

Civil society and the evolution of Australia's treaty making processes – where now the 'democratic deficit'?¹

Abstract

This presentation concerns the constitutional evolution of treaty making processes (especially Australia's) into a more 'democratic' form.

Edmund Burke, around the time of the French revolution, observed that:

'By a constitutional policy, working after the pattern of nature, we receive, we hold, we transmit our government and our privileges, in the same manner in which we enjoy and transmit ... our lives ... Our political system is placed in a just correspondence and symmetry with the order of the world, ... wherein, by the disposition of a stupendous wisdom, moulding together the great mysterious incorporation of the human race, the whole, at one time is never old, ... Thus, by preserving the method of nature in the conduct of the state, in what we improve we are never wholly new; in what we retain, we are never wholly obsolete.'²

My presentation today argues that the constitutional evolution of Australia's treaty making process has enhanced the role of civil society in influencing government – thereby bearing out Burke's natural philosophy on constitutions.

My specific thesis is that different countries treaty making processes – and Australia's treaty making processes in particular – have gradually adapted to the increasingly democratic international order that has been evolving. Put differently, Australia's treaty making processes have not only become more democratic, but they have done so in a way that naturally corresponds with the democratisation of treaty making around the world.

To trace these developments is to trace a long history of tension between 'democratic form' and the traditional notion of foreign policy making by executive government.

When Burke wrote he was basically comparing the British constitution – which was never codified like our own – with the French constitution. But, he was essentially arguing that – to be relevant and effective – a constitution (codified or not) must adapt to the order of its times and its world.

While the term 'constitution' (that is, the relationships of the principal organs of a state in terms of how they govern that state) needs no explanation, the word 'democracy' is semantically fraught.

A decent working definition of 'democracy' is: a political ideal which ensures not only that certain civil rights obtain equally and for all, but also that the voice of civil society is heard on matters of public importance.

¹ An abridged version of this speech was presented by David Mason (Executive Director, Treaties Secretariat, DFAT) at the ANZSIL Conference in Canberra on 30 June 2007.

² EJ Payne, **Burke Select Works Vol II** (1888) p 39.

Still, it would be too glib to leave it at that; because it ducks the historical context in which the term has evolved: debate has raged for centuries over the proper context for the democratic forms of a country's treaty making processes.

So, before I attempt to assert that Australia's treaty making processes have – arguably – been evolving into more 'democratic' forms, I need to set out my precise sense of how the term 'democracy' has evolved historically.

As John Dunn noted (in his semantic history of democracy, **Setting the People Free**) the term 'democracy' derives from the Greek word '**demokratia**'. **Demokratia** (according to Dunn) described a particular form of government, which was — for almost two millennia — overwhelmingly judged to be: 'grossly illegitimate in theory and every bit as disastrous in practice.'³

Dunn's observation, which sounds startlingly anachronic,^a has no greater purchase than when it is applied to the so-called 'diplomacy of democracy' which bubbled up in previous centuries.

For example, during the French Revolution, Robespierre resurrected – as a political standard – the much shunned 'democracy' to reify his grand vision for society.⁴ The foreign policy that ensued was as much a 'terror'^b as the municipal 'justice' that Robespierre deemed to be the corollary of his democracy. (Little wonder that Burke was so disgusted by the French Revolution.)^c

Even the great publicist for early American democracy Alexis de Tocqueville^d considered that democracy vitiated foreign policy. Indeed, he saw democracy as — systemically — quite deficient in matters of external affairs. To quote him:

'Foreign policy demands scarcely any of those qualities which are peculiar to a democracy; on the contrary it calls for the perfect use of almost all those qualities in which a democracy is deficient. Democracy ... fortifies the respect for law in all classes of society, but it can only with great difficulty regulate the details of an important undertaking, persevere in a fixed design, and work out its execution in spite of serious obstacles. It cannot combine its measures with secrecy or await their consequences with patience. These are qualities which are more characteristic of an individual or an aristocracy'.⁵

Accordingly, he saw the success of American democracy as falling somewhere between a curiosity and a paradox. A conundrum which could be explained by

³ 'What is very strange indeed (in fact, quite bizarre) is the fact that this single term [democracy] ... should turn out to be the ancient Greek noun *demokratia*, which originally meant ... one particular form of government ... overwhelmingly judged ... grossly illegitimate in theory and every bit as disastrous in practice.' John Dunn, **Setting the People Free** (2005) p.15.

⁴ Dunn, above, pp 112-118.

⁵ Alexis de Tocqueville, **Democracy in America** (1835) Part 1, Chapter XIII. Cf Charles de Montesquieu, **The Spirit of Laws** (1748) Book XI (on 'the separation of powers' enforcing a society's security); Thomas Hobbes, **Leviathan** (1651) Chapters 17 and 18; John Locke, **Two Treatises on Civil Government** (1689) Vol. II, Chapter 12.

