THE SEVENTH SIR JOHN QUICK BENDIGO LECTURE

REFERENDUM - THE AUSTRALIAN WAY

THE RT HON SIR NINIAN STEPHEN

SIR JOHN QUICK LECTURE

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Sir John Quick was a partner in the Bendigo law firm, Quick Hyett and Rymer, later Quick and Hyett, from 1890 to 1912. From 1891 the firm practised from premises at 51 Bull Street.

Robertson Hyetts are proud to be associated with the Sir John Quick Lecture.

REFERENDUM - THE AUSTRALIAN WAY

THE RT HON SIR NINIAN STEPHEN

When asked to give this Sir John Quick Lecture I immediately thought of s.128 of our Constitution and its referendum procedure, so closely associated with John Quick, whose memory this series of lectures honours.

The most intriguing thing about the Australian form of Constitutional referendum is surely how we ever came to have it formally written into our constitution. In 1900 the referendum was not only a very rare feature of constitutions world wide; it was directly opposed to the principle of representative democracy which Australia had inherited from Britain and which before federation was accepted by all six of the Australian colonies as the normal and very traditional form of government. It was that principle which Edmund Burke described when, in his speech to the electors of Bristol in 1774, he said "you choose a member indeed; but when you have chosen him, he is not a member of Bristol, but he is a Member of Parliament". Once chosen, he would speak as he saw fit, not as the voice of Bristol.

The discipline of rigid party systems may have, over the years, largely destroyed one aspect of Burke's model of representative government so that one votes for a party rather than for an individual but our prevailing system remains that of representative government, a far cry from the direct democracy of which the referendum is the instrument.

In fact, since the essence of representative democracy is government not directly by the electorate as a whole but by its elected parliamentary representatives, submission of matters to a referendum of the electors themselves, removing decision-making from their representatives in parliament, is a direct contradiction of representative democracy, though perhaps none the worse for that!

The curious thing is that those Australian politicians, all male and mainly heavily bearded, who gathered together in constitutional conventions in the late 1890's, deeply devoted as they were to the principles of representative government and the familiar Westminster system, and faithfully retaining it for the enacting of legislation, nevertheless gave us in our new federal system the novel process of referendum, a powerful manifestation of direct democracy, as the sole mode of changing our federal constitution.

What is more, the really basic question of whether or not to adopt a Federal Constitution and create the Commonwealth of Australia was itself left to be decided not by elected political representatives but by that same process of referendum within each of the six colonies.We are the only nation that I know of that has both hammered out the terms of its constitution at gatherings of popularly elected representatives and then submitted the result to the vote of the people at referendum. There is only one thing that mars this remarkable instance of direct democracy in action, apart from the fact that, save in a few exceptional cases, the indigenous people of Australia had no vote. It is that, with the honourable exception of South Australia from 1895 and Western Australia from 1899, women had no vote at the time of federation. The franchise did not extend to them, so they had no vote in the referendums.

How this all came about is worth recounting since among Britain and her dominions at the turn of the century the referendum was unique to Australia and the U.S. constitution, upon which so much of the federal aspects of our own constitution is based, has no recourse to referendum.

It was the Swiss Federation that served as the model on which the founding fathers of our constitution relied in selecting the referendum as the instrument of constitutional change.

Switzerland's Federal Constitution of 1848 introduced the referendum as the mandatory means for constitutional amendment and ever since the Swiss have adhered to that means, requiring a double majority, of voters generally and of voters in a majority of its cantons, to approve of an amendment to their Constitution.

For a British dominion to adopt the referendum was then a striking departure from the long entrenched British system of representative democracy.

When in 1891 members of the six colonial parliaments met to debate federation they were content to retain the representative principle, with amendment of the Constitution to be initiated by absolute majorities in each house of the federal parliament and then approved by specially convened conventions in each state, whose members would be elected by the electorate in each state. To be approved, the people of the states whose conventions approved the amendment would have to consist of a majority of the people of the commonwealth. This was the 1891 model; there was to be no question of direct consultation of the electorate.

