MONARCHY OR REPUBLIC — IT'S ALL IN THE MIND

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Sir Francis Burt, a former Chief Justice and later Governor of Western Australia, delivered the following speech to the Western Australian Constitutional Committee on 19 February 1994.

I notice from the media statement which was supplied to me that: "The issue of Western Australia's position in any moves to make Australia a republic will be a major part of the Committee's work ...". And that general statement appears to me to be borne out by the fact that of the nine matters specifically identified for discussion, seven relate directly or indirectly to the possibility of the Commonwealth, or the States, or one or more of them, becoming a republic.[1] And from the assumptions which appear to underpin the questions, it is apparent that their draftsman thought that if the Commonwealth became a republic or if this State were to become a republic

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1. The Committee's original terms of reference required it to consider: (i) The relative Constitutional positions of the Commonwealth and the States in any move to make Australia a republic; (ii) Possible ways to ensure that Western Australians have the right of self determination in deciding whether to remain with the current system of government or participate in a republic; (iii) The potential for a move to a republic to affect relative Commonwealth and State Government powers and ways to ensure that State powers are not threatened or diminished; (iv) Reforms to restore the position of States as originally intended under the Commonwealth Constitution; (v) If there is to be a move to a republican system, potential methods for appointment of the Commonwealth Head of State, and means to ensure that State Governments are actively involved in the process; (vi) Implications for the Western Australian Constitution if Australia is to become a republic; (vii) An analysis of federalism with particular focus on roles and responsibilities between the States/Territories and the Commonwealth; (viii) The role of the High Court of Australia; and (ix) The powers and functions and role of the Monarch and Governor in the Western Australian constitutional system of government.

that change or those changes would have a very direct impact upon — and a negative impact upon — the political institutions of the State. I do not think that is necessarily the case and I should tell you why.

Putting my submissions to you quite broadly to begin with, it would seem to me that the republican debate as it has been conducted in Australia has attracted to it a number of issues and a number of considerations which have little, if anything, to do with the question. That has happened because of a failure for the purposes of the debate to give definition to the republican idea and, unless that definition is forthcoming, there is no subject-matter for debate.

Of course if, for purposes of the debate, the advocated republican idea is understood to be that the Commonwealth or a State should become a republic with an elected executive president in the American mode, then the impact of such a change at Commonwealth level and upon the position of the States and upon the Federation generally would be difficult to predict or even to imagine. It would be a new thing. It could not be accommodated within the fabric of the old.

But my understanding is that the word "republic", as it has been used in the debate which has so far taken place, is not that idea. The republic spoken of assumes the retention of the Westminster-style parliamentary democracy. I understand the idea to be that the Queen of Australia will cease to be the Commonwealth Head of State, and that in her place there is to be a President, or Head of State, call him what you will, who will perform the duties generally carried out by the Governor-General or in the case of a State by the State Governor.

If I am wrong in that, which is to say that if a different mode of republicanism is being advocated, then it is imperative that the mode be stated and understood so that we all know what we are speaking about. That done the debate will no doubt expand to meet the new specifications. I can only say in a general way that the wider the electorate, for the purpose of choosing the Head of State, the greater the potential for damage to our parliamentary democratic system.

I would advocate three things about the Head of State, be he the Governor under our present system or a President under a republic of the kind which I suppose. Those three things are:

- That the Head of State be appointed by the Prime Minister or by the Premier as the case may be;
- That he be appointed for a finite term which cannot be extended; and
- That he enjoy judicial security of tenure.

The significance of each of those suggestions will appear when I come to discuss the "reserve" powers so-called.

With the debate restricted and focused in that way the most prominent stowaway free-loading on the debate can be seen to be the assertion that the monarchy is a necessary part of the mosaic called parliamentary democracy and hence if the monarchy is put aside our democratic institutions and with them are political freedoms will also be lost. The assumption appears to be that our democratic institutions live and can only survive under the protection of the Crown.

It is not easy to see how that argument can be sustained; indeed it is not easy to see how any rational foundation can be laid for it. There are many examples to be found today of parliamentary democracies which are republics and, for that matter, there are many examples of monarchies which are dictatorships. Indeed the boot would seem to be on the other foot because both logic and history would seem to be saying that a monarchy, as a form of government, cannot exist with a parliamentary democracy as the one contradicts the other. The political history of England from the time of the Stuarts is fascinating simply because it shows how the English managed to reconcile government for the Crown with government by the people — a reconciliation achieved by promoting the form and by denying the substance. The Crown has the form and the people have the substance. And that is what we have today.

