# Chapter Three

# The Republic: Is there a Minimalist Position?

David Russell, QC

"We are governed by idiots".[1]

## Introduction

I have taken an observation of the late Maxwell Newton as my starting point, not because I am seeking to comment on the result of the recent Queensland election, and still less as a commentary on the federal Coalition government, but because it seems to me to crystallise a critical distinction between American constitutional theory and Australian constitutional theory which is relevant to my topic.

The American approach is to regard all government as potentially bad, and capable of being an instrument of oppression if in the wrong hands. As a result, the United States Constitution contains a series of institutional checks and balances directed to ensuring that, if the powers of the executive, legislative or judicial branches of government are exercised wrongly, the wrong can be corrected and the wrongdoer brought to account.

The British approach has tended to be far less fearful of the possibility of government falling into the wrong hands and needing potential restraint, and more inclined to blame failings of particular governments upon individuals rather than structures. Consistent with this approach is the absence of a written constitution or formal restraints upon parliamentary sovereignty, such as a Bill of Rights and, possibly more damaging, a tendency to look for moral blame when the system fails and, not finding it, to conclude that no action is necessary to prevent future failure.

Australian constitutional theory (or at least what passes for the "progressive" component of it) tends to accept the British approach, coupled with a lament that appropriate development towards nationhood has been retarded by a "horse and buggy" Constitution which the people are unreasonably reluctant to modernise (by conferring more powers upon the Commonwealth government and, within that government, the executive branch).

## Executive summary

The essential propositions to be advanced in this paper are that:

- institutional restraints on government are important;
- within the Westminster context, such constraints as do exist are inextricably interconnected with the constitutional monarchy;
- so-called "minimalist" change, by abolition of the monarchy whilst retaining other features of our present system, will exacerbate tendencies towards untrammeled executive power, thereby bringing about major change;
- of all possible constitutional options, the so-called minimalist position is the least desirable result, and certainly less preferable to a republican model constructed on a strict separation of powers model;
- and in consequence, whilst a great deal of republican strategy has been directed to securing the support of constitutional monarchists for the so-called minimalist position, as the republican model embodying least change to existing arrangements, constitutional monarchists, if compelled to choose between republican models, should reject that approach and support instead an elected presidency on the United States model.

**The separation of powers**

The most significant institutional restraint on governments lies in the doctrine of the separation of powers itself.

Its classic exponent, Montesquieu[2] divided the functions of government into three basic categories: legislative (i.e., making laws), executive (i.e., implementing laws), and judicial (i.e., resolving disputes). In his *The Spirit of Laws,*[3] he reasoned that freedom was dependent upon these functions being exercised by separate organs of government:

> "In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.
>
> "By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and other simply the executive power of the state.
>
> "The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.
>
> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in tyrannical manner.
>
> "Again, there is no liberty, if the judiciary power be not separated from the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> "There would be an end of everything, were the same man or the same body, whether of nobles or of the people, to exercise those three powers, that of enacting the public resolutions, and of trying the causes of individuals".[4]

Montesquieu regarded these requirements as being satisfied by the then existing English constitutional arrangements.[5] In fact, United States constitutional arrangements nowadays come closest to Montesquieu's ideal. However, the significance of Montesquieu's analysis of the United Kingdom arrangements should not be overlooked, and still less is it correct to describe it as "a French idea that was embraced by the Americans in their Constitution".[6]

At the time Montesquieu wrote, it would have been inconceivable that the Westminster Parliament would be a mere cipher of the executive branch of government, so that the presence in the Parliament of the Ministry (or indeed the senior judiciary) did not mean that at that time his analysis was flawed — although, as events have turned out, the presence of the Ministry in the Parliament proved to be the Trojan horse whereby the effective capture of the legislature by the Executive was effected.

