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Federalism: A union made in heaven?

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FEDERALISM: A UNION MADE IN HEAVEN?

THE PARTIES ARE CREATED AS INDIVIDUALS

During the 1800s the original colony of New South Wales was divided up into five separate colonies:- Tasmania (1825) (called Van Diemen's Land until 1856) South Australia (1836), Victoria (1850), Queensland (1859), leaving New South Wales as we know it. In 1829 the independent colony of Western Australia was created.

The Australian Colonies Act 1850 gave the elective legislative councils which it established, the power to set up local legislatures and to regulate their membership. It also provided these legislatures with the general power to make laws for the 'peace, welfare and good government' of the respective colonies.

THOUGHTS OF "TOGETHERNESS"

Even while the six colonies were asserting their separate independence from Britain and from each other, some voices suggested that geography, common origins and culture, foreign and defence affairs, economic advantage and practical convenience created a need for some form of concerted action between the colonies, even a formal union.

RESEARCH EXERCISE

What were the main factors which caused each of the colonies to develop and act so independently of each other?

Consider in particular the different economic systems and the fiscal policies which resulted.

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COURTING FEDERALISM

The Sydney Convention of 1891 (the First National Australian Convention) brought together representatives from each colony to consider the possibility of a Federal constitution.

The Draft Bill to constitute the Commonwealth of Australia resulted from these discussions. Following this convention, there were several further conventions in which issues were discussed. The Bill was finally agreed to.

DISCUSSION QUESTION

Outline what you think would have been some of the issues, questions and concerns dealt with during the conventions.

UNION AT LAST

After the Constitution Bill was passed as a British Act of Parliament in 1900 the Australian Constitution came into effect on January 1, 1901.

As a result Australia became a federation, that is, every Australian must obey two sets of laws, can use two kinds of courts, elects two different governments and knows two separate Constitutions. These two sets of laws, courts, government and Constitutions are Commonwealth and State.

DIVIDING UP THE HOUSE-KEEPING JOBS

Commonwealth or federal powers are set out in the Commonwealth Constitution. This gives the Commonwealth Parliament, the power to make laws on specific subjects. These can be found in s.51 of the Constitution.

The States have the power to make laws dealing with matters not usually regulated by the Commonwealth: the kind of

'localised' matters you would expect the different states to deal with.

CLASS EXERCISE

Look at s.51 of the Commonwealth Constitution to see what 'specific' powers the Federal Government has.

Outline what you think would be areas of law-making that individual States are responsible for.

EQUALITY IN THE HOUSE?

Based on the colonies' demand for sovereignty over their own affairs, the Constitution was drafted to ensure the maintenance of their political strength.

In an ideal federation the two parties- the central government and the State governments-would be in equal strength, each in its own sphere. The Commonwealth would not lord it over the States. Neither would the States lord it over the Commonwealth.

But in fact, there is a federal imbalance in the Australian Federation. There is centralism rather than federalism. The Commonwealth, the central government, has become the stronger party in the Australian Federation. This can be seen in the decisions of a number of High Court cases, also in the elasticised application of s.109 of the Constitution by the High Court and by the fact that under ss 51 and 96 of the Constitution the Commonwealth holds the purse strings. Furthermore, under s51 the 'external affairs' power, State strength has been further eroded.

A SPAT OVER WHO'S IN CHARGE OF LABOUR RELATIONS

In the Engineers case, (*Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd.*(1920) 28 CLR 129) the question raised was whether the Commonwealth could regulate labour relations in state government undertakings.

The High Court held that s.51(xxxv) of the Constitution is in terms so general that it extends to all industrial disputes in fact extending beyond the limits of any one State.

During the case the Court emphasised that Commonwealth powers must first be interpreted 'completely' before State powers are ascertained.

This High Court decision gave priority to the Commonwealth specific powers over State general residual powers. It held that Commonwealth powers should be read widely and this created problems for the notion of joint Commonwealth and State sovereignty.

A SPAT OVER MONEY

In spite of the concurrent taxation powers allowed for by the Constitution, in the First Uniform Tax Case (State of South Australia v The Commonwealth (1942) 65 CLR 373) the High Court held that it was valid for the Commonwealth to introduce legislation forbidding the taxpayer to pay State income tax until he or she had first paid Commonwealth income tax.

A further Act, the States Grants (Income Tax Reimbursement) Act 1942 (Cth), provided that States would only be reimbursed by way of State grants if they had not used their income tax powers in the previous year.

