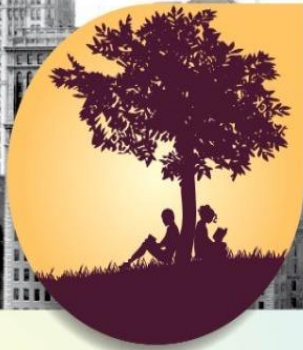


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Law History and Politics in Developing Societies: A Comparative Analysis of Constitution Making Process in Australia and United Arab Emirate

By: **Henry K. Murigi**¹

Abstract

Comparative politics is one of the most dynamic and deeper ways of understanding politics. Some new perspectives are gleaned from the exercise of comparing two States. Politics deal with the issue of how societies decide to organize themselves. Some of the practices will be housed in a document such as a constitution. Constitutions are not made in a vacuum. They are made to either alter, define or redefine the existing societal organization. It is very important to study the process leading to the creation of a constitution. One of the best tools for understanding constitution making process is studying comparative politics from two States. Such a study makes such a scholar more adept with the philosophy history and politics of any clause contained in a constitution. This is such an enriching exercise since a healthier understanding of different political practices and processes are inescapable. This paper seeks to compare the politics surrounding the constitution making in Australia and United Arab Emirates. The paper will consider the claims made as to how these two States came up, how they manage their politics, mainly as contained in their respective Constitution making process and political practices. The paper will begin by bringing out the uniqueness of each State then bring out the similarities. At the end it is hoped that it will illuminate the reader's attention to benefit of a comparative political study.

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Introduction

All the way from the classical period it is evident that comparative politics was being carried out. Harry Eckstein² claims that Aristotle's thoughts pointed toward the direction of comparative politics which was later developed by Machiavelli, Montesquieu, Hobbes and Smith as progenitors. Mark Irvin Lichback et al³ argue that to study comparative politics three dimensions are important. These are rationality in decision making, culture and structure. The suggestion is that with these dimensions, one can analyze the different political systems and gainfully compare two different States. Joel Migdal⁴ argues that the make-up of state is comprised of both ideas of the enlightenment and a response to modern day capitalism. To explain the State, one would have to consider the cultural perspective. With this approach it becomes clear that the State is a complex organization that is pulled in different directions with culture as a glue that made the state stick together⁵. From the structural perspective Migdal⁶ argues that the States crack due to financial emergency, severe elite division and political and propensity for popular groups to mobilize themselves. The rationalist perspective argues that politicians hold certain preferences that establish consciously and not simple random acts. These perspectives will be employed in analyzing, comparing, and explaining the context of constitution making in the Australia and UAE.

Political Systems in Australia

a) Australia's Demography

The Commonwealth of Australia is located on approximately land mass of 7,692,024 square kilometers (approximately 2,696,907 square miles).

² Harry Eckstein "A perspective on Comparative Politics, Past and Present" in Harry Eckstein and David E Apter Eds, *Comparative Politics; A Reader*. New York: The Free Press of Gleoncoe. 1963

³ Mark Irving Lichbach and Alan S Zuckerman *Comparative Politics; Rationality, Culture and Structure*. Cambridge University Press 1997

⁴ Ibid pp 208- 231

⁵ Mark Irving Lichbach and Alan S Zuckerman *Comparative Politics; Rationality, Culture and Structure*. Cambridge University Press 1997

⁶ Ibid

Approximately 39% of the land mass lies on the tropics. The distance occupied by Australia from East to West is approximately 3,782 Kilometers⁷. The climatic condition is more tropical with variations from different parts of the commonwealth. It is a relatively fertile land in terms of the soil and land use. Majority of the population is considered to be European even though there has been migration from Asia since 1970s⁸. Agriculture is one of the main sources of export for Australia. Mining of gold⁹, iron ore¹⁰, black coal¹¹ and bauxite among other minerals form part of Australia's economic power¹². As at 2012 mining activities contributed to 8.4% of the Gross Domestic Product (GDP)¹³. Most of the products that are mined are exported to Japan and South Korea. Although Australia has petroleum resources, it still needs to import about one-third of its domestic oil and petroleum needs.

b) Australia's Medieval History

One of the most contested aspects in terms of Australia's history is the origin of group called the Aborigines. One school of thought suggests they are among the first group of people to leave Africa in search of new lands between 49 to 65 thousand years ago¹⁴. Another school of thought suggest that human settlement in Australia began about 40 thousand years ago. This school argues that the Aborigines from India and China through the Timor Sea¹⁵. Another school of thought insist that the first Australians would have sailed through Southeast Asia since sailing was difficult everywhere else due to sea levels that were a lot low¹⁶. Yet another school of thought suggests that the Aboriginal are related to indigenous population of New Guinean.

⁷ Juliet Love, "*The Far East and Australia 2013*" 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 69

⁸ Ibid

⁹ Approximately 240 metric tons as at 2009/10

¹⁰ Approximately 423,393 metric tons as at 2009/10

¹¹ Approximately 471,089 metric tons as at 2009/10.

¹² Ibid

¹³ Ibid pp. 88

¹⁴ Hans Villarica "*Aborigines: The First Out of Africa, the First in Asia and Australia*" (2011)

¹⁵ Stuart Macintyre, "*The Far East and Australia 2013*" 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 69

¹⁶ Ibid

Some DNA can be traced from New Guinean. Aboriginals are diverse with different customs and traditions. They could also be traced from India. From the literature reviewed thus far, it appears that there is no consensus on their origin.

Most scholars however are in agreement that on arrival in Australia, the Aboriginals had to adapt to the environmental conditions. Also, there is general agreement that they engaged in agriculture as their main economic activity. There is also agreement that at independence the Aboriginals were excluded from the right to citizenship and also denied right to vote¹⁷. In addition, they were largely and deliberately ignored in the Constitution making. The Commonwealth of Australia Constitution Act provided that they should not be counted¹⁸. One of the arguments has been that the Aboriginals contestations with the British over its occupation placed them in an awkward position¹⁹. William Cooper, an Aboriginal leader sought to enforce the initiative by King George V for Aboriginal people to be represented in Parliament²⁰. The study of the Aboriginals is an ongoing concern due to the neglect by the colonial government and successive regimes²¹.

¹⁷ The Commonwealth Franchise Act of 1902.

¹⁸ Article 127 provides that “*In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted*”.

¹⁹In a commentary on the Constitution it is argued that the first century and a half of British-Aboriginal relations in Australia can be characterized as a period of dispossession, physical ill-treatment, social disruption, population decline, economic exploitation, discrimination, and cultural devastation. For the Aboriginal people, this was a period of dispossession from their homelands followed by dispossession from family, culture and life as they knew it. <https://aiatsis.gov.au/exhibitions/aboriginal-natives-shall-not-be-counted> _Seen on 25th November 2019 at 7.07pm

²⁰ Jessa Rogers; “Photostory and Relatedness Methodology: the Beginning of an Aboriginal–Kanaka Maoli Research Journey (part two)” *Australian Aboriginal Studies Journal* Australian Aboriginal Studies (2019) Issue 1,

²¹ *Ibid*

c) Colonial Period

The Portuguese may have visited Australia shores as early as sixteenth century²². In the seventeenth century the Dutch governor general of East Indies Anthony Van Demien authorized an expedition that pieced together the map outline of the continent²³. This continent at that time was called New Holland. The Dutch did not become the colonizers because they thought the continent was apparently barren. The British adventurer William Dampier had explored some of the Northwest Australia coast around 1688 and concurred with earlier assessment of the Dutch²⁴. Sometime in August 1786 the London Gazette published that “*Adventure in the South Pacific LT Cook Set Sail n endeavor Bark*” to observe the transit over at Tahiti in search of uncharted waters²⁵. Stuart argues that it is this voyage that led the British to declare sovereignty over Australia Continent in 1770²⁶. This British flag was hoisted in Australia by James Cook the world’s greatest explorer of the time which in effect declared the territory to belong to King George III²⁷.

