A FEDERALISM FLAWED

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INTRODUCTION

In its most limited sense, federalism simply involves some sort of division or sharing of powers between a central government and regional or state governments. Typically, the delineation of authority is enumerated in a written constitution, but aside from this consistency there are no hard and fast rules pertaining to federalist forms. The balance of power may favor the central government (as in the Australian model) or, alternately, it may swing towards the regional governments (such as in the loose union of cantons in Switzerland which is more commonly referred to as a confederation). Moreover, federalism need not be exclusive to capitalist economies nor parliamentary democracies.

Clearly, however, federalism does not exist in isolation. Its very nature implies and requires a significant measure of cooperation and compromise among all bodies vested with legitimate authority,yet each enjoying a certain degree of autonomy. In this broader sense, federalism is far more than a static structure. It is part of a greater political entity that impinges on the exercise of power and the politics of intergovernmental relations. All aspects of the political system and environment in which a federal form functions political parties and culture included — may directly influence its essential character and evolution. In turn, a federal structure may shape interactions between and among these same forces, thereby influencing and at times inhibiting democratic processes and outcomes. The latter has been perhaps more evident in Australia than in any other western nation which lays claim to a democratic federal form.

Australia has an extraordinarily messy and needlessly complicated system of federal parliamentary government. While day to day political activities appear to operate with little drama, any student of politics is well aware of the inherently contradictory processes and structures which comprise this seemingly successful model of western democracy. These often ignored deficiencies of Australian federalism became starkly apparent in 1975 when Edward Gough Whitlam, the legally elected prime minister of the country, was summarily dismissed from office by a single non-elected individual, then Governor-General Sir John Kerr. It was an unprecedented action which proved nothing short of a full-blown constitutional crisis. In the years hence, writers have vigorously debated where to apportion blame — was it the fault of ruthless party politics or a breach of the Westminster convention? Was it due to an outmoded constitution or an irresponsible media? Was federalism itself the culprit or was the CIA somehow involved in manipulating events from behind the scenes? A quick, yet, inadequate answer is that the crisis was precipitated by all of the aforementioned factors.

What follows is a detailed overview of the origins and current practice of federal parliamentary democracy in Australia, highlighting the many flaws which led to the sacking of former Prime Minister Whitlam. It is intended for those interested in comparative forms of federalism who are unfamiliar with the Australian experience. In addition, it should serve as a useful case study for proponents of a federalist Philippines who would hope to avoid emulating the painful mistakes of other countries.

FROM COLONY TO SELF-GOVERNMENT

The earliest form of European-influenced political arrangement in Australia dates back to 1788 with the establishment of a penal colony in New South Wales (NSW). The colony functioned as a jail, a police state with a clear-cut structure of government. All power resided with the governor. He appointed civil officials, held ultimate authority over an extraordinary judicial system, and ruled by decree. The governor controlled virtually every aspect of public life. He could decide on punishment for transgressors, remit sentences of model prisoners, and was responsible for the assignment of convicts to forced labor on lands granted free to immigrants. Settlers arriving in the colony quickly discovered that they no longer enjoyed the various rights guaranteed them by the British constitution. The governor, duly authorized to impose his own rules in areas as diverse as port regulations and wage fixing, commanded far more power in the colony than the monarch who appointed him exercised in England. All of the early governors were either military or naval men and their subordinate officers were expected to follow orders "according to the rules and discipline of war."

The system of governorship was made partly inescapable due to the colony's penal nature and isolation wherein two years might elapse between communications to and from England. It was a convenient enough arrangement during the early years when the over-riding problem of the colony was mere survival, and certainly it suited the British government which was less concerned with affairs in a distant prison settlement. The situation, however, progressively proved unworkable as contradictions emerged between the colony's penal character and its economic development which gave rise to competing social classes.

The first recognition of these contradictions was acknowledged in the Bigge Inquiry, prompted by wealthy property-owners in the colony who resented Governor Lauchlan Macquarie's policy of free land grants to pardoned convicts known as emancipists. Bigge, a young former Chief Justice of Trinidad, arrived in NSW in 1819 and spent a total of 18 months observing local colonial judicial and civil administration. Bigge's final report fitted closely the changing socio-economic realities of the penal settlement and his recommendations resulted in the Act of 1823.

The 1823 Act established a Legislative Council (LC) in NSW consisting of up to eight members appointed by the governor who were to advise him on legislative matters. It also separated the judiciaries of NSW and Van Diemen's Land (Tasmania), placing each

under the supervision of a Chief Justice. The Act did not greatly curtail the governor's powers; he appointed the LC himself and could then choose to ignore its recommendations. To this extent, the Act was intended to legitimize rather than restrict his authority. Nevertheless, it marked the real beginnings of constitutional evolution in Australia.

Initially, all members of the LC were civil officials, but in 1825 the British Secretary for the Colonies appointed three representatives from the merchants and gentry. In the same year, an Executive Council was established, comprising the lieutenant-governor, the chief justice, the archdeacon, and the colonial secretary. The governor was increasingly expected to consult with and heed the advice of these two Councils, but again such reforms were not designed to liberalize government as to make it more effective. Political freedoms, still lacking in England, were not likely to be conferred on a community of criminals and pardoned convicts.

Several important developments occurred during the 1830s, partly influenced by the Chartist movement in Britain, which led to the 1832 Reform Act. The Act widened franchise and redistributed seats in the House of Commons, thereby making it more representative of property-owning interests. In 1835, the then governor of NSW, Richard Bourke, sent a draft constitutional bill to England that contained provisions for a predominantly elective LC and in which emancipists could play a role. Trial by civilian jury was also extended to criminal cases.

