

HENRY PARKES ORATION 2004

A Republican President or a Presidential Republic?

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HENRY PARKES was one of the great figures of Australian politics. One measure of his greatness is that on nearly all the great issues that face this country he had something to say. Not infrequently, as in the case of the current subject, the republic, he can be found on both sides of the argument. He was at one time an enthusiastic supporter of the reverend John Dunmore Lang, our first notable republican, though he soon became disillusioned with both Lang and his republic.

Now to the terminology used in this lecture: The ‘republican president’ of the title is shorthand for ‘a-republic-with-a-president’. ‘Ah, but don’t all republics have a president?’ comes the query. At this stage I will cite the Humpty Dumpty justification: ‘When I use a word it means just what I choose it to mean – neither more nor less.’ By ‘a-republic-with-a-president’ I mean a republic in which the president is merely a political bit player, called upon only rarely and occasionally to play a political role. And by ‘a presidential republic’ I mean a republic in which the president is the key political actor, playing a day-to-day political role. Obvious examples of republic-with-a-president systems are Germany and Italy; the classic example of the presidential republic is of course the United States.

It is important to stress that the essential distinguishing mark between a republic-with-a-president and a presidential republic is the nature of the political role of the president. In both systems the president performs similar ceremonial functions as head of state. While it is probably necessary for the president in a presidential republic to have some clear mandate, usually through popular election, presidents in a republic-with-a-president can also be popularly elected. For example Ireland, Iceland, Portugal and Austria are all examples of republics in which the president is merely a political bit player yet is elected by popular election. I stress again that it is the political function that distinguishes the two systems: in the presidential republic the president is at the heart of the political executive, indeed often *is* the political executive, a day-to-day player in politics; whereas in the republic-with-a-president the president is merely a minor political actor, the role of the day-to-day political executive being performed by someone else, usually the prime minister and Cabinet.

At this point I suspect that the political scientists among you are muttering ‘Why does he go on with all this “Alice through the looking-glass” nonsense? What he means by a “republic-with-a-president” is what we simply call a “parliamentary republic”’. So what he really is talking about is a parliamentary republic versus a presidential republic.’ They are of course right and I will soon abandon the clumsy term ‘republic-with-a-president’ in favour of the term ‘parliamentary republic’.

But there was a purpose in this clumsy terminology, this ‘Alice through the looking-glass’ approach. If we frame the debate as parliamentary republic versus presidential republic then at least in British Commonwealth countries we make it too English, too comfortable, too cosy. The

words bias the argument in favour of the parliamentary republic. ‘Parliamentary republic’: two nice words and no mention of that alien thing – a president. Also ‘parliamentary republic’ emphasises that good thing – a parliament – while ‘presidential republic’ suggests there might not be a parliament at all. Yet in the classical presidential republic, the USA, the parliament – the Congress – performs most of the functions of a modern parliament more effectively than any parliament in a parliamentary republic. Just think of the various parliamentary enquiries on aspects of the war in Iraq that have emerged from the British House of Commons, the Australian Parliament, and the American Congress. I think there would be little doubt that the most hard-hitting and the most effective reports in challenging the executive and keeping it on its toes have emerged from the American Congress.

Thus, while from now on I will use the terms ‘parliamentary republic’ and ‘presidential republic’, one should always remember that parliamentary republics have presidents and that the classic presidential republic has a distinguished parliament.

Having for the moment disposed of terminology let me examine the state of the republican question in Australia in the aftermath of the referendum of 1999.

Death of the ‘minimalist’ model?

First I make an assumption that is debatable and will need to be argued through: that the defeat of the republican referendum in 1999 ended the possibility of a conservative or minimalist republic in Australia. This assumption derives much of its plausibility from a common political proposition that the longer the inevitable is denied or resisted the more radical the outcome is likely to be. There is a classic example from within the British political tradition. If any one of the Home Rule for Ireland bills of 1885, 1895 or 1912 – granting Ireland a degree of autonomy within the United Kingdom – had been passed then it is likely that today Ireland would still be part of a probably federal United Kingdom. Instead the essentially conservative proposals were each rejected and a more radical solution emerged – an Ireland independent from the United Kingdom. I suggest that a similar move from conservative to more radical solutions is likely for the republic in Australia.

In 1999 the Australian people were offered by referendum the most minimal of parliamentary republican models. Well perhaps not quite the most minimal. There was floating around the so-called McGarvie model whereby nothing was changed except that the governor-general (McGarvie was not keen on the title ‘president’) would be appointed and dismissed by a Constitutional Council, in place of the Queen, acting on the advice of the prime minister. The Constitutional Council was to be composed of three distinguished and elderly Australians – maximum age of 79 – drawn from retired governors-general, retired governors and retired judges.

