

**Gilbert & Tobin Centre of Public Law, Constitutional Law Dinner
2008, "Reflections on sections 7 and 24 of the Constitution"***

An understanding of our Constitution is enhanced by an understanding of the precise way in which prior to the Constitution, and prior even to the Convention Debates, democratic ideals came into the mental world of our founding fathers.

I have in mind two political developments in Victoria connected with the discovery of gold; the first is the grant of what was called "manhood suffrage" which occurred roughly half a century before the Constitution came into being; the second is the withering away of fledgling republican sentiment which occurred at about the same time.

The political developments I mention are complex and for the purposes of these reflections, I touch on each topic very lightly. I do so because these two developments affected the structure and terms of the Constitution.

Our founding fathers found the great challenge of their lives in the federation movement and a great deal is known about them -

* An edited version of a speech.

their temperaments and the individual circumstances of their lives. We know that, as we all are, they were tempered by their times.

At the 1890 Conference in Melbourne the South Australian delegate Mr Playford lamented that it was a misfortune of the conference that it met "without a sufficiently great occasion; without that force of circumstances, such as existed in Canada and the United States which might compel us to form a union *volens volens* ..." ¹ To this Alfred Deakin replied:

"How much better to meet as we do now, at our leisure, with a clear prescience of what must be the character of our future, to consider how deep we can lay the foundations of our national strength." ²

A remark like that reflects the circumstance that such civil strife as did occur in the colonies about the great political issues of the 19th century, chiefly the sharing of political power, was well over before the federation movement gathered momentum.

The delegates had the benefit of one of the greatest achievements of the Australian colonies prior to federation. That was to delineate a qualified version of, and to some extent actually achieve, the political equality necessary for the establishment of a modern liberal democracy. Many constitutions have been ushered in after significant civil violence, even civil war. Australia was spared such horrors, and at least, in that sense, blood did not stain the wattle. However, numerous delegates had their own experiences of significant civil strife and political agitation before the federation movement developed momentum.

For example, on 12 March 1868 the then Duke of Edinburgh was shot at Clontarf in New South Wales. The crowd, assembled to see the royal visitor, was outraged and surged forwards towards the would-be assassin calling for his lynching. He was only rescued by the swift action of the then Chief Justice of New South Wales, Sir Alfred Stephen, who first caught the culprit then dragged him quickly down to the wharf. The Chief Justice then hailed a passing steamer, onto which he flung the culprit with instructions that he be dispatched to Darlinghurst Gaol³.

Henry Parkes, on this occasion, unnerved perhaps by the sectarian tensions unleashed by his legislation to make education free, compulsory and secular, thought the fact that the assailant was an Irishman had the potential for generating a civil war. As a result of that, Parkes became heavily involved in the subsequent dealings with the Duke's assailant, but that is another story.

Deakin, like Parkes, had also seen his fair share of colonial tumult in the form of Victorian constitutional crises in the mid 1860s and again in 1877. The latter seemed to some, in the words of a contemporary commentator, to put the colony almost "on the verge of civil war"⁴.

Speaking very broadly, the latter crisis arose because the grant of manhood suffrage in Victoria in 1857 had not produced, as had been expected, greater social and economic equality.

One observer of the 1877 crisis said he believed no community except one "trained to self restraint and accustomed to

respect the laws, could possibly have stood such provocations as were given from both sides of politics."⁵ Legalism was already abroad.

In the middle of the 19th century, once the gold rushes were in full swing, very significant public agitation occurred in relation to extending the suffrage. These earlier events had also raised grave fears of serious civil strife.

Let me now concentrate on what happened in Victoria in relation to manhood suffrage. Whilst the British electorate had been widened by the *Reform Act* of 1832, that Act did not remove the social, occupational or property-based character of the electorate. Shortly thereafter, "manhood suffrage" became the centrepiece of English Chartists under their slogan "One man, one vote". The slogan "One man, one vote" encapsulated the first point of the Peoples Charter, as it was known, which was: "A vote for every man twenty-one years of age, of sound mind and not undergoing punishment for crime". The other points covered voting by ballot, abolishing property qualifications for members of Parliament, paying members of Parliament, equal Constituencies and annual Parliaments.

The six points of the "Peoples Charter" were predicated upon the belief that social justice for the working classes would follow from the control of legislation, implicit in the idea of manhood suffrage and in the related idea that members of Parliament should be paid and not be required to have property qualifications. In

other words Parliament would not be the exclusive preserve of the independently wealthy.

