Chapter Nine

Australia's Diminishing Sovereignty

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At the inaugural conference of this distinguished Society I had the honour to be invited to present a paper on the power of the Commonwealth Parliament, pursuant to s.51(xxix) of the Constitution, to legislate for the peace, order and good government of the Commonwealth with respect to external affairs.

I entitled that paper "When External Means Internal" in order to emphasise the extent to which the High Court in recent decades has converted a legislative power to deal with foreign relations and diplomatic representation overseas into a major, and almost overriding, source of power to control purely domestic issues.

Within the country the main practical consequence of that development has been an ever–increasing transfer of effective legislative power from the States to the Commonwealth. The transfer of power from the States to the Commonwealth is of course not new. It has been going on since federation, mostly in consequence of two notable features of our Constitution: the financial dominance of the Commonwealth through its powers to tax, and the influence of s.109 of the Constitution, which gives Commonwealth laws priority over State laws on subjects over which each has legislative power.

Indeed, the external affairs power of s.51(xxix) of the Constitution played very little part in our governmental arrangements at all until the mid–sixties. Since then however it has carried all before it, particularly in the trio of landmark decisions known as the Seas and Submerged Lands, Koowarta and Tasmanian Dam cases [New South Wales v. Commonwealth (1975) 135 CLR 337; Koowarta v. Bjelke-Petersen (1982) 153 CLR 168; Commonwealth v. Tasmania (1983) 158 CLR 1]. There is nothing as yet to suggest any prospect of the High Court beginning to wonder if enough is enough, let alone too much, and starting to set limits to this development.

Indeed, the now notorious Mabo case suggests the very contrary. Although the external affairs power was not directly involved in that constitutionally cataclysmic event, its spirit informs the entire proceeding. Part of the message is that if such countries as New Zealand, Canada and the United States of America can acknowledge claims to special rights made by their indigenous peoples, particularly in relation to land, we should not lag behind.

Why not? Is there in the experience of those countries something so very apt to our circumstances that we should dutifully follow their examples instead of making up our own minds about our own country? If there is, I am not aware of it.

My understanding of the American system of reservations for their indigenous Indians does not suggest to me that that particular example should be followed. With a few individual exceptions, it does not seem to have done much for anyone, Indian or otherwise.

If we turn to Canada, where in the indigenous racial context the light of what is nowadays felicitously called the politics of the warm inner glow seems to shine more brightly than anywhere else, we find both Indians and the people I was taught as a child to call Eskimos, but should now refer to as Inuit. This I find confusing because I thought Inuit was the language the Eskimos spoke, not the people themselves, but no doubt that is just my ignorance. I get similarly confused when Jews are referred to as Hebrews, and black South Africans as Bantu.

Anyway, Canada does not particularly enthuse me as an example either. I am not up to date with the Canadian Indian situation but my understanding is that on the Inuit front things are not too good. Apparently advantageous entrenched land rights that were offered to the Inuit in Canada's latest constitutional convulsion (a national pastime there, of course) were rejected. The ground of objection seems to have been a calculation that they could hold out for even better land rights.

Well, good luck to them, but I should have thought that the message for Australia would have been: keep clear of land rights, they bring nothing but turmoil for everyone. So what do we do? Take thought and seek our own original ideas? Dear me, no. Instead of undertaking anything so taxing, we charge headlong into the land rights quicksand, apparently alarmed at the prospect of being classified everywhere from Chad to China as internationally politically incorrect.

The third example always cited to us is New Zealand. I think it is particularly important in the case of New Zealand to emphasise that what I am talking about is not how other countries handle their internal affairs. I am talking about the undesirability of Australia formulating domestic policy, either wholly or in part, on the basis that we should do this, that or the other simply because other countries have done it already.

In the case of New Zealand there are striking differences from this country which should induce caution at the very least. For a start, the Maori and related non–white peoples of New Zealand are, as I understand it, very different from the Aboriginal peoples of Australia. Secondly, the history of their relations with their white rulers, symbolised by the Treaty of Waitangi, is similarly different. Thirdly, the history of that treaty in itself does not necessarily inspire confidence. Without in any way commenting upon the way in which New Zealanders manage their affairs, therefore, I see no reason why we should copy them.

