

Chapter Ten

Sovereign Citizens, not Subjects

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The Argument

I have been invited to address you on the virtues of direct democracy. In doing so, I hope to convert each and every one of you to the doctrine and practice of the constitutional sovereignty of each and every one of us: that is, to democracy in its proper and fullest sense. Indeed, "indirect democracy" is a contradiction in terms.

I am not going to bore you with the details of CIR (which can be gained from a number of excellent books and papers on the subject). Rather, I shall develop arguments about our need to establish the sovereignty of the people within both constitutional and institutional contexts that are far more fundamental to democracy than narrowly-focused arguments about CIR. However, they will, in passing, illustrate that CIR is just one, though by no means the most important, of several, logical consequences of constitutionally enshrining the sovereignty of the people. The most important of these is the empowerment of each and every individual citizen by establishing the institutional means and constitutional protections, through which individuals can take more responsibility for their lives and give less responsibility and power to governments.

With the constitutional entrenchment of the political supremacy of we, the people, must also come the constitutional entrenchment of the institutional means for its practical expression. This, of course, is the reason why there is so much resistance to such doctrines and practices from those who cherish the absolute powers mandated to the Political Executive by virtue of a Westminster-type system, no longer constrained by respect for those traditional conventions which, in the past, did at least provide some checks on gross abuses of the constitutionally undefined and unlimited executive powers of Prime Minister and Cabinet.

In the words of *The Economist* (June 7, 1995):

"Done with care, direct democracy works. The more political responsibility ordinary people are given, the more responsibly most of them will vote. This helps produce something closer to true government by the people. And that, after all, is the way the logic of the 20th century points. If democrats have spent much of the century telling Fascists and Communists that they ought to trust the people, can democrats now tell the people themselves that this trust only operates once every few years?"

Five Constitutional Strands

There are at least five major strands in Australia's current constitutional debate. They can be contoured as follows:

1. The positively anti-democratic, Hour-Glass Republikaners. This strand is represented by Prime Minister Keating's Republican Advisory Committee (RAC) and the Malcolm Turnbull stream of the Australian Republican Movement (ARM). Its agenda has been endorsed by those such as the editor-in-chief of *The Australian*, Mr Paul Kelly, expatriate art critic Robert Hughes, and the party bosses, apparatchiks and propagandists of state radio, television, publishing houses and grants-dispensing bodies and their private-sphere, business and other dependencies of the cultural hegemony. They advocate a polity centred around the axis of a strong executive and

oppose popular elections for the Heads of State and Government, constitutional entrenchment of the sovereignty of the people and a directly elected people's constitutional convention to decide how we should be governed.

Indeed, as state leader of this exclusivist and statist drive, Prime Minister Keating, addressing the annual dinner of ARM on November 5, 1995, described in venomous terms and tones such quintessential, democratic institutions and procedures as "some mealy mouthed thing". Moreover, and much to the delight of the Republikaner clique, he promised that the power of the state would be used to politically destroy the proponents of "such mealy-mouthed" things.

Essentially, the hour-glass Republikaners are a mix of anti-royalist oligarchs and monarchs -- latter-day Machiavellian 'Princes' -- who are more concerned with the metaphysics of nationalism and the power and privileges of political, social, cultural and economic elites than with democratic constitutionalism. Most have eschewed -- and tend to publicly ridicule -- moral approaches to political activity, favouring a utilitarian/positivist-derived instrumentalism. This is justified on grounds of "realism" and "necessity".

Thus, for them politics becomes a moral-free zone. Applied, their blueprint for the governance of Australia would, at the very best, encourage the development of what Professor Richard Rose calls an hour-glass society; a republic constructed on a constitution without citizens, and a society where "there is a rich social life at the base, consisting of strong informal networks relying on trust between friends, relatives and other face-to-face groups ... [and at] the top ... a rich political and social life, as elites compete for power, wealth and prestige".

Rose says that though "such a society resembles a civil society insofar as a number of informal and even formal institutions are tolerated and ... legally recognized by the state .. the result is not a civic community but an hour-glass society, because the links between the top and bottom are very limited [and the state will] tolerate such institutions as long as activities are confined to looking after small-scale individual concerns and do not concern affairs of state."

2. The Unreconstructed Westminsterites. This strand has much in common with the first and includes cultural elitists and extreme constitutional hierarchists (e.g. Sirs Zelman Cowen, Ninian Stephen, Rupert Hamer and Maurice Byers and Mr Gough Whitlam), as well as economic and social reformers of both the political left (the heirs of 19th Century socialist planning) and right (doctrinaire economic rationalists), whose ideologies have a common grounding in positivist and utilitarian traditions. All welcome the hierarchical structures of the Westminster system, because they believe that the power it accords allegedly wise and superior elites (themselves) can be used to achieve their respective -- and different -- goals despite popular opposition, which they attribute to ignorance, or worse.

Believing in the sovereignty of a hierarchy of both ("eminent") persons and institutions, they prefer the Keating republican "model" to democratic ones, precisely because the former is authoritarian. As the historical and political compromise between the (Presbyterian) hierarchy of institutions and the (Anglican) hierarchy of persons, they subscribe to the Westminster system as the institutional gatekeeper of hierarchical order and authority against democratic pressures from below. Hence their empathy with Strand 1, unease with Strand 3 and rejection of Strands 4 and 5.

3. The Constitutional Monarchists, as represented by Australians for Constitutional Monarchy (ACM). ACM members, out of a combination of moral sentiment and philosophy, believe that the best protection against both monarchical and republican forms of tyranny, as well as the best means for preserving liberty, lie in constitutional monarchy. They argue that constitutional monarchy guarantees the rule of law, limited and representative government and a strong civil society. With the second strand, they support the fundamentals of the Westminster system, but,

unlike them, they favour checks and balances on executive power. They contend that constitutional monarchy, liberty and democracy reinforce each other. However, and for obvious reasons, some have difficulty in accepting the sovereignty of the people.

4. The Democratic -- and mainly Jeffersonian -- Republicans who, recognising its strengths, prefer constitutional monarchy to Strands 1 and 2. However, they believe that ultimately democracy can only be achieved through a republican Constitution that establishes the sovereignty of citizens and limits and checks and balances all power. Some are communitarians, others are not.

