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# Speaking into a Silence

## *Embedded Constitutionalism, the Australian Constitution, and the Rights of Women*

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The Australian Constitution is a document that is mostly silent about rights. It has no comprehensive set of enumerated rights in the form of a *bill of rights*. Instead, it sets up a federal system and the basic framework of a representative democracy, with a few specific rights scattered throughout. Federal and state legislation provide the express means of protection of equality. Yet, the Constitution is a crucial part of the framework for understanding women's rights in Australia. Not only does it provide the source of federal legislative power with respect to equality but also, in recent years, a minority view on the High Court has asserted that equality is the underlying principle upon which the Constitution is founded.[1]

In this chapter, we explore the way that the Australian Constitution, without an explicit set of enumerated rights, can and should be used to establish and protect women's rights in practice. We consider how women have shaped the Australian Constitution both in its creation and throughout its development to the present day and argue that the federal system reinforces the traditional division of public and private life to the detriment of women. Looking at the formal mechanisms that exist for pursuing equality and antidiscrimination claims in Australia with reference to international covenants, domestic, federal, and state legislation, we show that Australian constitutional rights are embedded into a larger institutional, bureaucratic, and cultural framework. We examine the Constitution then, not as the locus of rights but as a framework for the articulation of the rights of women and other minority groups.

We conclude with an examination of the material rights of women in instances of constitutional claims for protection. We ask how women's claims have fared and what their outcomes offer for the future.

[1] *Leeth v. Commonwealth* (1992), 174 CLR 455.





### EMBEDDED CONSTITUTIONALISM

The Australian constitutional *system* derives its full meaning only when read in the context of the constitutional conventions and the common law.[2] These in turn derive their full meaning from the domestic social and political arena and international norms and treaties. Any discussion of rights under the Australian Constitution then must start from the premise that the Constitution is both constitutive of and constituted by the legal, political, and cultural system in which it operates. Although this might seem a postmodern approach to constitutional jurisprudence, in Australia it is also a doctrinal truth. In 1965, Sir Owen Dixon, Chief Justice of the High Court between 1952 and 1964, expressed the Australian brand of constitutionalism as follows:

> In Australia we have paid but little attention to the distinction, which appears to me to be fundamental between American Constitutional theory and our own. It concerns the existence of an anterior law providing the sources of juristic authority for our institutions when they came into being. . . . To me the lesson of all this appears to be that constitutional questions should be considered and resolved in the context of the whole law, of which the common law, including in that expression the doctrine of equity forms not the least essential part.[3]

The idea that the operation of the Constitution is determined not simply by its textual form but by systems of laws and values that give rise to it appears to be a fairly uncontroversial point. Tony Blackshield has described the Australian Constitution as "a skeleton and the flesh that goes on the bones [is] . . . filled out by practice, convention, habit and tradition."[4] Trevor Allan has similarly argued that the Australian Constitution becomes meaningful only once we accept that the principles of equality and individual liberty found in the common law give it form.[5]

Although scholars such as Blackshield and Allan recognize that the "skeleton" of the Constitution needs persistent fleshing out, it is not always the case that the material context is acknowledged. To the contrary, the acceptance of

[2] Conventions are an unwritten set of rules governing the role of the Queen (exercised through her representative in Australia – the Governor-General), the selection of the Prime Minister, and the membership of the cabinet among other things. For a fuller discussion, see C. Hughes, "Conventions: Dicey Revisited," in P. Weller and D. Janesch, eds., *Responsible Government in Australia* (Richmond, Victoria: Drummond for the Australasian Political Studies Association, 1980).

[3] Sir Owen Dixon, *Jesting Pilate* (Melbourne: Law Book Co., 1965) at 203, as quoted in G. Winterton et al., *Australian Federal Constitutional Law: Commentary and Materials* (Sydney: Law Book Co., 1999) at 848.

[4] Jane Innes, *Millenium Dilemma* (Wollongong: Wollongong University, 1998).

[5] J. R. S. Allan, "The Common Law as Constitution: Fundamental Rights and First Principles," in Cheryl Saunders, ed., *Courts of Final Jurisdiction: The Mason Court in Australia* (Sydney: Federation Press, 1996) at 147.

the Constitution as an abstract outline often results in an unacceptable decontextualization of constitutional claims, rights, and obligations. That is why in this chapter we attempt to untangle the Australian constitutional framework of equality with reference to the material context in which women's rights are actualized. It is only by doing this that we can explore how the Australian Constitution furthers or hinders the progress toward equality of the diverse group of Australian women. Before we turn to the embedded nature of the constitutional system, we need to outline the framework that forms the skeleton of the Australian Constitution.

## THE STRUCTURE OF THE CONSTITUTION

The *Commonwealth of Australia Constitution Act* was passed by the British Parliament in 1900, setting up a Western-style democracy in the form of a constitutional monarchy based on the English system of government.[6] It is a document that emphasizes democratic structures rather than individual rights.

It has three overarching structural frameworks. The first of these, federalism and the second, the separation of powers doctrine, relate to the distribution of power among the different component parts of the Australian federation. The third, responsible and representative government, relates to the system of government. Each of these structural characteristics is significant to the recognition of women's rights.

### Federalism

The primary aim of the Constitution when it was passed in 1901 was to unite the various Australian colonies as states under one federal compact. The Queen was to remain the sovereign and was to be represented in Australia by the Governor-General. Although today the Queen remains the formal head of state, her role is notional and symbolic.[7] Each of the states continues to claim sovereignty over their own domain but the Constitution allocates specific powers to the federal government. Those powers are primarily enumerated

[6] Despite the existence of the new Constitution, it took Australia many years to gain legislative independence from Britain. Under the *Colonial Laws Validity Act* 1865 (Imp) laws of the British Parliament could be extended to the colonies and override local legislation. The enactment of the *Statute of Westminster* 1931 (Imp) freed the colonies from British legislation except by consent. However, in Australia it applied only to Federal Parliament, as state Parliaments wished to retain dependence on British law. It was only with the *Australia Acts* of 1986 that British legislation was deemed not to apply to the States and Territories of Australia, as well as the Commonwealth.

[7] In 1975, there was a constitutional crisis when the Queen's representative, the Governor-General, sacked the elected Prime Minister. The implications of this event are too broad to explore in this paper.



in Section 51 of the Constitution. Unless the Commonwealth has specifically been given the power to legislate in a particular area, it may not do so. Where the Commonwealth does have such power, the states may continue to legislate in the area so long as they do not do so in a manner inconsistent with Commonwealth legislation.[8]

### Separation of Powers

In theory a strict separation of powers exists in the Australian Constitution between the judiciary, the executive, and the legislature based on the structure of the Constitution.[9] Each arm occupies a separate chapter in the Constitution and the High Court has held this to require that the domains of each be kept separate from the other.[10] The aim of this separation is to cordon the judiciary from the polluting influences of politics. Although in practice there are many exceptions to this doctrine, the High Court has remained steady in its opposition to judges exercising powers that appear too political.

The constitution creates the High Court in Chapter III. The High Court is the highest appeal court in the land and has original jurisdiction to consider federal constitutional matters. All matters of constitutional interpretation therefore rest with the High Court. The seven judges on the High Court are selected by the Prime Minister and are appointed until age seventy. Currently all are men. Justice Gaudron, who served for fifteen years on the High Court, was the first and only female member of the High Court and provided a significant articulation of a rights jurisprudence. Justice Gaudron recently retired from the bench despite not having reached retirement age, citing personal reasons. Hopes that Justice Gaudron might be replaced by another woman were dashed with the appointment of conservative judge Dyson Heydon. The Prime Minister, John Howard, countered criticism of the appointment by saying that it was made on merit and that it was unrealistic for critics to expect gender to be a consideration in the decision.

