

## Program 6 - Founding Documents

Every nation has its own balance between conceiving of its people as a nation of individuals and as a nation of communities.

The point at which the Australian balance is struck tends to leave issues like human rights to the states and territories, subject to occasional intervention by the Commonwealth, generally using the external affairs power.

The balance between equality of citizens considered nationally and the opportunity for State diversity is one of the inherent tensions of federal systems.

However moves for constitutional reform across a wide range of systems of government reflect changing definitions and needs of the modern nation-state.

### JOHN WESTLAND:

Hello I'm John Westland from Radio Australia and today's program in our series SHARING POWER, looks at 'Founding Charters'.

Sound Effects 'Nation on Parade'

### JOHN HIRST:

Even though people have turned out in greater numbers to federal centenary celebrations than I would have thought, there were 300-thousand people I think in Melbourne for the Federation Parade, I don't think there's the full emotional involvement that you get for instance at a sporting contest when Australia wins. Or even the parade through Sydney streets of the volunteers from the Olympics, I was in Sydney at the time and there's a real enthusiasm there and a feeling that this is something about Australia we can celebrate. Celebrating the making of a constitution still isn't something that turns Australians on in great numbers.

### JOHN WESTLAND:

John Hirst, whose book SENTIMENTAL NATION is about the making of the Australian Commonwealth.

If Australians find their constitution rather dull and legalistic - it begs the question why didn't the founding fathers look to the American Constitution for inspiration when they came together in the 1890's to write a Charter for the Australian nation.

Federation historian, Helen Irving...

HELEN IRVING:

The American Civil War really had only happened two and a half decades earlier and certainly all of the men who were there at that 1890 conference had living memories and many of them adult memories of the 1860s when the American Civil War was raging. And it was very much in their mind as something that they wanted to avoid if they were to proceed towards creating a federation for Australia and writing a federal constitution.

JOHN WESTLAND:

But while Australia's founding fathers regularly commented on racial inequality in American society that justified the inclusion of equal rights protection in the US Constitution - they saw no parallels in Australia. Instead, they regarded the marginalisation of racial groups as reasonable and necessary, if Australia was to avoid becoming racially divided like America....

Hilary Charlesworth is Director of the Centre for International and Public Law at the Australian National University.

HILARY CHARLESWORTH:

I think the reason why the Australian Founding Fathers didn't include a complete catalogue of rights in the constitution was that there was considerable fear that if there were statements of rights, especially broad general rights such as the right to equal treatment under the law, that these might be used by various groups in Australian society to better their position. And I think the Founding Fathers were quite conscious that they wanted those groups to remain in marginalised positions. I'm speaking particularly here of Asian and African workers, particularly miners who were in Australia, the minority Aboriginal population really didn't enter much into the constitutional drafters' consciousness much, it was assumed at that stage that the Aborigines were basically a dying race and that this wasn't going to be a large issue for the Australian polity.

HELEN IRVING:

The Constitution itself does not set down who has and who doesn't have the right to vote. It left that for the Commonwealth Parliament to decide and in 1902 the Commonwealth Parliament passed the first Commonwealth Franchise Act which simultaneously enfranchised adult women and ruled out what it called Aboriginal Natives of Australia, Africa and Asia, except for New Zealand, ruled them ineligible to enrol to vote unless they were already on the electoral roll prior to Federation.

JOHN WESTLAND:

Hilary Charlesworth points out in her recent book, *Writing In Rights*, that most Americans identify their Constitution with the Bill of Rights and regard the protection of individual rights as the highest function of government.

She argues that if 'White Australia' was one of the pillars of federation then it's high time to enshrine human rights in the Founding Charter...

HILARY CHARLESWORTH:

I suppose the Founding Fathers had in mind a very unified community that would be electing its politicians. Because they insisted on the need, if you, like to relegate the non-Europeans to the sidelines their vision of the perfect Australian polity wasn't at all a multicultural one, it was a mono-cultural polity. And therefore I suppose it was perfectly reasonable to assume that if you have a pretty homogenous community, not many minority groups, it's likely that the parliament will represent the community's views pretty precisely. But of course what's happened since Federation is that we have many more distinct minority groups and my argument would be that our constitution is quite unable to provide a framework for discussing the rights of minorities at all; there is simply no mechanism in our Constitution by which the rights of minorities can be attended to.

