

A Conversation with Professor Cheryl Saunders¹

by

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This is the eleventh interview for the Eminent Scholars Archive with an incumbent of the Arthur Goodhart Visiting Professor of Legal Science⁴.

Professor Saunders is Laureate Professor Emeritus at Melbourne Law School, and Founding Director of the Centre for Comparative Constitutional Studies at the University of Melbourne.

This interview was recorded, and the audio version is available on this website. Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.

Interviewer: Lesley Dingle, **her questions and topics are in bold type**

Professor Saunders's answers are in normal type.

Comments added by LD, *in italics*.

All footnotes added by LD.

1. Professor Saunders, you are the eleventh Goodhart Professor to be interviewed for the archive and the second retrospective scholar, the first being Professor Zines⁵. You held the Goodhart Chair from 2005-6, just as this archive was starting up. I'm extremely grateful to you for sparing the time from a very busy schedule participating in the Public Law Conference. Thank you very much.

Currently you are the Laureate Professor Emeritus at Melbourne Law School and you're also the Director for the Centre for Comparative Constitutional Studies.

No, I'm now the Founding Director of that Centre. The current Director is Professor Adrienne Stone.

2. Thank you. We don't have much time this afternoon but I hope we can go through a few topics, starting with your early life, your university education, your professional career, your Goodhart tenure, your research, and then some general views on the constitutional way forward, both for Australia and post-Brexit UK. So, if we could start with your early life. You were born in 1944 in Quetta.

I was born in Quetta, which in those days was in India, although it's now in Pakistan on the North-West Frontier. I was born there because my father was in the Indian Army. My mother was American. She had met him in London and then travelled to India to marry him before the War. My father was fighting in Burma for much of the time around the period when I was born, although I do have some photographs of him actually there around the time of my birth... My sister and I castigate ourselves that we didn't ask either of our parents enough about that period of their lives, while we had the opportunity to do so. Now that I am

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⁵ Leslie Ronald Zines (1930-2014). Goodhart Professor (1992-93), Emeritus Professor, Australian National University



older I can understand the challenges that my mother faced, to have a small baby in Quetta, towards the end of Second World War, when the war in the Pacific was still raging, and your husband away.. In any event, in a remarkable feat, my mother managed to get us both out of India and on a ship to the United States when I was three months old. It seems a remarkable story.

3. It's a fascinating trajectory and particularly when you look at the position on the map. It looked to me as though it was a dry, dusty part of the world.

But during the period of British India my impression is that was quite a nice spot in the hills: a place that offered relief from the heat of Delhi, for example. The impression is formed by pictures of the time; I have never been back there, however, to confirm it.

4. What made your parents decide then to move to Australia?

The Indian Army came to an end, as you know, with Indian independence. So, on any view my father was going to need to find another career. He, in any event, left India before the end of the war because he was involved with the American occupation of Japan after Hiroshima. After a time, we were all there as a family. I was in Japan when I was two with both my parents. That period of our lives lasted for a couple of years, after which my parents needed to decide where to go, on a more permanent basis. My understanding is that wartime Britain, I think, wasn't particularly attractive to either of them, because post-war life was so hard, although I had grandparents there. The choices lay between the United States, Canada, and Australia. They decided on Australia and, in particular, Melbourne, largely because there were other people from the Indian Army who were there, so that they would know some people when they arrived.

5. So they began their new life in Melbourne which is where you, obviously....

I grew up and my sister was born and my parents also lived for the rest of their lives.

6. And you went to the grammar school, the Church of England....

Girls' grammar school.

7. Do you have any memories of that period?

Yes, of course I do. I mean, everybody remembers their schooling to some degree. It was a perfectly comfortable period. Rather more interesting, I think, during my schooling was that we used to go backwards and forwards to the United States because my mother thought, possibly wrongly, that she needed to do so to maintain her American citizenship. So we had a cosmopolitan childhood to that extent.

I had cause to think about this again recently when I was interviewed by one of my grandsons for a school project. One of the questions he asked me was: what was it about my early life that proved influential? I'd never really thought about that before but I pointed to the extent to which we had moved around as a family during my early life. We travelled; my parents didn't come from Australia; I had grandparents from other countries who visited from time to time; and so I grew up knowing that there was a world out there. With hindsight, I think that has had quite an unconscious influence on my interests and the way in which I've approached life.

8. I know, an early start. To this day, you are very not averse at all to travel.

No. I have come to be very interested in how people live and in particular how their systems of government work elsewhere in the world. It is an endlessly fascinating subject.



9. Which began at an early age?

Well, to the extent that I understood there was more to the world than downtown Melbourne. It was just something that was inherent in our household, I guess, throughout my childhood.

10. While you were at school were you interested in law at that stage and, perhaps even, I noticed one of your interests is archaeology, did that begin at that period?