The present Westminster constitutional model, with executive authority exercised by Members of Parliament but in most circumstances only theoretically responsible to Parliament, is for that reason not a separation of powers model. The Commonwealth Constitution follows the separation of powers doctrine so far as the judicial power of the Commonwealth is concerned,[7] but not otherwise.[8] The Constitutions of the States do not do so as a matter of law,[9] although in practice the States do not often vest judicial powers in non-judicial bodies.

A recurrent critique of current Australian arrangements has been that the necessary balances between the executive, legislative and judicial functions of government are lacking. For example, a former Governor of Victoria (prior to his taking up that office) commented that:

> "That pressure against judicial independence which is most constant and potentially destructive, is pressure, in its chronic or acute forms, from the political and administrative executive. The threat mirrors the growth of an increasingly powerful political executive, which in practice controls the legislature, or at least its most influential house, most of the time".[10]

The 1992 *Strategic Management Review* of the Victorian Parliament, prepared by Professors K. Foley and W. Russell for its Presiding Officers (one Labor, one Liberal) included the following comments:

> "[A] system of government in which the executive branch was not subject to the requirement to operate within the rule of law (legislated by an independent Parliament and interpreted by an independent judiciary) would not be a parliamentary democracy at all, but at best a form of executive government disciplined only by elections if these were held.
>
> "These arms of government are not static in relation to one another, and commentators on constitutional development frequently discuss the relative movement of one arm with relation to another. The three arms are in fact in a dynamic tension with one another, and the workings of the system can be seriously jeopardised if one arm achieves total dominance over the others.
>
> "In Australia there has been a serious tendency toward untrammeled executive dominance ...
>
> "[We] ... consider that the underlying principle of executive dominance and the weakening of the other arms of government is a problem in this State, and we also consider that improvements need to be made to better allocate powers and responsibilities among the arms of government in a number of areas in Victoria ...
>
> "Unless the implications of [the] need to balance the arms of government are fully understood and acted upon, there is a real danger that the executive branch will make the other branches subservient, and the checks and balances required in the Constitution will be lost".

It is against a background of "the relative movement of one arm with relation to another" and "dynamic tension" that the question I have set for myself, namely, "Is there a minimalist position?", must be answered.

**The minimalist position**

At a basic level, the answer to the question is that there are two: the model preferred by the Australian Republican Movement, of parliamentary election with a special majority, and the so-called "ultra-minimalist position", first propounded by the former Victorian Governor Richard McGarvie, involving appointment of the President by a group of, for want of a better term, "wise men" comprising, for example, the existing State Governors.

The common element of each is that, whatever else may change, the powers of the Prime Minister and Cabinet cannot be reduced. In fact, for the reasons which follow, the probability is that they would be increased. The explicit reason for this has been stated by the Australian Republican Movement as being the need to attract support from the conservative side of politics — an approach which appears to be bearing fruit, given that the majority of Liberal participants in the Constitutional Convention supported a republic on a minimalist basis, notwithstanding that support for the constitutional monarchy is part of the Liberal Party's platform.

Each model, to put it into historical perspective, reflects largely the processes of the Polish Monarchy prior to the third partition of Poland at the hands of Catherine II and Russia.

The circumstances of the election of the last Polish King, Stanislaw Poniatowski, and his fate are, perhaps, instructive. The Polish constitutional structure simply denied to the government of the day powers required to deal with the threat posed by Catherine II and Russia. Those whose co-operation was required to ensure effective government chose to withhold it. In the present context, the important point to note is that the test of effective operation of a

constitution is not how it operates when things are going well, for in such circumstances normal processes of government will accord with community requirements. The test comes when things are going badly, and the normal civilities and usages of politics have been abandoned by the major participants.

Given the public's demand for involvement in the process of election, it is hardly to be supposed that the McGarvie model has any prospects of ultimate success in any referendum, and this paper therefore concentrates instead on the proposal which emerged from the Constitutional Convention.