America's unique advantages. Natural prosperity, geographical isolation, and cultural homogeneity permitted the USA's democratic system of government to survive.⁶

In short, to De Tocqueville, democracy was inimical to good foreign policy making.^e

He was – by no means – alone in this view. Over the centuries, howls of derision erupted whenever diplomatic method took a seemingly democratic turn. And much of this howling was indeed done by 'the best and the brightest' of the day.

For example, the legendary 18th century lawyer Sir William Blackstone in his legal classic **Commentaries on the Laws of England** (1765-1769) expressed a common view of the time that legislative assemblies should never be involved in the conclusion of treaties. Rather, such activities should be left exclusively to the Executive Branch of government.

To put it in Sir William's words:

'It is impossible that individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king therefore, as in a centre, all the rays of the people are united, and form by that union a consistency, splendour, and power, and that make him feared and respected by foreign potentates; who [Sir William asked] would scruple to enter into any engagements, that must afterwards be revised and ratified by a popular assembly.'⁷

Thereafter – as if to spite him – the American colonies revolted and installed a constitution which gave their president the powers to make treaties 'by and with the Advice and Consent of the Senate ... provided two thirds of Senators present concur'.⁸

As one commentator put it:

'The United States, in fact, was introducing a new principle into the diplomatic practice of the world. She had made her treaties a supreme part of the law of the land and therefore had given the [Senate] ... a part in enacting them. ... She was a democracy and as such had declined to entrust the superlatively important function of treaty-making to the executive alone ... And in due time the world consented to deal with the United States in the manner made necessary by her form of government.'⁹

Actually, the Founding Fathers' ideal was not easily realised. George Washington (in keeping with the spirit of the new constitution) entered the Senate in August 1789, presented a paper on his proposed treaty with the southern Indians, and then asked Senators certain questions regarding their advice and consent on the treaty. This was

⁶ See de Tocqueville, above, Chapters VIII and XVII.

⁷ Book 1, Chapter 7.

⁸ Article II (2).

⁹ R Hayden, **The Senate and Treaties, 1789-1817** (1920) pp 155-56.

because – ideally – the Senate was supposed to **advise** on the content of prospective treaties. Ironically, Washington fretted over the Senators’ advice and their possible delays in consent for his treaty. As John Quincy Adams recalls: Washington left the Senate Chamber saying he would be damned if he ever went there again.¹⁰

But Washington did return to the Senate and a new system of treaty making evolved. The Senate never turned into the council of advisers for proposed treaties that Washington and his compatriots had hoped for. But the Constitution was ‘adapted’, so to speak, in a manner which meant that the Senate was eventually regarded as having a power (under Article II of the Constitution) which was tantamount to that of a veto over treaties.¹¹ Conversely, the President was regarded as having the power to enter into compacts (which were treaties on the international plane) **without** the advice and consent of the Senate. (Although – in order to implement such treaties on the domestic plane – simple majorities in Congress might be required to pass laws for this purpose.) Such treaties became known as ‘Executive Agreements’ (which were not deemed to be treaties for the purpose of municipal American law).^f

In some ways, then, the vision of the American founding fathers’ prevailed.¹² Two centuries after their War of Independence it was unexceptional for constitutions around the world to provide for intervention by the legislature prior to the Head of State ratifying a treaty.¹³

I would observe that not everyone accepts this as a good thing. The renowned diplomatic theorist Harold Nicholson – in the middle of the twentieth century – wrote a polemic against both transparent diplomacy and the ratification of treaties by legislatures. He argued that they were blights on modern diplomatic method. This argument was largely premised on how the ordinary masses, in matters of foreign policy, displayed a lack of knowledge and understanding which cruelled their country’s national interests.^g

Of course, there can be no doubting the importance of confidentiality in effective negotiation.¹⁴ Nicholson surely had a point when he complained about negotiating treaties ‘in public’ and under a publicly declared mandate. It is a near impossible task for a diplomat to negotiate a treaty when his or her bottom line is known in advance and where any concession made may (and probably will) be bruited as a defeat for the government which made it. Even worse for diplomats is the preliminary travail of a negotiation which depends on a large number of people with conflicting interests

¹⁰ **The Role of the Senate in Treaty Ratification - A Staff Memorandum to the Committee on Foreign Relations United States Senate** (1977) J Sparkman (Chair) p 34.

¹¹ *Id.*, pp 36-49.

