

ELECTING A PRESIDENT

the elite versus the public *

Harry Evans

The apparent gulf between the opinion-leading elite and the general public on the question of selecting a new head of state now bulks large in the controversy about Australia dispensing with the monarchy. The elite orthodoxy is that an appointed president is necessary to avoid great damage to the system of government, and that an elected president would be disastrous for that system. How can the majority of the public be so stupid that they apparently do not see this self-evident truth (self-evident because so many important people find it so)?

Perhaps in this circumstance the question should be asked whether it is the populace who are so obtuse, or whether there are matters to which the elite are stubbornly blind. Such a situation would not be unprecedented. On a sober consideration of the matter, there are good grounds for concluding that the orthodoxy of the important people is irrational while the apparent instinctive reaction of the majority of the public is well founded.

The elite view may be summarised as follows: the powers of the appointed Governor-General are constitutionally very great but are restrained by conventions attaching to the Crown; in the absence of the Crown and with an elected president, constitutional restraints on those powers would have to be provided. In other words, an appointed president may possess the powers, but an elected president should not.

This thesis is actually a reversal of the constitutional principle arising from, and demonstrated by, western constitutional history. That principle is that extensive powers require election, and appointed bodies can have only limited powers. The House of Lords had its powers taken away because of its hereditary and appointed character; the United States Senate was changed from an appointed to an elected House because it possesses great constitutional powers; the French presidency under the 1958 constitution was soon changed from an appointed to an elected office. If the current powers of the Governor-General are to be retained, this would strongly suggest that a president must be elected; if a president is to be appointed this would

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point to restricted powers for the office. The majority of the public probably instinctively understand this, and the more the opinion-formers dwell on the great powers of the office, the more the public are likely to insist on election.

The elite view is that an appointed president best approximates the existing system of an appointed Governor-General, and an elected president would involve a significant change to the system, particularly by giving a president an independent public mandate. Again, this orthodoxy reverses the actual constitutional situation. It is assumed that the Governor-General in practice is hired and fired by the Prime Minister, but no Prime Minister has yet sacked a Governor-General. The latter theoretically represents the Crown, and in practice it could be politically more difficult to fire a Governor-General than to fire an appointed president. The Crown is constituted independently of the Parliament; the monarch's tenure of office is not dependent on the Houses. He or she has a separate line of political credit, as it were, with the public. Therefore an elected president, with an independent mandate, would most closely approximate the existing constitutional arrangement.

The general public may have an instinctive understanding of this principle also, because they perceive, quite correctly, that the Governor-General is a kind of umpire in the political process in which the politicians are the players. An umpire should not be appointed by the players, but should be independent of them and accountable to the wider society.

The importance of the head of state's role as an umpire, and the necessity of independence from the politicians, can be supported by reference to many past cases involving vice-regal representatives. A recent Australian example is provided by the situation arising as a result of the Tasmanian state election of 1989. The government of Mr Gray did not retain its majority in the House of Assembly, which expressed lack of confidence in him, but no other party won a majority. Mr Gray advised the Governor, Sir Phillip Bennett, to grant another dissolution and general election. The Leader of the Opposition, Mr Field, wanted the Governor to appoint him as Premier to form a Labor government with Green support. The Governor did not do what either major party required. He insisted that Mr Field provide clear evidence of his ability to form a government. When this was forthcoming, in the shape of a coalition agreement between the Labor and Green parties, the Governor refused to grant a dissolution to Mr Gray and required that he resign as Premier to allow the appointment of Mr Field. Neither political leader was pleased with the actions of the Governor, Mr Gray because he lost office and Mr Field because his premiership was burdened by the written coalition agreement with the Greens. The Governor was no doubt fortified in his interpretation and application of the principles of responsible government by his status as the representative of the Crown and by the conventions attaching to that status. Whether a president appointed by, and removable by, the major political parties, an umpire selected by the players, would be similarly fortified by that method of selection is questionable.

The orthodoxy maintains, however, that an election for a president is bound to produce a party politician, who would be unsuited for an umpire's role. There are two unfounded assumptions in this claim. There is no certainty that the electorate would vote for major party politicians in a presidential election with the same resignation as they vote in parliamentary elections. They may well take the opportunity to return a

non-politician. The parties may be clever enough to nominate non-party candidates to take advantage of this inclination. Both of these phenomena have occurred in other countries with elected presidents. Even if a party politician is elected, however, it cannot be assumed that he or she will behave in the same way as party members in a parliament. A distinct, one-person office is different from a parliamentary team situation. Elected presidents in other countries have a way of asserting their independence of their parties. In any case, a party politician may perform an umpire's role better than a harmless nonentity agreed upon by the major parliamentary parties; former players, not selected by the players, may make the best umpires.