5. Democratic Constitutionalists, who argue that so long as the constitutional and institutional arrangements are fully democratic, viz. the sovereignty of the people and limits to, and checks and balances on, executive power, the formal title given to the polity is an irrelevance. They have much in common with Strands 3 and 4, but on balance would be closer to the fourth strand.

Hierarchical Culture and Distrust of the People

The systemic and endemic distrust of the people that characterizes the cultural biases of our hierarchical elitists, as represented by Strands 1 and 2 and some elements of Strand 3, are derived from three, interrelated British traditions that, in Australia, have been reinforced by even less benign European traditions, which are explored in detail in the present author's latest book.

These traditions have been homogenized in Australia mainly through higher educational institutions. This explains further why our elites distrust constitutional arrangements that empower the people, and why the present constitutional debate is as much a cultural phenomenon as it is a political one -- something which most contemporary Liberals and many economic rationalists have never really understood either intuitively or empirically.

The three traditions have been brilliantly and independently written about by three different authors. However, when read in conjunction with each other, they offer definitive explanations of why our elites hold the people in such low esteem. The works are Joseph Hamburger's *Utilitarianism* (in A Bloom (ed), *Confronting the Constitution*, 1987); Ferdinand Mount's *The British Constitution Now*, 1993; and John Carey's *The Intellectuals and the Masses*, 1992.

Hamburger exposes the nature and consequences of the constitutional views of the English utilitarians, James Mill, John Austin and Jeremy Bentham. Mount thoroughly scrutinizes the constitutional views of Bagehot, Dicey, Laski and Jennings. Carey exposes the anti-democratic views and contempt for ordinary people of the wastelanders, such as D H Lawrence, T S Eliot, Ezra Pound, W B Yeats, H G Wells and Bernard Shaw, et cetera.

The biases and prejudices exposed and critically analyzed in these three works have fashioned the common, cultural bias that informs the constitutional preferences of our hierarchical elitists and, when applied locally, help to explain why they cannot be properly or fairly described, to say the least, as lovers of democracy.

The above-mentioned readings also illustrate how the Keating-Turnbull school has fully internalized, and is propagandizing, the worst of British constitutional, political and cultural traditions at the expense of the best. Carey demonstrates that G K Chesterton, for instance, was one of the few, consciousness-fashioning writers of the period who fought against the grain, as so pertinently witnessed by the following lines from his long poem, *The Secret People*:

"And a new people takes the land, and still it is not we.

They have given us into the hand of new unhappy lords,

Lords without anger and honour, who dare not carry their swords.

They fight by shuffling papers; they have bright dead alien eyes;

They look at our labour and laughter as a tired man looks at flies.

And the load of their loveless pity is worse than the ancient wrongs,
Their doors are shut in the evening; and they know no songs.

We hear men speaking for us of new laws strong and sweet.
Yet is there no man who speaketh as we speak in the street.
It may be we shall rise the last as Frenchmen rose the first,
Our Wrath come after Russia's wrath and our wrath be the worst.
It may be we are meant to mark with our riot and our rest
God's scorn for all men governing. It may be beer is best.
But we are the people of England and we have not spoken yet.
Smile at us, pay us, pass us. But do not quite forget."

The Theory, The Reality and The Ideal

What, though, is our present constitutional reality? Does it, on balance, favour the people? In theory, our present order of constitutional priorities is: Parliament first; Executive second; people third. In reality, it is Executive first; Parliament second; people third. If we are committed to constitutional democracy and, thereby, transforming ourselves from subjects into sovereign citizens, we must make it: people first; Parliament second; Executive third. That is, we must democratise our overly hierarchical constitutional arrangements, which now make accountability of government to the people and Parliament nigh on impossible.

Accountability, Morality and Democracy

Let us go back to basics. What is accountability ? In three, simple words, it means: Telling the truth!

Why is this necessary? Because without it, there can be neither faith, nor trust, nor reciprocity. And without those things there can be neither democratic citizenship nor a democratic civic culture. Furthermore, truth, justice, the rule of law and democracy are inextricably linked, both morally and empirically.

Justice can only be done if the truth is told. In the words of Bertrand Russell, "Part of the language of lying is that it only succeeds for as long as people think you are telling the truth". This proposition was well understood by Mikhail Gorbachev and his liberal allies, who acted on the assumption that the first necessary condition for moving towards democracy in the former USSR was an end to official lying, particularly about the past.

Indeed, the symbiotic relationship between truth and justice underpins the rule of law, and hence also of democracy itself. This is a moral equation. Partinost uses of executive power in a democracy to harm the innocent, to damage political opponents, to cover up malfeasance and lying, or to confer monopolies on favourites at the expense of equality of access and opportunity to others, all undermine trust and faith in political and legal processes. Politics in a democracy is not -- and cannot be allowed to become -- a moral free zone.

This is principally because democracy is itself a moral venture. The history of democracy is the history of individuals and whole societies attempting to limit and check and balance executive power. This is necessary so as first, to create, and then, expand and protect by constitutional means that space which we call civil society, in which each and every individual, as well as collectivities, have the opportunity of living preferred ways of life as best they can without harming others and unencumbered by the onerous impositions of democracy's principal enemy, secret and arbitrary government, of which we already have a short-circuiting overload.

Arguably democracy is, in secular terms, humanity's highest moral achievement. Of all modern political philosophers, Jacques Maritain has stated this proposition most nobly. An architect of

both the democratic reconstruction of post World War II Europe and the United Nation's Charter of Human Rights, he wrote in *Man and the State* (1951) that:

"Something particularly significant must be stressed at this point: democracy is the only way of bringing about a moral rationalization of politics. Because democracy is a rational organization of freedoms founded upon law. We may appreciate from this point the crucial importance of the survival and improvement of democracy for the evolution and earthly destiny of mankind. With democracy mankind has entered the road to the only genuine, that is moral, rationalization of political life: in other terms, to the highest terrestrial achievement of which the rational animal is capable here below. Democracy carries in a fragile vessel the terrestrial, I would say the biological, hope of mankind."

