Book Review: The Making of the Australian Constitution, by J. A. La Nauze

P. W. Hogg
Osgoode Hall Law School of York University

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works

Recommended Citation

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.
From the point of view of the Canadian lawyer, it is of value to have readily available the decisions of the Supreme Court in the Louisiana, Texas and California offshore oil cases, which he might like to compare with the Canadian Supreme Court's Offshore Mineral Rights Reference. Perhaps equally interesting is the decision in U.S. v. Spe'lar in which it was held that the Federal Tort Claims Act which excluded claims "arising in a foreign country" covered claims occurring on an airbase leased to the United States by an executive agreement with Great Britain, since Newfoundland constituted a foreign country. This decision to some extent rests on that in Vernilya-Brown Co. v. Connell, which was discussed, applied and distinguished. In that case, it was held that an air base in Bermuda leased to the United States under the same agreement was a "possession" of the United States and therefore within the purview of the United States Fair Labor Standards Act. It is perhaps unfortunate that the learned editor does not print the two decisions in running order. The 1948 case is named and there appears the statement "For opinion see infra III (3) (a)", but, since there is no consolidated table of contents and no indication is provided of what future volumes will contain, there is no way of knowing why the printing of the decision has been postponed and no indication is given of the rubric under which it will eventually appear.

When the series is complete, and the consolidated tables of cases and contents are available, together it is hoped with a comprehensive index, this work should serve as one of the most useful compilations in the field of international law.

L. C. Green*

* * *


This book is a fascinating account of the events leading up to the enactment by the Imperial Parliament in 1900 of Australia's federal constitution, the Commonwealth of Australia Constitution Act. Professor J. A. La Nauze, the author, is an historian, not a lawyer, but his book will have a special interest for lawyers, especially those who study federal constitutional law.

Unlike the Canadian federation, which was first officially mooted in 1864 and was completed (not without plenty of dif-
ficulties) only three years later, the Australian federation took a lot longer, starting with a conference in Melbourne in 1890 and ending in 1900. The author takes us through the whole process. The narrative, which could have bogged down in the terrible prolonged business of draft after draft, amendment after amendment (and there is by necessity plenty of this), still holds the reader's interest because the author is such a good writer and good historian. Thus we learn of the personalities of the important "framers", of how they related to each other, and of the kinds of local and political pressures they were under; even the weather played its part, with the fierce heat of the Australian summer influencing the time and place of meetings and exacerbating tensions at those meetings which did not avoid the summer.

The Australians of the 1890's had a number of advantages over the Canadians of the 1860's. They were more self-confident, less oriented to the United Kingdom. Thus it never occurred to the Australians to follow the Canadian precedent of allowing British Colonial Office officials to have a hand in the drafting of the bill for enactment by the Imperial Parliament. They sent their delegates to London with a bill already drafted, and with instructions that it was not to be altered. In the end the delegates were forced to accept one alteration, but only one. Nor did the Australians believe that the Privy Council was the summit of judicial wisdom, and they not only established their own High Court of Australia, but sought to make it the final court of appeal in constitutional cases. It was the appeals clause which they were forced to modify in London, but the resulting compromise excluded the Privy Council from most constitutional appeals.

The later date of their federation also gave the Australians the models not only of the Swiss and United States' federal constitutions, but also the British North America Act. And many of the delegates to the various meetings did their homework well, displaying a close knowledge of the text of, and judicial gloss on, the earlier constitutions. It was probably the United States' model which was most influential, partly because James Bryce's text, The American Commonwealth¹ made its terms and rationale more accessible, and partly because the strong states' rights feeling among the Australians led them to reject the more centralized Canadian distribution of power. But it was the Canadian model which taught them the important lessons that federalism could be combined with membership of the British Empire under the British Crown, and with responsible government; and that a federation could live without a bill of rights. The failure to include a bill of rights was due not merely to the uplifting conviction that civilized men of British descent organized

¹ (1888).
as a parliamentary democracy would never deny due process or
equal protection to their fellow man, but also to the inconvenient
fact that it would have placed in legal jeopardy the existing legisla-
tion of some of the states, which discriminated against the Chinese
and other non-white residents.

The author is always realistic in his assessments without being
cynical. He points out, for example, that as well as the nationalistic
and altruistic impulses to federation, the politicians and lawyers who
headed the federal movement were members of the two occupations
which "were bound to gain by the establishment of a federal con-
stitution". Furthermore, the division of legislative and executive
powers which is essential to a federation imposed an obstacle to the
rapid and sweeping changes proposed by the radicals of the 1890's
and was "likely to assist the preservation of things as they were".1

It only remains to add the platitude which is mandatory in a
review of this kind, but which is nevertheless true, that it is a great
pity that the constitutional lawyers of Canada and Australia have
not since 1900 taken more interest in each other's work. The two
constitutions are similar in important respects, and so are many
of the problems which beset the two federations, as current needs
overwhelm the structures designed (and very well designed) last
century. If this book helps to interest Canadians in the Australian
constitution it will have performed a service for Canada. But the
book must not be judged on that parochial basis; by any rational
standard it is excellent.

P. W. Hogg*