Most delegates to the 1891 Constitutional Convention felt that those powers retained by the colonies after they became states on federation were not to be subject to what some described as easy federal filching by piecemeal amendment in the future; as one of the delegates said, amendment was to be made "as difficult as possible". Only a few thought this formula for amendment was too restrictive, providing "a little too much safeguard" for the states; Deakin said he would "much prefer to go to the electors in the first instance". However, in the outcome the formula settled on in 1891 was one without any direct popular participation.

Likewise the mechanism for adoption of the Constitution was not to be by direct approval by the people. Some, Deakin and Playford of South Australia among them, urged this but the prevailing view was that the mode of approval of a Federal Constitution should be left to each colonial parliament to determine.

After that 1891 convention and its framing of a draft constitution, it was left to the colonial parliaments to take further the proposed constitution and with it the whole matter of federation. If the parliaments approved of it the convention recommended that it be submitted to the people in such manner as those legislatures saw fit, with the ultimate aim of having it enacted as an imperial act. Little of this happened; instead the proposal languished for a couple of years in the colonial parliaments which by then were becoming preoccupied with the economic crisis and depression of the early 1890's.

Despite this, popular support for federation grew. The effect of the depression of the early 1890s led people to seek salvation in a closer union of the colonies. The Australian Natives' Association, centered in Victoria, promoted this and urged action and federation leagues were formed to stir the politicians into action.They supported Edmund Barton, by then the outstanding supporter of federation in Sydney's parliament and gradually leagues which were active both here in Bendigo and throughout Victoria spread to Adelaide and Brisbane. Border leagues along the Murray were also strong federation supporters.

All this popular agitation had led, by 1893, to a strong popular impetus towards federation. But it was not until the border leagues convened a conference at Corowa on the Murray in mid-1893 that the move towards federation gained fully renewed vigour and with it the adoption of the concept of direct democracy in the form of a referendum. Sir Robert Garran in his "Prosper the Commonwealth" describes how this came about; that Corowa conference, sponsored by Border Leagues from both banks of the Murray and by Federation Leagues and the Australian Natives Association, at first seemed to be heading in an all too familiar direction, towards much debate without decisive result, when delegates, in impatience, demanded something more than speeches. At a short adjournment taken at the suggestion of Dr. John Quick, as he then was, of the Bendigo branch of the A.N.A., a fervent federalist, a resolution was framed and then enthusiastically adopted by the conference and it paved the way for all that followed in the ensuing years. It resolved that the legislatures of each colony should pass an act for the election of representatives to attend a statutory convention whose function would be to consider and adopt a bill to establish a Federal Constitution for Australia. Once adopted, the bill containing the proposed constitution was to be submitted "by some process of referendum to the verdict of each colony".

Here for the first time was a formal decision, if only by an informal gathering of enthusiasts for federation, that any constitution for a federated Australia should be submitted directly to its people and not merely indirectly through their representatives in the colonial legislatures. Alfred Deakin, in his "The Federal Story" written more or less contemporaneously but only published long after his death, describes the climate of opinion that lead to this outcome at Corowa. Radical critics of the proceedings at the 1891 Convention had two principal objections to that convention; first that it consisted of politicians appointed by and from the politicians of the colonial parliaments and not of representatives directly elected by the people and, secondly, that it did not contemplate that any proposed constitution would have to be approved directly by the electors in the colonies and not just by their elected representatives.

On his return to Bendigo after the conference Quick produced a model draft of the proposed enabling bill which he submitted to the Bendigo branch of the Australian Federation League which adopted it and published it on 1st January 1894. Then, largely as a result of meetings he had with colonial Premiers over the next 12 months, the Premiers' Conference which met in Hobart in January 1895 adopted a set of resolutions which quite closely accorded with Quick's proposal. Enabling bills were passed by New South Wales and South Australia in December 1895 and by Tasmania and Victoria in early 1896.

