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CONSTITUTIONAL LAW AND THE *ADELAIDE LAW REVIEW*

I INTRODUCTION

Academic journals chronicle not just the emergence of ideas, but also the historical context of their development. The first tentative exploration of the discipline, the rise and fall of doctrine, and the inevitable reassessment of existing truths are all made manifest in the pages of the journal.

The *Adelaide Law Review*, first published in 1960, provides something of an intellectual ‘archaeological dig’ for those interested in the history of Australian jurisprudence. What topics and areas commanded the attention of scholars is arguably as enlightening as what was written on them. Extending this theme, the absences and omissions in one generation often provide the urgency or catalyst for the next. Gaps, oversights or presumptions are examined and filled with the passage of the years.

This article will primarily explore the development of Australian constitutional law through the 39 previous volumes of the *Review*. Conceived in its broadest sense, constitutional law incorporates both the historical understanding of the people and their ambition for the institutions of state. As will be evident from what follows, the *Review* not only kept a watching brief of the technical developments of the law in this area, but also provided a valuable forum for discussion of Australian legal history and public law in general.

As with most journals, a balance is to be observed between scholarship that made sense of the discipline, and those who pushed forward the boundaries of knowledge.

II THE BEGINNING

The 1960s was a period of transition in Australia. The stayed austerity of the 1950s gave way to the optimism of greater economic prosperity. This state of affairs was tempered by the reality of the Cold War and associated tensions in international affairs. On 1 January 1960, *The Canberra Times* editorialised:

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There is good reason, for instance, to believe that real peace may replace the formulas that have passed for peace since the end of World War II. But, whether the goal is peace, achievement in the betterment of mankind through the conquest of disease, the banishment of hunger, or the equitable distribution of the bounties of the world, none is capable of being realised merely by wishing or hoping, but all depend on striving incessantly and behaving equitably.¹

At the University of Adelaide, the campus awoke to the new decade with a mixture of practiced orthodoxy and glimpses of the questioning of the existing social order that would soon come of age. The pages of the student magazine, *On Dit*, recorded an undergraduate life that revolved around academic, social and sporting activities, as well as the increasing political inquiries of the period. In 1960 the magazine kept a steady coverage of the case of Professor Sydney Orr, the University of Tasmania philosophy academic who was dismissed in 1956 for seducing an undergraduate student.² His cause, and the question of academic freedom, was closely covered during the year.³

Strikingly, the magazine had a lively coverage of the various religious groups, missions and fellowships on campus. Living up to its reputation as a ‘city of churches’, *On Dit* reported in its column ‘Church Unity’ on the Aquinas Society, the Seventh Day Adventist Students’ Society, and the ‘Evangelical Union Fanatics!’⁴ John Finnis, the Honorary Secretary of the Student Representative Council, was prompted to write an article entitled ‘Religion in Politics’ for the April 1960 edition. In it he concluded that

politics is better without the passion of religious dispute, and I think the Churches have done society and themselves a service by whatever retreat they may have made from the bad old days when politicians were churchmen and churchmen were politicians.⁵

Student politics were also given a platform by *On Dit*. The deplorable events of the Sharpeville massacre in South Africa on 21 March 1960 were the catalyst for a protest meeting in the Union Hall, and the condemnation of the apartheid regime.

¹ Editorial, ‘What of the Golden Sixties?’, *The Canberra Times* (Canberra, 1 January 1960) 2.

² *Orr v University of Tasmania* [1956] Tas SR 155, affd (1957) 100 CLR 526. See generally Cassandra Pybus, *Gross Moral Turpitude: The Orr Case Reconsidered* (William Heinemann, 1993).

³ Comment, ‘Prof Orr Speaks’ (1960) 28(2) *On Dit* 1; RH Corbet, ‘Inquiry Into Orr Dismissal Demanded’ (1960) 28(4) *On Dit* 2; Terry McRae, ‘Orr Case to Reopen?’ (1960) 28(12) *On Dit* 2.