¹² Alexander Hamilton wrote that the power to make treaties is neither a wholly executive nor wholly legislative function and that the joint possession of that power ‘would afford a greater prospect of security, than the separate possession of either of them.’ **The Federalist**, LXIV. (Attributed to Hamilton.)

¹³ ‘A comparative study of the constitutions in force shows that in most countries the intervention of parliament is required before final ratification by the Head of State.’ JM Ruda, **The Final Acceptance of International Conventions** (1976) p 23.

¹⁴ Modern text books on negotiating flag this importance, eg: Fisher, Ury and Patton, **Getting to Yes: Negotiating an agreement without giving in** (1991) p 37: ‘A good case can be made for changing Woodrow Wilson’s appealing slogan “Open covenants openly arrived at” to “Open covenants privately arrived at.”’.

settling clear instructions for those diplomats to negotiate a diplomatic outcome. Compare this with the certainty and celerity of an envoy negotiating on behalf of a single, determined and well-informed executive and you can see how easy it is for diplomats to sympathise with Nicholson.

In Nicholson's lifetime, however, diplomacy's remit moved from rudimentary statecraft to complex law-making. Nicholson never saw how this shift would capture – indeed demand – the involvement of popular opinion in diplomacy. In this context may I hearken to Edmund Burke. No matter how much he detested radical revolution, he still held that good policy was based on popular opinion.¹⁵ No doubt he included good foreign policy in this maxim.

Still, Burke's faith in public opinion's power to devise 'good policy' was treated as a vagary at the time. Perhaps his view was at odds with so many others because he believed in, as he put it, 'the great mysterious incorporation of the human race' and a political system in symmetry with the order of the world.^h Contrariwise, Nicholson (a self-styled humane sceptic) would have dismissed Burke's view as quixotic – at least in the context of foreign policy – citing historical examples of democratic foreign policy destroying 'democrats'.¹⁶ Nicholson would have similarly disdained Woodrow Wilson's ideal of 'Open covenants ... openly arrived at'. Finally, Nicholson was alarmed at the important change to 'the diplomatic method' signified by the US Congress refusing to ratify a treaty which Wilson had negotiated and signed in person.¹⁷ (*Plus ça change; plus c'est la même chose.*)

Yet, Australia provides an interesting example of the general trend by legislatures towards adopting more so called 'democratic' forms in the process of treaty making, and it is that development which I will primarily focus upon.

As with so much other of our constitutional development, its origins lay in the British experience. In 1924, the United Kingdom instituted a constitutional policy known as 'the Ponsonby Rule': by which every treaty requiring ratification by the Crown would, after signature, be laid on the tables of both Houses of Parliament for a period of 21 days prior to the treaty's ratification.

Subsequently, in Australia in 1961, Prime Minister Menzies followed the British lead by making a commitment that henceforth the texts of treaties, which until then had not normally been brought to the attention of Parliament, would be tabled in both Houses.

Still, many Australian parliamentarians regarded this mere tabling – without provision for parliamentary consideration or debate – as an inadequate form of review. So they called for a more comprehensive system of parliamentary scrutiny of treaties.¹⁸

¹⁵ '[Burke] recognises, what is now obvious enough, that English policy rests on the opinion of a reasonable democracy.' Payne, above, p ix. But cf Burke's disdain (id at pp 47-53 and 290-94) for the libertine National Assembly of the French revolutionaries.

¹⁶ Cf Harold Nicholson, **The Evolution of Diplomatic Method: being the Chichele lectures delivered at the University of Oxford in November 1953** (1954) pp 10-14, 90-91.

¹⁷ Id, pp 84-89.

¹⁸ BR Opekin, 'The Role of Government in the Conduct of Australia's Foreign Affairs', **Australian Year Book of International Law**, 1994, Vol 15, pp 129-153 at pp 138-139.

And, in particular, the criticism of the treaty making process began to grow among the States and Territories of Australia.

For three reasons much of this criticism was at the time downplayed, by way of arguing three key propositions:

First of these was to point out that, unless treaties are implemented by legislation, they do not have legal force on the domestic plane in Australia.¹⁹ That only occurs when laws – approved by both Houses of Parliament, or a delegate of Parliament – are in place to implement obligations of a treaty.

Secondly, it was noted that the Australian government's policy was not to enter into a treaty unless and until that treaty was consistent with Australia's state and territory legislation.

Thirdly, the implementation of a treaty – domestically – by legislation affords parliamentarians a chance to scrutinise that treaty.

Thus, it was argued, Parliament already had an important say in the way treaties were applied domestically, and no further role for it was necessary.

This argument was lacking in some important respects; not least because a treaty may expand the legislative power of the Federal Parliament with respect to external affairs and thereby confine the executive and legislative powers of the States.

