COURAGE IN CONSTITUTIONAL INTERPRETATION AND ITS CONSEQUENCES - ONE EXAMPLE*

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More than 50 years have elapsed since I was a law student. It would be interesting to discover how many of the legal principles that I was then taught still form part of the law. During the last 50 years there have been great changes in the law. There may even have been some reforms. If, as Lord Denning has said,[1] there are two sorts of judges - bold spirits and timorous souls - it is the bold spirits who have been in the ascendancy during the last 50 years. The boldness of the judges has been matched by the copious productivity of the legislatures. Nobody doubts that the law must be developed to meet the needs of a society whose nature and attitudes seem to be changing more rapidly than ever before. Of course, a new law may itself bring about changes in society; sometimes it may be intended to do so and in other instances the changes which the law brings about may be unintended and perhaps may have been unforeseeable. Laws, like drugs, may have side effects. For obvious reasons this is particularly true of changes in constitutional law, since the consequences of a change to a fundamental law are likely to be more extensive and unpredictable than a change in a law of another kind.

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* An address to students of the University of New South Wales Law School, 13th August 1991.

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1 *Candler v Crane, Christmas & Co* [1951] 2 KB 166 at 178.

It is the fashion at the moment to suggest that Australia should enter the new century with a new Constitution. It is true to say that the Constitution would benefit from amendment but it is by no means obvious that it should be regarded as entirely obsolete. It is true that it was framed 100 years ago, but the United State Constitution, on which ours is modelled, was framed in 1787, and in the United States it would be regarded as almost treasonable, and certainly un-American, to suggest that it should be entirely scrapped. Possibly those who advocate a new Constitution for Australia hope that the new Constitution will be unitary and republican in nature. The idea that the State Parliaments should be abolished has some popular appeal, given the widespread belief in Australia that the fewer the politicians, the better. However, of the arguments in favour of retaining a federal Constitution rather than changing to a unitary Constitution one strong argument that should not be overlooked is that the most effective way to curb political power is to divide it. A Federal Constitution, which brings about a division of power in actual practice, is a more secure protection for basic political freedoms than a bill of rights, which means what those who have power to interpret it say that it means. Experience has shown that the effect which the Courts will ultimately give to a constitutional provision may be unpredictable. Of course, the Judiciary as presently constituted in Australia would almost certainly give a bill of rights an interpretation which would be amply protective of political and civil liberties but who can tell what the position of the Judiciary would be if in some future crisis an attempt was made to seek totalitarian power.

After a lapse of time it may be possible to examine the side effects of a change to the law of the Constitution which has been brought about by judicial interpretation. One constitutional provision, the meaning of which has been shaped by judges who in this respect were the boldest of spirits is Section 51 (xxxv) of the Constitution. I should say that I do not intend to criticise those judges - I have not while on the bench dissented from their opinions as to the effect of Section 51 (xxxv) but have loyally followed them.[2] What I should like to do is to endeavour to consider very briefly the practical consequences that have resulted from the way in which that provision has been interpreted.

During the closing decades of the nineteenth century Australia was racked by strikes which caused serious disruption to industry and life generally and gave rise to great bitterness and even bloodshed. The maritime strike, the shearers' strike and the miners' strikes occasioned deep concern at the time. It was thought that it might be possible to avoid future strikes if an alternative method was provided for resolving industrial disputes and that arbitration, a process by which merchants had settled their disputes for centuries, might work equally effectively in the industrial sphere. Some colonies made laws providing for industrial arbitration and after much debate and fluctuation of opinion Section 51 (xxxv) was written into the Constitution. As most of you are aware, that

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2 See, for instance, *The Queen v Cohen; ex parte Attorney-General* (Q) (1981) 157 CLR 331.

provision gives to the Commonwealth Parliament power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

That the literal meaning of those words bears little relation to the effect which the Courts have given them appears from a recent case which received some publicity. In December 1990 the employees of a fruit cannery at Shepparton in Victoria agreed with the management of the cannery to give up some of the conditions of employment to which they were entitled under an award. The Company was in financial difficulties, and the employees thought it better to forego some of their benefits rather than to lose their jobs as they would have done if the cannery had been forced to close. The shop stewards at the cannery also agreed, but the unions had other ideas. They brought proceedings before the Industrial Relations Commission which assumed jurisdiction in the matter. An intelligent layperson, knowing nothing of constitutional law but informed of the words of Section 51 (xxxv), might be expected to express incredulity that the Industrial Relations Commission could, consistently with Section 51 (xxxv), have jurisdiction in the matter. After all, the employees and the employers had reached complete agreement and no dispute was existing, threatening or impending between them. Moreover, the transaction did not extend beyond the limits of one State - the employers and the employees were all at Shepparton. A student of constitutional law, on the other hand, would readily agree that the assumption of jurisdiction by the Industrial Relations Commission was constitutionally justified, have regard to the course of the decisions in which the High Court had explained the meaning of the constitutional provision. A union registered as an organisation under legislation made under the power given by Section 51 (xxxv) has been regarded as having a capacity greater than that of the employees which it represents.[3] By making a demand on employers in different States, a union can create a paper dispute which may involve an employer who has in fact no argument with his or her employees even if the employer does not employ any member of the union which made the demand.[4] Once an award is made, further proceedings can be taken under it although the employer and employees are entirely within one