Several claims have been made as to the exact interest of the British. Charles de Brosse for instance suggested that New Holland could be used for placement of foundlings, vagabonds, paupers and criminals²⁸. This was not to be a farfetched idea after all. In 1786 Captain Arthur Philips received a command from the British Government to establish and govern the colony of New South Wales as a penal settlement²⁹. On 22nd January 1788 the New

²² Stuart Macintyre, “*The Far East and Australia 2013*” 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 70

²³ Charles De Brosse *History of Navigation to Southern Lands* (1975)

²⁴ Stuart Macintyre, “*The Far East and Australia 2013*” 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 70

²⁵ https://upload.wikimedia.org/wikipedia/commons/5/52/DIEU_ET_MON_DROIT_-_On_heraldic_shield_of_the_LONDON_GAZETTE_Monday_August_26%2C_1768_-_Fitzroy_Gardens_Melbourne_AU_29_Oct2010_sRGB_web.jpg Document viewed on Monday 25th November 2019 at 7.20 pm

²⁶ Stuart Macintyre, “*The Far East and Australia 2013*” 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 70

²⁷ Alan Atkinson Conquest, in the *Australia’s Empire* Schreuder D.M (2008), Oxford University Press, New York

²⁸ Charles De Brosse *History of Navigation to Southern Lands* (1975)

²⁹ Ibid

South Wales was proclaimed a Crown Colony of the British Monarch by King George III. Some claim that this was not possible because King George had mental frailty on the same year. However, this is countered by the fact that the centenary of the glorious revolution was in this same year³⁰. The cost of war with France of independence with the former colony America left Britain with no dumping ground for convicted felons in addition to the prospects of flax and timber for naval supplies. This led to the creation of New Holland as a dumping ground for convicts³¹. Stuart also argues that at the end of the Napoleonic Wars in 1815 an increased number of convicts who were sent to new mainland In Western Australia and Southern Australia.

This seems to be the predominant argument about the appalling strength of British Civilization and the strength of the people appeared to have clung to the faith and the very raiment of the giant according to Adam Smith³². There is a suggestion that with this foundation the British Empire needed to take two approaches. On the one hand an authoritarian government which ensured domination by the colonial office and on the other hand a more liberal approach as proposed by Adam Smith³³. These two approaches were to later present themselves in the Political activities. Since Australia was established for penal purposes, an authoritarian government was firmly established. For instance, it is claimed that there was a gulf that separated the elite on the one hand and the population of exiled prisoners as well as indigenous inhabitants on the other hand³⁴. Due to the brevity of time this paper will accept that the Australia was established as a penal colony of Britain.

The economic activity that escalated the British scramble for Australia was the Victorian gold rush which had coincided with claims from the

³⁰ Brian Gillian et al *Australia and Globalization; The experience of two Centuries* (2001) Cambridge University Press

³¹ Stuart Macintyre, "*The Far East and Australia 2013*" 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 71

³² Adam F (1886) *Australian Essay*. Melbourne W. Inglis

³³ Brian Gillian et al *Australia and Globalization; The experience of two Centuries* (2001) Cambridge University Press

³⁴ Ibid

Australians for self-rule and demands for greater consultations³⁵. There was a rapid influx of newcomers and the population of non-aboriginals increased. This increase led to competition for the minerals available. The British were slowly losing control over the vast lands that were being occupied by pastoralist³⁶. Stephen Roberts argues that the British attempted to make a virtue out of the loss of local control by introducing mining license and license agents³⁷. This was to later appear in the Commonwealth Constitution of Australia under Article 91³⁸. This was a prohibition from continuous looting of the scarce minerals as illustrated in this background.

The debates between Karl Marx and Max Weber on the cause of class struggle presented itself in Australia as well. There was a growth in urban concentration as a consequence of the prohibition on land occupation and ownership. For instance the Victorian Capital Melbourne expanded to about 420,000 inhabitants, Sidney 360,000, Adelaide 115,000, and Brisbane 86,000³⁹. This led to the decrease in the cost of production of goods for exports. Consequently the labor force that was available began formation of union among workers among the pastoralist, mining and transport sector⁴⁰.

The workers unions advanced ideas such as lock outs and strikes which the colonial government responded to by supporting volunteer labor which would be protected by the volunteer militia. Unfortunately these strikes led to the decline of the economy⁴¹. This gave rise to the labor movements and subsequently the founding national party called the National Labor Party.

³⁵ Stuart Macintyre, *“The Far East and Australia 2013”* 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 73

³⁶ Ibid

³⁷ Stephen H. Roberts, *History of Australian Land Settlement, 1788-1920* (1924) Melbourne

³⁸ Article 91 provides “Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods”.

³⁹ Stuart Macintyre, *“The Far East and Australia 2013”* 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012. pp. 73

⁴⁰ Ibid

⁴¹ Stuart Macintyre, *“The Far East and Australia 2013”*

The main idea was to ensure that the colonies would come together to take responsibility for defense and external affairs⁴². A meeting was held in Melbourne led by a colonial statesman Sir Henry Parkes the premier of New South Wales with a view to consolidate defense forces. Out of this meeting a push for federation was birthed and it would be captured in the Commonwealth Constitution Act in the preamble⁴³.

d) Australia's Independence

Australia's colonies began to gain self-governance around 1850s. All the self-governing colonies had constitutional documents setting out the broad details and legislative powers of their popular assemblies⁴⁴. Authority rested with the imperial government through mainly the settlers who had arrived in Australia. However, governors were empowered to make regulations for the colonies. Since the governors had powers, there was a rising feeling that the governors wielded more powers. This led to the establishment of the legislative council. For instance, in New South Wales in 1823 the legislative council was established⁴⁵. This council established a bicameral legislature which was inaugurated by the 1855 Constitution Act.

The government institutions of the commonwealth grew out of debates and constitutional conferences that took place in the 1890s⁴⁶. The series of conventions held during this period were attended by representatives of the colonies. Before the Constitution came into effect, its terms were largely approved, by the people of New South Wales, Victoria, Queensland, Western Australia, South Australia, and Tasmania. Leading politicians participated in the drafting of the constitution and for most colonies delegates were elected

⁴² Ibid

⁴³ The Preamble provides that WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

⁴⁴ Ibid

⁴⁵ Hawker, Geoffrey *The Parliament of New South Wales 1856-1965* Ultimo NSW, Government Printers (1971)

⁴⁶ The Australian Constitution

to participate in the process. The draft constitution was adopted after a popular referendum before being sent to London for formal ratification by the Westminster parliament⁴⁷. The Australian nation-state was constructed through deliberative political process of consensus building negotiations and institutional design that required both political and popular support. This led to the formation of a federal government. The federation was built upon a popular nationalist sentiment evident in local communities from the 1870 that reached the heights in 1888 which was the anniversary of the centenary of British colonization⁴⁸.

Internal Arrangement in Australia

a) New South Wales.

New South Wales is claimed to be the premier state⁴⁹. It was the governing colony. There are several dimensions that make it the premier state. Firstly, it is argued to be the convict settlement which defined it as the original state. It has the old wealth from the rich historical underpinnings and the new wealth is ostentatiously displayed in its architecture⁵⁰. Secondly it is the largest population and the greatest wealth. Thirdly, its proximity to the center and has the highest representation. Lastly part of its dominance is the policy processes which is more innovative than other states within the commonwealth⁵¹. At the start of the twentieth century the position of New South Wales as the most populous and wealthy state seems assured. This has been maintained by way of accidental events as well as by design. It has sometimes been the leader in certain matters as well as a follower of others depending on the debate. The extent to which New South Wales remains a

⁴⁷ Ibid

⁴⁸ Brian Gillian et al *Australia and Globalization; The experience of two Centuries (2001)* Cambridge University Press pp 62

⁴⁹ Rodney Smith. *New South Wales:* in Jeremy Moon and Campbell Sharman, *Australian Politics and Government The commonwealth, The States and The Territories*, Cambridge University Press, (2003) pp 41-73

⁵⁰ Hirst, John *The Strange Birth of Colonial Democracy; New South Wales 1848-1884*, Sidney: Allen & Unwin (1988)

⁵¹ Hughes Colin A *The Proliferation of Portfolios, Australian Journal of Administration (1984) Ppp 257-74*

Labor state under question⁵². There is a claim that at the time of taking possession of Australia the principle of *terra nullius* in international law is used to permit occupation. This was important for the British so that they could declare that Australia did not have occupants i.e. the Aborigines.

b) Queensland

Queensland is located on the Northeastern side of Australia and was initially part of the New South Wales. There was a contentious separation of the State of Queensland from New South Wales. Initially it was referred to as East Coast of Australia. In 1859 after several debates the colony was declared independent from New South Wales⁵³. Queensland is a vegetation rich area with attractive transport as a result of the internal transportation of convicts that ended in 1842. Under the self-government rule in 1859 Queensland was administered under an Order in Council issued from New South Wales. The Governor was empowered to make laws for peace, welfare and good governance of the colony. Queensland passed its own Constitution Act albeit in the form of conventional British colonial Constitution⁵⁴.

c) South Australia

South Australia capital is the city of Adelaide. It was not populated and was economically disadvantaged due to lack of minerals. The colonial beginning in 1836 projected a penal model which was the foundation for its administration. When self-governance was granted in 1856, it was claimed to be the most democratic pioneering state in the British Empire⁵⁵. The

⁵² Rodney Smith. *New South Wales:* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003)

⁵³ John Wanna. *Queensland:* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 74-103

⁵⁴ John Wanna. *Queensland:* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 41-73