It was the Corowa conference that took the federation proposals out of what has been described as the narrow arena of parliamentary manoeuvre into the broader sphere of popular interest and popular decision, evidenced by the recourse to referendum. It was John Quick and his supporters initiative that led to that result. The subsequent constitutional conventions of 1897-98 resulted in the framing of a constitution requiring approval by referendum both for its adoption and for any amendment.

There was high controversy over this Corowa-inspired recourse to direct democracy. One South Australian member described any adoption of the constitution by referendum as "an absolute insult to parliament". Sir Henry Parkes denounced it as quite preposterous for a mob of people to make a constitution for a nation and went on to describe the Premiers of New South Wales, Victoria and South Australia, the most enthusiastic supporters of the proposal, as "three wandering lawyers who had dared to propose a constitution in disparagement of the work of true statesmen".
Despite this criticism recourse to referendum was retained, both for the initial adoption of the constitution and as an integral part of the process for its subsequent amendment, enshrined in s.128. A first series of referendums in the four colonies, New South Wales, Victoria, South Australia and Tasmania, on the proposed constitution was held and passed in each state in 1898. A second series of referendums was made necessary because the total affirmative vote in New South Wales fell short of the margin which that colony's parliament had fixed by which it should exceed the negative vote. Queensland joined in these referendums, held in 1899, which all duly affirmed the bill for Federation, and, in 1900 Federation was achieved with the enactment of the Commonwealth of Australia Constitution Act by the Parliament at Westminster and, finally, royal assent to it on 9th July 1900.

The terms of s.128 with its element of direct democracy produced a considerable qualification on the great principle of representative government. Isaac Isaacs saw s.128 as both democratic and as permitting of flexibility in the future. He had said at the 1898-99 conference that "while it is a very great thing that the constitution should not be rudely touched or hastily altered, we must admit, if we are fair to our conscience and to ourselves, that, after all, the Constitution is being made for the people, not the people for the Constitution".

Only in recent years has Britain itself, and Canada and New Zealand as well, adopted the referendum for questions of high importance, to that extent abandoning the time-honoured model of representative democracy and rule by elected representatives in parliament assembled. Nowadays referendums are much in vogue world-wide; Holland, I believe, is the only Western European democracy never to have had a referendum, always adhering to strict representative democracy. Switzerland however remains the true home of referendums. There in a typical year the Swiss may vote on up to sixteen questions at federal referendums and on two or three times that number in cantonal and communal referendums. The matters put to referendum are by no means confined to amendment of existing laws, but this is no place for a disquisition on Swiss constitutional law.
Australia's record of referendums for constitutional amendment has been a curious one.

At first sight the record seems lamentable, only eight of a total of forty-four proposals for amendment have been carried at referendum.

The requirement of s.128 that there be a double majority, both a majority nationally and a majority in at least four states, is often seen as a principal cause of difficulty in amending the constitution. However the statistical record shows that it may be a mistake to regard this requirement of a double majority as a major stumbling block in the effecting of constitutional change. Of the forty-four proposals for amendment which have over the years been proposed only four, two in 1946, one in 1977 and one in 1984, have failed because of this requirement. If the figures are looked at, it is significant that of the eight successful proposals, all but one of them received "yes" votes in every state. All in all, the Australian electorate seems to know its own mind; generally speaking, what it assents to it welcomes with enthusiasm, what it rejects it rejects with little hesitation.

The reason for the rejection of no less than thirty-six proposals has been the subject of much debate. Is it that those proposals were simply unacceptable to the electorate? Or are Australians suspicious of any change or perhaps of any politician-sponsored change? Is it that they are generally satisfied with the constitution as it stands? Or do they derive a perverse pleasure in denying to politicians the changes which they wish to make?

For an amendment to be accepted must it have the support of all major parties and hence not be seen as a party-political issue?

