Chapter Six

The High Court - The Centralist Tendency

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1. The Federal System

Each State and the Commonwealth have their own Constitutions. The State (former Colonial) Parliaments predated the Commonwealth Parliament. An examination of the Constitutions of the States demonstrates that each State Parliament is given power to legislate in general terms for the benefit of the State without limitations of power in the authorising provisions. Limitations of power did exist on the Colonial Parliaments when they were established. These limitations which derived from Acts of the United Kingdom Parliament and British constitutional law have, in modern times, been removed. The Commonwealth Constitution came into effect in 1901. The Constitution established and empowered the Commonwealth Parliament. The Constitution recognised the existence of the then Colonial Constitutions and Parliaments, which thereafter were to be called States and State Parliaments. The Constitution contained limitations on the power of State Parliaments and Government.

The Commonwealth Constitution does not provide a general grant of power to the Commonwealth Parliament (unlike the State Parliaments). The power of the Commonwealth Parliament is specifically defined. There are also certain prohibited areas of legislation.

Therefore, the scheme of the Commonwealth Constitution is that every Act of Parliament must fall within the words of a head of power in the Constitution and must not offend a constitutional prohibition. The power of State Parliaments, originating from a general grant, are into any area which is not limited by the Commonwealth Constitution or by a valid Act passed by the Commonwealth Parliament.

For the sake of those present who are unfamiliar with the Constitution, I quote some provisions of the Commonwealth Constitution which illustrate (i) authorising provisions for the Commonwealth Parliament, (ii) a prohibitory provision operating on the Commonwealth Parliament, (iii) a prohibitory provision operating on both Parliaments, (iv) a prohibitory provision operating on the State Parliament and (v) regulatory provisions operating on both parliaments. (See References)

2. The Role of a Constitution

Most countries have a basic document of government called a constitution. There are constitutions in countries such as the former USSR, South Africa, China, Singapore and the Philippines and Governments in these countries profess to function in accordance with their constitutions. If a very broad definition is adopted it could be said that constitutional government prevails in these countries. But something more than the existence of a constitution is required for an effective system of constitutional government. It is therefore proposed at the outset to distinguish between constitutionalism and sham constitutionalism. The constitutional system of government exists where a constitution is supreme and regulates the exercise of power by the main organs of government with the consequence that every act of ministers and public servants

is carried out in accordance with the law and every such act is authorised by law. The emphasis should be placed on the words "authorised by law". However, when law confers wide and unfettered discretionary powers over fundamental or important matters which affect individuals or institutions, acts committed in exercise of such discretion may be legal, but can not be said to be in a meaningful sense authorised by law. The presence of judicial review and control and fair elections are other important facets of constitutionalism. The content of law is also important. This is where the traditional concept of the rule of law as adapted to the modern state by Geoffrey Walker in his book The Rule of Law is to my mind immensely important.

Australia is not a totalitarian or authoritarian system, as yet. But there is a gradual movement away from constitutionalism and the rule by law is replacing the rule of law.

The question is often asked what is the relevance of a constitution drafted in 1900 for the present? The United States Constitution was drafted 200 years ago. The mere fact that the Constitution was drafted 90 or more years ago, does not mean it is outdated.

What a constitution is concerned about is power – providing to a government defined areas of power and placing limitations on the extents of power. The areas of power and the limitations on power are equally important.

The following quotations from Montesquieu and Hayek emphasise the premise that constitutionalism is identifiable with effecting a proper relationship between liberty and the power of government, in the context of Lord Acton's oft quoted statement "power corrups and absolute power corrupts absolutely".

Constitutionalism, then, provides a kind of bridge between political processes and political ideas. It infuses the governing system with a communal attitude that both supports the basic plan and imbues it with ideological, ethical coloration.

To obtain a clearer notion of the function of constitutionalism, it is important to recall that democracy does not eliminate political realities. The power of men over men remains. Relations of dominance and submission, leadership and influences are not abolished. Democracy attempts to increase individual freedom and general participation without destroying the kind of orderly society that builds around the power of leadership. It is the contribution of constitutionalism to instil the general goals of democracy so deeply in the political habits of both rulers and ruled that behaviour inconsistent with democratic ideals can never tempt them. Effective constitutionalism provides each set of political processes with a protective coating consisting of ideas about political conduct, about governing and being governed, which are so profoundly rooted in tradition that to violate them would be unthinkable.

A perfected constitutionalism need not bar the way to innovations in policy or governmental forms. It can, however, provide a protective safety device that will ensure maintenance of broader, more permanent community goals. Constitutionalism may thus correctly be called a conserving force, discouraging impetuous change but not necessarily impeding cautious reforms ..." (Fluno)

When Montesquieu and the framers of the American Constitution articulated the conception of a limiting constitution that had grown up in England, they set a pattern which liberal constitutionalism has followed ever since. Their chief aim was to provide institutional safeguards of individual freedom; and the device in which they placed their faith was the separation of powers. In the form in which we know this division of power between the legislature, the judiciary, and the administration, it has not achieved what it was meant to achieve. Governments everywhere have obtained by constitutional means powers which those men had meant to deny them ...

