Chapter Six
Federalism and the Crown – the Odd Couple?

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The Australian system of government at the federal level is an amalgamation of responsible government and federalism. Responsible government means what the British in the 19th Century called party government and is also referred to as the Westminster System. The government, and its officials, are responsible for their actions and expenditure to the Parliament and hence ultimately to the people who elected it. Federalism means that the power to make and administer laws is divided between a central government and provincial or State governments, with each competent within its own particular sphere.

Responsible government tends to concentrate power, federalism to separate and diffuse it. Responsible government stands for democratic accountability, federalism for the liberal idea of the separation of powers and the diffusion of power generally. On first inspection it might seem that responsible government would be more likely to be associated with the ideals of monarchy and federalism with those of republicanism. However, when we look more closely we can see that both federalism and responsible government are elements of the development of constitutional monarchy.

The early advocates of the idea of sovereignty, such as Jean Bodin in France and Robert Filmer in England, were opposed to the idea that sovereignty, and hence the power to make laws, could be shared by a number of bodies in a political entity.[1] Bodin insisted that sovereignty needed to rest with a single undivided entity, be it a Monarch, an aristocracy or a democracy. In practice both Bodin and Filmer were monarchists of the Absolute variety and they were opposed to the idea of mixed government. Mixed government is the theory that the most effective system of government, and the one least likely to decay and degenerate, is one in which power is shared between the one (monarch), the few (aristocracy) and the many (democracy).

Models of mixed government came from the ancient world. One such model was Sparta with its two kings, Ephors, Council of Elders and popular assembly. Another was Rome. The King was replaced by consuls who were elected every year, but the council of elders remained in the shape of the Senate, as did popular assemblies. In fact it appears to be the case that this tripartite division is extremely common, perhaps even universal, among early city states, with a similar set-up occurring in ancient Sumeria. Athens became a fully fledged democracy when, having rid itself of its kings and then its tyrants, it stripped the Areopagus or aristocratic council of its powers in 462 BC.[2]

In both the ancient and the modern world governments with a mixed Constitution were admired for their longevity and their stability. Hence one writer in colonial New South Wales could call attention to the fact that both Rome and Venice, along with England, had lasted because they possessed mixed Constitutions.[3] On the one hand it can be argued that mixed government worked because its three elements checked and balanced each other; on the other hand a strong case can be made that its real strength lay in the fact that mixed government required consultation, and hence its decisions embodied the consensus of the community.

The struggle of Parliament against the King in 17th Century England was not directed against monarchy as such. Rather it opposed the unified ideal of monarchy and sovereignty that concentrated power, in an unaccountable way, in the hands of the Monarch. It favoured a mixed system in which power was shared. Again, whatever mythology was tied up in the

idea of the "Ancient Constitution" that the advocates of the Parliamentary cause espoused,[4] it is nevertheless the case that power had been shared in the medieval period, and that kingdoms functioned on principles of community, consent and consensus.[5] In their rush to create viable states capable of fighting wars against other states, Monarchs across Europe attempted to undermine the "privileges" of the various corporations in their kingdoms, including the existing representative institutions derived from the medieval period.

The Princes of the 16th and 17th Centuries needed efficient armed forces if they were to survive in an extraordinarily competitive environment. The drive for efficiency meant that they sought to centralise power in their own hands rather than to resort to traditional practices involving consultation and consent. This meant over-riding traditional representative bodies, it meant creating standing armies and centralised bureaucracies. Only a few European countries were able to go through this process, that in effect created the modern state, without the destruction or emasculation of their traditional representative institutions. After decades of struggle England was one of those lucky few that managed to retain its traditional institutions while constructing an efficient modern state.[6]

In the wake of the Glorious Revolution of 1688 the English tended to understand the form of government that the Revolution had established as being mixed in nature. The key players were understood to be the Monarch, the aristocratic House of Lords and the democratic House of Commons. The English thought that they had restored the "Ancient Constitution" to its original condition, and they feared the prospect that forces would intervene to corrupt the balance, thereby destroying the delicate balance between its elements.

