

Sir Robert Menzies on Legal and Constitutional Issues

Anglo-Australian Common Law tradition vs Continental tradition

“I know that the creation of a formula is now regarded as the essence of statesmanship. Yet the whole historical genius of our race is against it. The draftsmen of the Code Napoleon were intellectually at the poles from the creators of the English Common Law...our intellectual tradition is inductive – trial, error, trial, success, a precedent – so that we sometimes appear to the onlooker to have no principles; while deductive minds elsewhere sometimes seem to us to be so occupied by pure syllogisms that common sense and human values seem to disappear.” R.G. Menzies, ‘The Ever Changing Commonwealth’ *Speech is of Time* (1958) 24.

Bill of Rights

“I am glad that the draftsmen of the Australian Constitution, though they gave close and learned study to the American Constitution and its amendments made little or no attempt to define individual liberties. They knew that, with legal definition, words can become more important than ideas. They knew that to define human rights is either to limit them – for in the long run words must be given some meaning – or to express them so broadly that the discipline which is inherent in all government and ordered society becomes impossible.

As I understand it, the Australian draftsmen had good reasons for not following the American model...

In short, responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of the Common Law, we have not felt the need of formality and definition.

I would say, without hesitation, that the rights of individuals in Australia are as adequately protected as they are in any other country in the world.

In America, if I may say so as a most friendly observer, there is a long history of distrust of ‘official’ people. As they are not directly answerable in Congress, where they do not sit, and in whose proceedings they are ‘outsiders’, it has been thought necessary to impose constitutional limits upon them, with the Supreme Court as the interpreter of those limits.

And as the interpretation of such provisions will be largely affected by political and social concepts, the judgments of the Supreme Court of the United States tend to possess a political flavour which is notably absent from the judgments of the High Court of Australia.” R.G. Menzies, ‘Supplementary Note on the Absence of a Bill of Rights’, *Central Power in the Australian Commonwealth*, (1967) 52-54.

Federalism

“Those who were, like me, brought up on the fundamental constitutional studies of A.V. Dicey and Lord Bryce will remember in particular the latter’s exposition of the two forces which operate in a federation; the *centripetal* and the *centrifugal*. Expanding this, I believe that all modern experience has shown that in a federation, where powers are distributed between the National Government and State or

provincial governments, there will develop either a movement, conscious or unconscious, to increase powers at the centre, or an opposite movement to increase the State or provincial powers at the expense of the central authority. In short, though the process may be a long one, federations tend either to become more dominated by the centre, with perhaps a perceptible public sentiment in favour of complete union, or to break up into their fractions... [I]n Australia ... the powers of the Central Government, though defined and therefore in form limited by a written Constitution, have tended to grow far beyond the conception of the original draftsmen; to some extent, it is true, as a result of formal amendment of the language of the Constitution itself, but to a material extent as a result of new and extended judicial interpretation of existing powers, with a marked tendency to aggregate financial power (and therefore political power) in the hands of the Parliament and Government of the nation.

I have not undertaken the very controversial political task of arguing whether this growth is good or bad. I am, particularly for a large continent with widely scattered communities, with great regional or local problems and understandable local prides and patriotisms, a Federalist. At our present stage of development, and for a long time to come, State Parliaments and Governments are and will be essential. The Constitution itself contemplates their continued existence and respects the powers 'reserved' to them.

But I cannot pretend that the growth of Commonwealth power which I have made it my task to describe does not present great problems of future adjustment for both Commonwealth and States if both are to co-exist and succeed.

In theory, some revised demarcation of powers could achieve this result; but, as a record of attempted amendments set out hereafter will show, the Australian electors (of whom I write with the respect due to people who accorded me their confidence for so many years!) have shown a marked reluctance to vote for constitutional amendments. Even those who feel that changes should be made, and they may well be in a majority, frequently develop uncertainties when the dry language of a proposed Amendment is submitted to them, and so, being in doubt, vote 'No', for reasons of prudence." R.G. Menzies, 'Introduction' *Central Power in the Australian Commonwealth*, (1967) 2-4

"One frequently chafes at the legalism of a federal system, though one knows that federalism is legalism. But one also discovers, as I have over the years, that in a federal system there may be shifts in power, alterations in the balance of power, which are quite independent of actual amendments to the constitutional document itself. There may also be new interpretations of old powers which would not have been anticipated by the draftsmen of our Constitution of 1900." R.G. Menzies, 'A general Consideration of the Theme, with reference to the Problems of Formal Constitutional Amendment', *Central Power in the Australian Commonwealth*, (1967) 7.

"Now, I am a Federalist myself, I believe as I am sure most of you do, that in the division of power, in the demarcation of powers between a Central Government and the State governments, there resides one of the true protections of individual freedom. And yet how true it is that as the world grows, as the world becomes more complex, as international affairs engage our attention more and more, and affect our lives more

and more, it is frequently ludicrous that the National Parliament, the National Government, should be without power to do things which are really needed for the national security and advancement.” R.G. Menzies, ‘A general Consideration of the Theme, with reference to the Problems of Formal Constitutional Amendment’, *Central Power in the Australian Commonwealth*, (1967) 24.

“For myself, I have always believed that Australian Liberalism must be truly Federalist. Constitutional changes involving some alteration in the distribution of powers may be made in the future; though past experience shows that the way of the amender is hard. But the vital thing about our Constitution, and I quote the authoritative words of Sir Owen Dixon in one of his judgments, is this:

“The foundation of the Constitution is the conception of a Central Government and a number of State Governments separately organised. The Constitution predicates *their continued existence as independent entities*. Among them it distributes the powers of governing the Country”.

In a Continent of our size and of such diverse resources and local interests, a Federal system is essential...

