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Abstract
Tranquillity, not turmoil - repose, not revolt - characterizes 'The Constitutions of the Australian States'. Is that fundamental premise - evolution, not revolution - of Australian state constitutions correct?

Book Review

EVOLUTION OR REVOLUTION : STATE CONSTITUTIONAL LAW SOJOURNS

by R D Lumb, *The Constitutions of the Australian States*
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Tranquillity, not turmoil - repose, not revolt[1] - characterizes *The Constitutions of the Australian States*.[2] Is that fundamental premise - evolution, not revolution[3] - of Australian[4] state[5] constitutions correct? Does

1 Of course, there is no need to advocate or remain at either polarity. See Sunstein C 'Routine and Revolution' (1987) 81 Nw U L Rev 869 (discussing proposals in Unger R *Politics : A Work in Constructive Social Theory* (1987) ('designed to break down the distinctions between routine and revolution and to facilitate individual and collective self-transformation'). Other assessments include Anderson P 'Roberto Unger and the Politics of Empowerment' (Jan - Feb 1989) 173 New Left Rev 93; Devlin R 'On the Road to Radical Reform : A Critical Review of Ungers' Politics' (1990) 28 Osgoode Hall L J 641; Thomson J 'Using the Constitution : Separation of Powers and Damages for Constitutional Violations' (1990) 6 Touro L Rev 177, 211 n 192 (references).

2 Lumb R *The Constitutions of the Australian States* 5th edn (1991) [hereafter cited by page number]. For exceptions see eg 7-8 ('constitutional crises' in NSW between 1788 and 1823 over Governors' powers); 53-56 ('crises' preceding the NSW *Constitution (Legislative Council) Amendment Act* 1933); 77 ('dismissal of Lang Government in New South Wales in 1932'); 96 ('constitutional crisis involving Mr Justice Boothby'); 99 (1973-1975 'struggle between the Commonwealth and State governments over the nature of the constitutional relations between Australian governments and the United Kingdom'); 100 ('confrontation [over] the States' traditional right of access to the Queen through the British Government'). See also 66-68 (Higinbotham's dissenting view on responsible government).

3 See eg 3 ('representative and responsible government ... the product of gradual evolution'), 68 ('not ... one fell swoop ... [but] a gradual development of an awareness'), 79 ('more appropriate ... to allow for the accumulation of further precedents'). See also Lumb R 'The Bicentenary of Australian Constitutionalism : The Evolution of Rules of Constitutional Change' (1988) 15 U Qld L J 3.

4 Professor Lumb suggests that *The Constitutions of the Australian States* 'will be of interest .... to those interested in comparative constitutional law and government' p xviii. Except as to the Australian Constitution (see eg pp 62 n 64, 103-107, 125, 127), comparative analyses and references are not included. Comparative literature includes

its reversal - revolution, not evolution - more accurately portray state[6] constitutional law?[7] Even if postulating the correct answer was possible,[8] that alone does not suffice. Getting there - means as well as ends - requires presentation and evaluation of opposing facts, opinions and conclusions. In turn, that engenders debate, provokes questions and invigorates intellectual innovation. When seeking to resolve present legal problems or facilitate future constitutional developments this, not right answers, is important.

Derivation of an historical perspective from lawyers' traditional resource materials ought, therefore, not to suffice. If it does, the resulting scholarship is exemplified by Professor Lumb's[9] narrative on the formation of Australian state constitutions.[10] Missing is a wider historiographical framework. In

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Leshy J 'The State of Constitutional Law in the States of the United States : Are there any Lessons for Australia?' (1990) 20 UWA L Rev 373; Lumb R 'Methods of Alteration of State Constitutions in the United States and Australia' (1982) 13 FL Rev l; Thomson J 'State Constitutional Law : American Lessons for Australian Adventures' (1985) 63 Tex L Rev 1225; Thomson J 'State Constitutional Law : Some Comparative Perspectives' (1989) 20 Rutgers L J 1059. For the burgeoning American state constitutional law scholarship see Thomson J 'State Constitutional Law : The Quiet Revolution' (1990) 20 UWA L Rev 311, 313 n 7 (references); Gardner J 'The Failed Discourse of State Constitutionalism' (1992) 90 Mich L Rev 761.