⁴ Adelaide University Aquinas Society, ‘Church Unity? Aquinas Society’ (1960) 28(2) *On Dit* 2; John Lawton, ‘Church Unity? EU Fanatics!’ (1960) 28(2) *On Dit* 2; Vernon L Bullas, ‘Church Unity? Seventh Day Adventist Students’ Society’ (1960) 28(2) *On Dit* 2.

⁵ JM Finnis, ‘Religion in Politics’ (1960) 28(4) *On Dit* 6.

The first motion passed at the meeting was subsequently transmitted to the South African High Commissioner in Australia.⁶

In April 1960, the Adelaide University Labor Club welcomed freshers with an address by the 34 year old backbencher Don Dunstan. According to the report:

Mr Dunstan in his brilliant style pointed out the manifold deficiencies of the Playford dictatorship whose philosophy is expressed in the motto of the AU Liberal Union — ‘God Bless the Empire’ and ‘Dog is Man’s Best Friend’.⁷

The year ended with a call to arms as the magazine uncovered a motion to the University Council, resulting in the front-page headline ‘Student Parking Ban in 1961?’⁸

In its first three years, the *Adelaide Law Review*’s editorial board was an outstanding group of scholars and students. Many of the latter would go on to carve out significant careers within the academy or judiciary. In 1960 the *Review* was edited by WR (Bill) Cornish, with Graham Clifton Prior as his Assistant. Bruce DeBelle was the Book Review Editor, and other notable members included David St Leger Kelly, Sandford D Clark and John Finnis. The Faculty Advisors were Norval Morris, Alex Castles and Howard Zelling.

In 1961 and 1962, the editorial board saw the addition of new members including David Bleby, Michael Harris, Michael Detmold and John von Doussa. All would become leading lights in the academy or the judiciary.

III THE *REVIEW* THROUGHOUT THE DECADES

Tracing the fortunes of constitutional law through the decades of the *Review* serves to highlight the relative state of the discipline and its trends. It is valuable not to limit the investigation solely to matters associated with the *Constitution*, but to cast its vision wider to note the emerging scholarship and history of public law.

A 1960s

Not surprisingly, the first article touching on constitutional law in the 1960 issue of the *Review* related to s 92 of the *Constitution*. In the decades before *Cole v Whitfield*⁹ the elusive meaning of this section was a staple of the High Court’s docket. The case

⁶ DR Stevenson and T McRae, ‘Adelaide’s Protest’ (1960) 28(4) *On Dit* 1.

⁷ Adelaide University Labor Club, ‘Clubs and Societies: Labor Club’ (1960) 28(4) *On Dit* 3.

⁸ Comment, ‘Student Parking Ban in 1961?’ (1960) 28(12) *On Dit* 1.

⁹ (1988) 165 CLR 360.

note, entitled ‘Section 92: What is Essential to Interstate Trade and Commerce’,¹⁰ outlined the recent High Court cases and the Supreme Court of South Australia’s application of the law in *Fry v Russo*.¹¹ The following year, the *Review* would continue its quest to make sense of the section with a case note on the next Supreme Court application in *Schwerdt v Telford*.¹²

The 1960s witnessed a number of emerging themes within the general scholarship. In 1961, the *Review* published an article by Enid Campbell entitled ‘Women and the Exercise of Public Functions’. Her survey soberly concluded that ‘[t]aken as a whole, the Australian legislation surveyed here reveals little in the way of a consistent and even pattern towards female emancipation’.¹³ Campbell and Harry Whitmore’s *Freedom in Australia*¹⁴ would be reviewed in the pages of the journal by Dame Roma Mitchell. Deftly resisting the temptation to drift into political controversy, the review praised the utility of the book.¹⁵

John Finnis would commence his own body of work with two lengthy pieces on jurisprudence and the separation of powers in Australia.¹⁶ The latter questioned in careful tones the historical and logical conclusions of the High Court in *R v Kirby; Ex parte Boilermakers’ Society of Australia*.¹⁷ Another significant contribution to South Australian constitutional law was the 1968 article by Michael Harris and James Crawford on the ramifications of that year’s South Australian election, which resulted in a hung parliament.¹⁸ The authors outlined the subsequent legal and political manoeuvring, and the central role of the Governor in such situations. It remains an article that is consulted as history in this area tends to repeat itself.