HELEN IRVING:

The American Constitution of course very famously has the so-called Bill of Rights, the ten amendments that were added after the constitution was completed and that Bill of Rights is often what people think of when they imagine a constitution as an inspirational document. But largely a federal constitution of any sort has to set out the contractual, if you like, arrangements between the states or the provinces or the cantons or whatever the regional units are called, and the central authority, the central parliament. And that requires an allocation and a distribution of powers between the two levels of government, and that is not a matter of inspiration, it's not a matter of exciting individuals about their rights and their future destiny and so on, it's a very necessary sorting out of a compromise between the two levels, distributing the powers in such a way that everyone gets the best advantage that they can of belonging to a federal unit. And that's really the meat of a federal constitution - all of the inspirational and aspirational additional extras and perhaps the idea of having protections of individual rights, they are added too, they are not a necessary or central part of a federal constitution.

JOHN WESTLAND:

Helen Irving from the University of Sydney.

Up-dating Australia's constitution has proved extremely difficult. First it requires endorsement from the Federal Parliament - which doesn't always like to override any of the States. Then the changes have to be put to the people - in the form of a nation-wide referendum. And for changes to go through, that referendum must win a majority in the majority of the states. Of the 44 referendums held since Federation just 8 have resulted in constitutional reform. One of the notable successes was the 1967 referendum when Australians were asked to vote to change the Constitution so that indigenous Australians would have the same rights as other citizens....

In that year, Zelman Cowan a constitutional lawyer - who went on to become a Governor-General - explained to the Australian public the context for the national referendum...

ZELMAN COWAN:

On Saturday, we're going to be asked to change the Australian constitution in two respects, both relating to Aborigines. Now the first matter concerns Section 127 of the Constitution, it's an odd provision, which says in substance that in reckoning the people of the Commonwealth, Aboriginal natives shall not be counted. Well nowadays of course the situation has changed, on its face the provision is objectionable and discriminatory and ought to be got out of the constitution. The other matter is a matter going to the powers of the Commonwealth Parliament. Our Founding Fathers gave the Commonwealth Parliament a power which now reads curiously, it said that the Parliament should have power to make laws for any race for which it was deemed necessary to make special laws. But the provision excluded the Aboriginal race, any race other than the Aborigines. Now why was this done? It was done because what our founding fathers had in mind was the problem of immigrant peoples like the Chinese or Pacific labourers, not the Aborigines who were indigenous people. Well now of course the situation has changed and what we want to do is to get out this provision which no longer makes sense. Well now what does it all mean? As things stand before the amendment power to legislate for the Aborigines in the states is a power given to the state parliaments. The Commonwealth may make general laws which affect the Aborigines as part of the people of Australia. For example the Commonwealth may make laws giving the Aborigines the franchise, it may make social service laws, but it may not make any special laws for the Aboriginal people. And it is thought that it is appropriate to deal with their welfare, and it is hoped that by taking out these discriminatory provisions we may at the same time give a national power to deal nationally with the problem of the Aborigines.

NEWS ITEM:

On May the 27th, 1967, 90 per cent of voters endorsed a proposal to make Aborigines Australian citizens. The referendum gave Aborigines the vote, made way for their inclusion in the Census and gave the commonwealth power to override paternalistic state statutes which controlled Aborigines.

JOHN WESTLAND:

One of the constant themes in Australian human rights debates over the last century has been the claim that the introduction of guarantees of rights would undermine the federal system by impinging on States' rights. A stark case in point was the national debate in 2000 over whether the Northern Territory and Western Australia were in breach of Australia's international human rights obligations when they implemented mandatory sentencing laws for property crimes. Those laws required jail for first-time adult offenders and second-time juvenile offenders and resulted in a disproportionate number of aboriginal offenders being sent to prison.

When the State Coalition Government lost the 2001 Northern Territory elections, mandatory sentencing was repealed in that state. However a test case on whether Australia was in breach of the International Covenant on Civil and Political Rights - to which Australia is a party - is still before the UN Human Rights Committee.

You're listening to 'Sharing Power' on Radio Australia. Today 'FOUNDING CHARTERS.'

Constitutional reform within Australia and around the Region inspires often spirited political debate because founding charters not only lay down the rules and institutions by which a nation is governed but they also embody peoples' aspirations for the kind of nation it should be.

Take for example the world's newest independent nation, East Timor.

