NEW SOUTH WALES CAMPAIGN FOR CONSTITUTIONAL CHANGE

DINNER, TATTERSALLS CLUB, SYDNEY

THURSDAY 26 MAY 1983

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The Hon Mr Justice M D Kirby CMG
Chairman of the Australian Law Reform Commission

ROOM FOR CAUTION

Im Australia, the Constitution is politics. The people can hope that it is about the law, teach that it is about the law and preach that it is about the law. But it is about political power:

* power as between the Commonwealth and the States;
* power as between the Governor-General and the elected representatives of the people;
* power as between the Chambers of the Parliaments;
* power as between the judiciary and those they judge.

A failure to appreciate these basic truths, and a starry-eyed faith in a bandwagon movement for constitutional change, is the surest recipe for failure to achieve legitimate constitutional reform. In a relatively free society, such as Australia, it is inevitable that there will be differences of view about where power should lie. Indeed, it is probably desirable that this should be so. When we cease talking about who should have power, we will probably have ceased to be a free people. Although, as has recently been asserted, Federal disputes can be arid exercises in linguistics, devoid of intellectual values[1], we must face the fact that short of some catastrophic catalyst for change, the Australian Constitution will probably outlive all of us — just as it has outlived virtually all of those who were alive when it ushered in the 20th century.

Because the Constitution is about power, and because of conventions which I faithfully observe, you will understand that I must be circumspect in speaking about constitutional change. My natural caution was reinforced when I read the sharply worded rebuke administered by Professors R S Davis and D A Kemp to the Governor-General.

He had launched the book 'Australia's Constitution : Time for Change?' For his pains, he was taken to task by the good professors. I believe their criticism was unfair. But I do not need to add my voice, for writers of various political persuasions have already sprung to the defence of Sir Ninian. More relevant is one of the two comments offered by the professors. Though their criticism was erroneous, their comment was not idiosyncratic:

> While the book canvasses for and against change, its inescapable bias is towards a major national focus on the necessity and urgency of change — unquestionably a controversial political judgment. For there are many who believe quite to the contrary — that a Constitution that has served and still serves the Australian society as well as it does, is in no need of thorough-going overhaul.[2]

This observation could have been made without the scurvy comment on the Governor-General. It is a valid observation. Almost certainly, it reflects the present view of the overwhelming majority of Australians. They just do not care about constitutional reform. They see it as a non issue. Indeed, I have noticed that the announced postponement of the proposed Referenda has been greeted in some sections of the press as positively desirable : allowing the government to concentrate its attention on the major tasks before it : the economy and unemployment. It seems that our governments are expected to concentrate on one thing at a time, despite all the temptations and pressures to do otherwise.

Though I believe the Australian Constitution is still basically appropriate for Australia's present needs, I do acknowledge the legitimate necessities of some constitutional reform. If they thought about it, I suspect that this too would be the general position of mst Australians. Unlike the professors of politics, I am perfectly content to let any Australian, from the Governor-General down, to debate legitimate constitutional reform. For example, I am quite opposed, personally, to changes towards a republican system of government. But I would not dream of disputing the right of republicans to urge their erroneous views on our society. Personally, I am not much in favour of significant change in the constitutional provisions about the courts. I think there are easier remedies for the problems that have been identified there. But I would applaud the closest possible attention to the issues and widespread public discussion and debate. We have been fortunate in Sir Zelman Cowen and Sir Ninian Stephen to have, as Governors-General, fine constitutional lawyers with a real contribution to make to intellectual discussion. It is not my concept of the Australian monarchy (an institution I support) that the Governor-General must retreat from proper contributions to public discussion about matters that concern fellow citizens. We can be sure that they will be conscious of the limitations within which all Crown officers must operate.

It will be a sorry consequence of the professors' letter if our community is deprived of the wit and wisdom of Sir Ninian Stephen.

Nonetheless, I will tread cautiously myself, lest I provoke another letter of professorial ire.

THE RIGHT MACHINERY?

The closing words of the book on constitutional change offer this realistic, though somewhat dispiriting conclusion for the would-be reformer:

> The way of the constitutional reformer is always going to be hard in Australia, but it should not prove impossible if the task is tackled with the right machinery, in the right spirit of co-operation and with the right degree of optimism.[3]

I hope it will not be thought a partisan comment — it is not meant to be — to say that many people in Australia were thoroughly depressed about the recent Constitutional Convewntion in Adelaide. Perhaps we should not have been. Few of us were there. Some progress seems to have been made. But the high degree of politicisation, doubtless aggravated by a number of circumstances, including the current Federal/State tensions, all conspired to make the reports depressing for those who hope for 'the right spirit of co-operation and the right degree of optimism'. The book suggests that the optimum time for constitutional change was in 1976-7. In the wake of, the crisis in November 1975, it suggests that there was a realisation on the part of politicians, particularly Federal politicians, of all persuasions, that reforms, including constitutional reform, were necessary. Where has that consensus gone?