Peter Berger brings together questions of morality, accountability, the legitimacy of institutions and democracy as follows :

" Society is not held together simply by practical needs and interests but by beliefs that explain and justify its particular institutional arrangements. Thus, a legitimation is any answer, on whatever level of sophistication, as to whether this or that institutional arrangement is morally just or proper. If no one else asks such questions two groups of people will, sooner or later: inquisitive children, or those who perceive themselves to be at a disadvantage under the particular arrangements. If an institution is to survive from one generation to another and if it is to stave off the ever-present possibility of disruption, there had better be some answers at hand, not just any old answers that someone might think up but answers that will indeed command the confidence of the people."

The ALP, Partinost Politics and Democracy

In the context of the themes of this paper, it is apparent that the ALP, like all political parties organized along unreconstructed 19th Century socialist lines, has a problematical relationship with democracy. The problem has most recently been well stated by Martin Malia in his book, *The Soviet Tragedy: A History of Socialism in Russia 1817-1991* (1995). Discussing in universal terms the organizational characteristics, motivations and goals of social democratic parties, he writes :

"Organized parties were a late nineteenth Century invention of the socialists, and the most precocious in this matter were the German Social Democrats. It was they who introduced party cards, regular dues, party cells, and a hierarchy of committees leading up to periodic congresses and a standing Central Committee. They did this in part because they were an embattled, adversary party -- indeed a counter-society in Imperial Germany -- and in part because universal suffrage made such a mass party possible. But as Weber's pupil Robert Michels pointed out as early as 1911 in his classic study of the Social Democrats, *Political Parties, the Social Democratic mode of organization inevitably tends to bureaucracy and oligarchy, thus thwarting egalitarianism ...*

"Still, in the German case, genuine elections made the bureaucratic oligarchy more or less responsive to the base. But if ever elections atrophied in such a structure, the pyramid of power would become a dictatorship under the euphemistic designation 'democratic centralism', where initiative flowed from the top down. This was Rosa Luxemburg's critique of Lenin's program. And this, of course, is precisely what happened once he came to power. To this it must be added that a similar bureaucratic centralism was adopted by parties of the revolutionary Right after the First World War in imitation of their Social Democrat and Communist adversaries, and the Communists transmitted the same type of organization to China's Kuomintang. Thus, in every Social Democrat party there is a Leninist Party in potentia."

Anyone who has participated in, experienced, or properly studied ALP politics will immediately recognise the relevance of Malia's analysis to the Australian situation. Moreover, the problem has been intensified in recent years through the movement into the ALP of ex-Communist and trade-union power-brokers who, though having largely abandoned Marxist-Leninist ideology, still employ Leninist-derived methodologies to wage factional warfare inside the party, to counter outside critics and opponents, to promote and implement the party's policies and, not least, to keep the party in power. They have bolstered the party's post-Whitlam organizational strategists who, for the reasons given by Malia, employ similar methods, which have also become part and parcel of organizational studies in the social and political sciences.

Moreover, and as Malia observes, the same organizational methodologies were adopted by radical right wing parties and movements, many of which, like Mussolini's Fascists and Adolf Hitler's Nazis, had their origins partly in radical Social Democrat movements. Ideology and goals were integrated into the organizational mode, with the party becoming the principal organizational weapon. What "true believer" means in this context is the person who subjects his/her individual will to the general will and tactics of the party, as defined by the hierarchs on any issue at any given time, even if it involves daily contradictions.

Partinost principles decree that one's highest duty is to the organization and its formations, whose function, when the party is in government, is to put the state and its agencies under the care of the party, its agents and fellow-travellers so as to maximize its controls over the levers of power and patronage and, thereby, to extend the weight and power of its presence in civil society through exploitation of the "demonstration effect". This requires submission of party members, particularly among the politically ambitious, to the will of the leader. In this context, "the natural party of government" argument is an argument for a one-party state, a partocracy. The unnatural cannot be tolerated. Hence the use of the language of pest control to condemn critics and opponents, and the waging of hate campaigns against them. Language is here our guide.

As J H Hexter observes:

"The language men choose in the public forum to serve their ends is usually a pretty sound indicator of some of their intentions, and an even better one of their habits of thought."

As a consequence of such influences as outlined above on its history, traditions, ideology and organizational methods and style, when in power the ALP tends to govern the nation as it governs itself. Briefly, state power is used to reward or punish individuals and whole electorates according to partinost criteria. In the words of the late Aaron Wildavsky, "As you organize, so shall you behave". All of this, needless to stress, has profound implications not only in terms of how Australia is presently being governed but, even more critically, for the future of the Constitution, if Mr Keating is allowed to get his way.

The Defenders of Secret Government

The arguments advanced before the WA Supreme Court and the High Court of Australia by Dr Carmen Lawrence -- and fully endorsed and financed to the tune of \$1,000,000 of taxpayers' money by the Keating Government -- that the survival of our "democracy" would be threatened by former cabinet ministers giving evidence to the Marks Royal Commission about what may or may not have been said at a State cabinet meeting concerning party-political strategies to be employed to destroy political opponents, and that our system of government is structured on secrecy, are ominous harbingers of what we can expect if the Keating Republikaners determine our constitutional future. They are offering a triple whammy in the form of the mad, the bad and the ugly.

In defending cabinet secrecy the way they are, Labor's spokespersons are advancing what can be best described as the Politburo Model of government. In the former USSR, the Politburo was the peak body of both the ruling party and the government. All its deliberations were secret and it was above the law. This was justified in the name of democracy, the salvation of the system and the best interests of all who lived in the Soviet Union. In reality, however, what it all amounts to is government by inquisition.

Patronage and Punishment

You will be handsomely rewarded if you are deemed to be a member of the "elect" or are prepared to follow the party's "general line", particularly in matters the party defines as priority areas. However, state power will be used to positively discriminate against you if you are considered to be of the "damned", as all those, including Commissioner Kenneth Marks and Ms Anne Vanstone, have discovered to their great discomfort for failing to heed the unveiled threats of Prime Minister Keating and Attorney-General Lavarch concerning the consequences of refusing to abide by the party's "general line" in the matter of the Lawrence-Easton scandal. What they seek from us is servility and not civility. Under their proposed Constitution we would cease to be subjects of a Crown pledged by oath to protect our rights and liberties, and become subjects of an immensely fortified Executive pledged by oath to advance its own exclusive partisan interests. However, now preoccupied with the terms of its own survival, the Crown will not protect us -- place not your trust in Princes ! Consequently we, the people, have no option but that of protecting ourselves through constitutionally entrenching our sovereign right to govern ourselves.