While the colonies in 19th-century Australia shared no single historical chronology, by the mid-1850s each had gradually and separately gained responsible self-government. (WA followed later in 1890). The demographic configuration of the settlement had undergone rapid transformation up to this time as rising numbers of migrants, pardoned convicts, and native-born significantly altered the balance of free-persons to prisoners. This in turn led to demands for further civil and political reform. This was by no means a unified challenge to the autocratic system of governors. Indeed, clear divisions existed in the NSW colony between the so-called elitist exclusives and the emancipist group which had grown to include wealthy former convicts, respectable migrants, and native-born. The latter had long urged for a representative government and trial by jury whereas the exclusives favored a restricted expansion of powers to merchants and gentry only. Over time though, the gap narrowed as each came to recognize that the economic interests they shared were far more crucial than any political differences that might separate them.

Two critical issues which cemented their alliance concerned colonial land policy and the future of convict transportation. Land was the principal source of wealth in pastoral Australia yet the Crown reserved all powers over its distribution, price, and allocation of moneys arising from its sale. As the greater demand for land became inevitable due to mass migration, the propertied exclusives and emancipists sought to guarantee their continued prosperity by securing control over policy legislation — something which could only be achieved through self-government. Equally vital to their economic survival was maintaining the cheap and ready supply of agricultural labor

provided by transportation. In this, they were opposed by native-born workers and the emerging class of migrant tradesmen who justly feared that the availability of convict labor would keep wages in the colony low. Clearly, the two systems of transportation and free immigration could not go hand in hand.

England itself remained undecided for some time. With its expanding economy and vast open spaces, Australia was increasingly seen as an attractive opportunity for capital infusion which might also satisfy the British middle class' desire for land as well as tempting dissident Chartists to leave England's shores. Aware that these prospective settlers would never migrate to a penal colony, the Molesworth Committee in 1838 recommended the abolition of transportation to the eastern colonies. The last assignment of convicts to NSW arrived in Sydney in November 1840.

By 1840, there were high hopes that the colonists might soon be allowed elected representatives to the Legislative Council. Finally in 1842, an Act was passed in Britain which gave NSW a new constitution with an expanded LC of 36 members—24 elected, 12 nominated, and a maximum of 6 drawn from the ranks of civil officials. Franchise and candidacy qualifications were high. The revamped LC had substantial powers as all legislation required its approval. Still, the governor held the right of veto as well as complete authority over the disposal of Crown land and revenue. Nor did the 1842 Act confer responsible government. Even in England, there was a lingering idea that government was subordinate to the sovereign and should be independent of parliament. Despite these limitations, the existence of a predominantly elective legislature had a significant impact on political life in the colony. Claiming a partial mandate, the LC as well positioned to challenge the governor and lobbied England for greater concessions in regard to land policy.

Changes in other parts of the white Empire prefigured the next two stages of constitutional development in Australia. The American War of Independence made English leaders more sensitive to the aspirations of what were called the "colonies of settlement." As a result, the British Parliament sometimes took action not because it particularly approved of certain developments but because it saw them as inevitable if the Empire was to survive and prosper. Thus in 1850, the Australian Colonies Government Act was passed into law. Political institutions in the colonies were reorganized bringing each, with the exception of WA, in line with NSW and its expanded legislature. Representative government was established in South Australia, while Van Diemen's Land and Port Phillip was separated from NSW and renamed Victoria. Everywhere franchise was widened to reflect the wider community and within two years control of Crown lands was conceded to the colonial legislatures.

Progress towards self-government in NSW and the other colonies could be viewed as a carefully orchestrated transformation. There was no seething resentment which in North America gave birth to a republican United States. Apparently the Imperial authorities had learned a lesson. The same can be said of the evolution of responsible government which was granted soon after in 1855 when the Acts to establish new

constitutions in Victoria and NSW received royal assent. According to Professor John Ward, one of Australia's foremost political historians, the Australian colonies never demanded responsible government; it was "imposed upon them" before they sought it. Ward persuasively writes,

> "There was no struggle to gain responsible government in the four colonies of eastern Australia. Demands for constitutional reform certainly existed there in the forties and fifties, but, especially in the fifties, they were for democratization of the constitutions so as to broaden the basis of political action, and for the transfer of power from London to Sydney or some other colonial capital.... When the new constitutions were drafted in the colonies there was only a tenuous, uncertain desire to see the colonial executives subordinated to the colonial legislatures, as responsible government would require. The powerful conservatives of New South Wales, Victoria and South Australia, who were trying to entrench themselves in privileged authority, while gaining complete control over colonial lands and revenues, had nothing to gain from responsible government. They wanted the heads of government departments to continue to be appointed imperial officials, working under governors, whom conservatives could influence.They did not want government departments controlled by Parliamentary ministers, who would be answerable to the legislature, to political parties and ultimately to the people."

Exceptional figures in Australian history include many dubious champions among their ranks. Prominent among them was William Charles Wentworth, the illegitimate son of Dr. D'Arcy Wentworth's liaison with a woman convict. A man of considerable talents, poet, explorer, and British- educated lawyer, Wentworth became a vigorous crusader for the emancipist cause. He inspired the foundation of the Australian Patriotic Association and established one of the colony's earliest newspapers, both of which served as mouthpieces in attacking the landed gentry and the denial of civil rights. The introduction of trial by jury is generally credited to his efforts.

Wentworth's role as defender of the poor and downtrodden soon proved a fleeting aberration in his long and famous political career. His real ambitions lay in seeking acceptance into the ranks of the elite exclusive class which had so scorned him. He eventually achieved this by becoming one of the wealthiest landowners in NSW. His personal fortune would have been much greater had he not been thwarted in his attempt in 1840 to acquire 20,000,000 acres of land in New Zealand.

As one historian has noted, Wentworth's own concept of freedom came to be "limited by his developing conviction that democracy had to be reined in by men whose intelligence and position gave them an obligation to rule" (Molony, 1987). This was made more than apparent when in 1852, England announced its willingness to accept draft constitutions from each of the colonies for the establishment of responsible government.

Wentworth, by now a self-admitted conservative, proposed a bicameral parliament with an upper house modeled after the British House of Lords. He envisaged titles and hereditary rights which one critic contemptuously denounced as "a Bunyip* aristocracy."

