JUDICIAL BETRAYAL

Augusto Zimmermann describes how the High Court has undermined Australia's federalism and the framers' wish for a balanced federation by allowing the Commonwealth to expand its powers

In drafting the Australian Constitution, the framers sought to maintain a balance in the distribution of powers between the states and Commonwealth. They designed the Constitution to be an instrument of government intended to distribute and limit governmental powers. Hence, one of the basic characteristics of Australia's Constitution is its express limitation on federal powers. Whereas the central power is limited to express provisions in sections 51 and 52, with these powers being variously concurrent with the states and exclusive, the substantial remaining residue is left undefined to the states.[1] The idea was to reserve to the people of each state the ultimate right to decide on the most relevant issues through their own state legislatures.[2] Sir Samuel Griffith, the leading federalist at the first Constitutional Convention, commented in 1891:

> The separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves.[3]

When Alfred Deakin introduced the Judiciary bill into federal Parliament, in 1903, he explained that the federal courts should be in charge of guaranteeing the preservation of the federal nature of the Constitution. He called the High Court of Australia the 'keystone of the federal arch'[4] because, as Albert V. Dicey pointed out, its members were 'the interpreters, and in this sense the *protectors* of the Constitution. They are in no way bound … to assume the constitutionality of laws passed by the federal legislature.' [5] [emphasis added]

The High Court originally comprised Chief Justice Samuel Griffith and Justices Edmund Barton and Richard O'Connor. Griffith was the leader of the convention of 1891 and Barton in 1897–98; O'Connor was one of Barton's closest associates. These judges sought to protect the federal nature of the Constitution by applying two basic doctrines: 'implied immunity of instrumentalities' and 'state reserved powers.'

'Implied immunity of instrumentalities' ensures that both the central and state governments remain immune from each other's laws and regulations. If federalism implies that each government enjoys autonomy in its own spheres of power, then no level of government should be allowed to tell another level of government what it must or must not to do.

'State reserved powers' ensure that the residual legislative powers of the states must not be undermined by an expansive reading of federal powers.[6] The doctrine protects the powers belonging to the states when the Constitution was formed—'powers which have

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not by that instrument been granted to the Federal government, or prohibited to the States.'[7] Such doctrine is actually manifested in section 107 of the Australian Constitution, which says: 'Every power of the Parliament of a Colony which has become … a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth.' In other words, every power that is not explicitly given to the Commonwealth shall 'continue' with (or be reserved to) the Australian states.

Unfortunately, these doctrines of 'state reserved powers' and 'implied immunity of instrumentalities' started being undermined when Justices Isaacs and Higgins were appointed to the High Court in 1906. Isaacs and Higgins had participated at the 1891 and 1897–98 conventions, but they were often in the minority in most of the debates and had no formal role in shaping the final draft of the Constitution. In fact, they were excluded from the drafting committee that settled the final draft of the Constitution for consideration by the conventions.[8]

Although there is a good reason to question the reliability of their views about the underlying ideas and general objectives of Federation,[9] from the beginning Isaacs and Higgins adopted a highly centralist reading of the Constitution. Under Isaacs's leadership, the 'implied immunity of instrumentalities' and the 'state reserved powers' doctrines were overturned by the High Court. For Isaacs, section 107 was not about protecting state powers, but about continuing its exclusive powers and protecting them by express reservation in the Constitution. This is a misreading of section 107, which confirms that the state parliaments should have continued to exercise full legislative powers, except for those exclusively given to the federal Parliament at Federation.

The drafters intended to provide the states with 'original powers of local self-government, which they specifically insisted would continue under the Constitution, subject only to the carefully defined and limited powers specifically conferred upon the Commonwealth.'[10] Because their intention was to allow these powers to 'continue,' they opted for defining only the federal powers specifically. This so being, it is correct to infer that the continuation of state powers in section 107 is *logically* before conferring powers to the federal Parliament in section 51. As Nicholas Aroney points out, 'such scheme suggests that there is good reason to bear in mind what is *not* conferred on the Commonwealth by s.51 when determining the scope of what *is* conferred. There is a good reason, therefore, to be hesitant before interpreting federal heads of power as fully and completely as their literal words can allow.'[11] [emphasis added]

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This leads to section 109 of the Constitution. Many have suggested that section 109 confirms the supremacy of the Commonwealth over the states. According to section 109, 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' Two things must be said about this. First, only federal powers are explicitly limited by the Constitution, not state powers. Second, it is only a *valid* federal law that prevails over a state law. Hence, no inconsistency arises if the federal law goes outside the explicit limits of the Constitution. If so, the matter is not inconsistency but the invalidity of the federal law on grounds of unconstitutionality.

