. Notwithstanding this, there is now a variety of Australian legislation which prohibits discrimination and discriminatory practices on various grounds, some based on international covenants and conventions to which Australia is a party.[11] Complainants in Australia alleging discrimination or similar conduct in breach of international provisions have a right of review on individual application to international tribunals as a remedy of last resort.[12] There is also a variety of ordinary legislation relating to the indigenous people of Australia,[13] supplementing the evolving Australian common law on this subject. All this legislation is potentially subject to reversal by Australian Parliaments (subject to the requirement of just terms for any resultant acquisition of property at the federal level[14] and subject to the superior force of Commonwealth legislation, within constitutional power, over State/territory

[9] Section 25 of the Australian *Constitution* provides that for the purposes of federal elections, if by a law of a State all persons of any race are disqualified from voting at elections for the lower house of a State Parliament, then, in reckoning the number of people of the State or of the Commonwealth, persons of that race in that State shall not be counted.

[10] Eg: *Simsek v MacPhee* (1982) 148 CLR 636, *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270.

[11] Eg: *Human Rights and Equal Opportunity Commission Act* 1986 (Cwth), *Racial Discrimination Act* 1975 (Cwth), *Anti-Discrimination Act* (NT).

[12] Eg: Under the First Protocol to the International Covenant on Civil and Political rights, Australia's accession to which was lodged on 25 September 1991 – see H Charlesworth, *"Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights"* (1991) 18 Melbourne ULR 428. This gives a remedy of last resort to the Human Rights Committee based in Geneva for alleged breaches of the Covenant.

[13] Eg: *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cwth), *Aboriginal Land Act* (NT), *Northern Territory Aboriginal sacred Sites Act* (NT).

[14] Section 51 (xxxi) of the Australian *Constitution*.

legislation[15]). There is no recognition in any Australian constitution of the indigenous people of Australia as the original inhabitants of this Continent nor of their inherited rights. There is no constitutional ban on discrimination (other than in commercial and revenue matters[16] and a provision preventing the imposition of disabilities or discrimination between different State residents, all in the Australian *Constitution*[17]). There is one recent High Court case which may support a constitutional right of equal treatment under the law and before the courts throughout Australia under Commonwealth laws,[18] but it is not clear yet how far this goes.[19] There may be some largely untested and probably fairly limited criminal process rights arising from the entrenched federal judiciary.[20] There is a limited constitutional right to freedom of religion at the Commonwealth level only[21] and a qualified implied guarantee of freedom of communication.[22] In the absence of any general constitutional guarantee of equality before or under the law or to the equal protection of the law and any general constitutional prohibition on discrimination or any general Australian bill of rights,[23] citizens must look to ordinary Australian legislation (where applicable) or to the common law for any available domestic legal remedies. If none are available there remains the possibility of complaint to a relevant international institution for a non-binding expression of opinion.

Now let this scenario be related to the position of the Northern Territory, as it makes plans for further constitutional development, perhaps by way of a grant of Statehood within the Australian federation, with its own Territory *Constitution*.

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[15] Australian *Constitution*, section 109, which gives superior force to Commonwealth legislation over inconsistent State legislation. A somewhat similar test applies between Commonwealth Acts and legislation of Commonwealth territories.
[16] Australian *Constitution*, sections 51 (ii), (iii), 88, 90, 92 and 99.
[17] Australian *Constitution*, section 117. It does not, however, operate as a general guarantee against disability of discrimination.
[18] *Leeth v Commonwealth* (1992) 174 CLR 455.
[19] In *Kruger v Commonwealth* (High Court, unreported, 31 July 1997), only Toohey J continued to give support to a general constitutional doctrine of equality, with Gaudron J taking a somewhat narrower view.
[20] Since the decision of the High Court in *Kruger v Commonwealth*, any such constitutional rights relating to judicial process may be limited.
[21] Australian *Constitution*, section 116.
[22] See footnote 6, above.
[23] In *Street v Commonwealth* (1989) 168 CLR 461, Deane J (as he then was) suggested at 521-522 that while it was literally true that the Australian *Constitution* had no bill of rights, this was a superficial view and potentially misleading. He referred to a number of constitutional provisions. However they still fall short of an enforceable and fairly comprehensive constitutional bill of rights as found in the constitutions of many other countries. In particular, there are limited provisions in the Australian *Constitution* of relevance to the topic of this paper.

The Northern Territory, despite the grant of significant self-governing powers by ordinary Commonwealth legislation in 1978,[24] remains a dependent territory of the Commonwealth.[25] The virtually unlimited plenary legislative power of the Commonwealth Parliament under section 122 of the *Constitution* in respect of territories remains in full force in the Northern Territory.[26] Despite judicial comments that suggest that territories and Territorians may be subject to at least some of the limited range of guarantees in the national Constitution,[27] there have been very few cases where this view has been applied in a positive way for the benefit of territories and Territorians.[28] And previously conceded democratic rights in territories, such as enabling elected territory legislatures to enact their own territory legislation, are apparently subject to reversal by ordinary legislation of the Commonwealth Parliament.[29] The application of the rule of law in the Northern Territory still very much appears to depend upon the whims and fancies of federal politicians expressed through national institutions in the ordinary way, and without regard to the conventions of responsible and representative self-government in territories.