5 The constitutional structure of the Northern Territory and the Australian Capital Territory are beyond the scope of *The Constitutions of the Australian States* (p xx) and, therefore, references are not provided. But see eg Loveday P & McNab P (eds) *Australia's Seventh State* (1988); Nicholson G 'The Constitutional Status of the Self-Governing Northern Territory' (1985) 59 ALJ 698; Nicholson G 'Constitutionalism in the Northern Territory and Other Territories' (1992) 3 Pub L Rev 50; Lindell G 'Self-Rule, not statehood' Canberra Times 22 Dec 1987, at 2; Lindell G 'The Arrangements for Self-Government for the Australian Capital Territory : A Partial Road to Republicanism in the seat of Government?' (1992) 3 Pub L Rev 5.

6 From 26 January 1788 to 1 January 1901 the states were colonies. See s 6 of the (UK) *Commonwealth of Australia Constitution Act* 1900.

7 Compare Thomson J 'Revolution' supra n 4.

8 Refutations of this possibility include Balkin J 'The Hohfeldian Approach to Law and Semiotics' (1990) 44 U Miami L Rev 1119; Balkin J 'Some Realism about Pluralism : Legal Realist Approaches to the First Amendment' [1990] Duke L J 375; Balkin J 'Tradition, Betrayal, and the Politics of Deconstruction' (1990) 11 Cardozo L Rev 1613; A D'Amato 'Aspects of Deconstruction : Refuting Indeterminacy with One Bold Thought' (1990) 85 Nw U L Rev 113; Moore M 'The Interpretive Turn in Modern Theory : A Turn for the Worse?' (1989) 41 Stan L Rev 871.

9 His constitutional law publications include *The Constitution of the Commonwealth of Australian Annotated* (4th ed, 1986); *Australian Constitutionalism* (1983); 'Territorial Changes in the States and Territories of the Commonwealth' (1963) 37 ALJ 172; 'Fundamental Law and the Process of Constitutional Change in Australia' (1978) 9 FL Rev 148; 'Section 51 (xxxviii) of the Commonwealth Constitution' (1981) 55 ALJ 328; Lumb, supra n 3; Lumb supra n 4; 'The Commonwealth of Australia' : Constitutional Implications' (1979) 10 FL Rev 287; 'The Northern Territory and Statehood' (1978) 52 ALJ 554; 'Aboriginal Land Rights: Judicial Approaches in Perspective' (1988) 62 ALJ 273; 'The Torres Strait Islands : Some Questions relating to their Annexation and Status' (1990) 19 FL Rev 154.

10 Pages 3-46. Most frequently cited is Quick J & Garran R *The Annotated Constitution of the Australian Commonwealth* (1901). Others include Melbourne A *Early Constitutional Development in Australia* (2nd edn 1963); Jenks E *The Government of Victoria* (1891); Sweetman E *Australian Constitutional Development* (1925).

particular, judicial biographies reveal a much less serene panorama.[11] Reference to and utilization of more detailed and specialized legal history publications[12] exposes the variations, complexities and nuances inevitably involved in legal and constitutional affairs.[13] One example is lawyers' fervent espousal of judicial power to review the constitutionality of legislation and executive acts or omissions.[14] Thus Professor Lumb opines :

> The recognition that a State parliament (and Executive) may be made subject to the overall control of a rigid constitution means that a judicial body will have the jurisdiction to interpret such a constitution and to pass judgment on the validity of legislative and executive action. An examination of the historical development of the colonial constitutions shows that the judges of the Supreme Courts were intended even in the era before responsible government to exercise the power of judicial review of legislative acts. That they continued to exercise such a jurisdiction (although not specifically granted by the Constitution Acts) after the advent of responsible government, which brought with it a greater security of judicial tenure, is clear. Such a jurisdiction is necessarily inherent in the courts of a system which has a controlled constitution.[15]

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11 See Thomson J 'Judicial Biography : Some Tentative Observations on the Australian Enterprise' (1985) 8 U NSW LJ 380, 398 - 400 (bibliography of colonial and state judges).

