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14-15 JULY 1990

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The Hon Justice Michael Kirby CMG*

> "It is often said that the Australian Constitution contains no bill of rights. Statements to that effect, while literally true, are superficial and potentially misleading. The Constitution contains a significant number of express or implied guarantees of rights and immunities ... All of those guarantees of rights and immunities are of fundamental importance in that they serve the function of advancing or protecting the liberty, the dignity or the equality of a citizen under the Constitution."
>
> Deane J in Street v Queensland Bar Association (1989) 63 ALJR 715, 737.

LIBERTARIAN WARRIOR

The life of Herbert Vere Evatt was one of dazzling achievements and melancholy failures. Yet of all his achievements none was to be of greater importance for the future character of the Australian Commonwealth than his valiant struggle against the legal measures to outlaw the

Australian Communist Party. For that struggle he paid a great personal price. It certainly contributed to his defeat in the 1954 general elections which thwarted his ambition to become Labor Prime Minister of Australia. It hastened the split in the Australian Labor Party (ALP) which was to keep that party out of Federal office until 1972. It alienated a large and powerful segment of the traditional Labor vote amongst Roman Catholics and in the growing ethnic communities. It divided the trade union movement. These divisions coloured Australia's political and social culture for twenty years. Yet with the advantage of the long perspective of history, I believe that it can be said with confidence to have been worthwhile. For the measure which was fought threatened to bring to the fore, and institutionalize, authoritarian features of Australian government which are never far from the surface. The narrow but decisive defeat of the moves against the communists required a far sighted decision by the High Court of Australia[1] and courageous support of liberty by a now forgotten band of Labor politicians and other citizens who supported Evatt. But it was largely the heroic tenacity of Evatt himself which saved the country from the path which the Menzies Government had chosen for it and which, for a time, swept the whole country in its path.

The passage of nearly forty years since these events, and the comfortable ascendency of the ALP in all but one of the State and Federal legislatures in Australia, make it all

too easy today to forget the issues at stake in the 1951 referendum on communism. The revolutions in Eastern Europe and the decline in the fortunes of international communism make it difficult for many of today's generation to recapture the mood and the fears of the 1950s. Dancing the Lambada and pursuing flow-ons, today's generation of Australians might regard the battles to ban the communists as curiously dated, with little contemporary relevance to their country. With hindsight, we can see the declining power of the communists and how the autocratic version of that political faith has become discredited. We can even see the loss of power of the antagonist religions which, in Australia of the 1950s, held such a powerful grip on their supporters. But as a lesson in adherence to fundamental principles, the events leading to the referendum on communism hold few equals in our country. In an age of government by opinion poll and election by marginal issues, it is timely to remind ourselves of an Australian politician who saw clearly an important principle at stake and adhered to true principle despite great political dangers - including to his own urgent ambitions.

The cynical will say of such a man that he never attained the highest elected office. He never became Prime Minister, as he longed for. Ironically, his fame and achievement were more celebrated abroad than ever they were in Australia. His very intellectualism was seen as a threat in the milieu of the mediocre anti-intellectualism of his own country. Yet I agree with his own assessment that it was

more important that he should have won the battle against the referendum on communism than a series of general elections.[2] Perhaps it was Evatt's training as a lawyer and experience as a High Court Justice which gave him the perception of the importance of the issues at stake, not so readily seen by his political colleagues and not seen at all by most of his fellow citizens until almost too late. Perhaps it was the lawyer's understanding of the deep undercurrents of abiding constitutional principle that gave him a blindspot so that he could see only the offence to principle which the government was attempting. Perhaps a real politician, steeped in deals - twisting and turning with the changing currents of transient public opinion - would never have made the mistake of choosing this battleground in the politics of 1952. It is not as if there was an absence of cautionary, even antagonistic warnings against what Evatt did. He was surrounded by critics and people faint of heart. Although he had many periods of oppressive lethargy, about this battle he became quite fired up. He was on the familiar ground of the law and the Constitution. Therefore, come back with me to 1950. Recapture the perils and controversies of the time. And see the true heroism of Dr Evatt's titanic struggle against the forces which apparently democratic and liberal politicians, out of fear or ambition, sought to unleash on the Australian people.

THE COMMUNIST PARTY DISSOLUTION ACT 1950

On 19 December 1949 the first Menzies-Fadden Government

was sworn into office by the Governor General of Australia, Mr William McKell. The Government won office mainly upon domestic issues. The promise to end petrol rationing and to provide child endowment for the first child were typically brilliant political gestures by Menzies. They were well targeted at the Australian electorate which he was to woo and win until he finally retired from his ascendency on 20 January 1966. Yet the times were dangerous internationally. The hopes of post-war harmony between the Western Allies and the Soviet Union had given way to the Iron Curtain, the creation of a ring of satellite states controlled by their own Communist Parties, the extremely dangerous Berlin Blockade and the final triumph of the Communist Party of China in 1949. The global spread of communism seemed unstoppable. Its claim to dogmatic truth had the same unsettling quality as the earlier (and later) claims of religious faiths. Perhaps there was truth, after all, in the teaching of Marx about the inevitability of revolution and of the communist dictatorship of the proletariat.

In the election campaign, Menzies declared that "Australia must be placed on a semi-war footing which will involve many restrictions on civil liberties".[3] He promised action against the Australian Communist Party.

On 25 June 1950 the forces of North Korea invaded the Republic of Korea. The United Nations Security Council met. The next day air and sea forces of the United States were

directed to assist South Korea. Later, a United Nations force was established. An Australian contingent participated in it and reached Korea on 17 September 1950. Within a month, it was in action. By 1 November 1950 forces of the Chinese Peoples' Liberation Army had entered the war. Before dominoes went out of fashion, many (including most citizens in Australia) saw the Korean episode as yet another instance of the expanding thrust of autocratic international communism. The Menzies Government was not slow to respond to these fears. No more sophisticated than the population which had elected it, it embraced the ANZAS Treaty, the SEATO Treaty, and proposed the National Service Act. But the great centrepiece of its responses was the Communist Party Dissolution Bill 1950.

A glance at the statute book for 1950 shows that this was the first major measure introduced into Federal Parliament by the newly elected Menzies-Fadden government. Only 26 pages precede it, most of them dealing, ironically enough, with the imposition of a contributory charge upon wool produced in Australia.[4] So the Dissolution Bill was clearly something which the new government had well advanced before it gained the Treasury benches.

The most curious feature of the Bill, which later became Act No 16 of 1950 is a two-page collection of nine preambular paragraphs. It is unusual in Australian legislation to proceed the substantive enactment with an explanation of why Parliament has proceeded as it has.[5]

This is a technique of legislative drafting in civil law countries. But these preambles were stated for a purpose. They were not merely historical or expository. They had a high constitutional objective. The Federal heads of power upon which the Bill was based were substantially s 51(vi) of the Constitution which empowers Federal Parliament to make laws with respect to "the naval and military defence of the Commonwealth and of the several States", and s 51(xxxix), the "incidental" power. The difficulty which the drafter immediately saw was that a court might hold that measures for control of a political party in a time of apparent peace would fall outside the legitimate characterisation of a law with respect to defence. Accordingly, by the preambles, Parliament endeavoured to recite for the High Court the political realities of the time. Although it might appear to be a time of peace, it was, in truth, a time when the defence power was needed as never before. The flavour of the preambles can be gathered from these samples:

> "And whereas the Australian Communist Party, in accordance with the basic theory of Communism, as expounded by Marx and Lenin, engages in activities or operations designed to assist or accelerate the coming of a revolutionary situation, in which the Australian Communist Party, acting as a revolutionary minority, would be able to seize power and establish a dictatorship of the proletariat:
>
> And whereas the Australian Communist Party also engages in activities or operations designed to bring about the overthrow or dislocation of the established system of government in Australia and the attainment of economic, industrial or political ends by force, violence, intimidation or fraudulent practices:

> And whereas the Australian Communist Party is an integral part of the world Communist revolutionary movement ... And whereas it is necessary for the security and defence of Australia and for the execution and maintenance of the Constitution and of the laws of the Commonwealth that the Australian Communist Party and bodies of persons affiliated with that Party should be dissolved and their property forfeited to the Commonwealth ..."[6]

The machinery provisions of the Act were simple. By s 4 the Australian Communist Party was "declared to be an unlawful association and is, by force of this Act, dissolved". By s 4(2) the Governor General was empowered to appoint a receiver of the property of that Party. By s 5(2), where the Governor General was satisfied that a body of persons affiliated with the Australian Communist Party and the continued existence of that body would be prejudicial to the security and defence of the Commonwealth, he could by instrument declare that body also an unlawful association. It would then, by s 6, be dissolved. Criminal offences were provided by s 7, with a penalty of imprisonment for 5 years, for persons knowingly becoming or continuing to be a member of an unlawful association or assisting such an association. By s 8, the property of unlawful associations was to vest in receivers. Section 9 provided for "declarations" to be made that a person was a member of the Australian Communist Party or a communist. Such declarations would be made by the Governor General by an instrument published in the Gazette. The result of such a declaration was, by s 10, that such a person was incapable of holding office, or being employed by

the Commonwealth or an authority of the Commonwealth, and specifically in any industrial organisation under Federal regulation. Such a person could not enjoy the benefit of contracts with the Commonwealth. Other civil penalties were imposed.

