

Chapter 1: Democracy and Liberalism in Australia

This Chapter

- Critically examines the concepts of democracy and liberalism.
- Provides a brief introduction to the Australian political system.
- Shows the way in which democracy and liberalism interact in our political system.

Issue

How well do Australia's political institutions realise liberal democratic values?

Some of the major themes that have long characterised liberal democratic politics are:

- The tension between the rule of the majority and individual rights and liberties.
- The relationship between democracy and equality.
- How the concept of democracy should be understood.

Introduction

Many people have observed that the values originally associated with democracy have been left out of modern political institutions.

- Representative political systems are usually designed to limit the power of governments (i.e. liberalism) rather than give effect to the popular will (i.e. democracy).

This chapter shows that both liberalism and democracy played a role in the design of Australia's political institutions.

- The resulting Australian Constitution provides for elections but also divides power between the branches and levels of government and the houses of Parliament.

This chapter assesses whether Australia's major political institutions are *living up to* the liberal democratic ideal.

Democracy

Representative democracy: A system whereby citizens delegate power to institutions elected by the people.

- Some have criticised it for being a 'façade' that departs too far from the original democratic ideal of 'rule by the people'.

Direct democracy: A means of citizens exercising power without the mediation of representative political institutions (e.g. parliaments).

- It is usually not considered a practical form of government in large and complex societies.
 - Large nation-states lend themselves more to representative political institutions.

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Direct democracy tends to be limited to occasional referenda on particular issues although there are some jurisdictions (e.g. Switzerland) that use it more than others.

- The main use of referenda in Australia is to change the Constitution although non-binding plebiscites are also held by the states on controversial issues.

The term **democracy** is now generally used to describe any political system where the will of citizens with equal political rights is reflected in law-making and governing whether the people exercise that power directly or indirectly.

- There are many models of democracy.
 - Presidential and parliamentary systems as well as the many different types of electoral system and varying levels of citizen participation provide different models of democracy.

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Presidential system of government: A system of government that separates executive and legislative power into different branches.

Parliamentary system of government: A system where the members of the executive government are drawn from and are responsible to an elected legislature.

Electoral system: The body of rules designed to turn the votes of citizens into representation in political institutions.

The different models of democracy interpret the substance of democracy in different ways.

- **Majoritarian democracy:** Described by Arend Lijphart as a model of democracy that aims to concentrate "political power in the hands of a bare majority."
 - It is characterised as "exclusive, competitive and adversarial."
 - It creates political rules and institutions which ensure "government by the majority in accordance with the majority's interests."
- **Consensus democracy:** Described by Arend Lijphart as a model of democracy that seeks to "share, disperse and limit power."
 - It is characterised by inclusiveness, bargaining and compromise.
 - It endeavours to maximise popular participation in decision-making through the establishment of rules and institutions that encourage "broad participation in government" and "broad agreement on policies."

Liberalism

John Locke provided the basis for liberalism by seeking to counteract the power of the state with the recognition of the rights of individual citizens.

- He believed that human beings had God-given rights particularly to liberty, life and property.
- He also believed that human beings were equal in the sense that "no person has a natural right to subordinate any other."
 - These beliefs were important because they challenged the idea that monarchs had an automatic right to exercise absolute power over all the people living in their territory.
- He believed that government was ultimately necessary but that its power was limited and its authority depended on the consent of the people.
 - **Social contract:** The idea that citizens consent to obey the state provided that it maintains order and respects and protects their rights.

Most contemporary liberals agree on the following tenets of government:

- The rights of the individual citizen should be respected.
- The rule of law should ensure that the state treats each citizen equally.
- Power should be divided.
 - The executive and legislative functions should be separated.
 - The government should be accountable to citizens.
 - The judiciary should be independent of government influence.
- The above tenets are best secured through a written constitution.

Many liberals are wary of democracy because they fear that it poses a threat to the individual.

- The fact that a government has been elected by the majority of the people is no guarantee that it will respect individual rights and liberties → Tyranny of the majority.

This leads to the idea of **liberal democracy** which combines representative democracy (e.g. free and fair elections with universal suffrage) with a variety of safeguards that are designed to limit government power such as:

- The rule of law.
- Constitutions.
- The dispersal and fragmentation of power.
- A flourishing civil society.