12 Other non legal Australian history scholarship should also be utilized especially if, as Professor Lumb expects, *The Constitutions of the Australian States* 'will be of interest ... to [non-lawyers] who research and work in ... Australian government and history ...' xviii.

13 For example, Professor Lumb does not mention Castles A *An Introduction to Australian Legal History* (1971) Castles A *An Australian Legal History* (1982); Bennett J & Castles A *A Source Book of Australian Legal History* (1979); Finn P *Law and Government in Colonial Australia* (1987); Whitfield L *Founders of the Law in Australia* (1971); Russell E *A History of the Law in Western Australia and Its Development from 1829 to 1979* (1980); Castles A & Harris M *Lawmakers and Wayward Whigs : Government and Law in South Australia 1836 - 1986* (1987) (very critically reviewed by Howell P 'Tribunals and Tribulations' (1990) 18 J Hist Soc of SA 147); Jaensch D (ed) *The Flinders History of South Australia : Political History* (1986); McPherson B *The Supreme Court of Queensland 1859 -1960 : History Jurisdiction Procedure* (1989). See also Black D (ed), *The House on the Hill: A History of the Parliament of Western Australia 1832 - 1990* (1991).

14 See eg Malcolm D 'The State Judicial Power' (1991) 21 UWA L Rev 7, 10-11, 25.

15 Page 131 (footnote, referring to the Victorian Supreme Courts' jurisdiction under s 85(1) of the *Victorian Constitution Act* 1975, omitted). This passage is an almost identical reproduction from the 2nd rev ed (109-110), 3rd ed (105) and 4th ed (113). However those earlier editions also stated :

> It might be argued that the Supreme Court of the States, the bulk of the jurisdiction of which consists of common law matters, are not appropriate organs for upholding and enforcement of constitutional rules...The Supreme Courts of the States would be not merely fulfilling a historic function but also a function in accord with comparative constitutional practice (of the Supreme Courts of the American States), by participating in judicial exegesis and application of constitutional rules.

On s 85(1) see Legal and Constitutional Commmittee [of the Victorian Parliament], *Report Upon the Constitution Act 1975* (March 1990); Lombardi R & Martin S 'Acts Without Power?' (Jan-Feb 1991) 65 Law Inst J 75; Hanks P 'Victoria' (1992) 3 Pub L Rev 33, 36-38.

Historical assertions and normative propositions are explicitly paraded. Absent are supporting reasons. Opposing arguments are neither alluded to nor rebutted. Ambivalence, rather than certainty may be the distinctive trait of judicial review's Australian history. As Professor Lumb chronicles, judicial review of governors' orders occurred before the era of responsible government.[16] Omitted are the consequences vis a vis judges advocating and exercising that power.[17] Professor Lumb also refers to the existence of the power of judicial review over proposed colonial legislation. Although expressly mandated by United Kingdom legislation, it was, within five years, modified.[18] Reasons for its introduction, modification and demise are not, however, disclosed in *The Constitutions of the Australian States*.[19] Early cases of judicial review of legislation not mentioned by Professor Lumb, also exist. Again, the retribution judges suffered does not inspire confidence in a conclusion that judicial review was, at least by the people and colonial legislatures, intended.[20] Following attainment of responsible government, judicial review continued.[21] One result, 'enlarging the sphere of [colonial] legislative authority' by the *Colonial Laws Validity Act* 1865 (UK), is noted by Professor Lumb.[22] Was this a direct and explicit assault on and repudiation of judicial review? Were notions of parliamentary sovereignty, not judicial supremacy, intended by colonial legislatures and the United Kingdom Parliament, as a general matter, to prevail?[23] Another direct sequel, to which Professor Lumb only indirectly adverts, replicated earlier

