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# **The Constitutional Evolution of Deliberative Democracy in Treaty Making<sup>1</sup>**

‘Truth springs from arguments among friends’

*David Hume*

‘Implicit ... in the very idea of ordered liberty, was a rejection of absolute truth’

*Barack Obama*

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<sup>1</sup> This is an expanded version of a speech which was presented by Mr David Mason (Executive Director, Treaties Secretariat, DFAT) at the ANZSIL Conference in Canberra on 30 June 2007.

## **Abstract**

A constitution – that is, whatever constitutes the relationships of the principal organs of a state in terms of how they govern that state – must adapt with the changing circumstances not only of the state that it constitutes but also the world community in which that state abides.

In the new international legal order treaties are taking on the role of, what is in effect, international legislation. These ‘law making’ treaties raise fundamental constitutional questions about how the principal organs of government may best consider and adopt international conventional law.

On the international level, during the twentieth century, the seemingly ineluctable rise of democracy into the ascendant form of national government supposedly generated a more democratic world order. Yet, ironically, the lack of direct accountability of the ‘treaty-law makers’ to civic constituencies raises questions about how ‘democratic’ the future international legal order may be. Conversely, on the municipal level the making of foreign policy is arguably becoming increasingly democratic. This is not simply because more and more countries have purportedly adopted democracy; but also because many established democracies’ processes for developing treaties have seemingly developed more ‘democratic’ forms. As a result, many democracies’ executive governments are gradually being influenced by their legislatures – and thereby civil society – in the process of treaty making.

Traditionally, democracy was held to be inimical to good foreign policy; but, from the perspective of modern international relations, this view has little salience. Indeed, this paper *inter alia* examines the view that the concept and reach of democracy needs to expand. It must be more than government by elected representatives. And it must be more than mandatory consultations between the executive and legislative branches on policy formulation. It is argued that an additional attribute of democracy should be the right of ordinary constituents to be heard by law makers on prospective laws. This ‘opportunity for interlocution’ is depicted as fundamental ‘political capital’ for a liberal, pluralist society – especially because it gives minorities a say in government. Therefore, the argument is made that the constitution of any liberal, pluralist society would be better if it were to incorporate principles of ‘deliberative democracy’ in its law making.

In this context, treaty making presents a dilemma regarding the constitutional adoption of deliberative democracy. This is because treaty making fuses both executive and law making power. Conventionally,

executive decision making was duly carried out by responsible officials; while democratic law making has nearly always been done in public and subject to debate. Arguably, this dilemma is being resolved in liberal democracies around the world by constitutional practices which favour deliberative democracy: legislatures are becoming a medium which allows public participation in treaty making and, in particular cases, informs the public about the impact of proposed treaties.

This paper examines the historical evolution of these practices as they relate to treaty making.

Before the American Revolution the executive branch of governments had a monopoly on foreign policy. After the American Revolution, as democracy became an increasingly popular form of government, a jurisprudence of ‘deliberative democracy’ slowly evolved.

The Founding Fathers of the American constitution were wary of the dangers of majoritarian rule. Consequently, their constitution instituted a system of ‘checks and balances’. This governmental scheme required the executive and legislative branches of government to discuss and negotiate proposed governmental policies. The US constitution did not make either branch of government subordinate to the other. Nor did it grant each of these branches a discrete independence – which might have allowed them to operate in splendid isolation from each other. Rather, it forced both branches to deliberate together in order to attain policy ends. (One aspect of this deliberative system was that any treaty negotiated by the US President would still require ratification by a two thirds majority vote of the Senate.)

Following the successes of US democracy its philosophy of institutional policy dialogues between branches of government has become increasingly popular around the world as a process for treaty making.

In addition, it was argued (from the example of the American system) that in order for laws to gain legitimacy ‘majority rule’ must be complemented by ‘deliberative democracy’: formal processes of discourse – in public forums – about important policy questions, (in particular, to give a proper hearing to dissenters.) Many established democracies (including Australia) have adopted this system of deliberative democracy – in one form or another – for their treaty making processes. Arguably, Australia is a good example of how deliberative democracy can be made to work, in practice, to enhance these processes.

More controversially, it can even be argued that constituencies around the world are no longer relying on the executive as a 'go-between' to negotiate treaties between sovereign states. Increasingly, ordinary citizens are engaging in trans-national co-operation among themselves in order to determine the content of treaties (which governments often then adopt). This new dynamic in international relations arguably amplifies the process of deliberative democracy in treaty making.

It is concluded there is a credible case for arguing that deliberative democracy has become increasingly important in allowing civil society to have a say in treaty making and therefore in foreign policy. This, in turn, may well change the way that the international legal order evolves: requiring treaty making to be more democratic and treaty makers to be more accountable.

*For I dipt into the future, far as human eye could see,  
Saw the Vision of the world, and all the wonder that would be; ...*

*Far along the world-wide whisper of the south-wind rushing warm,  
With the standards of the peoples plunging thro' the thunder-storm;*

*Till the war-drum throb'd no longer, and the battle-flags were furl'd  
In the Parliament of man, the Federation of the world.*

*There the common sense of most shall hold a fretful realm in awe,  
And the kindly earth shall slumber, lapt in universal law.*

**Alfred, Lord Tennyson, "Locksley Hall" (1842)**

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.’<sup>2</sup>

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.<sup>3</sup>

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<sup>2</sup> EJ Payne, **Burke Select Works Vol II** (1888) p 39. Cf the ‘constitutive’ theory of a ‘living’ international legal order posited by NG Onuf in ‘International legal order as an idea’, **American Journal of International Law** 73 (1979) pp 244-56.

<sup>3</sup> The modern definition of the term ‘democracy’ springs from the example of the United States, which evolved representative liberal democracy where elected rulers’ power was alloyed by respect for individuals’ inalienable civil rights. (Cf Jurgen Habermas, ‘Popular Sovereignty as Procedure’ James Bohman and William Rehg (Eds) **Deliberative Democracy: Essays on Reason and Politics** (1997) pp 35-65.)

The cornerstone for debates about the form that this new American democracy would take was ‘classical democracy’ (ie the ancient form of government founded in Athens by Kleisthenes in 507BC). Nonetheless, classical democracy differed from *liberal* democracy (where individuals’ civil rights are legally protected). The ‘*demokratia*’ of the ancient Greek republics established community rule; but did not guarantee their citizens any legal rights against those communities. Paul A Rahe, **Republics Ancient and Modern** (1992) p 19, John Uhr, **Deliberative Democracy in Australia** (1998) p 21.

The ‘Founding Fathers’ of the United States were opposed to the tyrannical majoritarianism of such ‘classical’ democracy, albeit their approaches differed on how civil rights might trammel majoritarianism. Three examples will suffice:

a) Thomas Jefferson saw a government ruled by elected representatives as a compromise between the ‘Leviathan’ of absolute monarchy and the majoritarianism of pure democracy; but he feared that even this ‘middle way’ faced the pitfall of elected politicians acting unjustly. Therefore, he supported a bill of rights as a bulwark against congressional tyrants. Paul A Rahe, above, pp 718-20; cf Thomas L Pangle, **The Spirit of Modern Republicanism** (1988) pp 124-127.

It is interesting that Burke's philippic against the French Revolution is now only remembered (if at all) as the screed which provoked Thomas Paine's direct rebuttal. A pamphlet called: **The Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution**. And **The Rights of Man** became the most famous polemic for democratic government ever penned. It was reported:

'In England *The Rights of Man* encountered a response like no other in English publishing history. The poor pooled their pennies, supplementing it with meager savings to buy the book. The Rights of Man became an underground manifesto, passed from hand to hand, even when it became a crime to be found with it in one's possession. The book became a bible to thousands of citizens who dreamed of a free England. Time after time, when men were tried for treason, invariably the Crown offered as evidence to the jury the fact that these men possessed a copy of *The Rights of Man*.'<sup>4</sup>

Simply put, democracy was virtually treason. But, while Paine's arguments could not be silenced – indeed, his shibboleth of 'democracy' eventually smashed the constitutional conventions of Europe – a fascinating question remains: exactly what was this 'democracy' Paine was fighting for?

b) Alexander Hamilton execrated ancient 'direct' democracy as follows:

'It has been observed that a pure democracy if it were practicable would be the most perfect government. Experience has proved that no position is more false than this. The ancient democracies in which the people themselves deliberated never possessed one good feature of government. Their very character was tyranny; their figure deformity.'