The effect of the proposed change will be felt at two levels: how it will affect the operation of the Constitution in a crisis, and how it will address the underlying malaise of the growing power of the executive branch of government.

**The Constitution in crisis**

Australia is fortunate that it has had few occasions upon which its Constitution has been called upon to resolve situations in which the normal civilities and usages of politics have been abandoned. The most notorious is comprised in the events of November, 1975 and, whatever may be thought of the tactics of the various participants, the Constitution at that time performed its task adequately by providing a mechanism whereby the people could resolve the issue. One might expect, therefore, that whatever other problems proposed changes might seek to address, the proposed model would address those events in at least as final a way as does the present Constitution.

Remarkably, precisely the opposite is the case. The republican model to be put before the people proposes that the existing powers of the Governor-General should not be changed, but that he should be liable to be dismissed by the Prime Minister of the day, subject to confirmation of that dismissal within one month by the House of Representatives alone by a simple majority (contrasted with his appointment by a two-thirds majority of both Houses of Parliament).

It is probably idle to suggest that, in a constitutional crisis, members of Parliament will do other than act in accordance with the wishes of their respective Parties. Certainly in 1975 none did. Whatever the position might be, it would be most unwise to assume that a determined Prime Minister would not have the necessary support within the House of Representatives to secure ratification of the dismissal of the Governor-General if that was a necessary part of his strategy.

Against that background, the events of 11 November, 1975, if they were to recur under the proposed dispensation, take on the quality of high farce. Each participant in the meeting would be aware of the existing precedent. Each would have the legal capacity to dismiss the other, so long as the other had not dismissed him first. Each presumably would attend the meeting with the documentation necessary for the dismissal of the other duly executed, and requiring only delivery to make it legally effective. Each would be waiting for the first indication from the other that this might occur with a view to taking pre-emptive action.

The problems do not, however, end there. Presumably the meeting would occur in private, in circumstances in which the only record of what occurred would be the recollections of the participants. Assuming that each reaches the conclusion that the time has come to dismiss the other, and takes the necessary action at about the same time, the legal consequences of what occurs would depend literally upon which of them delivered the document first. This itself could easily become a matter of dispute, which would need to be resolved by a trial, the principal issue in which was, which of the parties had the better recollection in circumstances where the absolute truth could never be known. The delays for which the law is renowned no doubt would come into play, and in the meantime no-one would know who was running the country.

In short, the very situation which lies at the heart of much of the argument for change to present arrangements would not only be not dealt with in an improved way by the proposed change: it could well be incapable of resolution in any practical way.

## In the absence of crisis

The proposed system would have to work in a non-crisis situation as well. Here it would aggravate existing undesirable trends.

The dismissal of the Lang Government in 1932, not because it lacked supply but because it was proposing to act illegally, no doubt has encouraged better behaviour in later administrations in all States and the Commonwealth. It is clear that many Governors-General and Governors have not accepted that their role is that of a mere cypher – whilst acting strictly within their constitutional role – and have exercised considerable influence for the good in other ways. These informal processes provide many of the checks and balances which exist in Australia.

The history of the Westminster system in the absence of the monarchy suggests that, by removing the monarch, the essential character of the system is lost. This has a formal element: the process of reporting to, and consulting with, the Queen undoubtedly strengthens those who hold the office in their resolve to act with propriety and convention, and provides a body of precedent and potential sources of advice. But it has an informal one as well, because it strengthens the office itself in the minds of the electorate as a whole, thereby providing a counterbalance in the minds of the politicians to the present Parliamentary majority.

It is not coincidental, therefore, that republican "Westminster" models have seen a decline in the standing of the position, most notably in India, where at State level the appointments are made by the central government and often do its political bidding. Nor is it coincidental that a number of recent appointments within Australia by governments with republican tendencies seem barely (if at all) consistent with an apparent desire to add lustre to the office by the distinction of the appointee, although in some of these cases at least it must be said that a potentially unpromising appointee, assisted perhaps by the dignity and tradition of the office, has performed with a distinction which seems not to have been intended by those responsible for the appointment.