Trust, Civility and Civic Culture

Without faith, mutual respect, trust and reciprocity there can be neither citizenship nor a civic culture. James Hunter illustrates how democratic citizenship bridges that gap between private and public activities which must be overcome if civility is to prevail over servility:

"Ideally, public culture and private culture would seem to complement each other. As spheres of symbolic activity, each provides a context for the other. Public culture functions as a legal and political context for private culture by demarcating the boundaries of permissible personal behaviour ... At the same time, personal interests and aspirations rooted in private culture become expressed as political claims in the public realm ... In this way, private culture provides the context in which public culture becomes a reality intelligible and personally relevant to ordinary people. Public culture becomes a realm that can be understood and influenced, a sphere of activity in which individuals and communities can present and advocate their particular interests, the place in which the various voices of private interest can press their particular claims as public discourse. To the degree that public and private culture interact in this way, the authority of democratic regimes achieves its measure of popular consent. Such is the moral foundation of the modern liberal state. Of course, this is how political life is supposed to work in theory. While some of the time practical reality fits the theory, much of the time it does not. The special language of public discourse, for example, often seems muddled, obscure, and incomprehensible. The impenetrable nature of legal rhetoric and bureaucratic verbiage is well known."

Hunter then discusses the relevance of the matters he raises in terms of citizenship:

"These factors are obstacles that private citizens and local communities face in entering public debate. When the obstacles are too great, public culture remains distant and unapproachable; private culture becomes isolated and the voices of ordinary citizens remain publicly silent. When private culture remains estranged from public culture, and individuals and communities retreat

from political expression, personal lives become irrelevant to the course and conduct of civic affairs. Why is all this important? Because the right to shape the public culture, or at least the right to have a voice in how public culture will be shaped, confers enormous benefits. The essential benefit is the right to pursue individual and community interests. Those who have no voice may be defined as illegitimate -- and their interests may be deemed irrelevant. The very survival of minority moral communities is at risk, unless all have the right to help shape public culture. In real life, of course, the many different voices that contribute to the shaping of public culture are not of equal volume or authority. Many voices may be heard, but the historical tendency has been for one voice to dominate. This was certainly true in the ... nineteenth Century. In this case and in others, the values and interests of one moral community overshadowed and oftentimes eclipsed those of other communities. This is what social scientists would call cultural hegemony, and the benefits that accrued to it are nothing less than power and privilege."

The late Professor Aaron Wildavsky related the virtues of faith, initiative and transcendence of self-centredness and self-interest from the moral perspective of democracy as follows:

"So far as people can live well without feeling compelled to participate, recognition of the right to be left alone speaks well of a society. But if citizens are left out of consideration in making important decisions, to define life as democratic would be deception ... To be ruled by another, paradoxical as it may appear, requires no faith, only forbearance. To be a subject requires only being an object; the rulers substitute force for faith, ruled acquiescence for initiative. To rule oneself, however, is not only to affirm but also to subdue the self, because reciprocity as well as autonomy is required for self-government. Citizens owe allegiance to others before they receive results for themselves. Citizenship is, first, an act of faith (a willingness to act in the absence of things seen) in political processes."

Unaccountable and Bad Government

The empirical evidence presented to officially-appointed commissions and committees of inquiry into the official conduct of public affairs by governments in all the Australian States and federally over the last decade proves that Australia is not governed civilly, and that the negative aspects of political systems which treat people as objects, as described by Hunter and Wildavsky in the above quotations, have predominated, thereby undermining civic culture.

Trust and stewardship have not been honoured, governments and their agencies have not sufficiently accounted for themselves (if at all), and the faith of the people in the ways and means by which they are governed has been betrayed. That is, we, the people, are being treated immorally by our governments through constitutional arrangements which permit and encourage them to do so.

The same evidence illustrates how, where, why, by whom or what, and to what degree, trust and faith have been betrayed. It is also clear the problems are endemic and systemic.

That it was all done so easily by members of governments and their agents -- or permitted by them -- reveals fundamental weaknesses not only in Australia's administrative and decision-making arrangements and procedures (which some authorities and commentators would have us believe is the whole extent of the problem), but also in the law, its structures of government and public institutions. At the base of all this lie our federal and State Constitutions. This leads logically and empirically to the inevitable conclusion that they are not sufficient providers of democratic, moral, responsible and publicly accountable government.

There can be no escaping this conclusion, which must be the central focus of all our enquiries into what must be done if we are committed to constitutional democracy.

However, mountains of evidence are being ignored by both our Republikaners and staunch defenders of the status quo in an extraordinary, self-protecting and pathological act of forgetting, which brings to mind the Czech writer, Milan Kundera's warning that: "The struggle of man against tyranny is the struggle of memory against forgetting." We must not be fooled by either those who have betrayed us, or their handsomely rewarded courtiers in the public and private media and our publicly funded cultural and educational institutions, into forgetting.

In this context, it is also worth recalling Berthold Brecht's statement that, "If you're against politics, you're for what politics will do to you." In democratic politics, Constitutions cannot be enabling acts permitting hierarchs to impose arbitrary ways and means of governing upon the people. They must enshrine the means by which people can live and participate freely in civil association.

Analysis and the Craft of Citizenship

The activities of government, politics, citizenship and analysis in a democracy are complementary and interacting. The method and role of analysis most suited to such tasks as reviewing our Constitutions and the means by which we are governed, and their impact upon people's lives, liberty, prosperity and happiness have been well adduced by my late friend and colleague, Aaron Wildavsky. He places them firmly in the contexts of trust, social interaction, moral values and accountability in such a way that he could have had our circumstances in mind, particularly as outlined immediately above, when he wrote, under the heading, "Analysis as Craft":

"Because the task of analysis ... is to try and alleviate practical problems, the analytic enterprise, Martin Landau rightly argues, 'cannot recognise the limits of any field ... By its nature it must follow problems wherever they go. It cannot ignore anything that may be relevant to a solution.' ... Trust in social interaction designed to detect and correct error reinforces reliance on individual integrity ... The analytic enterprise depends on social trust, on common recognition that the analytic activity is being carried out to secure more desirable outcomes ... with no 'facts that matter' there is no evidence, no hope for contradiction and error identification. Learning through error ceases. Theory, which acts as its own cause by dismissing new hypotheses out of hand, is called dogma. History, acting as its own justification, is called tradition."