I was interested in history at school and my interest in law grew out of that as much as anything else. I also took Latin, classical history, and subjects of this kind at school, and enjoyed them. So, clearly I was interested in ideas of that kind. I did decide at an astonishingly early age that I wanted to do law, on the basis of almost no knowledge about it whatsoever. So I'm lucky it turned out as well as it did.

11. Professor Saunders, we come now to your tertiary education. You did a BA LLB at Melbourne and you had decided to take law. You did a PhD immediately afterwards.

The PhD was not undertaken immediately afterwards. I graduated from the law school in '66 and I graduated with my PhD in '76. In between that I had three children, hence the delay, and hence also the fact that all my study took place in Melbourne. The topic of my PhD was intergovernmental relations in Australia which is an applied aspect of Australian federalism.

12. Then before you settled into your established career did you do any post-docs anywhere?

No.

13. Coming then to your professional career which, according to your CV, tells me that in 1989 you were given a Personal Chair as Professor of Law in Melbourne. I wonder if you could say briefly what posts you had in the interim period between doing your PhD and being awarded your Chair.

Most of my professional positions were at Melbourne Law School, although I worked at an earlier period as a tutor at La Trobe Law School. I do not even recall exactly what happened when. I think I began as a lecturer, became a senior lecturer, then reader, at various stages, before being awarded the very considerable honour of a Personal Chair.

14. At a comparatively young age as well. You also were made Laureate Professor, and I wonder if you could recount the circumstances of this appointment, which is a very prestigious position at Melbourne.

It is. The university has been through various stages in the way in which it honours its scholars. The idea of offering a Personal Chair was one, which gradually lost its significance once a system had been put in place to enable promotion to Professor. Previously, there had been a small, fixed number of chairs across the university for which one applied, with a Personal Chair as an exception to the rule. Once promotion to professor became a regular career move, there were a lot more professors in the university. In those circumstances, the university decided it would introduce a special category of professor, if you like, as a mark of distinction and as a mechanism for keeping senior scholars at Melbourne. The number of Laureate Professors was quite small: I think around 20. It was a move driven by the evolution of the university itself.



15. That must have been 2007? Since then, has the number grown?

Since, the university has moved through another phase in this regard. They still have Laureate Professors and I do not think that their number has grown particularly. But an additional category of professor has been introduced, the Laureate Professors and the professoriate at large, so as to be able to recognise the achievements of a wider range of people across the university.

16. In 2005/6 you were the Goodhart Professor here in Cambridge. I wonder if you have any outstanding recollections from that period.

It was a wonderful period. I was very happy here. I very much enjoyed my time as the Goodhart Professor, as did my husband. It was a very productive time interacting with colleagues in the Faculty here. I taught a subject on comparative public law with David Feldman⁶ which was quite entertaining for the students, as you can probably imagine. I was also extremely busy at that time because I was at that stage President of the International Association of Constitutional Law and one of the tasks of the President is to help to organise the next World Congress of the IACL; a very big world gathering of constitutional scholars and jurists. The Congress for my period as President was held in Athens. In the end, it was a great success, but inevitably there were all sorts of questions about the organisation that required me to travel to Athens from time to time to help to resolve. As a result, rather to my regret, I spent quite a lot of time during my time as a Goodhart Professor, on a plane to Athens and back, as well as to other places, to fulfil the responsibilities of IACL President.

So that was one aspect of my time here. But I was also editing a book while I was here. From memory, it was a book on legislative and executive relations in federal systems, which I was co-editing with a colleague, and which took quite a lot of my time. I can still see myself sitting in the Goodhart study working on chapters of that book, plus a number of other research commitments that I had while I was here.

17. So it sounds as though it was an extremely productive year.

It was a very, productive year. Parts of our family also joined us for Christmas so that was a very happy memory as well.

18. A nice contrast with the typical Melbourne Christmas.

A complete contrast with the typical Melbourne Christmas, but wonderful in any event. I still have contact with a few of the students from that time as well. Several of them were from Melbourne, and one now works in the Law School with me.

19. Professor Saunders, if we could just look at some of your research interests. You've written numerous publications dealing with issues of constitutionalism and federal forms of government, many of them comparing different jurisdictions. I've had a brief look at some of these, and obviously all I can attempt is a superficial overview. Nevertheless, it struck me that throughout your pieces and your books there are two thorny issues, if you like. I wonder whether you could comment on them. The first is the status of the Crown in Australian public affairs, and how you think this could be resolved or will be resolved?