The model was virtually identical with the status quo. It could well be described as the republican model for those who did not want a republic. It is perhaps a commentary on late 20th century Australian democracy that this extraordinary proposal was not simply laughed out of court. Neville Wran did his best, suggesting that with so many septuagenarians on the Constitutional Council ‘you would have to send the wagon around to all the nursing homes to get a complement’.¹ But the McGarvie model served various political purposes. It provided a refuge for faint-hearted republicans, mainly of Liberal persuasion; it was an instrument which could be used to compel mainstream republicans to minimise their own proposals; and in the end it was used as the vehicle at the Constitutional Convention to see off the radical and dangerously seductive model of a directly elected president.

The minimalist proposal ultimately put to the people was an advance on the McGarvie model but there was little else to be said for it. It was proposed to establish a president with powers identical to those of the governor-general, the president to be nominated by the prime minister, from a non-binding shortlist of three prepared by a broadly representative nominations committee, and confirmed by a two-thirds vote of the parliament. In essence the nomination was in the hands of the prime minister though he would need the prior agreement of the opposition leader in order to secure the two-thirds vote of the parliament, and in practice it would be difficult for the leaders to move away from the names on the shortlist. The power to dismiss the president lay unequivocally

with the prime minister, requiring as it did simply the backing of a majority vote in the House of Representatives. Any codification of the undefined reserve powers in order to clarify the powers of the president and his relations with the prime minister was eschewed as too difficult and likely to arouse controversy.

Apart from the inclusion of the nominations committee – a sop to those who favoured direct popular election of the president – the minimalist model put at the referendum represented a retreat by the mainstream republican movement during the course of the 1990s. Originally they had favoured both appointment and dismissal by a two-thirds vote of the parliament, Malcolm Turnbull arguing impeccably in 1993 that ‘establishing a two-thirds majority in a joint sitting as the pre-requisite for removal eliminates any prospect of the president being sacked simply because he or she has offended the government of the day’. However, as the defenders of the existing parliamentary order, particularly the McGarvyites, pointed out if a president breached the unwritten conventions in order to favour the opposition as against the government the prime minister would be unable to get the two-thirds majority to get rid of the president, given that in modern times no government has ever had a two-thirds majority in the parliament. The mainstream republicans acquiesced and so the power of dismissal rested with the prime minister backed simply by a majority vote in the House of Representatives.

The mainstream republicans had originally favoured codification of the reserve powers either through spelling them out in the Constitution or by empowering the parliament to define them in legislation. In the mid-90s Malcolm Turnbull had dismissed the refusal to codify calling it ‘the ultra-minimalist solution’ and advanced compelling reasons for codification: ‘first, just as good fences make for good neighbours, so do clear ground rules make for stable and predictable government ... second ... it is quite wrong in a democracy such as ours to have fundamental elements in our democratic system left to so-called unwritten rules or conventions’.² Yet under the pressures of the Constitutional Convention he and his allies succumbed to ‘the ultra-minimalist’ solution – no codification.

On 6 November 1999 this minimalist proposal went down to resounding defeat, rejected in all states and territories except the ACT, and overall by 6.4 million votes to 5.3 million. And yet it was supported by the bulk of the media and probably by a majority of the great and the good. What went wrong?

It is easy in retrospect to see the flaws in the minimalist model. So easy in fact that a conspiracy theory has developed which posits that the Machiavellian Prime Minister, in cahoots with his monarchist allies, schemed to secure the emergence of this model from the Constitutional Convention as the one least likely to seduce monarchists on the one hand or arouse the enthusiasm of republicans on the other. The minimalist proposal certainly split the republicans with an embittered minority of direct electionists supporting the ‘No’ case. It certainly lent itself to easy caricature – damned as ‘the politicians’ republic’, the president ‘a prime minister’s puppet’, presidential selection left to ‘the political deal-makers’. (These quotes are from the intellectually disreputable but emotively powerful official ‘No’ case on the referendum.)

The alienation of the populace from the political class was widespread in western democracies at the end of the 20th century, though Australia was probably unique in that leading members of the political class were at the forefront of the self-denigration. The minimalist proposal certainly mobilised little enthusiasm among the population at large, the nationalist appeal of ‘an Australian as head of state’ lacking the popular resonance possessed by the demonisation of the ‘politicians’ republic’.

This demonisation has made it very difficult, probably impossible, to resurrect the minimalist model. It is inevitable that the next proposal must represent an advance on minimalism and that almost certainly will involve a popularly elected president. But as noted earlier that will still offer us a choice of republics – between a parliamentary republic or a presidential republic, that is between a republic in which even though elected the president is essentially, as regards politics, a bit player, or a republic in which the president is the key figure in the political executive. And such are the variety of possibilities beyond our shores that these two systems – a parliamentary

republic or a presidential republic – represent but each end of a continuum with many models in between, the most obvious of these hybrids being the quasi-presidential republic of France.