The aim is to minimise the risk that majority rule poses to individual rights and liberties. There is tension at the core of the liberal democratic ideal.

There are positive connections between the two traditions:

1. Certain rights and liberties must be protected for democracy to be meaningful particularly freedom of speech and assembly which are crucial democratic rights.
2. Individual rights seem more secure in a democracy than they would be under a dictator or hereditary ruler.
3. Liberals support individual rights because of their belief in the autonomy and equal moral status of human beings.
 - It makes sense for them to support democracy which aims to give citizens an equal say in resolving political disagreements.

Types of Liberal Democracy

Parliamentary Systems

Responsible government: A system where cabinet is responsible to parliament and parliament is responsible to voters.

- These systems contained many liberal features such as freedom of speech and an independent judiciary.

A deliberative and representative parliament was historically thought to be the best way to ensure that the rights of the people were protected in parliamentary systems. The growth of liberalism did not change the structure of parliamentary government.

Presidential Systems

Many of the founders of the American Constitution such as James Madison saw representative institutions as a deliberate check on the interests of the majority.

- The American system is designed to limit the accumulation of power.

The US limits the power of any single institution by:

- The American Constitution separating executive, legislative and judicial power and providing a number of checks and balances (e.g. two houses of Congress with equal power and federalism).
- The Bill of Rights which subjects the government to rules.
- A sense of constitutionalism among the American people.

Outside the US presidential systems have been highly unstable.

- Presidential systems in Latin America and Asia have proved susceptible to strong presidents whose power overwhelms the legislative and judicial branches leading to dictatorship.

Many democracies limit the power of the presidency by formalising a system of power-sharing with parliament.

- **Semi-presidential systems:** Divide executive power between a president and a prime minister.

The Limits of Liberal Democracy

Many critics argued that liberal democracy was an abandonment of the democratic ideal; its commitment to democratic ideals of equality and participation were weak.

- Early forms of liberalism were not fundamentally concerned with advancing the rights of all people to vote and participate in politics.
 - Until the 20th century, the right to vote was accorded to a minority of the population.

While this extension of voting rights is essential to realising the true meaning of democracy, the focus in modern democracies remains on consent rather than democratic participation.

- Representation of all citizens rather than popular participation characterised most democratic systems.
- Free and fair elections give governments the authority to act on behalf of citizens but citizens' involvement in politics is rather limited.
 - The process of democracy became wider but not necessarily deeper - citizens could vote and form political parties but there were few formal opportunities to influence government policies in between elections.
- Rousseau argued that true democracy could only be achieved with the direct participation of citizens in the decisions that affect them; representative democracy is "slavery."

Contemporary liberal democrats could respond to Rousseau's critique by arguing that choosing political representatives is only one of the ways in which citizens can participate in politics.

- Civil society is also important in a liberal democracy.
 - **Civil society:** The free organisation of citizens outside the activities of the state.
 - Participation in this realm entails a level of political activity that sits in between periodic votes for elected representatives and full participation in the decision-making process.
- It is important though that the concerns of a civil society are reflected in democratic parliaments.

Democratic deficit: When notionally democratic institutions fail to reflect the views and interests of citizens.

Formally bringing the kind of participation we see in civil society and social movements into a system of representative democracy would be expensive.

Another major criticism of liberal democracy relates to the exercise of power.

- In a liberal democracy, it is important that parliamentarians are responsive to the wishes of the people.
 - Dahl argues that democratic governments are responsive to a wide range of interests and social groups.
 - Mills saw liberal democracy as a means of legitimising the rule of a tiny elite.
 - He argued that it is the interests of business that are paramount to democratic governments.
 - The elitist view sees:
 - Voters as powerless because the power elite places limits on the types of issues and opinions that constitute political debate.
 - Well-resourced vested interests as shaping elite decision-makers in their favour by making large donations to political parties, paying for professional lobbyists and shaping public opinion through expensive advertising campaigns.

The Tension Between Liberalism and Democracy

The radical view is that the federal, liberal elements of the Australian system dilute democracy by placing limits on the ability of elected governments to bring about the changes they have promised to the electorate.

- The division of legislative responsibilities between 2 levels of government also breaks up the clear chain of political accountability that is the primary strength of responsible government.

- These concerns which tended to stem from the left of the political system reached a peak with the Whitlam Dismissal in 1975.
 - Critics such as Maddox saw this as a calculated effort by the ruling class to deny the legitimacy of a democratically elected government.