⁵⁵ Howell P,A. *South Australia, Federalism and the 1890s; The Making of a Federation* In Andrew Parkin (ed) *South Australia, Federalism and Public Policy.* Canberra Federalism Research Center, Australian National University (1996)

political leaders were some of the leading contributors to the thinking that brought about federal movement in 1890s. South Australia was a unique colony since it was founded on a parliamentary statute as opposed to the Constitution. Authority was divided between the governor who was responsible for general government and Colonization Committee. This committee was responsible for land distribution, town planning and migration. During the period of self-governance South Australia had a bicameral parliament. The labor party was the dominant party in South Australia.

d) Tasmania

Tasmania was founded as a convict settlement island in 1803. It was initially referred to as Van Diemen's Land after the first Dutch explorer who landed on the Island. Following the abolition of transportation of convicts in New South Wales, Tasmania became the destination for the convicts⁵⁶. This was seen as the most isolated prison on earth. The movie the "last confession of Alexander Pierce" depicts the situation of the prisoners at Tasmania. It is based on a true story of Alexander Peirce who is said to have escaped prison several times and became a cannibal in the process. What was also interesting is that the prisoners who concluded their prison term opted to go to Victoria colony to the surprise of those at Melbourne in New South Wales State⁵⁷. This was more so during the discovery of gold at Victoria. Like other Colonies Tasmania had its own constitution during the declaration of self-rule.

e) Victoria

Victoria was a colony found in Southeastern part of Australia and was at the time the smallest State in size all through Australia. It was named after Queen Victoria the same way Queensland was named after the Queen⁵⁸. Initially it

⁵⁶ Aynsley Kellow *Tasmani* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 131-153

⁵⁷ Aynsley Kellow *Tasmani*

⁵⁸ Gray Presland, *The First Residents of Melbourne's Western Region* (revised edition), (1997). Harriland Press,

formed part of the greater New South Wales colony. It is said to be the home of the Aboriginal people who lived a semi-nomadic life of fishing, hunting, gathering, and farming eels in Victoria⁵⁹. The discovery of gold made it more prominent and attractive to many people. This is what is referred to as the gold rush⁶⁰. It has been argued that this is the best display of the injustice occasioned to the Aborigines since they were the initial natives of Victoria. With Melbourne as its capital Victoria was to become the main hub for several activities in Australia. The new Commonwealth Parliament, federal administrative agencies, security and intelligence organizations and the Australian Industrial Relations Commission are all located in Victoria. Melbourne is argued to be the home of protectionism as a way of encouraging manufacturing, industrial growth and national economic development⁶¹. It would be expected that its size would determine the number of representatives to the commonwealth parliament. Surprisingly under the commonwealth constitution of Australia it was allocated 23 members⁶².

f) Western Australia

It is arguably the largest colony state in terms of land mass in Australia with a total land area of 2,529,875 square kilometers (976,790 square miles). It was a support colony to the New South Wales in terms of offering convict-supported settlement⁶³. Western Australia was the last colony to decide to join the federation since it was the last one to gain self-government. This was because there was a clamor by the Western Australia to recognize the

⁵⁹ Economou et al *Victoria* in Jeremy Moon and Campbell Sharman, *Australian Politics and Government The commonwealth, The States and The Territories*, Cambridge University Press, (2003) pp 155-181

⁶⁰ Ibid

⁶¹ Ibid

⁶² Economou et al *Victoria*

⁶³ Knibbs, G.H. "The Creation of the Several Colonies". *Official Year Book of the Commonwealth of Australia*. 4. Melbourne: Commonwealth Bureau of Census and Statistics. (1911). p. 16

Aboriginal population in the section 70 of their constitution⁶⁴. The rest of the Commonwealth was not keen on this clamour. This was aimed at ensuring that the Aboriginals were able to access social welfare services. The British were not very pleased with this move. From its founding by the Dutch, West Australia has been strongly shaped by distance and isolation that other states. The population is dispersed in a few moderately sized centers and many farming communities, mining, and fishing⁶⁵.

g) Northern Territory

The process of the constitutional development of Northern territory began in 1863 when the colonial office of Great Britain vested control to South Australia⁶⁶. In 1888 the Southern Australia government constituted the territory as a single tow-member electorate district of South Australia. With the coming of the British, there were four early attempts to settle the harsh environment of the northern coast, of which three failed in starvation and despair⁶⁷. On 1 January 1911, a decade after federation, the Northern Territory was separated from South Australia and transferred to federal control⁶⁸.

h) Australian Capital Territory

This is the newest state in Australia. It is the smallest of the nine self-governing states in Australia. It became a state in 1989 making it a city state. Its capital Canberra has a vision of being the cleanest city in the world. Labor party politics are at the center of politics in this city. Governance is fluid, relations with other states is dynamic, and coalition building seem to be the ideals adopted for politics in this state.

⁶⁴ Jeremy Moon and Campbell Sharman, *Western Australia* in Ed. Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 155-181

⁶⁵ Ibid

⁶⁶ Dean Jaensch, *Notthern Territory* in Ed. Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 155-181

⁶⁷ Ibid

⁶⁸ Ibid

Australian Constitution and System of Government

a) Prelude to Governance

From the onset it was clear that a federation was the government system to be adopted in Australia. Sir William Stawell a Victorian Governor suggested that a federation would be established before it could be proclaimed⁶⁹. Consensus among historians suggest that the federal government making process for its day was the most democratic model of constitution making process⁷⁰. However, others argue that some sections of the Australian population participated in the drafting of the constitution⁷¹. The clamor for constitution making began with the push for self-government by the locals. This was followed by the idea that interest for to self-govern would adopt the Westminster principles as early as 1850s. Previously, the colonies were managed by the colonial office in collaboration with the local administrators. This to some extent appeared effective and needed not much change. The need for a change of governance was prompted by the attempt to introduce additional convict transportation in 1840s which sparked riots across the colonies⁷². Sir John Pakington gave permission to the colonies to draw up constitution for self-government at the behest of gold diggers such as Ballarat in 1854⁷³. It has been argued that this did not have any bearing on the Australians since the colonial system was already working well. The different colonies came up with their Constitutions with ease except Western Australia.

⁶⁹ Dean Jaensch, *Nothern Territory*

⁷⁰ Gilligan B *A Federal Republic: Australia's Constitution system of Government* Cambridge; Cambridge University Press (1995). Irving, H. *To constitute a Nation: A Cultural History of Australia's Constitution* Cambridge University Press (1997). La Nauze J. A *The Making of the Australian Constitution* Melbourne University Press (1972)

⁷¹ William, G. *Human Rights under the Australian Constitution* Melbourne; Oxford University Press (1999)

⁷² Robert Hughes, *The Fatal Shore: A History of the Transportation of Conflicts to Australia 1787-1868*, (1987) London

⁷³ Schreuder D.M et al *Australia's Empire* (2008), Oxford University Press. pp143

b) Constitution Making Process

The first governments under these arrangements were largely authoritarian and autocratic. Free settlers were determined to exert their influence in the management of the territories of the colonies. The British government-maintained control over defense and external relations while the bicameral parliament controlled the internal aspects. There was relative stability in the colonies and the ideas of federation began to be floated in the mid-19th Century. This was even more poignant because of the fear of influx of Asians. As soon as the Constitution was ratified the new parliament approve a legislation that denied Asians entry into Australia to balance the interests of the British in trade in the East.

As stated earlier the constitution making process was marked by a series of activities. A federal convention was held in 1891 which produced a draft constitution⁷⁴. This convention proposed a system of government that was relatively federal which heavily copied the American model⁷⁵. The first draft constitution was never implemented for a number of reasons. Firstly, it lacked popular support locally. Secondly the colonial government had not found favorable support to its initiatives. Thirdly the rise of the labor movement globally and the demand locally for the removal of colonial barriers⁷⁶. This led to the second initiative at constitution making process in 1897 and 1897. This was as a result of individuals such as Andrew Inglis Clerk the Attorney general of Tasmania, Charles Kingston of South Wales, Edmund Barton, who pushed for meetings that took place in Queen Victoria. This was arguably a better attempt since representatives from the colonies were sent to the conferences. Some colonies such as New South Wales, Queensland and West Australia did not manage to gather the required support base hence the referendum was not held in their respective

⁷⁴ Brian Gillian et al *Australia and Globalization; The experience of two Centuries* (2001) Cambridge University Press pp 62

⁷⁵ Ibid

⁷⁶ Brian Gillian et al *Australia and Globalization; The experience of two Centuries* (2001) Cambridge University Press pp 62

colonies⁷⁷. From this conference the second constitution was proposed which was more democratic taking after the American model. The democratic character of the constitution process and the constitution itself adopted the spirit of people of Australia⁷⁸. Compromise became the tool used to make the Australian Constitution.

c) Promulgation of a Federal Constitution

The Australian Constitution was then passed as part of a British Act of Parliament in 1900 and took effect on 1 January 1901. A British Act was necessary because before 1901 Australia was a collection of six self-governing British colonies and ultimate power over those colonies rested with the British Parliament. In reality, however, the Constitution is a document which was conceived by Australians, drafted by Australians and approved by Australians. Since that time, Australia become an independent nation.