The foregoing comments might suggest that the proper ambit of the Federal Parliament's legislative capacity to implement treaties under the external affairs power was well settled by the courts. Actually, prior to 1980,ⁱ there was little judicial deliberation on the constitutional extent of this power.

In this context, the States had (indeed, still have) an important role in treaty making for both a constitutional and a political reason.

The **constitutional** reason was that only a few legislative powers are vested **exclusively** in the Australian Parliament. Generally, federal legislation which was constitutionally valid (say, for example, laws to protect the environment) existed concurrently with states laws – unless the state laws were inconsistent – in which case such federal legislation prevailed.

The **political** reason was that – although the Federal Parliament had the power to implement treaties through its own legislation – it could also implement treaties through state laws. Further, in practice, the Commonwealth had chosen not to legislate to implement treaties regarding matters that traditionally fell within the bailiwicks of the states.

¹⁹ Per Justice Dixon: 'A treaty ... which does not terminate a state of war has no legal effect upon the rights and duties of the subjects of the Crown'. **Chow Hung Hing v The King** (1948) 77 CLR 449 at p 478.

This seemingly acceptable state of affairs ended. An end evinced by three key High Court cases. All three cases were challenges to the Federal Parliament's right to legislate in areas that were traditionally reserved to the states. All three failed. In *Koowarta v Bjelke-Petersen*²⁰ the High Court upheld the Racial Discrimination Act 1975 which implemented the International Convention on the Elimination of All Forms of Racial Discrimination 1966. In *The Tasmanian Dam case*²¹ and *Richardson v Forestry Commission*²² the High Court upheld federal Acts implementing the UNESCO Convention for the Protection of the World Cultural and Natural Heritage 1972.²³

After those cases^j (in the eighties) complaints about the treaty making process began to grow – especially among state governments.

In 1995 the Senate Legal and Constitutional References Committee conducted hearings into the treaty making process, which ventilated criticisms of that process. In November that year this committee recommended that legislation be enacted to establish a parliamentary committee which would, among other things, report on proposals by Australia to join any treaty.

By then Coalition members considered that there was a 'democratic deficit' in the way that the Executive entered into treaties; so some changes had to be made, and there was widespread and growing political support for such changes.

In consequence, on 2 May 1996, Mr Downer, the new Minister for Foreign Affairs, set out in Parliament the government's reform policy, to restore confidence in the Australian treaty making process by eliminating 'the democratic deficit' in that process. The new policy provided that the arrangements for parliamentary scrutiny of treaties through tabling would apply to all treaty actions, multilateral as well as bilateral, and extend not only to new treaties but to all actions to amend, terminate or withdraw from treaties, where such actions would have a legally binding impact on Australia. And a new joint parliamentary committee, the Joint Standing Committee on Treaties (JSCOT) would be established to review and report on the actions tabled.

This policy meant that parliamentarians could make considered reports on proposed treaties before the government decided whether Australia should join them. Nonetheless, the government did not have to follow these reports; it could join a treaty even where JSCOT recommended against this. In other words, parliamentary approval was not required before the Executive government agreed to join a treaty.

So, put simply: Australia's treaty making process normally²⁴ means that before Australia ratifies a treaty, that treaty will be tabled in parliament with an explanation from the relevant department on why the treaty will serve the national interest. JSCOT (the parliamentary committee responsible for Treaties) considers the treaty, invites views from the general public, holds public hearings, and (because Australia is a Federal State) it also considers the views of States and Territories. JSCOT then

²⁰ (1982) 153 CLR 168.

²¹ (1983) 158 CLR 1.

²² (1988) 164 CLR 261.

²³ BR Opeskin, above, at p 141.

²⁴ In cases of emergency a treaty action may be taken before it is tabled.

writes a report recommending whether (or not) the treaty should be ratified - which is submitted to parliament and published. The government then takes a decision whether to proceed with ratification of the treaty. The government may still ratify a treaty even if JSCOT recommends against it.^k

Initially, before the new committee had even been set up, these bold proposals were subjected to a degree of criticism.

There were objections to opening up the government's executive treaty making responsibility to parliamentary scrutiny and public consultation in this way.

- a) It was implied that the Coalition was seeking to limit international engagement through new treaty obligations because it believed that those commitments somehow diminished Australian sovereignty.
- b) It was said that a cloud of uncertainty and inefficiency would hang over our treaty negotiations; that Australian diplomacy would be hamstrung by the legislature; that JSCOT would simply add a further layer of useless bureaucracy to the treaty-making process; and so on.

Such lines of criticism about 'democratising' foreign policy have a long pedigree (some of which I detailed at the start of this presentation).

Which brings me back to part of that quote of Sir William Blackstone I cited earlier in this presentation, namely his **cri de couer**:

'who would scruple to enter into any engagements, that must afterward be revised and ratified by a popular assembly'?