Constitutionalism means limited government. But the interpretation given to the traditional formulae of constitutionalism has made it possible to reconcile these with a conception of

democracy according to which this is a form of government where the will of the majority on any particular matter is unlimited. As a result it has already been seriously suggested that constitutions are an antiquated survival which have no place in the modern conception of government. And indeed, what function is served by a constitution which makes omnipotent government possible? Is its function to be merely that governments work smoothly and efficiently, whatever their aims? (Hayek)

The Constitution merely deals with power and limitations on power. The need for limitations on power does not necessarily change from year to year or century to century. Sometimes where there are problems, change is necessary. The need for change can be over-emphasised. A constitution tends to reflect problems, conflicts and contradiction in society. It does not necessarily attempt to provide resolution of conflicts – but to create values, processes and institutions which will make possible resolution and, where resolution is not possible, compromise and co-existence. This is a basic proposition. But many critics of the Constitution proceed in ignorance of this factor. Sometimes a Constitution may reflect existing conflicts and contradictions in society. Let me provide an illustration.

The drafters of the Constitution in the 1890s debated and discussed the tensions arising from the relationship between the powers of the Senate, supply and Westminster style responsible government. They could not draft definitive sections for the Constitution because of the differing views of the delegates. What blew up in 1975 was an unresolved political problem which the drafters had agonised over, and finally incorporated in an open ended form in the Constitution. Therefore when the problem blew up in 1975 there was no clear constitutional answer. There were two conflicting conventions: a government without supply should resign; a government which had a majority in the House of Representatives had a right to govern. The Governor General sought a constitutional answer in 1975. He sought a quick resolution of the problem. There was no definite constitutional answer – the constitution and conventions provided direction – it provided a framework within which the problem could be tackled. The greatest democracy in the world (US) has a supply crisis every year (though not in the 1970's). The solution to a supply crisis is political negotiation – with unemployed public servants, disruption of welfare services and a bankrupt nation, as the sanction for politicians reaching a compromise. The Governor-General in 1975 could have pointed this out to the warring political leaders and placed the responsibility fairly and squarely on them. It was a situation which called for a political, not a legal solution. The Constitution provided values and a framework. It did not provide an answer.

Many of the critics of the Australian Constitution and those who have sought to effect change to it through devices and subterfuges which have been approved by the High Court, fail to understand the purposes of a Constitution which limit powers and provide avenues for dealing with conflicts. I make these comments about the role of a Constitution because it is the failure to understand the role of a Constitution that has led to the undermining of constitutionalism in Australia and the western world. A Constitution is not intended to provide a recipe for efficient government or for a government which can transform society along socialist or capitalist lines. These are matters within the area of government and must arise from interaction of people, government and many other factors.

3. The Role of the Judge

The traditional idea that the role of the judge is to interpret the law and the role of the legislature is to create law, has been subjected to sustained criticism. The extent of the law creating role of the judge depends on the context and circumstances. The common law in the pre-modern era during the period when the common law was being brought into existence, provided the judge a far more creative role than that which is available to the modern common law judge in England.

The High Court in a manner which I have no time to explain has, in recent years, adopted a creative (or may be destructive depending on the perspective) approach to the inherited English common law.

The role of the judge in the interpretation of Acts of Parliament may be more limited where parliament has taken pains to spell out its intentions, aims and objectives. In such a situation the role of the judge is limited to interpreting words and phrases and working out ambiguities arising from failures by parliament to clearly enunciate its will and purposes.

The role of the constitutional judge is wider than that of a judge operating in the modern common law system or interpreting an Act passed by Parliament.

The Constitution is an Act of the United Kingdom Parliament, but it is more than an Act of Parliament. In the words of Chief Justice Latham one of the effects of the Engineers case was to tie the court to the crabbed rules of English statutory interpretation. This means that the court interpreted the Constitution like another statute. It placed primary emphasis on the words of the Constitution and the words of a challenged Act.

This is literalism. Legalism is not the same as literalism. Legalism involves the employment of tried and tested methods of ascertaining the meaning of a legal document as intended by the authors. In relation to a constitution, it may involve where necessary an examination of the totality of the document and the historical context. Literalism is quite a different proposition. It means the adherence to the literal meaning of language with no regard to extra-textual considerations or broader constitutional objects.

The following judicial dicta provide a rationale for a different and broad interpretation of the Constitution.

O'Connor J stated in the Jumbunna Coal Mines case:

Where it becomes a question of construing words used in conferring a power ... on the Commonwealth Parliament, it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve. For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.

Higgins J, in Attorney-General for NSW v Brewery Employees Union of NSW stated:

Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act we are interpreting - to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.

These two quotations (including another by Windeyer J referring to the Constitution as the birth certificate of a nation) have been frequently quoted by the judges of the High Court.

There are two possible methods of broadly interpreting the Constitution.

The first approach is one which articulates a need to change and adapt the Constitution in the context of changing circumstances. The alternative approach is that the totality of the Constitution must be examined and interpreted in its historical context taking account of the intentions of the founders, leaving changes to the people in accordance with the amending procedure provided by the Constitution.