Whilst Ireland was still a dominion, the de Valera government established a model which had until recent times not been emulated elsewhere: the Governor-General (a former Minister) occupied no official residence, performed no functions other than those strictly necessary for constitutional reasons, and performed those constitutional functions literally over the kitchen table. Mr Carr's recent initiatives in this area do not even have the merit of originality.

In short, experience elsewhere suggests that Australia would end up with another politician with no authority, at a time when the other institutional checks and balances — Parliament and the Courts — are themselves in circumstances which are hardly propitious.

There are significant disfunctionalities in the system at all levels. This goes beyond the fact that the legislature and the courts are producing sub-optimal outcomes from time to time: rather, they are failing in their essential constitutional functions.

## The legislature

> "Parliamentary democracy is a system whereby people who think they are gifted amateurs (and very, very few are) purport to make laws that deal with issues beyond their experience. Expecting our political caste to make consistently intelligent decisions about tax is naïve. They must rely on the advice of their bureaucratic advisers – i.e., Treasury and the Australian Tax Office".[11]

If the key to the power of Parliament within the Westminster system is, as historians have said, its control of public finance ("the power of the purse"), then a review of the current effectiveness of parliamentary control of that power is instructive.

There are two elements of the power of the purse. The first is control of exactions of money from what would now be called the taxpaying public. The second is limiting the access of the executive government to the proceeds of revenue gathering activity. In short, tax and supply.

Parliamentary control of the former is almost totally non-existent. We have a system of which Sir Harry Gibbs has said:

> "It is not an exaggeration to say that the *Income Tax Assessment Act* is obscure and uncertain in its operation, it is burdensome to comply with, and to prevent avoidance it resorts to heavy penalties and to discretions so wide as to make it a gamble for a taxpayer to endeavour, quite legitimately, to reduce the tax payable. Such a law reflects no credit on the society which tolerates it".[12]

And despite sporadic attempts to reform it, it has simply kept getting worse, notwithstanding official assertions to the contrary, such as:

> "Within four years Australians will be working in one of the best designed tax systems in the world ...".[13]

The objectives which might reasonably be regarded as the fundamental responsibilities of the Parliament in this area are:

- opposition to new or increased taxes unless the additional revenue is clearly necessary;
- ensuring that the revenue demands of the state in relation to taxpayers are explicitly imposed in clear language; and
- ensuring that revenue authorities comply with the rule of law in the collection and recovery of tax.

There are of course other parliamentary responsibilities, including monitoring the operation of the tax system to ensure that it meets the classic goals of simplicity, equity and efficiency as well as, in modern times, international competitiveness. But important as these are, they are not constitutional roles. Parliament's failure in the latter areas has, perhaps, obscured its failings in the more fundamental, constitutional, areas.

Their constitutional importance is more easily understood when one recalls the role played by the *Ship Money Case* in the Stuart period. John Hampden, a member of Parliament, was assessed to £1 for ship money, a tax raised by Royal Prerogative. He objected on the grounds that, as a resident of a rural area, he should not have to pay it, and further that it was a tax which could only properly be imposed to meet temporary exigencies and not be a permanent source of government revenue.

The modern equivalent of Gray's "village-Hampden"[14] is most likely to be stigmatised by the revenue as a "tax cheat", much as Hampden was. On the determination of the *Ship Money Case* against Hampden, the Earl of Strafford expressed the "wish that Mr Hampden and others to his likeness were well whipt into their right senses".[15] This differs little in principle from the approach of our modern revenue gatherers, of whom it has been said:

> "Just as Reformation heretics were drawn and quartered and their fragments left to rot in a cage in a public square, I believe that, at its core, the Australian Tax Office harbours the same zeal for making its moral point to those it perceives as straying from the ethical straight and narrow".[16]

The unpopularity of new taxes has led many governments in recent elections to promise that there will be no new taxes and no increases in existing taxes. Notwithstanding that, the tax base has been significantly widened in many areas. The means whereby that is done has now become sufficiently common that it warrants analysis in its own right.