He goes on to say that:

"These tendencies support each other. The virtues of dogma -- limiting the scope of the debate, starting with initial presumptions -- are the virtues of tradition. Similarly the vices of dogma are the vices of tradition. These include shifting the burden of proof to the challenger and inhibiting learning by preventing rectification of errors. When tradition rules, recognition of error becomes anomalous, and policy acts to perpetuate itself. The tensions ... have their moral sides. Relating resources to objectives so that the promise of public policy can be kept is the mark of the responsible analyst. It is irresponsible to put resources to inferior uses, depriving others of their opportunities ... To be held responsible, as if one could control results, depends on possessing relevant resources, for otherwise accountability is a sham. Social interaction is efficacious only when autonomous individuals establish reciprocal relationships. Individual moral development requires a balance between autonomy and reciprocity, citizen and community, which at the public level, is the task of policy analysis."

Citizens as Sovereigns and 20 Minimal Principles for Constitutional Democracy

The following proposals for constitutional renewal contain no utopian panaceas. All the reforms recommended are down-to-earth and practical measures that can be set in train immediately through an exciting and cooperative exercise in citizenship involving the people, the Parliament

and the Government as joint-venturers in the great project of constitutional democracy. Such principles must be constitutionally enshrined as a bare minimum if that project is to be successfully pursued in Australia, and if we want that protection Professor Giovanni Sartori has so well reminded us in his masterpiece, *Democratic Theory Revisited*, is the purpose of the constitution of liberty.

These principles were used to formulate a model Constitution for the Australian States by Professor Martyn Webb in *The Executive State: WA Inc. and the Constitution* (1991). They are discussed in greater detail from both empirical and philosophical perspectives throughout my latest book.² They are here outlined, with the inclusion of new material, and applied to the Commonwealth Constitution, with specific reference to the sovereignty of the people in terms of direct democracy. Hopefully, they might stimulate public debate, so that we can go beyond both the executive-owned thing of the RAC--ARM Republikaners and the Westminster system's enshrinement of absolute executive powers in the office of Prime Minister and Cabinet. They are the constitutional entrenchment by a directly-elected people's Constitutional Convention of the following:

1. The political supremacy (ie, sovereignty) of the people. Such a clause makes the people, both individually and collectively, the direct democratic source of all power in the polity. It is the quintessence of a modern liberal democracy. The people -- rather than arbitrary and exclusive definitions of national culture, or national identity, or the Crown, or the Parliament, or the Executive -- are thereby established -- and, I reiterate, directly -- as the central and unifying element drawing the nation together as a sovereign entity through the power of each and every individual. It is something to which the overwhelming majority of people can meaningfully subscribe, despite party-political, religious and other differences. Once enshrined, it becomes the axis on which the whole Constitution runs and which sustains the entire political system, transforming -- to use Professor Webb's phrase -- subjects into sovereigns.

Only if this is done will we, the people, be able to call the Constitution our own, and only then will we be able to have government directly by the people as distinct from government for the people. Irrespective of whom we decide to institute as, or what we call, the Head of State, this is a democratic, constitutional imperative. If this is not done we will remain subjects of an immensely fortified and sovereign Executive that, in recent years, has so arrogantly -- and with such impunity -- usurped both Crown and Parliament, and which is now extending its power and presence ever deeper into a diminishing civil society in Australia.

2. Limitations on the powers of the executive and legislature and the protection of political freedom and the rights and liberties of sovereign citizens. This can best be embodied in a constitutional declaration of rights by the people. This should not take the form of a shopping list, but be expressed by statutes of limitations on the powers of the Executive, the Legislature and the Judiciary. This establishes in fundamental law the subordination of the executive, the legislature and the judiciary, ultimately, to the supreme power of the people, who have the sole constitutional right to determine how they are to be governed and to whom or what they may from time to time delegate this power, and how it may be divided and/or checked and balanced.

Common law rights must remain, but the Constitution must also spell out fundamental rights such as those relating to speech, assembly, voting/political participation, movement, privacy, property, trade, trial by jury, equality before the law, and belief and worship.

The need for such a declaration was dramatically illustrated when the Commonwealth Government -- presenting its case to the High Court in support of its legislative proposal to ban all political advertising on radio and television during election campaigns -- argued that the only

rights which Australians had were those which Parliament awarded them; as Parliament had not legislated for freedom of speech, Australians had no such right. Such imperiousness by the wielders of sovereign authority over the people should stand as a warning to everyone against people in the current debate who are advocating freeing the executive from accountability to the Crown -- the nominal sovereign -- in favour of accountability to an executive-dominated Parliament.

That the High Court finally extracted a limited right to freedom of speech in a roundabout (some would say even casuistic) way serves only to strengthen the need for such a declaration of rights. This would reverse the present situation by directly empowering the people to declare that Parliament, the executive and the courts shall have only those rights and powers which we, the people, delegate to them and for only so long as we, the sovereign authority, so decide.

3. The sole right of the people to directly elect their Heads of State and Government as their representatives and not overlords -- regardless of what they are called. By any definition or by any measure this, along with the right to legislate, is a litmus test of sovereignty. This would fulfil the democratic right of every citizen not only to vote for the highest offices in the land but, equally importantly, also to contest them.

It is in this area that we presently most need the popular exercise of direct democracy in the most fundamental way: through direct ballot. If the people are to be sovereign, nothing less will do. It is preposterous to advocate executive/parliamentary appointment of such offices under a modern, constitutional democracy. These are, and quite literally in the most practicable way, sovereign rights. The best argument I have heard for the popular election by direct ballot of our Head of State is when Sir Zelman Cowen said that if such a procedure was adopted, people like himself and Sir Ninian Stephen would have neither the inclination nor resources to contest such an office.