The Constitution has been argued to have been comprehensive statement of the powers of a national government. The Commonwealth Constitution accepted almost without dispute the British system of parliamentary government. The commonwealth government had to retain majority in the House of Representatives from whom most ministers would be drawn. The prime minister would be the leader of largest party and would maintain its support. Although this cannot be found in the founding Constitution, the executive powers of the commonwealth were vested in the governor general as the agent if the monarch. The system of government was not without controversy on matters of representation in parliament. The smaller state was concerned that New South Wales and Victoria would dominate parliament. They proposed a two-tier house which was a replica of the American constitution. Since this was a hybrid model adopting American and British model it was certainly going to introduce a contradiction.

⁷⁷ Ibid

⁷⁸ Ibid

d) System of Governance under Federal Constitution

The British parliamentary system and the concept of responsible government without question would not sit in properly with a federal government with an upper house with greater power and authority than the British model⁷⁹. There were some clauses in the Constitution that are claimed to have offered the equilibrium to these stalemates⁸⁰. Australia adopted a system of single member electoral district for the House of Representatives with a first past the post method of election. This was to be balanced by the system of proportional representation adopted by senate in 1949. Politics in Australia are organized around the labor party and anti-labor parties. The labor party is the oldest with its existence being traced back to 1891. The conservatives have dominated the remaining part of the history of Australians independence. The judiciary was established under Section 71 of the Constitution with judicial power being vested in the Federal Supreme Court.

e) Modern Politics in Australia

From 1907, Australia was accorded the status of dominion with the British Empire. This was however not unanimous since some individuals opposed the idea of dominion and were pushing for complete autonomy⁸¹. During the Great War (World War 1), it was already clear that the role of foreign relations was the preserve of the federal parliamentary powers. Australia aligned itself greatly with British government and considered itself as British admiralty. There were continued internal clamor for complete autonomy until 1926 when the Statute of Westminster conceded these demands recognizing Australia as a political equal of United Kingdom⁸². Australia retained the Monarch as the head of state. The transition period between this war and the next one was marked with realignment and internal political

⁷⁹ Galligan Brian A *Federal Republic: Australia Constitutional System of Government*, Cambridge: Cambridge University Press (1995)

⁸⁰ Paul W and Jenny F. *The Commonwealth:* in Jeremy Moon and Campbell Sharman, *Australian Politics and Government The commonwealth, The States and The Territories*, Cambridge University Press, (2003) pp 16-19

⁸¹ Paul W and Jenny F. *The Commonwealth:* in Jeremy Moon and Campbell Sharman, *Australian Politics and Government The commonwealth, The States and The Territories*, Cambridge University Press, (2003) pp 16-19

⁸² *Ibid*

turmoil in Australia. For the Second World War the Prime Minister Menzies confirmed that Australia would support Britain. He is said to have stated that since Britain was at war with Germany Australia was also at war. Australia has continued to participate in the global discourses adopting political alignments that were strategic.

United Arab Emirates

The coastline of seven United Arab Emirates extends to about 650 Kilometers (400 miles) from Oman to Qatar also known as the Arabian or Gulf Peninsula. The gulf water contains fish which informs the history of the UAE as we know it today. The climate is arid with very high temperatures. The total area is estimated to be 77,700 Square Kilometers which is small compared to Saudi Arabia and Oman. The official language is Arabic however the Arabs are outnumbered by the migrant workers.

a) Context of Studying United Arab Emirates

According to Landen Robert there are several themes that have been adopted to study United Arab Emirates. Firstly, the Trucial States and British Imperial Interests which surveys of the period of British political supremacy between 1882 and 1971. Secondly, the Internal changes which is a treatment of domestic developments within the several regional states. Thirdly, the western neighbors of the Trucial States where the focus is on a discussion of boundary negotiations between the leading emirates that is, Abu Dhabi, and Saudi Arabia. Fourthly, the relations between Britain, Persia, and the Trucial States. Fifthly, the Britain, Muscat, and the Trucial State Boundaries. Lastly the boundary questions and naturally, presented from a pro-Emirates (and British) point of view. This appears to be an emphasis on the chronology, political occurrences, frontier disputes, and the role of Abu Dhabi in regional affairs⁸³. This was going to play a significant role on UAE going forward and more significantly on the control of Britain. For the sake of comparison with Australia, this paper will focus on the constitution making politics around the formation of the federation known as United Arab Emirates.

⁸³ Landen, Robert G. "Muhammad Morsy Abdullah, *The United Arab Emirates: A Modern History* (London: Croom Helm, and New York: Barnes and Noble, 1978). Pp. 365." *International Journal of Middle East Studies* 12, no. 4 (1980)

b) History of UAE

Settlement in the UAE began during the Bronze Age on the culture of Umm al-Nar which was practiced in modern day Abu Dhabi⁸⁴. In the classical period Persia and Greece were dominant influences including to the Middle East. In 1498 the Portuguese arrived in the Middle East with a view to take control of the trade between Europe and the Far East. They gained monopoly in the Middle East and for instance in 1506 conquered Julfa (modern day Ras al-Khaimah) and thereafter built a fort⁸⁵.

Around the same time there were pirates who would attack vessels attempting to proceed to the Far East. These pirates around 1453 CE were Turks who occupied the territory as an extension of the Ottoman Empire⁸⁶. At the time the Pope had stopped trading with the East and traders started to look toward India. It is claimed that Vasco Da Gama went through the UAE on his way to India⁸⁷. Around 1600 CE Qatar which was part of the greater United Arab Emirates is first mentioned as being involved in pearl trade. The pearls were found in the ocean by fishermen. The pearl divers are now part of the native's elite because they used to dive holding their breath to get pearls. It is claimed that the fishermen who turned to be pearl men began could stay at sea for up to three months. For a long period there was the center of focus as an economic activity.

The British were interested in ensuring that they stop piracy that was occurring in the peninsula⁸⁸. The Gulf became a protectorate of the British around mid-17th Century. This led to an invasion by the British who were interested in offering protection for the purpose of ensuring that their route to trade with India was safe about 1800 CE. In 1830 CE the Turks started taxing the Qatar. Around 1873 the British were now in control of the UAE as a

⁸⁴ Gerd Nonneman "The United Arab Emirates Abu Dhabi Dubai Sharjah Ras Al Khaimah Umm al-Qaiwan, Ajman Fujairah" in Lucy Dean The Middle East and North Africa 2008 (London: Routledge 2008) p 1207

⁸⁵ Ibid

⁸⁶ Landen, Robert G. "Muhammad Morsy Abdullah, *The United Arab Emirates: A Modern History*

⁸⁷ Ibid

⁸⁸ Ibid

protectorate as an outpost for their interest in the trade happening in India. There was a clash between the pirates, the British and Al Qasimi vessels introduced various challenges between the leaders in the United Arab Emirates⁸⁹. The British made an expeditions to protect British-Indian trade and interests around Ras al-Khaimah. This led to campaigns against the harbors along the coast from 1809 CE and more fiercely in 1819 CE⁹⁰. The next year, 1820, a peace treaty was signed to which all the Sheikhs of the coast adhered⁹¹. The peace treaty did not succeed as expected. There were skirmishes, conflicts and raids by the British which continued sporadically. This continued until 1835 CE when the sheikhs agreed not to engage in hostilities at sea and Sharjah, Dubai, Ajman and Abu Dhabi signed a renewed treaty banning hostilities during the pearling season. This gave birth to the trucial states.

The historian Frauke Heard Bey⁹² argues that as a result of negotiation a truce was reached in 1820. It is argued that Sheikh Saeed Bin Tahnun Al Nahyan was the Ruler of Abu Dhabi, one of the Trucial States between 1845–1855⁹³. Subsequently and a number of other short treaties were made, culminating with the ten-year truce of June 1843⁹⁴. Feeling the benefit of peaceful pearling and trade, the coastal Sheikhs from these trucial states signed the Perpetual Treaty of Maritime Peace in 1853. The peace pact enabled the emirates to continue with pearl trade which was a booming business worldwide. They gained markets in Europe, Asia and America. It was clear that in 1930 Japan came up with pearls which are claimed to be not as authentic⁹⁵. This led to the downward spiral on pearl trade in United Arab

⁸⁹ Charles E. Davies *The Blood-red Arab Flag: An Investigation Into Qasimi Piracy, 1797-1820* (1997) University of Exeter Press

⁹⁰ Charles E. Davies “ *The Blood-red Arab Flag*: pp 20-24

⁹¹ *Ibid*

⁹² Heard-Bey, Frauke, *From Trucial States to United Arab Emirates: a society in transition*. London: Motivate (2005).