Section 9 contained machinery provisions to make the proof that a person was a member of the Party or was a communist easier. By s 9(3) the Executive Council was required to advise the Governor General to make such a declaration only after "the material upon which the advice is founded" had first been considered by a committee comprising the Solicitor General, the Secretary to the Department of Defence, the Director General of Security and two other persons appointed by the Governor General. A person so designated might, within 28 days, apply to a court to set the declaration aside "on the ground that he is not a person to whom this section applies".[7] Subsection 9(5) reversed the normal accusatory features of our criminal justice system by which the evidentiary burden rests heavily on the organs of the State to gain a conviction and the accused may remain silent. It provided:

> "9(5) At the hearing of the application, the applicant shall begin; if he gives evidence in person, the burden shall be upon the Commonwealth to prove that he is a person to whom this section applies, but if he does not give evidence in person, the burden shall be upon him to prove that he is not a person to whom this section applies.
>
> (6) Upon the hearing of the application, the declaration made by the Governor General

> under subsection (2) of this section shall, insofar as it declares that the applicant is a person to whom this section applies, be prima facie evidence that the applicant is such a person."

By s 25 of the Act, provision was made to facilitate the proof that a person had been a member of an unlawful association. That would be proved if the person was shown to have attended a meeting; spoken publicly in advocacy of its objects; distributed literature or written, issued or published a document in advocacy of the association or its objects. Proof that a person had been a member of the Australian Communist Party could be established by proof that the name, initials or other means of identification of the person appeared on documents found at the premises of the Party or on a list, roll or record found at the offices of premises of the Party.[8]

Wide powers to issue search warrants were granted.[9] Jurisdiction was conferred on the High Court of Australia in certain matters and on the Supreme Courts of the States to hear applications made to set aside the stigmatizing declarations.[10] Such jurisdiction was to be exercised by a single judge whose decision would be "final and conclusive".[11]

Confronted with the Bill, proposed with the authority of an election mandate and in times of apparent international peril, the Parliamentary Labor Party was at first divided. In its last year in government, it had used the wide provisions of the Crimes Act 1914[12] to deal with striking

coal miners. It had itself caused a raid to be conducted on the offices of the Australian Communist Party producing lists and other information which were later to be mentioned in the Menzies Bill. Evatt is said to have regarded these measures as an anathema.[13] However, he certainly used them during and after the War whilst in government. Labor's own recent record was fresh in mind when the ALP came to consider what it should do in respect of the Dissolution Bill. The full implications of the Bill were not at first realized by all. That realization began to sink in when, in Parliament, Mr Menzies stated that it would be "easy to declare" one Labor Senator. Mr Chifley, still Leader of the Opposition, suggested that "the Right Honourable Gentleman should not make threats".[14] Chillingly, Menzies said: "I never make threats that I do not carry out".[15] In Parliament, Menzies read out a long list of officials of unions alleged to be communists. Later, he had to correct this list, acknowledging that some had been included who were not communists at all. Both Chifley and Evatt aimed to defeat the Bill. Chifley was for fighting it clause by clause in Parliament. Evatt urged its easy passage, confident in the belief that the High Court of Australia would declare it unconstitutional. Evatt had reason to know the mood of the High Court. It was but 10 years since he had himself been a Justice of that Court. He had lately fought and lost the constitutional arguments on bank nationalisation in a marathon case. Arthur Caldwell and E J Ward favoured

fighting the Bill in toto. But on the right wing of the ALP a number of members actually favoured the objects of the Bill.

Deputy Prime Minister Fadden taunted the Labor Party, suggesting that its platform paved the way for a communist coup in Australia.[16] A number of amendments to the Bill were proposed by the Senate which was then still controlled by the ALP. The Government refused to accept these. Sensing the chance to control the Senate, it presented the Bills for a second time. Meanwhile, the Labor Executive, under fear of divisions within the Party, backed down. It resolved:

> "To test the sincerity of the Menzies Government before the people and to give the lie to its false and slanderous allegations against the Labor Party, the Bill should be passed in the form in which it is now before the Senate."[17]

The Bill duly became law on 20 October 1950.

UNITED STATES AND SOUTH AFRICAN ANALOGUES

It is interesting to reflect here upon the parallels between the Communist Party Dissolution Act 1950 in Australia and the Smith Act 1946 of the United States and the Suppression of Communism Act 1950 of South Africa.

The Smith Act [18] made it a crime for any person knowingly or wilfully to advocate the overthrow or destruction of the Government of the United States by force or violence. In 1948, a number of petitioners were indicted for violation of the provisions of the Act. They were leaders of the Communist Party of the United States. They

were charged with wilfully and knowingly conspiring to organise as the Communist Party a group of persons to teach and advocate "the overthrow and destruction of the Government of the United States by force or violence". Their offences were exclusively conspiracies of advocacy, teaching and communication. They were convicted by a jury. They then challenged the constitutionality of the Smith Act provisions. They asserted that it violated the First Amendment of the United States Constitution which guarantees free speech and the Fifth Amendment which secures due process of law.

The Supreme Court of the United States granted certiorari. However, by majority (Vinson CJ, Reed, Burdon, Minton, Frankfurter and Jackson JJ; Black and Douglas JJ dissenting) the Court refused to disturb the conviction of the petitioners. The Court held that the Smith Act did not violate the United States Constitution.[19] That judgment was handed down on 4 June 1951. It was to be used repeatedly by Menzies, in response to the legal criticisms voiced by Evatt, on the other side of the Chamber, concerning the attempts by legislation to suppress the Communist Party in Australia.

It is interesting now to read the convoluted prose of the majority reasoning in the Dennis case. Those judges were profoundly influenced by the perceived dangers at the time. But Justice Black's dissent was more pertinent to the developing Australian situation:

> "So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere "reasonableness". Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The amendment as so construed is not likely to protect any but those "safe" or orthodox views which rarely need its protection ... Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[20]

Justice Douglas wrote a dissent which also in many ways reflected the conclusion reached shortly before in Australia by a Royal Commission on Communism conducted in Victoria by Justice Lowe. The latter had found no evidence that the Australian Communist Party was directed from abroad. He found no evidence of espionage or sabotage. The findings were given little publicity and attention in the run-up to the legislative and constitutional assault on communists in Australia. Instead, communists were a bogey. They therefore justified exceptional, extraordinary measures, entirely out of line with fundamental principles of the common law. Justice Douglas had no patience with this kind of thinking, still less with such action:

> "The nature of Communism as a force in the world scene would, of course, be relevant to the issue of clear and present danger of petitioners' advocacy within the United States. ... If we are to take judicial notice of the threat of Communists within the nation, it would not be difficult to conclude that as a political party

> they are of little consequence. Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state which the Communists could carry. Communism on the world scene is no bogey man; but Communism as a political force or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution which petitioners espouse would have any success. In days of trouble and confusion, when breadlines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a change to gain adherence. But today there are not such conditions. The country is not in despair; the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it."[21]

In South Africa, the self-same fears, fuelled also by racial concerns, led to the Suppression of Communism Act 1950. It was enacted by the Nationalist Party government which, at about the same time as Menzies was elected to office in Australia, began the long political hegemony which continues in South Africa to this day. The Suppression of Communism Act of South Africa was later to be renamed the Internal Security Act. It remains a cornerstone of the exceptional control wielded by the Executive Government of that country and enforced by its courts.

A glance at the South African Act reveals familiar provisions. Section 2 provides that the Communist Party of South Africa "is hereby declared to be an unlawful organisation". Provision is made in the same section for

similar declarations to be made in respect of other organisations "propagating the principles or promoting the spread of Communism". Section 3 provides the consequences following a declaration that an organisation is unlawful. Thereafter, no person may become a member or office bearer or display anything that indicates an association with the organisation or take part in its activities. All property is forfeited to the State and vested in a liquidator. The powers and duties of the liquidator are provided by s 4. They bear a remarkable similarity to the provisions of the Australian Act. The section also contained a provision by which a list of communists was to be presumed to be correct unless proved otherwise.[22] Section 12 of the South African Act contains provisions for the proof of association with an unlawful organisation by reference to presence at meetings or earlier advocacy or defence of its objectives.