*Responsible and Representative Government.* The system of responsible government stems from the Westminster system of government in England and refers to the requirement that the Queen and her representatives act on the advice of the ministers. It also covers the notion of parliamentary responsibility, in other words, that members of the executive are accountable directly to the people. Some suggest that it is because of this commitment to a

[8] ...dian Constitution (brought into existence as the *Commonwealth of Australia Constitution* ... 1900 ([Imp.]) Section 109.
[9] ...kers's Case (1956), 94 CLR 254.
[10] ...maker's Case, ibid.

responsible government that the original drafters of the Constitution decided not to include a bill of rights.[11]

Responsible government, derived from the Westminster system, is coupled in the Australian Constitution with representative government. Representative government is provided for in those provisions of the Constitution that set out how the members of the House of Representatives and the Senate are to be elected to office and how the votes of the people are to be counted.[12]

## WOMEN IN THE MAKING OF THE AUSTRALIAN CONSTITUTION

### The Prehistory

The manner in which the Australian nation came into being is unusual in its commitment to democratic principles. The Constitution was not the result of a revolutionary war but was drafted over the course of several years in the context of a series of Federal Conventions. Delegates from most colonies attended these conventions and in many cases those delegates had been selected by popular election. After the draft was finalized, it was put to the vote and adopted in referenda that took place in each of the colonies.[13]

No women were delegates to these conventions. Women did, however, influence and shape the Constitution through indirect political means. According to Helen Irving, the 1890s saw the emergence of women as political actors. It is possible that this was a direct consequence of the debate around the Constitution and the opportunity it offered to have their needs and concerns addressed. The Constitution is, then, partly responsible for the genesis of political activism among women in Australia. Irving recounts the formation of different National Councils of Women in several colonies affiliated with the International Council of Women. All the colonies except Tasmania by the mid-1890s had suffrage leagues and several women's journals went into production.[14] However, not all women embraced the Constitution and what it offered. The feminist Rose Scott, for instance, who was an activist at the time of federation, saw the creation of a centralised federal government – the main reason for the Constitution – as a threat to women and democracy

[11] See Blackshield and Williams, eds., *Australian Constitutional Law and Theory: Commentary and Material*, 2nd ed. (Sydney: Federation Press, 1998).

[12] Sections 7 and 24 are the primary sections dealing with membership of the Senate and House of Representatives respectively.

[13] See Helen Irving, *To Constitute a Nation* (Cambridge: Cambridge University Press, 1999) at 1–6.

[14] "Interview with Helen Irving," in Innes, *Millennium Dilemma*, *supra* note 4 at 105–14; also see generally Irving, *To Constitute a Nation*, ibid., particularly Chapter 10.



because it would move decision making away from mothers to "a faraway federal parliament."[15]

### Who Is a Citizen?

Given this genesis, Australia's Constitution has some basis in popular acceptance. However, those entitled to vote in state elections and therefore on the Constitution did not represent the people in their entirety. Australia enfranchised its women long before most other Western democracies, but only women from South Australia and Western Australia were enfranchised in time to vote on the Constitution.[16] In the case of Western Australia, only white women were enfranchised, with indigenous men and women of Australia, Asia, and Africa specifically excluded. In New South Wales, Tasmania, and Victoria, some Aboriginal men were eligible to vote while all women (indigenous and nonindigenous) were not.[17]

White women obtained voting rights and appeared to be accepted as citizens soon after federation. The Commonwealth made election to office a formal right along with the right to vote in 1902 but the first woman was not elected to the Federal parliament until 1943.[18] Margaret Thornton outlines this disjunction between voting rights and more general citizenship rights for women:

> In classic definitional terms, citizenship is the status determining membership of a legally cognisable political community, although it involves more than a passive belonging. First, it includes abstract rights that are legally recognised and that apply equally to all citizens, at least in a formal sense. Second, the concept includes a more

[15] Marilyn Lake, "The Republic, The Federation and the Intrusion of the Political" in Jeanette Hoorn and David Goodman, eds., *Vox Rel/Publicae: Feminism and the Republic* (special edition [1995–1996] 46–50 *Journal of Australian Studies*) at 12.

[16] South Australia extended the vote to women in 1894 and Western Australia did so in 1899. New South Wales gave women the right to vote in 1902, Tasmania 1903, Queensland 1905, and Victoria 1908. White women were given the vote at the federal level in 1902. Section 41 of the newly enacted Constitution extended voting rights at the federal level to all enfranchised citizens of the states.

[17] "In Queensland, Aborigines other than freeholders were excluded from the franchise by a proviso to s6 of the Elections Act 1885 (QLD) ("No aboriginal native of Australia, India, China, or the South Sea Islands..."). In Western Australia, a similar disqualification was imposed by a proviso to Section 12 of the Constitution Amendment Act 1893 ("No aboriginal native of Australia, Asia or Africa...") New South Wales, South Australia, Tasmania, and Victoria imposed no such disqualification, and accordingly Aborigines in those States were entitled to vote for the first federal Parliament in 1901." See Blackshield and Williams, eds., *Australian Constitutional Law*, supra note 11, at 160. Note that only in South Australia would that have included aboriginal women.

[18] Dame Enid Lyons was the first woman elected to the Commonwealth Parliament. She later became the first woman in federal Cabinet. The right to be elected to office was not available in most states for another fifteen to twenty years.

subtle layer of meaning that operates to qualify the first, relating to the degree of participation within the community of citizens.[19]

Women's formal rights, then, did not correlate to full participation as citizens. In Australia, it was seen as problematic even to have abstract citizenship rights entrenched in the Constitution. There is no constitutional provision defining citizenship or indeed referring to it.[20] Either Australians were British subjects by being born "within the King's allegiance" or they were naturalized under one of the State's *Naturalisation Acts*. In the latter case, subject status was not inalienable but could be lost when the individual moved on to another colony or nation. Citizenship was not included in the Constitution because it contained an inherent claim to certain rights and freedoms that would preclude racial discrimination.[21] Instead, the words "people" and "subject" were used. Furthermore, the fact that women were not expected (and for some time not able) to be active in public affairs suggests that citizenship was also gendered male.

***Writing in Indigenous Women.*** The history of the inclusion (or exclusion) of indigenous women in the making of the Constitution and the system of government it set up is tied to the inclusion of indigenous people generally. Aboriginal peoples of Australia are not afforded special protection under the Constitution. The Races power in Section 51 (xxvi) that enabled the Commonwealth to make laws with respect to "[t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws" was intended to enable the government to discriminate against races other than the Aboriginal race. The first Australian Prime Minister, Edmund Barton, described the Races power, as it then was as necessary to enable "[t]he Commonwealth to regulate the affairs of the people of coloured or inferior races who are in the Commonwealth."[22] Aborigines were excepted from the Races power until 1967, not because the government wanted to protect them but because Aborigines were seen as a state matter and a dying race.[23] In 1967, the original Races power quoted earlier was amended to omit the words "other than the aboriginal race in any State." An overwhelming majority, over 90 percent of the population, passed the

[19] Margaret Thornton, "Embodying the Citizen," in *Public/Private* (Oxford: Oxford University Press, 1995) at 200.