The distinctive and emerging study of Australian legal history debuted in the *Review* in the early 1960s. Alex Castles, who would go on to become the leader of the

¹⁰ Case Note, ‘Section 92: What is Essential to Interstate Trade and Commerce’ (1960) 1(1) *Adelaide Law Review* 78.

¹¹ [1958] SASR 212.

¹² [1960] SASR 41, discussed in Case Note, ‘Section 92: Repairs and Interstate Trade’ (1961) 1(2) *Adelaide Law Review* 212.

¹³ Enid Campbell, ‘Women and the Exercise of Public Functions’ (1961) 1(2) *Adelaide Law Review* 190, 204.

¹⁴ Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1st ed, 1966).

¹⁵ Roma Mitchell, ‘Freedom in Australia, by Enid Campbell and Harry Whitmore’ (1967) 3(1) *Adelaide Law Review* 127.

¹⁶ JM Finnis, ‘Developments in Judicial Jurisprudence’ (1962) 1(3) *Adelaide Law Review* 317; JM Finnis, ‘Separation of Powers in the Australian Constitution: Some Preliminary Considerations’ (1968) 3(2) *Adelaide Law Review* 159.

¹⁷ (1956) 94 CLR 254.

¹⁸ MC Harris and JR Crawford, ‘“The Powers and Authorities Vested in Him”: The Discretionary Authority of State Governors and the Power of Dissolution’ (1969) 3(3) *Adelaide Law Review* 303.

discipline, wrote his first major work on the adoption of English law in Australia.¹⁹ In 1963, Castles was yet to unfold his significant critique of colonial exceptionalism and the legal status of Aboriginal Australians — that would come in time.²⁰

Perhaps the work that best captured the difficult role of the law in provincial Adelaide was DP Derham's review of KS Inglis' *The Stuart Case*,²¹ which uncomfortably surmised what many in Adelaide's legal and political circles would know. That is, that the episode pitted an accused Aboriginal man against the might of the establishment. As Derham concluded:

It may be that in the very long run it is a good thing that quiet and settled communities like that of Adelaide should be disturbed from time to time in their basic structures, as Adelaide's was by the Stuart case; but such disturbances leave scars nonetheless.²²

B 1970s

The 1970s ushered in an expansive period for the Commonwealth's legislative power, as the Whitlam Labor Government tested some of the perceived limits of the *Constitution*. However, judging by the volume of publications on constitutional matters, the *Review* was largely unaffected by these developments. The little consideration that was given appeared in the form of case notes or comment pieces. RJ (Dick) Whittington, MR Magarey and Kathleen McEvoy addressed issues as diverse as the act of state doctrine,²³ the concept of an 'excise' in s 90 of the *Constitution*,²⁴ and what constitutes a 'place acquired by the Commonwealth for public purposes' under s 52(i).²⁵

Similarly, the matter of what constituted 'Australian territorial waters' and their limits prompted DP O'Connell, the eminent international lawyer, to consider the High Court's decision in *Bonser v La Macchia*.²⁶ Drawing on the same case, Michael

¹⁹ Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2(1) *Adelaide Law Review* 1.

²⁰ Alex C Castles, *An Australian Legal History* (Law Book Co, 1982).

²¹ KS Inglis, *The Stuart Case* (Melbourne University Press, 1st ed, 1961).

²² DP Derham, 'The Stuart Case, by KS Inglis' (1962) 1(3) *Adelaide Law Review* 354, 356. The Stuart affair was addressed again in Michael Kirby, 'Black and White Lessons for the Australian Judiciary' (2002) 23(2) *Adelaide Law Review* 195.

²³ RJ Whittington, 'Act of State: *Attorney-General v Nissan*' (1970) 3(4) *Adelaide Law Review* 522.

²⁴ MR Magarey, 'Excise and Receipts Tax' (1970) 3(4) *Adelaide Law Review* 508.

²⁵ Kathleen McEvoy, '*Attorney-General for New South Wales v Stocks & Holdings*' (1972) 4(2) *Adelaide Law Review* 451.

²⁶ (1969) 122 CLR 177, discussed in DP O'Connell, '*The Commonwealth Fisheries Power and Bonser v La Macchia*' (1970) 3(4) *Adelaide Law Review* 500.