More interesting than a study of the South African Act in its original form is a consideration of the amendments which, in the 40 years of its existence, have accrued around the core provisions. They reflect what might have been if Dr Evatt's battle against the referendum on communism had not succeeded in Australia. Of course, we might have regained our senses. We did not have here the pressure of racial concerns that beset the South African ruling group. Perhaps our institutions were closer to the British tradition and would have rescued us from such folly. But as an instrument of oppression, the South African Suppression of Communism Act

illustrates the path which the Communist Party Dissolution Act proffered to Australia. The South African Act - as expanded - provides power for the prohibition of certain publications and for restriction on the publication of newspapers.[23] It provides for the prohibition of certain gatherings.[24] It bans certain persons from being within defined areas.[25] It provides for the forfeiture from elected office of communists and persons in or supporters of unlawful organisations.[26] It contains power for a Minister, not a court, to require a person given a notice under the Minister's hand to report periodically at a police station.[27] Apart from fines and imprisonment, the Act provides for the expulsion from South Africa of a person who is not of South African citizenship or birth and who has been convicted under the Act. No action for damages lies and no criminal action may be instituted by a person or body named as a communist under the Act.[28]

The definition of "communist" contained in the original South African measure was very wide.[29] The power of the Executive Government to declare an organisation unlawful on the basis of "satisfaction" that it meets the criteria in the Act has been held to be absolute and unassailable unless proved to be actuated by mala fides. The audi alteram partem rule does not apply.[30]

The United States of America had its constitutional guarantees and a Supreme Court of changing composition to rescue it from the wrongs of the McCarthy era.[31]South

Africa had no similar guarantees. The entrenched clauses of its Constitution were ultimately overcome.[32] In Australia, there were no applicable constitutional guarantees in the conventional sense.[33] The first round had been won by the Government in Parliament. The Dissolution Bill was duly enacted. In the second round, the Australian battle moved to the High Court of Australia.

THE HIGH COURT PRONOUNCEMENT

Once the Dissolution Act became law, an immediate application was made to the High Court to restrain the implementation of its powers until they could be tested. Justice Dixon refused to issue a general injunction. However, he directed that no persons should be "declared" under the Act nor property seized until questions of law stated by him could be decided upon by the High Court. He referred the case to the Full Court.

The Full High Court commenced its hearing without delay. Formally, the Full Court was required to hear a case stated by a Justice raising questions of law concerning the validity of the Dissolution Act. The defendants were the Commonwealth, the Governor General, senior Ministers and the receiver of the property of the Australian Communist Party. The plaintiffs were the Australian Communist Party, the Waterside Workers' Federation of Australia (WWF) and a number of unions and union officials apprehensive about the Act. The line-up at the Bar Table was remarkable. The Commonwealth's case was led off by Mr G E Barwick KC, later

to be Chief Justice of Australia. His two leading juniors were Mr A R Taylor KC and Mr W J V Windeyer KC, both later appointed Justices of the High Court themselves. Mr Windeyer was later to play a leading part in the Royal Commission on Espionage in which Dr Evatt was also to be locked in battle.

At the other end of the table were a number of barristers of courage who appeared for the Communist Party. They were led by Mr E A H Laurie and Mr W F Paterson. But the most remarkable figure, appearing for the WWF and the Federated Ironworkers' Association of Australia and officers of those unions - was Dr H V Evatt KC. With him were Simon Issacs KC (later to be a judge of the Supreme Court of New South Wales) and Gregory Sullivan (later to be Solicitor General of New South Wales).

Evatt's acceptance of the brief for the WWF caused great consternation in the ALP. It was feared that this would associate him too closely with communists and communism. Although ethically correct and professionally sound his judgment, in accepting the brief, was decried as "politically very, very foolish".[34] But Mr Chifley, then Leader of the Opposition, would not intervene to contest Evatt's decision. Later he defended it in Parliament against the relentless barrage of insinuation and direct attack from the Government benches.

The case was not the first time that issues relating to communism had come before the High Court of Australia. In 1933, the Court, including Justice Evatt, had held that an

offence alleged against the publisher of a newspaper of the Communist Party of Australia was not proved either by the averments in the information brought under s 30A of the Crimes Act or in the evidence called.[35] In the course of his reasons, Justice Evatt referred, with obvious knowledge and authority, to the nature of the doctrine of the Communist Party.[36] But he revealed his libertarian bias by indicating the narrow confines within which a valid Federal law suppressing the advocacy of ideas could be enacted under the Australian Constitution. The words were to prove prophetic:

> "It may be contended that ... the Crimes Act seeks to prevent the dissemination of doctrines which advocate, or tender to encourage, the use of force with the immediate object of overturning the Government of the Commonwealth. On the other hand, if the Part of the Act looks further ahead, and proposes to prevent all advocacy of Communism as against Capitalism, it may be largely invalid. The Privy Council has determined that none of the lawful subject matters of Commonwealth legislative power 'relate to that general control over the liberty of the subject which must be shown to be transferred if it is to be regarded as vested in the Commonwealth.' Attorney General for the Commonwealth v Colonial Sugar Refining Co [1914] AC at 255; 17 CLR at 654. ... I protest against the growing tendency to assume, without argument or proof, the existence of 'inherent power' in the Commonwealth Parliament".[37]

When in 1949, during the Labor Government, Lance Sharkey, an officer of the Australian Communist Party was indicted on a charge of uttering seditious words and found guilty by a jury, the trial judge postponed judgment and sentence until certain contested questions could be

considered by the High Court.[38] The Court upheld the constitutional validity of the provisions of the Crimes Act under which Mr Sharkey had been convicted. The Attorney General for the Commonwealth at the time of the prosecution was Dr Evatt.

The same Dr Evatt rose in the High Court in Melbourne to attack the constitutional validity of the Communist Party Dissolution Act. From the start of argument it became clear that the Commonwealth would have no easy ride. Amongst the most energetic in their interventions were two Justices recently appointed to the Court by the Menzies Government - Justice Fullagar and Justice Kitto. They had received their commissions in February and May of 1950. The Communist Party case was to provide an immediate test for their judicial neutrality. They were not found wanting. Justice Kitto in argument observed:

> "You cannot have punishment that is preventive. You can't remove his tongue to stop him speaking against you. That is wide open to a totalitarian State."[39]

Dr Evatt took the Court back to the important earlier decision in Ex parte Walsh and Johnson; in re Yates[40]. This had been the first major case in which he had appeared as an advocate in the High Court. He reminded the judges of what Justice Isaacs had there said. "An act founded on the belief of the Minister as to the extent of a power was not an act in respect of the subject matter of the power."[41] The same had been said in the Bank Nationalisation Case.[42]

Judicial neutrality would require that it be said again in the present case. It was the Court, not the Executive or even Parliament which would determine the operation of the law. It was the Court which would consider whether what was done by the enactment fell in substance within or outside the relevant subject matter of constitutional power.[43]

The legal argument was extended over many days. Meanwhile, the nation went about its affairs: observing the cricket scores and watching the military developments in Korea. On 9 March 1951 came the result. It was a surprise to virtually everyone in Parliament, except Evatt. The High Court (Dixon, McTiernan, Williams, Fullagar and Kitto JJ; Latham CJ dissenting) held that the Communist Party Dissolution Act 1950 was ultra vires the Parliament of the Commonwealth and invalid. Specifically, it was held invalid because its provisions did not prescribe any rule of conduct or prohibit specific acts or omissions but dealt directly with bodies and persons named and described. The Parliament itself had purported to determine or empower the Executive Government to determine the very facts upon which the existence of constitutional power depended. Parliament could not validly recite an enactment into constitutional validity. In the state of ostensible peace existing at the time, the Act could not be supported under the defence power.

The majority judgments were scathing about the Act. They bore out Evatt's prediction of the adverse reaction of the High Court. Justice Dixon (later to be Chief Justice of

Australia) repeatedly noted the use of words which he described as "rather vague", "most indefinite"[45] and "most uncertain".[46] He observed:

> "History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within institutions to be protected. In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based on a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the form of government they defend."[47]

This is not the place for a detailed exposition of the reasons of the High Court in the Communist Party case.[48] Commentators have suggested that the High Court, in this and other cases, was being "more pragmatic ... than its reasoning suggests."[49] The decision has led to speculation about how, if at all, the Act might have been redrafted to avoid the strictures of the Court.[50] Many Federal statutes, before and since, have been expressed in the vague language of generality. Many penal provisions have contained reversals of the normal onus of proof. However, these are "might have beens". The 24 days of argument and nearly 1500 foolscap pages of transcript came to a halt in the judgment which destroyed the fulcrum of the new government's legislative design for a communist-free Australia.[51] It was one of the most important decisions of the Federal

Supreme Court.

The very fact that the Court had found against the constitutional validity of the Act became a cornerstone of the opposition to constitutional change which was then to unfold. As that opposition was but narrowly successful, it is fair to say that the High Court majority twice saved Australia from the dissolution and suppression of a political party deemed unacceptable by the Executive Government of the day - and from the greater dangers to which that course might have led.

THE REFERENDUM CAMPAIGN

Ten days after the High Court judgment in the Communist Party case was announced, Prime Minister Menzies persuaded the Governor General to dissolve both Houses of Federal Parliament on the ground that the Senate, controlled by the ALP, had "failed to pass" the Commonwealth Bank Bill. The Senate had referred the Bill to a Select Committee. Mr Chifley fought his last electoral campaign. The ALP won back 5 seats in the House of Representatives. However, the Coalition Parties retained Government and secured control of the Senate. They held 32 Senate seats to 28 held by the ALP.