[20] Helen Irving has documented the debates that occurred over the word citizen in the framing of the Constitution. See generally Irving, *To Constitute a Nation*, *supra* note 13, ch. 9.

[21] Irving, *To Constitute a Nation*, ibid., at 158–9. Irving quotes Sir John Forrest's concern "[t]hat coloured persons who have become British subjects might in this definition be considered citizens." He goes on: "A concept of citizenship should not be allowed to rule out discriminatory legislation against, in particular, the Chinese."

[22] As quoted in Blackshield and Williams, eds., *Australian Constitutional Law*, *supra* note 11 at 165.

[23] Patrick Wolfe, "Nation and Miscegenation," in (1994) *Social Analysis* at 101.



referendum, a unique event in Australia, where referendums usually fail. Over time it had become clear that the only way that positive legislation would be passed to assist indigenous Australia was if the Commonwealth had the power to make it. In an interesting historical twist, then, the one power included in the Constitution to enable overt discriminatory practices was, in 1967, touted as the one section that might offer the possibility of some redress for discriminatory practices.

Over the next twenty years, the Commonwealth passed a series of Acts that by increasing degrees set up an infrastructure to assist indigenous Australians, the most recent being largely under the control of Aboriginal and Torres Strait Islanders.[24] There has, however, been ongoing debate about whether the amended section can be used to allow discriminatory laws or only laws for the benefit of a race. Interestingly, for our purposes, the primary and most recent case on this question involved aboriginal women and the recognition of an historical connection between Aboriginal women and their land. Because this case highlights the intersecting effects of a Constitution framed around both a racist and sexist ideology, it also illustrates the importance of examining gender inequality in the context of its intersection with other kinds of systemic inequality, in this case racism. We will return to discuss this case later in this chapter.[25]

## Federalism and the Public and Private Divide

The Constitution was drafted with the view that states' rights should be protected and centralized federal powers constrained. The Constitution therefore sets out specific areas of Commonwealth Government power. These include legislative powers, set out in Section 51, and executive powers, set out in Section 61. State powers are determined by state constitutions and are plenary and far-reaching. States generally have the power to make laws on any subject so long as the relevant law does not conflict with a specified area of Commonwealth coverage.[26] The Commonwealth's limited legislative powers were originally mostly over matters that are commonly thought of as public, economic, or financial as opposed to private or personal subject matters. However, as the years have passed, the Commonwealth's powers have expanded in line with its international obligations with respect to human rights. Nevertheless, some feminists have argued that the division of powers between the Commonwealth and the states parallels the artificial division between matters that relate to the public domain and matters that relate to the private domain respectively.

It is important then to any analysis of the Constitution as protector of women's rights, to consider the view that the Commonwealth Constitution

[24] The Aboriginal and Torres Strait Islander Commission (ATSIC) was established in 1990.

[25] *Kartinyeri v. The Commonwealth* (1998), 152 ALR 540.

[26] *Australian Constitution*, *supra* note 8, Section 109.

gave rise to a national polis set apart from the domestic or private concerns of the States. Helen Irving notes that until 1946, a broad range of social and welfare powers were excluded from Commonwealth jurisdiction.[27] She goes on: "Maternity, widows', unemployment and family allowances, among others, which are the very areas of greatest concern for women, were left in the hands of the States."[28]

In 1946, the Constitution was amended so that the Commonwealth was given power over these areas as well as sickness and hospital benefits and medical and dental services. By contrast, the Federal Constitution did give power over marriage and divorce to the Commonwealth at its inception. Marriage was put under federal control because Australians sought to avoid what they saw as the "culture of scandal and domestic distress resulting from differing State divorce laws" in America.[29]

Rose Scott opposed the centralized power of federalism and its derogation of power away from local and community politics and, therefore, in her view, the mother. Scott argued that "National life is built upon noble family life. It is the mother who makes the nation."[30] She viewed the moving of decision making to a centralized and distant government as the end of democracy, making it impossible for mothers to participate in government. Scott says: "For Heaven's sake, dear friends, let us divert ourselves from the ridiculous old fashioned idea that a great nation is made out of huge national debts, standing armies, expensive buildings, much territory, artificial sentiment, fat billets for some people while others starve."[31]

Similarly, the feminist legal theorist Margaret Thornton describes constitutionalization today as "typically involv[ing] the treatment of issues at a very high level of abstraction so that distinctive private or subjective features are sloughed off."[32] This leaves us with the question of whether in fact it is better for Australian women to have matters that relate to the so-called domestic or private sphere included in our Federal Constitutional framework or whether Scott is correct and this creates abstract rights in place of material claims.[33]

[27] Helen Irving, "A Gendered Constitution? Women, Federation and Heads of Power," in Helen Irving, ed., *A Woman's Constitution* (Sydney: Hale and Iremonger, 1996) at 102.

[28] Irving, "A Gendered Constitution?," ibid., at 102.

[29] See Irving, *To Constitute a Nation*, *supra* note 13, and *Australian Constitution*, *supra* note 8, Section 51(xx), 51(xxi).

[30] As quoted in Lake, "The Republic," *supra* note 15.

[31] Lake, "The Republic," ibid.

[32] Margaret Thornton, "Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the New Corporatism," in (1999) 23 *Melbourne University Law Review* 754–72 at 754.

[33] According to Helen Irving, there were equally as many women arguing the opposite to Scott. Irving, "Thinking of England: Women, Politics and the Queen," in Jeanette Hoorn and David Goodman, eds., *Vox RelPublicae: Feminism and the Republic* (special edition [1995–1996] 46–50 *Journal of Australian Studies*) 33–41.



## Contemporary Developments

The Constitution as a text has remained relatively intact in its 1901 form one hundred years later. Given the sexist and racist origins that we have begun to document earlier, it is a rather startling fact that there have been only eight amendments to the text in its one-hundred-year history. Of those amendments, the most significant were those already discussed, the deletion of Section 127 excluding the reckoning of Aboriginal natives in the numbers of people, and the reduction in the tenure of High Court judges from appointment for life to retirement at age seventy in 1977.

At the most recent referendum in 1999, Australians were asked to vote to change our constitutional system from a constitutional monarchy to a republic. At the outset, the Republican movement failed to garner support from women. One commentator attributed this to the movement's "assertions of manly independence."[34] Marilyn Lake says: "[I]ts most confident exponents are men.... Conversely, monarchists in Australia are often discredited for being unable to separate from the mother or for being, literally, old women."[35]

In 1998, a People's Convention[36] was held to debate the question of the Republic. The Convention was made up of government appointees and elected representatives and women occupied approximately 35 percent of those positions. A Women's Constitutional Convention initiated by women from several nongovernment women's organizations was held prior to the People's Convention. It had no official link to the government backed People's Convention, but the outcomes of the Women's Convention were presented to the Chair of the Government's Constitutional Convention, and were raised on the Convention floor during the proceedings.[37] The Women's Constitutional Convention supported a republic, a Bill of Rights, and recognition for local government in the Constitution. However, support for a republic was qualified by concern that any future model of government supported equality in decision-making processes and recognised indigenous Australians. The Women's Convention also called for greater civic education in preparation for the vote on the Republic. In the end, the referendum was structured in terms that did not reflect the outcomes of either of the Conventions and, when put to the people, failed.

[34] Marilyn Lake, "The Republic," *supra* note 15.

[35] Marilyn Lake, "The Republic," ibid. Lake cites opinion polls leading up to the referendum on the question that demonstrates a marked division along gender lines.