The colonists drafted their separate constitutions for responsible government according to the guidelines laid down by Britain. Though Wentworth's suggestion was easily defeated by popular pressure, he and his cohorts succeeded in gaining a nominated upper house, their insurance against unbridled democracy. As in NSW, all of the new responsible parliaments were bicameral. Victoria chose an elective upper chamber but restrictive membership qualifications ensured that it too would remain a bastion of the entrenched privileged, at least in the short-term.

While the colonial constitutions were being approved by the British Parliament and Queen Victoria in London, gold was discovered in the eastern colonies. These conservative constitutions were supposed to provide a new set of rules for fairly conservative societies yet by the time they were returned to Australia, the gold rush had changed the social fabric of the colonies forever. A rapid evolution of citizen rights followed over the next few decades, well in advance of political developments in Britain. Australia pioneered the use of the secret ballot which was adopted for the first time in the Victorian elections of 1856. In the same year, men suffrage was introduced in South Australia. Women gained electoral rights in the late 1890s, and before the turn of the century, the various parliaments had enacted impressive social legislation. Strong trade unions were formed and the right to strike along with the eight-hour work day were recognized by law.

FEDERATION

On the first day of the 20th century, the six colonial constitutions and their governments were overlaid by a new superstructure, the Commonwealth of Australia Act which created the basis for a federal system of government and law. Although the idea of federation was occasionally discussed by legislative committees and intercolonial conferences throughout the mid to late 1800s, there was never any real practical incentive for a united Australia. Political leaders were too preoccupied with encouraging development within their own independent and highly protected economic spheres. They were especially reluctant to concede any of their recently gained powers to a new national government. Added to this was the colonies' considerable isolation from each other which fostered political and commercial jealousies that formed obstacles to any sort of union.

Unlike the experience of other countries, Australia moved from colonial status to nationhood without revolution or civil unrest. Instead, federation was a somewhat

*A Bunyip is a large and rather ugly mythical Australian creature.

half-hearted affair, a politician's reform, and not the product of popular agitation. A standard text on Australian politics argues, "federalism was not easy to accomplish precisely because of the lack of compelling reasons. The federal deal was only just sufficiently attractive to the various parties for it succeed" (Emy & Hughes, 1988). The prime motive for federation was pure and simple economics. The depression years of the 1890s convinced many in the business sector that proper fiscal management needed intercolonial cooperation in areas such as overseas lending, banking and the removal of internal tariff controls which had inhibited the growth of a free market. Economic collapse was also accompanied by massive, prolonged strikes affecting key industries. These served as a stark warning to conservative interests that the tentacles of trade union power had reached beyond colonial borders and would require unified resistance by employers.

Several other reasons are usually advanced to explain Australian federalism. Firstly, the colonizing activities of France and Germany throughout the Pacific region in the late 1800s prompted a change in outlook of many leaders. The need for a single united defense force was recognized and, in an age of gunboat diplomacy, aspirations were stirred that Australia "ought to become Mistress of the Southern Seas" and to enjoy all the rewards that might accrue. Secondly, the idea of federation received some impetus from a growing national pride and sentiment reinforced by local artists, writers and cricket sporting heroes who showed that Great Britain could be beaten at its own game. Popular newspapers with intercolonial readerships also promoted a sense of shared history and national identity which tended to lessen parochial loyalties. Thirdly, the issue of federation was kept alive by influential organizations, including the Australian Natives Association which had disguised commercial interests. Finally, there was widespread concern in the colonies about protecting "White Australia" from the dangers of Asian immigration. Tight immigration control, it was thought, could best be maintained if one government supervised entry to the continent.

For those with greater reformist impulses who regarded federation as an opportunity to sever Imperial links and enhance an independent nation-state, the new constitutional framework was sadly disappointing. As social historian Richard White points out,

> The new Commonwealth was not sovereign: it had no power to declare war or peace; it could not make formal treaties with foreign powers and it had no diplomatic status abroad. The Head of State was the British monarch; the Governor-General, her representative, retained wide discretionary powers; Commonwealth law could be invalidated by legislation of the British Parliament; the highest court of appeal was the Privy Council in London; the national anthem was England's. Yet in 1901, few Australians felt such restrictions to be onerous...Most would have seen them as reflecting the vulnerability of the new Commonwealth and its necessary dependence for its security on the British Navy. But most would have also seen it more positively, as reflecting a natural, wider loyalty to the empire. Race and blood ran deeper than nationality (quoted in Walter, 1989).

The federal constitution was written, debated and rewritten in a series of conventions held during the 1890s. These meetings were attended by bourgeois politicians, graziers, lawyers and other "men of property" whose overriding concern was to safeguard their substantial vested interests. Not surprisingly, the draft compact primarily embodied their ideas for an improved and efficient machinery of government rather than any nobler philosophical vision of nationhood.

The resulting federal structure is usually described as a marriage of elements from the British and American systems, and is often referred to as a "Washminster mutation." From the British model, the so-called "founding fathers" incorporated the already familiar principles of responsible Westminster Cabinet government together with the practices and conventions of the British parliament. These included a government drawn from and accountable to parliament, a political party system which gave shape to electoral contests, and a continuing role for the monarch through her appointed representative, the Governor-General. The American contributions involved a mechanism for judicial review, an upper house (Senate) which guaranteed equal representation for each state, and lastly, a written constitution which specified powers of the central government, leaving the residue to the states.

The underlying incompatibilities of this peculiar mix were recognized but ignored by the founding fathers who assumed gentlemanly that fair play would always prevail. One potential source of conflict was evident in the powers bestowed on the Senate. A compromise arrangement that could easily lead to a deadlock of the two houses and was thus in obvious breach of the Westminster notion of a sovereign lower chamber. The constitution's many inadequacies, including the absence of a bill of rights, made it a less than ideal foundation for modern democratic government. If anything, it reflected a highly pragmatic business merger on the part of colonial politicians who succeeded in relinquishing minimal powers to create a viable central authority while retaining sufficient autonomy for their new states.