Speech in New York, urging ratification of the U.S. Constitution (1788-07-21) <[http://en.wikiquote.org/wiki/Alexander\\_Hamilton](http://en.wikiquote.org/wiki/Alexander_Hamilton)>. It is received wisdom that Hamilton objected to a bill of rights in the US Constitution eg <[http://en.wikipedia.org/wiki/Federalist\\_No.\\_84](http://en.wikipedia.org/wiki/Federalist_No._84)>. But, to be fair to him, he argued that 'that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.' This was because some civil rights - like **habeas corpus** - were guaranteed in the Constitution. Alexander Hamilton, **The Federalist No. 84** 'Certain General and Miscellaneous Objections to the Constitution Considered and Answered' *Independent Journal*, July 16, July 26, Saturday, August 9, 1788, <<http://www.constitution.org/fed/federa84.htm>>.

c) James Madison was even more disparaging of classical democracy than Hamilton. Madison wrote: 'Had every Athenian citizen been a Socrates ... every Athenian assembly would still have been a mob'. Rahe, above, p 324. Madison initially opposed a bill of rights for the United States because (like Hamilton) he believed the US constitution was a bill of rights. But (like Jefferson) he became a champion for such a bill as an adjunct to that constitution. See generally Robert A Goldwin, **From Parchment to Power: How James Madison Used the Bill of Rights to Save The Constitution** (1997).

Accordingly the United States adopted a 'bill of rights'. See generally Herbert J Storing, 'The Constitution and the Bill of Rights' Robert A. Goldwin and William A. Schambra (Eds) **How Does the Constitution Secure Rights?** (1985).

With the passage of time, the distinction between 'liberalism' (ie legal guarantees of civil freedoms) and democracy has eroded. (Perhaps because modern 'majoritarian' democracy consistently establishes civil rights - one way or another - through majority rule.) It is therefore submitted that 'democracy' putatively connotes 'liberalism'. See, for example, the definition of 'Democracy' in Bullock, Stallybrass & Tromby (Eds) **The Fontana Dictionary of Modern Thought** (1988) 2nd Ed p 211. That said, the term 'liberalism' has a plethora of meanings. (See John Dewey's summary of the evolution, in the nineteenth century, of 'liberalism' as a social philosophy which believed that legal rights do not afford sufficient protection for individuals and insisted that the state must intervene to ensure 'actual' liberty; rather than mere 'legal liberty', **Liberalism and Social Action** (1935) pp 2-27; cf CB MacPherson. **Democratic Theory: Essays in Retrieval** (1973) at pp 5-6 on the accommodation in the nineteenth century of the 'pre-democratic' liberal tradition with modern democracy; and at p 51 on liberalism as the basic criterion of 'democracy'.)

<sup>4</sup>The First Boston Edition of *The Rights of Man* A Political Pamphlet by Thomas Paine Published in 1791 <<http://www.earlyamerica.com/earlyamerica/writings/rights/>>.

‘International’ definitions of democracy are typically minimalist, simply associating democracy with regular elections. This seems inadequate as a political exemplar.<sup>a</sup>

A decent working definition of ‘democracy’ is: a political ideal which ensures not only that certain civil rights obtain equally and for all,<sup>b</sup> but also that the voice of civil society is heard on matters of public importance.<sup>5 c</sup>

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 understanding of how the term ‘democracy’ has evolved historically, and how that relates to the more modern notion of so-called ‘deliberative democracy’.

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.’<sup>6 d</sup>

Dunn’s observation, which sounds startlingly anachronistic,<sup>e</sup> has no greater purchase than when it is applied to the so-called ‘diplomacy of democracy’ which bubbled up in previous centuries.<sup>f</sup>

For example, during the French Revolution, Robespierre resurrected – as a political standard – the much shunned ‘democracy’ to reify his grand vision for society.<sup>7</sup> The foreign policy that ensued was as much a ‘terror’<sup>g</sup> 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.)<sup>h</sup>

Even the great publicist for early American democracy<sup>i</sup> Alexis de Tocqueville<sup>j</sup> considered that democracy vitiated foreign policy. Indeed, he saw democracy as — systemically — quite deficient in matters of external affairs.

To quote him:

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<sup>5</sup> Modern democracy is ‘indirect’: its primary institutional method for giving a voice to civil society is the election of representatives who govern. An indirect democracy may, or may not, have institutions that require governmental **deliberative** processes to hear citizens with an interest in the given outcomes of that process. Contrariwise, a direct democracy (where the community votes on governmental decisions) is inherently a ‘deliberative democracy’. Since the ancient democratic ideal of ordinary citizens having a **direct** say in government decisions has faded; the term ‘deliberative democracy’ is now needed to connote that category of democracies where citizens have the legal right to be heard during deliberations by their leaders. Cf Uhr, above, pp 20-21. Nonetheless, Joshua Cohen rejects the idea that direct democracy is ‘the natural or necessary form of expression of the deliberative ideal’, Bohman and Rehg, above, pp 67-91 at p 85. But cf Russell Hardin’s warning that most ordinary people lack the motivation to participate in deliberations on most public policy and that ‘*Popular Democracy in a large society with representative government subverts deliberation.*’ ‘Deliberation: *Method Not Theory*’ S Macedo (Ed), **Deliberative Politics** (1999) pp 103-119 at p 115-116.

<sup>6</sup> ‘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.

<sup>7</sup> Dunn, above, pp 112-118.

'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'.<sup>8</sup>

Accordingly, he saw the success of American democracy as falling somewhere between a curiosity and a paradox. A conundrum which could be explained by America's singular advantages. Natural prosperity, geographical isolation and cultural homogeneity permitted the democratic system of government of the United States to survive.<sup>9</sup> This construct of democracy as 'a House of Cards' looms over Abraham Lincoln's Gettysburg Address.<sup>k</sup>

In short, to De Tocqueville, democracy was inimical to good foreign policy making.<sup>l</sup>

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 18<sup>th</sup> 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 his people are united, and form by that union a consistency, splendor, and power, 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.'<sup>10</sup>

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

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<sup>8</sup> 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' to enforce a society's security); Thomas Hobbes, **Leviathan** (1651) Chapters 17 and 18; John Locke, **Two Treatises on Civil Government** (1689) Vol. II, Chapter 12.

<sup>9</sup> See de Tocqueville, above, Chapters VIII and XVII.

<sup>10</sup> Book 1, Chapter 7, <<http://www.lonang.com/exlibris/blackstone/bla-107.htm>>. Cf the view of John Locke (the preceptor of rational liberalism) that continuous purely lawful rule was impossible in foreign affairs (which were in 'a state of nature') and, accordingly, executive governmental power should be broad. Pangle, above, pp 255-56. Further, Locke insisted that foreign policy should be conducted by a single man. Rahe, above, pp 474-75.

Advice and Consent of the Senate ... provided two thirds of Senators present concur'.<sup>11</sup>

As the commentator Hayden 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.'<sup>12</sup>

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 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.<sup>13</sup>

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. Such 'deliberative micro-management' proved impractical. 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.<sup>14</sup> Conversely, the President was recognised as having the power to enter into compacts with foreign governments **without** the advice and consent of the Senate. Many such compacts were legally treaties on the international plane; but were deemed not to be 'treaties' for the purposes of municipal American law.<sup>15</sup> These treaties 'which dared not speak their name' became known as 'Executive Agreements'. In many cases – in order to implement these Executive Agreements on the domestic plane – simple majorities in Congress were required to pass laws for this purpose. Thus, in such cases, Congress could effectively veto these compacts.

In some ways, then, the vision of the American Founding Fathers prevailed.<sup>16</sup> Two centuries after their War of Independence it was unexceptional for constitutions

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<sup>11</sup> Article II (2). For an analysis of the legal consequences of the US President signing a treaty which remains unratified see Curtis A. Bradley, 'Unratified Treaties, Domestic Politics, and the U.S. Constitution' 48 **Harvard International Law Journal**, H307 (2007) <<http://www.harvardilj.org/print/117>>.

