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FEDERALISM ON TRIAL: WHAT BOMMAI AND NSW V COMMONWEALTH REVEAL ABOUT INDIA AND AUSTRALIA

~Prathmesh Wagh

INTRODUCTION

Federalism, on paper, looks like a fairly settled arrangement, it is a written division of powers between a centre and its constituent units. In practice, both India and Australia show that the real shape of federalism owes far more to how courts read that division than to the text itself. Two judgments in particular capture this: *S.R. Bommai v Union of India* (1994) from the Indian Supreme Court, and *New South Wales v Commonwealth* (2006) from the High Court of Australia. Decided more than a decade apart, in constitutional systems built on very different assumptions, they nonetheless tell a similar underlying story that it is judicial interpretation, not constitutional drafting, which ends up deciding how much room the states actually have to breathe. This piece walks through both cases and then places them side by side to see what that comparison actually shows about the two federal models.

CASE ONE: *S.R. BOMMAI V UNION OF INDIA* (1994)¹

(Decided by a nine-judge bench of the Supreme Court of India)

The dispute traces back to Karnataka, where the state government headed by Chief Minister S.R. Bommai was dismissed under Article 356 after several legislators withdrew their support. Bommai asked to be given the chance to prove his majority on the floor of the house; the Governor refused, and the state government was dismissed anyway. Bommai challenged this first in the High Court, lost, and eventually took the matter to the Supreme Court. The case put a long-standing question squarely before the bench: how much power does the Centre really hold over a state government, and where — if anywhere — are the limits?

¹ S.R. BOMMAI V UNION OF INDIA 1994 AIR 1918

The nine judges held that the President's power under Article 356 is not open-ended and must be exercised with real caution, not as a routine political tool. Just as significantly, the Court affirmed that state governments are not subordinate to the Centre — they operate within their own sphere, and that sphere deserves judicial protection. Floor tests, rather than a Governor's subjective satisfaction, became the accepted way to determine whether a ministry still commanded a majority. In effect, the judgment tried to close off a well-worn route for using central power to unseat inconvenient state governments.

CASE TWO: NEW SOUTH WALES V COMMONWEALTH (2006)²

(Decided by Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ.)

This case, often called the Work Choices case, arose after Parliament passed the Workplace Relations Amendment Act in December 2005. The Act shifted the constitutional footing of national industrial law away from the conciliation and arbitration power in section 51(xxxv) of the Constitution and onto the corporations power in section 51(xx) instead. Five states and two trade unions challenged the change, arguing that it would impermissibly disturb the federal balance by letting the Commonwealth regulate industrial relations on a scale the Constitution's framers never intended.

By a 6:1 majority, the High Court took a legalist approach and rejected the challenge. It held, first, that the corporations power extends broadly enough to cover the industrial relations of constitutional corporations, and second — and more consequentially — that there is no implied doctrine of "reserved state powers" that can be used to cut down an otherwise valid grant of Commonwealth legislative power. The majority went further still, holding that the federal balance is not a value the judiciary independently protects; it is simply whatever falls out of reading the enumerated powers as written. If a head of power covers the field, that is the end of the constitutional inquiry — concerns about upsetting the states' traditional turf do not enter into it.

LEGAL IMPLICATIONS

The Work Choices decision entrenched a strongly centralising tendency within Australian federalism. It gave the Commonwealth a workable route into areas that states had long assumed were theirs, achieved not through any grand statement about the nature of federalism but

² NEW SOUTH WALES V COMMONWEALTH [2006] HCA 52.

through a broad, literal reading of one specific head of power. That is arguably what makes the decision so consequential: it did its centralising work quietly, through orthodox statutory-style interpretation rather than an announced shift in constitutional philosophy.

COMPARATIVE ANALYSIS

Placed next to each other, these two cases expose a genuine and quite striking contrast in judicial temperament, the one that says as much about design as about interpretation.

India's Constitution was never purely federal to begin with. It carries visible unitary features: Article 3 lets Parliament alter state boundaries or rename states without requiring their consent, Article 250 allows Parliament to legislate on State List subjects during an emergency, and Articles 352 and 356 hand the Centre extraordinary powers over the states in defined circumstances. Yet it is precisely because these unitary tools exist openly on the face of the text that *Bommai* could draw a firm line — the Court read the misuse of Article 356 as a threat to something the Constitution itself protects, and used judicial review to hold that line. The result is a kind of paradox: a constitution built with strong centralising instruments produced, through *Bommai*, a judiciary willing to police those instruments closely and to insist that state autonomy and the doctrine of federal supremacy — states being supreme within their own allotted sphere — actually mean something.

Australia runs the opposite way. Formally, its Constitution decentralises power: section 51 hands the Commonwealth a finite list of enumerated powers, and everything left over defaults to the states. On paper, that should make the states harder to squeeze than their Indian counterparts. But *NSW v Commonwealth* shows how a formally decentralised text can still be centralised functionally, simply through how expansively the judiciary is willing to read the powers the Commonwealth does have. The corporations power was never intended, at least on the states' argument, to swallow national industrial relations law — but a purely textual, legalist reading of section 51(xx) got it there anyway, with no need for any explicit doctrinal shift. Commonwealth power looks, from the constitutional text alone, as though it should stay confined. In practice, it has tended to grow, and it has grown almost entirely through judicial interpretation rather than amendment.

The nine-judge bench in *Bommai* discussed the federal character of the Indian Constitution at some length, drawing on Dicey's account of federalism and setting it alongside the American federal model. In doing so it revisited earlier authority, including *State of West Bengal v Union*

of India, where the Court had observed that the exercise of legislative and executive power within the allotted fields is hedged in by numerous restrictions, so that the powers of the states are not co-ordinate with the Union and are not, in many respects, independent. The core legal implication of Bommai is that it pulled Indian federalism away from a purely Union-heavy, unitary-leaning model and toward one in which the states enjoy protection that is judicially enforceable, not merely a matter of central goodwill.

CONCLUSION

Read together, Bommai and *NSW v Commonwealth* make the same point from opposite directions. In India, a constitution loaded with centralising tools produced a Court willing to rein those tools in and give real substance to state autonomy. In Australia, a constitution built around limited, enumerated Commonwealth powers produced a Court willing to read those powers generously enough to let the Centre's reach keep expanding. Neither outcome was dictated purely by the constitutional text. Both were shaped, decisively, by the judicial philosophy each court chose to bring to the interpretive exercise — which is really the underlying lesson here: federalism, in both systems, is less a fixed constitutional arrangement than a running negotiation carried out primarily through the courts.