Together these pieces of legislation effectively created one uniform tax scheme. The States were theoretically entitled to impose their own income taxes but the conditions of these Acts meant in reality that it was practically impossible for them to do so.

WHO HOLDS THE 'PURSE STRINGS'?

Through s.96 of the Constitution the Commonwealth can exercise economic or financial control over the States. Under s.96 the Commonwealth can give money to the States, and it can lay down pretty well any condition it wants to.

This enables the Commonwealth to determine what the states should spend their money on.

A SPAT OVER HOW TO TREAT PEOPLE

In more recent years the 'external affairs' power in s.51(xxix) of the Constitution has been used by the Commonwealth to encroach upon areas that would traditionally have come under State jurisdiction.

In the case of *Koowarta v Bjelke-Petersen* (1982) 39 ALR 417 *Koowarta* and other Aurukun Aborigines asked the Aboriginal Land Fund Commission to buy a Crown leasehold pastoral property in Queensland for their use which the leasees were willing to sell

However, the Queensland Minister for Lands refused to allow this purchase. He said that it was contrary to government policy to allow large areas of additional land for development by Aborigines or Aboriginal groups in isolation.

Koowarta sought in the Queensland Supreme Court a declaration against the Queensland Premier (Bjelke-Petersen), the Minister for Lands and others.

Koowarta claimed that the Government's actions contravened the Racial Discrimination Act 1975 (Cth) (the Act) ss. 9 and 12.

s. 9 of this Act provided that it is unlawful for a person to do any act involving a distinction based on race which has the purpose or the effect of impairing the recognition on an equal footing of any human right.

s. 12 provided that it was unlawful for a person to refuse to permit a second person to occupy any land by reason of race of that second person.

The Queensland Government took an action in the High Court seeking a declaration against the Commonwealth that the Act was invalid.

The question which the High Court addressed was whether the external affairs powers in s. 51(xxix) of the Constitution could be used to extend to the protection of human rights in matters of internal affairs or domestic matters that are usually within the jurisdiction of the States.

The Court held that the Racial Discrimination Act was valid under the external affairs power even though it dealt with internal affairs.

During this case it was acknowledged by the Court that matters



which are of purely domestic concern are steadily contracting and those of international concern are ever expanding.

A SPAT OVER THAT 'DAM' SPOT

The Tasmanian Dams case (The Commonwealth v Tasmania (1983) 158 CLR 1), held not long after Koowarta, is another example of matters of domestic concern contracting and matters of international concern expanding.

In this case, the State of Tasmania authorised the construction of a dam on the Gordon River in Tasmania by enacting the Gordon River Hydro-Electric Power Development Act (1982) (Tas).

It did this for the purpose of generating electricity at a low cost in order to stimulate economic development and increase employment in the State of Tasmania.

The Commonwealth stepped in and demanded that there be no construction of such a dam. It did so to protect the natural and cultural heritage of the area.

The case went to the High Court for deliberation and it was held that under the 'external affairs' power

the Commonwealth was within its rights to stop the construction.

CLASS EXERCISE

In Koowarta Mason J. pointed out that 'external affairs' was a head of power expressed to equip the Federal Parliament and the Federal Executive with the power to take appropriate action on behalf of Australia in the world of international affairs.

What does the 'external affairs' power in the Constitution actually say?

On what basis can the Commonwealth Government use it?

How does it work?

How was the Commonwealth taking action on behalf of Australia when it stopped the Tasmanian Dam from being built? Why was this an 'external affairs' matter?

LAYING DOWN THE LAW

State strength has been further eroded by the application of s.109 of the Constitution. This section states that when a State law is inconsistent with a law of the Commonwealth, the State law shall be invalid to the extent of the inconsistency.

Given that the Commonwealth powers of legislation are to be read

widely, (Engineers case) the Commonwealth has the power to legislate with respect to many matters, which arguably, were originally intended to be in the States domain.

RESEARCH EXERCISES

1. What are the facts of the Engineers' case?
2. What are the facts of the First Uniform Tax case?
3. What does s.96 of the Constitution actually say?
4. Koowarta and the Tasmanian Dams Case are two examples of where the 'external affairs' power in the Constitution has been implemented so as to enable the Commonwealth to intervene in a matter that previously was thought to be a state domestic matter.

What other examples of the use of the 'external affairs' power can you give?

ESSAY TOPIC

"There are pros and cons to Federalism".

Discuss with reference to examples and/or cases to support your argument.