<sup>12</sup> R Hayden, **The Senate and Treaties, 1789-1817** (1920) pp 155-56.

<sup>13</sup> **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.

<sup>14</sup> *Id.*, pp 1-4, 36-49.

<sup>15</sup> See A Gilbert, **Executive Agreements and Treaties** (1973) Chapter 1 for a taxonomy of Executive Agreements.

<sup>16</sup> 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.) The American constitutional vision of the executive and legislative branches exercising overlapping powers in the realm of foreign policy remains controversial to this day. See, Norman J Ornstein and Thomas E Mann, 'When Congress Checks Out' **Foreign Affairs**, Nov/Dec 2006, pp 67-82.

around the world to provide for intervention by the legislature prior to the Head of State ratifying a treaty.<sup>17</sup>

Even back in the 1920s Hayden trumpeted:

‘England and practically every other democracy have now provided some method by which the representatives of the people may have a voice in determining what manner of treaties shall be made. The success of the American experiment demonstrated the practicability of such a system, and paved the way for similar democratic developments in other nations.’<sup>18</sup>

Why has this system proved such an exemplar for so many countries? Well, the US Senate’s participation in treaty making epitomised a broader vision of the American Founding Fathers and a recurrent purpose of their Constitution. US Senator (as he then was) Barack Obama explicated this ideal neatly:

‘What the framework of our Constitution can do is organize the way by which we argue about our future. All of its elaborate machinery – its separation of powers and checks and balances and federalist principles and Bill of Rights – are designed to force us into a conversation, a “deliberative democracy” in which all citizens are required to engage in a process of testing their ideas against an external reality, persuading others of their point of view, and building shifting alliances of consent. Because power in our government is so diffuse, the process of making law in America compels us to entertain the possibility that we are not always right and to sometimes change our minds; it challenges us to examine our motives and our interests constantly, and suggests that both our individual and collective judgments are at once legitimate and highly fallible.’<sup>19</sup>

In other words, American democracy is more than the right to elect a government; it is, or should be, a process which makes people ‘have a conversation’ about what is important.<sup>20</sup>

This ‘forced conversation’, this institution of public deliberation, is intended to determine how ‘the majority’ should form in a democracy; which – by virtue of this defining process – saves majority rule from its own base nature.<sup>21</sup>

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<sup>17</sup> ‘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.

<sup>18</sup> Hayden, above, p 156.

<sup>19</sup> Barack Obama, **The Audacity of Hope: Thoughts on Reclaiming the American Dream** (2006) pp 92-93.

<sup>20</sup> The relationship of liberal representative democracy to ‘deliberative democracy’ is theoretically controversial. Russell Hardin argues that democratic representative government of a large society ‘*subverts deliberation*’ ‘*Deliberation: Method Not Theory*’ Macedo, above, pp 103-119 at p 115. A fundamental constitutional question facing liberal democracy is whether the ambit of civil rights should be set (from time to time) by deliberative legislatures; rather than prescribed under a founding Constitution (whose exact content is left to judicial interpretation). Christian F Rostboll, **Deliberative Freedom: Deliberative Democracy as Critical Theory** (2008), pp 211-212 places the interpenetration of democracy and liberalism in an interesting perspective by arguing that deliberative democracy develops, determines and justifies which individual freedoms should be granted by law. Cf Jurgen Habermas, ‘Popular Sovereignty as Procedure’ Bohman and Rehg, above, pp 67-91; Iris Marion Young ‘Justice, Inclusion, and Deliberative Democracy’ Macedo, above, pp 151-169.

<sup>21</sup> Obama (above, p 92) does not claim that his insight about the US Constitution is original to him. A strong case can be made that the herald of Obama’s concept of ‘deliberative democracy’ is John Dewey, who wrote:

‘the strongest point to be made on behalf of even such rudimentary political forms as democracy has attained, popular voting, majority rule and so on, is that to some extent they involve a consultation and discussion which concerns social needs and troubles. .... De Tocqueville ... pointed out in effect that

## Democracy's genius is arguing about what matters.

Foreign policy matters. Therefore, it can be argued that democracies – informed by public deliberation – have, over more than two centuries, gradually adopted more expedient forms of deliberative democracy for their foreign policy. Consequently, democracies have seen ‘deliberative’ public opinion steadily increase its influence over their foreign policy.

Historically, not everyone has accepted this as a good thing. The renowned British 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.<sup>22</sup> 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 national interests.<sup>23</sup>

Of course, there can be no doubting the importance of confidentiality in effective negotiation.<sup>24</sup> 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 diplomats to negotiate a treaty when their 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 settling clear instructions for those diplomats to negotiate a diplomatic outcome.

popular government is educative as other forms of political regulation are not. It forces recognition that there are common interests, even though the recognition of *what* they are is confused; and the need it enforces of discussion and publicity brings about some clarification of what they are.’ **The Public and its Problems** (1936) pp 206-207.

But Dewey not only saw popular government as enforcing the need for deliberation, (cf Obama, above) he also argued that such deliberation gives minorities purchase against the majority, and the masses leverage against technocrats. As Dewey put it:

Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is *merely* majority rule. As a practical politician, Samuel J. Tilden, said ... : “The means by which a majority comes to be a majority is the important thing”: antecedent debates, modifications of views to meet the opinions of minorities, the relative satisfaction given the latter by the fact that it has had a chance and that next time it may be successful in becoming a majority. Think of the meaning of the “problem of minorities” in certain European states, and compare it with the status of minorities in countries having popular government. It is true that all valuable as well as new ideas begin with minorities, perhaps a minority of one. The important consideration is that opportunity be given that idea to spread and to become the possession of the multitude. No government by experts in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few. And the enlightenment must proceed in ways which force the administrative specialists to take accounts of needs. The world has suffered more from leaders and authorities than from the masses.’ **The Public and its Problems** (1936) pp 207-208. Cf James Madison **The Federalist** Number 10 (attributed to Madison); and Niccolo Machiavelli’s faith in the *vox populi* expressed in **The Discourses**.

Cf James Bohman, **Public Deliberation: Pluralism, Complexity and Democracy** (1996) pp 1-2.

<sup>22</sup> For an example of how ratification of treaties by a legislature can complicate diplomacy see Lloyd E. Ambrosius, **Woodrow Wilson and the American Diplomatic Tradition: The Treaty Fight in Perspective** (1990).

<sup>23</sup> Harold Nicholson, **The Evolution of Diplomatic Method: being the Chichele lectures delivered at the University of Oxford in November 1953** (1954) pp 89-90.

<sup>24</sup> 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.”’.

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.<sup>m</sup>

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. Presumably, he saw treaty making as a process of governmental negotiation. Therefore, secrecy was desirable not only because it facilitated frankness and compromises, but also because it excluded the glare of uninformed public opinion which might skew objectives.

Of course, parliamentary democracy has many institutions which deliberate secretly in order to govern. It is unremarkable for the important deliberations of executive government to be confidential.<sup>25</sup> (Cabinet being a prime example).<sup>n</sup> So there is nothing peculiar in deliberations about the quintessentially executive power of treaty making being done in secret. Contrariwise, the parliamentary forum is distinctive in that its 'deliberations' are nearly always public.<sup>26</sup> The assumption is that they are public because law making is better done in public.<sup>27</sup> A procedure for public debate about law making (especially citizens' representations to legislatures) makes for better laws.<sup>28</sup>

An intriguing constitutional aspect of treaty making is that it fuses both law making and executive power; which raises a question debated over the centuries: whether or not such international law making should include direct public scrutiny and debate as part of its deliberative process?

In considering this further, we must turn to the science of decision making. There is empirical evidence that groups of exclusive like-minded decision makers deliberating among themselves do not reach equitable compromises; rather they radicalise.<sup>29</sup> Ironically, they stray from 'the Wisdom of the Crowd' and tend towards the extremes of their 'like-mindedness'.<sup>30</sup> (A classic illustration of how foreign policy went wrong when an executive narrowed its deliberations in this way was the United State's aborted 'Bay of Pigs' invasion.)<sup>31</sup> Therefore, engaging inclusive,

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<sup>25</sup> Russell Hardin, above. Macedo, pp 103-119, at p 115-116 draws a distinction between deliberations on public policy by officials and by ordinary citizens; concluding that the former is not democratic and the latter is impracticable as a method for governmental decision making. However, in asserting that the theory of deliberative democracy focuses on legislative and popular deliberation, he seemingly excludes from that 'focus' ordinary methods for giving citizens formal rights to a hearing by governmental agencies.

