

# Essentials of Republican Legislatures: Distributed Majorities and Legislative Control<sup>†</sup>

## Republican government and its ailments

The construction of the legislature in a republic should be designed to safeguard republican government, that is, government carried on by the temporary chosen agents and trustees of the whole people in accordance with constitutional rules and limitations, as distinct from government by the arbitrary will of a tyrant or a factious oligarchy. The republican legislature must be proof, as far as possible, against those perversions of republics.

There are two superstitious practices which have been the ruin of many republics. One destroyed the democracy of ancient Athens, and the other brought down the Roman Republic, and they have continued to work destruction ever since.

As they form part of the dogmas of most proponents of the current republican movement in Australia, it is well that they should be analysed.

As they also relate to the construction of the legislature, they are a suitable subject for this conference.

It is a great irony that those superstitious practices have been contracted by Australia and many other countries largely

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as a result of British influence. The abolition of the monarchy may result in, and indeed is advocated by some with the deliberate intention to bring about, a more acute infection of these two British diseases.

### **Simple majoritarianism**

The first superstitious practice is simple majoritarianism. This involves the formation of governments on the basis of a simple majority of votes of all electors, and the making of all decisions, administrative and legislative, by those who obtained that simple majority in the last election. In practice it means that the political party which gains a simple majority, which is usually less than 50 percent of the total, of the votes, rules the country. This practice is exemplified by the British system, whereby such a party controls the legislature and forms the government. In the Australian context it means, or would mean but for certain factors which will be mentioned anon, that the leaders of the faction which controls the party which gained forty-odd percent of the votes at the last election rule the country.

The superstition which goes with the practice is that this is the only legitimate form of rule, and anything contrary to it is undemocratic. In fact it tends to destabilise democracies.

Simple majoritarianism is destructive because it produces overbearing majorities and alienated and disaffected minorities, which can in severe cases destroy the state. Simple majority government is more easily captured by a self-perpetuating faction to bring about this situation. Examples of these phenomena abound: the lapse of newly-independent states into tribal warfare; the extreme alienation of the western provinces from the Canadian central government, which is run by deals between Toronto and Montreal; Northern Ireland under Stormont; Queensland before Fitzgerald; the antagonism to Whitehall of the Scots, the Welsh and, more recently, the inhabitants of the Midlands, leading to the movement for constitutional reform in Britain.

### **Distributed majorities**

The cure for the evils of simple majoritarianism are institutional arrangements, particularly in the construction of

the legislature, to encourage the formation of distributed majorities. If institutions require, for the making of major political decisions, the support of majorities distributed across different groups in society and different regions, factious government and the growth of alienated and disaffected minorities are discouraged, and government is made more acceptable and stable.

One institutional arrangement to encourage distributed majorities is federalism, whereby different governments exercise responsibilities at their respective levels with the support of regionally-constituted majorities. Federalism has long provided a means of governing in an acceptable manner societies which are ethnically or otherwise divided, or which spread over an extensive territory. It is now being employed as a solution to the problems of such societies recently freed from one-party centralised governments.<sup>1</sup>

Closely associated with federalism is the design of the legislature to require distributed majorities for legislative decisions. The ingenious invention of the American founders, of one chamber representing the units of the federation according to population and the second chamber representing those units equally, has been widely adopted, including by Australia. It requires that proposed laws be endorsed by two majorities, one constituted by population and one constituted by regions. This ensures that the double majority for legislative decisions is reasonably geographically distributed, an important factor in a country with an extensive territory and an uneven distribution of population.

The key to the success of federalism in holding big and diverse countries together is its tendency to prevent the growth of simple majority rule and the consequent evils of factional government and alienated minorities.

This is in addition to the advantages of federalism of limiting the power of the central government and providing the citizen with another avenue for redress of abuses.

Australia's founders equipped the country with these institutional arrangements to encourage distributed legislative majorities. Apart from the Senate, the clearest example of provision for a distributed majority is the requirement for the

special majority in referendums for changing the Constitution. When the growth of nationally-based and highly cohesive political parties undermined the effectiveness of the Senate as a device to encourage geographically distributed majorities, proportional representation for Senate elections was adopted. This has had the effect of requiring what might be called an ideologically distributed majority for the passage of legislation through the Senate, a majority distributed over the political parties which receive a significant share of votes. In effect, the design of the Australian legislature requires a triple majority for legislative decisions: a simple majority by population, a geographically distributed majority and a majority across the political parties represented proportionally.

When the federal system, the Senate and the special majority in referendums are understood as institutional arrangements to encourage the formation of distributed majorities and to prevent simple majority government and its consequent evils, their value is more readily appreciated. The nonsensical slogans of "states' rights" and the Senate as a "states house" are then dispensed with in favour of the real substance of federalism and bicameralism.