Professor Don Aitkin, writing in the Canberra Times, offered 'a few suggestions on how to achieve constitutional reform'. Naturally, I avidly looked at this piece.[4] It contrasted the success which the Prime Minister achieved at the Summit Conference and what Professor Aitkin described as 'the failure' of the Constitutional Convention. He drew several conclusions, the first two of which were:

> First, take a lesson from Adelaide. Competing politicians are not the stuff of which consensus is made. If there are to be further Constitutional Conventions, make sure that they are not dominated by politicians.

> Second, avoid the besetting sin of Australian politics — trysing to rush things through while the power is available. People need time to think about difficult questions. If they don't get that time they are probably more likely to oppose a change than to support it.[5]

To these two conclusions, I would add the conclusion offered by the other professors, Davis and Kemp, that there is no significant movement for fundamental change in Australia. Short of a catastrophe it is unlikely that such a movement will gather a head of steam quickly, in the way things happen in this country. Accordingly, constitutional reformers, boringly enough, must lower their sights in Australia. The grand vision of a totally revamped Constitution by 1988 seems almost certainly outside the reformer's grasp. He will do better to concentrate his energies at the margin. He will be well advised to proceed in stages, educating our people in the process of orderly, democratic constitutional reform. After all, the constitutional reformer has a mighty task before him in the light of our history. Not for nothing did Professor Sawer call Australia, constitutionally speaking, the 'frozen continent'. The would-be reformer will, above all, examine the question of institutions for orderly constitutional change. He will almost certainly seek something better than the present Constitutional Convention. Even desirable changes are unlikely to be achieved in the factious and politicised atmosphere of such meetings. It is said that the genius of English-speaking people lies in their capacity to reduce conflict to a routine. The fundamental question which those who support orderly democratic constitutional change must ask is : what is the appropriate institutional routine for Australia? If the Constitutional Convention does not work, if we want something better than judicial reinterpretation of the compact, what new, effective mechanism can we devise that will address our problems and have a better chance of success than we have enjoyed to date? The batting average makes sobering reading. Of 36 Referenda questions so far put to the Australian people, eight only have succeeded.

The lesson of the eight is more important than the lesson of the failed 28. And some comfort can be taken by the reformer from the results of the successful Referenda in 1977:

* Of the four proposals put in that year three succeeded and were carried in six States, indicating that people can differentiate between proposals.
* The three that succeeded were smaller and less controversial than the one that failed.[6]
* Even the one that failed carried three States and had a majority of 62.22% of the electorate. This was an increase in two States and nearly 15% of the electorate over a similar Referenda held but three years previously.

I think it is a pity that the successful achievement of constitutional reform begun in 1977 was not followed up. If approving constitutional Referenda were not such an unusual thing in Australia, the psychology of caution and timidity that faces governments and people might diminish. I realise it is expensive and diverting of political attention; I realise that the record is discouraging; I also realise that there are often alternative paths that can be taken : including reliance on judicial reform. But it is surely preferable that Australia should develop means of looking to the people rather than the judges to adapt and modernise the Constitution. As it is, in default of adequate government initiatives and adequate popular response where there was an initiative, most of the burden of constitutional reform in Australia has fallen on the often unwilling shoulders of the High Court Justices. For the good government of our country, it is as well that they have so often felt able to rise to the necessities of that role.

A ROLE FOR LAW REFORM?

If it is conceded that, in principle, we should be trying to develop a routine institutional means of stimulating democratic constitutional change, how can this be done? Various possibilities have been offered:

* The use of parliamentary committees, despite their factionalism on issues of power.
* Persisting with the Constitutional Convention, despite the relatively low achievements and the disappointments of late.
* Grafting on to the Constitutional Convention a series of popularly elected non-political representatives.
* Developing a new institution that can search for the consensus and for a program of action, before submitting proposals and priorities to the bracing air of political controversy.

The first two possibilities, I put to one side, although more in sorrow than in anger. The third possibility (grafting a proportion of non politicians on to the Convention) I question:

* It would be expensive to arrange the election.
* People who run for election by popular vote would tend to be would-be politicians and possibly failed or rejected politicians.
* Parties, perhaps naturally, would tend to run 'tickets', thereby politicising the non-political.
* Many of the best potential candidates would not or could not offer themselves for election.

* The whole system tends to diminish the authority of the parliamentary process and to undermine the popular element for constitutional change which already exists in the amendment provisions of s.128 of the Australian Constitution.
* Because elected politicians of different parties would continue to outnumber the non-politicians, because of their experience in the parliamentary forum, it is likely that they would continue to dominate the Convention, introducing into it politics and factions, so well beloved of Australian politicians and of the media that at once lives off and generates the politics of division.

For these and other reasons, I do not favour the third proposal, though I acknowledge the high motives and idealism that has led to the suggestion.