<sup>26</sup> Some parliamentary deliberations are done *in camera*.

<sup>27</sup> Bohman argues that political deliberation is best carried out in an open public forum, because the quality of the reasons for political decisions is likely to improve, which naturally improves the outcomes of those decisions. James Bohman, above, at p 27.

<sup>28</sup> For a discussion of how discussion 'adds value' to decisions see James D Fearon, 'Deliberation as Discussion' Jon Elster (Ed) **Deliberative Democracy** (1997) pp 44-68; Gutmann and Thompson 'Democratic Disagreement' Macedo, above, pp 243-279; Thomas Christiano 'The Significance of Public Deliberation' Bohman and Rehg, above, pp 243-277 at pp 244-58 (who emphasises the intrinsic worth of public deliberation); Rostboll, above, at pp 206-07 (who posits the epistemic value of public deliberation, which 'frees' us); and Michael Rabinder James, **Deliberative Democracy and the Plural Polity** (2004) (who argues that 'plural' deliberation provides 'specifications for reforming processes and redesigning institutions'). Cf Rostboll, above, at p 151; Stanley Fish, 'Mutual Respect as a Device of Exclusion' Macedo, above, pp 88-102.

<sup>29</sup> James Surowiecki **The Wisdom of Crowds** (2004) pp 184-86.

<sup>30</sup> Cass R Sunstein, 'Misery and Company' **The New Republic**, October 22 2008, pp 39-43.

<sup>31</sup> David A. Garvin and Michael A. Roberto, 'What You Don't Know About Making Decisions' **Harvard Business Review**, September 2001, pp 108-116 at p 112. Cf Surowiecki, above, p 38.

unlike-minded individuals in deliberations who contest each other's views lessens polarisation, generates better options and fosters the golden mean of compromise.<sup>32</sup> (President Kennedy learned from his 'Pigs' experience and instituted such 'contested' deliberation in dealing with the Cuban missile crisis, with a laudable result.)<sup>33</sup>

These examples vindicate the spirit of what President Obama has called 'deliberative democracy'; but they fall well short of his definition of the term.

By '**deliberative democracy**' we must surely be referring to a system where any individual or group in civil society has **the institutional right to be heard** by government and thereby to assist government<sup>34</sup> explore morally justifiable ways for solving problems that matter.<sup>35</sup>

This 'deliberative system' of democracy rests upon two premises:

a) The first premise is philosophical, namely: that the essence of liberty is trust in our fallibility. Democracy cherishes doubt. Therefore, a democracy must aspire – philosophically – to a process that uses the collective wisdom of 'the public' (in all its pluralities) to test the rightness of our decisions.

b) The second premise concerns practicalities. Good decision making springs from 'the Wisdom of the Crowd'. But the empirical evidence shows that this 'wisdom' is only induced when we aggregate the decisions of disparate individuals who have the courage to say what they really think because they are acting independently of each other.<sup>36</sup>

It is not just philosophy, but also practicalities which justifies democratic decision making. In this context, James Surowiecki, the author of **The Wisdom of Crowds**, epitomises the true wisdom and wise truth of democracy:

'The decisions that democracies make may not demonstrate the wisdom of the crowd. The decision to make them democratically does.'<sup>37</sup>

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<sup>32</sup> Where decisions are made in what have been **properly assessed** as simple contexts ('the realm of known knows') or, their polar opposite, chaotic contexts ('the realm of unknowables') 'command-and-control' decision making generally works best. David J. Snowden and Mary E. Boone, 'A Leader's Framework for Decision Making' **Harvard Business Review**, November 2007, pp 68-76. Nonetheless, all decision making is a process – which should include properly assessing the context in which a decision must be made – and open inquisitive decision making processes usually make for better decisions. Garvin and Roberto, above, at pp 110-11. Cf Jack Night, 'Constitutionalism and Deliberative Democracy' Macedo, above, pp 159-169; Gutmann and Thompson, 'Democratic Disagreement' Macedo, above, pp 243-279 (especially at p 245); cf Snowden and Boone, above, pp 68-76 at pp 74-75.

<sup>33</sup> Garvin and Roberto, above, at p 112.

<sup>34</sup> See generally Dewey, (1936) above, pp 166-219 on how true liberty springs from the social communion of democracy (namely, individuals cooperating democratically with each other to improve society and enjoying the benefits of such cooperation). Cohen argues in a similar vein (albeit more prosaically than Dewey) that when properly conducted 'democratic politics involves **public deliberation focused on the common good**'. Cohen, above, pp 67-91 at pp 68-69.

<sup>35</sup> James D Fearon notes that a major argument for 'deliberation' about political decisions is that such deliberation is inherently moral: the right of all to participate in the deliberation legitimises the cognate decision. Elster, above, pp 44-68 at pp 60-61. However, according to James Bohman, above (1996), p 27 'public deliberation' is not so much a form of discourse or argumentation as a joint, cooperative activity, which – by definition – excludes much deliberation in public forums. (Cf Ian Shapiro 'Enough of Deliberation: *Politics is about Interests and Power*' Macedo, above, pp 28-38; Stanley Fish, Macedo, above, pp 88-102.)

<sup>36</sup> Surowiecki, above, pp 40-65.

<sup>37</sup> Surowiecki, above, p 271.

An illogical conclusion may be drawn from the two aforementioned premises of sceptical philosophy and epistemic practicalities; namely, that in order to properly express our doubts about ‘the people’s’ assembled wisdom we must amass the Wisdom of the Crowd. That is, the ‘majority opinion’ proposed by representative government (or represented by government proposals) must be challengeable by all the independent pluralities of ‘minority opinions’ (which, in aggregate, are taken to be ‘the public’).

In short, a democracy must aspire to a system which not only assumes that its decisions may be wrong, but also supplies ample opportunity for its public to challenge and test their rightness.<sup>38</sup>

This conclusion is supported by a cognate argument that fair procedures make for fair outcomes. The fairer laws are perceived to be the more likely it is that they will be accepted by those whom they govern.<sup>39</sup> In this light, perhaps ‘deliberative democracy’ attempts to do no more than make procedural systems of governmental decision making fairer.<sup>40</sup>

It is said that public participation in the deliberative processes of treaty making tests and proves the utility of ‘deliberative democracy’. Formal parliamentary ‘Q&A’ on foreign policy presents governments with new ‘*demandeurs*’: ordinary constituents. This educates both governments and constituents. Such education is argued to be a primary advantage of democracy. The best education teaches us to ask the right questions; which, in turn, so often averts the dearest education: missing the right answers. Public deliberation draws out better questions and answers. From this it is concluded that parliamentary deliberation about foreign policy increases public policy making discipline.

Logically, the more informed public opinion is the better its contribution to good policy. But increasing social complexity makes it harder for the public to be well

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<sup>38</sup> John Rawls posits that democracies’ constitutional ‘need for dubiety’ is an attribute of their ‘reasonable pluralism’. Rawls argues that, although there are no absolute truths, as a matter of ‘public reason’ there must still be a peremptory acceptance of ‘a constitutional democratic regime and its companion idea of legitimate law’. To quote Rawls in context:

‘a basic feature of democracy is the fact of a reasonable pluralism - the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions. Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. I propose that in public reason comprehensive doctrines of truth or right be replaced by the idea of the politically reasonable addressed to citizens as citizens.

Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity. The basic requirement is that a reasonable doctrine accepts a constitutional democratic regime and its companion idea of legitimate law. While democracies will differ in the specific doctrines that are influential within them - as they differ in the Western democracies of Europe, the United States, Israel, and India - finding a suitable idea of public reason is a concern that faces them all.’

