Parliamentary Democracy in Australia

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Sir Garfield Barwick, a former Chief Justice of the High Court, delivered the following speech to The Samuel Griffith Society[1] in Sydney on 2 April 1995.

This paper will dwell upon aspects of parliamentary democracy for which the written Federal Constitution of the Commonwealth[2] provides, upon its essentials and mechanisms, for democratic government. The impact which the operation of the party political system has had upon parliamentary democracy since the turn of the century, but particularly during the past 30 years, will be pointed out. A comparison will be made between parliamentary democracy in Australia and the constitutional arrangements of the United States of America. In that connection, reference will be made to recent decisions of the High Court of Australia. Finally, the substance of the paper will be related to the suggestion that the Constitution be amended to remove the monarchy and substitute a president.

'Democracy', a word frequently misused, describes a system of government under which a community manages and controls the whole of its affairs without exception.

Only in numerically small communities occupying a relatively small territory can the community directly manage and control its affairs either in general meeting or by referenda. In general, the management of its affairs must be effected through some representative institution. In the case of parliamentary democracy, the parliament is the representative and responsible

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1. Information on the aims, objectives and activities of The Samuel Griffith Society can be obtained by writing to: The Secretary, The Samuel Griffith Society, PO Box 178, East Melbourne, Vic 3002.
2. Commonwealth of Australia Constitution Act 1901 (Cth) (hereafter 'Constitution Act 1901').

institution by which the community manages and controls all its own affairs.

The Westminster system of parliamentary democracy is thought by many to be the best system of government yet devised. It is the result of a long historical and practical process driven by a love of personal freedom by which the English people converted an absolute monarchy claiming to rule by divine right into a constitutional monarchy owing its authority to an act of parliament and having the rules of succession fixed by the parliament. The place of the monarch in that system is best understood in the light of English history.

As each Australian colony was afforded self-government it inherited the rule of law and parliamentary democracy with a constitutional monarch upon the Westminster pattern. It was natural therefore when, in the latter part of last century, the colonists decided to federate under a written constitution that they should accept the rule of law and provide for a parliamentary democracy.

When the Constitution of the Commonwealth was framed it was for a colony within the British Empire. The initiative for federation and the drafting of the Constitution was undertaken wholly by the colonists without intervention by the imperial government, except as to the terms on which appeals might be taken from Australian courts to the Judicial Committee of the Privy Council ('the Privy Council'). Whilst the colonists would have preferred there to be no such appeal, the imperial government was not prepared to leave what might be imperial interests to the Australian courts — hence section 74 of the Constitution under which the appeal to the Privy Council remains, except in a case involving a question as to relative constitutional powers of the Commonwealth and the States or as to such powers between the States (in section 74 described as a question 'inter se'). In other words, the resolution of those constitutional questions was left entirely to the Australian courts.

The colonists were drafting a Constitution for a colony within the British Empire, but the emergence of the independence of Australia could not then have been regarded as remote. Accordingly, the powers given to the imperial monarch and his government were limited to what we might call imperial concerns. Thus, the only powers given to the monarch by the Constitution were:

- to appoint and instruct the governor-general;
- to withhold assent to Commonwealth bills in case the governor-general reserved that matter for the imperial monarch; and
- to disallow a statute of the Commonwealth within two years of its passage.

In respect of the exercise of each of these powers, the imperial monarch would rely upon the advice of the imperial government.

But the powers to summon, prorogue and dissolve the House of Representatives and, if the conditions of section 57 were satisfied, the

parliament (both the House and the Senate simultaneously), and to appoint the federal ministry, were expressly vested exclusively in the governor-general personally. Although he is the representative of the monarch in Australia, he derives none of the above-mentioned powers nor indeed any power from his vice-regal position.

Sir Garfield: Chief Justice 1964-1981

When as a matter of fact Australia became independent, the territory of Australia was excised from the British realm and thereupon the imperial monarch and his government lost all legal authority to interfere in any way in the affairs of the Commonwealth. The imperial monarch and his government could only exercise such authority within the British realm which now did not include Australia.

But a new monarch emerged — an Australian monarch — separate and distinct from that of Great Britain, just as today it is separate and distinct from the monarchy of New Zealand or that of Canada. Further, the word 'Queen' in section 1 of the Constitution, which formerly referred to the imperial monarch, now referred exclusively to the Queen of Australia.