Typically, the Parliament is told that the proposed measure is necessary to combat "tax avoidance". This has the dual attraction of ensuring that there will be little parliamentary scrutiny of the proposal (and there is little enough in respect of any taxing measure) because no-one wishes to appear to be "soft on tax avoidance", or, even worse, encouraging it; and that the government which introduced the measure will be able to claim that it is not in breach of its election commitments or, to use the current technical jargon, its "core promises" (as opposed to non-core promises). Indeed, the capital gains provisions were initially justified on the basis that they would

not raise significant revenue, but would prevent tax avoidance by converting income to capital gains.[17]

It is hard to avoid the conclusion that virtually all tax legislation (and much other legislation) is not even read, let alone understood, by those whose actions make it the law. The result was described, in another context, as a legislative sausage machine:

> "In these days Bills introduced mean Bills passed. A Government with a majority ..., and no Legislative Council to hinder them, puts a Bill in at one end of the machine, the Minister concerned turns the handle, and out it comes at the other end, only requiring the signature of the Governor to make it law".[18]

Supply legislation, whatever else might be said of it, is rarely complicated. But except in the comparatively rare cases of a determined upper House (or hung lower House) willing to refuse it, the notion of parliamentary use of the power to refuse supply as a real sanction on the activity of the Executive is fanciful at best. And the events of 1975 demonstrate that, even then, recourse to the Crown may be necessary to ensure that a government does not seek to govern without supply.

The reality is that Parliament has simply abrogated its constitutional functions in the areas which, historically and constitutionally, were the source of its power.

**The Executive**

Whilst most critics of the system of government in Australia identify the increasing power of the executive branch as against the other branches as the cause of the problems experienced in recent times, it may be questioned whether even from its own perspective the Executive is working satisfactorily.

One of the principal problems of what has been called the "Washminster" system is that we have neither the accountability provided through the Westminster system (because Ministers do not in fact accept responsibility for departmental action and, due to the combined effect of judicial and administrative review mechanisms, official freedom of information procedures and the unofficial version of those procedures (leaks) and, where they exist, anti-corruption bodies, have no effective capacity to control it), nor that available under the United States model (because those who exercise bureaucratic power cannot in many cases be held accountable personally).

During the days of the former Queensland Coalition government one memorandum which passed to a Minister's office stated, in as many words, "Coalition policy is not government policy – in fact, the policy of the former government remains in effect". Needless to say, the actions of many in the bureaucracy certainly appeared to proceed on the basis that this was the proper position.

Sir Humphrey Appleby in *Yes, Minister* responded to James Hacker's observation, following Baldwin on Northcliffe, that the civil service sought power without responsibility, which had been the prerogative of the harlot through the ages, with the proposition that it was preferable to responsibility without power, which was the politician's lot. Whilst clearly an exaggeration, this is not wholly without foundation, and a situation in which it is clear that persons responsible to the community should exercise power and be accountable for their stewardship is fundamental to democracy.

**The Judiciary**

> "I guess the spoils go to the victors".[19]

This is not the occasion to analyse recent decisions of the High Court, which have been the subject of many papers given to the Society, or the Federal Court. Rather, the purpose is to note a disturbing trend which, if not checked, will diminish the capacity of the third branch of government to perform its role if that has not, as many of the papers presented to this Society would argue, already occurred.

In addition to ensuring judges are secure in their office, independence of the judiciary requires that attempts are not made to politicise the judiciary by appointing as judges only persons sympathetic to the government of the day.