But the Northern territory remains in many respects a unique place within the wider Australian society. This is in part a product of history and geography, and in part a product of Australian constitutional law and politics. This is not the time and place to enter into a detailed recitation of all aspects of this uniqueness: sufficient for present purpose to mention the cultural and linguistic diversity of its small population,[30] the substantial importance of its Aboriginal people with many still living traditional

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[24] *Northern Territory (Self-Government) Act* 1978 (Cwth) and the *Northern Territory Self-Government Regulations.*

[25] This status is indicated in *Capital Duplicators Pty Ltd v ACT* (1992) 177 CLR 248 and in other High Court cases.

[26] *Capital Duplicators Pty Ltd v ACT*, above, and *NLC v Commonwealth* (1986) 161 CLR 1.

[27] Per Gaudron J in *Capital Duplicators Pty Ltd v ACT* at 26-27, see also *Kruger v Commonwealth*, above.

[28] G Nicholson, "*Constitutionalism in the Northern Territory and Other Territories*" (1992) 3 Public LR 540, 55 and note *Svikart v Stewart* (1994) 181 CLR 548, *Kruger v Commonwealth*, above, *Newcrest Mining (WA) Ltd v BHP Minerals Ltd* (High Court, unreported, 14 August 1997).

[29] As occurred with the *Rights of the Terminally Ill Act* (NT), the validity of which was upheld under Northern Territory Self-Government arrangements by the Supreme Court of the Northern Territory in *Wake v Northern Territory* (1996) 5 NTLR 170, but which was in effect later prospectively overrules by the *Euthanasia Laws Act* 1997 (Cwth).

[30] The Northern Territory population is reasonably cosmopolitan in its composition, like the rest of Australia, with just under one quarter of its residents being born overseas (although a larger percentage in Darwin) from in excess of 40 countries. When added to the number of children born from parents of non-English speaking backgrounds, it provides a rich cultural diversity. See Australian Bureau of Statistics, 1996 Census of Population and Housing, *"Selected Social and Housing Characteristics for Statistical Local Areas – Northern Territory"* (Catalogue No. 2015.7).

lifestyles, speaking their own languages and practicing their own culture and religion,[31] and the significant and growing links between the Territory and the nearby South East Asian countries.[32] It is a society that is youthful, often individualistic, markedly innovative and dynamic, yet multi-cultural, egalitarian and largely tolerant of differences (including when dealing with nationals of Asian countries). There seems little doubt that the addition of the Northern Territory as a full State-member of the Australian federal system would add a new element of diversity so necessary to sustain the principle of federalism in this country.

Thus if it be assumed that a grant of Statehood is to be conferred on the Northern Territory in the foreseeable future, and this seems to be the most likely form of constitutional change that may occur,[33] it is not unreasonable, in my view, to expect that this uniqueness will be reflected in the new constitutional documents adopted by the citizens of, and applicable to, that new State. Exactly how this should be so reflected, including whether this should be done by way of provisions in a constitutionally entrenched written document called a new State "*Constitution*", is a matter for debate. Section 106 of the national Constitution seems to contemplate that a new State will have some form of "*constitution*" capable of having some continuing legal effect, and with its own mechanism for change, whether or not that "*constitution*" is described as such, and whether or not it is contained within a single written document.[34] Such a new State "*Constitution*" would presumably form the basic law of the new State, subject to the operation of the Australian *Constitution* and the *Australia Acts* 1986. It need not necessarily be a "*rigid*" form of constitution, although given the uniqueness of the Northern Territory already spoken of, some degree of rigidity may be thought to be necessary or desirable to assist in preserving and maintaining this particular aspect of Territory society. The fact that the Australian *Constitution* is largely silent on the issue of the "*inclusive*" or "*exclusive*"

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[31] The 1996 Census reveals that about one quarter of the Northern Territory population claim to be of Aboriginal descent, many of them speaking indigenous languages. These Aboriginal people are, of course, included in the census figure for Australian-born residents, giving a greater diversity of population in the Northern Territory than elsewhere in Australia.

[32] The Northern Territory Government has generally been regarded as being progressive in establishing links with South East Asian countries.

[33] See Commonwealth/Northern Territory Statehood Working Group Final Report to COAG, May 1996, and the various publications of the Sessional Committee of the Legislative Assembly of the Northern Territory on Constitutional Development.