Buoyed up with this success, Mr Menzies announced the intention to propose a constitutional referendum to overcome the obstacle presented by the High Court's decision. These were difficult times for Dr Evatt. He had only just overcome the challenge in the seat of Barton presented by the war heroine, Nancy Wake. Miss Wake had gone to the electors with

the cry: "I am the defender of freedom; Dr Evatt is the defender of communism".[52]

On 13 June 1951, whilst the Federal Parliamentarians were attending a Ball to celebrate the jubilee of the Constitution, Mr J B Chifley died. Soon after, Dr Evatt was elected leader of the Parliamentary Labor Party. He had many problems before him. He was vulnerable politically because of the marginal seat which he had just managed to retain. He was alienated within his party - partly because of his intellectual and internationalist interests; partly because of his brusque, flawed personality. His party had traditionally depended heavily upon support from Roman Catholics. In many States there was a close personal link with senior members of the clergy. Dr Evatt himself often called on Dr Mannix, the Catholic Archbishop of Melbourne and shortly to be his deadly foe. Evatt knew of the support amongst many Roman Catholics for the Menzies Government's efforts to suppress communism. But he also saw the assault upon conventions which was involved in the Dissolution Act. He had a lawyer's respect for constitutional conventions - those which seemed fundamental to our political arrangements. In his book, The King and His Dominion Governors, he had remarked that "It is often impossible to tell whether the conventions are being obeyed, because no one can say with sufficient certainty what the conventions are".[53] But in the attempt to insert the dissolution of the Australian Communist Party, as such, in the Constitution,

Evatt clearly saw a breach of a most fundamental convention. And a dangerous one. The support for his stand within the ALP was mixed. In many quarters it was distinctly muted. But from the first, his own resolve was unshakeable. It is this which makes his victory in the referendum campaign the more remarkable and admirable.

The Government prepared to put the matter to the people by referendum. It introduced a proposed law known as the Constitutional Alteration (Powers to Deal with Communists and Communism).[54] The law proposed inserting in the Constitution the following new section:

> "51A(1) The Parliament shall have power to make such laws for the peace, order and good government of the Commonwealth with respect to Communists or Communism as the Parliament considers to be necessary or expedient for the defence or security of the Commonwealth or for the execution or maintenance of the Constitution or of the laws of the Commonwealth.
>
> (2) In addition to all other powers conferred on the Parliament by this Constitution and without limiting any such power, the Parliament shall have power -
>
> (a) To make a law in the terms of the Communist Party Dissolution Act 1950
>
> (i) Without alteration; or
>
> (ii) With alterations, being alterations with respect to a matter dealt with by the Act or with respect to some other matter with respect to which the Parliament has power to make laws;

(b) To make laws amending the law made under the last preceding paragraph, but so that any such amendment is with respect to a matter dealt with by that law or with respect to some other matter with respect to which the Parliament has power to make laws; and

(c) To repeal a law made under either of the last two preceding paragraphs.

(3) In this section, 'the Communist Party Dissolution Act 1950' means the proposed law passed by the Senate and the House of Representatives and assented to by the Governor General on the Twentieth day of October One thousand nine hundred and fifty, being the proposed law entitled 'an Act to provide for the dissolution of the Australian Communist Party and of other Communist organisations, to disqualify Communists from holding certain offices and for purposes connected therewith."

If only on the ground of verbal infelicity (and by way of contrast with the austere and sparse language in which the Australian Constitution was drafted at Westminster), the proposed additional words would have offended a constitutional purist like Evatt. But the attempt to revive and breathe spirit into an Act which had so lately been destroyed in the High Court of Australia re-energised him for the fight both in Parliament and before the people.

There is a certain irony in the obligation which was thus cast on Dr Evatt to resist a measure for the alteration of the constitution. Between 1944 and 1948, during the Labor

Government, he had proposed and supported 5 measures for the amendment of the Constitution, only one of which (social services) was accepted. His 1942 speech, with its proposals to amend the "horse and buggy Constitution" to permit Australia to cope with the post-war era, was deemed sufficiently important to the legal profession for it to be reproduced from Hansard in the Australian Law Journal.[55] Amongst other things he said:

> "[E]vents have proved that the Constitution which the Australian people adopted in 1900 is flexible enough for the needs of War. But it is equally true that it is not flexible enough to serve Australia in the great task of post-War reconstruction ... The defence powers of the Commonwealth are contained in a few general words, to which the courts have been able to give a sufficiently wide interpretation to meet the situation of totalitarian War. By contrast, the peace-time powers of the Commonwealth though numerous and detailed are hedged round with severe limitations. Although they were written down in the 1890s, many of the words and phrases were simply transcribed from the American Constitution of 1787. The general approach belongs to the horse and buggy age of social organisation ... Only three [proposals for amendment of the Constitution] have been accepted. A great many reasons for this have been advanced. I suggest that the real reason is to be found not in any theory of popular inertia or popular ignorance but in the fact which is so obvious that no one takes any account of it. Both in the United States and in Australia the few amendments that have been passed have been specific. They have not merely sought to give a power but have indicated, though often in broad terms, what is in fact to be done. When it is proposed simply to give a power the proposal leaves room for fear that the powers will be exercised in some way that is objectionable."

Heeding this warning, the Menzies Government proposed both a

general power and a specific one. It left no doubt as to exactly what the Government wanted to do. Introducing the Bill for the alteration of the Constitution, Mr Menzies resorted to paternal omniscience:

> "It will be readily agreed in this place that the Government is in a better position to judge of the dangers of war or of the existence of international emergency than any outside members of the public. It has confidential sources of information, some of which are on the highest level. It has a widespread series of diplomatic missions in other countries. It frequently cannot say all that it knows. It can never disclose all its sources. The judgment of the High Court therefore no doubt with complete legal accuracy, discloses a serious defect in the powers of the Commonwealth to deal with an emergency before it has developed into war or to deal with an obvious imminence of war."[56]

It was in this speech. and not for the last time, that Menzies called in aid the judgment of the Supreme Court of the United States in Dennis. Only the majority judgments were read. Menzies explained the inclusion of the specific measure not as a matter of pride but because of the unique problem facing the nation. Ominously, he referred to the communist "Fifth Column" which would fight the Bill.

When the debate on the second reading of the Constitutional Alteration Bill resumed, the Leader of the Opposition rose to speak. Mr W C Wentworth objected on a point of order. He urged that, as Dr Evatt had appeared as counsel in the High Court, he could not be heard but by leave of Parliament. The Speaker upheld the objection. It was an unanticipated ploy designed to disrupt Dr Evatt's

presentation. Eventually, however, Dr Evatt came to the substance of the matter. He explained the opposition to the Bill in language both powerful and passionate:

> "This is a Bill of very great significance and importance. If Honourable Members analyse it fairly they will find that it represents a direct frontal attack on the established principles of British justice. It goes much further than the legislation which was recently held by the High Court of Australia to be unconstitutional. I think I can establish that this is one of the most dangerous measures that has ever been submitted to the legislature of an English-speaking people. I do not think that a Bill of this character would receive a moment's consideration from the Mother of Parliaments, the British Parliament for in that Parliament traditions of political liberty and established justice are always recognised and are indeed all powerful."[57]

Carefully, Dr Evatt traced the conference resolutions of the ALP at conferences from 1948 to 1951. These repudiated the methods and principles of the Communist Party. But they expressed abhorrence to measures to declare a political party banned. Repeatedly, he insisted that the High Court had ruled the earlier measure unconstitutional - as if to cloak his opposition to the Bill with the authority and propriety of the Court's determination. He pointed to the vagueness and uncertainty of who was a "communist". And the measures that could be introduced against people on that ground.[58] He pointed out that the High Court would not be empowered to make a decision on the matter dealt with. The decision would be made by Parliament. There would be no provision for appeal. There would be no constitutional challenge to the

"dragnet powers of the Government":

> "Without using any legal process, the Government could take action against any persons who belonged to the group mentioned or who subscribed to the theory mentioned. It would be subject to no restraint whatsoever."[59]

His stance was clear:

> "We believe that if a Communist commits acts of sabotage or engages in seditious enterprises, he should be dealt with under the ordinary criminal law. That is the principle upon which Labor Governments have acted. ... When a Communist leader in Australia talked about welcoming the foreign army that might land on these shores, a Labor Government invoked the existing Crimes Act against him and he was tried before a jury. In other similar cases some men were convicted and others were acquitted."[60]

Evatt criticised the failure to fulfil an electoral commitment to review the laws of sedition and subversive activities. That was the proper way, he declared, to attack this problem. Instead, a "fatal blunder" had occurred in considering that war could be waged "upon a set of political ideas and upon a hopelessly weak political party - the Communist Party".[61]

Dr Evatt saw the proposed referendum as nothing less than an attack on the rule of law:

> "In order to preserve the rule of law in Australia, we must ensure that the people will reject this proposal at the referendum. All that the High Court has done, in effect, has been to refuse to allow this Government to legislate against the ideologies of a political group. It has never refused to allow the Parliament to legislate against crime. If an individual is guilty of a crime against his country, including the crime of conspiracy, we

> say that he should be prosecuted. The Government has in its hands in the shape of the Crimes Act the weapon that it can use against such a person, but it appears not to be worried whether crimes have been committed. It wants to proceed against certain individuals because they hold particular political ideas, either alone or in common with others. We say that mere ideas or beliefs do not enter into the picture and that what matters is what a man does or attempts to do. We say that no man should be convicted, or deprived of civil rights, merely because he holds certain beliefs, any more than that he should be allowed to justify the commission of some crime on the ground that he held such beliefs. It is not the beliefs but the crime that matters. The government has convulsed the politics of the country and engaged in a witch-hunt to track down and ban a Party or disqualify the members of a Party irrespective of any overt acts of proved criminality."[62]

After a further appeal to judgments of the High Court and an endeavour to distinguish the Dennis case, Evatt reached his conclusion. He appealed to the Universal Declaration of Human Rights signed in 1948 in the passage of which he had played such a leading part:

> "Having failed once to achieve its purposes the Government is now bringing up the matter a second time. It wants in effect to reject the Declaration of Human Rights and wants Australia to join the totalitarian States in respect of such matters. The Australian Labor party believes that the Australian people will prefer to retain those safeguards and that they would not possibly accept a measure of this kind. ... In this great democracy the people are being asked to adopt totalitarian methods in order to defeat the totalitarian doctrine of Communism. For those reasons we shall urge the people of Australia to reject those proposals. ... To support an alteration of the Constitution as we are now asked to do would be to become a party to tyranny and injustice. The Australian people therefore should be asked to reject the measure and to refuse to put a fascist and totalitarian blot on their Constitution."