The answer today can be gleaned from the fact that intervention by legislatures in the treaty making process is now a norm around the world (rather than the exception).¹ Further, a simple extrapolation indicates that (before long) a large majority of states in the world will have treaty making processes where proposed treaties are subject to some form of review or approval by legislatures.

I may further observe that – as democracy continues to spread around the world – the development and negotiation of treaties looks likely to become more democratic. Accordingly, concerted lobbying of governments by their civil society constituencies on matters of foreign policy is gaining in acceptance and momentum. This dynamic – however galling it might be to politicians and diplomats – will likely become a pervasive and powerful aspect of international relations.

In Australia, since JSCOT began its work, the criticism of parliamentary review of treaty making has not yet entirely faded away, but it is much dimmer. Overall, JSCOT has been a significant success in dealing with the new dynamics of sovereignty, diplomacy and treaty making in a rapidly globalising world.

What should not be forgotten is that JSCOT has been established through a stated policy; not by law. So our system of treaty review may evolve quickly and effectively with the dynamics of modern diplomacy.

We have none of the technical and legal obstacles faced by the United States under Article II, Section 2 of its Constitution, which requires that treaties can only be made

with the advice and consent of two-thirds of the Senate. The result of which is that the United States enters into many international agreements which are treaties on the international plane; but not treaties under US law.

But at the same time we do have a system which upholds democracy and pluralism through proper scrutiny. A system, moreover, which has the flexibility to adapt to Australia's requirements as treaties become an ever more important dynamic in the world and for all our lives. And this system needs to be flexible and adaptable.

With Australia's treaty making practice now bedded down, we find ourselves singularly well placed to adapt to, and thrive in, this regime of international engagement and agreed reciprocal obligations, without surrendering our democratic sovereignty to decide what is in our best interests.

It also looks likely to be the case that as globalisation continues apace we will soon see nations' executive governments routinely adopting – into their **domestic** law – rules which do not originate from legislatures; but which are prescribed by international organisations.

Today, international bodies routinely prescribe international rules intended to have municipal application.²⁵ This process of rule prescription springs less and less from the slow process of using treaties to amend earlier treaties and more and more from the rapid process of mere votes or resolutions of organs of international bodies which are established under treaties. The rules so prescribed are being adopted – as domestic laws – by executive governments:

- a) almost universally,
- b) almost routinely, and
- c) **sometimes** – where minor technical and administrative matters are concerned – almost automatically.

Put simply:

- a) treaty laws are expanding in reach and impact around the globe;
- b) they now influence our lives as pervasively as our domestic laws; and
- c) they are turning 'the global governance of international problems' into a virtual reality.

So, as international organisations take a greater and greater role in prescribing rules that will apply in domestic jurisdictions, the importance of JSCOT's scrutiny of treaties will increase; because JSCOT will be judging:

- a) not only how Australia is bound on the international plane,
- b) but also which 'global rules' Australia should adopt.

More importantly, the nature of diplomacy is changing in a way that will empower popular constituencies of civil society; thereby making parliaments' organs for treaty review (like JSCOT) that much more important as instruments for those constituencies.

²⁵ Cf Schermers and Blokker, **International Institutional Law** (1995) p 977.

Under traditional statecraft, diplomats negotiated with each other in order to determine foreign policies. Policies that served what their government's judged to be the national interest.

Treaties were the result.

The extent that domestic constituencies influenced these treaties increased over the centuries as democracy spread and as technology improved the capacity of people (not just governments) to co-operate on international issues. These influences have turned into a juggernaut.

It is obvious that international relations are now directed and influenced by a much larger number of powerful agents than a few decades ago.

While I do not claim that the sovereignty of the nation state is under threat, already some aspects of international governance are being driven by forces that are outside the control of governments acting alone. Take the Ottawa Convention on the Prohibition of Anti-Personnel Mines, which has been signed by over 150 states. I do not wish to take anything away from the governments who brought the Ottawa Convention into force. But it was a non-governmental organisation launched in 1992 – **the International Campaign to Ban Landmines** – which sparked the world-wide movement to ban land mines.