DIONISIO SOARES:

The Constitution is a symbol, it's not only limited to its meaning as the grounds for a source of law of the new country in the future. It's a symbol of unity. I mean for the East Timorese the Constitution is something that actually they could rely on to have protection of their rights, protection of their lives, freedom of expression and so on. Something for the suffering they've gone through almost 500 years and they think that by having a constitution it symbolises freedom, it symbolises their protection, it symbolises something that can guarantee that everyone in the country has the equal opportunity to life, the welfare system and everything. I mean all these colonial sufferings the East Timorese have felt in the past, now seem to be the foundation that is actually stimulating a lot of thoughts, thinking in their minds that look, for the constitution to work, it needs wider consultation, the people should have a say, at least to understand that these rights are protected and respected, to understand our citizens have equal rights as other beings and also other things that they have not experienced during the colonial period.

JOHN WESTLAND:

Dionisio Babo Soares was Vice-Dean for Social and Political Studies at the University of East Timor. He's currently completing a doctorate at the Australian National University focusing on East Timor's transition to nationhood.

Following the country's first democratic elections in August 2001, the Constitutional Assembly had just 90 days to draft a Constitution in time for Presidential elections. Dionisio Soares told a Conference on Constitutions and Human Rights at the Australian National University that the Assembly has yet to come to terms with how the country deals with the human rights abuses that took place during the 25 years of Indonesian rule and continued after the 1999 referendum on independence conducted under U.N supervision.

DIONISIO SOARES:

We could say that almost all rights actually are protected, that all East Timorese political parties and people in the Diaspora and in East Timor are committed to upholding the rule of law, to comply with international standards of human rights and all international conventions on human rights. However, we have a lot of problems inside East Timor, there are a lot of questions remaining. We are having issues like reconciliation that need to be sorted out and this reconciliation applies not only to East Timorese supporting independence and anti-independence, but also to some internal political rivalries that have occurred in the past and resulted in conflict and the death of many people. And these are the issues that we should look at, but at the same time we also have people who I think were perpetrators of some of these crimes in the past and are now in power. We're talking about the Constitution on one side, but on the other side we're talking about justice and I'm not sure will this apply equally to all citizens regardless of their position in society or in the government? But we are benefiting a lot from our involvement with the international community, the drafting of the constitution is an example, we're incorporating all the issues about human rights in the constitution, something that is still lacking in Indonesia. The 1945 Indonesian Constitution - it's pretty short. The one that's being drafted in East Timor has 152 articles and of course it covers more things than the Indonesian one. But you know we're only talking about a constitution, we need to actually look also to practice, how is it going to be implemented?

JOHN WESTLAND:

Since the fall of the Suharto regime, Indonesia's National Parliament has added a full chapter on human rights' guarantees to the 1945 post-independence Charter. However, human rights lawyer, Frans Winarta is concerned that no change has been made to that part of the Constitution that restricts citizenship to the indigenous Indonesian peoples a move seen by the Chinese community, in particular, as a justification for continued discrimination.

Indonesian Chinese have been subjected to a myriad of discriminatory laws and regulations put in place during the Suharto years....

FRANS WINARTA:

There are about 60 regulations, not even laws comprising of presidential decrees, instructions, cabinet circulars in letters, government letters, ministerial decrees and so forth discriminative in nature. It discriminates Tao worshipping, prohibiting of lunar New Year, to be celebrated openly, prohibiting using the Chinese characters in trade, in advertisement, press also. It's the only Chinatown in the world where there's no Chinese characters. This is bad for Indonesia because Indonesia internationally will be considered as a discriminative state. But discrimination through the law is really bad because that indicates to the majority in Indonesia that anything to do with Chinese is bad. It's not true, actually, because the accusation since '65, since the aborted coup in '65 is that the Chinese are inclined to support the communists and they are inclined to be communists, and therefore their culture has to be limited. Even their names, their school has to be dissolved at that

time. They have to be dispersed you know, and they cannot be too proud of themselves you know, all those things were just spearheaded by the army of Indonesia. In every seminar since '61 to '69 in Bandung they always talk about the Chinese problem, and actually there's no Chinese problem. What we have now is a national Indonesian problem actually. They don't treat the Chinese fairly, but not only to the Chinese but also to the other non-Javanese minorities like the Bataks, like the Papuans, the Moluccus, the East Timorese in the past, and the Founding Fathers of Indonesia, when they developed the Republic of Indonesia, they never talked about ethnicity, they never talked about religious background, they never talked about cultural background. What they wanted was a state where the state respects every citizen as a human being.

JOHN WESTLAND:

Human Rights lawyer, Frans Winarta.

'Sharing Power' is produced by Sue Slamen with technical production by Ryan Egan from Radio Australia. Academic Advisor, Dr Richard Chauvel from Victoria University in Melbourne.

I hope you can join me - John Westland - on Radio Australia again next week.