16 Pages 7 - 9.

17 For the circumstances surrounding the judges' recall to England, see eg Currey C *The Brothers Bent : Judge - Advocate Ellis Bent and Judge Jeffery Hart Bent* (1968); Whitfield supra n 13, 21-24, 30; Thomson J *Judicial Review in Australia : The Courts and the Constitution* (1988) 23-25 (refusing request to remove Judge Advocate Wylde). For a pre-1865 overview see Thomson J 'Constitutional Authority for Judicial Review : A Contribution from the Framers of the Australian Constitution' in Craven G (ed) *The Convention Debates 1891-1898 : Commentaries, Indices and Guide* (1986) 173, 174; Thomson J 'Removal of High Court and Federal Judges : Some Observations Concerning Section 72(ii) of the Australian Constitution' (1984) Aust Current L 36033, 36042-3 n 13 (citing references and noting Justice Montagu amoved 31 December 1847, Justice Lutwyche amoval proceedings contemplated in 1862 and 1863, Justice Boothby amoved 29 July 1867, and 1816 recall of the Bents).

18 Pages 9-10 (referring to s 29 of the (UK) *New South Wales Act* 1823).

19 For a detailed analysis see Currey C *Sir Francis Forbes : The First Chief Justice of the Supreme Court of New South Wales* (1968) 42-46, 284-98; Thomson J *Judicial Review in Australia* supra n 17, 25-33.

20 See eg Bennett J *Sir John Pedder : First Chief Justice of Tasmania* (1977); Howell P *'The Van Diemen's Land Judge Storm'* (1965) 2 U Tas L Rev 253; Keon - Cohen *'Mad Judge Montagu : A Misnomer?'* (1975) 2 Mon UL Rev 50; Whitfield supra n 13, 72-74, 80-82; Thomson *Judicial Review in Australia* supra n 17, 34-45.

21 Pages 96-97. For detailed accounts see Thomson 'Removal of High Court and Federal Judges' supra n 17, 36043 n 13 (references); Thomson *Judicial Review in Australia* supra n 17, 46 - 47 (judicial review in South Australia, New South Wales, Queensland, Victoria and Van Diemen's Land).

22 Page 97. For confirmation that this 1865 (UK) Act was perceived as a grant, not restriction, of colonial legislative power and the suggestion that it 'ushered in several decades of judicial reticence and legislative ascendancy' see Thomson 'American Lessons' supra n 4, 1234 (footnotes omitted).

23 See id 1234. The exceptions to this general tendency are manner and form requirements and repugnancy fetters in ss 2 and 5 of the 1865 Act. See 97.

instances of removing judges.[24] Thereafter, if judicial review 'continued to [be] exercise[d],'[25] no examples are cited in *The Constitutions of the Australian States*.

If power is 'not specifically granted by the Constitution Acts,'[26] what is its constitutional warrant or justification? Perhaps, continual use obviates any usurpation charges.[27] A more normative standard - 'judicial review of legislative acts ... is necessarily inherent in the courts of a system which has a controlled constitution'[28] - is advanced by Professor Lumb. Even conceding that state constitutions are controlled,[29] countervailing arguments[30] and examples[31] can and should be raised.

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24 As to Justice Boothby's amoval see 113 n 1; Howell P, The Boothby Case (M A thesis University of Adelaide, 1965); Castles & Harris supra n 13, 125-134; Whitfield supra n 13, 134-159; Thomson *Judicial Review in Australia* supra n 17, 46-60.

25 Page 131 (quoted in full in text accompanying supra n 15).

26 Id.

27 But Justice Frankfurter, for example, would not agree. *Youngstown Sheet and Tube Co v Sawer* 343 US 579, 610 (1952) ('Deeply embedded traditional ways of conducting government cannot supplant the Constitution. . . ') .

28 Page 131 (quoted in full in text accompanying supra n 15).

29 But 'State (colonial) constitutions in the nineteenth century were to a large extent flexible constitutions. ... It is only in recent decades that rigidity has been introduced into various parts of these constitutions, at least in some states . . . ' xix-xx. See also 81 n 40 (Privy Council's rejection of High Court's view of inflexible state constitutions), 127 ('flexible' contrasted with 'controlled or rigid' state constitutions) . But see 'Fundamental Law' supra n 9, 174-179 (possible limitations on State Parliaments' powers to amend state constitutions); 116-131 (manner and form requirements).