‘The Idea of Public Reason Revisited,’ in John Rawls, *The Law of Peoples*, pp 131-132. Cf Peter G Danchin ‘Whose public? Which Law? Mapping the internal/external distinction in international law’ Jeremy Farrall and Kim Rubenstein (Eds) *Sanctions, Accountability and Governance in a Globalised World* (2009) pp 27-52 at pp 40-46.

<sup>39</sup> Cf John Rawls’ ‘common good idea of justice’, which envisages ‘a family of representative bodies’ whose role in society’s hierarchy is to participate in consultation procedures. ‘The Law of Peoples’, above (1999) p 71.

<sup>40</sup> Cf Iris Marion Young, ‘Justice, Inclusion and Deliberative Democracy’, Macedo, above, pp 151-158; Jack Night, Macedo, above, pp 159-169.

informed.<sup>41</sup> Nowadays, public opinion needs to be apprised by more than the roar of a bullhorn soaring above a soap-box.<sup>42</sup> Those best positioned to inform the public about policy are those who make policy. Public opinion empowers policy making; so, it is argued, policy makers should empower public opinion.<sup>43</sup>

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.<sup>44</sup> No doubt he included good foreign policy in this maxim.

Still, in England, Burke's faith in public opinion's power to devise 'good policy' was treated as a vagary at the time.<sup>o</sup> 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.<sup>p</sup>

Contrariwise, his compatriot Harold 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'.<sup>45</sup> Nicholson believed that public opinion warped foreign policy. So he would have disdained, Woodrow Wilson's ideal of 'Open covenants ... openly arrived at' and had already sounded his alarm about 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.<sup>46</sup> (*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 now focus upon.

As with so much 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 which required 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.<sup>47</sup>

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<sup>41</sup> 'Expertise, the high degree of division of labour, new technologies, and many more factors also seem to put many current issues beyond the grasp of even the best-informed citizens. Popular sovereignty ... seems to be the first casualty of complexity.' Bohman, above, p 151. Further, given that a single electoral vote rarely effects an election result the rational voter cannot be expected to try that hard to master such complexity, CB Macpherson, above, pp 188-189.

<sup>42</sup> 'There can be no public without full publicity in respect to all consequences which concern it. Whatever obstructs and restricts publicity, limits and distorts public opinion and checks and distorts thinking on social affairs.' Dewey, (1936) above, pp 167.

<sup>43</sup> Cf Uhr, above, pp 224-227.

<sup>44</sup> '[Burke] recognises, what is now obvious enough, that English policy rests on the opinion of a reasonable democracy.' Payne, above, p ix. Although Burke's disdain (id at pp 47-53 and 290-94) for the libertine National Assembly of the French revolutionaries was patent, several historical authorities characterise him as 'a champion of liberal principles', John Uhr, above, p 60.

<sup>45</sup> 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.

<sup>46</sup> Id, pp 84-89.

<sup>47</sup> For a history of the constitutional evolution of the Ponsonby rule see paragraphs 122-130 of **The Governance of Britain: War Powers and Treaties: Limiting Executive Powers** Consultation Paper CP26/07, published on 25 October 2007 <<http://www.justice.gov.uk/publications/cp2607.htm>>. See also

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.<sup>48</sup>

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.<sup>49</sup>

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

A focus of this criticism was that a treaty may expand the legislative power of the Federal Parliament with respect to external affairs<sup>50</sup> and thereby confine the States' exercise of their executive and legislative powers. This developed with the High Court's interpretation of this legislative power in a way which the States saw as a threat to their own powers.

Although the States had (indeed, still have) an important role in treaty making, prior to 1980<sup>q</sup> there was little judicial deliberation on the constitutional extent of this capacity of the Federal Parliament to implement treaties and how that implementation may encroach on States' functions.<sup>51</sup>

Nonetheless, it was clear enough – even back in the late 1930s – that the Australian Constitution differed radically from the US and Canadian Constitutions in the way it delimited powers over foreign policy.

Unlike the US Constitution (see *US v Belmont*, 301 US 324 (1937)) Australia's Constitution did not grant the federal government exclusive jurisdiction over foreign policy.

- Therefore actions or laws of an Australian state government are not unconstitutional - and consequently invalid - simply because they encroach on matters of foreign policy.<sup>52</sup>

Unlike the Canadian constitution (see **Labour Conventions** case [1937] AC 326)<sup>53</sup> Australia's Constitution did not grant the Australian states legislative powers which are expressly defined and exclusively reserved to those states.

<<http://www.justice.gov.uk/news/newsrelease251007b.htm>>. A government paper **The Governance of Britain** presented to Parliament (by Jack Straw MP, the Secretary of State for Justice and Lord Chancellor) in July 2007 proposed consultations on appropriate means to put the Ponsonby Rule on a statutory footing. See <<http://www.justice.gov.uk/publications/governanceofbritain.htm>>.

<sup>48</sup> Hansard, Australian Federal Parliamentary Debates (Reps) 23<sup>rd</sup> Parl, 3<sup>rd</sup> Sessn, vol 11 of R 31 1693.

<sup>49</sup> BR Opeskin, '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.

<sup>50</sup> For example, Ninian Stephen, 'Making Rules for the World' (1995) 30(2) **Australian Lawyer**, pp 13-14.

<sup>51</sup> For an historical summary of legal views on this capacity see David Solomon, **The Political Impact of the High Court** (1992) pp 29-33.

<sup>52</sup> Cf the opposite consequence in the United States in, for example, the case of **Bethlehem Steel Corporation v Board of Commissioners** 276 Cal App 2d 299. See also <<http://archives.usaengage.org/archives/background/lawsuit/NFTCbrief.html>>.

<sup>53</sup> See also **MacDonald v Vapor Canada Ltd** [1977] 2 SCR 134 at 168-169, C Wilfred Jenks, 'The Constitutional Capacity of Canada to Give Effect to International Labour Conventions' **Journal of Comparative**

- Therefore, our federal government does not have to rely on State laws to implement treaties on certain subjects which are the constitutional preserve of the states.<sup>54</sup>

Instead, Australia could, and did, follow a system of ‘co-operative federalism’ in which our States voluntarily played an important role in Australian treaty making. This co-operative system rested upon both a constitutional fact and a political rationale:

The constitutional fact is that only a few legislative powers are vested **exclusively** in the Australian parliament.

- a) Consequently, legislation passed under the federal parliament's external affairs power (for example, to protect the environment) may exist **concurrently** with state legislation unless the state legislation is inconsistent.
- b) But federal legislation, if constitutionally valid, will prevail over inconsistent state legislation to the extent of such inconsistency.<sup>55</sup>
- c) Accordingly, although the federal parliament has the power - through its own federal legislation - to implement treaties (and other matters concerning ‘external affairs’) Australia may also implement treaties through state laws.

The political rationale (obtaining for Australia’s Parliament as a corollary of this constitutional fact) was that federal laws should not implement treaties regarding those matters which were traditionally administered by the states.<sup>56</sup>

This seemingly acceptable state of affairs ended in the 1980s. 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*<sup>57</sup> 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*<sup>58</sup> and *Richardson v Forestry Commission*<sup>59</sup> the High Court upheld federal Acts implementing the UNESCO Convention for the Protection of the World Cultural and Natural Heritage 1972.<sup>60</sup>

After those cases<sup>r</sup> (in the 1980s) complaints about the treaty making process in Australia began to grow – especially among state governments.

**Legislation and International Law** (1935) 17 (1) pp 12-30. Friesen observes that ‘the *Labour Conventions* model’ of treaty making creates many difficulties and suggests (at p 1450) that a ‘workable improvement’ would be to give a federal government the power to pass laws to implement treaties, from which the ‘sub-federal units’ (provinces) may ‘opt out’. Jeffrey L Friesen, ‘The Distribution of Treaty-implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models’ (1994) 94 (4) **Columbia Law Review**, p 1415-50.

<sup>54</sup> But cf AE Gottlieb, **Canadian Treaty-Making** (1968) pp 74-79.

<sup>55</sup> ‘When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.’ Section 109, Australian Constitution.

<sup>56</sup> BR Opeskin, above, at p 142.

<sup>57</sup> (1982) 153 CLR 168.

<sup>58</sup> (1983) 158 CLR 1.

<sup>59</sup> (1988) 164 CLR 261.