⁹³ Said., Zahlan, Rosemarie *The Origins of the United Arab Emirates : a Political and Social History of the Trucial States*. Taylor and Francis. (2016). p. 241

⁹⁴ Heard-Bey, Frauke, *From Trucial States to United Arab Emirates: a society in transition*. London: Motivate (2005).

⁹⁵ *Ibid*

Emirates. This period was the genesis of the little activity in the Gulf⁹⁶. Elsewhere the world was getting involved with the events leading to and getting out of the Great War commonly referred to as World War I⁹⁷.

c) Growth of UAE

In 1820 several treaties had been signed between several states in Europe recognizing four Sheikdoms (Khalifa, Bahrain, Qatar and Dubai). The Sheikh wielded power to the different spheres of influence. This was as a result of the influence of Islam following the collapse of the Roman Empire. Each Sheikdom was treated by the British as a unique province. When the Sheikh would not manage the certain places in the Sheikdom the British would develop it into a different province. For instance, when the Sheikh of Sharjah was not able to control Fujairah, the British made it a province⁹⁸

d) Discovery of Oil in UAE

The history of Iran's oil industry began in 1901, when British speculator William D' received a concession from Iran to explore and develop southern Iran's oil resources⁹⁹. The discovery of oil on May 26, 1908, led to the formation in 1909 of the London-based Anglo- Asian Oil Company (APOC)¹⁰⁰. By purchasing a majority of the company's shares in 1914, the British government gained direct control of the Iranian oil industry, which it would not relinquish for 37 years¹⁰¹. After 1935 the APOC was called the Anglo- Iranian Oil Company (AIOC). A 60-year agreement signed in 1933 established a flat payment to Iran of four British pounds for every ton of crude oil exported and denied Iran any right to control oil exports¹⁰². A dispute arose from Saudi Arabia's longstanding claim, made in 1949, of sovereignty over a large part of Abu Dhabi territory where oil was suspected to be present and an area in a 20-mile circle around the center of the Buraimi

⁹⁶ Ibid

⁹⁷ Ibid

⁹⁸ Gerd Nonneman "The United Arab Emirates p 1208

⁹⁹ Curtis, Glenn E, Eric J Hooglund. *Iran: A Country Study*. Washington, DC: Federal Research Division, Library of Congress: (U.S. G.P.O, 2008).160–163

¹⁰⁰ Curtis, Glenn E, Eric J Hooglund. *Iran: A Country Study*.

¹⁰¹ Ibid 160–163

¹⁰² Ibid 160–163

Oasis. The claim arose after a geological party from the Arabian American Oil Company (Aramco) crossed the 'Riyadh line'. This was a border line negotiated in 1935 by the Oman on behalf of Oman and Abu Dhabi with Saudi Arabia, which the latter had rejected¹⁰³. The Saudis responded by extending their territorial claim to include the right to negotiate with the Sheikhs of the entire Buraimi/Al Ain Oasis and areas of the southern and western part of Abu Dhabi¹⁰⁴. The Saudis relied on historical precedent (the oasis was under Wahhabi influence on a number of occasions in the period between 1800–1869) for their claims, which were countered by arguments from Abu Dhabi and Muscat based on more recent events.

The argument led to the 1950 'London Agreement' whereby all exploration and troop movements would cease in the area until the issue of sovereignty was resolved. Despite ongoing negotiations, the Saudis attempted to take back the oasis¹⁰⁵. Meanwhile, Saudi Arabia embarked on a campaign of bribery to obtain declarations of tribal loyalty on which its case was to be based¹⁰⁶. In 1955 arbitration proceedings began in Geneva only to collapse when the British arbitrator, objected to Saudi Arabian attempts to influence the tribunal and withdrew one of the two judges to resign, the other being the Belgian President. Given these breaches of the agreement, the British government decided to unilaterally abrogate the Standstill Agreement and take the oasis in 1955¹⁰⁷. Following this dispute the British decided to split the territory of Buraimi Oasis and gave part of it Buraimi to Oman and the territory under Sheikh Zayed, including the village of Al Ain, to Abu Dhabi¹⁰⁸.

¹⁰³ Quentin. Morton, Michael (2013). *Buraimi: the Struggle for Power, Influence and Oil in Arabia*. London: I.B. Tauris.

¹⁰⁴ Hawley, Donald (1970). *The Trucial States*. London,: Allen & Unwin. p. 188

¹⁰⁵ Morton, Michael Quentin (2013). *Buraimi: The Struggle for Power, Influence and Oil in Arabia*. London: IB Tauris. p. 304

¹⁰⁶ Edward, Henderson, (1993). *This strange eventful history: memoirs of earlier days in the UAE and the Sultanate of Oman*. Dubai, UAE: Motivate Pub. p. 20

¹⁰⁷ De Butts, Freddie, (1995). *Now the dust has settled: memories of war and peace, 1939-1994*. Padstow, Cornwall: Tabb House. p. 175

¹⁰⁸ Said. Zahlan, Rosemarie *The Origins of the United Arab Emirates: a Political and Social History of the Trucial States*. (Taylor and Francis 2016). . p. 193.

This resolved the dispute and created a boundary of Abu Dhabi as part of UAE. However, tribal factions as previously identifiable are claimed to still be in existent even today. Feuds, rivalries, petty jealousies and pride associated with the old system have are said to be on the decline in the long term are likely to be completely shed their old shapes and emerge sideways in the new guise of guised as nationalism that is likely to appear as an autocratic right wing called progressive movements¹⁰⁹.

e) **The Family Union**

To understand the current constellation of UAE it is important to study the idiosyncrasies of the lead brothers. Sheikh Shakhboub who took over rein of Abu Dhabi in 1928 was not interested in development. Sheikh Sayeed on the other hand who was in charge of Dubai was outgoing and open minded who was favorite of westerners¹¹⁰. In 1966 Sheikh Zayed took over the development of Emirates. Zayed was outgoing and very popular. Dubai came up as an investment hub with foundation being the trade of Gold. It is argued that the English left emirates for several reasons among them decolonization global push, economic model critics, imperialism was ending, and the British government was interested in saving money to sustain the military. This left the UAE in the hand of a family union which were originally pearl farmers.

Constitutions making Theories

There are several dimensions that have been suggested by scholars to analyze constitutions. The textualism theorist argue that the consideration must be had on the text its meaning and import¹¹¹. The textualist will analyze the structure of the text consider the words as they would sound in the mind of a skilled, objectively reasonable user of words¹¹². For instance, in Australia textualism was influential and particularly prominent in the interpretative approach of

¹⁰⁹Kristian C, U. *The United Arab Emirates; Power, Politics, and Policymaking* New York, NY 10017 (2017)

¹¹⁰ James O. *Britain and the Gulf Shaikhdoms, 1820–1971: The Politics of Protection*. Center for International and Regional Studies (2009)

¹¹¹ Easterbrook, Frank H. *"The Role of Original Intent in Statutory Construction"*. Harv. J.L. & Pub. Pol'y. **11**: 59(1988). [p. 65].

¹¹² Ibid

Sir Garfield Barwick¹¹³ in the debate on the amendments to the Australia's Interpretation Act of 1901. It has been claimed he rejected key elements of textualism, stating that statements made in the Second Reading speech by Ministers introducing an Act may be used in the interpretation of that act¹¹⁴. For instance, there is unanimity in the two Constitutions (Australia and UAE) that the interpretation of the text should be done by the Court¹¹⁵.

Diametrically opposed to textualism is the originalist theory. The idea flows from considering the original intent of the Constitutional framework. The common phrase among the originalist is the idea of looking at the imaginations of the founding fathers of the nation. The founding theorists argued that under this theory the idea is to look at the functional and motivation intent of the text¹¹⁶. From this one can understand the true intent of the Constitution. One of the criticisms of this theory it presumes that there is a single, unified intent behind a text. This challenge is compounded by the fact that in any constitution making process the lawmakers either have no intent, one intent, or multiple intents. But these multiple intents are always consistent, otherwise the law can have no meaning.

The other two approaches to constitution making are the formalism and structuralism. Formalists insists that any text stands on its own as a complete entity, apart from the writer who produced it¹¹⁷. The challenge with this approach is it reduces the importance of a text's historical, biographical, and cultural context. Structuralism on the other hand argue that a particular sphere of culture may be understood by means of a structure that is distinct both from the organizations of reality and those of ideas or the

¹¹³Sir Garfield Barwick was an Australian judge. He was the seventh and longest was serving Chief Justice of Australia, in office from 1964 to 1981.