I therefore identify three approaches to constitutional interpretation – the literal technique, the broad interpretation in the light of human needs and changing circumstances, and, the broad

interpretation in the context of the intentions of the founders. I propose to focus on these competing views.

Professor PH Lane (1988:606) writes about one High Court decision which favoured the Commonwealth thus: "We detect a judicial concern for the ubiquity of a law-controlled community, and an unease about the escape of the individual, the interstate trader, from that uniformity".

The Mason High Court has expressed a fear of putting more and more matters outside the authority of Australian parliaments.

Senator Gareth Evans argued "It is the judges rather than the people or politicians who have in practice borne the primary responsibility of adjusting the Constitution to the reality of social and economic change". Regrettably, however, this has not been good jurisprudence when the result was clearly to distort the constitutional compact.

The rationale for judges to interpret the Constitution broadly in the first sense is provided by the views of Sir Anthony Mason on the role of a judge and the High Court, in `Future Directions in Australian Law' (1987) (Monash University Law Review 149 at 157), where he states "in recent years the High Court has been less inclined to pursue formal legal reasoning so far". He cites a number of examples of his impatience with traditional legal reasoning.

Sir Anthony also argued at 158 that the courts have a responsibility "to develop the law in a way that will lead to decisions that are humane, practical and just". Such a formulation provides a slippery slope for judges. Judges will have vastly different conceptions of what is humane, practical and just.

Sir Anthony says in the same article at 158-59 that "it is unrealistic to interpret any instrument, whether it be by a constitution, a statute or a contract, by reference to words alone, without any regard to fundamental values". What are fundamental values? Fundamental values of a Marxist, a Socialist, democratic socialist, an anarchist, or objectivist, a Liberal, a Libertarian, or a traditional moralist, are different. Sir Anthony then proceeds to say that "by values I mean those that are accepted by the community rather than those personal to the judge". Sir Anthony is apparently confusing community values and fundamental values. There is, however, no indication that Sir Anthony, in his judgments on the common law and the constitution which have involved departures from existing precedent, has paid any regard to community values. How are community values to be assessed?

Sir Anthony's judgments do seem to reflect the dominant values of the academic community – are these community values? The respected and impartial organisation the Roy Morgan Value Study has found that only 4% of the Australian people favour more intervention in the lives of ordinary Australians. Yet one of the bases of Sir Anthony Mason's interpretation of the constitution is that it must be interpreted so as to provide more room for Parliaments to operate. One may ask "Where is Sir Anthony's respect for community values?"

The above words of Sir Anthony Mason demonstrate unbounded intellectual arrogance, coupled with a knowledge and understanding of democracy, constitutional law and legal processes which is myopic. This comment is equally applicable to other judges who share Sir Anthony's philosophy.

The unbounded intellectual arrogance lies in the belief of a small number of judges in the High Court (sometimes by a majority of one) that they have the duty and the obligation to re-write the constitutional document drafted by a body elected by the people consisting of persons of diverse backgrounds and philosophies, versed in politics as well as in constitutional law. Does it not enter into the minds of the High Court Judges that they are not infallible and that they may be wrong or misguided? If so, should they not desist from their belief that they should proceed with the re-writing of the Constitution?

The judges have demonstrated little understanding of democracy, the political processes in government. This is evident in the ease with which they brush aside the history and development of the Constitution, the manner in which it was drafted by a Constitutional Convention consisting of persons elected by the people and the amendment machinery in section 128. The knowledge of law demonstrated in the Murray Islands case would earn one out of ten from me if I was correcting an undergraduate essay.

Sir Anthony Mason (as Justice and Chief Justice) in decided cases as well as public speeches and writings, has expressed the importance of deferring to the authority of a Parliament elected by the people. This overlooks the dimension that the power of the Parliament is limited by the Constitution. The role of the judge is to interpret the Constitution. A judge who fails to do so is in breach of his judicial duty and has abdicated his responsibility.

As ABC broadcaster and legal commentator Richard Ackland puts it: "The founding fathers wrote the Constitution as though Australia was to be six States with one little Commonwealth government tacked on to look after customs and defence. State rights and powers were to dominate. Instead, the High Courts over the years have virtually re-written the Constitution to hand power from the States to the Commonwealth". Ackland says "the Court has brought about "The Great Centralist Dream". Since states-righters have won some rounds, it's been a two-steps-forward, half-a-step-back process, but Canberra has been the overall winner."

I do not have time to flesh out and prove this bare statement. But my writings demonstrate that the High Court has adopted an approach to construction that has led it to undermine the intentions of the Constitution's draftsmen, (see Cooray, 1979: Ch 1; Cooray, 1988:Ch 5.9; Cooray & Ratnapala, 1987).

It bears emphasis that whatever law making role the High Court has exercised in respect of the Constitution has taken place in the context of legislation enacted by the Commonwealth Parliament.