30 None of this necessarily follows from the existence of a written constitution prescribing limited powers. It would be possible for constitutional constraints on the legislature's power to be interpreted and applied by the *legislature itself*; it would even be possible - given sufficient constitutional sensitivity in the electorate - to argue that normal political checks would be an adequate safeguard against exploitation or abuse of such self-regulating power. But, normally, it has been assumed that if the written limits on power are to be meaningful, compliance with them must be assessed by some independent institution....

Again, it does not necessarily follow that the independent body empowered to scrutinize statutes for constitutionality should be a court.

Blackshield A 'The Courts and Judicial Review' in Encel S, Home D & Thompson E (eds) *Change the Rules : Towards a Democratic Constitution* (1977) 119, 127 (emphasis in original). For the view that '[j]udicial review of parliamentary legislation is not essential to a federal system' see G Sawer *Australian Government Today* (rev ed 1977) 108. See also Thayer J *Cases on Constitutional Law with Notes* (1895) vol 1, 149. Literature on the US Constitution includes Berger R *Congress v The Supreme Court* (1969); Clinton R *Marbury v Madison and Judicial Review* (1989); Higgins T *Judicial Review Unmasked* (1981); Snowiss S *Judicial Review and the Law of the Constitution* (1990); Sosin J *The Aristocracy of the Long Robe : The Origins of Judicial Review in America* (1989).

31 Most prominent is Switzerland. See eg Sawer G *Modern Federalism* (1976) 20, 81; Freund P 'The Federal Judiciary' in Bowie R & Friedrich C (eds) *Studies in Federalism* (1954) 106, 155-157. See also Thomson *Judicial Review in Australia* supra n 17, 269 n 804 (France, African countries, Thailand and Ireland).

Scattered throughout *The Constitutions of the Australian States* are episodic analyses of the United Kingdom Parliament's *Australia Act* 1986 and the Commonwealth Parliament's *Australia Act* 1986.[32] Conforming to Professor Lumb's fundamental state constitutional law premise, their significance is minimised and any glimmers of revolutionary potential are not extrapolated. Executive power exemplifies the former technique. Only a modification - state governors' elevation to a position similar to governors-general - has eventuated in 'the constitutional relationship between the monarch and the States' by virtue of sections 7 and 10 of the Australia Acts.[33] More radical possibilities, however, have been proffered. Does section 7 'mandate the existence of the Monarchy, the States, the office of State Governor, the position of State Premier, and the continuation of the institution of responsible government within the states[?]'[34] On the assumption that section 7 transfers to state governors the Queen's powers and functions, other than appointment and dismissal of governors, is 'a zone of executive power immune, except by amending the Australia Acts, from legislation' created?[35] If so, have states returned to an unassailable executive power which prevailed before the era of responsible government?[36] A second possible enhancement of the Australia Acts' significance relates to the source of state constitutions' validity. Derivation of that validity, for Professor Lumb, flows from original United Kingdom Constitution Acts and local-colonial and state-constitution legislation.[37] Whether the Australia Acts perform this function is not addressed in *The Constitution of the Australian States*. Three concessions are, however, made : 'The subject matter of the Australia Acts relate basically to the constitutions of the States.... [T]hey amend' the Queensland and Western Australian constitutions and section 6 provides legal efficacy to manner and form requirements in state legislation.[38] Combined with the view, which Professor Lumb endorses, that

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32 See eg 70-71, 73, 88-89, 90 n 45 (reference), 109-112, 114 n 50 (references), 117, 119-120, 128-129. For other discussions see Hanks P *Constitutional Law in Australia* (1991) 85-98, 167-183; Thomson J 'The Australia Acts 1986: A State Constitutional Law Perspective' (1990) 20 UWA L Rev 409; Crawford J, 'Amendment of the Constitution,' in Craven G (ed), *Australian Federalism : Towards the Second Century* (1992) 177.