⁶ David Feldman, Rouse Ball Professor of English Law, Cambridge University (2004-)



Well, it depends what you mean by the status of the Crown. Are you referring to the article that I wrote in the Melbourne University Law Review?⁷

20. I was looking at this book, “The Constitution of Australia”⁸.

In that case, let me make several points. On the one hand there has been, as you know, a republican movement in Australia which culminated, at least for the moment, in an unsuccessful referendum towards the end of last century. I expect that issue will at some stage come back on the Australian public agenda again, although it does not look like it’s going to happen any time soon at the moment. My own view is that where the movement failed the last time – apart from the fact that proponents of a republic were trying to achieve it in the face of government opposition, which is always very difficult – is that they took a far too narrow view of what amounted to being a republic. They did that deliberately because they thought that it be an easier argument to win. The rationale for minimalism is obvious. Nevertheless, it meant that they had to define a republic merely in terms of breaking your with the Crown, rather than rethinking those parts of the constitution that are clearly driven by monarchical considerations. For example, this approach continued to leave the head of state to decide whether and when to dissolve the parliament, subject to some rather contentious and unexpressed constitutional conventions. Thinking and writing about this more recently, it seemed to me that there would have been advantage, and that there would still be advantage, in debating in a more fundamental way what a republic might actually involve in a country like Australia.

That is an important set of issues. But there is another set of issues, about which I have also written about in a relatively recent article in the Melbourne University Law Review, that assumes that we retain the monarchy but focuses on the use of the terminology of the Crown to personify the state. One of the changes that has occurred in Australia, interestingly I think, is that we tend to have reduced our reliance on the concept of the Crown, at least for purposes of legal analysis. The High Court has pointed out the a concept of the Crown needs to do less work in Australia where the written Constitution itself gives us a concept of the polity, which does much of the necessary work that the concept of the Crown does in, say, the United Kingdom. Other jurisprudential consequences follow. In addition, a development of this kind also casts light on the way in which the different countries in the British Commonwealth have evolved. This is of interest to me, and one of the reasons why I wrote the article.

Despite the very considerable similarities between the underlying constitutional ideas in (for example) the United Kingdom, Canada, and Australia; and despite the fact that formally we all retain the monarchy and have the same queen our usage of the concept of the Crown is quite different. One of my purposes of the article was to explore how and why even apparently similar countries diverge in those ways.

21. Thank you. The second issue that I discerned is this whole question of federal statutes and native title following the Mabo⁹ case. In this regard I had a very interesting conversation with Justice Finn in 2011¹⁰ and he mentioned how hard it had

⁷ Saunders, “The Concept of the Crown” (2015) 38 Melb. Univ L.Rev. 873-896

⁸ *The Constitution of Australia: A Contextual Analysis*. Hart Publishing, 338 pp. 2011

⁹ <http://aiatsis.gov.au/explore/articles/mabo-case>

Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)

[http://www.austlii.edu.au/cgi-](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/high_ct/175clr1.html?stem=0&synonyms=0&query=title+%28+%22mabo%22+%29)

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¹⁰ <http://www.squire.law.cam.ac.uk/eminant-scholars-archive/professor-justice-paul-finn>



been for him having to give judgment... he actually physically went to Perth for the case of Bodney and Bennell¹¹ in 2008 and he hoped at that point that there would be some federal legislation which would accommodate these situations. Professor Saunders, how do you see this moving forward?

The native title area? My involvement with native title issues has been much more tangential. By way of one example, however: in the 1990s I was involved in a very controversial matter advising the government on whether a particular area in South Australia was sacred to aboriginal women and should therefore be protected. So I had some close involvement with indigenous questions at that stage. I, of course, like any other public lawyer, am familiar with Mabo and the other decisions of the court that have followed it. More recently, I have written a little about these questions again in connection with a movement to recognise indigenous Australians in the Constitution, which may lead in due course to a referendum. I have also had some discussions with indigenous leaders around the country about how this issue might most constructively be handled, drawing on my own earlier experiences with how to encourage popular involvement with constitutional review and change, through a body called the Constitutional Centenary Foundation, of which I was Deputy Chair. Professor Finn, as Justice Finn, was involved in these issues in a different way, as a judge deciding some of these questions.

22. Yes.

More generally, my work falls into two categories. One category involves Australian public law, including Australian constitutional law. That is how I began my academic career, and I remain active in that field. But the second aspect of my work now is comparative constitutional law. This also now feeds my work on Australia, because it enables me to see Australian constitutional law from different perspectives. That is one of the great benefits of comparative law. I now work a great deal on comparative public law. That is the subject of my paper for the Cambridge Public Law Conference that I will be attending over the next few days.

23. Which leads into the final part of this conversation, which is just some general questions. I've based these upon your considerable experience in comparative federal constitutional work, particularly in common law jurisdictions. You said in your research paper, "Reforming the Australian Federal Democracy"¹², which was published in 2015, was about the question of inter-state relations and relations with the Commonwealth. You said you didn't think this would necessarily require constitutional change, but that it should not be ruled out. I wonder what you saw as the ideal way forward for Australia in terms of the State/Commonwealth relationship?