[36] This is not to be confused with the constitutional conventions discussed earlier referring to certain unwritten but well-accepted rules.

[37] See Dr. Jennifer Curtin, "The 1998 Women's Constitutional Convention," Research Note 21 (1997–98), online: Parliament of Australia, Department of the Parliamentary Library <www.aph.gov.au/library/pubs/rn/1997-98/98rn21.htm> (date accessed: 18 April 2001).

At that same referendum, Australians were asked to vote on a new preamble to the Constitution written by the current Prime Minister, John Howard, and a highly regarded conservative poet, Les Murray. Two main groups were outraged by the Prime Minister's preamble. The first comprised indigenous Australians and the second women.

Howard's Preamble, far from enshrining the equality of men and women, attempted to capture the spirit of the Australian through the concept of "mateship."[38] "Mateship" is a fantasy form of *bon amie* between men purged of homoeroticism. It is an intensely masculine worldview that has its origins in the deprivations of the Australian bush and allegiances formed on the battlefield in World War I. A fervent debate followed in the media with some women arguing that this was inherently masculinist and resulted in half the population not being included in the fundamental conceptual apparatus for recognition of Australian identity. Indigenous Australians, too, felt excluded by the reference. The only indigenous Member of Parliament, Senator Aden Ridgeway, indicated the term was one that stemmed from Australia's colonial heritage and was a language used most comfortably by white Anglo-Australian men. The word *mateship* did not make it into the final draft of the preamble put to the Australian people and this may be because a significant number of women occupy positions in both the major parties and the largest independent party.

It also should be noted that the preamble was put to the people as a document of no legal significance whatsoever. We argue, however, that the Australian Constitution is particularly susceptible to symbolic and cultural power because of its open textured nature. The recent referendum and debate over the preamble was valuable in that it placed the question of Australian identity on the agenda. It raised the question of who is included automatically in that definition, who has to fight for inclusion, and who is inevitably left out.

## EQUALITY RIGHTS IN AUSTRALIA

### Is There a Right to Equality?

There is no comprehensive bill of rights in the Australian Constitution. There are, however, a few express freedoms and prohibitions limiting state power scattered throughout the Constitution and the High Court has recently found some rights implicit in the Constitution because of the system of government it establishes. In particular, the High Court has found a limited right to freedom of political communication to be implied from the system of

[38] The preamble read in part: "Australians are free to be proud of their country and heritage, free to realise themselves as individuals, and free to pursue their hopes and ideals. We value excellence as well as fairness, independence as dearly as mateship."



representative government that the Constitution sets up.[39] Australian High Court opinions are seriatim, which makes analysis of decisions a complex and sometimes uncertain business.

Perhaps the most significant decision in recent years on the question of the protection of equality in the Australian constitution is, however, the minority decision of Deane and Toohey JJ in the 1992 case of *Leeth v. Commonwealth*.[40] Deane and Toohey argued, with reference to the preamble to the Constitution, that: "[the] conceptual basis of the Constitution . . . was the free agreement of 'the people' – all the people – of the federating colonies to unite in the Commonwealth under the Constitution. Implicit in that free agreement was the notion of the inherent equality of the people as parties to that compact."[41]

In other words, according to Deane and Toohey JJ, it is the conceptual basis of the Constitution and not the Constitution itself that ensures the right of each individual to be treated equally. Although Justice Deane and Justice Toohey were in the minority, two of the other five justices, Gaudron and Brennan, left the question open.[42]

Justice Gaudron relied on the separation of powers doctrine as a means to import values and principles of equality into the Constitution. In *Leeth*, Gaudron J expanded the separation of powers doctrine to include not just the delineation of powers the judiciary can exercise but also the manner of their exercise. She determined that the standard of justice that was required to constitute the judicial power of the Commonwealth encompassed a concept of equality. She said: "All are equal before the law. And the concept of equal justice – a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such – is fundamental to the judicial process."[43]

If a general right of equality was found in the Constitution either in its own right or through the separation of powers doctrine, there would be scope for making claims to equal rights for women in the text of the Constitution itself. However, this remains a minority position. This position was revisited in the case of *Kruger v. Commonwealth* (1997) 146 ALR 126, in which Gaudron J

[39] *Australian Capital Television Pty Ltd v. Commonwealth* (1992); 177 CLR 106; *Levy v. Victoria* (1997), 146 ALR 248; and *Lange v. Australian Broadcasting Corporation* (1997), 145 ALR 96.

[40] *Leeth* involved a prisoner who was convicted of a federal crime but housed in a state prison. In order to ensure that federal and state criminal offenders incarcerated in the same gaol would be treated equally the parole period was determined by the state rule. In other words, persons convicted of the same federal crime but housed in prisons in different states would be subject to potentially different parole periods. The argument put by Leeth was that there was a broad underlying requirement in the Constitution of equal treatment which was being denied to him because of this state-based rule.

[41] *Leeth v. Commonwealth* (1992), 174 CLR 455 at 486.

[42] The Australian High Court has seven judges including the Chief Justice.

[43] *Leeth*, *supra* note 41, at 502.

reaffirmed her view that equal treatment was implicit in judicial process but was not a general right. Justice Dawson and Justice McHugh gave limited support to Gaudron J's position but Dawson J and Gummow J rejected the approach of Deane and Toohey JJ. Justice Toohey held to his earlier position but together the views of Dawson, Gummow, Gaudron, and McHugh JJ result in the rejection of the doctrine of legal equality suggested by Deane and Toohey JJ. Justice Gaudron's more limited guarantee however, remains. Thus, whereas *Kruger* has probably put an end to the Deane and Toohey JJ line, it has left scope for the further development of the Gaudron J line. Interestingly, the concept of equal justice itself is imported into the Constitution rather than being derived from it. Its most likely derivation is the common law.

### Women's Rights – an External Affair?

Instead of having direct Constitutional protection, equality rights in Australia are protected by Federal and State legislation. Each state of Australia has enacted antidiscrimination legislation enforcing equal treatment, regardless of sex, in a range of public fora such as employment, education, and the provision of goods and services.[44] In addition, the federal government has passed a series of acts aimed at ensuring equal treatment on the grounds of race, sex, and disability.[45] The federal government does not have the explicit power to make "equality rights" legislation. There is nothing in the Constitution directly giving it that power. Instead, to pass its antidiscrimination laws, the government had to rely on the existence of international treaties and its "external affairs power" in Section 51 of the Constitution. Although the Constitution does not give direction on the role of international agreements in domestic law, the High Court has found that where a law is needed to implement an international agreement, the federal government may rely on its power to make laws with respect to external affairs to enact domestic legislation in that area. Each of the federal antidiscrimination acts thus corresponds to an international treaty. For example, Australia has signed and ratified the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), and this international agreement effectively makes nondiscrimination against women an "external affair," giving the federal government the power to pass domestic legislation, the *Sex Discrimination Act* 1984 (Cth.), to enforce nondiscrimination. The federal

44 *Anti-Discrimination Act*, 1977 (NSW); *Equal Opportunity Act*, 1995 (Vic); *Equal Opportunity Act*, 1984 (SA); *Equal Opportunity Act*, 1984 (WA): *Discrimination Act*, 1991 (ACT); *Anti-Discrimination Act*, 1991 (Qld); *Anti-Discrimination Act*, 1992 (NT); *Anti-Discrimination Act*. 1998 (Tas).

45 *Racial Discrimination Act*, 1975 (Cth); *Sex Discrimination Act*, 1984 (Cth); and *Disability Discrimination Act*., 1992 (Cth).



