

LIVING DANGEROUSLY WITH THE CONSTITUTION

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(Shorter Version)

Introduction:

This address is part of an event hosted by the Council for the Humanities, Arts and Social Sciences, CHASS., and the fourth in a which brings people from the humanities, arts and social sciences to Canberra, to allow them to discuss their work with national parliamentarians. These people contribute to the nation in all sorts of ways: economic, social and cultural.

Today I want to re-ignite a discussion on our Constitution. CHASS asked me to address the issue 'can the Commonwealth take over our universities?' I think the key point is not 'can', but 'when'. And I want to add that the views and opinions I am setting out today are mine, and not necessarily those of CHASS.

A Constitution of Checks and Balances

The Australian Constitution always is a challenging topic on which to talk. It is widely regarded as a boring document, written by boring nineteenth century heavyweights, arising out of a boring, British Victorian history that contains no

salacious hint of radicalism or revolution. The reality is very different. The Australian Constitution has serious claims to relevance, both in terms of its general quality as a constitution and in terms of the highly developed political philosophy that runs through it.

As regards quality, the most plausible and practical test of any constitutional document is its longevity as a genuinely democratic instrument. Applying the Australian Constitution's own achieved benchmark, how many other constitutions have provided a century of safe, stable, democratic government? The answer is that our own shabby document actually is a member of an exclusive club with only around half a dozen other members.

On the question of political philosophy, many Australians would be staggered to learn that their Constitution does indeed have a pervasive philosophical position concealed beneath its nineteenth century verbiage. This is a classically liberal-conservative philosophy centred on the balancing of power: the notion that power, while necessary, is deeply open to misuse and therefore must be pervasively balanced and dispersed. Of course, this philosophy has been disputed many times during Australia's history - most notably by Labor, which has found it frustrating in the pursuit of reform - but has managed to stagger semi-intact into the twenty-first century.

Today, however, the constitutional balance of power is under severe stress, notably from the Commonwealth government. This partly is because many conservatives - the successors of those who wrote the Constitution - are increasingly intolerant of checks upon power. Consequently, our Constitution of checks and balances is

becoming dangerously destabilized. This can be seen by examining three of the most important balancing features of the Constitution: federalism, parliamentary government and the constitutional governor-generalate.

Checks and Balances: Decline and Fall

Federalism, of course, is the classic American device for the balancing of power. It comprehensively divides power throughout the federation and balances the capacities of national and State governments one against the other. The comic prospect of an Australian dictator is simply not possible so long as no one government controls everything, everywhere, all the time.

Parliamentary government balances power two ways. First, the power of the executive is constrained not only by the macro requirement of having to govern with the confidence of Parliament, but also through multiple micro requirements in the nature of question time, parliamentary committees and so forth. Second, parliamentary power is itself balanced against executive power, so that parliament is reliant upon the executive for much of its structure and organization.

Finally, the constitutional governor generalate (the monarchy died, unnoticed, years ago) balances power in a very special way, by separating legitimacy from power. The very existence of the Governor General as symbolic local head of state works to deny to the Prime Minister, as most powerful person in the land, the added characteristic of ultimate legitimacy, so inhibiting any identification of the Prime Minister with the nation state and its values.

Probably, the greatest contemporary challenge to the Australian Constitution is that each of these crucial balancing mechanisms simultaneously are under extreme stress, and all have been under pressure during the Howard Government.

Federalism is, perhaps, the most potent example. This has been federalism's worst decade since the 1920's, with the low point being the High Court's decision in the Work Choices case last year, which effectively will allow the Commonwealth to utilize its corporations power to invade virtually any area of State competence.

The implications of that power cannot be overestimated. To take just one example, it would allow the Commonwealth to assume comprehensive regulation of Australian universities, including their teaching, research and governance. Whether this would be good policy is a question that can be debated, but it certainly would overthrow another delicate Australian balance of power, whereby control of the independent national infrastructure represented by universities was divided between two sets of governments.

The confronting reality here is that leading conservatives have fallen out of love with federalism, with John Howard being unquestionably the most centralist Prime Minister in the nation's history. This has left federalism a political orphan, with its prospects undeniably grim.

The plight of parliamentary government in Australia has so long been noted that its accelerating decline is not well appreciated, particularly among the jaded politicians and media who serve at the altar of the political process. Again, the substantial

collapse of institutions like question time seems no longer to shock us, although it certainly shocks the frightened schoolchildren ferried in to observe it. Critically, the present government has contributed to this wider decline through such measures as Prime Minister Howard's deeply troubling proposal to substantially reduce the powers of the Senate in respect of disputed legislation. In an earlier period, the attitude of then Prime Minister Paul Keating to Question Time are a matter of record.

Finally, the notion of a Governor-General as the apolitical repository of important ceremonial duties which should be kept rigorously separate from politicians seems to have almost entirely collapsed. The current Prime Minister regularly presides at such national events as military departures and homecomings, as well as major celebrations and mournings, with the inevitable result that there has developed a far greater potential for identification between the nation's political leader and its fundamental emotions. Under a theory of the constitutional balance of power, this is a far from healthy tendency.

Reasons

An important question is why we are experiencing this intensified series of challenges to the notion of balanced power. A number of reasons suggest themselves, some applying specifically to particular balances, others more generally.

One factor is that there always has been a tension in Australia between balance of powers and more facilitative constitutional approaches. Critics have included (as noted) the Australian Labor Party, business from time to time, and a wide and impatient media contingent.

A second is the current culture of “power worship” so prevalent within Australian political and media circles. This culture is intolerant of hindrances, restraints, philosophical quibbles and – to a significant extent – ethical restrictions. It therefore is deeply hostile to any constitutional theory which inhibits the free flow of power and the achievement of objectives.

A third, less obvious factor, is the “businessification” of Australian politics and public administration. Today, the ultimate criterion for judging any measure of policy or administration is the extent to which it complies with a business best-practice model. Business has little truck with such vague considerations as the balance of power and is intensely outcomes oriented. Consequently, highly influential business figures are dismissive of the Constitution and its checks, particularly federalism.

As already noted, a critical factor has been the abandonment of the notion of constitutional checks and balances by the very conservatives who placed them in the Constitution. The Howard Government has been notably hostile to federalism, and at best indifferently antipathetic towards parliamentarianism and a functioning governor generalate. Given Labor’s own ambivalence, this has left the Constitution’s underlying premise critically unsupported.

Finally, those who continue to support the chief balancing features of the Constitution have failed to modernise them so as to adapt them to changing conditions and secure the support of succeeding generations. Federalism, for example, has remained a Centralism-States Rights squabble, instead of moving to a leadership paradigm, where the Commonwealth sketches broad policy directions, which the States individually

interpret. The decline in the public perception of parliament has been allowed to continue without any serious attempt at reform. The Governor-General languishes as a lonely survivor of monarchy, without having been given new life in an Australian republic.

Conclusion

The future for all of these fundamental restraining features of the Constitution is decidedly grim. There is no sign of a revival in federalism. On the contrary, with the Commonwealth possessing technical power to do almost anything it likes, the federal balance is now a question of Canberran realpolitik. In the case of Parliament, we have been talking about its reform for so long that nobody is listening anymore: certainly not the two major parties with vested interests in its continuance in its present debased form. As for the Governor-General, that office inevitably has had something of the pantomime about it, but is now a pantomime that few wish to attend.

The Australian Constitution, as a structure of checks and balances, has served us well for a hundred years. Through our own fault, we are now living dangerously with a seriously destabilized structure.