THE "TOTALITARIAN BLOT" FAILS

The debate in Parliament and before the public was bitter. The speech by Dr Evatt was followed immediately by Mr Harold Holt. He was then the Minister for Labour and National Service and was later to be Prime Minister. He opened his address with words which were to recur throughout the referendum and that were to haunt Dr Evatt for the rest of his political life:

> "The House has just been listening to the most notable defender of Communism in Australia. The Leader of the Opposition (Dr Evatt) has spoken at considerable length and, at times, with some degree of fervour in a role in which this country is becoming increasingly accustomed to see him in both the Parliament and the law courts."[63]

Mercilessly - and with some justice - Dr Evatt was criticised for inconsistency in voting for the Communist Party Dissolution Bill when it passed through Parliament. He was criticised for appearing in the High Court. He was taunted for the fall in his personal vote in the seat of Barton. He was chastised for his attacks on communists when in Government, and his defence of them in Opposition.

The following day, the proposal was pressed through the House. There were 64 votes in favour and 41 against. The Labor Party stood firm behind Dr Evatt on this occasion. Stung by the criticism of alleged inconsistency, Evatt himself read from what Menzies had said in Parliament in May 1947. He had then expressed the view that "these people should be dealt with in the open",[64] opposing a ban such as

now proposed.

At the beginning of the campaign opinion assessments were certain that the proposed amendment would be carried with 80% of eligible voters voting for it.[65] Buoyantly, Mr Menzies opened the Government's campaign at the Canterbury Memorial Hall in Melbourne on 5 September 1951.

> "You now have a chance to arm your Parliament with power to deal with our most dangerous internal foe. If you reject it, it will not come again. This is the one great chance. When the choice is between freedom of our nation and the freedom of a highly organised, disciplined and conspiratorial group of enemy agents, my choice, your choice, must be the freedom of the nation."[66]

The newspaper reports disclose that 21 persons, including 5 women, were ejected from the meeting. A number of them gave the "communist clenched fist salute". One report continues:

> "At one stage Senator John Gorton (Lib Vic) who was sitting in the second row from the front rose shaped up to an interjector seated behind him. ... When one interjector was particularly noisy, Mr Menzies said to cheers: 'He is just one of Dr Evatt's Reds; don't worry about him'."[67]

In the way of those times, the Menzies case appeared on the front page. Later the Evatt case appeared, without neutrality under the heading "Reply to Vote 'Yes' Case" on an internal page. Dr Evatt spoke in Canberra. He urged that the Government's referendum proposals would "permit Australia to be turned gradually into a fascist state to the prejudice

of democracy and of British justice".

As it happened, the referendum followed closely upon a major law conference which was held in Sydney. Lord Jowitt, the Lord Chancellor of the United Kingdom, was injudicious enough to buy into the Australian political scene. He was reported as saying that no such measure against communism would be considered in Britain as it was "contrary to the British tradition". It is a sign of those far-off times, that this opinion of a visiting Law Lord was elevated into a point of major national importance. Subsequently, Lord Jowitt, after seeing Mr Menzies, revised his comment. But Dr Evatt pointed out that even the revised and enlarged statement still made the point that the measure "would not accord with our traditional practice and outlook".

The Sydney Morning Herald the following day deplored the "sectarian bitterness" which had been injected into the campaign by advocates of a "No" vote. "Cool and informed judgment" was what was demanded, "not virulent partisan attacks on the Menzies Government".

In the letters column, the President of the New South Wales Liberal Party wrote from Ash Street that:

> "If any further evidence were needed of the urgent necessity to grant the Commonwealth power to deal with Communists that evidence was furnished in the most forceful manner at the opening by Mr Menzies of the 'Yes Campaign' on Tuesday. No radio listener could have missed the hatred and virulence of the Communist's unbridled and disgraceful efforts to deny the Prime Minister the common right of free speech. ..."

Compared to the hour long interruption of that common right of free speech (in which Mr Menzies plainly revelled), the indefinite interruption to the civil rights of political organisations seemingly melted into insignificance.

On 7 September Dr Evatt spoke to 500 railway workers at the Eveleigh Workshops in Sydney. He warned about the fascist tendencies which he said were abroad. His audience was contrasted with 3,000 people who packed the City Hall in Brisbane to hear Mr Menzies open the "Yes Campaign" in that State. Introducing the Prime Minister, Mr C G Wanstall, President of the Queensland Liberal Party and later Chief Justice of Queensland, called for better audience behaviour. Mr Menzies declared to the audience that "he had not found one good robust word from Dr Evatt against communism".

After the first week of the campaign, the Sunday Herald declared that the referendum had become a "Menzies-Evatt duel".[68] Dr Evatt, who hated air travel, had travelled more than 9,000 miles by air in support of the "No" case. The staff correspondent with him observed:

> "Despite Dr Evatt's personal optimism about the outcome of the referendum it is clear that this confidence is not shared by some Labour Party supporters in all States. In private conversation many of them who traditionally support the Labour Party find their loyalties divided on this occasion because of their hatred of Communism. It is obvious that in Victoria there is a serious division among the rank and file of the Labour Party on the referendum."

On the following day Mr Menzies was in Perth declaring that after the success of the referendum the Act "will have

instant validity ... and before Christmas we will have some of these Communists routed".[69]

By the middle of the second week, the Sydney Morning Herald was firming up. To "play safe", it declared, meant placing a ban on the Communists. To "play safe" it was necessary to heed the Government call and not Dr Evatt's demand to leave the constitution alone.

In Adelaide, Mr Menzies told 1,200 supporters that his opponents were becoming "desperate". Thousands of "good honest labour people would vote yes", he said. The former Prime Minister, Mr W M Hughes MP, 87 years of age, addressed 600 students at Sydney University supporting the yes vote. The students were reported to have cried "Oooo" in mock horror when Mr Hughes said "The Communist does not believe in Parliamentary government but in bloody revolution". He gained a laugh when he urged them "I hope you will turn a deaf ear to the calls of Communism and Dr Evatt".

Menzies continued to delight in the "rabble" who attended his meetings. Evatt's meetings were smaller - but there were more of them. Repeatedly, Evatt warned about the "fascist methods of arbitrary government by which politicians would themselves determine who would be declared as a communist ... slandered and deprived of property and civil rights. That is sheer totalitarianism of the Right - in other words fascism".[70]

By 14 September 1951, the Sydney Morning Herald was losing its patience with Dr Evatt. His concern was not "a

lofty concern for British justice but the opportunity for a stunt campaign against the Government". It concluded:

> "The referendum is essentially a non-party - a non-sectarian - matter. The question should be answered on its merits, which have nothing to do with the political complexion of the Government proposing it. It is a simple question: 'Should the freely elected Government of Australia, which is at all times answerable to Parliament and the Australian people, have the power it now lacks to deal with the Red Fifth Column in our midst?'"[71]

The Sunday Herald saw communist imperialism "on the march and in every free country its Fifth Column plots and waits the hour of betrayal to strike".[72] The vote was now but 6 days away. The next day, Mr R G Casey urged that only "active communists" had anything to fear from the referendum. Meanwhile, a number of leading Anglican churchmen had entered the debate. Almost with one voice they spoke against the proposal. They were, for their pains, assailed both by the Government and the newspapers.

Mr J T Lang joined the debate in the last week. He said that electors should reject the proposal because it sought to circumvent the High Court's judicial review. To deprive Australia's future generations of the protection of the High Court was to take "a step into the unknown" said this aged radical. By now the Party pressure was increasing. Big referendum meetings were held. Mr Menzies chose Hurstville, in Dr Evatt's Sydney electorate for a big final rally. Dr Evatt spoke in Adelaide. Mr E J Ward debated the issue at the Sydney Stadium with Mr W C

Wentworth. The blows were almost as vigorous as in a boxing match. In Sydney 8,000 people heard referendum speeches in the Domain. A visiting evangelist from London urged a "No" vote. Ten Protestant clergymen published a letter cautioning against accepting the change.