Before the draft constitution could be sent to England for royal assent, it required endorsement by a majority of the voting population in each colony. Few Australians were overly excited by the affair and the document failed to achieve the requisite numbers in the first round of referenda conducted in 1898. The following year, only 60 percent of eligible voters participated yet it was sufficient to seal the charter's approval. The trade union movement, whose members had been excluded from the earlier conventions, was understandably opposed to the terms of the constitution. They viewed it as a reactionary and self-serving effort on the part of royalist conservatives devised to resist the onward march of Australian democracy. Such fears were not to be realized in the short-term and the fledgling Labor Party won substantial gains from the new electoral divisions.

CONTRADICTIONS

The theory of Westminster responsible government establishes parliament as the focus of democracy. It is where the nation's interests are served and guarded through

open debate and decision-making by duly elected representatives. Parliament is where the buck stops, so to speak, as it keeps government honest and protects the rights of the people. In the contemporary British model, parliamentary sovereignty is assured. It does not share power with other tier of government, there is no area of law-making upon which it cannot act, and no court exists that can invalidate its legislation. Parliament itself is the custodian of the constitution and a simple Act of Parliament is all that is required to change its provisions. Most importantly, no other chamber exists that can undermine the House of Commons' position as the house of government. It is the only elected house and it alone is where representation and responsibility rests. The House of Lords surrendered its right of veto as early as 1911 and since then has held only very limited powers of review.

The Australian situation is far removed from the theory and even practice outlined above. When the founding fathers grafted federalism onto the British model, the end product drastically altered fundamental principles of Westminster responsible government. Under federalism, the Australian parliament is not sovereign. The House of Representatives is not the house of government and the essential chain of accountability is fractured by national and state governments that have separate and overlapping fields of responsibility. The three components of federalism which have been the source of continuing conflict are the written constitution, the High Court, and the Senate.

HIGH COURT

The High Court was created in 1903 to arbitrate on the constitution from which it derives legitimacy. The court is the final judge of the constitution and has the authority to overrule any law passed by either the national or state parliaments that it regards as constitutionally invalid. The court was specifically established with this power as a safeguard mechanism within the federal framework to ensure that no tier of government encroached on the delineated field of activity of another. The court's authority, however, places it above parliament and thus denies the essential sovereignty of parliament. It is a necessary feature of federalism which has resulted in a structure of government in Australia which is clearly at odds with the Westminster form as practiced in Britain.

As umpire of constitutional disputes, the High Court has also played a primary role in reshaping the original federal bargain. Successive governments trying to circumvent the limitations imposed on them by the constitution have frequently found themselves involved in protracted and complex litigation. This highlights one of the worst aspects of governance directly attributable to the federal compact in Australia, that is, excessive delay. At such times, federalism has come to resemble a system of confrontation rather than cooperation, and the court is reduced from legal expert to political player — an unavoidable outcome if one believes the dictum that constitutional law is "logic plus politics."

Court interpretations over the decades since federation have supported a greater centralization of powers, allowing the commonwealth to maneuver its way into policy fields which conflict with and undercut state responsibilities. The court's most crucial decision affecting intergovernmental relations concerned the assumption of income tax collection by the federal government. This had been surrendered temporarily by the states as an emergency measure during the Second World War, yet when the smoke and dust of battle cleared away, the federal government had no intention of returning the same courtesy. This move was subsequently twice challenged and upheld by the High Court. There is nothing in the constitution which gives the federal government exclusive power to impose income tax, and the states could do likewise if they so chose but it would be a foolhardy endeavor almost certainly leading to electoral defeat.

Most revenue in Australia is raised by way of income tax, customs duties, and excise. Under the constitution, only the federal government has the power to impose the latter — a concession on the part of the former colonies to enable financing for a national defense force. With its monopoly powers over income tax affirmed, the federal government was in effective control of the nation's purse strings. At the same time, it removed virtually all responsibility from the states for the standards of services provided within them. Hence, it became an electoral necessity for the federal government to maintain adequate public services in each state which also afforded an opportunity to influence more and more areas of state activity. Using its constitutional power to grant money tied to "specific purposes", the federal government intruded into such fields as health, tertiary education, roads, and urban development, all of which are constitutionally sole responsibilities of the states. Once again, the High Court has upheld this broad use of the federal government's powers. Tax powers have undoubtedly lost some of their attraction over the intervening years and under the guise of reforming the commonwealth-state nexus, successive federal governments have sought to devolve responsibility for revenue collection. The former Menzies and Fraser Liberal governments as well as the current Labor administration, all promised a "New Federalism" involving adjustments in financial assistance to the states. An assortment of schemes always fell short of state needs, thus exposing the hollow rhetoric of much federal diplomacy.

Critics of federalism stress its tendency to divide and blur lines of accountability. This is particularly so in the Australian context and it poses a very grave limitation on ministerial responsibility, a core component of Westminster parliamentary government. In most instances of shared portfolios, the situation becomes hopelessly confused to the point where no minister in any of the several governments across the country can be held answerable for certain actions. For example, agreements concluded by ministerial councils can never be scrutinized effectively by any of the other parliaments since the majority of participants are accountable only to their respective legislatures. The aboriginal people of Aurukun and Mornington Island in Queensland have been made into a political football between federal and state ministers for aboriginal affairs, each able to deny responsibility when it suits them. Should members of the public complain about poor conditions in a local school, a state minister quickly blames it on inadequate commonwealth funding, while the federal minister is able to retort that the state has not ordered its priorities correctly.

The most controversial area in this regard (and likely to remain so for some time) is the environment. The relevant commonwealth minister is Ms. Ros Kelly, one of the few women to hold a position of power in Canberra and the first ever to be a member of the Cabinet. She was recently accused of describing the Prime Minister's version of New Federalism as "crass politics." The subsequent furor has been especially rancorous, bringing more heat than light to bear on the issues. In the midst of bickering, *The Sydney Morning Herald* (September 11, 1991) editorialized,

> The comments by Mrs Kelly that are at the center of the controversy concern how the Federal Government's attempt to renegotiate its relations with the States will impact on her powers to achieve satisfactory environmental legislation.