There are many liberals in Australia who see the checks and balances in the Australian system as an enhancement of democracy.

- Galligan argued that there is no conflict between liberalism and democracy because the Constitution was ratified by the people.
- Others point out that the Senate is no less democratic than the House of Representatives as it is also democratically elected and because it uses a form of proportional representation it is actually a better reflection of the people's political preferences.
 - Those who support this view tend to support the consensus model of democracy.

Rights and Freedom

Individual rights and freedoms are central to both liberalism and democracy.

- Human rights campaigners have highlighted a range of concerning developments in Australia including the mandatory detention of asylum seekers, mandatory sentencing laws, the Northern Territory intervention in Indigenous communities and far-reaching anti-terrorism laws as violations of human rights.

There have also been concerns about freedom of speech and freedom of press in Australia.

- Australia is ranked 30th in the 2011-12 Reports Without Borders *Worldwide Press Freedom Index* which puts Australia behind many other liberal democracies.
 - This led to the Australia's Right to Know campaign in 2011.
 - They argued that the cumulative effect of hundreds of restrictions casts a pall over political debate.

Many human rights advocates suggest that the protection of human rights and liberties in Australia would be bolstered by the adoption of a charter of rights.

Participation

Widespread political participation is central to the democratic ideal so an important measure of the health of Australian liberal democracy.

- For most Australian citizens voting is the beginning and the end of our participation in politics.
 - In the *Australian Social Attitudes* report (2001-03) less than a third of people had contacted a political representative while only 12 per cent had taken part in a protest or demonstration.
 - The proportion of citizens who are a member of a political party in Australia has fallen dramatically since the mid-20th century.

Pluralists would argue that the concerns of citizens are represented by the many interest groups active in politics and society.

- Some interest groups like to protest directly while other groups directly lobby government behind closed doors.
- The lack of transparency in the lobbying industry is of great concern.
 - The Australian Electoral Survey reported that in 2010 44.4 per cent of Australians thought that the government was entirely or mostly run for "a few big interests looking out for themselves" rather than "for the benefit of all the people."

Equality

The myth of equality is belied by the actual level of economic inequality between classes in Australia.

- The wealthiest 10 per cent of Australian families own nearly half of Australia's private assets while the poorest half own less than 10 per cent.

The lack of social equality affects the ability of each citizen to participate in politics.

- Wealthy citizens and corporations can make donations to political parties, hire professional lobbyists and launch expensive campaigns to get their view across.
 - The Howard Government's response to global warming was heavily influenced by the coal industry.
 - Mining companies launched a \$22 million advertising campaign against the Rudd Government's Mining Super Profits Tax which contributed to the downfall of Rudd.
- There are a variety of measures in place to limit the ability of the wealthy to dictate policy.
 - Political parties and politicians must declare any large donations they receive and there is a register of lobbyists and public funding of election campaign costs.

The market economy means that managers and owners of capital exercise direct control over important aspects of the lives of Australian workers such as their wages, hours and working conditions.

- Many of the decisions about how and where economic resources are deployed are made either by powerful private individuals in the market sector or by politicians.
- Socialists argue that we live in a bourgeois democracy where the dominant class are the owners of capital.

Any substantial effort to reduce the level of social equality in Australia and to adopt greater 'democratic' control over industry would involve a higher degree of intervention on the part of the government.

- Past attempts to adopt more democratic control of Australian industry have also been limited by the liberal elements of the Australian system.
 - *Example:* The Chifley Labor Government of 1944 - 1949 attempted to nationalise Australian banks.
- This does not mean that all liberals are opposed to any form of government intervention in the economy.
 - Many liberals have become strong supporters of the welfare state and of the idea that the government has a legitimate role to play in limiting inequalities in income and wealth and fostering greater equality of opportunity.

Chapter 2: The Australian Constitution

This Chapter

- Defines a constitution and explains its purpose.
- Explores the various categories that are used to classify constitutions.
- Examines the essential attributes of the Australian Constitution and the circumstances that led to its creation.
- Outlines the key features of the Australian Constitution.

Issue

Should Australia adopt a bill of rights?

Introduction

Important measure of the health of a democracy is the extent to which there exists a clear set of rules that define the structure and operation of the political system.