Detmold considered the federalist tension between the Commonwealth and the states, and addressed the jurisprudential definition of sovereignty.²⁷

There were a number of prescient articles published during the decade. Campbell's survey of 'appropriation' in the *Constitution* would be recalled for decades.²⁸ A comprehensive paper, it mirrored many of the questions that the High Court would consider four years later in the *AAP* case.²⁹

Castles, again through the lens of legal history, addressed the development of a contemporary concept of which 'political questions' could and should be avoided by the judiciary.³⁰

A brief article by David St Leger Kelly is also noteworthy for its early acknowledgement of the work of the South Australian Law Reform Committee.³¹ The Committee, led by Justice Zelling, played an important role in developing South Australia's reputation for progressive law reform during the 1960s and 1970s.

C 1980s

Constitutional matters did not feature heavily in the *Review* during the 1980s. However, there were some important articles published during the decade.

The impact of the Whitlam Government on the polity and constitutional arrangements were slowly being considered by authors. In 1980, James Crawford reflected upon the 1977 constitutional amendment relating to casual vacancies in the Senate.³² Having provided a background to reform at the Commonwealth level, Crawford investigated the role of state parliaments in filling casual vacancies. Of particular interest was the demise of the Liberal Movement, the appointment of Janine Haines to the Senate casual vacancy in 1977, and the associated obligations of the South Australian Parliament. This would not remain an idiosyncratic or isolated issue. The question of who should take up a vacancy when a party has changed its character became relevant in 2018 when Tim Storer was elected to the Senate in the wake of the s 44 cases.³³

²⁷ MJ Detmold, 'Sovereignty: Aspects in Constitutional Law and Jurisprudence' (1971) 4(1) *Adelaide Law Review* 169.

²⁸ Enid Campbell, 'Parliamentary Appropriations' (1971) 4(1) *Adelaide Law Review* 146, cited in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 41 [66] (French CJ), 76 [191] (Gummow, Crennan and Bell JJ), 212 [603] (Heydon J).

²⁹ *Victoria v Commonwealth* (1975) 134 CLR 338 ('AAP').

³⁰ Alex C Castles, 'The Judiciary and Political Questions: The First Australian Experience, 1824–1825' (1975) 5(3) *Adelaide Law Review* 294.

³¹ D St L Kelly, 'The South Australian Law Reform Committee' (1970) 3(4) *Adelaide Law Review* 481.

³² James Crawford, 'Senate Casual Vacancies: Interpreting the 1977 Amendment' (1980) 7(2) *Adelaide Law Review* 224.

³³ *Re Kakoschke-Moore* (2018) 352 ALR 579.

Two contributions directly related to the dismissal of the Whitlam Government in 1975 were Crawford's review of LJM Cooray's *Conventions, The Australian Constitution and Future*³⁴ and SJ Gibbs' review of Sir Garfield Barwick's *Sir John Did his Duty*.³⁵ Crawford accepted Cooray's view that there was a crisis in the interpretation of the conventions related to the role of the Governor-General. Crawford left open the solution. Gibbs was less restrained and dismissed Barwick's defence of Sir John Kerr as a 'disappointment'.³⁶

Articles that considered emerging constitutional questions included Jeffrey Goldsworthy's review of s 109 of the *Constitution*.³⁷ The High Court's decision in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*³⁸ was the backdrop for Goldsworthy's impressive outline of developments in the area. Another article was Peter Hanks' account of s 90,³⁹ published at a critical moment in the development of the relevant jurisprudence. Hanks noted clearly the tension between an economic union and fiscal federalism. The case law surrounding s 90, and what constitutes an 'excise', was in a state of flux. Hanks' recourse to the history of the section would be significant when the High Court considered the issue in the late 1990s.⁴⁰

One of the most important articles published during the decade relating to the history of the High Court was Clem Lloyd's account of its internal politics during the Chief Justiceship of Sir John Latham.⁴¹ This exquisitely researched article uncovered the role that the former Chief Justice attempted to play as an advisor to government.