33 Page 73.

34 Craven G 'A Few Fragments of State Constitutional Law' (1990) 20 UWA L Rev 353, 364.

35 Thomson supra n 32, 425. See also Winterton 'The Constitutional Position of Australian State Governors' in Lee HP & Winterton G (ed) *Australian Constitutional Perspectives* (1992) 274.

36 Professor Lumb agrees that a settled colony's stages of development include :

> First there has been a purely despotic government when the colony has been ruled .. by a Governor ... Then there has been a constitution, with a Legislative Council .. [B]ut the executive has been unassailable by the legislature and responsible only to the colonial office...

Jenks E supra n10, 11 (quoted 3).

37 Pages 17, 29, 32, 33, 38, 40, 48. See generally, Douglas N 'The Western Australian Constitution : Its Source of Authority and Relationship With Section 106 of the Australian Constitution' (1990) 20 UWA L Rev 349.

38 Pages 111, 117, 119, 127.

the Commonwealth Parliament's *Australia Act* is constitutionally viable,[39] a third significant feature might be promulgated : Commonwealth constitutional power and legislation - the *Australia Act* - encapsulating, establishing and controlling state constitutional law.[40] Enormous consequences for state constitutions would then ensure.

Recognizing and playing with such conundrums requires a plethora of scholarship. Slowly, that is emerging. Indications of its quality and quantity can be gleaned from Professor Lumb's bibliography.[41] Other compilations are also available.[42] Their continued proliferation, not stagnation, for example, in relation to judicial decisions[43] and proposals for constitutional amendments[44] should be welcomed. Through four editions The Constitutions of the Australian States has exemplified the best features of these endeavours. Professor Lumb has led by example. If state constitutional law is to thrive, emulating and improving upon that past performance must be mandatory.

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39 Page 108 ('until ... the *Port Macdonnell Fishermen's Association Case* ((1989) 168 CLR 340) there were grave doubts ...'). See also 107 (discussing *Port Macdonnell*). For doubts concerning the validity of the (Clth) *Australia Act* see Thomson supra n 32, 414-415.

40 See id 427 (also suggesting that state constitutional law questions may be matters of federal jurisdiction). See also 91, 107 (effect on state legislative power of s 5 of the (Clth) *Coastal Waters (State Powers) Act* 1980); Thomson supra n 32, 417 n 26 (differing views on Clth *State Powers Act*).

41 Pages 156-161.

42 See eg Hawker G & Grahame R 'New South Wales Political Bibliography, 1856-1966: Part I' (1968) 3 Politics 66; Hawker G & Grahame R 'New South Wales Political Bibliography 1856-1968 : Part II' (1969) 4 Politics 57; Heard D & Chapman R, 'A Bibliography of Literature on Tasmanian Politics and Government' (May 1974) 8 no 1 Politics: Supplement 1-32; Thomson 'Quiet Revolution' supra n 4, 312-313 nn 5-7. See also 'State and Territory Constitutional Law: A Symposium' (1992) 3 Pub L Rev 3.

43 For example in relation to *Toy v Musgrove* (1888) 14 VLR 349 discussed at 66-68 see: Wood D 'Responsible Government in the Australian Colonies : Toy v Musgrove Reconsidered' (1988) 16 Melb UL Rev 760; Waugh J *'Chung Teong Toy v Musgrove and the Commonwealth Executive'* (1991) 2 PUVLR 160. Judicial decisions since Lumb's 5th ed include *Eastgate v Rozzoli* (1991) 23 NSW LR 683; *Keating v Dickson* (1991) 23 NSW LR 433; *Bignold v Dickson* (1991) 23 NSW LR 683; *Ahern v Hawkins* (1990) 2 Qld R 401; *R v Smith ex parte Cooper* (1992) 1 Qld R 423; *R v Tilley* (1991) 56 SASR 140.

44 See eg Gray M 'A Victorian bill of rights : judicial review and other issues' (Autumn 1991) 63 Aust Q 74; A Moran 'The Constitution (Declaration of Rights and Freedoms) Bill 1988 (Vic.) - A Doomed Legislative Council Proposal' (1990) 17 Melb UL Rev 418. See also Thomson supra n 4, 312 n 6 (Reports proposing amendments).