The intellectual tide which demanded more power to central government and therefore adaptation of the Constitution to changing circumstances, gradually prevailed over traditional constitutionalism and the idea that the original compact could be changed only by the people. As a consequence the Constitution has undergone a transformation which has resulted in the translocation of substantial powers from the States to the central government. This translocation was judicially executed in the context of legislative initiatives, without the approval of the people in the manner required for the alteration of the Constitution.

A less publicised fact is that almost all of the proposals submitted to the people which tended to centralise power have been rejected not only by voters in a majority of States but also by a majority of all Australian voters. If anything, the history of referenda in Australia demonstrates a popular reluctance to depart from the original constitutional settlement.

These facts point to a startling divergence between community wishes and constitutional development in Australia. The transformation took place as a consequence of the literal and "the Constitution must change in accordance with the needs and modern circumstances" approaches.

The judges who adopted a literal construction may have done so as a consequence of their common law training which provided them with no expertise to relate to written constitutions, or with a view to being apolitical and avoiding political controversy or because they saw the technique as a means of giving effect to their preferred views on centralism.

Australia has as good a Constitution as could have been drafted by imperfect human beings. Problems with the Constitution have arisen not from intrinsic drafting weaknesses, but as a consequence of its interpretation by the High Court which has, in the context of legislative initiatives, presided over a substantial relocation of power from the States to the Commonwealth.

This is contrary both to the intentions of the drafters and to the wishes of the people as expressed in successive referendums.

Another dimension in constitutional interpretation is the federal balance (a concept to which I will return). Some judges have been conscious of the need to maintain a federal balance – others have been unconscious of or to varying degrees hostile to the idea of a federal balance.

Traditional Constitutionalism Versus Needs Oriented Change Approaches

According to traditional legal theory the task of a Court vested with constitutional jurisdiction is to apply, interpret and uphold the Constitution. In the words of Quick and Garran, "where a community is founded on a political compact it is only fair and reasonable that that compact should be protected, not only against the designs of those who wish to disturb it by introducing revolutionary projects, but also against the risk of thoughtless tinkering and theoretical experiments". Accordingly the function of changing the Constitution is not vested in the courts but in a separate constitutionally designed body (the people) acting according to a prescribed procedure.

The Constitution undoubtedly reflects the values of its founders. There is a case for altering a constitution when values change. But this is simpler said than done. How are present community values to be determined? Is a transient and bare majority in the Commonweaith Parliament or the High Court itself competent to decide these issues for the community? The referendum statistics referred to are relevant in this context. However a more important issue arises.

This issue involves the consideration of the very meaning of a constitution. Should a constitution be something which is pliant to momentary pressures or should it represent a longer term compact insulated from the vicissitudes of majoritarian impulses? Can a constitution in a meaningful sense be operated on the principles of supremacy of Parliament alone? Any discerning observer of the English constitution will concede that there is a great deal more to it than the supremacy of Parliament which in effect reflects the policies of the government of the day, enjoying the confidence of 51% of the Parliament. On many legislative issues before Parliament it may enjoy much less popular support in the community outside. In a society such as Australia where there is pronounced diversity of interests (regional, economic, ethnic, etc.) the need for constitutional certainty is even greater. In such a society the terms of association have greater claim to observance. But we need not go so far. History is quite clear that there are no inevitable trends in social perceptions. Marx, in this respect has been proved hopelessly wrong. What is popular social policy today can be despised tomorrow. A constitution that is pliant to short term currents of majority opinion cannot serve its purpose. It cannot protect minorities or individuals. It will be a manipulatable and vulnerable statute which will sooner or later fall prey to demagogues or dictators.

A common argument advanced against relying on the intentions of the founders is that the original intentions of the founders of the Constitution are themselves uncertain. Therefore it is argued that it is unhelpful to ask judges to attempt to give effect to such intentions and to leave any change to the amending procedure. Doubts on the intentions regarding specific provisions are always likely to occur. But the broader objects of the founders are sufficiently clear from the history of the federation and the text of the Constitution. The principal submission is that in the construction of specific provisions, it is unwarranted to adopt interpretations which are clearly inconsistent with the broad objects of the founders. It is argued that the framers of the Constitution included Isaacs, Higgins, Griffith, Barton and O'Connor and that the first two held a rather different view of the federal balance than the latter three. This is undoubtedly correct. However, is it not important to ask the question whether the Colonies would have ever agreed to federate on terms such as those which are reflected in many of the High Court judgments? Would they have federated on the terms they agreed to if they anticipated the interpretations in

successive High Court decisions culminating in the Franklin Dam case? If the answers are most likely in the negative, should not any change be left to the amending procedure? My thesis is not that each constitutional question involving doubt should be resolved by the referendum method. The submission on the contrary is that certain decisions of the High Court have defeated the broad intentions of the founders ascertainable by recourse to the principles of construction developed within our legal tradition in relation to the interpretation of constitutions. A doubt regarding the intentions of the founders may justify an interpretation by the High Court. But in order to justify the withholding of a question from the people, the doubt must be reasonable.