The Queen of Australia can only exercise the powers originally given to the Queen of Great Britain by the Constitution upon and in accordance with the advice of the Australian ministry, communicated by its prime minister.

Thus, on the emergence of Australian independence, the Australian monarch became bound to appoint as governor-general the person nominated for that office by the Australian ministry and could only give such instructions to the governor-general as that ministry advised. The power to withhold assent to legislation could only be exercised upon the advice of that ministry. In other words, the Australian monarch became a powerless figurehead and Australia gained all the advantages of a republic, except of course its description as such.

The fundamental basis of parliamentary democracy as under the Constitution is that the community itself is capable of managing and controlling the whole if its affairs without exception and that the majority of those elected to parliament will act in government for the benefit of the

whole community. In other words, the government will be truly democratic.

It must follow that the representative parliament must be fully sovereign as to all matters committed to it by the Constitution. Any limitation on that sovereignty is a limitation on the democratic control by the community of the whole if its affairs.

Both chambers of the parliament (House and Senate) are elected on the same universal suffrage. Members of the House of Representatives are elected to represent a constituency, an area thought to have common interests. The senators are elected by a state, voting as one constituency.

No revenue can be raised or money borrowed or money spent out of the consolidated fund, into which all receipts are paid, without the approval of the parliament. The annual presentation by the ministry of a budget covering both income and expenditure enables the parliament to control those receipts and expenditures. If the parliament refuses or fails to approve that budget and to appropriate funds to implement it, clearly the ministry does not have the confidence and support of the parliament and its tenure of office must be terminated and the community consulted.

The Constitution provides for the separation of powers, vesting the executive power in substance in the ministry (formally described as the Governor-General in Council),[3] the legislative power exclusively in the parliament, and the judicial power exclusively in the federal courts.

The members of the ministry are not elected as such: they are appointed, in his discretion, by the governor-general. The governor-general must choose as his ministers members of the parliament whom, in his opinion, would command the confidence and support of the parliament. Consequently a ministry is responsible to the parliament and through it to the community for the advice it gives and the acts taken upon it. The ministry is not appointed for a fixed term, in particular not for the term of the parliament. It is appointed to hold office during the governor-general's pleasure. This does not mean during his personal pleasure. It means in substance for so long as the ministry retains the confidence and support of the parliament. If that confidence and support is not obtained or is withdrawn, what has arisen is then in truth a deadlock between the ministry and the parliament, as the governor-general cannot retain in office a ministry which does not have the confidence and support of the parliament. In this event the tenure of the ministry must be terminated and the community consulted. The deadlock will thus be resolved. This will be done by the holding of a general election. That is a prime example of democracy in action.

The mechanism by which this reference of the deadlock to the community is secured is by the dismissal of the ministry if it does not resign or advise a dissolution. At that time, if there is no other group of members of parliament who could command its confidence and support, the governor-

3. Constitution Act 1901 s 63.

general must dissolve the House of Representatives or, if the necessary conditions exist, perhaps both chambers of the parliament simultaneously.

Thus, the mechanisms for the democratic control by the community of its own affairs consist of the election of a representative and responsible parliament, the appointment of a ministry responsible to the parliament to hold office so long as the ministry commands the confidence and support of the parliament, and the termination of the ministry's office and dissolution at least of the House of Representatives whenever that confidence is not obtained or is withdrawn.

It is evident from this description of the working of the Constitution that the essence of parliamentary democracy is that the parliament is in control of the ministry at all times and independent of it.

Perhaps it is worth mentioning that the Constitution, being that of a federation, provides for a Senate, a chamber of the parliament. The legislative power of the Commonwealth is vested in both of the chambers with the exception that the Senate may not initiate or amend a money bill, though the Senate must be a concurring party to all legislation including all appropriation bills.

THE PARTY POLITICAL SYSTEM

The paper now deals with the question of the impact upon parliamentary democracy of the party political system. The party system has tended to provide stability in government and activity in opposition. It is natural in a political party that a leader should emerge who will tend to give unity of purpose and of activity to that party. Consequently when the party secures a majority in the House of Representatives, the leader is certain to be chosen by the governor-general as the prime minister whose advice will be accepted in the selection of the other members of the ministry.