But a controversial 'test' has been applied by the courts to resolve matters of inconsistency. Such a test has been instrumental in expanding federal powers at the expense of the states. Inconsistency, which can be nowhere found in the text of the Constitution, is said to arise when the Commonwealth, either expressly or impliedly, evinces the intention to 'cover the field.' First mentioned by Isaacs J in *Clyde Enginnering Co Ltd v Cowburn* (1926), and then endorsed by the High Court in subsequent cases, the 'cover

the field' test suggests that 'if a competent legislature expressly or impliedly evinces its intention to cover the whole filed that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field.'[12] As Sir Harry Gibbs indicated, the adoption of such a test 'no doubt indicates that the Courts have favoured a centralist point of view rather than a federal one.'[13]

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The court's centralist approach can also be observed in the interpretation of section 51(xxix) of the Constitution, which gives the federal Parliament the power to make laws with respect to external affairs. The federal Executive has entered into thousands of treaties on a wide range of matters. These treaties are often related to topics not otherwise covered by the enumerated powers of the Commonwealth. However, in *R v Burgess; Ex parte Henry* (1936), the High Court decided that the use of external affairs by the Commonwealth is not restricted to its power to make laws with respect to the external aspects of the subjects mentioned in section 51.[14]

Together with the regular operation of section 109 (inconsistency), the external affairs power therefore offers the potential to 'annihilate State legislative power in virtually every respect.'[15] Such possibility was once recognised by Dawson J, who saw a broad interpretation of external affairs as having 'the capacity to obliterate the division of power which is a necessary feature of any federal system and our federal system in particular.'[16] Likewise, in *Tasmania Dam* (1983) Gibbs J stated:

The division of powers between the Commonwealth and the states which the Constitution effects could be rendered quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the [Commonwealth] Parliament so that they embraced literally all fields.[17]

WorkChoices

The federal power for the regulation of industrial relations is section 51 (xxxv), which provides a very limited scope for federal regulation of the area. It limits federal law only to matters of conciliation and arbitration for the prevention and settlement of industrial disputes extending only beyond the limits of any one state. This is why the recent federal industrial relations system is not based on section 51 (xxxv) of the Constitution, but primarily on section 51 (xx), which allows the federal Parliament, subject to the Constitution, to make law 'with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth.'

The Commonwealth has used section 51 (xx) to subject all the employees working at 'constitutional corporations' formed within the limits of the Commonwealth to its industrial relations system. Of course, this is a clear attempt to overcome the express limitations of the Constitution. In *WorkChoices* (2006), however, a five-to-two majority of the High Court held that so long as Commonwealth law can be characterised as a law with respect to a subject matter within the federal legislative power, it does not really matter whether that might also affect another subject matter altogether. In sum, a head of power does not need to be read narrowly to avoid breaching an explicit limitation provided by another head of power, even if the final result renders the latter ineffective.

WorkChoices confirms the centralist method embraced by High Court in matters of constitutional interpretation. The Commonwealth has been allowed to regulate areas originally under state control. Strongly dissenting in *WorkChoices*, Callinan J commented that such 'centralizing principles' have produced 'eccentric, unforeseen, improbable and unconvincing results.' These principles, he added, 'have subverted the Constitution and the delicate distribution or balancing of powers which it contemplates.'

> There is nothing in the text or the structure of the Constitution to suggest that the Commonwealth's powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society. This Court too is a creature of the Constitution. Its powers are defined in Ch III, and legislative made under it. The Court goes beyond power if it reshapes the federation. By doing that it also subverts the sacred and exclusive role of the people to do so under s 128.[18]

The money problem

One of the least satisfactory aspects of the federal system is its vertical fiscal imbalance.[19] While the drafters wished to secure the states with a privileged financial position and independence, the courts have allowed for a dramatic expansion of federal taxation powers. As a result, the states have become heavily dependent on the Commonwealth for their revenue, so that any semblance of federal balance has largely disappeared.

In 1901, only the states levied income tax. In 1942, the Commonwealth sought to acquire exclusive control over the income tax system, which was then confirmed by the High Court in *the First Uniform Tax Case* (1942).[20] When the war was over, however, the Commonwealth kept monopolising the income tax system. Hence, a further challenge was made by the states in the *Second Uniform Tax Case* (1957).[21] There the court confirmed the Commonwealth's income tax system as well as its power to impose whatever conditions it saw fit in granting money to the states.

Section 96 gives the Commonwealth power to grant financial assistance 'to any State on such terms and conditions as the Parliament thinks fit.' The High Court has allowed the grants section to be used subject to any conditions the federal government chooses to impose.[22] As such, the states have been induced to achieve all sorts of objects on behalf of the Commonwealth, which the Commonwealth itself would not be able to achieve under its own enumerated powers, such as education,[23] health, roads,[24] and compulsory purchase of land.[25] Section 96 has become, as Sir Robert Menzies once put it, 'a major, and flexible instrument for enlarging the boundaries of Commonwealth action; or, to use realistic terms, Commonwealth powers.'[26]