- **Constitution:** Document that contains the rules by which the state is organised and governed (*i.e.* map of the institutions of the state and describes the powers they possess) and that describes the relationship between the government and the citizenry.

Different Types of Constitutional Models

Every constitution is different in:

1. Mode.
 - Written v. unwritten.
 - Entrenched v. flexible.
 - Advantage of flexible constitutions is that it allows law-makers to update, revise and adapt the rules of government to the changing needs of society without having to wrestle with a complex amendment process.
 - Higher law v. ordinary legislation.
2. Content.
 - Effective v. façade.
 - Descriptive v. limiting.
 - Constitutions that limit power are rooted in liberalism.
 - Attempt to constrain government through separation of powers: assigning key functions to separate institutions.
 - Bill of rights v. limited or no rights protection.
3. Type of government.
 - Constitutional monarchy v. republican.
 - Federal v. unitary.
 - Presidential v. parliamentary.
 - Dictatorship v. democracy.

Variation occurs because a constitution is drafted to suit the political, cultural and social realities of the people.

- Any assessment of the merits of a constitution is inherently subjective.

A commitment to constitutionalism must exist in order for a government to function in a manner consistent with the structures of its constitutional system.

- Constitutionalism: Idea that government should be legally limited in its powers and that its authority depends on it observing these limitations.
 - Dependent on the prior existence of values and attitudes (*i.e.* political culture) that are compatible with the values enshrined in the constitution.

Constitutional Formation and Practice in Australia

Total of 9 constitutions in Australia: 1 for each state and territory and 1 for the nation.

- *Commonwealth of Australia Constitution Act 1900 (Cth)*.
- *Australian Capital Territory (Self-Government) Act 1988 (Cth)*.
- *Constitution Act 1902 (NSW)*: First enacted in 1953.
- *Northern Territory (Self-Government) Act 1978 (Cth)*.
- *Constitution Act 1867 (Qld)*; *Constitution Act Amendment Act 1934 (Qld)*.
- *Constitution Act 1934 (SA)*: First enacted in 1854.
- *Constitution Act 1975 (Vic)*: First enacted in 1853.
- *Constitution Act 1889 (WA)*; *Constitution Acts Amendment Act 1899 (WA)*.

Have been few formal changes to the document as it has proven to be highly flexible and functional.

Five attributes:

1. Written.
 - 2 separate segments:
 - *Commonwealth of Australia Constitution Act 1900* which is the Act passed by the Imperial Parliament to establish the Commonwealth and consists of 9 perfunctory clauses.
 - Long segment consists of 128 sections divided into 8 chapters.
 - Chapter I: The Parliament.
 - Chapter II: The Executive Government.
 - Chapter III: Judiciary.
 - Chapter IV: Finance and Trade.
 - Chapter V: The States.
 - Chapter VI: New States.
 - Chapter VII: Miscellaneous.
 - Chapter VIII: Alteration of the Constitution.
 - Only makes sense when read alongside a host of lesser laws and extra-legal instruments.
 - *Example*: Omits explicit reference to the conventions of responsible government.
 - Responsible government: Executive is answerable to parliament and retains office for as long as it enjoys the confidence of the lower house.
 - Some argue that responsible government does not sit easily alongside the federalist approach of the Constitution.
2. Constitutional monarchy.
 - Queen acting through the Governor-General is both the head of the Australian state and the repository of executive power.
 - In practice it is the PM and the cabinet that exercise this power on a daily basis.
3. Liberal.
 - Expressed in the tripartite separation of legislative, executive and judicial functions of government.
 - In practice the executive and legislative are fused.
 - Advantage is that it minimises the incidence of gridlock between the 2 branches and improves the efficiency and stability of the law-making process.
 - Disadvantage is that it tends to increase the power of the government.
4. Rigid.
 - Special procedures set out in s128 are required to formally amend the Constitution.
 - Any bill to alter the Constitution must be passed by an absolute majority in both houses of Parliament.