4. A renewed federalism that examines and redresses existing imbalances of power between the Commonwealth and the States. The federal compact needs to be re-examined and renewed as a consequence of the centralist directions in the shift of power occasioned by such things as the use of the foreign affairs, taxing and patrimonial powers to increase federal parliamentary and executive authority over the people of Australia. They are now being flagrantly exercised to advance the monopolies of power and privilege of political cronies against all those individuals and collectivities, whose priorities do not conform with those of central, executive authority in just about every sphere of spiritual and material endeavour.

These and other measures in the prevailing politics of exclusion have -- without reference to the people -- altered the very nature of the Commonwealth of Australia, which the people of the Australian States originally formulated through a Constitutional Convention and enacted through referendums nationwide. This has resulted in the diminution of diversity and contributed to the suppression -- and destruction -- of creative talent and inventiveness, which are the lifeblood of any progressive people. Without level cultural and political playing fields "economic rationalists" among us can forget about level economic playing fields.

Unfortunately, some economic rationalists, despite their claims to "realworldliness", have been putting the cart before the horse. 16th and 17th Century jurists such as Edward Coke and Thomas Fuller and Members of Parliament such as Richard Martin, however, understood the situation perfectly well:

"Arts and skill of manual occupation rise not from the King, but from the labor and industry of men, and by the gifts of God to them ... It is as unlawful to prohibit a man not to live by the labor of his own trade as to prohibit him not to live ... " (Nicholas Fuller);

" ... Monopolies are against the great charter because they are against the liberty and freedom of the subject ... The Monopolist that taketh away a man's trade, taketh away his life, and therefore is so much more odious, he is *viva sanguinis*." (Edward Coke);

"The principal commodities both of my town and country are engrossed into the hands of these blood-suckers of the commonwealth". (Richard Martin, MP for Reading).

The people of the States should have a direct say in formulating the terms of proposals germane to the distribution and weighting of powers in Commonwealth-State relations -- not just voting on what is put to them by "eminent persons." Such things as trading, taxing and immigration powers must be to the forefront of discussion and examination. If the Crown is to be removed from State and Federal Constitutions alike, the whole question of the power relationships at this level should be thrown open to both question and renegotiation. It is necessary to do this before the centre's centripetal and integrative "federalism" becomes irreversible. It is difficult to overemphasise the importance of this point, precisely because we are talking about the sovereign rights, qua the daily living, of individuals at the coal-face of political, social, cultural, economic, artistic and sporting life.

5. A bicameral and legislative Parliament with a strong Upper House of check and review. This is necessary for at least two vital reasons: to provide equal representation for the people of the States and as a check on the executive, particularly if there is, as now, no effective separation of the legislature and executive.

Any weakening of the powers of the Senate, for the reasons given above, also diminishes the powers of the people and checks and balances on the executive, which definitively controls the House of Representatives. Proposals to remove the Senate's powers to block Supply -- and, hence, remove the unelected, caucus-selected executive for malfeasance -- in conjunction with those empowering the executive to appoint the Head of State, as is envisaged by the Hour--Glass Republikaners and other unreconstructed Westminsterite authoritarians, would reduce the Senate to the status of a committee of the House of Representatives; ie, another arm of the executive in real political terms. By such means, the greying embers of effective parliamentary opposition and the last residues of its status as a legislature would be finally extinguished, to the full satisfaction of our Machiavellians, Positivists and Utilitarians who, despite differing party labels, share some core values and political/constitutional goals, precisely because they have learned nothing better, and have benefited grossly from what we have got by becoming masters of sycophancy and deception. If the people want something, it is by definition wrong. Only that which they want and get is right.

6. Increased freedom and independence of action from the executive of all parliamentarians. Two principal measures can help achieve this: first, the granting to chairpersons of parliamentary committees the same status and salaries as Ministers to lessen their vulnerability to executive and party bribery and bullying; second, prohibiting the use of pledges and/or oaths that require a parliamentarian to vote in a particular manner or accept party discipline, and making it a criminal offence for anyone attempting to apply such measures. By requiring that all votes taken in Parliament be free, or conscience, votes, we will encourage the practice of that morality at the parliamentary level which we normally teach the young: to have the courage to act on the strength of one's convictions. Such a measure will also help the transformation of our Parliament into a true legislature.

7. The supremacy of the legislature over the executive. While this is clearly established through the embodiment of several of the principles discussed here, it needs to be specifically spelled out in a democratic Constitution, particularly if government is to be formed from the majority party

in the lower house of Parliament. Though general theory claims that in Westminster-type polities Parliament is the effective sovereign authority, practice tells us otherwise. The barely limited -- and undefined -- powers of an Australian Prime Minister hold within them the potential of transforming our system into a mammoth favours-dispensing machine, in which those who have been given the right entry cards, or who have paid enough party dues, have every chance of punching jackpots for themselves until the general revenue is exhausted.

Thus government can easily become a giant "pork barrel" greased by the Prime Minister and cabinet and the polity turned into an Australian version of La Cosa Nostra, with the sovereign authority effectively representing not public interests but private ones -- Il Partito Nostro. Indeed, there are many ominous signs that we are possibly well down this path already. If accountability to the nominal sovereign -- the Crown -- is to be abandoned and the executive, through the Parliament, is empowered to appoint the Head of State (Il Capo?), the polity will be fully opened to capture by the corrupt and unscrupulous, leaving force as the only ultimate means available to the people for protection.

The institutional separation, as well as division, of the Parliament and executive must be seriously considered as a necessary means for achieving this goal, as well as combining the offices of head-of-Government and Head of State into the one popularly elected office. The latter would eliminate the ongoing jurisdictional conflicts that dog those polities which maintain separate offices, particularly in many republics. Such a measure is, moreover, entirely consistent with the sovereignty of the people. By such means both the Parliament and the executive would be made directly responsible to the people, whilst the former would be transformed into a genuine legislature. The Polish historian and statesman, Bronislaw Geremek, who knows through the dehumanizing experiences of two totalitarian regimes what democracy is not, has pointed out that "in Central Europe, after World War I, parliamentary institutions were exceptionally weak and in the context of the authoritarian temptation, genuine Parliaments in Poland, Romania and Hungary disappeared from the scene". Thus he concludes that Parliaments as true legislatures give "citizens an opportunity to be engaged, to have a role in politics, and to be active in public life [because] Parliament is a concrete realization of the idea of freedom". This leads logically to the next step towards the institutionalisation of direct democracy.