Since the appellation 'prime minister' emerged this century there has been a tendency to afford the prime minister presidential status and, in some cases, presidential authority. This has tended to mask the fact that in truth the prime minister is but the chairman and spokesman of the ministry which shares responsibility for all the acts of government. As he is the spokesman of the ministry, it is understandable that he should become prominent in the public perception and identified with the activities of government. None of this requires that the prime minister should have presidential status or presidential executive authority. If he is accorded these attributes it is likely that autocracy, rather than democracy, will become operative.

But this aspect of the impact of the party system on parliamentary democracy is not the major consideration in this paper. What can and does happen is that when a party achieves a majority in a general election there is a distinct tendency that the members of parliament who are members of that

party may become merely representatives in the parliament of their party rather than representatives of a constituency having obligations to the whole of the community. The party's view on a matter before the parliament will be endorsed automatically rather than the concerns of the constituency as a whole being independently considered.

Members of the party are required to vote for every proposal of the executive government under threat of personal disadvantage should they not do so. The disadvantage usually takes the form of the withdrawal of endorsement by the party when next they face the electorate.

Incidentally, to threaten or visit a member with a personal disadvantage because of the way the member votes or otherwise acts as a member of the parliament is itself a breach of parliamentary privilege, jealously guarded by parliament in asserting its independence of the executive. Members of parliament should be free to exercise their own judgment without fear of disadvantage in casting a vote or otherwise acting in the parliament. A parliament alert to maintaining its independence should see that its committee of privileges acts to prevent such a breach of privilege.

If a parliamentary party is allowed by any means to compel those members of parliament who are also members of the party to vote according to the prescription of the executive government, the role of parliament and its relation to the executive as designed in parliamentary democracy is reversed. Instead of the parliament in its independent judgment controlling the executive, the executive controls the parliament and the community has lost the democratic control of its affairs.

One further aspect of this impact of the operation of the party system on parliamentary democracy is that as things stand a governing party discusses and frames proposed legislation in the secrecy of its party meeting. What attitude the members of parliament take in that secret discussion is therefore unknown to the constituency. When the proposal is presented to the parliament as a bill those members will vote for it, come what may. Not only is the constituency deprived of the knowledge of the attitude its representative has taken in the party room, but the parliament itself is denied the benefit of the members' independent judgments.

The impact therefore of the party system is that the parliament is virtually turned into a rubber stamp in the hands of the executive. Thus, whilst the party system may have provided some stability in government it has, on the other hand, drastically altered the relationship of the parliament to the executive and the control of its affairs by the community itself.

It would seem that the problem for the immediate future is to restore the authority of the parliament as being in constant control of the executive government and of ensuring that bills presented to the parliament are openly discussed by the members of the parliament. No doubt to allow the members to exercise their independent judgments and to have a bill fully discussed in

the parliament would make the path of the executive government much less comfortable than now. It would probably result in a considerable slowing down in the rate of legislation. But it may be that that would not be a bad thing.

However, no matter what the problems and what the difficulties, if parliamentary democracy is to be maintained, authority, independence and openness of the parliament must be restored. Difficult as the problem might appear, it seems it must be faced and solved. This paper does not pretend to offer a solution; it is enough for present purposes to say that the problem exists and calls for a solution.

As the rule of law is an essential element of Australian government only that conduct which the law forbids or restricts is unlawful. Thus, freedom of speech, of assembly, of movement and of the ownership of property are all liberties enjoyed by the whole community. They are liberties of the community itself and are under its control through the parliament which is responsible to it. They are not rights of individuals enforceable against the community, although of course those liberties are enjoyed by all its individual members. The community itself will decide whether or not these liberties should be in any manner varied or curtailed. Therefore those liberties can only be varied or curtailed by an act of the parliament which has exclusive power to do so.

CONSTITUTIONAL ARRANGEMENTS IN THE UNITED STATES

It is convenient at this point to compare the situation under the United States Constitution with its amendments setting up the Bill of Rights of individuals. The United States Constitution was founded on a distrust of the community and of the congress to whom unlimited sovereignty was not given. Want of confidence in the majority of the community led to the entrenchment of individual rights as enumerated in the constitutional amendments. By entrenching those individual rights the constitution builders first of all diminished the sovereignty of the congress, thereby reducing the democratic control of its affairs by the community itself. These rights were expressed in words and therefore their construction and application were placed in the hands of an unelected and unrepresentative judiciary which thus has the ability to determine the parameters of the rights contained in the amendments. The decisions of the judiciary on these matters cannot be overturned or modified by the congress.