For the various governments involved in the dispute, of course the reverse is equally significant—how the new environmental laws will affect their dealings with each other.

Conservation, then, is at the cutting edge of matters which ordinarily would interest only scholars and constitutional lawyers. Ostensibly dry and remote issues are revealed to have important ramifications. One political observer has put the situation very succinctly:

> Laws governing land use are State laws and only when (endangered species) conveniently congregate in sites where there are potential export industries will the Commonwealth do much to protect them. (*The Australian*, September 11, 1991)

Such comments emphasize two further points. First, the commonwealth can lay claim to and is often presented as the more enlightened and progressive partner in constitutional challenges. Whether deserved or not, the states (collectively or individually) are generally seen as venal, self-serving and antediluvian. The Queensland government was certainly the source of international outrage under a former administration as it sought to permit logging in virgin rainforests, sandmining of many splendid beaches and oil exploration on the Great Barrier Reef. Canberra used High Court-endorsed constitutional provisions to thwart the worst of these proposals. During Hawke's tenure, a previous Tasmanian state government also moved to build a dam that would have flooded vast tracts of wilderness. This too was stopped by High Court ruling.

Informal changes to the constitution through High Court rulings have made a nonsense of the Westminster notion of responsibility. So too, its role in the "steady aggrandizement" of commonwealth powers has transformed the way in which the federal compact actually works. One consequence is that the financial side of Australian federalism is particularly flawed as spending obligations of the states are simply not matched by their taxation powers. Over time, nevertheless, the exercise of federal dominance has gradually been qualified by political considerations so that the extent to which federal governments capitalize on favorable court decisions is now based on

calculated electoral advantages. What began as a co-ordinate federalist form which emphasized the separateness and legally independent status of each tier of government has evolved into a political federation whereby the greatest constraints on the exercise of commonwealth power are now political far more than legal (Emy & Hughes, 1988). Whoever wins the day in a confrontation over health, education or the like will do so mainly through public-approved sheer force of will.

THE CONSTITUTION

Federalism required a written constitution to divide formal authority between the national and state governments. As the constitution limits the area of competence of the national government and because its contents cannot be amended by parliament, it is in obvious conflict with the Westminster prescription of a sovereign parliament. Any change to the constitution requires approval by referendum of a majority of voters in a majority of states. It is a complicated and rarely successful process given the nature of party politics, which is why most federal governments have tried to expand their powers through informal means such as High Court interpretation. Only eight alterations have been made by referendum over the years since 1901, including three in 1977.

The constitution is the country's supreme law, the definitive statement on the make-up of the Australian political system. One could thus reasonably expect to refer to it for a fairly precise albeit legalistic description of government. But this is not the case in Australia. Chapter II of the Constitution states that:

> The executive power of the Commonwealth is vested in the Queen and exercisable by the Governor-General as the Queen's representative....There shall be a Federal Executive Council to advise the Governor-General....The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish. Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council and shall be the Queen's Ministers of State for the Commonwealth.

Under the constitution, formal executive authority is exercised by a Governor-General who is appointed by the Queen and who in turn nominates an Executive Council from the parliament which the people elect. These ministers advise the Governor-General, oversee the operation of departments and hold office at his pleasure.

The practice of Westminster convention, however, makes the constitution an extremely inaccurate description of how political processes actually work. The Queen may appoint the Governor-General but he is selected and recommended to her by the Australian government. Similarly, executive authority resides with the Cabinet composed of ministers produced from the party or coalition which holds a majority of seats in the lower house, the House of Representatives. These ministers are chosen by the prime minister who in practice, is the sole adviser of the Governor-General.

The limitations of the constitution are even more apparent in regard to the prime minister and cabinet. Constitutionally they do not exist. The constitution does not set out how a responsible government should function and does not even recognize the key component in the entire process, that is, that the practices of responsible government are carried out through convention rather than by formal rules. As Australia's supreme law, the constitution is a defective, not a definitive statement on the structure of politics.

Conventions evolved over a period of more than a century in the developing British system of responsible government and were naturally adopted by many of the Empire's overseas colonial possessions. They are the informal rules, and mutual understandings between actors which guide the operations of the entire political system. In Britain where there is no written constitution, conventions are given legal force through established precedent. In Australia, prior to the 1975 crisis, none of these conventions was legally binding because they had been omitted from the written constitution. The smooth functioning of parliament was based on their acceptance as gentlemen's agreements. The system thus had the potential to breakdown if certain conventions ever came into conflict, and such conflict was made possible at the national level when parts of the Westminster model and federal form were grafted onto each other.

The technical aspects of the various conventions are generally applied in the Australian setting. Cabinet government which acts as a linkage between the executive and legislature is the most important. It is also the distinguishing characteristic between the Westminster and presidential systems. The existence of cabinet rests on another key convention, ministerial responsibility — a notion which should technically ensure accountable democratic governance by establishing a chain of responsibility running from cabinet to parliament to the people.

The technical rules of cabinet government require that ministers must hold a seat in parliament. Each is entrusted with specific executive duties assigned to him by the chief minister and all are individually and collectively responsible to parliament. Unlike other ministers, the chief minister must have a seat in the lower house and retains his position so long as he can maintain a majority of support in the popular house. His appointment is subject to conventional ratification by the monarch or the monarch's representative. The main onus of responsibility is on the chief minister who should resign or recommend a dissolution and general election if he loses majority support.

These conventional technicalities are observed in every parliament throughout Australia and since 1977 some aspects do have constitutional basis. Yet they make little sense outside of the context of disciplined party politics. Party politics as it presently operates in Australia subjugates parliament and government to the party undermining the key concept of ministerial responsibility. According to two academics, contemporary party politics as practiced in Australia "severely qualifies much of the Westminster myth if not the reality of the British prototype." They argue that the

> Cabinet is not responsible to parliament. It responds to the caucus, to the party and, in periodic elections, to the people. In the sense of holding government responsible for its actions, parliament in Australia is impotent. It is the party, not parliament, which decides on the role, actions and policies of the government. In the same manner, individual ministers are responsible not to parliament but to the party in parliament, and it is up to the party - caucus, Cabinet or leader - to pass judgment and apply sanctions. In Australia, the roles and functions of government and party have become one, with a consequent decline if not disappearance of responsibility in government (Brugger & Jaensch, 1985).