Sex Discrimination Act is explicitly directed at equality of treatment between the sexes, and protects against discrimination on the grounds of sex, marital status, pregnancy, and potential pregnancy, sexual harassment, and dismissal from employment on the grounds of family responsibilities.

The Australian system of sex equality rights follows closely the international human rights conception of nondiscrimination based on sex. The *Sex Discrimination Act* protects against direct and indirect discrimination, although indirect discrimination is subject to a reasonableness test.[46] The Act is based on a formal equality model, and as such, has sometimes been used by male complainants to oppose benefits for women.[47] However, the *Sex Discrimination Act* acknowledges substantive equality in a limited way by allowing "special measures" to be taken to achieve substantive equality. Australia has no affirmative action legislation that allows or requires quota systems. For some years, Australia has had an *Affirmative Action Act*, currently, and in amended form, termed the *Equal Opportunity for Women in the Workplace Act*, that encouraged equality in employment practices.[48] However, this Act was named misleadingly, because, rather than enforcing substantive equality, it was based on the primacy of the merit principle.

The importance of international agreements in Australian constitutional law, and in equality rights, is illustrated by the constitutional challenge made against the sexual harassment provisions of the *Sex Discrimination Act* in *Aldridge v. Booth*.[49] In that case, the complainant, Ms. Aldridge, was an employee of Mr. Booth, and claimed that throughout her employment he subjected her to repeated acts of sexual harassment. The respondent argued that the sexual harassment provisions of the *Sex Discrimination Act* were unconstitutional because they went beyond the scope of the treaty, CEDAW, on which they were based. The Federal Court found that the sexual harassment provisions were valid, based on the broad antidiscrimination and equality principles underlying CEDAW, and the federal external affairs power. The former Sex Discrimination Commissioner, Quentin Bryce, describes the practical importance of Australia's acceptance of CEDAW in that case:

> [*Aldridge v Booth*] decided that the provisions under Section 28 of the *Sex Discrimination Act* relating to sexual harassment were valid. They were being challenged. The [] Court had to consider the signing and the ratification of the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) by Australia. We had to run out during the hearing to get evidence of ratification. Evidence of depositing the documents in New York.[50]

46 See *Sex Discrimination Act*, ibid., Section 5(2),7B(1),(2).

47 See, for example, *Proudfoot v. ACT Board of Health*, [1992] HREOC (17 March 1992).

48 *Affirmative Action (Equal Opportunity for Women) Act*, 1986 (Cth); *Equal Opportunity for Women in the Workplace Act*, 1999 (Cth).

49 *Aldridge v. Booth* (1988), 80 ALR 1.

50 Quentin Bryce, as quoted in Innes, *Millenium Dilemma*, *supra* note 4 at 17.

The Constitution also protects rights indirectly through the application of Section 109. Under Section 109 of the Constitution, if a state law is inconsistent with a federal law, the state law will be invalid to the extent of the inconsistency. This gives federal laws on antidiscrimination principles primacy over state laws. The external affairs power and Section 109 work as conduits of power, between local (state) and central (federal) and between national and international protection of rights.

The international human rights system, then, is extremely important to Australia's domestic protection of women's rights. International agreements give the Australian federal government the power to protect rights that it otherwise would not have. This means that it is impossible to understand the existence of women's rights in legislated form without looking at the Constitution, but the Constitution alone does almost nothing. It also raises as an issue the impact of the absence of express constitutional protections on women's *material* rights.

## SPEAKING INTO A SILENCE: THE NEED FOR ARTICULATED RIGHTS?

In examining women's material rights under the Australian Constitution, it is clear that these can only be understood in the context of a complex framework of legal, political, and cultural constraints. We suggest it would be difficult otherwise to explain how it is that the racist and sexist origins of the text are not more enduring in terms of the everyday conditions in which we live. For instance, we have universal suffrage for all adults over eighteen and comprehensive antidiscrimination laws at the state and federal level, making both racial and sexual discrimination the subject of prohibition and penalty. All this is so despite the fact that the Constitution does not guarantee these. Although there continue to be serious inequalities, Australia compares favorably with many of the countries that have expressly enumerated equality protections in their Constitutions. Despite the existence of comprehensive equality legislation, there are drawbacks to a lack of entrenched protection of women's rights, namely, the lack of protection against parliamentary incursion into human rights. A temporary safeguard was achieved when in *Minister for Immigration and Ethnic Affairs v. Teoh*,[51] the High Court found that even if an international treaty has not been the subject of domestic implementing legislation, the mere fact of a government entering into the treaty created a legitimate expectation that governmental decision makers would act consistently with the terms of the treaty. Where they did not, procedural fairness required that the person affected by the decision be given adequate opportunity to respond. The Federal Government responded to the *Teoh* case by proposing legislation, the *Administrative Decisions (Effect of International Instruments) Bill* 1999, to "undo" this important judicial finding concerning the status of international treaties in Australian law. The purpose of the *Administrative Decisions Bill* is to make it clear that when the government enters into a treaty, no expectations are to arise from that act alone, in the absence of any legislation. The Bill has since lapsed and its future is uncertain.

[51] (1995), 128 ALR 353.



In Australia, debate continues about how best to protect women's rights with many arguing that a statutory Bill of Rights might be better, as it would articulate a basic system of rights without entrenching the idiosyncrasies of the government of the day. Dame Roma Mitchell, the former Justice of the Supreme Court of South Australia has said: "I would still like us to have a bill of rights but not one that is entrenched. If one thinks back to the time when our Constitution came into being, what rights would have been included? None of the 'founding fathers' would have been in favour of declaring discrimination on the grounds of race illegal."[52]

One of the questions that has arisen for us in writing this is whether the existence of constitutional equality rights would in fact provide guarantees that would be meaningful for women. This is partly because of the way in which rights are arguably only ever an abstracted universalizing form that can never speak to the manifold differences that exist between those who might utilize them.[53] By contrast, the utility of rights is precisely their capacity to infiltrate the language and rhetoric of the lawmakers.

The absence of a Bill of Rights means that both the role of the judiciary and the parliament is crucial in protecting those rights that do exist or which may be implied. With respect to the judiciary, the High Court's willingness to "read" human rights into the common law is essential.

In practice, freedom of speech and other personal freedoms are as much judge-made law in, for example, the United States as they are in Britain and Australia, in the sense that any Bill of Rights will be subject to judicial interpretation. A system of normative fundamental rights can be useful to set limits on both the interpretive scope of the judges and the legislative power of parliament. However, if those limits turn out to be a matter of legalistic hair splitting, then their effectiveness will still ultimately depend on the politics of the court and the parliament. If, for instance, one must choose between race and gender equality when framing a claim and one is an Aboriginal woman, the effects will be unjust and distorted.

We are inclined to agree with a statutory Bill of Rights approach although at times like the present where the government is regressive and conservative it is hard to resist the desire for entrenched equality rights. Nevertheless,

[52] Jane Innes, "Interview Dame Roma Mitchell," (recorded 1999), online: University of Wollongong <www.uow.edu.au/law.civics/updates/roma_mitchell.html> (date accessed: 18 April 2001).

[53] Margaret Thornton, "Historicising Citizenship" (1996) 20 *Melbourne University Law Review* 1076.

in Australia we have had a lot of progress developing women's rights and constitutionally guaranteed rights can vanish where they are filtered through institutions that fail to acknowledge their significance.