The notion that judges should not be appointed for political reasons is of comparatively recent history. As Sir Harry Gibbs has pointed out:

> "Of course things in England were not always in this happy situation. For centuries, some appointments to the bench were made simply on the basis of political or personal favouritism. In 1587 Queen Elizabeth I appointed as her Lord Chancellor her favourite dancing companion, Sir Christopher Hatton, who had never been called to the bar and who, it was said, rather disparagingly, could hardly know the distinction between a *subpoena* and a *latitat*. In more recent times the story was told of how Lord Halsbury answered an inquirer who had asked whether, *ceteris paribus*, the best man would be appointed to a judicial position: he replied, '*Ceteris paribus* be damned, I'm going to appoint my nephew' ".[20]

In Queensland, there have been clear instances of favouritism in the appointment of judges in the past. Mr Justice McPherson has observed:

> "The choice of McCawley, Blair, Brennan and Webb was not made in order to encourage the belief that judicial appointment remained the prize for pre-eminence in the practising profession. Men like Feez, Stumm, and MacGregor, and later Hart, Real and Fahey, were passed over because of their political opinions".[21]

In 1930 a Royal Commission found in respect of former Premiers Theodore and McCormack that:

> ".....men who have occupied high and responsible positions in the State ... betrayed for personal gain, the trust reposed in them, and have acted corruptly and dishonourably".[22]

The Crown declined to prosecute Theodore and McCormack, but sought to recover moneys from them in a civil action and failed. Subsequently, all barristers who acted for Theodore were appointed to the bench by the 1932-1957 Labor Governments. Although amongst those who acted for the Crown were leaders of the Bar, none was appointed, although one was appointed to the District Court upon its re-establishment in 1959.[23]

The proper principles applicable were explained by the (Conservative) United Kingdom Lord Chancellor as follows:

> "My first and fundamental policy is to appoint solely on merit the best potential candidate ready and willing to accept the post. No considerations of party politics, sex, religion, or race must enter into my calculations and they do not. Personality, integrity, professional ability, experience, standing and capacity are the only criteria, coupled of course with the requirement that the candidate must be physically capable of carrying out the duties of the post, and not disqualified by any personal unsuitability. My overriding consideration is always the public interest in maintaining the quality of the Bench and confidence in its competence and independence".[24]

These were first adopted in the United Kingdom by Lord Jowitt, Lord Chancellor in the Attlee (Labour) Government.[25]

Sir Harry Gibbs concluded in relation to the appointment of judges that:

> "No matter what the Court, to achieve the result that all appointments are solely on the basis of merit (i.e., legal excellence and experience coupled with good character and suitable temperament), it would seem essential that those making the appointments should seek and obtain adequate and informed advice from the judiciary and the profession. Various procedures may be suggested for ensuring that such advice is given, but no procedure will be effective if the will to appoint only the best is lacking. In the end, we must depend on the statesmanship of those in all political parties".[26]

One means of ensuring that a departure from this practice is easily noticeable is to ensure that the composition of the group from which the judiciary will be selected is not subject to

political manipulation. In that regard, the recent totally unmeritorious steps towards the abolition of Queen's Counsel by most State Governments provide an ominous portent.

The signs have been plain enough for those who wished to see them. Justice Meagher of the New South Wales Court of Appeal has observed:

> "… Dr H. V. Evatt … was the Chief Justice of New South Wales' Supreme Court from 1960 to 1962. When he was appointed he was suffering from advanced senility. He plainly could not manage the job. He was old and ill, uncomprehending and inarticulate, incontinent and barking mad".[27]

One would hope that such an appointment would not be made today. But recent developments give even more grounds for concern. The notion that the judiciary should mirror the make-up of the community (and perhaps reflect politically correct views) has achieved some prominence in recent times in Queensland at least. The Government has just appointed to the second most senior judicial position in the State a former District Court Judge who was, prior to her appointment, junior to 21 Supreme Court Judges, 22 other District Court Judges and, had she continued in actual practice, 60 Queens' and Senior Counsel, as well as 50 junior counsel.