Disciplined political parties have usurped the powers of government resulting in a form of "elective dictatorship." Chief ministers and cabinet decide the legislative program of the national and state parliaments and dictate almost every other aspect of their workings. They have vast powers including the right to select governors, chief justices and all other judges, police officials and the heads of all government agencies and financial bodies. In constitutional and practical day-to-day terms, an American president who must negotiate with Congress is far less powerful than an Australian prime minister.

In their defense, parties argue that responsibility has not been eroded but merely transferred to the electorate (Brugger & Jaensch, 1985). A tenuous assertion considering all components of representation—recruitment, candidature selection, competition for office —are similarly dominated by the parties. The people may vote in parliamentary elections but they have no voice in determining through the ballot box who shall head their governments or occupy vital executive positions. They must accept whoever is chosen by the ruling political parties. Effective democratic representation suffers. By no stretch of the imagination does the preponderance of white anglo-saxon parliamentary members even come close to reflecting the multicultural and gender make-up of the larger population. Indeed, even the machinery by which parliaments are elected—voting methods and electoral boundaries—have been stacked in the interests of major parties to maximize their advantages over independents and smaller parties. The situation is further aggravated by strong party identification which guarantees a large proportion of safe seats. Victory usually relies on capturing the swinging vote so parties package policies to suit the minority above the often marginalized majority.

The enormous powers collectively wielded by the prime minister and cabinet may seem to contradict the argument about loss of parliamentary sovereignty. The point is that in practice, so many factors qualify theory thereby reducing Westminster government to the status of myth. Once disciplined political parties emerged within an already flawed constitutional framework that gave no legal force to key conventions, it was only a matter of time before crisis ensued.

SENATE

The Senate derives its theoretical legitimacy from two mutually incompatible concepts, the federal need for a states' house and the Westminster requirement of a house of review. Patterned after the American model, the Senate was given equal powers with the House of Representatives to the extent that it could veto any legislation coming from the lower house. This placed the Senate in a position where it could check the people's house, thus undermining the Westminster notion that the people's house should be the house of government and house of final responsibility. The obvious incoherence was recognized at the time by the founding fathers. A government could only govern so long as it maintained a majority in the lower house but it could not govern effectively unless it also controlled the Senate. In fact the powers assigned to the Senate were much broader than those needed to ensure the federal principle. The only power it was not granted was the right to initiate and make amendments to appropriation/money bills which provided the executive with financial supply. Here too, it was always assumed that the Senate would observe convention and give free passage to these important bills. The Senate was constructed in such a fashion for the simple reason that the smaller colonies would not agree to federate unless they had sufficient protection against ever becoming subordinated to a central government.

In order to overcome potential deadlocks between the two chambers, the founding fathers included a "mechanical contrivance" in Section 57 of the constitution. This allowed the Governor-General to dissolve simultaneously both houses of parliament in the event that the Senate twice "rejects or fails to pass" bills by the House of Representatives. Because of the inclusion of this clause, it could be argued that the Senate was even more powerful than the lower house. Whereas constitutionally the Governor-General could dissolve the lower house as he saw fit, the Senate could only be dissolved together with the lower house. A hostile Senate was thus in a position to force a dissolution of the lower chamber.

In 1897 colonial delegate and future prime minister Alfred Deakin predicted that:

> The contentions in the senate or out of it, and especially any contention between the two houses, will not and cannot arise from questions in regard to which states will be ranked against states...Contests between the two houses will only arise when one party is in a possession of a majority in the one chamber and the other of a majority in the other chamber....The men returned as radicals would vote as radicals; the men returned as conservatives would vote as conservatives. The contest will not be, never has been and cannot be between states and states...It is certain that once this constitution is framed it will be followed by the creation of two great national parties (quoted in Brugger & Jaensch, 1985).

No sooner had federation occurred when political parties largely eroded the original rationale for the creation of the Senate. What happened in the upper house was not decided by states' interests but by party numbers. If a party held a majority in both houses then the Senate functioned as little more than an echo. If the government faced

a hostile Senate then confrontation and obstructionism resulted, tempered only by respect for parliamentary conventions. If the numerical balance of power in the Senate was held by independent members or those from a smaller party then the way was open for some measure of negotiation. The review function of the house similarly suffered at the hands of partisan activity.

CRISIS UNFOLDS

The drafters of the constitution had faced the difficult task of elaborating on paper the many complex features which comprise Westminster responsible government. The problem was overcome by ignoring it. The drafters simply followed the familiar colonial model of investing executive authority with the monarch's representative, assuming conventional practices would be accepted as a matter of tradition and good faith. This had generally proved satisfactory in the colonies but in the new federal context where mutually incompatible structures were at the mercy of cohesive political parties, mere good faith was no guarantee.

In December 1972, the conservative coalition opposition composed of the Liberal and smaller Country Party lost office after 23 years in power. Even worse was that their defeat had installed the left-wing Labor government headed by the erudite Edward Gough Whitlam. Conservative parties who dominated the Senate and thus controlled passage of legislation decided on a course of action to remove what they regarded as a socialist menace. There is no disagreement that theirs was a carefully calculated plan of obstructionism aimed at forcing Whitlam to an early election through a double dissolution. During Whitlam's two short terms lasting from 1972 to 1975, the Senate defeated more legislation than in any of the previous 71 years of federation. In 1975 alone there were 21 twice-rejected bills.