<sup>60</sup> BR Opeskin, above, at p 141.

In 1995 the Federal Parliament's Senate Legal and Constitutional References Committee conducted hearings into the treaty making process, which ventilated criticisms of that process. In November that year the 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 it was widely considered that there was a 'democratic deficit' in the way that the Executive entered into treaties; so some changes had to be made,<sup>61</sup> and there was widespread and growing political support for such changes.

In consequence, on 2 May 1996, Mr Downer, the Minister for Foreign Affairs in the newly elected Coalition Government, 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 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; Australia could join a treaty even where JSCOT recommended against this. In other words, parliamentary approval was not required before the Executive government expressed its consent to be legally bound by a treaty.

This Australian process is not like the US system – where a chamber of the legislature must legally ratify executive action to join a treaty<sup>62</sup> – but our system has similarly 'democratic' consequences:

- a) It gives those who may be affected by a treaty the formal right to a hearing before a Parliamentary Committee.
- b) In practice, the government tries to consult with all those who may be directly affected by a proposed treaty because such consultation is a matter of concern to JSCOT and about which it will specifically address its enquiries.

Therefore, 'the JSCOT process' can in many respects be said to meet 'the Obama criterion' for deliberative democracy: it generates 'forced' conversation.

So, put simply: Australia's treaty making process normally<sup>63</sup> 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,

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<sup>61</sup> For example, Ninian Stephen, above, pp 13-14, at p 14. Cf Daryl Williams, 'Australia's Treaty-Making Processes: The Coalition's Reform Proposals', Alston and Chiam (Eds) **Treaty-Making and Australia: Globalisation versus Sovereignty** (1995) pp 185-95. The term 'democratic deficit' was reportedly coined in the context of European Community institutions (see Australian Senate Legal and Constitutional References Committee, **Trick or Treaty? Commonwealth Power to Make and Implement Treaties** (1995) p 229).

<sup>62</sup> The term 'treaty' in this context is being used in the sense of American constitutional law; not international law.

<sup>63</sup> Where the Foreign Minister considers that delaying a treaty action would be detrimental to the national interest then that treaty action may be taken before it is tabled.

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 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. But it should again be noted that the government may still ratify a treaty even if JSCOT recommends against it.<sup>5</sup>

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) There were suggestions that the Coalition was seeking to limit international engagements through new treaty obligations because it believed that such 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 coeur**:

'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).<sup>†</sup> Further, it looks likely that before long a 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 corollary of which

is that the United States has entered into many international agreements which are treaties on the international plane; but not treaties under US law.

Nevertheless, we do have a system which upholds democracy and pluralism through extensive 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.<sup>64</sup>

An illustration of JSCOT's advancement of deliberative democracy is apposite to the wider themes of this paper. One of the earliest treaty actions JSCOT considered was 'Amended' Protocol II to the Inhumane Weapons Convention.<sup>65</sup> JSCOT hearings on this convention were a forum for diverse groups to put their views including the Australian Network to Ban Landmines, and the Medical Association for the Prevention of War. These groups were harbingers of what became known as 'the Ottawa Process': the movement to ban land mines, which culminated in the **Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction** (Oslo, 18 September 1997) which I will call the Mine Ban Treaty.<sup>66</sup>

The role of JSCOT in allowing civil society a voice in the treaty making process for this convention was significant. As one astute academic observed JSCOT's public hearings were a key instrument for engaging the public in active consultations on the convention and getting substantial input from civil society.<sup>67</sup> In addition, the recommendations of the majority report of JSCOT 'largely expressed the long-contended aims of NGOs – in particular, that Australia actively involve itself in the Ottawa process for banning land mines – although it would be simplistic to suggest that the eventual alignment of official governmental policy with NGO views was based primarily on considerations of "the NGO view"'.<sup>68</sup>

And as that academic further observed:

'An examination of the policy process through which Australia's position towards instituting a total ban on landmines was developed provides a compelling example of a case where participatory policy-making actually occurred. The activeness of the Australian NGO campaign to ban landmines (supported by an extensive international network) undoubtedly played a role in propelling the issue onto the government

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<sup>64</sup> Cf Article 53 of the French Constitution, which prevents certain 'treaties' having effect on the French municipal plane unless implemented by law. The problems with this article were illustrated in *Conseil d'Etat, Assemblée, 18 décembre 1998, SARL du Parc d'activités de Blotzheim, Rec. p. 483 (confirmed, almost one year later, by: Conseil d'Etat, 23 février 2000, Bamba Dieng et autres, Rec. p. 72)* where it was held that a Judge cannot apply a 'treaty' that has been ratified by the French Executive (the President or the Government) without respecting the procedure of Article 53 of the French Constitution. This created difficulties since (in some cases) France's President or government had ratified treaties without respecting the 'prior parliamentary authorization' procedure of Article 53.

<sup>65</sup> Chapter 3 of JSCOT Report Number 5 pp 11-41.

<sup>66</sup> The text of this convention may be found at <<http://www.austlii.edu.au/au/other/dfat/treaties/1999/3.html>>.

<sup>67</sup> Elizabeth Mason, **Participatory Policy Making in Australia and the Treaty to Ban Landmines**, Unpublished, November 2009.

<sup>68</sup> Id.

agenda, and the consistent pressure enacted on decision-makers to support an immediate and total ban was eventually realised. Empirical evidence suggests that the government implemented meaningful measures to allow for the voice of civil society not simply to be heard, but incorporated into the decision making process – in particular, through the inclusion of an NGO representative in multilateral negotiations and the holding of JSCOT hearings, through which the submissions of non-government actors appeared to have a decisive influence on the Committee’s subsequent findings. While the government did not exhibit such a preparedness to respond to NGO views from the outset, policy-makers did appear to actively consult with NGO representatives during the most critical negotiation process. Furthermore, the continued NGO-government commitment to norm-building and advocacy initiatives can be seen as evidence of a working partnership.

This involvement of civil society in negotiation of an arms control agreement, an area traditionally held to be too politically sensitive to involve non-governmental voices, is testament to a shift in both international norms regarding participation and Australian efforts at more inclusive policy-making. Indeed, the mechanism that appears to have provided the greatest level of consultation during this process were the JSCOT hearings into the treaty, an innovation of this governmental reform process aimed at addressing the democratic deficit in treaty making.<sup>69</sup>

Coincidentally, there was a ‘sea-change’ in the government’s stance: from reluctance to support a goal that was perceived to be unattainable; to Prime Minister Howard’s surprise announcement in 1997 that Australia would sign the Mine Ban Treaty.<sup>70</sup> For all we know, the government’s ‘four minute mile down the road to Damascus’ on this treaty may have owed nothing to JSCOT’s deliberations. But it certainly did nothing to dent JSCOT’s reputation as a forum for the public debate and parliamentary scrutiny of foreign policy. The Mine Ban Treaty proved to be ‘a perfect start’ for JSCOT.

JSCOT’s role in the policy making on land mines heralded many similar examples of public participation in the parliamentary scrutiny of prospective treaties. It is therefore curious why many commentators continue to disdain Parliament as a ‘bit player’ in Australian foreign policy.<sup>71</sup> The truth is that, quite apart from its legislative implementation of treaties, Parliament is a major conduit of public opinion into the review of treaty making and thereby an important influence on Australia’s foreign policy. Accordingly, it is easy to agree with Joanna Harrington’s suggestion that JSCOT should be used as a model for other Commonwealth nations.<sup>72</sup>

Indeed, JSCOT’s contribution to ‘the Ottawa Process’ illustrates how some aspects of international governance are being driven by forces that are outside the control of governments acting alone. I do not wish to take anything away from the

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<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> For example, Stewart Firth reports that the greatest impact of JSCOT is not to make the government more accountable but to burden DFAT officers with writing an endless succession of National Interest Analyses and also that ‘government dominates the stage of foreign policy-making and ... parliament is a bit player’. Stewart Firth, *Australia in International Politics* (2005) p 86. Equally dismissive are Capling and Nossal, ‘Parliament and the Democratization of Foreign Policy: The Case of Australia’s Joint Standing Committee on Treaties’ *Canadian Journal of Political Science*, Vol 36, No 4, September 2003, p 849, who labelled the creation of JSCOT and related reforms as ‘window dressing’.