The rationale for the appointment is of interest:

> "The position with respect to seniority is simply this: it is an important matter to be taken into account. At the end of the day, however, it is important that these appointments be made on merit. It is particularly important with respect to the position of women in the judiciary, because it is notorious that women have been under-represented in judicial offices. It is important that, in making those appointments, we should have regard to an inclusive approach which includes the whole of the community, including women.
>
> "It is therefore a matter of some great pride and achievement that we have now achieved in Queensland an Australian first, that is, the first woman in the history of Australia to attain the position of President of the Court of Appeal. Justice McMurdo brings to that position not only a depth of experience and expertise following seven and a half years in the District Court, not only a deep love of justice and intellectual rigour, and not only a commitment to Aboriginal reconciliation, but also a particular expertise in the field of criminal law which, after all, constitutes the bulk of the work of the Court of Appeal.
>
> "There are some who believe that judicial positions should always go to the good old boys from the big end of town, but that is not a view which this government adopts …".[28]

and:

> "This issue is not about consultation; it is about the appointment of a woman judge. It is Labor Governments that have led the way in appointing women to the District and Supreme Courts and the Court of Appeal. What the member for Warwick is agitating is the cause of those arch conservatives in the legal profession who believe judicial appointment must always go to the good old boys from the big end of town who have been to the right schools and are members of the right clubs. We are a multicultural society. Women make up a little more than half of our community, yet they are few and far between on the Court benches. It is high time the membership of the Courts reflected more accurately the make-up of society".[29]

But again as Justice Meagher has commented, in the context of entry into the profession,[30] a Court which accurately reflects the make-up of society is unlikely to be entirely satisfactory:

> "By all means abolish these barriers to entry and extend an invitation to the new competitors: people who can't speak English, people who can't read or write, people with criminal backgrounds, thieves, liars and people who are ignorant of the law. Then they can have a merry time demolishing the necessity of telling the truth and burying the notion of honesty. That is what the future holds if the motivated and progressive take charge".

Distasteful as the United States process of judicial confirmation is, if the statesmanship which Sir Harry Gibbs identified as necessary is going to continue to be absent, formal processes of

that nature will be the community's only protection from inappropriate appointments which will both debase the institutions of the judicial branch of government in the minds of the public and, more importantly, have the capacity to inhibit their performance of their duty.

**Summary**

Opponents of the change which is sought to be imposed may well not accept that it is their responsibility to assist in the design of any republican model, taking the view that it is for the proponents of change to identify what change they want, and then to persuade the people that the change will be for the better.

On the other hand, the current failings of the present system can be recognised without supporting the need for the changes sought. This paper has sought to show that these deficiencies come in large part from the absence of checks and balances on the executive. If that be correct, it follows that remedial action requires either the restoration of the former checks and balances, or substitution of new ones. The changes proposed as part of a possible move to a republic involve moves in entirely the opposite direction.

The minimalist position undoubtedly would involve the least textual change to the existing Constitution. However, far from it following that simply deleting the monarchy from our present arrangements would be the change which would be most acceptable to monarchists, it is precisely because monarchists believe those checks and balances are important (however imperfectly they may operate at present) that it is logical that they should reject change which will eliminate them. If, contrary to the monarchists' preferred position, change is to come anyway, then monarchists should be concerned to ensure that the change should retain and enhance, as far as possible, those restraints on executive power which are plainly required.

In this sense, the people — whose opinion, whenever it has been asked, has been to support an elected Presidency as part of any republican model — are correct. Undoubtedly it would change existing arrangements, and provide an alternative centre of power to the Prime Minister and Cabinet of the day. Undoubtedly, ultimately it would lead to a model of government not unlike that operating in the United States. But the deficiencies of that model, glaringly obvious as they may be, are as nothing compared to the deficiencies of the Westminster system stripped of its remaining checks and balances. It is, perhaps, this point which the people instinctively understand, and the elitists in the Australian Republican Movement either do not or will not.