For his sortie into Dr Evatt's electorate Mr Menzies was greeted with cheers and boos. The hall was surrounded by 75 uniformed police. Mr Menzies called in aid a legal opinion supplied by "Mr Barwick KC and Mr Alan R Taylor KC that the powers which the proposed amendment to the Constitution would give the Federal government would be very restricted". He was greeted with "Heil Hitler".[73] The legal theme was taken up by the leading editorial in the Sydney Morning Herald on Tuesday 18 September 1981.[74] It was not possible to extend and pervert the power afforded under the question to include a church, a political party or a trade union other than communists or communism. But what did this mean - the doctrine had a degree of uncertainty about it. Mr Eric Willis wrote from Parliament House, Sydney criticising "misguided apologists for communism" and urging a yes vote.[75] Cardinal Gilroy, on the other hand, said in Sydney that people should vote according to their conscience; but that the Government should take "quick and effective action to deal with Communism because the people had clearly declared that that should be done". By now the campaign was reaching its last days. "This is why Communism must be rooted out" was the banner headline of the Sydney

Herald. Local "Reds" have paved the way, said an unidentified writer. Even more bold was the heading on the following day "The 'No' Case is Based on Misrepresentation". This took apart the official pamphlet issued in connection with the "No" case. Sir Arthur Fadden in his final broadcast on the referendum urged that a no majority would "leave communists free to continue their attacks on the Australian way of life".

By Wednesday of the last week, Dr Evatt was denouncing as "erroneous" the opinion published on the preceding day by "two leading constitutional lawyers".[76] They were described as "Mr Menzies' 'selected counsel'". On the Thursday the newspapers carried the report of Mr Menzies' last radio appeal from Canberra. It repeated the stress put on the advice of "two of the most eminent practising constitutional lawyers in Australia" that the proposed "power would not authorise the making of a law dealing with persons other than Communists". He appealed over the head of Dr Evatt to the Labor voters who were against the Government politically but "who regard the communists as the enemy of all us of". Dr Evatt, now himself at Hurstville, asked the people of Australia "to beware of the Government referendum proposals - to reject them and to take no risks". He was appealing to a well known propensity to caution in referenda of which he had been frequently the unwilling recipient.

Dr Evatt concluded every day of the campaign with a radio broadcast. His last campaign speech was on the

Esplanade at Bondi. It attracted 1,200 people. According to reports, he spoke simply, and from the heart. Commentators recorded that for once, this ungainly orator had spoken with great power.[77] He raised the spectre of the abolition of trial by jury, the suppression of members of trade unions, churches or professional bodies with the repeated invocation "I challenge", Dr Evatt saw the campaign out:

> "I challenge any constitutional lawyer to say just how far a power-drunk Government could go once it obtained these powers."[78]

On the same day Sir Arthur Fadden said that reports that the Government planned to sell TAA were "just fantastic lying propaganda". The Sydney Morning Herald, in its last editorial before the referendum urged that "our freedoms must be actively defended."[79] But they were talking about the freedom of some only of the citizens of the country. Mr Menzies in his final comment must have sensed a shifting mood:

> "I cannot understand, [he declared] how any Liberals can get alongside Dr Evatt and the Communist Party on this issue. Let them make no mistake. A 'No' victory will be a victory for the communists".[80]

The newspapers on the day of the referendum reported both major parties confident of victory. Mr J L Carrick, then General Secretary of the New South Wales Division of the Liberal Party, said that reports from six States indicated that there would be a "substantial victory" for the

referendum. Mr E G Wright, State Secretary of the Labor Party declared "There has been a terrific swing to the Labour Party in recent weeks". These were days before accurate opinion polls, telephone surveys and television advertisements. Nearly five million electors were registered to vote. The Leader of the Opposition was to spend the evening at home in Sydney listening to the results of the count. The Prime Minister was reported to be in Melbourne. The question posed to the electorate was:

> "Do you approve of the proposed law for the alteration of the Constitution entitled 'Constitution Alteration (Powers to Deal with Communists and Communism) 1951?"

The Sunday Herald on 23 September 1951 recorded the outcome: "Referendum Defeated".

> "Australians yesterday refused to give the Commonwealth Parliament power to outlaw Communists in time of peace. They voted 'No' decisively at the referendum to amend the Constitution to give Parliament that power. Four States said 'No' - NSW, Victoria, South Australia and Tasmania. 'No' majorities both overall and in States built up solidly until 11 p.m. But then, as country votes poured in, there was a dramatic turn. 'Yes' made a gain of 43,736 votes among the 665,970 voted counted between 11.10 p.m. and 2.15 a.m. The upsurge of 'Yes' votes, however, could not affect the issue although if it continues it may reduce the 'No' overall majority."[81]

The photograph on the front page was of Dr Evatt casting his vote at Kogarah. He had travelled more than 14,000 miles in his campaign. "Observers say that although his chances of defeating the Government proposals looked forlorn, he always

felt it could be done". The vote showed a substantial swing away from the Government. The size of the "No" vote surprised Liberal leaders. Sir Arthur Fadden, the Federal Treasurer, was reported as "sorely grieved".[82] "Once again the Australian people have shown their traditional reluctance to amend the Constitution", opined the Sunday Herald. But there were tributes to the "vigorous Labour campaign skilfully spearheaded by Dr Evatt who succeeded in convincing even many non-Labour voters that the anti-Communist power sought could be seriously abused".[83]

"Less politics and more work" was the call of the leader in the Sunday Herald. Australia had been through two general elections and a referendum within two years. In an article which had obviously been prepared with the assumption that the communists would be banned, the newspaper asked "Who are these communists?". Their pathetic numbers and total lack of a mass base were revealed by the struggle to collect more than a few names of those who had been the principal targets of so much heat and light.

The final vote in the referendum saw Tasmania finally swing into a "Yes" majority. Thus the Government secured three States (but not a majority of States) and 49.44% of the vote (but not a majority of the electors). The referendum therefore failed in accordance with the Constitution.[84]

DÉNOUEMENT AND REFLECTIONS

On the Monday following the referendum the Sydney Morning Herald editorial declared that the "fight against the

Reds must go on".[85] The staff correspondent acknowledged that the victory in the referendum had strengthened Dr Evatt's leadership of the Labor Party. Nevertheless, it noted pessimism within the Party as a result of the split developing in Victoria between those members of the Keon-Mullens group who had adopted a "passive attitude" to the official "No" campaign of the ALP. In Tasmania, the Labor Premier, Mr Cosgrove and most of his Ministers stayed away from a meeting which reportedly shocked Dr Evatt. It was a hint of worse that was to come. The referendum was an undoubted triumph for Evatt. With ferocity of purpose and clear sighted determination he had effectively turned a frightened and nearly unanimous people to reject the constitutional "blot". His energy in fighting the proposal was unbounded. Yet it had curious results.

Professor Crisp has suggested that, ironically, the referendum defeat actually saved Menzies' reputation by halting his slide into autocracy and authoritarianism.[86] Otherwise, suggests Kylie Tennant, Menzies would have been remembered "as a combination of McCarthy and Verwoerd".[87] Whilst this may be exaggerated, there is no doubt that Evatt's campaign saved Menzies - and a lot of decent people on the conservative side of Australian politics - from the worst excesses to which the referendum could have shifted Australia.

But the other irony is that the mantle of "defender of communism" was to endure and to hurt Evatt grievously in the

1954 General Election. In this, Menzies had the advantage of the defection of Vladimir Petrov at the critical time which he and Fadden used to full effect. Deprived of the ultimate crown, Evatt went on to his controversial role in the Petrov Royal Commission. There is little doubt that Evatt's view of the Royal Commission was strongly coloured by the view he had of the Government's actions in the referendum on communism and in the sensational handling of the Petrov defection. His embroilment in that Commission, whatever the rights and wrongs of it, contributed to the divisions in the ALP and eventually to Evatt's decline, erratic behaviour and removal from Labor leadership. But he still had fights for civil liberties to perform. His defence of staff, friends and other fellow citizens before the Royal Commission is another tale. To the extent that he was unfairly branded a "defender of communism" he, and the Party which he led, suffered greatly for the stance they took over the legislation to ban the Communist Party and communists in Australia.

Yet, looking back, that stance was more memorable than many of the acts of Government and more enduring than the ephemeral spoils of office. At stake was nothing less than the future of Australian political society.

Looking at the dramatis personae of those times, inevitably with the wisdom of hindsight, some judgments can be made. In respect of the referendum, Menzies emerges poorly. He was a fine lawyer. He must therefore have realised the departure which he was proposing from the

fundamental principles of British justice which he so often loudly and rightly espoused. One suspects that he was manipulating a political force which he knew had great electoral appeal. But that so many members of the Liberal Party, who stood in succession to the great Australian tradition of Alfred Deakin, should have supported such a measure now seems incredible. That so many fine people, whose later careers were to evidence their commitment to true liberal values were so strident in their denunciation of Dr Evatt and in their support of the anti-communist measures is somehow depressing. That even the Labor Party could not muster enthusiasm to defeat the Dissolution Bill in Parliament and later had to be virtually dragged to opposition to the referendum by Evatt is also rather discouraging.