Each one of these explanations is open, none is proven. There is one incontestable fact that in the quarter century since 1973 the record has been particularly bleak. Of the eighteen proposals that have been put to referendum in those twenty-five years only in the referendum of 1977 were any successful. However it is notable that the three successful proposals of 1977 were successful in all six states and by wide margins, in each of them the "yes" vote nation-wide was well over 70%. Of the quarter century's other fifteen proposals nine of them, including the two last year on a republic and on a changed preamble, failed to get a majority in even one state and four others achieved a majority in only one state, New South Wales. Again, all this is perhaps further evidence of decisiveness on the part of the electorate.

Informal voting was low during the last quarter century up to 1999; except in the referendum of 1984 it was always less than two per cent, much lower than was the case in the referendums of the early decades of this century. So informal voting provides no explanation for the failure of so many proposals. Incidentally, for reasons not immediately apparent, Queensland over this period has consistently recorded by far the lowest number of informal votes and South Australia equally consistently the highest.

One obviously possible explanation for the failure of so many proposals to pass the referendum hurdle is that electors simply did not find the proposals attractive. This is frequently put forward, it being said that all too often the issues involved are inadequately explained in advance. Another common explanation is that proposals are rejected because they are seen as grabs for power by the central government. However this hardly seems plausible in the case of the proposals rejected since 1974, what they dealt with can scarcely be seen in this light.

There is one element of s.128 that may be relevant to a number of these possible explanations of the frequent failure of proposals; it is that proposals for constitutional amendment cannot under s.128 originate with the people but only with parliament. In this respect the procedure differs from the classic model of referendum encountered in Switzerland and in a number of U.S. states. I think particularly of California, there a proposal, if initiated by a given number of electors, has to be put to a general referendum regardless of the wishes of the legislature. It has been suggested that by divorcing the process from parliament in this way it can be seen to be more directly a process of the people, so that proposals put forward become more likely to attract support.

Such citizen initiated referendums were in 1987 recommended in the report of one of the advisory committees of the constitutional commission of the time, with five hundred thousand electors required as the minimum number who might initiate a referendum for amendment of the constitution. This was a recommendation which was, however, ultimately rejected by a majority of the constitutional commission.

With the coming of the computer and advanced electronics all the expense and complexity presently involved in conducting elections and referendums may, of course, swiftly disappear, each citizen, armed with a personal computer and appropriate smart card, being capable of communicating his wishes authentically to government or returning officer and of casting a vote on any issue. But, I leave to others and to other occasions the whole question of the virtue of direct democracy through the use of voter initiated referendums not merely for constitutional amendment but for ordinary legislation, its enactment and its repeal.

There are able supporters of such a reform in most political parties in Australia but they are as yet very much in a minority. Likewise I leave aside the so much debated question of why the referendum of 1999 failed and the related question of the desirability of having the form of amendment to bring about a republic left to a constitutional convention before being submitted to the vote of the people.

Instead I hope to have shown that in the adoption and means of amendment of our constitution direct democracy through the referendum was to the fore and that the relative infrequency of successful amendment may not necessarily show the amending procedure to be to blame as unduly difficult. Whatever may be the reason for relative lack of success in securing passage of constitutional amendments at referendum one fact is clear, that the authors of our constitution recognised that it should be for the people of the Commonwealth ultimately to decide the question of constitutional amendment, they to determine whether an amendment proposed by parliament be adopted or rejected. The democratic virtue which attached to the initial submission of the constitution to popular vote at referendum attaches also to the constitution's inbuilt process of amendment. It was said by one academic commentator after the defeat some years ago of a proposed amendment at referendum that "if the constitution does need changing it is time we stopped whinging about s.128 and got down to the job of, as commentators, educating; as politicians, persuading". But the great question on every referendum always remains "does the constitution really need amendment and, if it does, is this the amendment that is needed?