## EMBEDDING CONSTITUTIONAL RIGHTS

It should be clear from the preceding discussion that we see the process of examining the Constitutions of each of our countries from the perspective of women's rights as intimately connected to a broader feminist theorizing of the State. In recent feminist theories of the state, the Constitution is viewed as *one* of the discursive arenas in which power is organized and enacted rather than as the *grundnorm* or foundational and basic legal instrument of the nation determining all power relationships. Pringle and Watson put it like this:

> Rethinking the State, we conclude, requires a shift away from seeing the state as a coherent, if contradictory, unity. Instead, we see it as a diverse set of discursive arenas that play a crucial role in organizing relations of power. . . . Women's interests and thereby feminist politics are constructed in the process of interaction with specific institutions and sites.[54]

Recognizing Constitutions as one site of power should not detract from the importance of finding feminist ways to engage with them. On the contrary, precisely because Constitutions "self-consciously and explicitly deal with fundamental questions relating to the organization of social and political life,"[55] it is crucial to find feminist strategies for engaging with and utilizing these forms. We have not only to recognize the importance of finding a way to, as Adrian Howe puts it, "break out of the constraints imposed by masculinist law scholars on current constitutional conversations,"[56] but we also have to find a contextual and strategic approach to those conversations.

We suggest that the Australian case offers a particularly clear illustration of the location of a Constitution within a larger bureaucratized system of power. Women's rights are embedded in many legal and nonlegal institutions including privatized and deregulated systems of powers such as the marketplace. As we noted earlier, Constitutions are often spoken of as the bones on which the flesh of civil society is hung, and yet this lifeless image of the body politic does not tell us *whose* body is represented, nor *where* the body is located. We are concerned with how women's rights are realized

[54] Rosemary Pringle and Sophie Watson, "Women's Interests and the Post-Structuralist State" in Michele Barrett and Anne Phillips, eds., *Destabilizing Theory: Contemporary Feminist Debates* (Stanford, CA: Stanford University Press, 1992) 53–73 at 70.

[55] Patrick Macklem, "Constitutional Ideologies" (1988) 20 *Ottawa Law Review* 117 at 118.

[56] Adrian Howe, "The Constitutional Centenary, Citizenship, The Republic and All That – Absent Feminist Conversationalists" (1995) 20 *Melbourne University Law Review* 218 at 226.



and what such rights look like when viewed in material form. In particular, we are interested in the role of the Constitution in forming and protecting the concrete rights of women. By examining how women's rights are created or undermined in practice, we can *locate* the Constitution in a material and political context.

## REPRODUCTIVE RIGHTS AND WOMEN'S BUSINESS

The preceding discussion raises the question of how women's rights are protected in Australia if Constitutional rights are only one of the many legal and institutional factors to be considered. For example, in Australia, there is no constitutional guarantee of privacy or reproductive freedom and yet we have much the same reproductive freedoms and privacy as our U.S. and Canadian counterparts. The point here is that the legal system is only one regulatory mechanism by which women's freedoms are constrained.

We now turn to the way that various forms of regulatory and bureaucratic power constitute, transform, or deny women's freedoms by examining appeals to rights in recent Australian politics: the right of all women to access IVF programs and the right of indigenous women to control their sacred lands.

### IVF and Women's Rights

Under the *Sex Discrimination Act* women have a right to equal treatment in the provision of goods and services, regardless of their marital status. "Services" includes medical services, such as IVF. Despite this, the Victorian State government passed legislation in 1995 restricting IVF services to married women. In 1997, they amended this legislation so that de facto (heterosexual) couples could access the services.[57] Only single and lesbian women were excluded by the legislation. If women in this category wanted to have a child using assisted reproductive technologies (ART) or IVF, they had to travel to another state for every treatment, or, in the case of ART, resort to unsafe methods of falling pregnant.

As discussed earlier, under Section 109 of the Constitution, if a state law is inconsistent with a federal law, the state law will be invalid to the extent of the inconsistency. However, it takes a court to declare the relevant sections of the legislation invalid on the grounds of inconsistency. The *Victorian Act* effectively denied IVF to single and lesbian women until a Victorian gynecologist, Dr. John McBain, challenged the legislation.[58] McBain was consulted

[57] *Infertility Treatment Act*, 1995 (Vic), Section 8(1) provided: "A woman who undergoes a treatment procedure must – be married and living with her husband on a genuine domestic basis; or be living with a man in a de facto relationship."

[58] *McBain v. State of Victoria*, [2000] FCA 1009 (28 July 2000).

by a woman wishing to access fertilization procedures, and was unable to provide the treatment to her because she was single. McBain applied to the Federal Court for a declaration that Section 8(1) of the State legislation restricting IVF on the basis of marital status was inconsistent with Section 22 of the *Sex Discrimination Act*, which prevents discrimination in the provision of services. The Catholic Church, represented by the Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church, appeared as amicus curiae in the case, arguing that the legislation was not inconsistent with the *Sex Discrimination Act*. The Federal Court found that the legislation was inconsistent, and was invalid to that extent.

The Catholic Bishops then applied to the High Court for relief in the form of administrative writs effectively setting aside the decision of the Federal Court. This was an extraordinary step, given that they were not a party in the original case. The Catholic Bishops argued that IVF services are services that can only be provided to a woman, and because the *Sex Discrimination Act* does not cover services that, by their nature, are only capable of being provided to one sex,[59] there is no inconsistency with the state legislation. They also argued that CEDAW does not apply to IVF services or to marital status discrimination and so there is no appropriate international treaty on which the Commonwealth could pass the relevant sections of the *Sex Discrimination Act*. A further extraordinary step was taken by the federal government, in the form of the Attorney General, who granted the Catholic Church a fiat to bring proceedings in its name. The fiat was limited in scope to allow the Catholic Bishops power to litigate the issues surrounding the inconsistency of legislation but not constitutional issues. This, in effect, meant that the federal government could support the discriminatory state legislation without having to put itself in the slightly ridiculous position of arguing against the constitutionality of its own federal legislation.

The High Court handed down its decision in McBain, finding that the Catholic Bishops lacked standing to bring their application.[60] The seven judges of the full court unanimously dismissed both applications, finding that there was no justiciable matter to be heard between the Catholic Bishops or the Attorney General and the respondents. The court did not address the substantive issues of sex discrimination and women's right to access IVF services, potentially leaving these issues open to future challenge.

The IVF example is a good illustration of the indirect impact of the Constitution on women's rights. Although there is no constitutional right to equal access to goods and services, the external affairs power given to the Commonwealth under Section 51(xxix) of the Constitution provided a "backdoor" for such rights by allowing the *Sex Discrimination Act*, based on CEDAW, to be passed as an "external affair." Of course, this assumes that

[59] *Sex Discrimination Act*, *supra* note 45, Section 32.
[60] *Re McBain; Ex parte Australian Catholic Bishops Conference*, [2002] HCA 16 (18 April 2002).



the federal government wants to protect such rights. In the case of IVF, the federal government has decided that it wants state governments to have the power to discriminate against single and lesbian women in the provision of IVF services. An amendment Bill proposing changes to the "goods and services" sections of the *Sex Discrimination Act* to allow state legislation to discriminate in the regulation of IVF services is currently before Federal Parliament.[61]