<sup>72</sup> J Harrington, ‘Redressing the Democratic Deficit in Treaty Law Making: (Re) Establishing a Role for Parliament’ *McGill Law Journal*, Vol 50, No 13, November 2005, p 491.

governments which brought the Mine Ban Treaty 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.

One academic summed up this movement as follows:

[The] achievements of the landmines campaign have to a significant extent been attributed to the actions of international non-state actors. In particular, the International Campaign to Ban Landmines (ICBL), an “umbrella” organisation that has since 1992 united a diverse range of transnational groups committed to the cause, has been credited with providing the initial impetus that propelled landmines onto international and state agendas. Crucial to the politicisation of the landmines issue was the dissemination of information by the ICBL amongst defence organisations, scholars, interest groups and state networks. Gathered from aid and medical professionals, they provided expert data on the scope and effects of landmines, which both galvanised public opinion and provided factual analysis that could then be utilised by policy makers to enable informed decisions to be made. Mobilisation of civil society was also achieved by the high degree of publicity that various figures generated around the issue. These ranged from landmine victims, who visually attested to the horrors of such weapons, to high-profile media figures such as the late Princess Diana ....<sup>73</sup>

The official ‘DFAT View’ of the negotiating history of the Ottawa process is consonant with the above analysis and 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.’<sup>74</sup>

In these campaigners’ unanimity of measures and strength of execution can we hear ‘the sound of distant thunder’?<sup>u</sup> 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 – since 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.)

It remains to be seen how democracies’ diplomatic efforts will be helped or hindered by this emerging ‘peoples’ diplomacy’. But non-democracies’ diplomacy will not be similarly affected; because – almost by definition – they are much less receptive to the collective will of their citizens.<sup>v</sup>

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<sup>73</sup> Elizabeth Mason, above.

<sup>74</sup> 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).

It can reasonably be argued that democracies have a recent track record of effective cooperation with each other.<sup>75</sup> It follows that – as this ‘new diplomacy’ gains purchase – the nature of democracies’ diplomacy may drift further and further from that of non-democracies.

The essential point to be made, however, is that – in our globalising world – it is increasingly likely to be the case that constituencies divided by national borders will see less and less need to rely on their political executives as diplomatic ‘go-betweens’.<sup>76</sup> Foreign policy is indeed continually witnessing (if you will forgive the terminology): ‘diplomatic disintermediation’. As this trend continues it will be easier and easier for like-minded citizens in different countries to deal directly with each other in order to exert pressure on their respective governments. That could – depending on the issue – amount to increasingly significant pressure to influence, change, and determine foreign policies. Governments may still hold the authoritative and primary control in determining foreign policy.<sup>77</sup> But voters will likely have an increasing voice in how that authoritative control is wielded and what is taken into account as they determine how the national interest is best served.

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.<sup>78</sup> 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.<sup>79</sup> The rules so prescribed are being adopted – as domestic laws – by executive governments:

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<sup>75</sup> ‘What separates democracies from non-democracies, however, is their proven track record of effective cooperation. They disagree, yes; but they also know how to limit and overcome their disagreements. NATO, the most successful multilateral organization the world has ever known, is a concert of democracies on a regional level. It works not only because its members have common interests and shared values, but also because they have established procedures for overcoming disagreement in ways that both meet the interests of the members and ensure timely and effective action. Democracies work well with each other, above all perhaps, because their shared commitment to the rule of law and government of, by and for the people enables them to trust one another’s leadership. There is no place for intimidation or coercion in inter-democratic interactions, whereas relations between democracies and non-democracies are invariably infused with suspicion and mistrust.’ Ivo Daalder and James Lindsay, ‘Democracies of the World, Unite’, **The American Interest**, November/December, 2006 < <http://www.the-american-interest.com/ai2/article.cfm?id=220&MI=7>>. The UK’s diplomacy with the USA and USSR in the thirties is an example of one democracy working much better with another democracy than with a non-democracy. K Nelson, **Britain, Soviet Russia and the Collapse of the Versailles Order, 1919-1939** (2006) p 325.

Cf Thomas Carothers, ‘A League of Their Own’, **Foreign Policy**, July-August 2008, pp 44-49; **Warsaw Declaration: Towards a Community of Democracies** [27 June, 2000] 39 ILM 1306 (2000).

<sup>76</sup> Cf Dewey, above, (1936) pp 107-108.

<sup>77</sup> Cf Ayres and Macdonald, ‘Deep Integration and Shallow Governance: The Limits of Civil Society Engagement across North America’, **Policy and Society** 2006 Vol 25, No 23, pp 23-39.

<sup>78</sup> Cf Schermers and Blokker, **International Institutional Law** (1995) p 977.

<sup>79</sup> See, for example, International Telecommunication Union, WORKING GROUP TO PREPARE FOR THE 2012 WORLD CONFERENCE ON INTERNATIONAL TELECOMMUNICATIONS, ‘Unilateral acts of international organizations as an expression of their normative authority’, **CWG-WCIT12 TEMPORARY DOCUMENT 16, SOURCE: Secretariat, CWG-WCIT12**, 23 March 2010.

- 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 as well as pluralist ideals.

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 converse 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.

Put simply:

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

Under the Australian Government’s policy of treaty review 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 federal bureaucrats to usurp states’ ‘sovereignty’ or individuals’ rights.<sup>80</sup>

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<sup>80</sup> Cf Australian Senate Legal and Constitutional References Committee, **Trick or Treaty?**, above, pp 240-47.

The role of JSCOT is critical in ensuring that our domestic constituency's views and concerns are listened to when determining Australia's treaty policy outlook on any given subject. Arguably, this can increasingly be seen as mandating a diplomacy which exemplifies deliberative democracy. 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 with 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. Just the way Thomas Paine's 'popular treason' won out over Edmund Burke's counter-revolutionary fealty. 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.<sup>81</sup> It is no more than 'having a say'; no less than 'the other side of the story'. Pericles' troops died for it in droves.

Indeed, Burke was a herald of de Tocqueville's conclusions 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.<sup>82</sup> Put differently, civilisation – in the long run – chooses the best of all systems: the one which demands an increasingly important contribution from civil society. That contribution is guaranteed by people having institutional avenues for making representations to parliaments and bureaucracies.<sup>83</sup>

Treaty-making is international law making and the essence of foreign policy. As such it deserves the best of all systems; and demands, at the very least, a fair system.

This is just as well, for in the view of informed observers, a global constitutional<sup>84</sup> crisis may be looming.<sup>85</sup> It is argued that the perennial drift of power

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<sup>81</sup> 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.

<sup>82</sup> John Stuart Mill, **M De Tocqueville on Democracy in America**, Edinburgh Review LXXII, 1840; reprinted in *Dissertations and Discussions* Vol II (1859). Cf the theory of an evolving international legal order posited by Onuf, above, pp 256-65, and the constitutional prospects of a Utopian 'Society of Peoples' posited by Rawls, 'The Law of Peoples', above, (1999), at pp 29-30.

<sup>83</sup> Where decisions are made in simple contexts ('the realm of known knowns') or chaotic contexts ('the realm of unknowables') leaders should naturally adopt 'command-and-control' decision making – once they have properly assessed that such contexts exist. David J. Snowden and Mary E. Boone, A Leader's Framework for Decision Making, **Harvard Business Review**, November 2007, pp 68-76. Nonetheless, all decision making is a process and open, inquisitive decision making processes – including processes for determining the context in which decisions are made – usually make for better decisions. David A. Garvin and Michael A. Roberto 'What You Don't Know About Making Decisions', **Harvard Business Review**, September 2001, pp 108-116. Cf Snowden and Boone, above, pp 70-71; Jack Night, 'Constitutionalism and Deliberative Democracy', Macedo, above, pp 159-169.

<sup>84</sup> For an argument that the current international legal order is a 'constitutional' order see Onuf, above, pp 265-66.

<sup>85</sup> Cf Ninian Stephen, above, pp 13-14; Richard Falk and Andrew Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty' 36 **Stanford Journal of International Law** (2000) pp 191-220.