There’s an interesting thing about Federation. Of all systems of government it is, because of its written nature, the most rigid and legalistic. Yet to make a Federation work, as we have found in Australia, requires great human understanding and flexibility of mind. It is here that what I have called the pragmatism of the Liberal approach proves its value. The central nature of the Federation I have briefly described; but beyond this, and in dealing with the practical problems, there must be no dogma, but an ascertainment of the merits and an honest desire to act upon them. Sir Robert Menzies, ‘The Foundations of Australian Liberalism’, 2 May 1979 in G Starr *The Liberal Party of Australia: A Documentary History* (1980) 265-266.

State Opposition to Increases in Commonwealth Power

[T]here is in my country, normally, a considerable distrust of or hostility to central authority. It is a curious thing, but States which have bemused themselves, as they very frequently have, by what I call the fallacy of the sovereign’ State, readily fall into the error of thinking the Commonwealth is a foreign power, and that you must not give it too much authority. You must clip its wings. And therefore any proposal to increase the power of the Commonwealth, unless there are compensating factors for the States, has, normally, a very slim chance of being carried. There is something rather ironical about this, because the practice has arisen in every State in Australia, I would think of taking all problems of the provision of funds to Canberra. I suppose you know nothing of this in the United States, but it is quite common to Australia. It is so easily said about any local problem, ‘Well, why don’t you take this to Canberra? Why don’t you get the Commonwealth to do something about it? And yet, while this goes on, paradoxically enough, the very people who are saying, why doesn’t the Commonwealth do something about it, go to great pains to see that the Commonwealth has no power to do something about it.

Well, these may or may not be the exact reasons. Behind them all is the historic fact that federation came about in Australia, not primarily by the presence of a common

danger or external threat, but by a process of domestic argument which extended over many years, involved several conventions which engaged the labours of some of the best minds in the country, and led to two referendums in 1898 and 1899 before general approval had been secured and the Constitution could be presented to the British Parliament for enactment.” R.G. Menzies, ‘A General Consideration of the Theme, with reference to the Problems of Formal Constitutional Amendment’, *Central Power in the Australian Commonwealth*, (1967) 21-22.

The Crown

“In a Monarchy like ours, the focal point is also an office, the Crown, now occupied by a woman, the Queen. Her actual powers are small; she acts upon the advice of her Ministers, whose views are, on political occasions such as the Opening of Parliament, expressed by her, but not attributed to her. She never enters the political lists. Rooted as her office is in the deep soil of history, enduring as it has provide through the great shocks of political and military and social events, it enjoys the respect of all but a handful of her people. The Queen is seen, in all the countries within her allegiance as the fountain of honour, the protector of the law, the centre of a Parliamentary system in which she makes and proclaims statues ‘by and with the advice and consent’ of Parliament. True, all of these things are, if you like, a matter of form. Even the Royal prerogatives are now defined by the law and are exercised in accordance with it. But no amount of cold analysis can destroy the basic fact that the Crown remains the centre of our democracy; a fixed point in the whirl of circumstance. This great and practical truth is seen most clearly on historic occasions.” R.G. Menzies, ‘The Crown in the Commonwealth’, *Afternoon Light* (1967) 237.

Recommending the appointment of a Governor General to the Queen

“My conclusion about these matters can be stated very briefly:

1. In the last resort, the Queen must be guided by the advice of her Prime Minister in the Commonwealth country concerned, since constitutional practice forbids a purely personal and unadvised appointment; while, if there is to be advice, it must clearly come from the Prime Minister of, for example, Australia, and *not* from the Prime Minister of the United Kingdom.
2. But this does not mean that any Prime Minister should simply force one person’s appointment, without adequate discussion and without any genuine exchange of views with the Queen.

To do what had been done by two of my predecessors would be, in my opinion, rather offensive to the Crown. There must be a genuine exchange of views and a genuine consideration of the available people. After all, as I said to the Queen, the Governor-General is *her* representative not ours.

3. In considering names in his own mind, a Prime Minister should, in my opinion, consider, among other things, two factors.
Is any proposed nominee personally known to the Queen? It is very desirable that he should be since, in Australia, or wherever it may be, he will stand in the place of the Queen and carry with him as he goes around the country some derivative atmosphere of Royalty. In other words, the presence of a Governor-

General should evoke some at least of the emotions which we have when we contemplate the Crown.

If the Governor-General is notoriously completely unknown to the Queen, he will have some difficulty in carrying with him the atmosphere I have described.

The other factor is this. As the Governor-General may well be called upon to deal with political crises and to deal with applications by governments for dissolutions, it is in the highest degree important that his impartiality should be undoubted. Once he is powerfully-suspected of partiality, not only will his joral authority be reduced but his own loss of reputation may seriously and adversely affect the position of the Crown itself." R.G. Menzies, 'The Crown in the Commonwealth', *Afternoon Light* (1967) 258-259.

Prospect of an Australian republic

"I merely say that until the so-called republicans make clear to the rest of us what kind of republic and what system of government they aim at, we can, I think, ignore them." R.G. Menzies, 'Looking Forward', *Measure of the Years* (1970) 208.

Contribution of Britain to Australia

"I cannot go anywhere in Australia without being reminded of our British inheritance; our system of responsible government and Parliamentary institutions, our adherence to the rule of law and, indeed, our systems of law themselves; our traditions of integrity in high places and of incorruptibility in our Civil Service. We derived all these things from Westminster. Our language comes to us from Britain and so does the bulk of our literature. To have no love for a relatively small community in the North Sea which created and handed on these vital matters would be, to my mind, a miserable act of ingratitude. The fact that in Australia we have received all these things, and have made all our own notable contributions to their development, not only fills me with pride but strengthens my affection." R.G. Menzies, 'Looking Forward', *Measure of the Years* (1970) 207.