8. The supremacy of the electorate over the legislature and citizens -- initiated legislation. Just as (7) provides for the legislature's supremacy over the executive, this principle takes the further important step of enshrining the people's sovereign rights as legislators. Simply put, all political theory equates sovereignty with the right to legislate. Where democratic theory and practice differ from the alternatives is that they assign sovereignty to the people. While the sovereignty of Parliament is preferable to the sovereignty of the executive, a Parliament with absolute power can be as dangerous as an absolute executive and, indeed, can amount to the same thing for the most obvious reasons that do not need to be discussed here. Consequently, this measure needs to be specifically embodied in the Constitution and enacted through the principles proposed in this essay.

Furthermore, as sovereigns, it is vital that the people have the constitutional right to initiate legislation through referendums. The sovereign citizens may also allow the Parliament to put legislation to the people for popular vote. Where this does occur -- particularly in Switzerland and a majority of U.S. States -- consensus tends to outweigh conflict, and governments become more cautious about legislative impositions and more prone to consult, in the knowledge that the people effectively wield the ultimate legislative weapon through CIR whose strength, like that of most reserve powers of sovereigns, lies not so much in the scorecards of success and failure on

particular measures, but in its very existence as the ultimate symbol and embodiment of citizens' sovereignty.

9. Direct accountability of members of the executive and legislature to their sovereigns, through referendums empowering the sovereign citizens to impeach, recall and dismiss those to whom they have temporarily delegated the exercise of some of their sovereign powers. This is the embodiment of principles (7) and (8). Moreover, all laws passed by Parliament must apply equally to members of all branches of government, including laws such as making chief executive officers of public companies (and members of Cabinet) accountable to voters to minimise outbreaks of national equivalents of WA Inc. Parliament must have powers of impeachment over all members of the executive and judiciary; and, by the same token, as the expression of their sovereignty, the people must have powers of impeachment, recall and/or dismissal over all members of the three branches of government through citizen-initiated referendums specifically geared to this.

The failure of all political parties when in government to honour the traditions of ministerial responsibility (ie, to resign when Parliament has been misled or lied to, or administration is careless or corrupt) reinforces the necessity of such measures. So do the recent declarations by most of the Keating cabinet that our system of government is dependent upon secrecy, that lying by politicians to Parliament and the people is not a serious matter, and that members of the judiciary and legal profession who do not toe the line of the ruling party will be punished.

10. Checks and balances in the introduction, passage and enactment of all bills in Parliament. This can be best achieved by strengthening the committee system to provide for open public hearings and scrutiny of all legislation.

11. The requirement that all legislation passed by Parliament be enacted within 90 days, unless otherwise specified in the legislation. This is to prevent governments from failing to enact Opposition-amended legislation or passing legislation for "window-dressing" purposes only.

12. Senate approval of all treaties, long-term deployments of troops, declarations of war, ambassadorial and other major executive and judicial appointments. For treaties and appointments, confirmation proceedings must be open to public hearings and submissions. These measures are necessary to impose limitations by way of checks and balances on the powers of patronage of Prime Minister and cabinet, which combine the former monarchical powers of patronage with those, even more commodious, powers of patronage of the modern bureaucratic state. The powers of patronage have been used to such an extent by Labor since 1983 that it is questionable whether Australia can any longer be described as a genuinely pluralist society in face of the monopolies it has bestowed upon its members, financiers, claqueurs and courtesans in just about every area of human enterprise and endeavour.

13. Line by line scrutiny of the Budget by Parliament and a greater role for state audit as the people's watchdog. At the moment the Budget is passed en bloc. This measure, involving a cost-benefit analysis of all parts of the Budget, would take near absolute control of the purse-strings away from the executive and would further entrench, along with other measures enumerated above and below, principles (7) and (8). Such scrutiny would be delegated by the people to parliamentary committees conducting open public hearings. Simply put, it is the sovereign's right not only to tax but also to decide the levels and uses of taxation.

Let us not forget history in such matters. For instance, in 1610 the House of Commons:

"[I]nsisted that taxation could take place only with the consent of Parliament and that subsidy bills had to be initiated in the Lower House. Many in the Lords accepted both of these principles. The fact that Lords were not exempt from taxation (unlike many continental countries) led to a

community of interests between the two Houses on this all important question and provides one reason for the failure of Stuart absolutism."

Nearly four hundred years later, the wheel has turned almost full circle. Rather than requesting Supply from Parliament, our modern executive demands it as if a Divine Right. Substitute "Prime Minister" for "King" in the 1621 statement of a royalist sycophant that "Parliament ... possesses no power except from the King under the King", and the similarities between 17th Century royalist claims to absolutism and those of our present Executive are obvious. Consequently, it needs to be unequivocally laid down that Parliament has the indisputable, people-delegated right to grant, or refuse, Supply. For either House to give up that power -- as the likes of the misnamed Australian Democrats, Sir John Gorton, Mr Whitlam and the ALP are all demanding the Senate do -- is to give over Parliament to the absolute rule of the executive. Therefore, we need to re-establish -- and not further disestablish -- the superior powers of the people and Parliament over the executive in these vital areas, as democratic theory and practice demand.

Likewise, the role of the Auditor-General as a means of encouraging greater accountability of all public expenditures by the executive needs to be re-examined, so that it can fulfil its proper function of being, in the words of Le Monde, "the great investigator of the failings of the state mechanism."