### **Simple majoritarianism in Australia**

Unfortunately, the superstition of simple majoritarianism is an article of faith to Australian radicals, and therefore it permeates the republican movement. It has become clear that the abolition of the monarchy is a convenient cover for the dismantling of the restraints on simple majority rule, particularly the federal system and the Senate (the recent proposals to change the electoral law for the Senate so as to eliminate minor parties is only the latest manifestation of such an intent).

Simple majoritarianism put into practice would be more disastrous in Australia than in most countries, because political parties here are more narrowly based, hierarchical and rigidly disciplined, and there is a culture of government being seen as the art of riding roughshod over all opposition and criticism. In Britain simple majority rule is restrained by more independent backbenchers and a range of conventional controls, but even so the country flounders and reformers

become more shrill in their condemnation of the system. Australia with a British, simple majority legislature would have Britain's problems magnified.

Australia being a large country, it would also soon develop Canada's problems of irreparable alienation of the less populous provinces. It is significant that there is a strong movement in those provinces for equal representation in an elected Senate. There is also a movement for them to secede from Canada and join the United States, the rationale being that they would thereby gain two senators each, and more influence in Washington than they ever have in Ottawa.

The preservation of republican government in Australia therefore requires that the current design of the legislature, which is conducive to distributed legislative majorities, be retained if not enhanced.

### **Executive government equals government**

The second superstitious practice which is destructive of republics is the equation of executive government with government as such. This arises from a belief that there is, and must be, in every state some person or group of persons called the government, that that entity governs, which is seen as a combination of administering and legislating, and that the executive government is that entity.

This belief is obviously encouraged by the British cabinet system, in which the ministry can readily be identified as the government. The formation of a ministry by the political party which wins a majority of parliamentary seats in an election means that such a government has a claim to be the democratically elected government, with a consequent strong claim to a monopoly of legitimacy.

According to this belief it is not only erroneous but a contradiction in terms to contemplate some other entity either controlling the activities known as governing or having some say in the performance of those activities. This amounts to suggesting that the government should be prevented from governing, and that someone else should govern, and as the government is democratically elected the very idea is a violation of democracy.

This kind of thought process, in which statements about governments governing are simply tautologies and therefore cannot be questioned, explains the violent reaction of certain people, particularly old-fashioned social democrats, to any suggestion that executive governments should be subject to control and veto by any independently-constituted body, such as a second chamber of a legislature.

Carried to its logical conclusion, the doctrine of executive government equals government results in caesarism or bonapartism, the embodiment of the popular will in an individual who is able to give expression and effect to that will. Some would say that prime ministerial government, particularly as practised in Australia, is not so far removed from that logical conclusion. One of the constant themes of the current republican movement is that any new elected head of state must not be allowed to limit the powers of the prime minister. The true republican asks: " why not?" .

### **Legislative control**

Opposed to the doctrine of executive government equals government is the quintessentially republican idea of legislative control. According to this concept a representative and deliberative assembly controls the executive government, using the word control with its primary meanings, as given by the OED, of " to check or verify, and hence to regulate" , " to call to account" , " to exercise restraint or direction upon the free action of" . The basis of this view of government is that power without control is always abused. Regular elections are a necessary but not a sufficient control.<sup>2</sup> Therefore the representative assembly, on behalf of the sovereign people, exercises control in that sense over the offices to which the executive power is entrusted. On this view, government consists not only of the power which commands, but the institutions of countervailing power which limit and regularise it.

Contrary to some assertions, the principle of legislative control does not involve a clear distinction between legislative and executive powers, or an insistence on the complete separation of the bodies which exercise those powers. Of course, if the assembly possesses the legislative power, in the sense that primary laws cannot be made without its consent, this greatly facilitates and enhances legislative

control. The principle of legislative control, however, is perfectly consistent with the initiation of proposed laws by the executive, the delegation of secondary law-making powers to the executive, subject to control by the legislature, and the coordination of administration and legislation. The doctrine of the separation of powers in its purest form can lead to a notion that the legislature should exclusively legislate and the executive should exclusively administer, and neither should infringe upon the function of the other. This notion is exemplified in the decision of the US Supreme Court to the effect that the Congress cannot impose a legislative veto on executive decisions.<sup>3</sup> The principle of legislative control, on the contrary, involves the legislature in administration to the extent that it scrutinises, and has some formal power to influence, the administrative activities of the executive.

If the legislature is so constituted as to reflect a properly distributed majority, this legitimises legislative control, because the legislature more accurately reflects the community, and also facilitates legislative control, because a properly distributed majority is likely to exercise that control in a constructive manner.