It should not be ignored, either, that the United States model is not without its advantages, of which perhaps the most notable is the wider talent pool available for the choice of political heads of departments. It is difficult to imagine a less appropriate career path for the head of a department of state than that which currently obtains, if the person concerned is expected to have significant skills of organisational management and leadership.

Of all possible worlds, the so-called minimalist model is the worst.

**Endnotes:**

1. Maxwell Newton (1968).

2. Charles de Secondat, Baron de Montesquieu (1689-1755).

3. *L'Esprit des Lois* (1748) (Tr. T. Nugent, Revised J. V. Pritchard) Book XI, paragraph 6: *Encyclopaedia Britannica Great Books of the Western World,* Volume 38.

4. *Ibid*., pp.69-70.

5. *Ibid*., pp.74-5.

6. cf. Malcolm Fraser : *Constitutional Change: The Illusion of Progress,* published in *Federation into the Future* (1998), CEDA, Melbourne.

7. *Attorney-General (Commonwealth) v. The Queen (Boilermakers' Case)* 1957 CLR 529.

8. *R. v. Dignan* (1931) 46 CLR 73.

9. *Clyne v. East* (1967) 2 NSWR 483 — although this statement must be qualified in the light of the majority judgments in *Kable v. Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

10. The Hon Mr Justice R E McGarvie, *The Independence of the Judiciary, Quadrant,* March, 1992, p.55.

11. P. Haggstrom (former Special Tax Adviser, Office of the Commonwealth Ombudsman): *Tax Reform: The Emperor's Clothes* (1998), *The Tax Specialist,* Volume 2, No.12 at pp.2-3.

12. *The Need for Taxation Reform:* Sir Harry Gibbs, 11th National Convention, Taxation Institute of Australia, 5 May, 1993.

13. The Hon PJ Keating, MP, House of Representatives, 26 February, 1992, *One Nation* Statement, p.15.

14. Thomas Gray: *Elegy written in a Country Churchyard:*
    "Some village-Hampden, that with dauntless breast,
    The little tyrant of his fields withstood,
    Some mute inglorious Milton here may rest,
    Some Cromwell, guiltless of his country's blood".

15. Green, *A Short History of the English People* (1874) — republished (1992) by the Folio Society, London at p.535.

16. Haggstrom, *op. cit.,* at p.4.

17. Parliament was told the new tax would raise $50 million in 5 years. In the fifth year alone the tax collected was $600 million.

18. Bernays, CA, *Queensland — Our Seventh Political Decade, 1920-1930,* Sydney: Angus & Robertson, 1931, p. 46.

19. ACTU Queensland State Secretary John Thompson, *Courier-Mail,* 7 August, 1998, in the context of industrial law changes.

20. Sir Harry Gibbs CJ, *The Appointment of Judges,* Address to the Australian Institute of Judicial Administration, 23 August, 1986.

21. B H McPherson JA, *The Supreme Court of Queensland*, p.338.

22. *Report of Royal Commission appointed to inquire into and report upon certain matters relating to Mungana, Chillagoe Mines, etc.,* in *Queensland Parliamentary Papers* (1930) Vol.1, p.1366.

23. The identity of those who appeared may be found in *R. v. Goddard and others* [1931] QWN 37.

24. Lord Hailsham LC: *Law Society Gazette,* 28 August, 1985 at p.2,335.

25. Sir Robert Megarry: *75 Years on — Is the Judiciary what it was?,* The Edward Bramley Lecture, 1984.

26. *op. cit*., pp.14 - 15.

27. Address to the St James Ethics Centre, 27 August, 1998.

28. Hon M J Foley, MLA, *Queensland Parliamentary Debates,* 4 August, 1998.

29. *Ibid*., 5 August, 1998, p.1610.

30. *op. cit.*.