It seems to me, with Professor Aitkin, that the best chance of success lies in a more low-key approach that tries, at least in the first instance, to get away from factional politics. It is perhaps notable that the major constitutional changes achieved in OECD countries in recent years (in Sweden in 1975 and in Canada in 1978) were achieved not through parliamentary committees, nor through political conventions, nor through popular assemblies, but through independent commissions. Not to labour the point, what we need is a national constitutional law reform commission. It is needed not to exclude governments and parliamentary initiatives, nor even to exclude the new suggested possibility of popular initiatives, but as a routine, more low-key institutional endeavour to search for matters upon which agreement can be secured by an orderly process of consultation, debate and consensus. Such a commission could also participate in the process of constitutional education. If it could build up a track record of success, it could venture upon increasingly larger projects. I know this is depressing news to the Jacksonian popular democrat. But the fact is that bureaucratic machinery of this kind offers the best hope of securing an orderly program of constitutional reform through the democratic process. The Constitution is, after all, simply another law. True it is, a special law, specially difficult to change. But the techniques that are now being developed throughout the English-speaking world for law reform generally, through law reform commissions, are techniques with relevancy to the process of constitutional law reform as well. As developed in Australia, they involved:

* the appointment of independent, respected, experienced and talented Commissioners;
* the cumulation of teams of interdisciplinary interfactional consultants;
* the willingness to debate hard issues in the four corners of the country;
* an effort to earn the respect and confidence of all political parties;

* a readiness, at least at the outset, to tackle smaller and non-controversial topics but a willingness, also, to make recommendations on difficult, sensitive and controversial matters as well.

I do not believe that we in Austrlia have given enough attention to the institutions of constitutional reform. In saying that, I do not suggest that radical reforms are necessarily needed. But some reforms and some mechanisms for securing such reforms do appear at least arguable. Amongst these are the totally non-controversial removal of superseded and irrelevant anachronisms in the Constitution. But there are other matters, as well, upon which an institutional solution could be tried. I refer, for example, to the apparent desirability of considering an enlargement of the Federal parliamentary power to deal with aspects of bioethics. The Australian Law Reform Commission helped in this regard in the preparation of its report on Human Tissue Transplants. That report has become the basis of the law in every jurisdiction of Australia save Tasmania. But many other topics now await attention, such as in vitro fertilisation, genetic engineering, human cloning and so on. The human body is the same, and the perils to mankind are the same in every part of Australia. There is no justification for separate laws on such topics and there are arguments for national laws. Yet we now have five inquiries proceeding in Australia which may produce five different laws on in vitro fertilisation. The founding fathers did not include these matters in the Federal power because such developments of science were not even speculated upon in 1901. There are many similar matters where I believe there could be general consensus for the enlargement of national regulation. But it is unlikely to come about, sad as it is to acknowledge this fact, through the partisan process, at least in the first instance. Let it therefore be developed in another way and only then, after close and careful discussion and consultation, let it be submitted to the parties and the factions.

CONCLUSIONS

The conclusions of this talk can be briefly stated. I do not believe Australians want or are ready for radical changes to their Constitution. But there are needs for some changes and our record of democratically achieved change is fairly depressing. Perhaps it is not as depressing as some commentators would have us believe : there is a psychology which has now built up that teaches that Australians are a nation of nay-sayers and presented with a Referendum question are almost congenitally incapable of agreeing. Clearly this is an over-simplification. They have not had all that many chances. Thirty six in 82 years is not really a surfeit of opportunities. Moreover, in recent years, in the past decade or so, they have shown themselves both discerning and more willing to contemplate change : particularly on smaller matters upon which there is general political consensus.

The large political matters of fundamental power readjustments will remain at the heart of the political debates. Politicians who seek such large readjustments appear to have a major task in front of them to carry their fellow countrymen and countrywomen with them. What we appear to need most of all is a regular instrument for achieving the constitutionally achievable. Parliamentary committees have failed. The Constitutional Convention seems to be failing. Popular assemblies do not appear to be the Australian way. I believe that what we need is a national institution that follows the law reform model : a constitutional law reform commission. I am second to no-one in support for and respect for the parliamentary institution. But those institutions throughout Australia need help in tackling the challenges of constitutional reform — as indeed in other areas of law reform. The lesson of Sweden and of Canada stands before us. If we are serious about orderly constitutional reform where it is needed, we will look to our institutions. The alternative, in default of democratically conceded reforms, will be increasing pressure on the judicial branch of government to provide constitutional reform. It is wrong and undesirable that the 'least dangerous branch' should replace the will of the people. But we need better ways, more efficient ways, and more frequent ways of ascertaining what the constitutional Will of the People is.

I cannot close without commending the authors of Australia's Constitution : Time for Change? Our country will be richer for constitutional debate because such debate asks basic questions about our national identity and the fundamental terms upon which we live together in the Australian society as a communitysof free people.

FOOTNOTES

1. J McMillan, G Evans and H Storey, Australia's Constitution -- Timew for Change? 140ff.

2. Australian Financial Review, 7 May 1983, 13. Emphasis added.

3. McMillan et al, 380.

4. Canberra Times, 4 May 1983, 2.

5. ibid.

6. The three which succeeded were related to the filling of casual vacancies in the Senate by persons from the same political party as the vacating Senator (carried six States, popular vote 73.25%); to enable the Australian Capital Territory and the Northern Territory electors to vote in Referenda (carried six States, 77.72% popular vote) and to provide for the retiring of High Court and Federal judges (carried six States, 80.1% popular vote). The Referendum question which was lost related to ensuring simultaneous House of Representatives and Senate (carried three States, 62.22% popular vote).