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3 *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528; *Federated Ironworkers' Association of Australia v The Commonwealth* (1981) 84 CLR 265 at 279-280; *The Queen v Dunlop Rubber Australia Ltd; ex parte Federated Miscellaneous Workers' Union of Australia* (1957) 97 CLR 71 at 81 et seq; *The Queen v Portus; ex parte M'Neil* (1961) 105 CLR 537 at 545.

4 *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association, id*; *Metal Trades Employers' Association v Amalgamated Engineering Union* (1935) 54 CLR 387; *The King v Blakeley; ex parte Association of Architects etc of Australia* (1950) 82 CLR 54; *The Queen v Cohen; ex parte Attorney-General* (Q) note 2 *supra* at 336-7.

State.[5] In addition, although the Courts have insisted that the Commission cannot make a rule common to all in an industry,[6] in practice the Commission does determine standard wages and hours and conditions of employment which are given effect by a multitude of awards.[7] The awards prevail over the State law.[8] They tend to be followed by State tribunals in relation to matters in which the Commission itself has no jurisdiction. A constitutional provision which was intended to be applied to industrial disputes which in fact had an inter-State character, and which was expressed in a way which clearly revealed that intention, has been given a much wider effect by means of some legal fictions.

As a result we have in Australia a system of industrial relations that is unique. The Industrial Relations Commission does much more than prevent and settle strikes; it determines national standards regarding wages and conditions of employment and thus has a most important influence on the state of the economy. In making its decisions it may be influenced by Government policy but is not controlled by that policy. It has powers which the Commonwealth Parliament does not possess, and in the exercise of those powers may either assist or frustrate the management of the economy by the Government. Its power is greater than its responsibility. My aim is not to inquire whether the system has reduced strikes, or achieved justice between employer and employee, or whether it works well in the national interest. Most Australians probably regard the system as natural and satisfactory because they are accustomed to it. For good or ill, however, the interpretation which the Courts have given to the constitutional power has enabled the creation of an institution which has no parallel elsewhere - it is as Australian as the kangaroo - a body which has wider powers than the Parliament which created it, and which plays a part in the management of the Australian economy almost as significant as that played by the Parliament itself.

Another consequence of the wide interpretation given to the constitutional power has been the growth in strength of the unions. It was not surprising that the system of conciliation and arbitration which the Constitution allowed to be created involved an important role for the trade unions. In fact, since in the working of the system more importance is attached to the position of the unions

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5 *Federated Engine-Drivers' and Firemen's Association of Australia v Adelaide Chemical and Fertilizer Company Ltd* (1920) 28 CLR 1; *The Queen v Commonwealth Conciliation and Arbitration Commission; ex parte Melbourne and Metropolitan Tramways Board* (1962) 108 CLR 166 at 169; *The Queen v Isaac; ex parte State Electricity Commission* (Vic) (1978) 140 CLR 615 at 619-620.

6 *Australian Boot Trade Employees' Federation v Whybrow & Co* (1911) 11 CLR 311; *The King v Kelly; ex parte State of Victoria* (1950) 81 CLR 64 at 80-82.

7 See, for example, *The Queen v Kelly; ex parte Australian Railways Union* (1953) 89 CLR 461 at 475.

8 See *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 and cases there cited.

than to that of the individual employee, the role of the unions has become an essential one.[9] In the first two decades of this century, after the arbitration system was established in the Commonwealth and some of the States, there was a striking increase both in the number of persons who joined trade unions and in the proportion of employees who belonged to a union.[10] It has been said that the system "has been a major contributing factor to Australia's position as one of the most 'unionised' countries in the world".[11] Opinions will differ on the question whether this has been beneficial to Australia; no one will deny the importance of its consequences for Australian political and economic affairs.