The Chartists ostensibly failed in England in the short term but that is also another story. I will say no more about that other than to quote the famous Whig Thomas Babington Macauley, opposing the Chartist idea of expanding the suffrage in 1842 in the House of Lords. He said⁶:

"I believe that universal suffrage would be fatal to all purposes for which government exists, and for which aristocrats and all other things exist, and that it is utterly incompatible with the very existence of civilization. I can see that civilization rests on the security of property... Believing this, I will oppose with every faculty which I possess the proposition for universal suffrage."

On the same occasion, Lord John Russell said that possibly "universal suffrage may be exercised without injury to order in a country like America where there was no monarchy" but he went on to say it was not appropriate in England⁷. Such hostile attitudes to democracy are to be compared with the attitudinal change and the pace of attitudinal change in Victoria only six years later to which I turn.

The centrality of the discovery of gold to nation building has been a natural and popular topic for many Australian historians, but all I want to do is to provide a snapshot of those who came to the colony in pursuit of the promise of instant wealth. Here is Ernest Scott's description of them:

"Gold drew English Chartists and Irish Repealers, participants in the French, German, Belgian, and Hungarian revolutionary upheavals of 1848, Polish and Spanish insurrectionists, Italian nationalists, a great and

mixed crowd of political enthusiasts, dauntless champions of lost causes, visionary idealists and fervent exponents of utopian theories.

That group formed a Reform League which put forward a program for political reform. The program was "substantially that of English Chartism adapted to local circumstances."⁸

The central aspect of the diggers' program for obtaining what came to be called the "digger suffrage" was the subject of intense political agitation in 1854. The agitation arose out of a burning sense of political exclusion in circumstances where the right to dig for gold was subject to a licence and the associated licensing scheme was rigorously enforced by intimidatory police conduct. Having mentioned who the diggers were, all I want to do next is provide a chance to appreciate the language they used in the political agitation for digger suffrage.

A typical resolution passed at a meeting of diggers about the necessity for extending the suffrage stated:

"That, as all men are born free and equal, this meeting demands the right to a voice in the framing of the laws which they are called on to obey."⁹

A typical grievance from diggers to Governor LaTrobe said:

"... we must not omit to mention a strong conviction in the minds of diggers, that they will never have justice until they are fairly and fully represented in the Legislative Council ... and we would respectfully suggest, for the serious consideration of His Excellency, the justice of at once giving full and fair representation to the people."¹⁰

The dream of many hopeful colonists, especially those digging for gold whose "property" was basically a tent, was to shift the basis of political power from the ownership of property to individuals.

The language of the diggings has been described by one historian as "the language of rights"¹¹. The diggers saw a right to vote as a concrete expression of a right to be a stakeholder in the country and in its future. Because it was a new country they were strongly opposed to simply replicating familiar institutions of government.

Public discourse echoed those sentiments. Consider a contemporaneous *Argus* editorial:

"While England is under the necessity of advancing towards the development of her constitution by gradual concessions, we, who have nothing to do with privileged classes, and vested political rights, had the choice of at once beginning a new career."¹²

The three passages from contemporaneous documents set out above which are representative of a good deal of material, convey the colonial Zeitgeist. It was one of hope and suspense, informed by a desire to make a new start in the "New World". The year 1854, which had been marked by violence and increasingly strident claims for suffrage, ended with the small but armed rebellion in December and the loss of lives, at the Eureka Stockade. Americans present on the diggings had tentatively introduced "the idea of a substitution of republican institutions for the present monarchical form of government."¹³ After the Stockade, authorities were extremely concerned that withholding the right to

vote could seriously disturb civil peace. Another strand of thinking in their deliberations was that withholding the right to vote might give greater encouragement to those pursuing the idea that the American form of government was to be preferred.

A Board of Enquiry followed by a Royal Commission, was immediately set up after the Stockade and was manned judiciously enough by persons sympathetic to the diggers. It reported three months later that miners should be given a £1 annual licence which carried with it the right to vote. The diggers' suffrage made manhood suffrage inevitable and that followed in Victoria in 1857. Whilst timing varies from colony to colony, once the nexus between participation in the political process and property was severed, in respect of lower houses, it was inevitable that all colonial constitutions were similarly modelled. Accordingly, an itinerant person living in a tent, or in possession of a swag and a £1 licence, could take part in the political processes set up under the new Victorian Constitution. But behind that result lay compromises and there were subsequent qualifications of the effectiveness of the ability to take part in political processes.