- If both houses cannot agree and within 3 months it is passed in one house with an absolute majority again then the Governor-General can present the bill to the people.
 - Bill can then be put to the people to vote upon; must achieve a double majority (*i.e.* majority of the states and majority of Australian electors overall) to succeed.
 - Only 8 have been approved of 44 proposals presented to electors.
5. Federal.
- Drafters of the Constitution faced 2 problems:
 - How to protect the autonomy and independence of the colonies while ensuring that the new federal government had sufficient capacity to act in matters of agreed national interest.
 - ss106-108 provided for the continuation of the states' constitutions, parliaments and laws unless these laws conflict with other sections of the Constitution.
 - s51 delineates and limits the scope of the federal government's powers.
 - Constitution confers very few exclusive powers on the Commonwealth in ss52 and 90.
 - Structure and power of the Senate also act as safeguard for the states.
 - Senate "shall be chosen directly by the people of the State" to provide opportunities for the states' interests to be represented in the formulation of national policy.
 - Senate granted virtual parity with the House of Representatives under s53.
 - How to quell the fears of the smaller states who were anxious that their voice in national debate would be drowned out by the more populous states.
 - All of the states were awarded equal representation in the Senate notwithstanding population size in s7.
 - Any amendment to the Constitution required the support of a majority of the states.

Should Australia Adopt a Bill of Rights?

Bill of rights: List of rights and liberties belonging to the people and which the government cannot trespass.

- Takes two basic forms:
 - Statutory bill of rights which is an Act of Parliament.
 - Constitutional bill of rights which is considered a body of higher law and theoretically beyond the reach of parliament.
 - Laws passed by the legislature must be consistent with the rights enshrined in the bill of rights.
 - *Example:* American Bill of Rights.

Liberals are strong supporters of a constitutional bill of rights.

- Giving courts the final say is important because judges in constitutional courts normally enjoy security of tenure so they can judge whether the rights of individuals have been violated without the pressures of re-election.

Criticisms of constitutional bill of rights:

- Controversial because it gives significant power to unelected judges who are able to overturn laws passed by a democratically elected legislature.
- Can be used to hinder as well as advance social reforms.
 - *Example:* Difficult to pass laws banning hate speech against vulnerable minorities in the US.
- Difficult to modify and could leave a country with obsolescent rights enshrined in the constitution.
 - *Example:* Right to bear arms.

Australia does not have a constitutional bill of rights.

- Few rights are explicitly protected in the Constitution.
- Reasons why framers of Constitution rejected:
 - Purpose was to codify federal agreement; issue of rights protection assumed a very low priority.
 - Bill of rights was unnecessary; represented a personal attack on the good character of colonial legislators, institutions and practices of parliamentary democracy.
 - Codification of human rights would undermine existing and future colonial legislation designed to discriminate against Indigenous and Asian persons.

Some argue that Australia does not have a national bill of rights because there is simply no need for one.

- No bill of rights does not mean that we lack any human rights safeguards.
 - *Example: Racial Discrimination Act 1975 (Cth) and Sex Discrimination Act 1984 (Cth).*
- Galligan and Morton: Australia has been "just as successful in achieving a rights revolution as comparable bill of rights countries."

Others argue that Australia's utilitarian political culture is another reason for its failure to adopt a bill of rights.

Others argue that the most significant obstacle to the introduction of a bill of rights is the attitude of Australian politicians.

- 54% of legislators believe that a national bill of rights is desirable compared to just over 70% of the public.
- Political cost to government is likely to outweigh the benefits.

The Dialogue Model

Dialogue model: Statutory bill of rights that aims to foster the protection and promotion of rights by encouraging intergovernmental dialogue between the different branches of government; gives courts greater power to assess whether legislation is consistent with human rights but it leaves parliament with the final say.

- Adopted by the ACT in 2004 and Victoria in 2006.
- Rudd held a National Human Rights Consultation which recommended that Australia adopt a federal Human Rights Act in the form of the Dialogue model.
 - Did not adopt a full version of the Dialogue model.
 - Some elements were adopted such as:
 - Ministers must give a statement of compatibility when bills are introduced into parliament.
 - Joint Committee on Human Rights was established to scrutinise bills in light of human rights considerations.
 - Strongly criticised for failing to empower courts to issue declarations of incompatibility.

Advantages:

- Would help protect and promote human rights by drawing attention of parliament and government to human rights issues when formulating legislation.
- Leave the elected parliament with the 'final say on laws' thus avoiding the democracy-related objections levelled against constitutional bill of rights.

Disadvantages:

- Parliament will be reluctant to go against a court's wishes when it issues a declaration of incompatibility; courts will in practice have the final say on rights questions.