But of three players, good can certainly be said. The first is Evatt himself. If he had achieved no other success (though there were many), his leadership in the defeat of the referendum campaign, against all odds, was a wonderful and lasting contribution to the political ethos of this country. An ethos of tolerance, adherence to the rule of law and respect for human rights was preserved. An ugly, authoritarian "blot" on the Australian Constitution was avoided.

The High Court of Australia as an institution also emerged with its reputation for judicial neutrality and legal wisdom enhanced. The clear sighted appreciation of the

majority of the danger for civil liberties of this vaguely worded draconian statute began a course which ended with the defeat of the referendum. The majority Justices, assisted by Evatt with his still very considerable legal authority as counsel, prevented a transient majority in Parliament from doing a terrible wrong. On the other hand recent research has shown that Chief Justice Latham, former conservative Deputy Prime Minister and a long-time passionate opponent of communism, admitted in a letter to Sir Earle Page to having "had an informal talk with the Prime Minister" [Menzies] about the defeated Act and to have "made some suggestions to him".[88] Such contact upon such a measure and in such circumstances has, naturally enough, attracted strong criticism. Latham appears to have belatedly appreciated that this would be so as his papers show evidence of "careful pruning".

Nevertheless, at critical moments in our nation's history the High Court of Australia has taken reluctant governments back to fundamental principles. Even in recent times it has repeatedly done so. It has defended against vague legislation the basic right to claim legal professional privilege[89] and protection against self-incrimination.[90] It has kept an Anti-Corruption Commission within the ambit of a power to make inquiry and not publicly to appear to substitute itself for a judge and criminal jury.[91] Not always does the High Court reach the heights that its own members[92] or other observers[93] might wish. But it is not

true to say that Australia is without constitutional protections for basic rights.[94] And in the Australian Communist Party case, the High Court showed how basic rights in the Australian Constitution may sometimes be preserved by the judicial branch of government until the political process, with inspiring leadership, had righted itself.[95]

Thirdly, the people of Australia must be celebrated. Their rejection of succeeding constitutional referenda is a source of despair in many quarters. It keeps Australia, constitutionally speaking, a "frozen continent".[96] It sometimes frustrates the legitimate needs of modern government. It shifts the forum for constitutional change to the courts rather than Parliament or the people. Yet there would be few observers today who would not acknowledge the wisdom of the narrow vote taken on the sunny Saturday in September 1951 when an extraordinary measure against communists was defeated. Time has vindicated that vote.

Are there any lessons from these far-away battles for contemporary Australia? Was this a unique political aberration in the history of our democracy? Or does it reveal a deeper vulnerability of our institutions to which we should attend as we approach the centenary of the Federal Constitution?

First, I believe that it shows the Federal polity of Australia in a good light. Had the Communist Party Dissolution Act been enacted in New Zealand, there would have been no constitutional inhibition to the operation of the

Act. Just as in South Africa, it would have taken its course, unless some early version of Sir Robin Cooke's notion of "rights which go so deep" that even Parliament cannot abolish them[97] had captured the imagination of earlier New Zealand judges. In Australia, the limitation and division of powers under the Federal Constitution came to the rescue of an over-enthusiastic Government, new to office. It put brakes on what it wanted to do. Federalism is often decried for its inefficiency. There is no doubt that inefficient it sometimes is. Evatt himself recognised and deplored this often enough. But it is also a system of government peculiarly well suited to a time of the concentration of great executive power. Its merits were shown in a bright light by the brake which the lack of Federal power put upon the enactment of the ban on communists.

Secondly, despite the learned contemporary legal opinion to the contrary, it should not be assumed that the law would have been confined in its operation to "communists" who happened to be members of - or associated with - the Party of that name. The referendum would have given power over communism and communists as such. A body of political doctrine is necessarily ill-defined. Views about the boundaries of "communism" would have differed in the judiciary, as in the community. Proof of those boundaries could have been infinitely difficult. But the very vagueness of those terms would have imperiled many citizens whose only offence might have been a concern for the oppressed, a

sympathy for the causes of world peace or a radical view of social policy at home. Nor should the potential for inhibition and a chilling effect on the part of the referendum proposal, and the laws it would, if passed have authorized, be under-estimated. Perhaps it was this fear, and the scarcely veiled threats even to members of Federal Parliament itself, which finally galvanised reluctant members of the Australian Labor Party behind their Parliamentary leader.

Thirdly, it will be seen how readily the politics of Australia became debased in 1951 by fear of a foreign enemy. A streak of xenophobia is never far from the surface in Australian public life. It has been so from the very first days of the arrival of the First Fleet. Then the feared enemy was La Perouse, who sailed up the coast just behind Phillip. Later it became Kanack workers and the Chinese imported to the goldfields. Then it was the non-white "hordes" to the North. Today there are modern equivalents. We should take heed from this feature of our public life and be alert to its symptoms in contemporary Australian society to engage in witch-hunts and to search for scapegoats for the perceived ills of society.

Fourthly, the crucial, pivotal role of the High Court of Australia in our constitutional arrangements was demonstrated. The need for judges of courage, impervious to the whims of popular opinion (yet not ignorant of them) was shown in this case as rarely before or since. The nation was

fortunate to find, at a critical moment, a political leader who was also a barrister and former Justice, who was imbued with a strong sense of constitutionalism and who could, by process of the law, persuade and encourage the members of the High Court bench to affirm fundamental principles which so many others could not, or would not, see and which that Court earlier and later had not seen so clearly as in the Australian Communist Party Case.

Fifthly, it is important to observe that the proponents in the Coalition Parties of the Communist Party Dissolution Act, and later of the referendum, were not evil men. As their many notable and patriotic achievements in a long period of government demonstrate, most were fine Australians. Yet, for a crucial moment, the politicians who marched behind the banner of Liberalism were guilty of proposals alien to our constitutional and legal traditions. They were also guilty of personal attacks and vituperation on Dr Evatt, sustained long after the referendum was lost, which, even by the robust standards of Australian politics, were shameful. To some extent the negativism of their stance displayed a vacuum in the philosophical underpinning of conservative politics in Australia which was to haunt those parties after they eventually lost government in 1972.

Sixthly, the importance of political leadership was clearly demonstrated. This was a time before transient opinion polls and instant television ratings. It was a time of radio campaigning, town hall meetings and oration in the

Domain. It is necessary to question whether the changes in the Australian media which have occurred in the last forty years would have facilitated the Evatt campaign against the referendum. Or would the modern age, in which so much deference is shown to passing opinion, have caused a vulnerable political leader to bend to the 80% of his fellow citizens said to support the referendum when it was first proposed? In some matters it is vital to secure leadership fashioned by principle and honed by knowledge of our constitutional history and conventions. Unfortunately, we have seen departures from such conventions, often for reasons of transient political expediency. The list grows longer every year. On such questions it is necessary to have a political voice of principle. No politician is invariably principled. Dr Evatt made many mistakes in his political career. But when a big test came, he saw the vital principle at stake most clearly. And whatever the odds, he joined battle.

Had he not done so we might well have seen the adornment of the Communist Party Dissolution Act with the panoply of security measures now seen in its successor in South Africa. We might have seen the establishment of the Un-Australian Activities Committee. The arrests at midnight for nothing more than holding stigmatised ideas. The "declaration" of persons and organisations as "banned". Public stigmatization, name-calling, alienation. A witch-hunt society.

Sadly, the fate of political leaders in Australia - or indeed of other citizens - who take a stand on issues of principle concerning basic civil liberties is that they are generally denounced. Often by government and opposition alike and by the media and by their fellow citizens. Governments, Parliaments and private organisations in Australia rush headlong into proposals with serious implications for basic principles, riding so often the fleeting waves of perceived popular opinion. Woe betide anyone who dares to oppose that opinion; especially if he or she is a politician, dependent on popular support. The truth of these remarks may be seen in Australia's laws and policies on drug control, with more and more draconian penalties, police powers, prison building and other hard measures for a problem of public health. It may be seen in the unhappy proposal for a universal personal identifier (the Australia Card). It may be seen in the proposal to submit voiceless prisoners to compulsory AIDS tests and not to oppose the measure because there were "no votes in doing so". It may be seen in the repeated enhancement of the powers of Royal Commissions and anti-Corruption Commissions. It may be seen in the attitudes of governments of different political persuasion to traditional conventions safeguarding judicial independence. People in Australia who speak out against these perceived wrongs are relatively few. And when they do, for their pains, they are assaulted and reviled: just as Dr Evatt was when he was labelled the defender of communists

and communism.

Human rights matter most when they are most at risk. Ironically, this was a point which Chief Justice Latham made during the War in the Jehovah's Witnesses Case.[98] They were sorely at risk in our nation in 1951. Happy was Australia that at that time it found a champion for the constitutional traditions of tolerance and political pluralism and the preservation and protection of basic civil rights. History will judge the rôle of Dr Evatt in safeguarding those liberties, when they were endangered, as one of the most important of his many contributions to human society. "Defender of communism"? No. Defender of our peaceful liberties!

ENDNOTES

* President of the New South Wales Court of Appeal. Commissioner of the International Commission of Jurists. I am grateful to Sue Quill and Robert Beech-Jones for useful suggestions on the subject of this paper.