Yet if we are to explore these other options we need to understand why the intelligent and experienced leadership of the mainstream republican movement – and remember the model was as much Paul Keating's as it was Malcolm Turnbull's – chose a model which ended ultimately in the debacle of November 1999. Why did they turn away from other less minimalist models? There were indeed very powerful reasons for adopting the course that they did and anyone seeking to advance the republican cause needs to ponder them.

The mainstream republicans were haunted by the history of referendum failure in Australia. They drew from it three lessons. First, change had to be as simple as possible to minimise negative red herrings. This served a key tactical purpose as well. 'The Australian Republican Movement's platform had to be as simple and as short as possible', wrote Turnbull, 'so that our opponents would be left without anything to defend except the monarchy itself.' This was to underestimate the ingenuity of the monarchists. Secondly, anything that was not absolutely necessary to the change should be jettisoned. 'We could not afford', warned Turnbull, 'to encumber ourselves with radical baggage that would impede the achievement of our core objective.'³ Ultimately that meant the jettisoning of nearly all baggage, radical or otherwise. Thirdly, from the few successes and the many failures in referendum history they drew the lesson that a referendum could only succeed if both major parties were behind the proposal or at least did not oppose it. Throughout the 1990s the Australian Republican Movement hoped that the Liberals could be brought on board and that this could be done by advancing the most modest and conservative of republics. That is why, although the divisive shadow of Paul Keating may have brooded over the Constitutional Convention, his name was scarcely mentioned. All three lessons pointed towards the most minimal of solutions.

I will suggest in a moment that we Australians have perhaps been too dominated by these so-called lessons. We have allowed our imaginations to become too cribbed and confined by referendum failure and that bolder, sweeping more imaginative change, particularly if it can galvanise and resonate with the public, may be the way to go. David Solomon has suggested that the 'widespread public discontent with politicians and the political process might be tapped and harnessed by proposals that make the governance and political system more open and accountable'.⁴ Certainly there is an example that points in that direction from across the Tasman.

But it was not simply the lessons of referendum failure that influenced the minimalism of the republic proposal. There was in all the leading republican protagonists – from Keating perhaps above all – an unquestioned conviction that the Westminster system of an executive selected from and responsible to the parliament was the best of all possible political worlds. It was of course one which gives political supremacy to the prime minister provided he maintains the mastery of his party and through it the control of the parliament. Anything in the passage towards a republic that threatened the balance of that system, in other words the supremacy of the prime minister, was anathema. As Keating instructed the Republic Advisory Committee, they must devise a method of replacing the Queen and the governor-general but in so doing to examine no options 'which would otherwise change our structure of government'. This conservatism guaranteed that the republican proposal would be minimal. I will suggest later that this involves too rosy an evaluation of the Australian version of the Westminster model.

The republicans recognised that their minimalist, conservative project was hardly likely to galvanise the masses. Keating seems to have instinctively realised this, his radical nationalist tirades providing a camouflage for the very modesty of his proposal. Yet cooler heads around the Prime Minister and in the republican movement recognised that such tirades were counter-productive, for a conservative republic could come only through the support of the right and the prime ministerial remarks tended to alienate the very conservatives whose support the republicans would need. The Australian Republican Movement's hope all along was that if the Liberal leadership could be got into the republican cart then the fact that the minimalist proposals did not stir the people's imagination would not matter.

The symbolic issues of the republic, which stirred intellectuals, found little purchase with the broader population and the tepid nationalism of the republican cause seems to have had little resonance with the masses. Australian-born men had been governors-general for a generation while the Queen, a hard-working kindly old matron with a dysfunctional family, aroused sympathy rather than antipathy and anyhow didn't seem to have much to do with Australian governance. Perverse monarchists further confused the matter by claiming that the governor-general was really our head of state or, echoing Sir Henry Parkes, claimed that we were already 'a crowned republic'. Most importantly of all, anti-monarchical nationalist rhetoric was simply bypassed when the monarchists decided not to defend the monarchy as such but rather to concentrate their energies on demonising 'the politicians' republic'.

Minimalist republicans might not agree with me that the minimalist option is now dead, particularly in the light of the cogent reasons for adopting it in 1998–99. They would argue that its defeat in 1999 was due to peculiar and contingent political circumstances unlikely to be permanent. Above all they would argue that if John Hewson or Peter Costello had been Liberal leader rather than John Howard then there could well have been effective bipartisan support for the minimalist model. With Howard's eventual passing a new bipartisan alliance could be consummated around the minimalist model ensuring its triumph in a future referendum. Thus there would be no need to contemplate such dangerous options as popularly elected presidents.

