

A Symbolic Issue

M. A. Stephenson and Clive Turner (eds), Australia: Republic or Monarchy. Legal and Constitutional Issues, University of Queensland Press, Brisbane, 1994

Reviewed by John Hirst

In his introduction to this volume, Sir Zelman Cowen expresses surprise at how quickly support for the republic has grown. Tony Abbott, former executive director of Australians for Constitutional Monarchy, ascribes this solely to the support of Prime Minister Paul Keating, who, he speculates, will also be responsible for sinking the movement. As an office holder in the Australian Republican Movement, I find the common error of giving Paul Keating the credit for the republican resurgence rather galling. Fortunately, we have some hard evidence to refute the claim. Newspoll first showed a majority for the republic (44 per cent for, 40 per cent against, 16 per cent undecided) in February/March 1992, well before the Prime Minister took up the cause. Isn't it much more likely that the Prime Minister became interested in the republic because he knew he was on a winner?

Many constitutional lawyers have been thrown off balance by the republican cause. It doesn't raise the constitutional issues that they regard as important, like federal-State relations, the Senate and supply, the growth of executive power, the use of the external affairs power, and a bill of rights. They are puzzled and disappointed to find that republicans are chiefly interested in symbolism. These responses are evident in some of the contributions to this volume. Kenneth Wiltshire sees republicanism as only marginally useful in dealing with the problems and challenges of the next century. Suri Ratnapala wants a true separation of powers, which he sees as the defining characteristic of a republic. Sir Harry Gibbs is a little unfair when he writes that the Republican Movement 'seems to have been launched without much consideration of the sort of republic that was designed — the concern was with the symbolism, rather than the substance the change' (p.12); but it is true that constitutional change was a secondary and not a primary concern. Republicanism represents a sea-change in the nation's thinking about itself: it is the disavowal of the joint identity — British and Australian — with which Australians were comfortable for so long.

This volume would thus give a very poor account of the Republican Movement if it were concerned solely with constitutional and political issues. Fortunately, the editors have included an essay of Donald Horne on the symbolic advantage of a republic. Far from disowning our heritage, as Tony Abbott alleges, Horne sees the republic as an opportunity to celebrate Australia's distinctive heritage in words and symbols. The republic will define a civic culture, not a chauvinistic nationalism; it will celebrate the land itself, the Constitution as amended by the people, the rule of law, a liberal democracy, tolerance and equal civil rights.

Sir Harry Gibbs, R. D. Lumb and Gerard Carney deal with the constitutional complexities on the road to a republic. But they tend to turn difficulties into obstacles.

There are two constitutional difficulties. First, the Constitution is section 9 in a British Act of Parliament. It is alleged that the power to amend the constitution by referendum might relate only to the Constitution itself and not to the eight sections that preceded it. These include a declaration that the people agreed to unite in an indissoluble commonwealth under the crown. If that can't be altered by referendum, then we would have to remain a monarchy for ever because the British parliament has declared that it will no longer legislate on Australian affairs. The better legal opinion, in my view, is that amendment by referendum is good for all purposes. How could it be otherwise? Can it be seriously suggested that this High Court or any High Court would tell the sovereign people that a majority of them in a majority of the States could not effect a change to a republic? The doubters need to take more politics with their constitutional law. If there are monarchists who seriously doubt the people's power to alter the Constitution in every particular, then they are wrong to claim, as they do, that Australia is a sovereign independent state.

The second difficulty relates to the States. Can an amendment to the federal Constitution oblige a State to become a republic if a majority of its citizens have voted to retain the monarch? That is, would a majority vote in four States be enough to extinguish the State monarchies or would it require a majority in all six States? Furthermore, can a federal amendment extinguish the entrenchment of the monarchy in the State constitutions? Legal opinion is divided and with better reason than on the previous matter. These issues receive more detailed attention than any other in this volume, especially in Carney's thorough essay 'Republicanism and State Constitutions'. But it is highly unlikely that these issues will have to be settled by constitutional lawyers and High Court judges. For an amendment to be carried in four States, it has to enjoy overwhelming support, sufficient indeed to carry all six States. Of the eight referendums that have been carried, all but one passed in six States. Polls give no indication that support for a republic varies on a State basis. In one poll Tasmania was the most republican state in the Commonwealth. This is another indication of how constitutional lawyers are fazed by the republican issue. They are so used to considering possible amendments that can be seen as an attack on the small States that on this issue too they imagine that small States will be at odds with the rest. Even if one or two States did vote 'no' in a republican referendum, long before the High Court determined whether they could be 'coerced' into becoming a republic another factor would come into play, one entirely neglected by the authors in this volume: the Queen. Are we to imagine that after being removed as Queen of Australia and Queen of at least four States, she would consent to remain as Queen of Queensland, occupying a royalist redoubt in a republican Australia? Hardly.

There are innumerable political difficulties on the road to a Republic — Tony Abbott delights in listing some of them — but no constitutional barrier. The constitutional law has of course to be done correctly, but constitutional lawyers overlook how easily points of law can be settled when the people's wish is clear. The modern monarchy depends on the goodwill of the subjects; a clear indication by referendum that a majority of Australians want a republic will put the matter beyond dispute.

Constitutional lawyers are more usefully employed discussing how a minimalist republic might be constructed. This issue is treated rather spottily in this volume, with the contributors failing to engage with one other. George Winterton, the pioneer minimalist, again sets out his sober plan for a republic. His plan has been in circulation for some time, but the anti-republicans ignore it. Sir Harry Gibbs asserts that no matter how the president is chosen, he or she must become a political figure. Winterton, and the Republican Movement, propose that the president be elected by two-thirds majority of Parliament. If that wouldn't ensure the election of a bipartisan figure, it would be helpful to show why. The difficulty here is not constitutional, but political: the people, by overwhelming majority, according to the polls, want a directly elected president. Fitting such a figure into a Westminster system presents some problems. Tony Abbott is alert to what the monarchists can do with this split between the republican leadership and the people.

The other chief matter that a republican constitution would have to settle is the reserve powers of the head of state. This is a notoriously contentious issue, but there is close agreement on what the powers are, except in relation to a refusal of supply by the Senate. Everyone accepts that a government acting illegally has to be dismissed, but is a refusal of supply in itself grounds for dismissal, as Sir John Kerr thought in 1975? Winterton proposes that the issue be left, as it is now, unresolved.

The debate over the republic is not strictly between monarchy and republic but between absentee monarchy and republic. Several of the contributors recognise that the strongest case the republicans have is that the monarch is in the first place Britain's. Gareth Grainger argues that the objection can be met by creating an Australian monarchy and urges that this option be put to the people. In response to those who consider a monarchy incongruous in democratic, egalitarian Australia, he points to Norway, which created a monarchy as recently as 1905.

The volume ends with two essays on a bill of rights, a matter not central to the republic but which will no doubt be raised when constitutional change is discussed. Gabriël Moens argues very strongly against transferring legislative power to the judiciary, the inevitable consequence of the introduction of a bill of rights. Frank Brennan shares some of these doubts, but if there is to be a bill of rights he wants special provisions for Aborigines to protect their culture and to allow self-government.

Opinion on the republic is changing very rapidly. Sir Zelman Cowen, still neutral when he penned the introduction to this volume, has since said that the issue can no longer be left on the back burner and has thrown his great influence against a popularly elected president. John Howard is praised by Tony Abbott for being a stout defender of the monarchy; but Howard has since endorsed the plan of the former leader of the Liberal Party to call a constitutional convention to consider all aspects of the Constitution including the head of state. The issue of the next election could well be not whether we are to have a republic, but what route we are to take to it.

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