¹¹⁴ Ibid

¹¹⁵ Article 76 of Australia Constitution and Article 99 of United Arab Emirates Constitution

¹¹⁶ Paul Brest, Sanford Levinson, J.M. Balkin and Akhil Reed Amar, Reva B. Siegel, *Processes of Constitutional Decision-Making*, New York: Aspen, 5th ed., 2010. B. Boyce, "Originalism and the Fourteenth Amendment", 33 *Wake Forest L. Rev.* 909

¹¹⁷ Cain, Mary Ann. "Problematizing Formalism: A Double-Cross of Genre Boundaries," *College Composition and Communication*. 51:1 Sept 1999. 89-95

imagination¹¹⁸. This methodology implies that rudiments of human culture are implicit by way of their relationship to a broader, overarching system or structure¹¹⁹. It works to uncover the structures that underlie all the things that humans do, think, perceive, and feel. This can be used in explaining how for instance Constitutions come up.

There is no unanimity on the best approach to compare constitution making politics. What matters is how one looks at the constitution. For the purpose of this paper we consider constitutions we consider the historical perspective and originalist and the structuralism theory can best explain the existing environment. Constitution making is a multi-disciplinary and multi-dimensional activity. It contains both internal or domestic factors as well as external or international factors. Analysis must be had on both since one is able to discern the culture that irrigates the constitution making process as an imperative for understanding how it operates. By so doing it is hoped that the differences and similarities of the Australian and United Arab Emirates will emerge.

Constitution Making Process in United Arab Emirates

As soon as the United Kingdom terminated all existing treaties with the crucial states, a treaty of friendship was made between Abu Dhabi, Dubai, Sharjah, Umm al Quwain, Ajman, and Fujairah. Ras Al Khaiman did not initially join this treaty since it wanted to be in equal footing with Abu Dhabi. However, on considering the economics of military spending it decided to join the treaty¹²⁰. The glue that made the federation stick was the generosity of Sheikh Zayed the ruler of Abu Dhabi who was passionate about the federation. These federation approved a provisional (draft) constitution which was to expire after five years however it was renewed successively

¹¹⁸ Deleuze, Gilles. 2002. "How Do We Recognise Structuralism?" In *Desert Islands and Other Texts 1953-1974*. Trans. David Lapoujade. Ed. Michael Taormina. Semiotext(e) Foreign Agents ser. Los Angeles and New York: Semiotext(e), 2004. 170–192

¹¹⁹ Ibid

¹²⁰ Gerd Nonneman “ The United Arab Emirates p 1208

until 1996 when a draft was adopted as the Constitution. UAE also submitted its application for membership to the Arab League and the United Nations. Prior to this seamless flow of Constitutional order there was a season of negotiations between the crucial states. In 1969 a meeting was held by the union of Supreme council to discuss the 'constitutional shape' of the union¹²¹. Abu Dhabi, Dubai, Bahrain, and Qatar set the principal issues on the agenda including selection of a president and prime minister, the location of a capital and the structure and selection of the federation's advisory assembly¹²². In early 1970, following two years of unproductive negotiations, the emergence of a union of nine sheikhdoms seemed remote. It appeared that the rulers continued to not to be committed to a federation of nine, yet their behavior suggested otherwise. In late 1969, each of the four larger sheikhdoms Abu Dhabi, Bahrain, Dubai, and Qatar began creating separate state institutions that indicated they were preparing for independent statehood¹²³. It would later emerge that the rulers of Bahrain and Qatar were not ready or willing to succumb to a ranked structure of a state unless they could be assured they would be the ruler that would dominate it. This was a potential for disaster as observed by Ibn Khaldun¹²⁴. Rather than join a federation of nine sheikhdoms dominated by a rival, Bahrain and Qatar opted for independence that was guaranteed by the relationship that existed with Saudi Arabia. At the time, the rulers of Bahrain and Qatar possessed the economic resources to independently sustain their shaykhly authority.

¹²¹ Brandon Friedman, "From union (ʿittihād) to united (muttahiḍa): the United Arab Emirates, a success born of failure", *Middle Eastern Studies*, (2017) Vol 53:1, pp 112-135

¹²² Taryam, p.118; and, for a draft copy of the agenda items in English, see US Department of State Telegram, Dhahran to Washington, 10 May 1969, Dhahra 00401 101110Z, RG 59.

¹²³ Brandon Friedman, "From union (ʿittihād) to united (muttahiḍa):

¹²⁴ "solidarity maintained by egalitarian ethics is doomed when it is transformed into a hierarchically arranged structure the state"

The Constitution clearly demarcates the responsibilities between these two levels of government¹²⁵. The Federal government comprises the conventional executive, the legislative and the judicial branches. It is a presidential style of government. The President is aided by the Council of Ministers, which is headed by the Prime Minister, and includes all ministers and state ministers. The Supreme Council of Rulers is the prime policy-making body. It comprises the seven Rulers of seven Emirates. Under the Constitution, the members of this Council elect the President, from amongst its members, for a period of five years. All constitutions are highly correlated to each other, but taking any one constitutional characteristic, we are likely to find exceptions¹²⁶. Consequently, if constitutions matter, they matter thanks to nonlinearities small differences leading to important results. This is why the issue of nonlinear interactions among characteristics has to be taken a lot more seriously, and why Acemoglu's critique focusing mostly on OLS issues, misses the target (by comparison, these are relatively minor problems)¹²⁷. The federal state is divided in provinces. It is a system where seven emirates' rulers are the supreme council of rules. They are followed by the President and Deputy. There is also a council of ministers. A national council and judiciary.

Internal Domestic factors

At the time of constitution making in both Australia and UAE the existing environment was greatly influenced by the British Empire rise and collapse. The Napoleonic wars had an influence on the second British Empire. This greatly influenced the perception interest to control large parts of the world where there were contests such as Australia. The constitution that emerged from these was a pragmatic. It did not transform the existing structure to differ significantly from the existing order. This is effectively what gave rise

¹²⁵ Sarker, A. E., & Al Athmay, A. A. A. R. A. *The Changing Facets of Public Administration in the United Arab Emirates. International Journal of Public Administration*, (2017) 41(10), 832–844

¹²⁶ Lord Wright, *Memories of 1971: A Historic Year In The Emirates*, Asian Affairs, (2011) 42:2, 300-308

¹²⁷ Tarko, V. *The challenge of empirically assessing the effects of constitutions. Journal of Economic Methodology*, (2015) 22(1), 46–76.

to a federal system of governance with the provinces. The complete decline of the British Empire came about after the end of the Second World War. This coincided with the clamor for the independence of United Arab Emirates from being a protectorate to complete autonomy. The politics around the creation of a union United Arab Emirates was predominantly influenced by the internal environment in Qatar and Bahrain as well as Oman.

External Factors

A comparative overview of international influence on constitution-making on the emergence, evolution, and distribution of international constitutional norms offers a better understanding. While most research on international norms explains the creation and expansion of specific norms in the actions of particular agents, in some cases norms may spread globally regardless of the type of action taken by the agents who aim to implement them¹²⁸. For instance, United States Constitution became a point of reference for how the Constitution of Australia came about with a bicameral parliament.

Contemporary Politics

a) United Arab Emirates

In modern day United Arab Emirates, the Constitution already settled that the President would be appointed by the Supreme Council which consists of the Rulers of all the Emirates composing the Union¹²⁹. However, the Supreme Council has not been seamless as imagined. When Sheikh Zayed died at the age of eighty-six on 2004 after a period of declining health the Presidency of the UAE and Ruler ship of Abu Dhabi passed smoothly to his oldest son and designated successor, Sheikh Khalifa bin Zayed Al Nahyan. While Sheikh Khalifa had been heir apparent for more than three decades since his appointment as Crown Prince of Abu Dhabi in 1966, his uncontested assumption of power in 2004 took some external observers by

¹²⁸ Hanna Lerner, Amir Lupovici, Constitution-making and International Relations Theories, *International Studies Perspectives*, Volume 20, Issue 4, November 2019, Pages 412–434

¹²⁹ Article 46 United Arab Emirates Constitution

surprise. The primary reason for such uncertainty over the management of the leadership transition lay in a (misreading) of familial dynamics among the many sons of Sheikh Zayed. United Arab Emirates continue to attract attention for the upcoming iconic architecture and buildings such as Burj Khalifa the tallest building in the world. In 2009 there was a big economic decline but was able to reemerge.

b) Australia

Kenyan Senator in Australia

Under Article 57 of the Australian Constitution when there is disagreement through a stalemate between the bicameral houses there is something referred to as double dissolution. In Australia there has been 7 dissolutions in 1914, 1951, 1974, 1975, 1983, 1987 and 2016. In a double dissolution sometimes, there is a joint sitting to try and resolve the stalemate. The double dissolution provision comes into play if the Senate and House twice fail to agree on a piece of legislation which is referred to as trigger events. The conditions stipulated by section 57 of the Constitution are when a trigger bill originated in the House of Representatives and three months elapsed between the two rejections of the bill by the Senate. The context is that the Senate's failure to pass the bill, or to the Senate passing it with amendments to which the House of Representatives will not agree. The challenge is that there is no constitutional provision for resolving the deadlock to this stalemate.