First, the form of the thing. In the case of a self-governing colony under the Crown, and in the case of the Commonwealth itself, the Crown in the person of the Governor appears to be all-powerful. He calls and prorogues Parliament, he makes the law with the advice and the consent of the Legislative Assembly and the Legislative Council (although I notice that modern Acts of the State Parliament are at pains to deny that), he appoints the Ministers of State, he appoints the judges and so on. The waste lands of the colony are vested in the Crown although since *Mabo* caution requires one to say "subject to the equities". All power comes from the Monarch and the Governor represents the Monarch.

That is the form of the thing. The substance of the thing — putting on one side for the moment the exercise by the Governor of the "reserve" powers so called — is that the Governor is appointed and removed by the Premier of the day and, in all things relevant to the Government of the State, he acts on the advice of the Executive Council or of the Premier or perhaps of a minister. Subject to what I have to say about the reserve powers, he has no political authority flowing directly from his office. He never exercises the authority

of the Monarch on his own initiative or for that matter on the initiative of the Monarch. This position was finally settled by the enactment of the Australia Act 1986 (Cth), under which the Monarch if present in the State cannot exercise any of his or her powers other than with the advice of the Premier. This is important when we come to consider the existence and content of the vice-regal reserve powers because it would seem to me to deny the Queen's authority in Australia unless sustained by local political authority.

And if that is so, and surely there can be no argument about it, then our system of parliamentary government could operate in exactly the same way if the Commonwealth or a State were a republic with a non-executive President or a non-executive Governor, call him what you will, appointed by the Premier under exactly the same conditions as presently apply to a Governor said to be representing the Monarch.

Could I say something about the "reserve" powers of the Governor and, under the model republic which I have assumed, of the republican Head of State? This, I think, is important because it is an area calling for the attention of the Legislature whether we become a republic or not. Leaving on one side the powers which are conferred upon the Governor-General by the Constitution and confining my remarks to the position of the State Governor, the reserve powers are focused upon the vice-regal power to withdraw his commission from a Premier who still enjoys the confidence of the Legislative Assembly. The authorities are collected by Sir John Kerr in *Matters for Judgement*[2] and they would seem to combine to sustain the opinion that unquestionably the power exists.

It is the possession of this power or of these powers, if more than one, which enables it to be said that the Monarch and through the Monarch the Governor-General or a State Governor is the last line of defence of the parliamentary system and that this line of defence will be given up if the State were to become a republic. I think that it would be generally agreed that in a sovereign state which is a parliamentary democracy a non-justiciable power should exist in someone to terminate the commission of the Prime Minister and of his other ministers, severally or collectively, if it be the case that they are governing illegally or, and this may amount to the same thing, without the authority of Parliament. The obvious person in whom to vest that power is the Queen's representative or in the case of a republic in the head of state. So the general proposition is correct: powers of his kind — and if it is thought to assist, then let's call them "reserve powers" — must exist to protect the State

2. J Kerr *Matters for Judgement: An Autobiography* (Melbourne: MacMillan, 1978) 219.

from final breakdown.

Forsey in his paper "Constitutional Monarchy and The Provinces" published in 1967[3] puts it this way:

> The Crown is the embodiment of the interests of the whole people, the indispensable centre of the whole parliamentary democratic order, the guardian of the constitution, ultimately the sole protector of the people if MPs or MLAs or ministers forget their duty and try to become masters and not servants. The Crown's reserve power to refuse the advice of ministers when that advice imperils the constitution still remains ... and if parliamentary government is to survive, it must remain.[4]

You will find a general discussion of the reserve powers in the Report of the Advisory Committee on the Republic.[5]

If it be the law of the State that, as Forsey puts it, "The Crown ... is the indispensable centre of the whole parliamentary democratic order" or, in more down to earth language, if it be the law of the State that the Governor has a power to terminate the commission of an elected Premier who continues to enjoy the confidence of the Legislative Assembly, then as it would seem to me, the source of that power should be identified. The extent of that power should be marked out and the objective facts — necessarily in general terms — conditioning the exercise of the power should be laid down by law. I know that there are many who would not agree with that. They feel more comfortable with Forsey's rhetoric and are not concerned to find a democratic basis for the power of which he writes.