These seem to me to be counsels of extraordinary optimism. They ignore the extent to which the republican movement itself has been radicalised by defeat, hesitant to advocate ever again a minimalist model. They ignore the extent to which the trend within the Labor Party, already apparent before the referendum, in favour of a popularly elected president has been accelerated by the referendum defeat. They ignore the extent to which the conservative community has been galvanised against anything that has the taint of 'a politicians' republic'. They ignore the extent to which the demonisation of the 'politicians' republic' has made the minimal option something from which most politicians would keep their distance. Above all they ignore the extent to which the notion of a popularly elected president has become rusted on in Australian public opinion, has become the indispensable condition for the people's acquiescence in a republic.

If we abandon minimalism there is probably no escaping the popular election of the president. Indeed probably the most minimal model that is now viable is Western Australian Premier Geoff Gallop's proposal that the parliament nominate three candidates on whom the electorate would vote. Given that the politicians would dominate the nomination process even this might no longer be acceptable. Whatever process we adopt, a directly elected president does not, of course, commit us to a presidential republic: we could still have a parliamentary republic like Ireland, Austria, Iceland or Portugal, in which most political powers lie with the prime minister and Cabinet, not with the directly elected president.

Electing the president in a parliamentary republic

I will examine the parliamentary republic option first. I will not propose any detailed model but simply canvass the major issues involved.

Three arguments are commonly advanced against popular election of the president. First that it would deter the great and the good from becoming our head of state for such figures would not submit themselves to popular election and possibly popular dismissal. This seems to me an argument that can be truly labelled elitist (I hesitate to use the term given its perverse use in recent debates but here I think it appropriate). Yet if we remove monarchical mystique as the basis of authority in the polity then in a democracy we can only rest authority on the people. If someone is too fastidious to submit him or herself to the rough and tumble of the popular arena, that would seem to disqualify such a person as a suitable head of state of a genuine democratic republic.

Dismissal of a president, as we have seen with the minimalist model, always raises difficulty. Obviously an elected president could not be summarily dismissed by the prime minister or the parliament. We can go a long way to obviate any need for dismissal on political grounds by carefully specifying and circumscribing presidential powers. In the case of other grounds for

dismissal – misbehaviour, unfitness for office, bringing office into disrepute, incapacity – a judicial finding endorsed by a two-thirds majority of the parliament would probably be the way to go.

Secondly it is argued that popular election would inevitably guarantee that we would get a politician as president. To prevent a plethora of weird candidates we would need tight electoral rules specifying large numbers of voters for nomination and significant sums for deposits, which would favour the party organisations. Yet the parties themselves might well choose distinguished non-partisan figures in order to sway the undecided in the electorate. And anyhow if the parties did offer the electors only a choice between politicians I suspect people would themselves prefer to choose a politician as their president rather than leave it to the politicians to choose a non-politician as president without any reference to the people.

Thirdly it is argued that the popular election of the president would upset the delicate balance between the parliamentary executive and the head of state, between the prime minister, indirectly elected, and the president, directly elected. ‘If a new Australian head of state were to be elected by popular mandate,’ warned Paul Keating, ‘he or she would inherit a basis of power that would prove to be fundamentally at odds with our own Westminster-style of government’.⁵ For once John Howard agreed with him, putting the position more bluntly: ‘Direct election of the president would inevitably create a rival power centre – and I mean a political power centre – to that of the prime minister’.⁶ When Keating and Howard agree ordinary Australians should be on their guard.

On one point there is unanimity: to enhance the legitimacy and hence the authority of the president by direct election yet to leave the shadowy monarchical powers in our Constitution untouched would be to create a potential monster. There is also agreement on what follows from this: if we were to have an elected president then we would have to spell out in some way the reserve powers and the unwritten constitutional conventions that govern their use. To recognise the prime minister – at present not mentioned in the Constitution – and to spell out how the prime minister would be appointed by the president and possibly dismissed by the president, and the conditions under which the president would grant or deny a prime minister a dissolution of the House of Representatives or a double dissolution of both houses, would be invaluable in itself. There would be much to be said for presidents, prime ministers and school kids being provided in the Constitution with an outline of the mechanisms of executive authority. It would make the Constitution an instrument for understanding rather than, as it is at the moment, an impediment to understanding. It was a pity the Constitutional Convention ducked this issue in 1998. It cannot be ducked if we have an elected president.