The attention of the world was captured by the election of a Kenyan female Senator of South Australia province. She was the first black African born Senator in the history of Australia. Lucy Muringo Gichuhi a humble girl from Kiraga Village in Nyeri County was an accountant in Kenya having graduated from University of Nairobi. In 1999 she decided to migrate to Australia for greener pastures when at the time Australia was looking labor workforce globally through the skilled migration program. The Constitution of Kenya at the time did not permit dual citizenship. According to the Immigration Act a Kenyan who applied for citizenship of another State automatically lost Kenyan citizenship. By assuming Australian Citizenship Lucy lost her Kenyan citizenship and became a naturalized Australian.

Senator Lucy Muringo became a lawyer having finalized her law degree at university of Adelaide and at the time she was interested in getting a Job as a lawyer. She got a job with a lawyer working for Senators. Subsequently double dissolution of parliament occurred in 2016. This led to the declaration of the election for both houses. The qualification of electors of senators are well captured in the Constitution. It provides that such electors shall be in each State that which is prescribed by the Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once¹³⁰. She declared that she would contest for Senate seat together with his partner under the Family First Party.

Party politics in Australia

Australian politics is centered on Parties. It is claimed that the senator ran as a second candidate and under the electoral system the party must determine who is the main candidate and a number two. She ran on the Family First Party ticket as second to Mark. who got some financial troubles and was declared no qualified to contest even though they had won. The Family First party managed to get the position 12 in the elections of the Senator for South Australia. The Australian Constitution permits 12 senators for South Australia. Mark won the seat but soon thereafter became bankrupt and was disqualified from assuming the seat due to bankruptcy allegations. Mark was declared not entitled to be in the ballot in the first place. This automatically meant that Senator Lucy. After fierce court battles the Court declared Senator Lucy to have been entitled to the South Australian province under the Family first party.

Since Australian politics is party led, the win by Family first party with two candidates makes it clear that the second can become the Senator. In Senator Lucy case, she contested as a second candidate and the voters are eligible to elect their candidate of choice or the party. When the party wins the first candidate gets the position. If there is difficulty the second gets or when the electorate decided. There was a challenge that she was not entitled to be a

¹³⁰ Article 8 of the Australian Constitution

Senator because claims that she was not Australian. The conservative party challenged her participation to the election and the Australian Court overruled the challenge and permitted her to proceed with the challenge for the position of Senate. The election of the Family First Party was equally challenged in Court and the Court ordered a recount of her votes and here victory was confirmed in 2016.

Several years later the Family first party was dissolved after being absolved by the Conservative party. This meant that Senator Lucy had to decide whether to join Conservatives following the Family first party or the Liberal party. In 2018 she declared that she could not going to join the Conservative party at all and insisted that she was liberal to the core and hence join the Liberal Party. She was welcomed by the Prime Minister to the Liberal party. In 2019 she contested for nomination for a ticket at Liberal party and only managed to get the 3rd having garnered 2500 Liberal Party votes. This meant that her tenure at the Senate came to an end on 30th June 2019.

Conclusion

This paper sought to establish the constitution making politics in Australia. It is founded and comparative theory of politics with the hope that better understanding would be gained from Australia and United Arab Emirates politics. The common thread has been the British. For Australia the State emerged at the time when the British was losing control of what was the British Empire. The State began as a penal colony and grew to be a model that would influence the region called Australian Continent. It has emerged as a powerhouse in what is could down under. Australia continues to place allegiance to the Queen of England even after gaining independence. The constitution appears to be transformational and progressive permitting the migration culture so that a Kenyan born Senator could be elected and sit in Senate. The fact that the Senator could migrate, gain citizenship, gain elective post is the hallmark of a well thought out political system.

The current reality for Australia is very dynamic. Although the constitution-writers saw each level of government as having a role to fill, hopefully for all time, their optimistic words about the division of power in a federal state

have not been borne out. An important, if not always appreciated, point is the part that perspective has played in shaping the different levels of government in the years since 1901. Commonwealth governments have tended to focus on their own needs, policies and preferences before those of the states or territories, with an implicit assumption that the national view is the one that should be preferred in times of debate and argument. State concerns have often been pushed aside. Similarly, state and territory governments have seen policy through the prism of their regional needs, often seemingly unable to see that there might be a need greater than the satisfaction of their own community.

United Arab Emirates emerged as a protectorate of British. It began as a state that was concerned with pearl trade. Due to global trends and growth of Japan as a hegemony, the pearl trade came to an end. The Constitution that came about was a product of seasons of downward economic trends as well as discovery of oil. This introduced the challenge as to how the Emiratis would govern themselves after the British decided that UAE was to cease being a protectorate. Ibn Khaldun suggests that solidarity maintained by egalitarian ethics is doomed when it is transformed into a hierarchically arranged structure the state. There was a clamor for a federation with what is known now as UAE and Bahrain and Qatar. The rulers of Bahrain and Qatar were unwilling to submit to a hierarchical structure of a state unless they could be assured they would be the ruler that would dominate it. At the time, the rulers of Bahrain and Qatar possessed the economic resources to independently sustain their shaykhly authority. Dubai's position was more precarious because its economic resources were not on a par with Bahrain's or Qatar's at the time.

Political relations between sheikhdoms were really relations between individual sheikhs, studies of protection-seeking customs at the individual level are relevant to the study of regional political relations in the Gulf. Shaykh Zayid's firm leadership, characterized by personal attributes like patient consultation and generosity, may not have made Shaykh Rashid's or Shaykh Saqr's decision to accept political subordination to Abu Dhabi easier, but it did ultimately make the federated, hierarchical structure of the

UAE possible. The UAE was thus formed under this premises. It can be concluded from the above that the UAE stands today at a crossroads where it faces a number of internal and external challenges. However, dealing with these challenges is no longer a matter of choice because the way they are addressed will determine the country's future security and development.

What has emerged is that the British had significant influence on both Australia and UAE. The different approaches to the different contexts show how the great super power Britain declined. Unlike United States, Australia and UAE continued allegiance to British has not permitted them to rise beyond them. To this end Britain remains an important factor for the development of these two States. The Constitution making process thus produced an allegiant attitude by these two countries toward the British. The States are very diverse in their political system with UAE being a federal monarchy and the Australia being a federal constitutional state. At the center of their political system is the existence of the power dynamics within the state and externally with their neighbors.

References

Adam F *Australian Essay*. Melbourne W. Inglis (1886)

Aynsley Kellow *Tasmani* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 131-153

Brandon Friedman, “From union (’ittihād) to united (muttahida): the United Arab Emirates, a success born of failure”, *Middle Eastern Studies*, (2017) Vol 53:1, pp 112-135

Brian Gillian et al *Australia and Globalization; the experience of two Centuries* Cambridge University Press (2001)

Charles De Brosse *History of Navigation to Southern Lands* (1975)

Charles E. Davies “*The Blood-Red Arab Flag*: (1999)

Curtis, Glenn E, Eric J Hooglund, and Library of Congress. Federal Research Division. *Iran: A Country Study*. Washington, DC: Federal Research Division, Library of Congress: (U.S. G.P.O, 2008).160–163

De Butts, Freddie, (1995). *Now the dust has settled: memories of war and peace, 1939-1994*. Padstow, Cornwall: Tabb House. p. 175

Dean Jaensch, *Northern Territory* in Ed. Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 155-181

Economou et al *Victoria* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003) pp 155-181

Edward, Henderson, (1993). *This strange eventful history: memoirs of earlier days in the UAE and the Sultanate of Oman.* Dubai, UAE: Motivate Pub. p. 20

Gerd Nonneman “The United Arab Emirates Abu Dhabi Dubai Sharjah Ras Al Khaimah Umm al-Qaiwan, Ajman Fujairah” in Lucy Dean *the Middle East and North Africa* 2008 (London: Routledge 2008)

Gilligan B *A Federal Republic: Australia Australia’s Constitution system of Government* Cambridge; Cambridge University Press (1995).

Galligan Brian *A Federal Republic: Australia Constitutional System of Government*, Cambridge: Cambridge University Press (1995)

Gray Presland, *The First Residents of Melbourne's Western Region* (revised edition), (1997). Harriland Press.