One compromise, which again I touch on very lightly, is that not every democrat was a republican. Those democrats who were republicans were prepared to let their republican sentiments abate once a right to vote was obtained. Those who would have preferred to replicate British institutions in the colony and wanted neither manhood suffrage nor a republic were prepared to accede to the former but certainly not to the latter. The fact that 1854 also saw the start of the Crimean war may naturally have also had

a role to play in encouraging those compromises particularly in relation to the damping down of republican sentiments.

It must be conceded at once that not every historian sees the achievement by the diggers of a right to vote as an unqualified success. Possibly as a reaction to hyperbole about the synergy between the Eureka Stockade and Australian democracy, Geoffrey Serle has pointed out that the victory was immediately qualified by such matters as the imposition of property qualifications for the Upper House and plural voting.¹⁴

Manning Clark thought the diggers' achievement was a failure from the vantage point of participants in the struggle who wanted much more parliamentary reform, not just a vote based on an individual rights rather than property. He speaks of the event in terms of "lost opportunities" and saw the diggers as being co-opted into the colonial establishment by the grant of the suffrage.¹⁵

John Hirst, who has written a formidable account of the birth of democracy dealing with analogous developments as they unfolded in New South Wales, argues that in one sense democracy was achieved too easily in Australia without the defining autonomy to which struggle and contention can give rise.¹⁶ This was precisely Mr Playford's point at the 1890 Conference which I mentioned earlier.

In assessing the achievement one needs, I think, to remember the attitudes in England exemplified in the extracts from

the speeches of Lord Macauley and Lord Russell. The ideals which made the diggers outsiders to the English establishment of entrenched rank, privilege and power, were the very ideals which especially equipped them to force the infant colonial establishment down the road of political modernity.

In any event, by the time of the Constitutional Conventions the political template forged in colonial constitutions of "full and fair representation", as it was then understood within an imperial framework, was well established. For that reason, delegates conceived of a federation, characterised by democratic ideals, but within that imperial framework.

Representative government which was not dependent on propertied interests expressed an ideal of political equality not, to be sure with the inclusiveness of application which our modern society demands, but it was the expression of an ideal which was capable of expansion when further contestations of equality occurred as they did, first with women in 1902 and much later with indigenous Australians in 1967.

In the final result, our system of government set up under the Constitution is one of which, it is sometimes said, ultimate sovereignty reposes in "the people" as expressed in sections 7 and 24 (and one must add section 128).

It is often said that a Constitution is based on values not all of which could possibly be expressed in the text of the Constitution. Another frequent and obvious enough remark is that

as circumstances changes so also do values the possibility of which was recognised by Alfred Deakin when introducing the Judiciary Bill.

This particular background to the Constitution is important because the circumstances in which the diggers' suffrage was obtained in Victoria, the struggle, and the language in which it was conducted, reveals the values which lie behind, and are expressed in the Constitution, in the phrase "directly chosen by the people". The values are those of justice, fairness and equality, as applied to the sharing of political power, a point of great consequence for all arms of Government when exercising their respective powers, and indeed for all of us.

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- 1 Murdoch, *Alfred Deakin*, (1923) at 155, quoting from the official report of the Conference.
 - 2 Ibid.
 - 3 Martin, *Henry Parkes A Biography*, (1980) at pp 232-234.
 - 4 La Nauze, *Alfred Deakin*, Vol 1, (1965) at 31.
 - 5 Ibid.
 - 6 Hansard Parliamentary Debates, 3 Ser; Vol LXIII, 1842 cols 13-90 reproduced in P Hollis (ed), *Class and Conflict in 19th Century England 1815-1850*, (1973).
 - 7 Hansard Parliamentary Debates, 3 Ser; Vol LXIII at p 75.
 - 8 Scott, *A Short History of Australia*, 4th ed (1920) pp 203; 213.
 - 9 *The Argus*, 8 December 1854.
 - 10 Report of Board of Inquiry, *Riot at Ballarat*, Victoria 1854. Appendix B.
 - 11 Goodman, *Making an Edgier History of Gold*; Iain McCalman and Andrew Reeves (eds), *Gold: Forgotten Histories and Lost Objects in Australia* (2001) at p31.
 - 12 *The Argus*, Editorial, 21 March 1854.
 - 13 Extracted from La Trobe's letter of 1 June 1853 to the Duke of Newcastle, set out in Molony, *Eureka*, (2001 reprint of first publication 1984), at p31.
 - 14 Serle, *The Golden Age*, (1963) at pp 264-265.
 - 15 Clark, *A History of Australia*, VIV (1978; reprinted 1999) at p83.
 - 16 Hirst, *The Strange Birth of Colonial Democracy: New South Wales 1848-1884*, (1988).