Such codification is not, as has sometimes been suggested, beyond the wit of man. Every European parliamentary republic designed since World War II, and there have been a host of them, has with considerable success laid down the ground rules establishing the relationship between president and parliamentary executive. McGarvie himself, who instinctively disliked the idea of codification, nevertheless provided the philosophical basis for such codification: the essence of a convention is its constitutional rationale. Much work has already been done in Australia on the necessary codification by the Constitutional Conventions of the 1970s and 1980s, by the Advisory Committee on Executive Government (1987) and by the Republic Advisory Committee in 1993. It would be foolish to pretend that there is as yet a complete consensus but there is a fair degree of agreement on how to spell out most of the ground rules.

There does remain one outstanding issue, which arises from a unique feature of the Australian system: the power of the Senate to reject supply – the source of the greatest gubernatorial crisis in our history. How is the president to respond if a Senate rejects or refuses to pass a budget backed by a majority of the House of Representatives? How do you codify that? The simplest solution would be to remove the power of veto over budgets from the Senate. But this is unlikely to win the support of the Coalition parties and would be resisted by the smaller states.

On the other hand, even today Labor would probably oppose any codification of presidential powers in this matter, which might be taken as endorsing Sir John Kerr’s actions in 1975. The most elegant solution so far advanced is that if the Senate blocked supply and the government refused to compromise its position to meet Senate demands, then the government would remain

in office until lawfully appropriated funds ran out and the government sought to spend monies not lawfully appropriated, which would be a clear breach of the Constitution. This has the great advantage of ruling out any pre-emptive strike by the president, which was the weightiest of the criticisms of Kerr in 1975. On the other hand it does so by risking the financial integrity of the government and possibly of the nation. However, if this position were clearly set out in constitutional rules then it is unlikely such an ultimate crisis point would be reached.

These are the major constitutional changes that would be required if we were to establish a parliamentary republic with a directly elected president. They would involve considerable re-writing of the Constitution. At this point we might ask ourselves should we go further? Given the constitutional changes required to accommodate a directly elected president, would this facilitate the contemplation of more ambitious changes? Should we seize the opportunity to move towards a presidential republic in which day-to-day political power rests with the president? This would involve borrowing from the American experience – the classical example of the presidential republic – and would entail not merely the reform but the reconstruction of Australian government.

Challenges of a presidential republic

I am encouraged in contemplating such ambitious questions by those doyens of republicanism Donald Horne and Malcolm Turnbull. In quite general terms Horne has argued that a republic should come ‘only as part of one of those great unfolding processes in which the people of a nation discuss things among themselves, trying out this, trying out that, until one of those miracles of democratic society occurs: the people find a new way of seeing themselves, a new consensus.’⁷ The more practical and pragmatic Turnbull, contemplating the wreckage of his hopes in late 1999, wrote that next time round ‘it is very important that we have a proper debate on the issue of a directly elected president ... my preference would be to include two direct-election models: one with a ceremonial president like the governor-general and the other a full-blooded United States-style system, with a president who is also the head of government.’⁸ What follows is a modest contribution to that proper debate, to that national discussion.

We should note here that the founding fathers of the Australian nation were much more imaginative, much more ambitious, and much more ready to break with the Westminster model than any of their successors in the past century. They compromised the classic Westminster system by major borrowings from the great democracy across the Pacific. At the very time when conservatives in the United Kingdom were arguing that Westminster and federalism were incompatible, the Australian founding fathers set up a federal structure adapted from that of the USA. In imitation of the American system they established a High Court to interpret the Constitution. The enumeration of powers and the limitations on parliamentary sovereignty were more characteristic of the United States than they were of Westminster. Indeed a plausible case can be made out that a presidential executive of the American type was not seriously considered by the founding fathers chiefly because it was incompatible with Australia remaining a monarchy. A parliamentary executive broke with none of the monarchical traditions inherent in the British system; a presidential executive would have sundered them. Could you possibly have a presidential monarchy?

To make the case for a presidential republic we have first to take a more dispassionate, and thereby inevitably more jaundiced, view of the parliamentary system than usually prevails in this country, and second to stress the virtues of the presidential republic and distinguish them from a host of contingent factors that are not inherent in the system but are often adduced by reference to the United States. An example of the latter is the allegation that only a millionaire can be president of the United States. That may be true but it is not a necessary feature of a presidential republic, merely the result of the particular nominating and primary election processes that have developed in the United States and the prevailing cultural attitudes to the role of money in election financing in that country.

I do not intend to develop the case for a presidential republic as against a parliamentary republic in any detail, but rather to sketch out the major lineaments of the arguments involved. We have noted that the essential difference between a parliamentary republic and a presidential republic is that in the former the president is a ceremonial figure with a minimum political role, with

executive power resting in a Cabinet led by a prime minister, while in the latter day-to-day executive powers are exercised by the president.