An orthodox argument frequently heard is that a president must not be in a position to challenge the prime minister', which a president with an electoral mandate may do. Presumably this means that a president should not exercise the powers of the office other than in accordance with prime ministerial advice. The conventions of responsible government attaching to the Crown and the office of Governor-General, however, require that in some circumstances the powers of the office be exercised contrary to that advice. The duty of a Governor-General is to ensure that a government is constituted which has the support of the lower house or a reasonable prospect of obtaining that support. This duty may involve rejecting the advice of the Prime Minister. The Tasmanian case provides one instance of this. So u-hat must be meant by this argument is that a president must observe the conventions. There is no reason to suppose that an elected president would be more likely to depart from the conventions than an appointed president. The reverse could equally be assumed. In either case a president could not long maintain in office a government which did not have the support of the lower house.

The more sophisticated version of this argument is to the effect that an elected president may change the system of government by exercising in person some of the executive powers, while maintaining a government with a party majority in the lower house. The effect of this, it is said, would be to give rise to a hybrid presidential/parliamentary system such as exists in France.

As with the point about the powers of the office, the repetition of this argument may be counterproductive so far as changing public opinion is concerned. One reason for the public perception of the question may be that there is an instinctive understanding of the fundamental flaw in the current system of government: the excessive concentration of power in the hands of the Prime Minister. Through intense party discipline, the Prime Minister controls absolutely the House of Representatives. One of the institutions which is supposed to be a control on government is thereby eliminated. Only the federal elements of the system, the Senate when not under government party control, state governments of different party complexions, and the High Court interpreting the Constitution when litigation is brought before it, impose some control on the otherwise absolute monarch, the Prime Minister. Occupants of the office who have treated institutions as mere instruments of their royal will and attacked any which stand in their way have served only to draw attention to the undue concentration of power. The electorate, most of whom do not vote directly for the Prime Minister, may be forgiven for thinking that some breaking down of that concentration of power could be desirable, even if it does change the system of government.

There is an implication in the elite orthodoxy that the combination of a parliamentary or cabinet system of government, under which the party or coalition with a majority in the lower house forms the government, with a directly elected president would be a bizarre innovation found only in some obscure corners of the world. An examination of the various relevant systems reveals a different picture.

There are twelve democratic and constitutional republics which have been stable under their current constitutions for twenty-five years or more. They are: Austria, Botswana, Finland, France, Germany, Iceland, India, Ireland, Israel, Italy, Switzerland and the United States of America. Excluded from the list is Singapore, on the basis that in 1993 it radically altered its constitution by changing to an elected president; the direction of the change, however, is significant. The two countries with non-parliamentary systems may also be excluded: the United States, where executive power is reserved for the president, and Switzerland with its unique collegiate executive and rotation of the office of head of state. This leaves ten republics with parliamentary/ cabinet systems, six of which have directly elected presidents: Austria, Botswana, Finland, France, Iceland, and Ireland. It is usual to classify Finland and France as having hybrid presidential/parliamentary systems, but they undoubtedly have in essence parliamentary/cabinet systems, in that a president cannot maintain in office a government which does not have the support of the legislature, as President Mitterrand was constrained to accept. It is more accurate to classify all of the six as belonging to a parliamentary/cabinet group and as exhibiting a range of provisions relating to presidential powers. Contrary to statements frequently made, none of the six constitutions comprehensively codifies the powers of the president; it would be impossible to do so. Some contain more provisions than others concerning the relationship between the presidents and the legislatures and the formation of governments. Elected presidents are to be found at both ends of the spectrum of presidential powers, the ends being occupied perhaps by France and Ireland.

The state of the republics of the world, therefore, offers little support for the orthodox view.

Finally, most people, not being intellectuals, are able to detect the massive contradiction at the heart of the elite orthodoxy: the monarchy must go partly because it is undemocratic, but the people must not be allowed to choose the replacement, because they would stupidly make the wrong choice. There is a decided air of Venetian oligarchy about schemes for an appointed president, which does not go well with the historical political culture of Australia a century after the Constitution was adopted by popular vote.

It has been well said that the opinion-formers should not rule out the option of an elected president because that may be what the people want, and a change to a republic may be rejected without it. To that should be added the equally significant point that the apparent majority view of the people is also perfectly rational and supportable by evidence.