The official 'DFAT View' of the negotiating history for the Ottawa convention provides some illuminating insights into what happened and its implications:

'The history of the landmines ban and Australia's approach to it is instructive in that government had to respond to what was arguably the first internet-enabled lobbying campaign. Information about landmines, about the campaign, about various governments' attitudes to it, and about mobilisation and lobbying strategies could be exchanged nationally and globally as never before. Compared to earlier, letter-writing campaigns, the pressure on governments was increased exponentially. The landmines ban was also an early example of the sort of cross-cutting issue which has become the norm in a globalised world: the arcaneries and – in the eyes of detractors, lethargy – of international arms control negotiations colliding with the impatience of passionate humanitarian advocates.'²⁶

In these campaigners' unanimity of measures and strength of execution can we hear 'the sound of distant thunder'? Inevitably, such 'people's diplomacy' has been condemned as naïve and ingenuous; because the 'negotiating mandates' of civil societies risks subverting national interests. Indeed, the **International Campaign to Ban Landmines** received exactly that criticism – because it handed a tactical advantage to objectionable regimes and deprived unobjectionable regimes of cheap, efficient materiel. (The sort of 'democratic' outcome that Harold Nicholson had always warned us would come about from a 'democratic' diplomacy.)

²⁶ See Chapter 6 'The Ottawa Convention: negotiating history—DFAT view' in the book by Patricia Pak Poy: **A Path is Made by Walking It: Reflections on the Australian Network to Ban Landmines, 1991-2006**, (2007).

The wider point to be made, however, is that – in our globalising world – it is increasingly likely to be the case that voters will see less and less need to rely on their political executives as diplomatic ‘go-betweens’. Foreign policy is indeed continually witnessing (if you will forgive the terminology): ‘diplomatic disintermediation’. As this trend continues it will likely be easier and easier for constituencies in different countries to deal directly with each other in order to exert pressure on their respective governments. Pressure to influence, change, and determine foreign policies.

Governments may still hold the authoritative and primary control in determining foreign policy. But voters will likely have an increasing voice in how that authoritative control is wielded and which considerations are taken into account as they determine how the national interest is best served.

Put simply:

- a) Foreign policy is less and less the esoteric province of diplomats.
- b) One reason for this is the increasing role of legislatures in the treaty making process - which gives ordinary citizens a greater voice in that process.

Under the Australian government’s treaty review policy parliamentarians can make considered reports on proposed treaties before the government decides if Australia should join such agreements. So Australia’s treaty making process can no longer be criticised as one which allows faceless bureaucrats to usurp states’ ‘sovereignty’ or individuals’ rights.

Arguably, this can increasingly be seen as a system of ‘democratic diplomacy’, where the role of JSCOT is critical in ensuring that our domestic constituency’s views and concerns are taken into account in determining Australia’s foreign policy outlook. As citizens become more aware of (and involved in) treaty making the constitutional competence of JSCOT is likely to grow – a development which, I surmise, would have met Burke’s approval as one achieving a political symmetry with the (growingly democratic) order of the world.

For Burke’s belief about the ‘method of nature’ in the conduct of the state is neither wholly new nor wholly obsolete.

That method of nature can reasonably be seen as the foundation of democracy: an ideal championing the fair contest of ideas; where all have access to the best opinions and the wisest arguments; where polemics rise or fall, triumph or crumble, in the hurly burly of public debate. This is the very nature and way of civil society.

A way which is old indeed. For it is the democratic method of the ancient Athenians; the Periclean ideal of ‘equable voices’: that every citizen may have the opportunity to be heard.²⁷

So I hope that you might also agree that Burke’s view about constitutions is not wholly obsolete either. Indeed, Burke was a herald of de Tocqueville’s conclusions

²⁷ Thucydides, **The Peloponnesian War**, II. Cf Dunn, above, p 27; John Stuart Mill, **Law of Libel and Liberty of the Press**, Westminster Review, III, 1825.

that the triumph of democracy as a political system is inevitable; that democracy's ultimate ascendancy is a law of nature: a corollary of progressive civilisation.²⁸ Put differently, civilisation – in the long run – chooses the best of all systems: the one which demands an increasingly important contribution from civil society.

This is just as well, for in the view of informed observers, a global constitutional crisis may be looming. It is argued that the perennial drift of power from nation states to international organisations is turning into an avalanche, and that, as it crashes down around us, the 'democratic deficit' will become obvious. No doubt, there will be attempts to give 'civil society' the rights not only to challenge these organisations' administrative decisions, but also to elect these organisations' leaders. No doubt, these attempts will be met with howls of derision. *Plus ça change ...*

²⁸ John Stuart Mill, **M De Tocqueville on Democracy in America**, Edinburgh Review LXXII, 1840; reprinted in *Dissertations and Discussions* Vol II (1859).

ENDNOTES

^a Cf Dunn, above, at p 27 ('With the critics of democracy there is a wider range of voices to listen to, not all of them cultured despisers like Plato.') and at pp 45-46 (for details of Plato's criticisms of democracy).

^b M Burleigh, **Earthly Powers** (2005) p 92 :

'Tocqueville claimed that, while Robespierre was personally against exporting the Revolution with "armed missionaries", he and his colleagues proselytised their views in the manner of a militant religion, declaring a holy war on the unregenerate regimes of Europe'.