The essential structural difference in which this contrast is rooted is this: in the parliamentary republic, executive and legislature are fused in a single institution – the parliament – to which the executive, that is the prime minister and Cabinet, belong and to which they are responsible, and which itself has the power to elect and reject the political executive. By contrast in the presidential republic the political executive and the legislature are separate and neither institution can select or remove the other. The advantages and the disadvantages of the two systems flow from this central structural fact.

Paradoxically it is the very power of the parliaments to determine and to bring down governments that has been the source of the decay of parliaments in parliamentary systems with dominant two-party systems during the course of the 20th century. As one American observer has noted ‘the parliamentary system formally assumes legislative supremacy, [but] in fact assures the almost unassailable dominance of the executive over the legislature’.⁹ Given that parliaments have the formal power to bring governments down, governments have set out to ensure that this never happens.

Their instrument has been the modern tightly disciplined political party. Provided the party leadership can retain control of the party’s MPs – and they have developed a fine array of sticks and carrots to do so – they need have no fear of parliament. Rather than parliaments bringing governments to account, parliaments, or at least their lower houses to which governments are usually responsible, have been turned into rubber stamps for the actions of the executive.

The result is that in Australia we have between elections an elected or democratic dictatorship. I do not want to exaggerate this point. I mean simply that between elections citizens have little power to influence an executive determined to carry through its programs.

There are of course institutional constraints on the authoritarian inclinations of the executive government. Its great power is tempered by the Senate – over which, because of its electoral system, governments have had no control for a generation, though this may be about to change – by the states with their constitutionally allocated powers, by the High Court and its role in constitutional interpretation, and above all by the prospect of the next election.

By contrast, in presidential systems where neither executive nor legislature is responsible to the other, parliament has retained much of its authority. As one English observer noted a generation ago ‘as a legislature the Congress ... has continued to exercise a degree of independent decision-making power far greater than that retained by the other legislatures of the Western democracies.’¹⁰ It is still true today that despite the accretion of power to the modern presidency – the so-called imperial presidency – there remains a real tug of war between president and Congress, most striking when the party complexions of president and Congress are different, but continuing in more muted forms even when the same party has the presidency and dominates the Congress. Presidents have continually to bargain with the Congress for policies and funds. President Bush cannot assume the acquiescence of the Congress in his budgets or his legislation as can Tony Blair of the House of Commons and John Howard of the House of Representatives.

Of the three functions attributed to a modern parliament – remonstrance of individual grievances, scrutiny of legislation, and rendering the executive responsible to parliament – only the first, remonstrance of individual grievances, is performed with any distinction by the Australian House of Representatives.

There is no effective scrutiny of legislation in the lower house: the representatives simply rubber stamp the legislative wishes of the government. The principle that the executive has the right to use its majority to get its legislation through the house has made a farce of the subtle mechanisms of the committee and report stages of bills, increasingly simply truncated by the application of the guillotine. This is not true of the Senate where there has been effective scrutiny, particularly through committees, of the government’s legislation. But this may be simply a function of an electoral system that has denied the government of the day a majority in the Senate over the course of the last generation. In the years ahead we are likely to discover whether this scrutiny

power is inherent in the upper house or simple a function of the electoral system. For the Senate is as permeated by executive influence as the House of Representatives. It is simply that for some time past the executive has not had the numbers.

In the presidential republic, however, the legislature remains a significant legis-lative body, that is an important maker of legislation. Although the president inevitably initiates most legislation and retains an ultimate veto power over legislation, Congress is no rubber stamp. Both houses of the Congress contribute often significantly to the legislation that emerges and ultimately can override the presidential veto. Thus, unlike the parliamentary system, we have a reciprocal, give-and-take relationship in law-making between president and parliament in the presidential republic.

In Australia the House of Representatives plays little effective role in scrutinising the general operations of government, in asserting the control over the executive that is supposedly the essential characteristic of the Westminster system. In the parliamentary system the accountability of the government to the parliament – the principle that ministers are responsible to parliament for their actions – is a lofty idea with grand traditions but today it is little more than a hollow sham. Provided the Cabinet retains the loyalty of the majority party it cannot be made accountable nor its ministers made responsible.

The most authoritative text on the Australian Parliament concludes that ministerial responsibility is ‘entirely a question of political judgement’. The notion that a minister must resign for failed actions or administration because he is accountable to the parliament has been junked in practice, as with so much else, although the rhetoric remains. A minister only resigns today if his Cabinet colleagues, or more particularly the prime minister, think it would not be in the political interests of the party to retain him. Much touted as another means of securing effective parliamentary oversight, ‘Question time’ often provides fine political theatre but rarely much substance. It is perhaps revealing to note that the only monograph to study question time in the Australian Parliament is entitled ‘Questions without answers’.¹¹ The standing orders of the House are full of requirements as to what constitutes a question. They are almost totally silent on what constitutes a ministerial answer. That is because it is the executives of both parties which together write the rules for the House of Representatives.