The developments around IVF and access to services demonstrates the complexity of the federal-state relationship, the Constitution, international agreements, and domestic legislation in formulating, or undermining, women's equality rights. Equal access to IVF is protected in the federal *Sex Discrimination Act*, which relies for its existence on the implementation of CEDAW through the external affairs power. However, the protection of women's rights in the *Sex Discrimination Act* relies on political and legal will. This illustrates the importance of other forms of institutional power in the concrete realization of expressed rights, for instance, the significance of the role of medical and religious institutions, and their perception of mothering or reproduction, in protecting or opposing women's rights. The discriminatory Victorian legislation was declared invalid because of the actions of an individual doctor concerned about the legal rights of his patients. Other doctors, such as this IVF specialist, testifying before a Senate Committee inquiring into the *Sex Discrimination Amendment Bill*, are not so protective of their patient's rights:

> Another case [of mine] was of a woman who had had her tubes ligated, and had had children previously but, during the course of the interview, it transpired that the reason she did not have any children was that the children's services department had taken them into care for abuse and she wanted to replace those children using infertility services. I personally felt it was inappropriate and so I declined to assist, even though I suspect I may have been committing an act of discrimination.[62]

This makes it clear that women's rights will not be upheld as long as there are individuals with institutional power to oppose those rights. We think medical power is one of the sources of control over women that is underestimated and cannot necessarily be remedied by a bill of rights. Religious institutions also exert extralegal power. The Catholic Bishops have been the major driving force in the litigation to remove women's equal access to IVF services.

Although this example demonstrates the web of interests and power affecting women's rights and determining whether those rights are realized

[61] *Sex Discrimination Amendment Bill* 2002.
[62] Dr. David Molloy, *Transcript of evidence* (13 February 2001) at 13, as cited in Senate Legal and Constitutional Committee, *Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No. 1) 2000* (Canberra: Commonwealth of Australia, 2001) (Dissenting Report of Senator Hogg and Senator Collins) at 72.

or undermined, this does not mean that the Constitution is irrelevant. This example also shows the importance of the Constitution as a conduit of rights through the external affairs power and Section 109. Of course, the protection that can derive from Section 109 is contingent on the fact that the federal statute be more progressive than state legislation and there is no constitutional obligation that this be the case. However, in practice federal legislation implementing international treaties is more progressive as it imports aspirational standards from the international human rights system.

## Aboriginal Women's Rights

Another recent case stands out as a moment when the judiciary could have developed the constitutional jurisprudence of Australia to strengthen the rights of women and indigenous Australians. However, whereas the example of access to medical services, specifically IVF, demonstrates the potential weakness of a legislated system of equality rights, *Kartinyeri v. Commonwealth*[63] demonstrates that constitutional provisions are also vulnerable to alternate interpretations. Written, as they must be, in broad and general terms, they are incapable of expressing the particularity amongst the members of the group to which they refer. In this case, the races power refers only to the power to make laws for "the people of any race." The power is not given to consider the differing needs of women of the relevant race compared with men. Before going further, it must be stated that the Races power is just that, a power to make laws not a guarantee in the form of an absolute right individual or otherwise. Nevertheless, the 1967 amendment to the Races power discussed earlier was both intended and understood at the time to allow the federal government to assist and benefit the indigenous population and to stop the conservative states from both neglecting and discriminating against Aborigines.[64] Instead, in *Kartinyeri*, indigenous women lost because the Constitution was interpreted in a way that was conservative and legalistic. There was, of course, scope for a different interpretation of the Constitution.

[63] (1998), 72 ALJR 722.

[64] The official case for supporting the 1967 amendment to the Races power stated:

> "The purposes of these amendments to the Commonwealth Constitution are to remove any ground for the belief that, as at present worded, the Constitution discriminates in some ways against people of the Aboriginal race, and, at the same time, to make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Commonwealth Parliament considers this desirable or necessary."
>
> *Justice and Equity: Resources on the Reconciliation Process and Social Justice for Indigenous Australians* (Sydney: Human Rights and Equal Opportunity Commission, 1995), CD-ROM.



*Kartinyeri* concerned the question of whether the Commonwealth government could pass laws to remove the rights of a group of indigenous women who claimed that the site of a proposed development was a sacred site for Aboriginal women. The case had a protracted history. It originated in a proposal to build tourist facilities on Hindmarsh Island in South Australia, including a bridge to the mainland to allow access to the new facilities. An organization representing a group of indigenous women opposed the development and bridge, on the grounds that it would damage or desecrate a significant area in the traditions of the Ngarrindjeri people. In fact, in the words of the original applicants, the construction of the bridge would "undermine cosmological and human reproduction and cause Ngarrindjeri society and its traditions to ultimately disappear."[65] Women of the Ngarrindjeri people knew of the sacred nature of the area and its significance, but their knowledge was secret according to Ngarrindjeri law. It was privileged knowledge that only women were allowed to access according to their traditions. As such, it could not be told to men. In addition it could not be told to women who were not authorized to have access to the knowledge. There was immediate dispute over the veracity of the claims, compounded by the fact that some Ngarrindjeri women were quoted as saying they knew nothing about the sacredness of the site. Because many of the women had been taken from their traditional community as children and brought up in a mission, it is not surprising that the claim was virtually impossible to verify. The competing claims of the Ngarrindjeri women along with the voice of the female developer became the subject of a story in *Who Weekly*, an Australian women's magazine. The magazine gave each woman a chance to speak freely in representing their position. McKee and Hartley write of how the article enabled the "truth value of each of the positions offered . . . [to be attested] . . . by personal reminiscence and experience."[66] In contrast, the legal presentation filtered out the voices of women and their concerns in favor of increasingly legalistic abstracted language.

The filtering out of women's voices has always been part of the relationship between white and Aboriginal Australia. Early attempts to recognize indigenous rights in Australia were mostly conducted by white men through negotiations with Aboriginal men. The assumption was that men were the leaders of their communities and not the women. The Sex Discrimination Commissioner's submission on Aboriginal Customary Law puts it like this: "This historical bias laid the foundation for an ongoing emphasis on the role of men, and a "feedback loop" in which male views are recognised and

[65] As cited by Gaudron J in *Wilson v. The Minister for Aboriginal and Torres Strait Islander Affairs* (1996), 189 CLR 1 at para. 7.

[66] Alan McKee and John Hartley, "Truth Integrity and a Little Gossip," In *Australia Alternative Law Journal* Vol. 21, No. 1 Feb. 1996, 17.

reflected back to communities by mainstream institutions while women's views are marginalised."[67]

The significance of the desecration of their sacred site for the Ngarrindjeri women was lost in the proliferating legal and political documentation.[68] There is a notable absence in the *Hindmarsh Island* cases of discussion of the consequences for Ngarrindjeri society and its female knowledge holders if desecration of their sacred site occurred. The absence is particularly striking given the assertion by the Ngarrindjeri women that their society would ultimately end if the building went ahead, and is evidence of the abstracting effect of constitutional language.

While the case was still being tried, a new federal government was elected to power. In order to put an end to the dispute, the new government passed the *Hindmarsh Island Bridge Act* 1997 (Cth.). The Act terminated the rights of Aboriginal people under the Heritage Protection Act to seek to restrain development of the Hindmarsh Island Bridge, regardless of whether the development would desecrate Aboriginal sacred sites.

The plaintiffs argued before the High Court that the *Hindmarsh Island Bridge Act* was invalid. A central plank of their argument was that the Races power of the Constitution only empowered laws for the *benefit or advancement* of people of any race. They contended that the Races power could not be relied on to pass racially discriminatory laws, if not for all races, then at least not for Aboriginal people, given the history of the power. Another argument raised on behalf of the plaintiffs was that the Races power was ambiguously expressed, and should be construed as far as possible in accordance with international human rights norms of nondiscrimination. What was not and could not be argued was that Aboriginal women were uniquely disadvantaged by this new law and that in so being there was not only racial discrimination present but also sex discrimination.