There is, in the marked contemporary Australian tendency to approach domestic issues by trying to link them with other people's problems, an unsettling undertone of the famous cultural cringe, from which we are supposed to have suffered for the last two hundred years, and from which, according to some determined pessimists, we still suffer. I do not know if these are the same people as those who insist on talking this country down as racist, or different people of a similar cast of mind, but it really doesn't matter.

What matters is the remarkable persistence in Australian intellectual life of a tendency to take our values from elsewhere. In no context is this more clearly to be seen than in the operation of the external affairs power. My concerns today therefore have a different emphasis from my previous paper, or perhaps I should say carry the same emphasis but present a different aspect of it, an aspect which, although I did not choose the expression, I am happy to call Australia's diminishing sovereignty.

Any topic worthy of debate is always the better for a touch of irony. This topic certainly has that. Is it not ironical in the extreme that, at the very time when so much hot air is being generated by our republican enthusiasts in the name of sovereignty, there is evidence in abundance that true sovereignty, as opposed to political posturing, has been diminishing in this country for quite some time?

Let us return now to the three landmark cases that I mentioned earlier. The first was the Seas and Submerged Lands case in 1975. As it happened, that decision led to some sensible results, by way of a useful principle and a reasonable clarification of how, as a matter of domestic law, to distribute offshore domestic power between the Commonwealth and the States.

These gains however were made at a cost which is proving to be considerable. Not only was resort to the external affairs power quite unnecessary: the two maritime conventions relied on had nothing to do with the main contentions argued. Only heroic intellectual contortions by the High Court made it seem otherwise. This gave powerful support to the view, with which I entirely disagree, that if Australia enters into an international agreement it can, with the

assistance of s.51(xxix) of the Constitution, use that agreement as a means of getting its own way on domestic questions.

That is not the way the system should work. International agreements are not intended to settle domestic disputes but to make the world a better or safer place: to make nations better neighbours. That is a quite different matter from making any particular nation a better place. Of course there is, or one hopes there will be, an inter–relation between the two, but this hope should not be allowed to obscure the proper division of responsibility.

That division ought to be between the conduct of the external or foreign affairs of the nation state, and the conduct of its internal or domestic affairs. Each is conducted in the first instance by the executive government of the day, but for different purposes. External affairs are primarily concerned with Australia's position internationally, that is to say, with its relations with other nation states. In a federation, internal affairs are primarily concerned with relations between the constituent parts of the federation, and also the balancing of interests that do not necessarily correspond to those constituent parts but have a more national character.

Although the executive government is the prime mover in both departments of the national life, there is a significant difference of emphasis between them. In external affairs the government is relatively untrammelled. Although particular policies may be debated in Parliament, and although supplementary legislation may be needed for the implementation of a policy like a trade treaty, or the supply of arms and equipment, Parliament and the subordinate constituent parts of the federation do not in general play a major role in external affairs.

Insofar as legislation is required, it should be directed towards genuinely external affairs. What I mean by a genuinely external affair is any matter that as a physical fact has its primary operation outside this country. The contrast I draw is with a situation in which the only external element that can be detected is a degree of goodwill between nation states generated by physical consequences that occur, not outside but inside one or more countries, in our case Australia.

As soon as that happens, each of the goodwill nation states is allowing each of the others to trespass upon its own sovereignty. This happens because the compact leads to physical consequences that ought to be the result of domestic policies, not external policies. This remains true, although less obvious, in such a case as South Africa, where the physical consequences of a goodwill compact are visited not upon the parties to it but upon an outsider.

It remains true because it legitimises a surrender of sovereignty. If South Africa, or indeed any other nation state, decides to interfere in our domestic policies towards Aborigines, we shall be in no position to object. That is because we have to a significant extent surrendered our own sovereignty over that subject, by helping to internationalise it through our own blatant and sustained interference in South Africa's internal racial policies.