D 1990s

In 1987, Sir Anthony Mason became the Chief Justice of Australia. He would hold that commission until his retirement in 1995. The 'Mason Court', comprised of an array of outstanding jurists, was a catalyst for innovation and renovation in many areas of Australian law. Constitutional law was no exception.

³⁴ LJM Cooray, *Conventions, the Australian Constitution and the Future* (Legal Books, 1979), discussed in James Crawford, 'Conventions, the Australian Constitution and the Future, by LJM Cooray' (1980) 7(3) *Adelaide Law Review* 402.

³⁵ Garfield Barwick, *Sir John Did His Duty* (Serendip Publications, 1983), discussed in SJ Gibb, 'Sir John Did His Duty, by Garfield Barwick' (1984) 9(3) *Adelaide Law Review* 426.

³⁶ Gibb (n 35) 426.

³⁷ JD Goldsworthy, 'Legal Rights, Subject Matters and Inconsistency: *Ansett Transport Industries (Operations) Pty Ltd v Wardley*' (1981) 7(4) *Adelaide Law Review* 487.

³⁸ (1980) 142 CLR 237.

³⁹ Peter Hanks, 'Section 90 of the Commonwealth Constitution: Fiscal Federalism or Economic Unity?' (1986) 10(3) *Adelaide Law Review* 365.

⁴⁰ *Ha v New South Wales* (1997) 189 CLR 465.

⁴¹ Clem Lloyd, 'Not Peace but a Sword! The High Court under JG Latham' (1987) 11(2) *Adelaide Law Review* 175.

The *Review* in the 1990s reflected this influence with a number of major publications on constitutional law. Reaction to the Court's emerging jurisprudence in areas of express and implied rights was well covered.⁴² For instance, Genevieve Ebbeck considered the Court's decision in *Street v Queensland Bar Association; Re Robertson*.⁴³ The increasing importance of the external affairs power was reviewed in detail by Donald Rothwell, in light of significant developments.⁴⁴ The race power was also the subject of renewed interest.⁴⁵

The theme of state constitutional law and the role of the Governor was again in focus as Alex Castles critiqued the 1989 Tasmanian election and the hung parliament that followed.⁴⁶

To mark the centenary of the *Constitution Amendment Act 1894* (SA) and female suffrage in South Australia, the *Review* published a special issue in 1995. Deborah Cass and Kim Rubenstein contributed a wide-ranging article on the role of women in the Australian constitutional system.⁴⁷

In 1998 the *Review* published a special issue on constitutional law. Entitled 'Critical Perspectives on Australian Constitutional Law', volume 20(1) received contributions from the nation's leading public law scholars. Amongst the authors were Cheryl Saunders, Michael Coper, Penelope Pether, Natalie Stoljar, Sir Anthony Mason, Hilary Charlesworth, Deborah Cass, Leslie Zines, Bradley Selway, Dennis Rose, Geoffrey Lindell, Anne Twomey, Rosemary Owens, Geoffrey Kennett, and Justice Susan Kenny. Topics included the High Court, interpretative methods, the influence of international law, representative democracy and interveners in constitutional litigation.

As the century drew to an end, the *Review* changed in format and substance. Longer and more detailed expositions of the law were now commonplace. Constitutional law, back in fashion, was influenced by theoretical and comparative discussions.

⁴² Simon Bronitt and George Williams, 'Political Freedom as an Outlaw: Republican Theory and Political Protest' (1996) 18(2) *Adelaide Law Review* 289; Christine Parker, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16(2) *Adelaide Law Review* 341.

⁴³ (1989) 168 CLR 461, discussed in Genevieve Ebbeck, 'Section 117: The Obscure Provision' (1991) 13(1) *Adelaide Law Review* 23.

⁴⁴ Donald R Rothwell, 'The High Court and the External Affairs Power: A Consideration of Its Outer and Inner Limits' (1993) 15(2) *Adelaide Law Review* 209.

⁴⁵ John Williams and John Bradsen, 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19(1) *Adelaide Law Review* 95.

⁴⁶ Alex Castles, 'Post-Election Constitutional Usage in the Shadow of Mount Wellington: Tasmania's Constitutional Crisis, 1989' (1990) 12(3) *Adelaide Law Review* 292.