In a presidential republic the president and his Cabinet ministers are not responsible to the legislature and cannot, except in the extraordinary case of a presidential impeachment, be dismissed by the parliament. While, as we have seen, the practical consequences of the responsibility principle have been neutered within Westminster systems, its absence in the presidential republic has paradoxically freed up the legislature to be much more energetic in its oversight and scrutiny of the executive. The powerful Congressional committees of inquiry in the United States have no equivalents in the Westminster system in terms of the energy and depth of their research, in the vigour of their inquisition of Cabinet ministers, and in the hard-hitting nature of their conclusions. This is in part because the Congress of the United States is its own master and not a creature of the executive and thus creates its own rules, determines its own research needs, finds the back-up staff required and allocates the funds that will be invested in Congressional inquiries.

The decay of parliamentary authority in one system and its survival in the other has had important consequences for the legislators themselves. Few in the Australian Parliament would place commitment to the parliament before commitment to the party. This is because status and authority within the parliament go overwhelmingly to ministers and shadow ministers and these positions are determined by the political parties. Virtually the only worthwhile career path in the parliament is to rise into and through the ranks of the executive or the shadow executive. The whole ethos of the parliament is permeated with the ambition to make one’s way in this executive world. Committee chairmanships are but stepping stones to that ambition. Even the speakership of the lower house or the presidency of the Senate is rarely bestowed for distinguished parliamentary service but rather for services to one’s party or as compensation for missing out on executive opportunities. A few among the minor parties and the independents do display the characteristics of parliamentarians but this is mostly by default – the executive route is closed to them.

In the parliament of the presidential republic it is very different. Few congressmen will seek and even fewer actually secure executive office. For most of them, including many of the most able,

parliament will be their career. I am not suggesting party is not important to them, but that their ambitions through the party will be parliamentary ambitions. There are many parliamentary career pathways through the Congress: majority and minority leadership of the Senate and the House, the speakership of the House, chairmanships of the prestigious committees of the Senate and House – Appropriations, Budget, Rules, Ways and Means in the House of Representatives, Budget, Foreign Relations, Governmental Affairs, Judiciary in the Senate. All play critical parliamentary roles in the management of the Congress, the scrutiny of legislation, the oversight of the executive. Such men of course serve their parties and the achievement of their ambitions is secured through party support. But they also serve the parliament in its never ending struggle with the executive. They are not suborned by an all-powerful executive entrenched within the parliament itself.

One other important contrast arises from the fusion of executive and legislature within one system and their separation in the other. The Australian founding fathers made no formal decision about the executive being responsible to the legislature and there is no reference to such responsibility in the Constitution. What they did decide was that the members of the executive, the ministers, must of necessity be or become members of the parliament. This has meant that the executive has been drawn exclusively from members of parliament, from an extraordinarily limited pool of talent. Moreover with the increasing professionalisation of politics this pool – perhaps pond is more appropriate – has become in a sense more limited. Increasingly the bulk of the ministry and the shadow ministry are made up of men and women who have had no other significant work experience than that of politics.

By contrast the separation of powers by insisting that Cabinet members not be members of Congress opens up the heart of executive government to all the talent in the community. The president can choose his Cabinet from all walks of life. He usually does choose some from the Congress, who must give up their seats there, but otherwise he chooses businessmen, soldiers, lawyers, academics, state politicians – indeed the whole talent pool of the nation is open to him. A group of young Australians has recently advocated a similar flexibility for Australia arguing that it represents a way for Australia to ameliorate gender and racial imbalances in Australian public life.

These are the issues and choices which will confront us if we contemplate a presidential republic. Much will depend on the priorities we give to various key values. Those who value efficiency and clear accountability may well prefer the untrammelled executive authority of the parliamentary republic over the possibilities of deadlock and buckpassing inherent in the presidential republic; those who value liberty and participation may prefer the presidential republic over the elective dictatorship of the parliamentary republic. Or perhaps we should look at the halfway house of French quasi-presidentialism. It seems to get the best of both worlds. When the Elysée and the Matignon are in the same party hands it functions as a presidential republic; when those palaces are in the hands of opposing parties then it functions like a parliamentary republic.

Like the Australian founding fathers, we should be prepared to exercise our imaginations and range across the world for ideas.

Lessons from the New Zealand model

If all this seems too difficult, if the challenges appear too great, and the weight of tradition and established forces too overwhelming, let me conclude on a tale of inspiration from across the Tasman. Proportional representation, particularly of the German kind known as MMP (mixed member proportional), is almost as alien to the Westminster tradition as an executive president. Proportional representation of a less foreign bent has turned up in a few odd Westminster places – in voting for European MPs and peripheral assemblies in the United Kingdom, in Tasmania and in the Australian Senate, but god forbid that it should ever be used for electing the house to which the executive is responsible. It is disliked by political elites in dominant two-party systems for exactly the same reason as directly elected presidents and executive presidents are disliked by the same elites – it threatens prime ministerial–Cabinet dominance of the system.

