

A conversation among comparatists on the Australian constitutional system

di Maurilio Gobbo and Lucia Scaffardi

What renders special this monographic section is the dialogue between legal scholars from both Australia and Italy that we were able to bring together to study the Australian constitutional system from a comparative perspective. The section consists of a collection of the presentations delivered at the 2024 Inaugural Webinar of the ‘International Research Law Group Italy-Australia’.

We have both studied the Australian legal system for many years and therefore our desire was to intensify our contacts with Australian scholars both senior and junior. We wanted to keep “the flame” of our early-career studies burning because we still have a yearning for a country that has truly entered our hearts. We still dream about those boundless landscapes, friendly people and a culture of constitutional law that has few equivalents across the globe.

As underlined during the inaugural webinar held on 30th May 2024 we dedicate this monographic section to our Mentor Nino Olivetti Rason, Senior Professor of Comparative Public Law at the University of Padua.

We would also like to thank the University of Padua (in particular the Political Science Law and International Studies Department), the University of Parma (specifically the Department of Law Politics and International Studies) and the Comparative Public and European Law Association for their support. We also thank Angelo Rinella for representing the Association, Justin Frosini for chairing the webinar and Vito Breda for delivering the final remarks which were subsequently transformed into the conclusion of this monographic section.

This collection focuses on the debate concerning current constitutional issues in Australia seen from an Italian perspective. The words of Stephen Gageler, the current Chief Justice of the High Court of Australia, perfectly capture our objective: “By virtue of similarity of our systems, we can benefit from each other’s experience. There is a great benefit from sharing approaches to dealing with common issues. On the other hand, we have to recognize and respect that real differences in institutional arrangements mean that the same solution may not be either politically acceptable or practically workable from one country to another”¹.

¹ *In Conversation with Stephen Gageler, Chief Justice of the High Court of Australia, in Judicature International* (2024), at

Turning to the single contributions it should be underlined that Nicholas Aroney and Erika Arban's article offers an account of the constituent power at the basis of the Australian Constitution, supplemented by occasional comparisons with the Italian regional state under the 1948 Constitution. The two authors argue that, unlike the Italian experience, the constituent power as manifested in Australia is profoundly plural and federal in nature even compared with the Italian Constitution after the reform of 2001. Aroney and Arban highlight how these plural foundations have had a significant impact on the design and structure of the Australian Constitution.

In "Indigenous Cultural Heritage in Australia and the Right to Keep It: A View from Europe" Vines and Bassu look at the failed referendum of 2023 on the Voice to Parliament which aimed to get recognition in the Commonwealth Constitution for Indigenous people in Australia. The authors underline how this recognition was seen as needed in the Constitution because of the threats to people, language, and culture which have existed in Australia since colonisation in 1788. Vines and Bassu emphasise that what Australia seems to lack is a concerted political will to see the need for protecting cultural heritage.

Kerr and Clementi's piece on the evolution of the Australian form of government focuses on trends in Australia's government over the past thirty years, particularly regarding the relationship between the Executive and Legislative branches at federal level. The authors investigate key constitutional developments and interpretations that have influenced the contemporary characteristics of Australian government seeking to provide insight into the dynamics of Australia's political structure and governance.

Dolcetti and Scaffardi's study of Australian Federalism after the Covid-19 pandemic highlights the significance of the relationship between different levels of government in the Australian context where, in responding to the pandemic, a new ad hoc intergovernmental forum, the National Cabinet, was created. The two authors examine the role played by the National Cabinet and the lasting effect on both the form of state and the form of government in Australia.

The comparative study of Vines, Lubian and Viglione addresses the use of obiter dicta in Australia and Italy showing how these two countries have variations on their tradition. Through this study the three authors highlight the complex nature of the legal process and the intricacies of persuasiveness across jurisdictions.

Finally, Lynch and Tieghi explore liberty as a paradigm shift in discussions around the role of dissent in contemporary final courts using three different levels of dialogical analysis. The latter are employed to consider the potential contribution of Australian judicial decision-making practices to promote the High Court as a reflective judicial institution that might be well-positioned to inform the broader dialogue on comparative judicial behavior studies.

In a nutshell, we believe this monographic section features a diverse array of voices that provide a bridge between legal scholars in Australia and Italy.



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