It would be quite fair to say that those liberties which were spoken of earlier — freedom of speech, of assembly, of movement, and of the ownership of property — are far more secure under a Westminster system of parliamentary democracy than they are in the United States where they are

in the hands of and subject to the vagaries of the judiciary. This until recently could also have been said of the position of those liberties in Australia. Our liberties could be protected by ourselves. But recent decisions of the High Court[4] have implied a constitutional individual right of free speech and by doing so have reduced the sovereignty of the parliament, withdrawn from the community its heretofore democratic control of its liberties, and vested it in an unelected and unrepresentative judiciary. The parliament cannot overturn such decisions even though in truth they may be unwarranted in law. It is exclusively a judicial function to construe the words of the Constitution. Like the entrenchment in the United States Bill of Rights, this is an undemocratic step.

Another thing the entrenchment of these rights in the United States Constitution did was to embalm, as it were, the views of the then current generation and place them beyond the reach of subsequent generations. Thus, today the American community may not deal effectively with the possession of firearms as the circumstances require. The attitude of a long past generation with respect to the possession of firearms cannot be altered. It needs little elaboration to show that this is a most undemocratic course and it emphasises that the United States Constitution is not wholly democratic.

As a side note, it might be pointed out that individualism, so highly promoted in the United States, is not democratic because it sets the individual against, and indeed above, the community and at the same time withdraws from the community the power to do what is right by the community as a whole.

FREE SPEECH UNDER THE AUSTRALIAN CONSTITUTION

In Australia, prior to recent decisions of the High Court, no one could have doubted that the Australian community had freedom of expression subject of course to the law of defamation, if that law really could be regarded as a reduction of freedom of speech. This situation could only be altered by an act of the parliament itself. No knowledgeable mind could doubt that the entrenchment of a constitutional right of free speech in the individual was not only unnecessary but inconsistent with the maintenance of parliamentary democracy. Such a mind could scarcely have imagined that there was any implication of an entrenched individual right in the Constitution. No word in the document suggests it and, as has been pointed out, such an implication is inconsistent with parliamentary democracy. But it has been so decided. In consequence, the sovereignty of the parliament has been impaired and

4. *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Aust Capital TV Pty Ltd v Cth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 68 ALJR 713; *Stephens v WA Newspapers Ltd* (1994) 68 ALJR 765.

the parameters of freedom of expression are now to be determined by an unrepresentative and unelected judiciary, whose decisions in this respect the parliament cannot reverse. Already the court has entered upon determining those parameters and has varied the law of defamation.[5] The Australian community has been landed with an undemocratic aspect of the United States Constitution. Instead of the matter being controlled by an act of parliament, it will be controlled by decisions of the High Court, all made on narrow majorities and not always expressed in unambiguous language.

MONARCHY OR REPUBLIC?

The paper will now refer briefly to the question whether the Constitution should be amended to remove the monarch and substitute a president. As has been pointed out, parliamentary democracy provides Australia with all the benefits which a republic could give. One cannot imagine the Australian community forgoing the enormous benefits of parliamentary democracy for some other form of government, as for example the United States presidential and congressional system. With the continuance of parliamentary democracy the parliament, the ministry and the office of the governor-general would remain. On that footing, the aim of this amendment must be to replace a powerless monarch with a powerless (ie, non-executive) president. The selection of the monarch is determined by rules of succession fixed by parliament, but a president would need to be elected or appointed. In either case it is highly unlikely that the choice of president would always, if ever, have the unanimous support of the community. The probability is that a large proportion of the community would disfavour the choice whether by appointment or by election. The fact that the choice might be of an Australian would not necessarily produce unanimity.

Thus one might expect the substitution of the monarch by a president to cause division in the community, whereas the monarchy tends to provide a unifying influence. Faced with the necessity to restore the authority of parliament, the question whether a powerless monarch should be replaced by a powerless president might seem to be of little consequence.

Even allowing due weight to the criticisms made in this paper of the operation of the party system, the government of the community under a powerless constitutional monarch is eminently practical and satisfactory. It is at best doubtful whether the offence it may give in some minds to Australian nationalism is enough to warrant the dislocation which an attempt to effect the change from a powerless monarch to a powerless president is likely to cause.

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5. *Theophanus v Herald & Weekly Times Ltd* supra n 4; *Stephens v WA Newspapers Ltd* supra n 4.