When we vote at a referendum we are taking part in the ultimate democratic process open to a citizen, direct participation in a high affair of state. Hard fought for in the 1890s and achieved thanks to the initiative of Sir John Quick of Bendigo, it is no small achievement for Australians that the right we then exercise has, through wars and depression, now endured undiminished for a whole century in which most things have changed utterly.

The Rt. Hon. Sir Ninian Stephen

Born in the United Kingdom on 15th June 1923. Educated in the United Kingdom, Switzerland and Australia. War Service 1941-1946 Australian Army.

Admitted to practise in Victoria as a Barrister and Solicitor in 1949 after studies at University of Melbourne; LL.B. (Melbourne) 1950. Practised as a Solicitor, 1949-52, and from 1952 as a barrister and member of the Victorian Bar practising principally in commercial, equity, taxation and constitutional areas; appointed Queen's Counsel in 1966. Appointed to the Victorian Supreme Court bench in 1970 and in March 1972 appointed a Justice of the High Court of Australia. Sworn of the Privy Council of the United Kingdom in 1979 and sat as a member of its Judicial Committee. Retired from the High Court of Australia in 1982 when senior puisne justice to take up appointment as Governor-General of Australia, which office he held until 1989.

Appointed Australia's first Special Ambassador for the Environment 1989-1992; Chairman of various Australian governmental and other bodies including the Constitutional Centenary Foundation, the Antarctic Foundation, was Chairman of the National Library of Australia for six years and Chairman of the Australian Banking Industry Ombudsman Council for four years. Appointed in 1992 by the United Kingdom and Republic of Ireland Governments as Chairman of Strand Two of the Talks on Northern Ireland. Elected as a Judge of the United Nations International Criminal Tribunal for the former Yugoslavia 1993-1997. Appointed in 1994 Commonwealth of Nations Special Envoy to Bangladesh. Chairman of the United Nations Expert Group on Cambodia 1998-1999. Currently Chair of the Australian Citizenship Council and of the Australian Blood and Blood Products Review. Appointed in 2000 Member of Ethics Commission of International Olympic Committee.

Honours and Awards. K.G., A.K., G.C.M.G., G.C.V.O. K.B.E., P.C., Commandeur de la Legion d'Honneur. Hon. Doctorates (Melbourne, Sydney, Griffith Universities and University of Western Australia), Hon. Master, Gray's Inn, London.

July, 2000

Sir John Quick

John Quick was born in Cornwall, England in 1852. In 1854 his family migrated to Australia; his father died shortly thereafter.

At age 10 he entered the workforce, undertaking various manual jobs in mines then progressed to journalism. His drive for self improvement led him to complete a law degree at the University of Melbourne (1874-77) and in 1882 he was awarded a Doctorate in Law.

At this time, Sir John Quick was in charge of the Age Parliamentary staff. He entered politics himself in 1880, winning the Legislative Assembly seat of Sandhurst (Bendigo), which he held until 1889.

Quick's public support for Australian Federation commenced with an 1882 speech to Parliament. As a delegate from the Bendigo A.N.A., he attended the 1893 Corowa Conference where he presented the famous resolution which took Federation's fate away from Parliaments, and gave it directly to the people via elections for representatives and a referendum on the draft Constitution. He wrote the Enabling Bill needed for these stages to occur and also wrote a booklet, *A Digest of Federal Constitution* (1896), to help educate the public.

Throughout the two referenda campaigns of 1898 and 1899, he addressed numerous public meetings.

Quick's work for Federation was recognised with the award of a knighthood in 1901.

He was elected unopposed as Bendigo's first Federal M.P., holding the seat until 1913.

The Sir John Quick Bendigo Lecture has been established to revive the memory of this self-made man who had the forethought and perseverance to promote Australia's union. Quick himself referred to his long devotion to Federation as a "public duty" he had to perform. Sir John Quick deserves to be recognised as a "Father" of Australian Federation.

Written by Michele Matthews, BA(Hons) Melb, DipEd LaT

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