When a Supply bill reached the Senate in April 1974, the plan was put into action. The Senate took the bill into its custody by a formal first reading and then placed it on the shelf to collect dust. With few options open to him, Whitlam secured a double dissolution. Although his government was returned to office after the subsequent election, it failed to win control over the Senate where the balance of power was split between the Liberal coalition and the ruling Labor parties. With the status quo unchanged, the opposition put precisely the same plan into operation again. This time they were helped by the occurrence of two casual vacancies in the Senate. Convention dictates that any such vacancies should be filled by a member of the same party but in this case partisan advantage took precedence. The Liberal premiers of NSW and Queensland appointed anti-Labor senators to the positions giving the opposition a clear majority in the upper house.

In October 1975, another Supply bill reached the Senate and was promptly shelved. Little more than 12 months into his term, Whitlam refused to seek a second dissolution. A deadlock ensued and over the next four weeks a constitutional and financial crisis

erupted. The government was quickly running out of money as convention after convention was flaunted. The Governor-General who should only listen to the advice of his chief minister broke convention by conferring with both the leader of the opposition as well as the High Court's Chief Justice Sir Garfield Barwick, a former member of the Liberal party and a Liberal appointee. Barwick, as he later explained to the media, merely informed the Governor-General about his "constitutional duties." The government had barely two weeks of supply remaining when on November 11th Sir John Kerr dismissed Whitlam as prime minister, announced a dissolution of Parliament, and then took the unusual step of inviting Malcolm Fraser, the leader of the opposition to form a caretaker government until new elections could be held. Prior to the effectivity of the dissolution, the lower house passed a vote of no-confidence in Fraser which conventionally obliged Kerr to dismiss Fraser in turn. Kerr simply ignored the maneuver.

There is no doubt that the power and action of the Senate contradicted normal Westminster arrangement and procedure. By blocking the Supply bill, it exercised legal right over constitutional principle, thereby breaking a convention faithfully observed by the House of Lords since the 17th century. As debate unfolded, each chamber made counter claims in regard to correct constitutional behavior, the Senate justifying its stand by appeals to its peculiar traditional dual roles as a states' house and guardian of national interests. That it had never functioned as such was of little consequence. The entire affair may have been resolved quite differently had the Governor-General did not intervene.

THE GOVERNOR-GENERAL

Political power in Australia derives from the Crown and proceeds from the Queen's representative, the Governor-General. He is not in office to reflect the people's will for he is not elected. The system of responsible government could be too easily undermined by a head of state who had an electoral basis of power which could be used to defy ministerial or parliamentary authority. By the time of federation the British system had developed to the point where the monarch was essentially a ceremonial figurehead considerably distanced from political intrigue. The founding fathers expected the same of all future Australian Governor-Generals. John Downer, a member of the federal convention in 1891 noted that:

> We are not prepared to interfere with the cardinal principle of our constitution and that is that the nominal head of government should be only the nominal head of the executive and not become a real substantial legislative force in the community (Crisp, 1965).

This statement emphasizes that the Governor-General was always intended to have a significant but limited role.

The first Governor-General did play an important but specific role in the early governments as defenders of the Imperial connection. Australia had no independent foreign policy at the time of federation. In all such matters decisions were made in London and conveyed from the Secretary of State for the Colonies via the Governor-General to the Prime Minister in Australia. The Governor-General remained part of the laborious chain of communications until the adoption of the Statute of Westminster after the outbreak of the Second World War which transferred foreign policy powers to the national government. The Governor-General also acted as a guardian of the constitution with a large amount of "personal discretion" during the early years prior to the emergence of a stable two party system. By 1920 the political stability of parliament had greatly reduced this discretionary role.

The role of the Governor-General as Imperial Proconsul would obviously be weakened by the appointment of an Australian to the post. This happened for the first time in 1931 when the Labor Prime Minister James Scullin insisted even against the wishes of King George V himself, that Australian-born Isaac Isaacs should be appointed. Scullin fought tooth and nail to get Isaacs installed and the whole idea of an Australian Governor-General caused a fierce controversy. The fact that Isaacs was Jewish did not help. The real importance behind this change was that it emphasized the strength of the elected government at the expense of the monarch in the Australian system, hence altering the theory that the appointment of the Governor- General was an act of the King. The advice upon which the King should act was now that of the political party in power at the time.

More than a decade before Kerr summarily dismissed Whitlam, one prominent academic confidently concluded:

> The history of the Governor-Generalship of Australia...has been the history of sure and steady erosion of the small initial deposit of personal initiative and discretion vested in the holders of the office. In becoming, politically, ever more innocuous and unobtrusive —and provided it does not seekto become socially too pretentious— it constitutes an ever more satisfactory formal keystone to the constitutional arch (Crisp, 1965).

Nobody could support the idea of sure and steady erosion of initiative and discretion after November 1975.

The action of Sir John Kerr in 1975 was utterly without precedent in the Australian context. No Governor-General had ever dismissed a federal leader. Some critics have drawn a parallel with the dismissal of the Lang Labor government in NSW during the early 1930s but the Governor Sir Phillip Game, sacked Jack Lang for alleged unconstitutional behavior. No wrongdoing of any sort was involved in the Whitlam incident. A popularly elected government with a healthy majority in the lower house could not get its money bills through the Senate and so the Governor-General intervened by getting rid of the government. Kerr gave Whitlam no prior warning nor did he offer Whitlam the opportunity to request another dissolution of parliament which would have allowed him to remain in office.

The Age, a Melbourne newspaper, described Kerr's decision as "a triumph of narrow legalism over common sense and popular feeling." It added that:

> By bringing down the Government because the Senate refused it Supply, Sir John Kerr acted at least against the spirit of the Australian Constitution. Since 1901, it has been a firmly held convention that the Senate should not reject budgets...Sir John Kerr has created an awesome precedent - that a hostile Senate can bring down a government whenever it denies Supply. (Kerr) breathed life into a constitutional relic - the right of kings and queens to unilaterally appoint governments (Blum, 1986).