The Australian Council of Trade Unions has particularly grown in power and status as a result of the industrial relations system whose creation has been made possible by the wide view which has been accepted as to the scope of Section 51 (xxxv). The ACTU was established in 1927.[12] By that time the notion of paper disputes and of the representative role of the unions had been recognised and the centralised system of arbitration was in place. The concept of a basic wage had been expounded by Mr. Justice Higgins as early as 1907,[13] and as the Commission began the practice of general basic wage hearings it had become apparent that a decision made in one case as to the basic wage would be likely to affect all unions and not merely those nominally parties to the particular dispute. It was recognised that it would be convenient in such proceedings that there should be a body capable of presenting a case for the trade unions as a whole. That role naturally enough fell to the ACTU although it was perhaps not until after the second world war that the ACTU attained its present position of dominance within the trade union movement. The ACTU came to handle cases in the Commission which involved major issues. As its authority grew in this way it also began to play a major part in attempting to resolve industrial disputes even when they did not come before the Commission. It became natural that the ACTU should be accepted by the Government as the body which could speak for the trade union movement as a whole. The extent to which a particular Government would consult the ACTU might no doubt depend on which party was in power and perhaps on personal attitudes and relationships but in any circumstances the ACTU now occupies a position of considerable importance and influence. It can hardly be doubted

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9 E Sykes, *The Employer, the Employee and the Law* (4th ed, 1980) at p 157.

10 In 1901 there were fewer than 100,000 unionists in Australia representing just over six per cent of all employees. By 1922 there were over 700,000 unionists representing about one half of all employees and by 1926 there were 850,000 unionists representing fifty five per cent of all employees: C Donn and G Dunkley "The Founding of the ACTU" (1977) 19 *Jnl of Industrial Relations* 404 at pp 419-420.

11 B D'Alpuget *Mediator. A Biography of Sir Richard Kirby* (1977) at p 113.

12 See, generally, J Hagan *The History of the ACTU* (1981) and RM Martin "The Authority of Trade Union Centres" (1962) 4 *Jnl of Industrial Relations* 1.

13 *Harvester Judgment (ex parte McKay)* (1907) 2 CAR 1.

that the ACTU could not have attained that position had it not been for the system of industrial relations which developed as a consequence of the interpretation given to Section 51 (xxxv). The influence of the ACTU now extends not only to wages and conditions of employment but to wider economic and social issues, such as the taxation system and the provision of superannuation. Again it is no part of my argument to consider whether or not it is beneficial that such a body should enjoy such influence. No doubt there are conflicting views, strongly held, on that question. The point again is that the existence of the centralised industrial system which developed as it did because of the meaning given to Section 51 (xxxv) gave the ACTU the opportunity to develop into a position of great significance in Australian life, although no doubt the ability of its officials enabled it to take advantage of that opportunity.

The provisions of Section 51 (xxxv) might have been satisfactory enough if they had been used for the purpose for which they were originally intended - the provision of a system of conciliation and arbitration for the prevention and settlement of strikes that involved workers in a number of States and so could not be dealt with effectively by any one State. The State Parliaments at least had the advantage of flexibility; if the system of arbitration had proved unsatisfactory they could have replaced it by another, and if different States had regulated industrial relations in different ways the virtues and disadvantages of contrasting systems could have been observed. The powers of the Commonwealth Parliament under Section 51 (xxxv), although expanded to the limit, do not permit of a flexible approach. It can be no more than a matter of speculation whether it would have been better for Australia if the constitutional provision had been confined in the manner originally intended, and if the regulation of industrial relations had been left to the States. Certainly the present position, reached by an unsatisfactory artificiality of reasoning, is far from ideal.

If this talk has a moral, it is that it may be that judicial boldness can be carried too far. Perhaps it should be tempered by circumspection. The consequences that have in fact followed from the wide operation which the Courts have given to section 51 (xxxv) include the establishment of a body which has quasi-legislative powers greater than those of the Commonwealth Parliament, the strengthening of the trade unions, and the growth of the influence and power of the ACTU. Whether or not these results represent the best of all possible worlds, they are hardly the results which the constitutional provision was designed to achieve. If the ideal result would have been to give the Commonwealth Parliament power to regulate industrial relations, that result has not been achieved, and it would be remarkable if it could be achieved without an amendment to the Constitution, even if, as has been suggested, the power given by Section 51 (xxxv) could be exercised by enabling the process of conciliation and arbitration to be conducted by a Commonwealth Minister.

One indirect consequence of the way in which this constitutional provision has been interpreted has a touch or irony about it. If one can believe press

reports, the influence of the ACTU is now so great that an official of that body was recently able to veto a proposed increase in the salary of the Justices of the High Court. If I am right in suggesting that it was the decisions of the High Court that made it possible for the ACTU to achieve its position of influence, well might one say, in the words of Shakespeare, "and thus the whirligig of time brings in his revenges".[14]

14 *Twelfth Night*, Act V, Scene 1.