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,<sup>w</sup> but also to elect these organisations’ leaders. No doubt, these attempts will be met with howls of derision. *Plus ça change...*

## ENDNOTES

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<sup>a</sup> It has been argued that a principle of ‘democratic inclusion’ can usefully guide the development of international standards on democracy. See H. Charlesworth, 2006, ‘Building Justice and Democracy after Conflict’, Academy of the Social Sciences Australia, Cunningham Lecture, Canberra, 21 November 2006. In this lecture Professor Charlesworth observes that ‘the North’ sees democracy as regular elections and ‘the West’ sees democracy as having a fixed content. In this context Professor Charlesworth argues in her lecture:

‘We need a much broader debate on what democracy means. As Susan Marks has pointed out, ‘low intensity’ forms of democracy, such as those contemplated in the cases of Iraq, Timor Leste and the Solomons, ‘concentrate attention on forms and events, and ... shift the emphasis away from relationships and processes.’[Marks, Susan (2003). *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology*. Oxford University Press: Oxford: 52] The effect is to consolidate existing social orders and to reduce the prospect of political and social change through redistributive claims.’

<sup>b</sup> Civil rights obtaining equally and for all is but one of many definitions of ‘liberalism’. The writer submits that it is useful to distinguish between two types of such liberalism:

- o First, where a democratic legislature may determine the legal scope of civil rights; and so then ‘liberalism’ is technically a connotation of majoritarianism (‘majoritarian liberalism’ so to speak).
- o Second, where inalienable civil rights are constitutionally entrenched and difficult to attenuate by popular vote. So then there is ‘absolutist’ liberalism, which exists independently of majoritarianism. This is because it is the judiciary (not the people) that determines the legal scope of such rights. However, if the example of the United States is anything to go by, the judiciary are far worse at determining the scope of civil rights than the legislature. Alexander Hamilton – in opposing freedom of the press being entrenched as a constitutional right (**The Federalist No. 84**) – has been signally vindicated by the rulings of the US Supreme Court on press freedoms, eg *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>c</sup> The system employed in the ancient Athenian democracy of Kleisthenes had, in one sense, an attribute of modern deliberative democracy: citizens affected by a proposed law could argue the case for or against that law. This was because, in Kleisthenes’ system of ‘pure’ democracy, all members of the principal organ of Athenian democracy – the Assembly – had the

right to speak on prospective laws. This Assembly was not elected by an Athenian constituency; it was the Athenian constituency: generally speaking any male citizen of proper age was not only eligible to take part in Assembly deliberations but also considered to be under a duty to do so. Accordingly, such a citizen had the right to discuss a prospective law which would affect him in the Assembly. M Ostwald, 'The Reform of the Athenian State by Cleisthenes', **Cambridge Ancient History** (2nd ed) Vol. 4 (Cambridge, 1988) pp. 303–46.

For an economic and geopolitical analysis of why democracy developed in Ancient Greece, see Robert K Fleck, 'The Origins of Democracy: A Model with Application to Ancient Greece' <<http://www4.ncsu.edu/~tct/PDFs/Oworkshop/Greece%207.5.pdf>>.

<sup>d</sup> Cf James Madison:

'Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence, of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other.'

Federalist No 10 (attributed to Madison).

<sup>e</sup> 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).

<sup>f</sup> Democracy might have been acceptable to Americans as a means of preserving their liberty according to the rule of law; but many seminal political philosophers who preceded de Tocqueville saw democracy as undermining external security (and therefore liberty) because there was no 'rule of law' governing international affairs. Even, John Locke, the preceptor of 'rational' liberalism, and an inspiration for the US Declaration of Independence believed that continuous purely lawful rule was not possible in foreign affairs (which operates in 'a state of nature'). Thomas L Pangle, **The Spirit of Modern Republicanism** (1988) pp 46-47. Similarly, Thomas Hobbes notes that the full and absolute liberty of states means a state of perpetual war and so he draws the distinction between 'true liberty', which was the will of god; and the 'false liberty' extolled by classical authors, in which 'freedom' was enjoyed in a condition of perpetual war. **Leviathan**, Chapter 21 <<http://www.earlymoderntexts.com/pdf/hobbes2.pdf>>. Cf Aristotle: 'In a democracy, liberty is to be supposed; for it is commonly held that no man is free in any other form of government.' **Politics** (6:2).

<sup>g</sup> 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.

For a history of revolutionary France's 'holy wars' against Europe see generally Gregory Fremont-Barnes, **The French Revolutionary Wars** (2001).

<sup>h</sup>For 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.

<sup>i</sup> America's initial constitution had amendments added to it which reflected the philosophy of 'Lockean' liberalism, namely: that the reasonable pursuit of happiness was a natural desire and moral duty, which should be underpinned by

individuals' civil rights to life, liberty and property. (Albeit these precise rights were not specifically adopted in the US Constitution till the 14<sup>th</sup> Amendment was passed in the 1860s.) Cf Pangle, above, pp 117-127, 141-171, 276-279. (Nonetheless, CB MacPherson. **Democratic Theory: Essays in Retrieval** (1973) pp 228-34 argues that Locke's conception of 'natural rights' is radically different from the putative modern conception of human rights because the latter are equal and reciprocal.)

<sup>j</sup> 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. **Robert D. Putnam**, 'An Interview with Robert Putnam: Bowling Alone: America's Declining Social Capital' <<http://xroads.virginia.edu/~HYPER/DETOC/assoc/bowling.html>>.

<sup>k</sup> 'Fourscore and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation or any nation so conceived and so dedicated can long endure.' <<http://www.americanrhetoric.com/speeches/gettysburgaddress.htm>>.

<sup>l</sup> A fuller quote from Part 1, Chapter XIII of de Tocqueville's **Democracy in America** illustrates de Tocqueville's disdain for what he considered 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 necessities 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.<sup>8</sup>

<sup>8</sup> The question of secrecy in group deliberations also impacts on the morality of such decisions – if group decisions tend to be less moral than secret group decisions will be worse than public ones. It is interesting that Alexander Hamilton – who championed strong and independent executive power – argued that groups lack the moral rectitude of individuals:

'Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons. Regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one. A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses, for which they would blush in a private capacity.'

Federalist Papers No. 15, Alexander Hamilton

<[http://en.wikiquote.org/wiki/Alexander\\_Hamilton](http://en.wikiquote.org/wiki/Alexander_Hamilton)>

<sup>9</sup> The traditional view held by many for millennia was that: 'rule by "the best men" was seen as automatically superior to any other form of government; [so] the idea of following public opinion would have struck them [Polybius and Henry Fielding] as simply absurd'. Dominic Sandbrook, 'Trial by fury' *New Statesman*, pp 34-36, at p 36.

<sup>p</sup> 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>>

<sup>q</sup> **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.

<sup>r</sup> 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.

<sup>s</sup> Jose Maria Ruda, above, pp 23-29.

<sup>t</sup> See also **International Campaign to Ban Landmines** Nobel Lecture, **The Nobel Peace Prize**, Oslo, December 10, 1997, by Rae McGrath on behalf of the International Campaign to Ban Landmines <[http://nobelprize.org/nobel\\_prizes/peace/laureates/1997/icbl-lecture.html](http://nobelprize.org/nobel_prizes/peace/laureates/1997/icbl-lecture.html)>

<sup>v</sup> ‘People’s diplomacy’ may improve the efficiency of international democratic cooperation in ways which leave non-democracies’ diplomatic efforts at a disadvantage. Perhaps one harbinger of this ‘threat to non-democracy’ in world affairs is the call by John McCain for some kind of international league which only democracies are eligible to join. McCain argues: ‘We cannot build an enduring peace based on freedom by ourselves, and we do not want to. We have to strengthen our global alliances as the core of a new global compact - a League of Democracies - that can harness the vast influence of the more than one hundred democratic nations around the world to advance our values and defend our shared interests.’ (New York Times, John McCain’s Foreign Policy Speech, 26 March 2008). See also Daalder and Lindsay, above.

<sup>w</sup> Chesterman, Simon, ‘Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law’, **Global Governance**, Vol. 14, pp. 39-52, 2008. Available at SSRN: <<http://ssrn.com/abstract=975167>>.