[34] Section 106 of the Australian *Constitution* provides that the Constitution of each State shall, subject to the Australian *Constitution*, continue as at 1901 (for Original States) or as at the admission or establishment of any new State, until altered in accordance with the Constitution of that State.

nature of Australian society, provides in itself no reason, in my opinion, for avoiding this issue in the context of a new State Constitution. In fact, it may well provide added reasons for specifically addressing this issue in the Northern Territory. The issue may be seen as being too important to be left entirely to the politicians and partisan politics of the day. Simple representative majoritarianism might not be perceived as providing sufficient legal guarantees on matters of cultural diversity, which appears to be regarded as being of great importance in the Northern Territory. It is quite a distinct and narrower question than that as to whether there should be some form of comprehensive statement of rights ("Bill of Rights") in a new State Constitution.

It is of course possible to debate the effectiveness of written constitutional guarantees of citizen's rights, and it is not desired in this paper to enter upon the subject of constitutional Bills of Rights and their merits or otherwise. What is being raised is the question of whether a new Constitution for a unique Northern Territory society should at least reflect in some way the most fundamental values of that society, and in particular the values relating to cultural diversity, in a manner designed to preserve and enhance those values. The merit of so providing has to be weighed against the importance of having a system of representative democracy, exercised through a new-State parliamentary institution and its responsible Ministers, unimpeded by any constitutionally entrenched provisions by reference to, and for the protection of, the diverse nature of Territory society, such that the new Sate Government and Parliament are free to act as they see fit without any legal restraints by reference to those fundamental values.[35]

In my own opinion, the lessons of even the recent past, some being from parts of Europe and some from much closer to home, have indicated the importance of trying to do everything that reasonably can be done to maintain and enhance a reasonable level of unity, harmony and tolerance within our society. The principle of unity in diversity seems more appropriate and relevant today than ever before. It is not a passing value, but one which, in an increasingly interdependent world, has an enduring quality and importance. From my own perspective as a Baha'i, there is no long term sustainable future for humanity, let alone for any small section of

[35] There is a considerable amount of literature on the merits or otherwise of constitutionally entrenched rights beyond change by a simple majority of the members of Parliament present and voting. In the case of the Northern Territory, see Sessional Committee of the Legislative Assembly on Constitutional Development, Discussion Paper No. 8. *"A Northern Territory Bill of Rights?"* (March 1995).

humanity such as in the Northern Territory, without a wholehearted commitment to the principle of unity in diversity. The challenge before all of us is to develop attitudes and principles which treasure cultural diversity[36] and which at the same time promote unity and harmony in a fair, open-minded and tolerant way.[37] The danger of not adopting this approach is to leave open the door, no matter how slight, for the entry of prejudices hatreds, divisions and ultimately the potential for violence and societal breakdown. I do not put forward constitutional entrenchment of our fundamental core values as some sort of universal panacea in this regard. Clearly this cannot be so. But it can be part of a more comprehensive program, designated to inculcate in all citizens the value and beauty of human diversity, and that such diversity is not necessarily productive of hatred and discord. In fact the opposite can potentially be the case. Mine is a plea for the preservation of the "*inclusive*" Australian society, on which I think is very much in line with the Northern Territory tradition, and one that closely accords with basic human rights. The new Northern Territory Constitution should, in my view, offer express guidance and direction in relation to this "*key*" feature of Northern Territory society. The alternative of a new Constitution that is simply silent on this issue. Or worse, one which actively facilitates division and preference (even if under the guise of formal equality but which is in effect based on majoritarian principles, with no corresponding recognition of minority cultures and values), is in my view a much less desirable option. The value of an entrenched written constitution is that it can provide a sound framework for achieving a balance that secures the interests of all citizens (majority and minority) in the society in a fair way, designed to maintain the "*inclusive"* society. The goal is a form of unity in diversity. This is infinitely preferable to a constitutional framework which incorporates or facilitates exclusivity, separateness and disadvantage.

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[36] The Report of the Sessional Committee of the Legislative Assembly on Constitutional Development, "*Foundations for a Common Future*" (November 1996), Volume 1, indicated the Sessional Committee's view that it was a critical aspect of the new Northern Territory's Constitution that it should reflect the special multi-cultural nature of the Northern Territory, although recommending that it not also have a comprehensive Bill of Rights. In so far as an Aboriginal right to self determination should also be recognized, it should operate within the wider constraint of a "*harmonious, tolerant and united multi-cultural society"* in the Northern Territory (see Preamble 15 to the *Final Draft Constitution for the Northern Territory*, being Appendix 8 to Volume 1).

[37] The Baha'i Writings are replete with references to the need for unity consistent with a proper acceptance and appreciation of cultural diversity. The human race is compared to the "*flowers of a garden: though differing in kind, colour, form and shape, yet, in as much as they are refreshed by the waters of one spring, revived by the breath of one wind, invigorated by the rays of one sun, this diversity increaseth their charm, and addeth unto their beauty*". That which is said to prevent the establishment of unity in diversity is ignorance and prejudice, and the lack of recognition of the underlying spiritual unity of the whole human race.

Historically, this latter option is more likely to be productive of discord and violence, at least in the longer term. In my opinion, if a new Northern Territory Constitution did not reasonably reflect this "*inclusive*" form of society in its express language, it would be failing in its primary objectives.

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