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The financial problems of the states have been aggravated by court decisions that have prevented states from raising their own taxes. States cannot raise anywhere near the revenue they need. The Commonwealth collects over 80% of taxation revenue (including the GST), but is responsible for only 54% of government outlays. By contrast, the states collect 16% of taxation revenue but account for approximately 39% of all outlays.[27] As a result, the states have turned to other sources of 'taxation' such as gambling, although remaining heavily dependent on federal grants. When the Commonwealth grants money to the states, it often does so with many strings attached. As George Williams points out, 'the States have no real choice but to accept the money, even at the cost of doing the Commonwealth's bidding.'[28]

Conclusion

The continual expansion of Commonwealth powers has resulted in a Federation far removed from that originally envisaged by the framers. Since the 1920s, the High Court has allowed the Commonwealth to expand its powers to the point where many of the advantages of federalism have either been lost or are not being realised to their full extent.[29] This court needs to understand that the federal structure of the Australian Constitution, particularly its limited powers conferred upon the central government as opposed to the powers which should have continued with the states, 'by no means implies that federal legislative power is to be accorded interpretative priority.' Quite the contrary.[30]

Endnotes

1 Mark Cooray, 'A Threat to Liberty,' in Ken Baker (ed.), *An Australian Bill of Rights: Pro and Contra* (Melbourne: Institute of Public Affairs, 1986), 35.
2 Albert V. Dicey, *Introduction to the Study of the Constitution* (Macmillan, 1915), 387.
3 Samuel W. Griffith, *Official Report of the National Australasian Convention Debates* (Sydney: 1891), 31–32.
4 *Commonwealth Parliamentary Debates* 8 (1902), 10,967. Cited in Geoff Gallop, 'The High Court: Usurper or Guardian?' *Legislative Studies* 92 (1995), 60, 61.
5 Albert V. Dicey, *Introduction to the Study of the Constitution*, as above, n 2, 387–388.
6 Peter Hanks, Jennifer Clarke, Patrick Keyzer, and James Stellios, *Australian Constitutional Law: Materials and Commentary*, seventh edition (Butterworth, 2004), 569.
7 Thomas M. Cooley, *Principles of Constitutional Law*, third edition (Little, Brown and Co., 1898), 35–36.
8 Walter Sofronoff, 'Deakin and the Centralising Tendency,' *Quadrant* (September 2008), 86.
9 Nicholas Aroney, 'Constitutional Choices in the *WorkChoices Case*, or What *Exactly* is Wrong with the Reserved Powers Doctrine,' *Melbourne University Law Review* 32:1 (2008), 1.
10 As above.
11 As above.
12 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 486.
13 Harry Gibbs, 'The Decline of Federalism?' *University of Queensland Law Journal* 18 (1994), 1, 3.
14 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 641.
15 Harry Gibbs, as above, n 13, 5.
16 *Victoria v Commonwealth (Industrial Relations Act)* (1996) 187 CLR 416, 9.
17 *Commonwealth v Tasmania (Tasmania Dams)* (1983) 158 CLR 1—Gibbs CJ, dissenting.
18 *New South Wales v Commonwealth (WorkChoices)* (2006) 229 CLR 1, 779.
19 Brian Galligan and Cliff Walsh, 'Australian Federalism: Developments and Prospects,' *Plubius* 20:4 (1990), 7.
20 *South Australia v Commonwealth* (1942) 65 CLR 373.
21 *Victoria v Commonwealth* (1957) 99 CLR 575.
22 In *South Australia v Commonwealth (First Uniform Tax)* (1942).
23 In *A-G (Vic); ex rel Black v Commonwealth (DOGS)* (1981), the High Court held that the Commonwealth could grant the states money on condition that the states then paid it to religious schools.
24 In *Victoria v Commonwealth (Federal Roads Case)* (1926) 38 CLR 399, the High Court allowed the Commonwealth to grant the states money on the condition that it should be used to construct roads designated by the Commonwealth, even though road building did not fall within any enumerated power.
25 In *Pye v Renshaw* (1951) 84 CLR 58, the High Court dealt with the effect of section 51(xxxi) (Commonwealth's power to acquire property on just terms) and on section 91 (the grants power). The High Court held that the Commonwealth is able to get around the restrictions in section 51 9xxx) by ensuring that the law could not be characterised as land acquisition. Hence, section 51 (xxxi) does not restrict the section 96, and the Commonwealth can therefore evade the section 51 (xxxi) requirement that property must be acquired on just terms.
26 Robert Menzies, *Central Power in the Australian Commonwealth* (Cassell, 1967), 76.
27 Andrew Stewart and George Williams, *WorkChoices: What the Court Said* (Federation Press, 2007), 12–13.
28 As above, 13.
29 George de Q. Walker, 'The Seven Pillars of Centralism,' in *Upholding the Australian Constitution*, proceedings of The Samuel Griffith Society Conference, vol. 14 (2002).
30 Nicholas Aroney, 'The Ghost in the Machine: Exorcising *Engineers*,' in *Upholding the Australian Constitution*, proceedings of The Samuel Griffith Society Conference, vol. 14 (2002).