That paper is not so much a research paper as a series of reflections on the operation of Australian federalism and a plea for change... Australia has a federal system which has become increasingly centralised. This has occurred without formal constitutional change. At least some of it has occurred through intergovernmental mechanisms, relying almost entirely on involve executive action. To that extent Australian federalism has become increasingly opaque as well, with its lines of accountability muddled, presenting a very complex picture for Australian voters. This in itself is a problem for Australian democracy. In any event, however, a country with the geographic size of Australia needs have vibrant,

¹¹ Full Court of Federal Court of Australia (Finn, Sundberg and Mansfield JJ). 23 April 2008 [2008] FCAFC 63. <http://www.austlii.edu.au/au/journals/AUIndigLawRw/2008/19.pdf>

¹² https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616590



elected levels of government at different levels. Canberra is a very long way from most of the rest of the country. Centralisation has made it an overburdened level of government, without real capacity to do everything it takes on. .

So, the argument in the paper to which you refer, which I wrote with a colleague, Michael Crommelin, was this. The first step is to realise that Australia has a problem in this regard, which affects both federalism and Australian democracy. It would be feasible to re-balance the federation with political will and leadership, but at the moment the muddle simply tends to be accepted. Everyone grumbles, but there is little vision about what might be done. The paper lays out some options. It does not depend on constitutional change; and constitutional change is difficult to achieve in Australia, in any event. On the other hand, if constitutional change were to be on offer there are all sorts of ways , in the light of federal experience elsewhere, including, I might say, in the United Kingdom, in which Australia might maximise the opportunity to make the constitution more responsive to what we have termed federal democracy.

24. Thank you. The other point, still trying to generalise in terms of your considerable and illustrious output, brings me to constitutional issues of post-Brexit UK. I wonder whether any likely new UK constitutional arrangements apropos the EU would affect future constitutional relations with Australia?

I don't think Brexit is highly significant for this purpose one way or another. One obvious consequence might be, I suppose, that if and when Brexit is formalised, the UK may seek to strengthen its relations with the old Commonwealth countries, Australia, New Zealand, Canada, and so forth. Whether that would happen in a constitutional way or in other ways including trade and freer movement of peoples, remains to be seen. I noted as I came through Heathrow yesterday that there was a sign encouraging citizens from certain countries, including Australia, to register for easier access to the UK and I wondered if it was a sign of the time. But I cannot see the Brexit would make much of a difference in constitutional terms, whatever other social and political developments occur.

25. Because I suppose that a complicating factor here is the whole question of Scotland. I wonder whether you thought a solution might be for a formal British federation arrangement?

Within the UK itself?

26. Yes.

Well, you know, I gave the Williams Lecture here a couple of years ago¹³ in which I argued that in a sense, Britain already has a federal-type system. It is not a typical federation, and federalisation is complicated by the position of England, but arrangements in the UK now so obviously are built around territorially based autonomy that you have a federal type model of sorts. Whether the UK will go further down the path to federalisation remains to be seen. In particular, if one takes the view that federation requires a written, entrenched constitution, as in most federations, such a move would be a major step here, requiring decisions that extend well beyond the requirements of federation. It seems to me at the moment to be more likely that devolution will, of course, remain in place and it will deepen, not just in Scotland but also in Northern Ireland and possibly Wales. I saw a

¹³ Sir David Williams Lecture. Friday 27 February 2015, Laureate Professor Cheryl Saunders of the University of Melbourne delivered the 2014 Sir David Williams Lecture entitled "Devolution. Federation. Constitution. From here to where?" at the Faculty of Law, University of Cambridge. <http://www.cpl.law.cam.ac.uk/sir-david-williams-lectures/professor-cheryl-saunders-devolution-federation-constitution-here-where>



suggestion in the media yesterday, for example, that Wales is now arguing for a Welsh judge on the United Kingdom Supreme Court. It may be that for the foreseeable future, however, these arrangements will continue to be held in place by rather more characteristically British ways of doing things: constitutional conventions and, ideally, self-denial and self-awareness on the part of the centre.

In these respects, the UK offers an interesting federal type model for the world. It has some difficulties as well, however. I am no great expert on how devolution works here. But reading some of the parliamentary committee debates, for the purposes of the Williams Lecture and subsequently, it seemed to me that the politicians and the bureaucrats in Westminster and Whitehall had a fairly shallow understanding of or respect for the concept of autonomous decision-making by the people of the devolved regions. Cultural change is always hard, but unless it begins to happen, the potential of devolution cannot be realised. If that sort of stalemate arises, the UK may be forced to think through more formalised arrangements.

27. Thank you very much. I can only thank you again.

I hope it has been useful to you.

