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AFTER ADELAIDE : CONSTITUTIONAL LAW REFORM REVISITED

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TO CONSTITUTIONAL ANGELS

When Sir Ninian Stephen launched the interesting new book 'Australia's Constitution : Time For Change?' by John McMillan, Gareth Evans and Haddon Storey, he drew a sharply worded rebuke from Melbourne Professors of Politics, S R Davis and D A Kemp. Many verbal champions sprang to the defence of the Governor-General. But the professorial correspondence indicates the controversy that attends discussion in Australia of constitutional reform. It is, after all, about power. And therefore it is controversial. Treading where constitutional angels might avoid, I want to suggest that the time has come for careful reassessment of Australia's machinery for constitutional law reform. In fact, the closing paragraph of the new book points the way:

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.

Many Australians were rather depressed about the recent Constitutional Convention in Adelaide. True it is, some achievements were made. But the degree of politicisation, doubtless aggravated by a number of circumstances current in Federal/State attention, conspired to make the reports from Adelaide depressing for people waiting for the signs of 'the right spirit of co-operation and the right degree of optimism'. Another politics professor, Don Aitkin, writing in the Canberra Times drew two conclusions which seem sensible:

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 they are not dominated by politicians.

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

To these conclusions one can probably add the sensible paragraph in the otherwise querulous letter of Professors Davis and Kemp. Boringly enough, for the bright-eyed constitutional reformers, it must be acknowledged that there is no significant movement for fundamental change of Australia's Constitution. Short of a national catastrophe, it is unlikely that such a movement will gather a head of steam in the foreseeable future. The grand vision of a totally revamped Australian Constitution by 1988 seems almost certainly outside the reformer's grasp. He would probably be better advised to concentrate his energies at the margin : proceeding in stages, educating our people in the process of orderly, democratic constitutional reform. Not for nothing did Professor Geoffrey Sawer call Australia, constitutionally speaking, the 'frozen continent'.

Assuming, as seems sensible after the better part of a century, that some readjustment of the Constitution is necessary, and assuming that a preferred methodology involves the democratic rather than the judicial path, what is the 'right machinery' to which McMillan, Evans and Storey refer in the last paragraph of their book?

#### A POPULAR ASSEMBLY?

Various possibilities are now being offered to assist and stimulate the process of constitutional reform in Australia:

- \* The use of parliamentary committees, despite their inevitable 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 doubt:

- \* 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 legitimate 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 and, 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 have led to the suggestion. Unsurprisingly, the proposal was rejected by the recent Adelaide Convention.

#### AN INDEPENDENT COMMISSION?

The best chance of success for constitutional renewal would appear to lie in a more low-key approach. At least in the first instance, this would get the issues of constitutional reform 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 government and parliamentary initiatives, nor even to exclude the newly 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 democrats. But the fact is that bureaucratic machinery of this kind probably offers the best hope of securing an orderly program of constitutional reform through the democratic process. The Constitution is, after all, simply another law.

It is, a special law, hoped to be stable and specially difficult to change. But the techniques that are now being developed throughout the English-speaking world for law reform generally, through independent, multidisciplinary law reform commissions, are techniques with relevancy to the process of constitutional law reform as well.

NEED WE BE DEPRESSED?

The batting average for democratic constitutional change in Australia makes sobering reading. Of 36 Referenda questions so far put to the people, eight only have succeeded. The lesson of the eight is perhaps more important than the lesson of the failed 28. But some comfort can be taken from the results of the successful Referendum in 1977:

- \* Three of the four proposals put in that year succeeded.
- \* The three that succeeded were on topics less controversial than the one that failed.
- \* Even the one that failed (simultaneous elections) carried three States and had a majority of 62% in the electorate.

The 1977 experience suggests that Australians can discriminate in Referenda questions. Perhaps they need more opportunities to build up a track record of orderly constitutional reform. Thirdly six opportunities in 82 years is scarcely a flood of lost chances. A record of success in our nay-saying country might overcome the phenomenon of psychological hesitation about the Referendum process. But to succeed, a new, improved instrument for development constitutional reform proposals seems to be needed. After Adelaide, many are doubting the value of Constitutional Conventions — at least as presently organised.

The book, Australia's Constitution : Time for Change?, is in the 'best seller lists' — not normally the fate of books on such a sober topic. Perhaps this fact says something about the mood of the times. But the great thaw in the constitutionally frozen continent seems a long way off.