⁴⁷ Deborah Cass and Kim Rubenstein, 'Representation/s of Women in the Australian Constitutional System' (1995) 17(1) *Adelaide Law Review* 3.

E 2000s

The 2000s would see the continuing rise of constitutional scholarship within the volumes of the *Review*. As with previous decades, there were both in-depth dissections of recent High Court decisions and systematic reviews of the jurisprudence to provide clarity or to distil trends.

On a number of occasions throughout the 2000s, the *Review* gave itself over to special editions celebrating the work of leading constitutional scholars. For instance, in 2004 it paid tribute to Adelaide alumnus Professor Geoffrey Lindell.⁴⁸ Leading scholars such as Leslie Zines, George Winterton, Adrienne Stone, Graeme Hill, Simon Evans and John Uhr explored Professor Lindell's contribution to many of the foundational questions of Australian constitutional law.

Three years later, in 2007, volume 28 was assembled in sadness to commemorate the life, and contribution to the law, of the late Justice Bradley Selway. Many of the contributions were from former Solicitors-General such as John Doyle, Chris Kourakis, Tom Pauling, David Bennett and Pamela Tate. They were joined by Robert French, AJ Brown, Melissa Perry, Ben Wickham, Helen Irving, Brian Galligan and Emma Larking in paying tribute to Justice Selway. The theme of the collection touched on many of Brad's areas of practice and scholarship.

As with previous decades, Michael Kirby continued his faithful support for the *Review* with contributions on the centenary of the *Jumbunna* case⁴⁹ and a reflection on the life of Dr George Ian Duncan, whose senseless murder was the catalyst for the decriminalisation of homosexuality in South Australia.⁵⁰

The *Review* continued to publish scholarly works on the issues of the day. Many articles reflected the vibrant debate that accompanied such issues. Whether Australia should have a bill of rights,⁵¹ criticism of the High Court,⁵² and the role and purpose of the implied freedom of political communication⁵³ were all accommodated within the broad mandate of a scholarly outlet.

⁴⁸ TA Gray and John Williams, 'A Tribute to Professor Geoffrey Lindell' (2004) 25(1) *Adelaide Law Review* 1.

⁴⁹ *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 (*Jumbunna*), discussed in Michael Kirby, 'A Century of *Jumbunna*: Interpretive Principles and International Law' (2010) 31(2) *Adelaide Law Review* 143.

⁵⁰ Michael Kirby, 'Dr George Ian Duncan Remembered' (2016) 37(1) *Adelaide Law Review* 1.

⁵¹ James Allan, 'Bills of Rights as Centralising Instruments' (2006) 27(1) *Adelaide Law Review* 183.

⁵² Geoffrey Lindell, 'In Defence of the High Court: Its Role as an Agent of Constitutional Change' (2012) 33(2) *Adelaide Law Review* 399.

⁵³ Dan Meagher, 'Freedom of Political Communication, Public Officials and the Emerging Right to Personal Privacy in Australia' (2008) 29(2) *Adelaide Law Review* 175; Michael Wait, 'Representative Government Under the South Australian Constitution and the Fragile Freedom of Communication of State Political Affairs' (2008) 29(2) *Adelaide Law Review* 247.

IV CONCLUSION

The University of Adelaide and its law school were in existence well before Australia was a nation. The Adelaide Law School did not so much catch up with the *Constitution*, rather the *Constitution* caught up with it. The *Review* has a proud history, and its volumes have provided a forum for many of the great scholars and jurists of public law and constitutional history.

Before the establishment of the *Federal Law Review* (1964) and *Public Law Review* (1990) generalist journals, such as the *Adelaide Law Review*, were the main outlets for scholarship on constitutional law. Revisiting the volumes of the *Review* since its establishment, it is possible to discern how the changing nature of Australian constitutionalism has affected scholarship. In a more decentralised federal system, and in the absence of greater national journals with electronic distribution, state-based journals allowed for avenues of scholarship that had a local appreciation of federal constitutionalism.

One conclusion that is inescapable is that the wisdom in establishing the *Review* has been well and truly rewarded by the intellectual contribution it has made to Australian constitutional law and history.