I am unable to leave such an important question in that way and a further examination of the question leads me to conclude that one cannot be sure that the Governor has any power of that character. I say that because the source of the power, should it exist, must be found within the prerogatives of the Crown and it is to me not clear how any power of that kind has survived the enactment of the Australia Act 1986 (Cth). And if such power does exist, what then does it empower the Governor to do and under what circumstances? What is it that conditions its exercise without advice?

No one has been able to return an answer to those questions with any degree of confidence. That state of affairs should not be allowed to continue and that is so whether the State remains a Monarchy or whether it becomes a democratic republic. It is not fair to leave the Governor in that position and the matter should be placed beyond doubt by statute. The Committee should

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3. Reprinted in E Forsey *Freedom and Order* (Toronto: McLelland & Stewart, 1974).
4. Extracted in *Matters for Judgement* supra n 2, 221.
5. Republic Advisory Committee *An Australian Republic: the Options* (Canberra: AGPS, 1993) 88 ff.

pay particular attention to this question.

I would say two things about it. In the first place, I do not think that it would be beyond the wit of man to identify in advance the circumstances under which the Governor should act to terminate the commission of a Premier who has the confidence of the Legislative Assembly. This is the codification approach advocated by Dr Evatt years ago.[6] And if the circumstances need to be established by a fact finding — which is most unlikely — then I can see no reason why the Governor should not be able to obtain an advisory opinion on any question of fact from the Supreme Court. And if that can be done for the Governor, then it can be done for the President.

In the second place, to enable that to work the Governor must be appointed for a term certain and he must be given judicial security of tenure. He could not hold office during the pleasure of the person whose conduct is under inquiry. It was that factor which gave rise to the charge of deceit in the Kerr/Whitlam confrontation. It saps the confidence which must exist between the Governor and his Premier.

To return to the central question — Monarchy or republic? — one is able to say that if all the legal problems which arise when considering how the Commonwealth or a State can become a republic can be overcome (and there are many such questions and the answers to them are not easy) and if the answer to the end question is to depend only upon material considerations such as are seen to control political decision-making generally, then it would not in a material sense matter whether you made the change or not. It is not a change likely to have any effect upon the efficiency or quality of government.

But one can, with confidence, predict that politically and socially it would matter a great deal because the answer to the question, To be or not to be? is all in the mind and there the answer is controlled by things which cannot be measured. To say that is not to say that the question is not an important question. When properly understood it is saying that it *is* an important question. Values, beliefs, loyalties and so on are all of the mind and if people believe that the Crown is important because it represents all that has come to us from the English-speaking people and if they feel a loyalty to the Crown, then in political terms the Crown is important and its importance will not be removed from the minds of people by a debate of a kind that is being presently conducted.

It is said, and I am sure it is true, that people have migrated to this country from countries and from cultures which have had no experience of English

6. See Kerr supra n 2, 53-54.

traditions, of English institutions generally, or of the values which the English people have come to associate with the English Monarch in particular. It is said that such people are unable to relate to the monarchy or to the English political experience or to English cultural history — in the language, in the arts or in the Christian religion and so on and for that reason under the Monarchy they are unable to develop a sense of an Australian belonging, an Australian identity.

I find that to be a very potent submission and I accept it. Having done so, it is apparent that the entire debate is about the cultural interface between that part of the community who are foreign to and unable to identify with the English tradition on the one hand and those who, in the words of Dr Evatt spoken in 1953, understand the word "British" to mean "the British tradition of government under which every member of this Parliament pledges his faith and allegiance to the monarch, not as a symbol but as a person".

When that is understood the character of the problem becomes apparent. From that one can, with confidence, predict that the resolution of the problem will not be easy and it will not be achieved by counting heads and by the majority forcing change upon a section of the community who will certainly resist it and continue to resist it. The price of that change achieved in that way at the present time would be too great. History teaches us, and it is today still teaching us, that cultural values and beliefs can create in the mind a sense of community belonging which is very difficult to displace and more often than not it is hardened by an attempt to do so.

There is at the present time no crisis demanding an immediate solution and the people of Australia must be given time to resolve the problem in their own time and at their own pace. The legal change, if made, must first be made in the hearts and the minds of Australians. This will require patience and a nice judgement, but if we work at it with some detachment and with a sense of understanding and caring each for the other, then I am sure that a solution will emerge which is acceptable to the Australian people and which gives proper expression to all faiths and to the aspirations which together we stand for.

Never let it be thought that this is an issue which will be solved by legal change. You cannot in a matter such as this enforce by law a change which would deny the truth as people believe it to be.