In the late 1970s and early 1980s there was considerable dissatisfaction with the workings of the first-past-the-post electoral system for the election of the single-chamber New Zealand

Parliament. The Nationals won the 1978 and 1981 elections with less votes than their Labour opponents while minor parties were significantly underrepresented by the electoral system. In opposition – and these things are always easy and tempting in opposition – the Labour party committed itself to a royal commission on the electoral system including the possibility of proportional representation and when it came to power appointed such a commission. The commission reported in 1986 and to the shock of the political elite recommended the German MMP system as ‘the best voting system for New Zealand’s present and future needs’. Even worse the commission recommended that the decision on its adoption be taken out of the hands of the parliamentarians, with their vested interest in the existing voting system, and given to the people through the unusual procedure of a popular and binding referendum. In 1987 the Labour Prime Minister, David Lange, possessor of an endearing if naïve idealism, promised, without consulting his colleagues, a binding referendum on the electoral system in 1990.

But neither his ministerial colleagues nor the parliament were having any of this nonsense. The parliament set up an Electoral Law Committee which in 1988 enthusiastically endorsed the first-past-the-post electoral system, suggested a few minor amendments and questioned the wisdom of imposing an alien West German model on New Zealand. It did, however, recommend an indicative, not a binding, referendum on whether a few extra members could be elected by a different voting system. By 1989 the Labour government, in full revolt against the royal commission, introduced an electoral reform bill which ‘in no way alters the fundamentals of our electoral system’ and offered the people a referendum on the length of the parliamentary term as a substitute for Lange’s promised referendum on the electoral system.

In their election manifesto in 1990 the Nationals promised a binding referendum on the electoral system. This did not signal the conservative party’s conversion to proportional representation but was essentially a tactical device designed to highlight Lange’s failure to honour his referendum promise. No sooner had they got in to office than the Nationals began watering this commitment down. The binding referendum became an indicative referendum in which the people were asked if they wanted change and if they did which of four reform options would they prefer. It has been suggested that four options were included in the hope of watering down support for any one option. The leadership of both major parties having too much to lose campaigned against any change. To the dismay of the politicians this exercise in bipartisanship was overwhelmingly rejected by the New Zealand people. On an admittedly low turnout 85 per cent voted to change the electoral system with 71 per cent preferring the German MMP option. With Labour now abandoning opposition and the Nationals reluctantly committed to a binding referendum the people got their way. In 1993, 54 per cent of the population voted for MMP.

There are many lessons in this for Australia but two stand out. If the people have got the bit between their teeth, then even a united stance by the political elite may be insufficient to prevent change, indeed in the present climate of opinion may even enhance its prospects. Secondly, creative proposals outside conventional boundaries should not necessarily be ruled out. Their advocacy may at least provide the space within which major changes may be achieved.

Notes:

- 1 Constitutional Convention, Transcript of Proceedings, Thursday 12 February 1998, *Hansard*, p. 865.
- 2 Turnbull, Malcolm, *The reluctant republic*, William Heinemann Australia, Port Melbourne, 1993, p. 166
- 3 Turnbull, Malcolm, *Fighting for the republic*, Hardie Grant Books, 1999, p. 4.
- 4 Solomon, David, *Coming of age: charter for a new Australia*, University of Queensland Press. 1998.
- 5 Paul Keating, speech in the House of Representatives, 7 June, 1995;
<http://australianpolitics.com/1995/06/07/an-australian-republic-the-way-forward.html>
- 6 John Howard, statement in support of the ‘No’ case, 25 October 1999;
<http://australianpolitics.com/1999/10/25/john-howard-statement-against-a-republic.html>
- 7 ‘Now there’s a thought’, *Sydney Morning Herald*, 18 May 2002
<http://www.smh.com.au/articles/2002/05/17/1021544074455.html>
- 8 Turnbull, Malcolm, *Fighting for the republic*, Hardie Grant Books, 1999.
- 9 Schlesinger, Arthur M. Jr, ‘Leave the Constitution alone’ (1982) in William Lasser, *Perspectives on American politics*, 6th edition, Wadsworth Cengage Learning, Boston, 2012, p. 302.
- 10 Vile, A. J. C., *Politics in the USA*, Routledge, London & New York, 5th edition 1999, p. 102.
- 11 Uhr, John, Questions without answers: an analysis of Question Time in the Australian House of Representatives, Australasian Political Studies Association & Parliament of Australia, Canberra, 1982.