Despite the perception that the Races power was amended in 1967 to benefit Aborigines, the court looked both at the express terms of the Constitution and the original intention of the drafters and did not find that the power only authorized beneficial laws because in its terms it did not express such an intent. This is despite the fact that the amendment was passed on a

[67] Human Rights and Equal Opportunity Commission, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in Northern Territory* (HREOC, May 2003), available online at <http://www.humanrights.gov.au/sex_discrimination/customary_law/submission.html>.

[68] A separate but related issue here is the widespread speculation at the time that the women involved in asserting the "secret women's business" were wrong or misleading in their assertions. A Royal Commission held into what became known as the Hindmarsh Island Affair failed to support the assertions. However, a recent federal court case found to the contrary. In *Chapman v. Luminis Pty Ltd (No 5)*, [2001] FCA 1106 (21 August 2001), the court did not accept that the women's secret knowledge was fabricated or that it was not part of genuine Aboriginal tradition.



wave of support for the introduction of measures to assist Aborigines. Justice Gaudron rejected the argument that the amendment disclosed a constitutional intention that thereafter the power should extend only to beneficial laws.

However, she did go on to elaborate the meaning of the phrase "the people of any race for whom it is deemed necessary to make special laws." Gaudron J accepted that the Races power does not authorize special laws affecting rights and obligations in areas in which there is no relevant difference between the people of the race to whom the law is directed and the people of other races. Second, the law must be reasonably capable of being viewed as appropriate and adapted to the difference that is claimed where there is a relevant difference. So although the power is wide enough to authorise both advantageous and disadvantageous laws, she argued, it is difficult to conceive of circumstances in relation to Aboriginal Australians where a disadvantageous law would be valid, because it could not reasonably be viewed as appropriate and adapted to their different circumstances. These "different" circumstances Justice Gaudron described as serious disadvantage, including disadvantaged material circumstances and the vulnerability of indigenous culture. In other words, the term "special" laws required attention to the contemporary circumstances of the group in question and given the current state of disadvantage in Aboriginal populations, a special law could only be beneficial.

Nevertheless, Gaudron J accepted that the *Bridge Act* merely amended the *Heritage Protection Act* and that the *Heritage Protection Act* continued to be a valid act under the Races power because it continued to protect and preserve areas and objects of significance to Aborigines. Her argument is, we believe, ultimately undermined by her acceptance of the *Bridge Act* amendment and had the result of disadvantaging a group of Aboriginal women.

Several of the other judges also were persuaded by the view that the *Hindmarsh Island Bridge Act* was only in effect reducing the *Heritage Protection Act* and so repealed in part the *Heritage Protection Act* rather than being a whole new Act.[69] A repealing Act was, they considered, supported by the head of power that supports the law – in this case the Races power.

The only judge to hold the Act invalid was Justice Kirby who, in doing so, argued that the Constitution was not intended to violate human rights.[70]

The Court in *Kartinyeri* demonstrates that constitutional changes do not necessarily provide a stable base for a reliable system of rights. Nor does ordinary human rights legislation protect women's rights against a government with a social agenda at odds with principles of equality. It is difficult,

[69] Gummow and Hayne JJ held that special laws were quite likely to disadvantage one race even as they advantaged another, and that a restrictive interpretation could not be put on the Races power and therefore both beneficial and nonbeneficial legislation would be permitted. Justice Kirby in *Kartinyeri*, *supra* note 63 at 765.

therefore, to see how an entrenched right to equality in the Constitution would have offered a different outcome in *Kartinyeri* and the cases that follow it. What the case does then, is remind us that the Constitution – any Constitution – is limited by the forms of power in which it is embedded. Although we might view the Court as wrong-headed in this instance, it is clear that even entrenched rights offer no guarantees of redressing material harm.

## CONCLUSION

The Australian Constitution was never intended to describe or protect the kinds of equality rights that we expect for women today. Fixed in a racist and sexist ideology, anything it might have had to say about women's rights would not have been something that we would have wanted entrenched for all time.

Despite this, it is clear from the Australian experience that the development of a sense of women's rights over the past one hundred years has built a web of interpretation around and within the document of the Constitution that does protect women's rights. Nevertheless, where there is a failure of legal imagination or a lack of political will, women's rights founder. The Constitution is a mere skeleton, not only embedded in the living body of the State but also in a political and social context that changes in its commitment to women's rights. That skeleton gives us a basic democratic structure but alone is lifeless and gives us little else.

Our approach to the Australian Constitution, then, is necessarily somewhat postmodern. The interests of women are not unitary but diverse so that the interests of indigenous women will not necessarily coalesce with the interests of white middle-class women. In addition, the interests that oppose women's rights are similarly diverse. The Constitution both actively constitutes and is constituted by those interests. We reject the view of the Constitution as a kind of monolithic and impervious instrument of power but, rather, see it as a text that is imbricated within existing webs of power, developing, responding, and actively resisting, at different moments, the various forces within which it is operating.

For feminists, then, to engage with the discursive power of Constitutions, it is strategically imperative to identify both the external local and global forces that make up the whole of the discursive frame. We agree with Tony Blackshield that the Constitution "is a piece of paper; pieces of paper don't do very much. It is what you do with them that counts."[71] We argue for an embedded approach to constitutional rights, one that acknowledges all of the diverse ways in which rights are filtered, translated, upheld, or undermined.

[71] Tony Blackshield, as cited in Jane Innes, *Millenium Dilemma*, *supra* note 4 at 1.



**Suggested Further Readings Not Included in the Footnotes**

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# The Gender of Constitutional Jurisprudence

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CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
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http://www.cambridge.org



First published 2005

Printed in the United States of America

*Typeface* Sabon 10/12 pt. *System* LaTeX 2ε [TB]

*A catalog record for this book is available from the British Library.*

*Library of Congress Cataloging in Publication Data*

The gender of constitutional jurisprudence / edited by
Beverley Baines, Ruth Rubio-Marin.
p. cm.
Includes bibliographical references and index.
ISBN 0-521-82336-6 – ISBN 0-521-53027-X (pb.)
1. Women's rights. 2. Constitutional law. I. Baines, Beverley, 1941–
II. Rubio-Marin, Ruth.
K3243.C66 2004
342.08'78–dc22 2004045100

ISBN 0 521 82336 6 hardback
ISBN 0 521 53027 X paperback

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## Acknowledgments

Like most of its kind, this project is the result of many joint efforts. It initially was conceived in a series of informal meetings held between the coeditors during Ruth Rubio-Marin's research stay at Queen's University in Kingston, Ontario. That stay was made possible by a Fellowship from the Canadian Embassy in Madrid, Spain. The idea was to hold a small conference and a series of workshops and internal sessions to discuss the themes and the structure that a gender focused book on comparative constitutional jurisprudence ought to have. This gathering took place in June 2000, and for their funding contribution we thank the Law Foundation of Ontario, the Office of Research Services at Queen's University, the Department of Constitutional Law in the University of Seville, and, above all, the Spanish Ministry for Social Affairs and the Foundation "El Monte." Finally, for their contributions in bringing the volume to fruition, we are pleased to recognize the insightful comments of Cambridge University Press's readers, the editorial support of Lewis Bateman at the Press, and Nigel McCready and Sharron Sluiter for their technical assistance at Queen's.

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October 2003