Citing an extract from Alexis de Tocqueville, Furet and Melonio (Eds) **The Old Regime and the French Revolution** (1998) 1, p 101. Cf Alexander Hamilton, 'Pacificus No. 2' July 3, 1793, **Papers of Alexander Hamilton**, 15:55-63.

^cFor example:

'Does [France] not produce something ignoble and inglorious? A kind of meanness in all the prevalent policy? a tendency to lower along with individuals all the dignity and importance of the state? Every person in [France] ... is disgraced and degraded, and can entertain no sensation of life except in a mortified and humiliated indignation ... those who attempt to level, never equalize.'

Payne, above, pp 55-57

^d De Tocqueville's book *Democracy in America* marked the start of the United States' central role in the systematic studies of the links between democracy and civil society. Bowling Alone: America's Declining Social Capital **Robert D. Putnam An Interview with Robert Putnam** <<http://xroads.virginia.edu/~HYPER/DETOC/assoc/bowling.html>>.

^eA fuller quote from Part 1, Chapter XIII of de Tocqueville's **Democracy in America** illustrates de Tocqueville's considered disdain for the decided inferiority of democratic foreign policy making:

'Democracy appears to me better adapted for the conduct of society in times of peace, or for a sudden effort of remarkable vigor, than for the prolonged endurance of the great storms that beset the political existence of nations. The reason is very evident; enthusiasm prompts men to expose themselves to dangers and privations; but without reflection they will not support them long. There is more calculation even in the impulses of bravery than is generally supposed; and although the first efforts are made by passion alone, perseverance is maintained only by a distinct view of what one is fighting for. A portion of what is dear to us is hazarded in order to save the remainder.

But it is this clear perception of the future, founded upon judgement and experience, that is frequently wanting in democracies. The people are more apt to feel than to reason; and if their present sufferings are great, it is to be feared that the still greater sufferings attendant upon defeat will be forgotten.

Another cause tends to render the efforts of a democratic government less persevering than those of an aristocracy. Not only are the lower less awake than the higher orders to the good or evil chances of the future, but they suffer more acutely from present privations. The noble exposes his life, indeed, but the chance of glory is equal to the chance of harm. If he sacrifices a large portion of his income to the state, he deprives himself for a time of some of the pleasures of affluence; but to the poor man death has no glory, and the imposts that are merely irksome to the rich often deprive him of the necessaries of life.

This relative weakness of democratic republics in critical times is perhaps the greatest obstacle to the foundation of such a republic in Europe. In order that one such state should exist in the European world, it would be necessary that similar institutions should be simultaneously introduced into all the other nations.

I am of opinion that a democratic government tends, in the long run, to increase the real strength of society; but it can never combine, upon a single point and at a given time, so much power as an aristocracy or an absolute monarchy. If a democratic country remained during a whole century subject to a republican government, it would probably at the end of that period be richer, more populous, and more prosperous than the neighboring despotic states. But during that century it would often have incurred the risk of being conquered by them.

Conduct OF FOREIGN AFFAIRS BY THE AMERICAN DEMOCRACY. Direction given to the foreign policy of the United States by Washington and Jefferson--Almost all the defects inherent in democratic institutions are brought to light in the conduct of foreign affairs; their advantages are less perceptible.

We have seen that the Federal Constitution entrusts the permanent direction of the external interests of the nation to the President and the Senate, which tends in some degree to detach the general foreign policy of the Union from the direct control of the people. It cannot, therefore, be asserted with truth that the foreign affairs of the state are conducted by the democracy.

There are two men who have imparted to American foreign policy a tendency that is still being followed today; the first is Washington and the second Jefferson.

.....

[Washington] succeeded in maintaining his country in a state of peace while all the other nations of the globe were at war; and he laid it down as a fundamental doctrine that the true interest of the Americans consisted in a perfect neutrality with regard to the internal dissensions of the European powers.

Jefferson went still further and introduced this other maxim into the policy of the Union, that "the Americans ought never to solicit any privileges from foreign nations, in order not to be obliged to grant similar privileges themselves."

These two principles, so plain and just as to be easily understood by the people, have greatly simplified the foreign policy of the United States. As the Union takes no part in the affairs of Europe, it has, properly speaking, no foreign interests to discuss, since it has, as yet, no powerful neighbors on the American continent. The country is as much removed from the passions of the Old World by its position as by its wishes, and it is called upon neither to repudiate nor to espouse them; while the dissensions of the New World are still concealed within the bosom of the future.