1. The Australian Communist Party & Ors v The Commonwealth & Ors (1951) 83 CLR 1.
2. Evatt told the ALP Caucus that he regarded the referendum results as "more important than a dozen elections". Federal Parliamentary Labor Party, Minutes, 26 September 1951.
3. R G Menzies quoted, without reference, by Kylie

Tennant, Evatt: Politics and Justice Angus & Robertson, 1970, 269 (hereafter Tennant).

4. Wool (Contributory Charge) Act (No 1) 1951 (Cth).
5. But see Human Rights and Equal Opportunity Commission Act 1986 (Cth), Preamble.
6. Communist Party Dissolution Act 1950 (Cth), Preamble.
7. Ibid, s 9(4).
8. Id, s 25(2).
9. Id, s 22.
10. Id, s 23(2).
11. Id, s 23(4).
12. Id s 30A.
13. See Tennant, 259.
14. Commonwealth Parliamentary Debates (House of Representatives) 27 April 1950, 1996.
15. Ibid.
16. Commonwealth Parliamentary Debates (House of Representatives) 10 May 1950, 2353.
17. Federal Parliamentary Labor Party, Minutes, 18 October 1950.
18. 18 USC par 2385. See also Subversive Activities Control Act 1950 (US) and Communist Control Act 1954 (US). The similarities between the Australian and South African statutes and the Smith Act suggest that the drafters of the former had the Smith Act before them. However, the Australian Act also appears to have drawn upon the Unlawful Associations Act 1916 (Cth).

The lastmentioned Act was considered by the High Court in Pankhurst v Keirnan (1917) 24 CLR 120. Its constitutional validity was upheld under the defence power. By s 4 of the Act, the encouragement of the destruction of or injury to property was proscribed. Its specific target was an "association known as the Industrial Workers of the World" (IWW). Section 2 of the Act declared the IWW (and other associations) to be "unlawful associations".

19. Dennis et al v United States, 341 US 494 (1951). In 1957 the Smith Act came before the Supreme Court again in Yates v United States 354 US 298 (1957). Although the Court purported to reaffirm Dennis it so narrowed the application of the Act that prosecutions were thereafter virtually abandoned. See Mathews, below, n 32, 117f.

20. Ibid, 580, 581. See discussion in M Coper, Encounters With the Australian Constitution, CCH Aust, Sydney, 1987, 371.

21. Ibid, 588.

22. Suppression of Communism Act 1950 (SAf.) s 8.

23. Ibid, s 6.

24. Id, s 9.

25. Id, s 10.

26. Id, s 5.

27. Id, s 10(4).

28. Id, s 27(2).

29. Id, s 1(2). See R v Sisulu 1953 (3) SA 276 (A). Contrast the 1982 re-enactment which did not define the Communist Party of South Africa or communism. See discussion The Law of South Africa 1989, Cum Supp Butterworths Limited re Internal Security Act 1982.

30. South African Defence and Aid Fund v Minister of Justice 1967 (1) SA 263 (A).

31. See Communist Party of the United States v Subversive Activities Control Board 367 US 1 (1961). Cf discussion "Communist Party Cases" in Supreme Court 1960 Term 75 Harvard L Rev 104 (1962). Cf Harris & Ors v Minister of the Interior & Anor (1952) (2) SA 428 (A).

32. See A S Mathews, Law, Order and Liberty in South Africa, Juta & Company Ltd, 1971, 267.

33. But cf Deane J in Street v Queensland Bar Association (1989) 63 ALJR 715, 737. In a number of his judgments, Murphy J developed the theme of implied constitutional rights. See eg Attorney General for the Commonwealth, at the relation of McKinlay v The Commonwealth (1975) 135 CLR 1, 74; McGraw-Hinds (Aust) Pty Ltd v Smith (1979) 144 CLR 633, 670.

34. J Ferguson cited Tennant, 262.

35. The King v Hush; ex parte Devany (1932) 48 CLR 487.

36. Ibid, 517.

37. Id, 518.

38. The King v Sharkey (1949) 70 CLR 121.

39. Cited Tennant, 267.

40. (1925) 37 CLR 36.

41. Ibid, 96.

42. Bank of New South Wales v The Commonwealth (1948) 76 CLR 1 at 186-7.

43. See Dr Evatt's argument summarised (1951) 83 CLR at 49ff.

44. (1951) 83 CLR 1, 177.

45. Ibid, 185.

46. Id, 186.

47 Id, 187-8.

48. L Zines, The High Court and the Constitution (2nd ed), Butterworths, Sydney, 1987, 196. See also by the same author "Mr Justice Evatt and the Constitution" (1969) 3 Fed L Rev 153, 168 where Evatt J's treatment of civil liberties during his period as a Justice of the High Court of Australia is examined. Professor Zines concludes that Evatt J "would have limited Commonwealth legislative power not for 'Federal' reasons but because of a concern to uphold traditional common law principles relating to the liberty of the individual and the independence of the judiciary". (ibid, 168). These values were to be reflected in his response to the referendum on powers to deal with communism.

49. Zines, 214.

50 Ibid, 212.

51. G Sawer, Australian Federalism in the Courts, Melbourne

Uni Press, London, 1987, 487.

52. Cited Tennant, 270.

53. See H V Evatt, The King and his Dominion Governors, 2nd ed, Frank Cass, 1967, xxxvii (Preface by K H Bailey, citing Evatt).

54. See 1951 Statutes (Cth) 275 (A Proposed Law).

55. (1942) 16 ALJ 160 at 161-2. See also E Campbell, Changing the Constitution - Past and Future (1989) 17 Monash Uni L Rev 1, 20-21.

56. Commonwealth Parliamentary Debates (House of Representatives) 5 July 1951, 1071-7.

57. Ibid, 10 July 1951, 1213.

58. Ibid, 1217.

59. Id, 1218.

60. Id, 1219.

61. Id, 1220.

62. Id, 1220.

63. Id, 1223.

64. Ibid, (11 July 1951), 1436.

65. Tennant, 285.

66. Sydney Morning Herald, 6 September 1951, 1.

67. Ibid.

68. Sunday Herald, 9 September 1951, 7.

69. Sydney Morning Herald, 10 September 1951, 1.

70. Sydney Morning Herald, 13 September 1951, 3.

71. Sydney Morning Herald, 14 September 1951, 2.

72. Sunday Herald, 16 September 1951, 2.

73. Sydney Morning Herald, 18 September 1951.

74. Ibid, 2.

75. Sydney Morning Herald, 18 September 1951, 2.

76. Sydney Morning Herald, 19 September 1951, 3.

77. Tennant, 285.

78. Sydney Morning Herald, 20 September 1951, 3.

79. Sydney Morning Herald, 21 September 1951, 2.

80. Sydney Morning Herald, 22 September 1951, 2.

81. Sunday Herald, 23 September 1951, 1.

82. Ibid.

83. Loc cit.

84. Australian Constitution, s 128.

85. Sunday Herald, 23 September 1951, 2.

86. L F Crisp, Ben Chifley, Longmans, Melbourne, 1957, 404.

87. Tennant, 260.

88. C Lloyd, 'Not Peace but a Sword! The High Court under G J Latham' (1987) 11 Adel L Rev 175, 202.

89. Baker v Campbell (1983) 153 CLR 52.

90. Controlled Consultants Proprietary Limited v Commissioner for Corporate Affairs (1984) 156 CLR 385, 393. See also Attorney General for the Northern Territory v Maurice & Ors (1986) 161 CLR 475, 490-1.

91. Tibor Balog v Independent Commission Against Corruption, unreported, High Court of Australia, 28 June 1990, 10.

92. Jago v District Court of New South Wales (1989) 63 ALJR 640. The Court denied a common law right to speedy

trial. The reference is to the contrary opinion of McHugh JA stated in that case in the Court of Appeal and earlier in Herron v McGregor (1986) 6 NSWLR 246 at 522.

93. Attorney General for New South Wales v Quin, unreported, High Court of Australia, 7 June 1990. The reference is to the author's opinion expressed in (1988) 16 ALD 550.

94. See Murphy J and Deane J above n 33.

95. On the other hand, whilst some of the reasoning and other private correspondence of the Justices, since available, shows that the High Court judges disavowed some of the draconian provisions of the Dissolution Act. Their reasons did not reveal frankly that disapproval. Like many other decisions, particularly at that time, the expressed reasoning tends to disguise the fundamental objections. Perhaps in some cases it even to reveals that the objections may not have been so fundamental. The latter conclusion is suggested by the fact that two years later in Marcus Clarke and Co Ltd v The Commonwealth (1952) 87 CLR 177 the High Court upheld the validity of an Act where the suggested source of Federal power (defence) depended on the opinion of the Treasurer. See Zines, above n 48, 202-5. See also Lloyd, above n 88, 199f.

96. This was Professor Sawer's description.

97. L v M [1979] 2 NZLR 519; Fraser v State Services

Commission [1984] 1 NZLR 116, 121. See also Building Construction Employees' and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations and Anor (1986) 7 NSWLR 372 (CA).

98. Adelaide Company of Jehovah's Witnesses v The Commonwealth (1943) 67 CLR 116, 123, 132.