It is often contended that where doubts have arisen as regards specific provisions the intentions of the draftsmen as stated in the Convention Debates do not provide any guidance. It is true that the Convention Debates do not provide guidance on specific provisions. But the Convention Debates and the entire national debate which surrounded the drafting provide ample evidence of the view of federation that the Constitution was intended to incorporate. The High Court in interpreting such provisions has often failed to give due weight to the fact that the Australian Commonwealth is a federation and not a union. There is nothing more clear from the Conventions than the fact that the founders intended the States to retain a degree of independence of action. The precise limits of this independence are open to argument but not the fact that a degree of independence was intended. The approach of the majority of the High Court to the interpretation of the Constitution has taken minimal account of the implications of federation.

The federal balance concept is one which emanates from the text of the Constitution. It is specifically declared in the Preamble which refers to an "indissoluble Federal Commonwealth". The Parliament is referred to in section 1 as the "Federal Parliament".

Section 7 refers to a Senate composed of Senators "for each State". The emphasis on the need for the federal balance to be expressly stated is misconceived. It is not stated in so many words because it is obvious. An examination of the text of the Constitution in a dispassionate manner demonstrates that a careful division of powers between centre and States permeates the entire Constitution. It is dishonest to ignore this division, and draw no implications from it or to merely construe the words of a particular section in the abstract, without reference to the federal division. The Constitution is something more than a mere Act of Parliament. But even on basic canons of interpretation, an Act must be construed as a whole. To ignore the federal division is to fail to honour even this elementary principle.

One of the most fundamental of concepts upon which modern Western Civilisation was built is perhaps the principle pacta sunt servanda – that agreements (whether between individuals, or between State and people or even between nations) should be honoured. This principle is not a modern creation of western civilisation. It has been with man from ancient times albeit in an inarticulated form. The difference in the modern age was that it became more articulated, legally supported and sanctified as an effective principle of human conduct. This exaltation of the principle gave rise to constitutionalism and permitted free and orderly interaction between individuals so as to make possible the economic activity which produced modern civilisation. In the field of constitutional theory it meant the binding effect of the terms of a constitution fairly agreed upon.

Pacta sunt servanda was a particularly irksome impediment to the new constitutional theorists, as it was to law reformers. However by this time there were other emerging concepts. Karl Marx had said that the constitution of a nation was merely the formal superstructure of its social system and when the social system is changed, the constitution must necessarily change. Marx therefore directly questioned the legitimacy of formal constitutions. Few Western scholars were ready to venture as far as the repudiation of constitutional documents. But many saw in the

intellectual method of thinkers like Karl Marx a justification for making a written constitution pliant and responsive to intellectually comprehended, as distinct from popularly felt, needs. The effectively articulated and widely propagated intellectual views had Iittle difficulty in overshadowing the relatively inarticulated public opinion. In course of time, intellectual consensus began to displace popular wishes as the driving force of reform.

Major barriers to this intellectual tide lay in the field of legal theory, and in particular, constitutional theory. Here, the concepts of fragmented and limited governmental power, of individual rights and liberties, of the sanctity of contract and of judicial restraint were seen as orthodoxies standing in the way of universally desired objectives. Hence it became necessary for the new theorists to mount a relentless assault on the edifice of traditional legal theory. Justification for chipping away these perceived barriers became a predominant concern of legal thinking and scholarship became measured by the yardstick of its usefulness to the cause of facilitating effective government and the promotion of "social" purposes.

The doctrine of separation of powers and the classical view of the rule of law became, in the hands of these theorists, valueless abstractions conjured by Montesquieu and Dicey who were themselves mercilessly ridiculed. Engaging in self-fulfilling prophecies intellectuals and politicians denied the relevance of these theories to modern reality while proceeding to create that reality. Constitutionalism not only became unfashionable but was regarded as being in bad taste in many academic circles.

Whilst hacking away at the old legitimacy the reformists had also to construct the new. What would be the criteria of this new constitutional legitimacy? It had to be built upon a theory of necessity, inevitability and unavoidability. The approach to this task is illustrated by the following words of Professor Colin Howard.

The most important effect of the written constitution as a legal document is to inhibit political evolution... In its character as fundamental law the constitution entrenches an institutional structure of government that is both inflexible and complex. The effect is to distort the political process by compelling it to operate within a framework that is almost entirely unresponsive to the needs of a socially and technologically advanced democracy.

The suggestion here is that constitutional reform is needed and that the need legitimises the change. But the crucial issue is who determines the need. Undoubtedly those who propose a political programme which of necessity requires a greater centralised power in government will need changes. Those who wish to undertake legislative structuring of society will need changes. Those who seek uniformity of government rather than diversity will need changes. Those who equate nationalism wnh centralism will need changes. For all these people the fragmented power structures of the Constitution will appear as obstacles. And predictably their concept and vision of the society will appear to necessitate radical alterations of the Constitution.

Nevertheless, a claim of legitimacy quite obviously cannot be founded on the needs as perceived by one school of political thought, if the appearance of political pluralism is to be maintained. Hence it becomes necessary to mount an intellectual offensive that creates an aura of community consensus on the needs of the day. Once that appearance is sufficiently established, the constitutional guardians inevitably capitulate. Thus the High Court wilting under intellectual pressure began to endorse the new criteria of legitimacy. These criteria centred on the needs of society as comprehended by those who dominated intellectual discourse.