If the executive government controls the legislature, legislative control is absent, which generally means that there is little control over the executive, which tends to become absolute in power and absolutist in behaviour. This is the great problem of the British cabinet system: through control of the majority party, the ministry, which consists of the leadership of that party, can prevent any proper scrutiny or control of its activities by the legislature. That scrutiny and control is exercised only by second chambers to the extent that they are independent of the ministry. Thus even the non-representative House of Lords is regarded as valuable for the degree of legislative control it brings, and only upper houses in Australia have normally exercised scrutiny and control, thereby earning the enmity of "democrats" .

### **Executive prerogatives in Australia**

As has been noted, the doctrine of executive government equals government is very strongly entrenched in Australia's political culture, particularly amongst orthodox radicals. It is

reinforced by the practice of the British system of cabinet government, which in turn is greatly reinforced by the intense cohesiveness of political parties.

To add to this, the Australian Constitution also reinforces executive government primacy, because it confers on the ministry certain prerogatives which derive from the monarchy, and which are unrepblican, not only in that sense, but in the sense that they limit legislative control.

Under the Constitution, the ministry in Australia possesses the following powers not subject to legislative approval:

- to make treaties (a power of great importance since the High Court held, in effect, in the *Tasmanian Dams* case, that a treaty can extend the legislative powers of the central government)
- to declare war and to engage in warlike military operations
- to prorogue the Parliament at any time
- to dissolve the House of Representatives at any time
- to veto legislative proposals (because the ministry controls the House of Representatives, this power is not exercised to veto legislation passed by both Houses, and arguably there is a (British) convention that it could not be so exercised; but the ministry has in effect a veto over any proposed laws passed by the Senate)
- to initiate all financial legislation and to determine whether such legislation passes the House of Representatives (in effect, an executive monopoly over such legislation)
- to make all executive appointments (including heads of departments, the chiefs of the armed forces, ambassadors, the Auditor-General, members of statutory authorities and quasi-judicial bodies)
- to appoint all federal judges (a very significant power, considering the role of the High Court in interpreting the



Constitution; a government long in office could stack the Court with its supporters).

A strong case can be made out that, in a government truly republican, the executive government should not possess an unlimited power of prorogation or dissolution, an unqualified veto over legislation or an unqualified monopoly over financial legislation, and that each of the other powers listed should be subject to legislative approval.

A survey of the constitutions of contemporary democratic republics which have been reasonably stable indicates that in most of those countries most of these powers are not entrusted exclusively to the executive government.<sup>4</sup> It could be said to be a feature of republican constitutions that these powers are subject to legislative supervision.

It is ironic that the proponents of the current republican movement in Australia, generally speaking, not only eagerly embrace the British simple majoritarian and executive-dominated system of government, but also support these executive prerogatives, which are derived directly from the monarchy, which have little basis in the absence of the monarchy, and which are not characteristic of republics. Such support is indicated by the conspicuous absence of any proposals to change these powers.

A highly developed system of legislative control is a mark of republican government. A movement to make the system of government in Australia completely republican should also be a movement to strengthen legislative control.

### **Republican models and the republican movement**

The discussion of republican models for Australia has been in fact a discussion of methods of appointing a new head of state, and, as has already been noted, the dominant theme is the need to devise such a method without interfering with, or limiting, prime ministerial power and the system of executive-dominated government. One would think that such a discussion in the presence of a genuinely republican ideology would welcome some method of selecting a head of state which would have the beneficial by-product of limiting prime ministerial power. One

would also think that such a discussion would include suggestions for improving the representative capacity of the legislature and the provisions for legislative control of the executive. On the contrary, the favoured proposals tend to be accompanied by schemes of "reform" for dismantling the institutions which encourage distributed majorities and which control executive power.

The reason for this is simply that the republican movement is not based on a genuinely republican ideology, but simply on a hostility to the monarchy as such, combined with a conventional radical faith in simple majority rule and executive-dominated government.

What is required is a true republican movement, which would, amongst other things, concentrate on strengthening the position of the legislature as the principal safeguard of government truly republican.

**NOTES**

1. Cf Daniel Elazar, *Exploring Federalism*, 1987: federalism "forces majorities to be compound rather than artificially simple" (p. 2); "majority rule is not rejected, but majorities are compounded either from distinct territories (territorial democracy) or concurrent groups (consociationalism), not counted through simple addition" (p. 19). As Elazar points out, this concept is the basis of James Madison's famous expositions in *The Federalist* nos 10 and 51.
2. Madison again: *The Federalist* no. 51.
3. *INS v Chadra*, 1983 462 US 919.
4. The countries covered by the survey are: Austria, Botswana, Finland, France, Germany, Iceland, India, Ireland, Israel, Italy, Switzerland, United States of America.