The Union is free from all pre-existing obligations, it can profit by the experience of the old nations of Europe, without being obliged, as they are, to make the best of the past and to adapt it to their present circumstances. It is not, like them, compelled to accept an immense inheritance bequeathed by their forefathers an inheritance of glory mingled with calamities, and of alliances conflicting with national antipathies. The foreign policy of the United States is eminently expectant; it consists more in abstaining than in acting.

It is therefore very difficult to ascertain, at present, what degree of sagacity the American democracy will display in the conduct of the foreign policy of the country; upon this point its adversaries as well as its friends must suspend their judgment. As for myself I do not hesitate to say that it is especially in the conduct of their foreign relations that democracies appear to me decidedly inferior to other governments. Experience, instruction, and habit almost always succeed in creating in a democracy a homely species of practical wisdom and that science of the petty occurrences of life which is called good sense. Good sense may suffice to direct the ordinary course of society; and among a people whose education is completed, the advantages of democratic liberty in the internal affairs of the country may more than compensate for the evils inherent in a democratic government. But it is not always so in the relations with foreign nations.

Foreign politics demand scarcely any of those qualities which are peculiar to a democracy; they require, on the contrary, the perfect use of almost all those in which it is deficient. Democracy is favorable to the increase of the internal resources of a state, it diffuses wealth and comfort, promotes public spirit, and fortifies the respect for law in all classes of society: all these are advantages which have only an indirect influence over the relations which one people bears to another. But a democracy can only with great difficulty regulate the details of an important undertaking, persevere in a fixed design, and work out its execution in spite of serious obstacles. It cannot combine its measures with secrecy or await their consequences with patience. These are qualities which more especially belong to an individual or an aristocracy; and they are precisely the qualities by which a nation, like an individual, attains a dominant position.

If, on the contrary, we observe the natural defects of aristocracy, we shall find that, comparatively speaking, they do not injure the direction of the external affairs of the state. The capital fault of which aristocracies may be accused is that they work for themselves and not for the people. In foreign politics it is rare for the interest of the aristocracy to be distinct from that of the people.

The propensity that induces democracies to obey impulse rather than prudence, and to abandon a mature design for the gratification of a momentary passion, was clearly seen in America on the breaking out of the French Revolution. It was then as evident to the simplest capacity as it is at the present time that the interest of the Americans forbade them to take any part in the contest which was about to deluge Europe with blood, but which could not injure their own country. But the sympathies of the people declared themselves with so much violence in favor of France that nothing but the inflexible character of Washington and the immense popularity which he enjoyed could have prevented the Americans from declaring war against England. And even then the exertions which the austere reason of that great man made to repress the generous but imprudent passions of his fellow citizens nearly deprived him of the sole recompense which he ever claimed, that of his country's love. The majority reprobated his policy, but it was afterwards approved by the whole nation.

If the Constitution and the favor of the public had not entrusted the direction of the foreign affairs of the country to Washington it is certain that the American nation would at that time have adopted the very measures which it now condemns.^f <<http://xroads.virginia.edu/~HYPER/DETOC/home.html>>.

^f J Sparkman, above, pp 1-4..

^g Harold Nicholson, above, pp 89-90.

^h Perhaps it is the propensity of humans to 'incorporate' that underpins the durability of democracies. It has been noted that when de Tocqueville visited the United States in the 1830s:

`it was the Americans' propensity for civic association that most impressed him as the key to their unprecedented ability to make democracy work. "Americans of all ages, all stations in life, and all types of disposition," he observed, "are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types--religious, moral, serious, futile, very general and very limited, immensely large and very minute. . . . Nothing, in my view, deserves more attention than the intellectual and moral associations in America".`
<<http://xroads.virginia.edu/~HYPER/DETOC/assoc/bowling.html>>.

ⁱ **The King v Burgess; Ex Parte Henry** (1936) 55 CLR 608 represented the first proper consideration by the High Court of the Federal Parliament's legislative power to implement a treaty under the 'external affairs' power conferred by sec. 51 (xxix) of the Constitution.

^j See BR Opeskin, above, at pp 141-146. For a typical screed against these High Court decisions see: Dr Colin Howard, 'Australia's Diminishing Sovereignty' **Chapter 9, Proceedings of the Second Conference of The Samuel Griffith Society**, The Windsor Hotel, Melbourne; 30 July - 1 August 1993.
<<http://www.samuelgriffith.org.au/papers/html/volume2/v2chap9.htm>>. Cf IDF Callinan 'International Law and Australian Sovereignty', Latham Lecture, **Quadrant**, July-August 2005, No 418 (Vol XLIX, No 7-8) pp 9-17 especially the 'question of democracy' raised by the damming of the Franklin River at p 11.

^l Jose Maria Ruda, above, pp 23-29.