The composition of the High Court made it exceptionally susceptible to pressures of centralism. Being appointees of the Commonwealth executive, who were drawn mainly from careers associated with Commonwealth activity, the judges displayed a natural sympathy for the goals of the central government. In recent times several active proponents of the new legitimacy ascended

the High Court pedestal and in consequence, the substance and momentum of constitutional change began to accelerate.

It is said that institutions are microcosms of the larger community. That however, is true (if at all) of unmanipulated or spontaneously grown institutions. At any rate the High Court of Australia was not such an institution. Between the Court and the people, there existed the elite world of academics, journalists and politicians – the professed guardians of the public interest. The High Court was in fact the creature of this elitism. The Court drew its members and its inspiration from this world of "superior wisdom." Good and honest men who served on the Court hardly realised their distance from the community. Their intellectual milieu was one dominated by the new social theorists who regarded society as something to be designed and ordered to yield the greatest benefit. Not surprisingly therefore, they were persuaded to believe in the necessity and inevitability of expanding government authority. They were thus drawn unconsciously into the intellectual plot to re-draw the constitutional boundaries of power without the consent of the people.

The pro-Commonwealth activism of the High Court may itself have contributed to the public reluctance to endorse formal constitutional alterations. Pro-Commonwealth decisions which engaged public attention have drawn noticeably negative voter reaction. If on the other hand the popular resistance to constitutional change is owing to some "conservatism" of Australians, who amongst us is competent to fault them? The Australian Constitution was meant for the Australian people. To override their wishes, however misguided one may think they are, is to wrest the sovereignty of the nation from the people and to repose it in persons who have no legal or moral claim to it.

It is difficult if not impossible to fully comprehend the occurrence of such an extraordinary legal subterfuge in a nation deeply imbibed in constitutional tradition,unless the philosophical upheavals of this century which profoundly changed the problems and human solutions are taken into account.

The change in philosophical outlook was mainly the result of the new sense of human mastery over the environment, which in turn was inspired by the fabulous scientific and technological achievements of this century. This euphoric sense of human capacity quickly permeated every field of human learning and radically changed the way in which human problems were regarded, thus giving rise to the predominant social theories of our times.

It did not take long for leaders around the world (of all political persuasions) to succumb to an illusion of their capacity to fashion the destiny of humankind. This overpowering sense of capacity led them to think that the limited range of their power and authority was the main obstacle to the achievement of socially desirable goals. Given this feeling, few leaders feared the consequences of the imperceptible growth of power capable of both use and abuse.

As Western nations grew immensely wealthy and the bounty of democratic governments expanded immeasurably it seemed that all social ills were curable given the political will. This new faith provided the foundations of the greater part of intellectual discourse, and theories upon theories were built to support the new concept of all-embracing government.

Public opinion, when tested, always fell short of intellectual expectations and the more evident this fact became the more necessary it became for the social theorists to establish new criteria for legitimising constitutional change. The successive popular vetoes registered at constitutional referenda convinced these theorists that the average Australian voter was conservative, uninformed or indifferent to the problems of government. Alternatively he was regarded as a victim of reactionary manipulation incapable of independent thought and action. Faced with an unresponsive public, the intellectual attention inevitably shifted to the alternative forum of the High Court. Here, the arguments based on the "new economic and social realities", the

"compelling new circumstances" and the "necessities of modern government" fell upon vastly more receptive ears.

An Examination of some High Court Decisions

Uniform Tax

The power to raise income tax was initially conferred on both the Commonwealth and the State Parliaments. The Commonwealth adopted during World War II a devious method involving the enactment of four separate Acts to force the States to relinquish their income tax power and at the same time took over the State income tax departments. This was not all done directly. The intention to effect a de facto nationalisation of State Government activity was nowhere stated in the four relevant Acts. The High Court refused to look at either the real intention of the Acts or the relationships between them. Instead, it looked at each Act separately and found that authority for the enactment of the legislation could be found under various provisions of the Constitution. South Australia v Commonwealth (1942) 65 CLR 373. As a consequence of this case the States became heavily dependent on the Commonwealth for finance and the extent of the States' powers was considerably diminished.

The effect of the Act was to take over the State income tax power, the State income tax offices (buildings) and the State income tax officers. This happened during war time and part of the scheme was limited to the duration of the war. But once the Commonwealth had taken over the income tax field and imposed taxes equal to the prior State and Commonwealth taxes combined, it became politically difficult and impractical for the States to re-enter the income tax field.

The High Court was asked to look at the total effect of the Act – but it refused to do so. It looked at each Act separately and found that each Act was within the head of Commonwealth power.

This is a complex case – and I ask constitutional lawyers to pardon me for the brief summary, which must necessarily contain missing dimensions. The case is instructive because it is an example of a conservative literal approach to the Constitution, leading to a result favourable to the Commonwealth seeking to expand its power.