The Governor-General evidently had the constitutional authority to take the course of action he did. But in doing so, he defied several important parliamentary conventions. A very strong case can be put forward that he should not have removed a duly elected government at any cost, remembering that the government had not acted improperly, illegally or unconstitutionally. Kerr defended his use of the Crown's reserve powers as a means to an end, the end being an election. That he flaunted the important conventions of responsible government was of little matter. As one writer has explained, "Kerr placed his reliance completely on an election, if in the process constitutional sins might be committed, an election would wash them away" (Browning, 1985). As matters turned out, Whitlam lost the new election.

Some years later, the affair was engulfed in further controversy when American Christopher Boyce, arrested for treason, alleged that the CIA had manipulated Whitlam's downfall. Boyce was a former employee of TRW Systems Inc., a cryptographic communications center in Los Angeles which processed telexed messages between CIA headquarters in Langley and the Agency's satellite surveillance system in Australia. During his trial, Boyce claimed that he decoded several secret communications which had referred to Kerr as "our man."

There is some basis to Boyce's allegations though Whitlam himself has always avoided accusing the CIA of complicity. Australia has long been a host country of highly-sophisticated US intelligence and satellite tracking facilities. While their strategic value has declined over recent years, in 1972 they still comprised an extremely vital component in America's early warning system and global defense network. When Whitlam assumed office, many of his immediate actions aroused suspicion among the ranks of intelligence officialdom. Australian troops were withdrawn from Vietnam and diplomatic relations established soon afterwards. Australia's overseas intelligence organization (known as ASIS) was ordered to pull its operatives out of Chile. He closed down a communication signals station in Singapore run jointly by ASIS and the CIA. He refused security checks on his staff and permitted the Attorney General to conduct a raid on files held at the domestic intelligence bureau known as ASIO. Whitlam opposed US plans to upgrade its military base on the small Indian Ocean island of Diego Garcia and his government reversed a policy which had denied naturalization to leftist refugees from Chile and Greece.

It is not possible to determine whether the CIA actually engineered a covert propaganda scheme aimed at destabilizing the government after the first forced election in May 1974. Nevertheless, by the end of that year a media war was in full swing. According to Joan Coxsedge, a Labor member of the Victorian legislature,

> almost every move by the Whitlam Government or by individual Labor parliamentarians, whether it was a departmental decision, a staff appointment, an international cable, a telex, a phone call, or a confidential letter, quickly became the property of the news media. There was an unparalleled campaign of personal vituperation, hinting at incompetence, dissension, corruption and personal scandal within the ranks of the government (Blum, 1986).

Trouble escalated in November 1975 when the local press reported that the US facilities were in fact CIA creations and that the first station chief had been channeling funds to the leader of the opposition minority party. Already the source of serious concern to the intelligence community, Whitlam gave notice of an inquiry into the real purpose and nature of the US establishments and also demanded a list of all CIA operatives based in Australia. His announcement sounded alarm bells in the corridors of the defense department and secret service agencies. Between November 6th and 9th, the Governor- General held a series of meetings with senior defense officials. During these exchanges, he was undoubtedly informed that the CIA had threatened to break off intelligence relations with Australia. Two days later, Kerr, without warning or ultimatum, sent the Whitlam government packing.

Ironically, Kerr had been appointed by the Queen on Whitlam's recommendation against the advice of others in his party. It proved the worst error of judgment in his entire political career. Of course, Whitlam was not to know that Kerr would breach convention in such a manner, yet warning signs were there. Since the 1950s Kerr had been closely connected with a number of CIA fronts. He was an executive member of the Australian Association for Cultural Freedom and a past president of Law Asia, both of which were local chapters of prominent CIA-inspired foundations. At the very least, Kerr's decision was a calculated political move, not a constitutional duty.

CONCLUSION

Australians generally believed before 1975 that they lived in a democracy and the majority probably still do. But the Australian government then and now is a constitutional monarchy. No constitutional change has occurred since 1975 to prevent the Governor-General from sacking a future leader although the chances of such have been reduced by the Australia Act of 1986, a parliamentary reform which specifically requires governor-generals as well as state governors to act exclusively on the advice of their chief ministers. Prior to this measure, in 1977, the Fraser Liberal Party somewhat ironically pushed through a referendum giving legal force to the convention that senate vacancies be filled by a member of the same political party. Still this is no guarantee that opposition parties in the Senate will. observe other conventions and refrain from forming alliances which are intent on blocking supply bills of the lower house.

In explaining the 1975 crisis, many commentators (including the now deceased Sir John Kerr himself) treat with politics in a vacuum. Few chose to address the real issue of who controls Australia and what political realities were hidden within the constitutional furor. The 1975 crisis, of course, was not an event isolated in time. Its origins can be traced to the great clashes of the 1890s between "labor" and "capital." Federation later shaped class tensions into national confrontation by producing the highly disciplined parties which have opposed each other throughout Australia's history. Liberal parties happily dominated the country's political life, ruling for more than 60 of the 75 years since federation. Labor had been the classic underdog but that all changed when Whitlam won office. Powerful conservative forces and business interests reacted with a plan never before used, to remove a democratically elected government before its three-year term expired. It was another chapter in labor's struggle against capital. No conservative government would ever find itself in the Whitlam predicament, after all, Australia's upper chambers have always been designed to work against radical change. The current Labor government, often criticized as a pack of conservatives with a human face, learned well from the Whitlam experience.

As the Australian federation approaches its centenary year (2001), proposals are being advanced for an overhaul of the federal compact itself. The constitution has been judged to be an inadequate document for a middle power with First World aspirations as it faces the challenges of the 21st century. The debate regarding the necessity or otherwise of change will become much more heated over the next few years. Republicanism is posited as one solution, allowing for a system of limited executive authority with a clear separation of the three arms of government. The American model, in which the powers of an executive president are checked by those of Congress could also form the basis for new constitutional arrangements if parties are reconstituted in a way to reflect the true interests of their constituents. At this stage, there is little argument that Australia's current system of parliamentary responsible government has grave deficiencies. Whatever changes may result, they must ensure that the Australian people become the real source of political power.

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