Hans Villarica *“Aborigines: The First Out of Africa, the First in Asia and Australia”* (2011)

Harry Eckstein “ A perspective on Comparative Politics, Past and Present” in Harry Eckstein and David E Apter Eds, *Comparative Politics; A Reader.* New York: The Free Press of Gleoncoe. 1963

Hawker, Geoffrey *The Parliament of New South Wales 1856-1965* Ultimo NSW, Government Printers (1971)

Hawley, Donald *The Trucial States.* London,: Allen & Unwin. (1970).

Heard-Bey, Frauke, *From Trucial States to United Arab Emirates: a society in transition.* London: Motivate (2005).

Hirst, John *The Strange Birth of Colonial Democracy; New South Wales 1848-1884,* Sidney: Allen & Unwin (1988)

Law History and Politics in Developing Societies: A Comparative Analysis of Constitution Making Process in Australia and United Arab Emirate:
Henry K Murigi

(2022) *Journal of cmsd* Volume 9(2)

Howell P,A. *South Australia, Federalism and the 1890s; The Making of a Federation* In Andrew Parkin (ed) *South Australia, Federalism and Public Policy*. Canberra Federalism Research Center, Australian National University (1996)

Hughes Colin A *The Proliferation of Portfolios, Australian Journal of Administration* (1984)

Irving, H. *To constitute a Nation: A Cultural History of Australia's Constitution* Cambridge University Press (1997).

James O. Britain. The Gulf Sheikhdoms, 1820–1971: *The Politics of Protection*. Center for International and Regional Studies (2009)

John Wanna. *Queensland:* in Jeremy Moon and Campbell Sharman, Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003)

Jessa Rogers; “Photostory and Relatedness Methodology: the Beginning of an Aboriginal–Kanaka Maoli Research Journey (part two)” *Australian Aboriginal Studies Journal* Australian Aboriginal Studies (2019) Issue 1,

Juliet Love, “*The Far East and Australia 2013*” 44th Ed, Routledge, Taylor and Francis Group London and New York, 2012.

Jeremy Moon and Campbell Sharman, *Western Australia* in Ed. Australian Politics and Government The commonwealth, The States and The Territories, Cambridge University Press, (2003)

Kristian C, U. *The United Arab Emirates; Power, Politics, and Policymaking* New York, NY 10017 (2017)

Knibbs, G.H. "The Creation of the Several Colonies". *Official Year Book of the Commonwealth of Australia*. 4. Melbourne: Commonwealth Bureau of Census and Statistics. (1911).

La Nauze J. A *The Making of the Australian Constitution* Melbourne University Press (1972)

Landen, Robert G. “Muhammad Morsy Abdullah, *The United Arab Emirates: A Modern History* (London: Croom Helm, and New York: Barnes and Noble, 1978). Pp. 365.” *International Journal of Middle East Studies* 12, no. 4 (1980)

Mark Irving Lichbach and Alan S Zuckerman *Comparative Politics; Rationality, Culture and Structure*. Cambridge University Press 1997

Morton, Michael Quentin. *Buraimi: The Struggle for Power, Influence and Oil in Arabia*. London: IB Tauris. (2013)

Paul W and Jenny F. *The Commonwealth:* in Jeremy Moon and Campbell Sharman, *Australian Politics and Government The commonwealth, The States and The Territories*, Cambridge University Press, (2003)

Robert Hughes, *The Fatal Shore: A History of the Transportation of Conflicts to Australia 1787-1868*, London (1987)

Rodney Smith. *New South Wales:* in Jeremy Moon and Campbell Sharman, *Australian Politics and Government The commonwealth, The States and The Territories*, Cambridge University Press, (2003)

Said. Zahlan, Rosemarie *The Origins of the United Arab Emirates: a Political and Social History of the Trucial States*. (Taylor and Francis 2016).

Sarker, A. E., & Al Athmay, A. A. A. R. A. *The Changing Facets of Public Administration in the United Arab Emirates. International Journal of Public Administration*, (2017) 41(10), 832–844

Lord Wright, *Memories of 1971: A Historic Year In The Emirates*, Asian Affairs, (2011)

*Law History and Politics in Developing Societies:
A Comparative Analysis of Constitution Making
Process in Australia and United Arab Emirate:
Henry K Murigi*

(2022) *Journal of cmsd* Volume 9(2)

Schreuder D.M *Atkinson Conquest, in the Australia's Empire* . Oxford University Press, New York (2008),

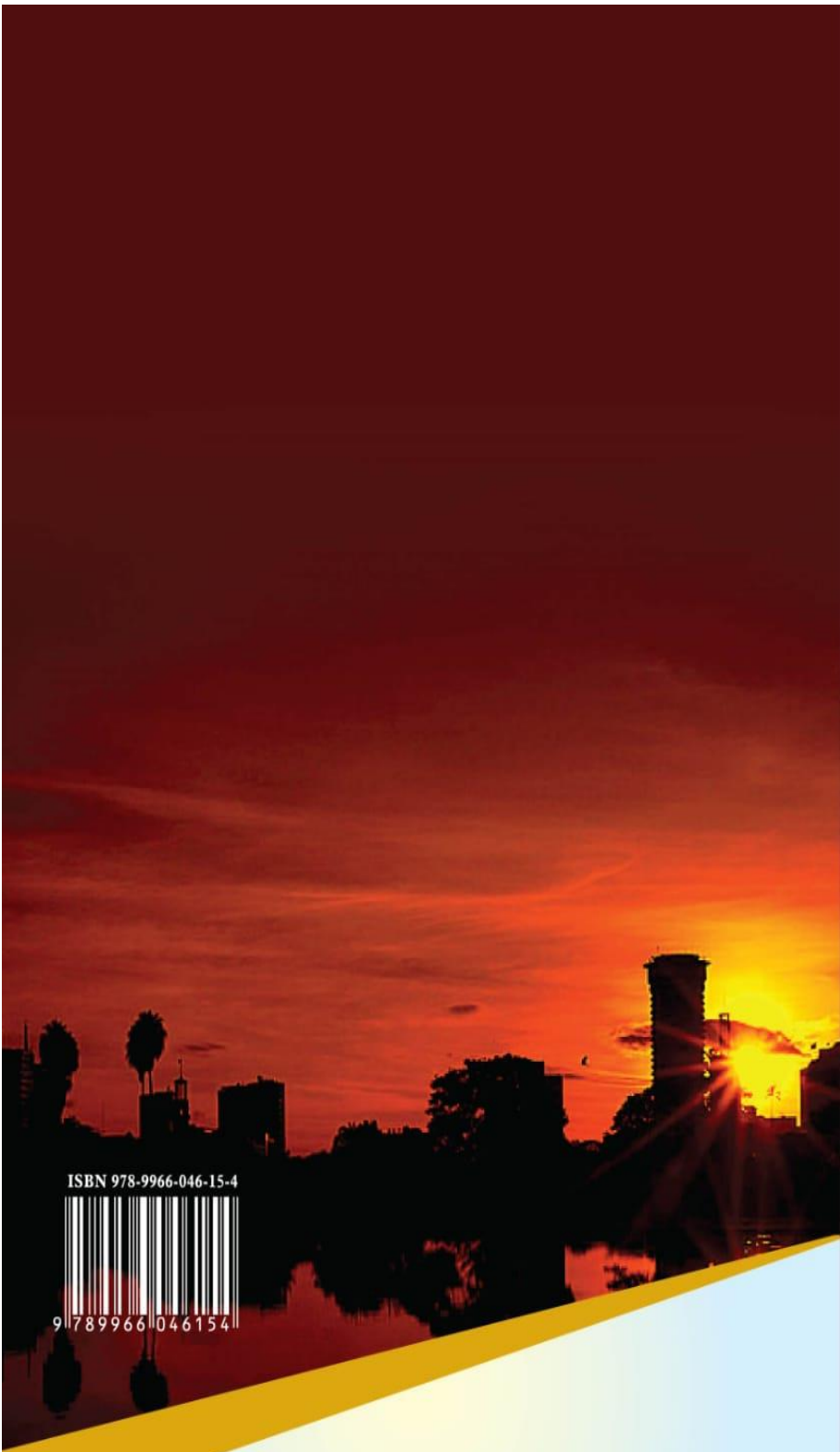
Stephen H. Roberts, *History of Australian Land Settlement, 1788-1920* Melbourne (1924)

Stuart Macintyre, "*The Far East and Australia 2013*" 44th Ed, Routledge, Taylor and Francis Group London and New York, (2012).

Tarko, V. *The challenge of empirically assessing the effects of constitutions. Journal of Economic Methodology*, (2015) 22(1), 46–76.

William, G. *Human Rights under the Australian Constitution* Melbourne; Oxford University Press (1999)

Yousef Khalifah Al-Yousef. *The United Arab Emirates at a crossroads, Contemporary Arab Affairs*, (2013).



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