This case is an example of a situation which has frequently confronted the High Court. The issue arises whether an Act passed by the Commonwealth Parliament is within a head of power granted to it by the Constitution or whether it infringes a prohibition contained in the Constitution. The High Court may interpret the Act on the basis only of its words, even where an analysis of the Constitution as a whole, the intentions of Parliament, the effects of the Act would reveal that the Act contravened the Constitution's authorising and prohibitory provisions. This approach has made it possible to draft legislation in such a way that its real purpose and effects are concealed.

The Koowarta Case (1982) and the Tasmanian Dams Case (1983)

The Constitution confers on the Parliament the power to legislate with respect to "external affairs". In two cases in the early 1980s dealing with alleged racial discrimination and the building of the Franklin Dam, the High Court held that where the Commonwealth Executive has entered into a treaty, the Commonwealth Parliament has power to legislate on the subjects covered by the treaty even though under the constitution power to legislate does not exist. The Commonwealth Executive has the unfettered power to enter into a treaty. Apart from that, power of the Executive to act within Australia is derived from section 61 of the Constitution and Acts passed by Parliament. Where legislative power exists, the Commonwealth Parliament can, through legislation, confer power on the executive and other agencies. Prior to these two decisions the principle that Parliament could legislate to implement a treaty had been subject to a number of restrictions. The High Court swept away some of these restrictions and denuded the

others of practical significance. It recognised some restrictions that apply to parliament's legislative power to implement treaties, but these limitations are in practice likely to be of no effect. If they were, the Commonwealth legislation in at least one of these cases would not have been upheld.
Under the "external affairs" power the Commonwealth Government by the expedient of entering into a treaty can enhance the area of legislative power of Parliament.
A United Nations treaty or covenant exists on almost every conceivable subject on which parliament may wish to legislate. Therefore the effect of these judgments is to provide a very wide area of legislative power to the Commonwealth. The extent of this power is not appreciated because the Commonwealth is unlikely to explore it to any degree. Commonwealth Parliamentarians are elected by the inhabitants of the State. There are therefore substantial political restraints on the exercise of power. This does not offer much consolation. The power is available – and may be carefully selectively and perhaps ruthlessly used when a real need arises.
This case cleariy illustrates the tension between the two types of broad interpretation I outlined earlier.

Section 92 (Freedom of Interstate Trade)

Section 92 is a provision which places prohibitions on legislative power. It enacts "trade, commerce and intercourse among the several States shall be absolutely free".
In R v Anderson; ex parte Ipec-Air Ltd (1965) 113 CLR 177 and in Ansett Transport Industries (Operations) v Commonwealth (1977) 139 CLR 54, the High Court upheld a prohibition by a government body on the importation of aircraft essential for the conduct of interstate trade on the basis that the trade did not commence until the aircraft was imported.
The High Court held in this case that the Commonwealth Parliament had no power to prevent an airline operating inter-state services.
The effect of IPEC was far reaching. Since aircraft were not manufactured in Australia, the Commonwealth was able, by the simple expedient of refusing an aircraft import licence, to limit, close down, or control the inter-state operations of airlines. In the view of the High Court this did not affect the freedom of interstate trade, because it was anterior to the movement of trade.
The power of the Commonwealth to implement the two line airline policy is based on its export control power under 51(1) to legislate for trade and commerce.
The IPEC decision and many similar ones are consistent with the strictly literal construction that the High Court has for the most part purported to apply. Yet this commitment to literalism has often been contingent on the production of the desired result, i.e. the expansion of the powers of the Commonwealth. This too can be illustrated by reference to the Court's approach to Section 92. The Court has restricted the scope of the Section in two important ways. It has excluded (as shown in the above example) antecedent commercial activity from the protection of Section 92 even where such activity is essential to the exercise of free interstate trade. This was effected by strict literalism. On the other hand, the High Court has abandoned literalism to permit regulatory impediments to interstate trade by disregarding the Section's requirement that such trade be "absolutely free". The Court has held that regulation in the public interest is not inconsistent with freedom, and is necessary to preserve freedom. On a literal construction, how can regulation be consistent with the words "absolutely free"? In this case, the Court's approach has been clearly policy- oriented.
The two techniques in tandem have served to over-turn a central concern of the Constitution as agreed to in 1900. Constitutional theorists focus on the wider definition of interstate trade and commerce adopted by the High Court since the 1950s in a few cases that restricted Commonwealth legislative initiatives. However, taken in its totality, the High Court's interpretation of Section 92 has been permissive in relation to legislative experimentation,

particularly when the effects of its dichotomous approach are taken into account. The flourishing State and Commonwealth marketing and restrictive occupational licensing schemes constitute a monument to the failure of the High Court to give effect to Section 92. Clark King v Australian Wheat Board (1978) 140 CLR 120 represents the extreme case of the Court allowing a monopoly to prevent trade across State borders.

There have, however, been cases where Section 92 has been invoked to protect freedom of interstate trade. The most notable example is Bank of NSW v Commonwealth (1948) 76 CLR 1, where legislation nationalising the banks was held to be unconstitutional.