These matters cannot be divorced from moral questions. Professor Gerald Caiden most convincingly argues that, when properly constituted and properly respected by government and society, state audit's function is promoting good government:

"State audit comes closest of any public body to being the public's watchdog over governmental activities, the one most wedded to concepts of honesty, legality, frugality and service in public administration, most sensitive to public needs, and most promotive of economic, efficient, effective and responsible government. It is a leading force for good government, independent of partisan political domination and executive control, even though it is formally linked to the legislature and legally viewed as its agent. It is one of the few bodies able to evaluate governmental programs, master complex relationships between public programs and issues, pinpoint priorities, recognise neglected and emerging problems, and provide administrative expertise in policy implementation and governmental reorganisation. It stimulates political and public initiatives and coaxes public officials to do better. And it does most of these things openly, in full consultation with those it audits, and with the knowledge of the legislature, the public and mass media ... Special reference should be made to the role of state audit in strengthening legislatures. The growth of the administrative state has shifted the balance of government firmly into the hands of the executive, reducing the legislature to impotence in one-party states and greatly reducing its power in other regimes. The expansion of state audit activities has some potential in revitalising legislatures and restoring some initiative to individual legislators. State audit provides considerable information about government operations which the legislature cannot otherwise provide for itself and has not been able to obtain voluntarily from the executive and individual public agencies, and does so in a readily useable form. It provides guidelines and measures by which governmental programs can be gauged, and points out defects in public sector administration. It provides an alternative evaluation of agency performance, independent of the executive, and can supply individual legislators with an investigatory body of their own."

Benjamin Geist elaborates further on the moral dimensions of state audit under the heading Morality as follows:

"The normative activity of state audit is based ... upon principles of propriety, even of morality. State audit institutions tend to be highly aware of the state apparatus's duty to maintain at all times, a high degree of justice, fairness and equity in its dealings with the people it serves. They also tend to postulate high standards for judging such dealings: in particular they tend to take a jaundiced view of *raison d'etat*, expediency or shortage of resources, used to excuse improper acts or lack of consideration towards citizens ... On a case-by-case basis, its duty is to criticize improper decisions and, in the process, establish new norms of behaviour for the prevention of improper decisions in the future."

In brief, properly constituted and properly respected by government, state audit is a means of conducting permanent inquiries into the propriety of government. Had state audit been properly constituted and respected, the billions of dollars lost by Australian State and federal governments on useless or partisan causes over the last decade would have been minimised, if not actually prevented.

The contempt displayed towards the damning reports of Auditors-General by our governments is not merely disgraceful, it also amounts to a form of political corruption. The public interest demands that urgent action be taken to make our governments accountable to state audit which, because it monitors expenditures and proprieties, is in many respects more important to good government than is the actual setting of the budget and the budget itself. State audit is a vital means for the detection and correction of error and corruption before their effects become endemic and systemic.

14. The right of Parliament to institute, and set the terms of reference of commissions of inquiry without reference to the executive. This would make Royal Commissions and/or their equivalents responsible to Parliament and not the executive which, by existing arrangements, is the inheritor of monarchical powers and thereby can avoid implementing, or even considering, commission recommendations, set the terms of reference and appoint the commissioners.

15. Making Parliament and the executive subject to higher law and adjudication by the courts to ensure that neither any area of government activity nor any individual is exempt from the laws.

16. Constitutional recognition of an independent and competitively appointed Public Service to guard against party-political stacking, as has been increasingly the practice at both federal and State levels in recent years.

17. Complete and final separation of the judiciary and the executive and increased independence of the judiciary from the executive. Thus the practice whereby Chief Justices sometimes act as Heads of State (eg, when a State Governor is seriously ill or otherwise indisposed) will be rendered unconstitutional, and through the provisions outlined in (12) the executive's present powers to reward party loyalists and apparatchiks with judicial posts (thereby politically stacking the courts) will be made more difficult by constitutional fiat.

18. Prohibition of employment of former MPs to offices of profit in either the public service or in a government agency for at least one year after resignation or defeat at the polls.

19. The sole right of the people to alter, amend, revise or change in any way their Constitution through democratically elected people's constitutional conventions and/or citizen-initiated referenda. This is a logical and necessary expression of the sovereignty of the people and reverses the present and ridiculous requirement that deprives the people of the fundamental right to be the authors of proposals for constitutional change, and which leads to the present undemocratic practice whereby committees and commissions of executive-appointed and remunerated "eminent persons" are empowered to dictate the terms of constitutional debate and, even more important, the very proposals which are to be put to the people by way of referendum.

20. New oaths of office for all parliamentarians, public officials and citizens based upon the observance of the Constitution and its principles -- especially the sovereignty of the people.

There are several problems with the new Oath of Citizenship officially introduced on Australia Day, 1994. First, it was imposed upon the people by government and Parliament without popular approval. This alone makes it a travesty from a democratic perspective. Second, in swearing allegiance to the Crown under the old oath, citizens were swearing allegiance also to the Constitution of which the Crown is an integral part and to which it is bound under its own oath of office. Third, under the new oath citizens are not bound to uphold the Constitution. They are required to swear allegiance to amorphous entities described as "the nation" and the "Australian people": the *volkstadt* and *volkstum*. It is thereby meaningless in content but nationalistic and undemocratic in form. The reason why "citizens" are not required to swear allegiance to the Constitution is obvious. The present Government and its Republican supporters have publicly dedicated themselves to abolishing it and replacing it with one without citizens, and which an executive-dominated Parliament can effectively change by parliamentary-executive decree. The conclusion is as inevitable as it is logical. When contracts are so worded and can be so easily changed and manipulated for partisan political and ideological purposes by power elites, they are not worth the paper they are written on and constitute an assault on civility and democracy.

Conclusion

In his second inaugural address, Thomas Jefferson, one of the original fashioners of the principles of constitutional democracy, said:

"Entertaining a due sense of our equal right to the use of our faculties, to the acquisitions of our industry, to honour and confidence from our fellow citizens ..., what more is necessary to make us a happy and prosperous people? Still one thing more, fellow citizens -- a wise and frugal government, which shall restrain men from injuring one another, which shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labour the bread it has earned. This is the sum of good government, and this is necessary to close the circle of our felicities."

It is easy to give notional assent to such altruism. Let us give real assent by placing the royal mantle of government which has passed from the monarch to the political executive on the shoulders of those to whom it belongs: the people of Australia and their heirs and successors in perpetuity. Thereby, in the 100th year of our Commonwealth the people of Australia will have just cause to celebrate the great constitutional achievements of the past through the exercise of their sovereignty, whilst honouring in the most fitting manner the debts we owe all those who sacrificed their lives for the advancement and ideals of democracy.

That is our challenge. Accept it, and future generations will bless and honour your memory for having fought, and won, the good fight. When all is said and done, democratic constitutionalism is the best protection against the mad, the bad and the ugly, precisely because it is the people's means of controlling, both directly and indirectly, political power by civil means.