That particular exercise in surrendering sovereignty over our own affairs was all the more remarkable in that we insisted, and still do, on retaining in our own Constitution s.51(xxvi), which in explicit terms empowers the Parliament to enact racially discriminatory laws. Although the rest of the world, rather surprisingly, does not seem as yet to have noticed that provision, and although most Australians, if they have heard of it at all, seem to be under the mistaken impression that its function is to authorise laws for the advancement of Aborigines, the simple fact is that it is not so restricted, but authorises racially discriminatory laws in general.

The ironical consequence is that a law passed under s.51(xxvi) to benefit a racial group can usually do so only by discriminating against everyone else. This sort of exercise is often called "positive discrimination", as if there were some magic in the word "positive" that changes the meaning of "discrimination". Such puerile semantic tricks do nothing to alter the fact that a law of that kind is still an act of racial discrimination expressly authorised by our Constitution.

If it is to be removed from the Constitution, however, a referendum to do that ought to be the result of a domestic debate and a domestic government policy. It ought not to be hidden behind a purported international obligation. The likelihood is different. Particularly owing to our South African involvement, but not entirely because of that, we are likely at some stage to find ourselves under international pressure to remove s.51(xxvi) simply because we are regarded, correctly, as having surrendered effective sovereignty over domestic racial issues.

This brings me back to the Seas and Submerged Lands case. The principle there decided, that the power of the Parliament under s.51(xxix) of the Constitution to legislate with respect to external affairs extends to matters outside Australia with which Australia has some reasonable connection, did not need to rely on s.51(xxix) at all. Such a conclusion could have been arrived at on the much sounder basis that a power to make laws with extraterritorial application is inherent in any nation state.

This is a sounder basis than reliance on s.51(xxix) because it does not require an international agreement about anything. It is a simple and usual extension of domestic legislative power. Dragging superfluous international conventions into the matter merely gave powerful support to a pernicious and unnecessary use of the external affairs power. It is a usage that has in recent years led to an increasing number of actual or threatened losses of sovereignty, by which I mean control of our own domestic affairs.

The second of the landmark cases I referred to earlier, Koowarta, illustrates the progression. The context was racial discrimination. Although inter–racial strife has been a continuous theme throughout history, and continues to flourish at the present day in most parts of the world, racial discrimination has for some reason now reached a pitch of moral fervour for which I cannot recall a parallel, unless it be the anti-slavery movement that played so great a part in the American civil war.

As I think we all know, it is not so long since even to investigate the extent to which there might be a genetic basis for evident differences between ethnic groups was a hazardous undertaking. For a while, racial discrimination shared with the feminist movement the feature that publication of even the most rigorous and respectable scientific results could mean the end of a career, the destruction of a reputation and even personal danger and hardship. Although the worst excesses of dogmatic censorship of knowledge about race may now be on the wane, prohibition of racial discrimination is still a motherhood cause and seems likely to be around for some time.

In Koowarta there was a superficial and misleading resemblance to Seas and Submerged Lands, in that the challenged legislation (which in the event was upheld) was enacted in reliance on an international agreement to which Australia was a party, in that instance the Covenant on the Elimination of all Forms of Racial Discrimination. To concentrate on that aspect of the matter, however, is to miss the point.

The point is that Seas and Submerged Lands dealt with questions of extraterritorial jurisdiction and the offshore division of legislative power between Commonwealth and States, to the resolution of which the international conventions involved were neither necessary nor even relevant. As I mentioned already, the problems involved, although presented in all the trappings of international posturing, were in fact domestic, and perfectly capable of resolution by the High Court without reference to s.51(xxix).

Contrast this with Koowarta. The problem there did not arise from anything inherent in our constitutional structure, like the division of powers between Commonwealth and States, or from the march of domestic events calling for extraterritorial laws. It arose entirely from the very international agreement that was purportedly relied on to resolve a domestic problem. By any sensible measure there was no such problem of racial discrimination in this country as could possibly justify our surrendering effective sovereignty over the subject to any international body.