Most recently, the High Court has turned its back on all previous interpretations of Section 92 and rendered it virtually nugatory. In Cole v Whitfield (1988) 62 Australian Law Journal Reports 303, the High Court held that Section 92 now provides immunity only from Commonwealth or State laws that impose discriminatory burdens on interstate trade. The result (admitted in argument by the Commonwealth Solicitor-General, who supported the view) is that 32 cases where legislation had been previously found invalid are by implication overruled. Most of the discriminatory and protective Acts that have been held to contravene Section 92 are Acts of State parliaments. An important effect of the decision is to provide the Commonwealth Parliament with unlimited regulatory power so long as it treats all States uniformly.

This reinterpretation of Section 92 was supported by 16 Counsel, including eight Queen's Counsels and six Solicitors-General. It was opposed by a Queen's Counsel and Junior. The High Court did not offer any convincing demonstration that its reinterpretation of the Section was consistent with the words of the Section.

Professor PH Lane's comment on this case is quoted above.

Professor G de Q Walker (1980) argues that in the context of Section 92 the High Court has embraced outmoded economic doctrines supporting state intervention, despite the increasingly influential body of economic opinion that condemns restrictive occupational licensing and state trading monopolies as anti- competitive and contrary to the interests of consumers. In some Section 92 cases the High Court has invited Counsel to put before it evidentiary or other material that might assist it in forming its judgments. Walker argues that Counsel should invoke modern economic research suggesting that Section 92 should be so interpreted as to benefit consumers by promoting increased competition, wider freedom of choice, and lower prices.

Not unnaturally, the galaxy of Counsel representing government in Cole did not do this. Counsel representing individual litigants have likewise shown little familiarity with modern economic ideas. Sound arguments have not been made. Even if they had, it is doubtful whether a majority of High Court Justices, with their abiding faith in the power of government, would have understood the arguments.

Section 92 must be interpreted on its words. Yet the High Court cannot stop at merely looking at the words. Freedom is a concept that requires analysis in the context of political and economic theories, as well as the ideas that moved the drafters of the Constitution. A broad interpretation in the context of the specific words of the Constitution is therefore required. There are, unfortunately, no indications that the High Court will construe the Constitution in this way.

Conclusion

Finally, I wish to place constitutionalism in a wider framework. Democracy, the rule of law and constitutionalism are foundations of classical liberalism and are in fact the products of that tradition. But they are concepts which, owing to their very appeal, have been stolen and misused to lend support to ideas which are fundamentally opposed to liberalism.

The term "democracy" today means not the duty of government to conform to ascertained wishes of the people, in the context of a system of checks and balances on abuses of power, but the right of government to decide what is good for the people, on the basis that people have elected it.

The rule of law which once meant government, subject to known and stable laws and the Constitution, is today used to legitimate the momentary will of government. Rule by law has replaced the rule of law.

Constitutionalism involves much more than just having a Constitution. Most countries, including those which have authoritative and totalitarian regimes have a document called a constitution. Singapore and pre-apartheid South Africa not only had a constitution, but meticulously operated in terms of the Constitution with manipulated elections and a tame judiciary. Constitutionalism involves much more than just having a Constitution.

The High Court has denuded the Constitution of many of its significant limitations of power. If Parliaments and Cabinets are to have all-embracing power, what is the purpose of a constitution? We have not reached that stage yet – but we are moving in that direction.

The best short statement of the rationale of liberal constitutionalism is that of James Madison, the most influential draftsman of the United States Constitution. Madison said "But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary.

"In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed: and in the next place oblige it to control itself.

"A dependence on the people is, no doubt, the primary control on the government: but experience has taught mankind the necessity of auxiliary precautions (Federalist 51)".

Federalism is just one of the "auxiliary precautions" or "checks and balances" or "control's' – call it what you may – and this is a more powerful rationale for federalism than "States Rights".

Supporters of federalism over the years would have done better to rely less on State rights and rely more on the dimension that the division of power between centre and States provides for a check against unrestrained exercise of power.

The rewriting of the Australian Constitution has proceeded in blissful ignorance of or careless unconcern about fundamental features of constitutionalism – the system of checks and balances and the need for limitations on the powers of Parliament and Cabinet.

I can do no better than end by echoing Madison's emphasis on the need for "auxiliary precautions" and the obligation on government to control itself.

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Attorney-General for NSW v Brewery Employees Union of NSW (1908) 469,611-12.
Authorising Provisions for Commonwealth Parliament
51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-
(i) Trade and commerce with other countries, and among the States:
(ii) Taxation, but so as not to discriminate between States or parts of States: ...
(iii) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth: ...
(xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money: ...
(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth: ...
(xxix) External affairs: ...
(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:
122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.
Prohibitory Provision Applying to State Parliament
90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.
Prohibitory Provisions Applying to Commonwealth and State Parliaments
92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.
114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth nor shall the Commonwealth impose any tax on property of any kind belonging to a State.
Prohibitory Provisions Applying to Commonwealth Parliament
116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.
Regulatory Provisions Applying to Commonwealth and States
See 109, 96,106,107.