

1057

TREAD SOFTLY BECAUSE YOU TREAD ON MY SPIRIT

## TREAD SOFTLY BECAUSE YOU TREAD ON MY SPIRIT

Michael Kirby\*

On Remembrance Day, our country stopped, united for two minutes, to honour the brave men and women who fought under our flag in times of war.

The moment was poignant. The identity of the soldier, laid to rest in Canberra with solemn rites, is unknown. But we do know this much of him. He was proud to be an Australian soldier. He took his duties of loyalty to the Crown and to his country seriously. His sacrifice was offered for our freedom.

Over the years before and since that sacrifice - more than a century before and three parts of a century since - countless Australians have taken an oath of allegiance, just as that unknown soldier took, to the Crown - the King or Queen - our Head of State. A part of the spirit of a person goes with such commitment. Obligations of this kind, binding on mind and heart, have been given and taken for millennia - long before the modern history of Australia began in 1788.

I have myself taken an oath of allegiance to the Queen of Australia several times. I have done so with each succeeding judicial commission I have received. Sometimes, I have done so publicly, as is the convention of the judiciary of New South Wales. Sometimes I have done so privately, as when I was sworn nearly twenty years ago as a Judge of the Arbitration Commission and ten years ago as a Judge of the Federal Court of Australia. Most recently I did so when sworn as Acting Chief Justice of New South Wales in October 1993. The oaths administered to me, of allegiance, are personal oaths binding my allegiance to the Queen and to Her Heirs and Successors according to law.

Similar oaths are administered to all of the Queen's Ministers, Federal and State, to Defence service personnel, police officers, customs and other officials high

and low across this country. Until recently, similar oaths were taken to the Queen of Australia by new migrant citizens. Thus, millions of Australians living today have taken an oath of allegiance to the Queen of Australia established as our Head of State by the Constitution which we Australians designed, adopted and have kept.

Do these oaths mean nothing? Is allegiance so lightly given and taken away in this changing world? Is loyalty such a plaything of passing fad and fancy? Does the reciprocal oath which the Queen took at her Coronation forty years ago, to serve the people of Australia, weigh as lightly upon Her conscience? I doubt it.

Of course, oaths can be released. But at least in the history of English-speaking people, the oath of allegiance has usually been taken with a measure of seriousness. Not only are we the beneficiaries of the great constitutional struggles of the British Isles. We inherit the ideas of freedom that come with the English language. The notions of individual dignity and worth that come with the English common law. And the very essence of our culture that is marked upon us indelibly by our literature and poetry.

Certainly, in earlier times the oath meant a lot. William Shakespeare put these words upon the lips of King Richard II as he faced Bolingbroke and the enforced end of the loyalty of his people:

*"With mine own tears I wish away my balm,  
With mine own hands I give away my crown,  
With mine own tongue deny my sacred state,  
With mine own breath release all duteous rites:  
All pomp and majesty I do forswear:  
All manors, rents, revenues, I forego;  
My acts, decrees, and statutes, I deny:  
God pardon all oaths that are broke to me!  
God keep all vows unbroke are made to thee!"*

In those last verses, Shakespeare expresses the peril of a change of a people's allegiance. It is not easily accomplished because it is, for many, a thing of the heart. It is a thing of the spirit. It is a thing that runs deep and about which people feel

keenly. If an oath of allegiance to the Queen of Australia means nothing and is to be regarded as a trivial thing, what of the oaths that are "made to thee" - what of the oaths that follow to the Constitution, to the laws, to the people, to Australia? Will this oath too be such a light and flimsy thing that it can be changed, just as easily, at some future time?

I do not speak here of the formal things: the documentary oaths and declarations. I speak of the commitment of part of the spirit of a people to the Constitution they have, to its provision for a Head of State, to the Head of State they have and to the respect that many deeply feel for that Head of State. This is something that transcends political party. I also believe that it transcends ethnicity. It is not just another issue for a referendum, or for party strife. This is not an issue which is one for the 50.1% of votes. This is not a cause for a passing majority. This is an extremely divisive issue about the very loyalty of a country and its people. It is an issue to be handled with great delicacy - not bullied forward to a bare majority. Sentiments of the spirit are rarely susceptible to an exclusively logical treatment.

Mr Hawke, in his recent intervention, speaking to a thousand students at Oxford University was surely right to say:

*"Australians have a considerable respect and affection for the Queen."*

And why should we not have such affection and respect for our Head of State who has seen out such a long parade of Prime Ministers and Premiers in forty-one years of service? Here is the continuous, historical symbol of our permanent constitutional government. In a time when so much in the world is changing, there is a value in such symbolism of permanence. It is a value that we Australians should not lightly throw away. Before we do so, we should be very sure that we have something better, and just as safe, to put in its place. It is surely no coincidence that the *system* of constitutional monarchy operates in half of the advanced OECD countries. It is a

system that works well in putting a check on the pretensions of political power. In Australia it has served our liberties well.

The notion that we should change our Constitution and replace the Queen to fit in with the time-table of a sporting jamboree or to pander to millennial madness is unworthy of serious contemplation. The Olympic Games will come and go. The century will turn. The centenary of the Constitution will pass. Heady though all of these events will doubtless be, they are not the occasion for needless change to our Constitution, to meet somebody else's agenda or to soften the false pride of those whose minds are locked into the nationalistic vision of the nineteenth century and must have a local, and none other, to be their Leader.

To them I say: Grow up! Look about you to see the curse that nationalism has caused the world. Look about to understand how internationalism and regionalism is the movement of the next millennium. Instead of looking backwards to nationalism look forward, at least to regionalism. One of the links we enjoy in our region is the common Head of State which Australia, Papua-New Guinea and New Zealand share in the Queen. We should be enhancing these links, not destroying them.

And do not treat lightly our oaths and the commitment of Australians living and dead to the Crown of this country. Contrary to assertion, it is a very Australian thing - not an English thing. It has been with us all the time since settlement of this land. If past referenda are any guide, it will be with us for a very long time to come. On that basis it is far from a thing of the past. It is an attribute of the present and a reality for the indefinite future. You see, things of the spirit are not so easily changed.

---

\* From the Merrylees Memorial Lecture delivered by Justice Kirby at Charles Sturt University, Wagga Wagga, 9 November 1993.