The French *philosophe* Montesquieu recognised that this was far from the truth of the matter. He considered that the British (as they had become after the *Act of Union*) had created a new type of political system. It was not a republic like Venice or ancient Rome, but neither was it a traditional monarchy like France.[7] It was a regime that combined the power of the new state structures that almost two hundred years of continual warfare had brought into being, with the principles of community and cooperation that had been characteristic of medieval practices of government.

Eighteenth Century England was a regime in which commerce flourished, in which people enjoyed a degree of freedom unknown in continental Europe but which nevertheless possessed a strong state structure. It was this combination of power and liberty that was most startling and innovative. Britain was more powerful than France despite its smaller population, and yet it could be powerful without resorting to tyranny and coercing its population. Many saw "mixed government" as the key to maintaining the balance between power and liberty. "Mixed government" is what we today would understand by the term "Constitutional Monarchy". In it the Crown operated as a unifying principle guaranteeing the Constitution and the rule of law that provided the basis of British power. The other elements of the Constitution ensured that the power of government did not over-reach itself and become despotic.

At another level, mixed government ensured that the actions of the British government were based on the consent of at least the most significant part of the British community. Investors were confident that the British government, unlike the French, would not default on loans, and hence lent money to the British at a lower rate of interest.[8]

The British Constitution was the product of slow, and sometimes painful, evolution in England and then Britain. The loss of the American colonies indicated that it was not perfect. Parliamentary sovereignty seemed to be at odds with the rights of British Americans. The British government was not being unreasonable in seeking to recover some of the costs that they had incurred against the French in America. But they broke the rules of mixed government by attempting to raise those funds without consultation or consent. The British government did behave despotically in America, and the fact that they resorted to such casuistical arguments as "virtual representation" did not help matters.

The war against the American colonies raised the real problem of what the British Constitution meant in British colonies that had not grown slowly and organically but had been created in a relatively short period of time, and how that Constitution was to be applied in such circumstances.

What did the British Constitution mean in a "new" British colony? How could it be transplanted so that it preserved the delicate balance between liberty and power? After they had become independent, the new United States of America gave one answer to that question.

The Americans looked at the workings of the 18th Century British Constitution and sought ways to avoid what they saw as its deficiencies. In particular they were concerned with the issue of corruption. They believed that the British Constitution had been corrupted so that power was snuffing out its liberty.[9] They could only escape that power and corruption by declaring themselves independent. They found a solution to the problem of power and corruption in the rigid separation of powers between the Executive, the Legislature and the Judiciary, and in the creation of a federal system of government. It should be noted that separation of powers is not the same thing as mixed government.

Corruption preyed on the mind of 18th Century political writers. They were concerned that the Executive could corrupt the legislature through such means as offering "places" to Members of Parliament. They were afraid that with Parliament and the people corrupted, a Monarch could introduce a "standing army" to impose his will. Fear of corruption shaped the American revolution; the American colonists only declared their independence when they had become convinced that not only the British politicians but also George III were conspiring against them. In other words, the American Constitution took on its particular shape because of the form that the British Constitution had taken during the course of the 18th Century.

By the time the Australian Colonies had reached the stage at which the British government was willing to grant them a degree of self-rule, the British Constitution had also moved on and evolved. Queen Victoria was much more of what we would today understand as a Constitutional Monarch than had been George III. William IV had been the last Monarch who had tried to interfere in the appointment of Ministers. By the 1850s Britain had a system of responsible government in which the Ministry of the day was responsible to Parliament for its existence.[10]

Corruption was no longer the issue that it had been in the previous century, particularly after the Reform Bill of 1832. It is most certainly the case that corruption did not figure in the minds of the Australian colonists at the time of the granting of Responsible Government, just as fear of corruption and conspiracy does not figure in Australian culture in any way comparable to the extent that it does in American culture.

Contrary to the views of recent republican writers, the majority of colonists at the time of the granting of responsible government to the Australian Colonies in the 1850s were not republicans.[11] They were men and women desirous of having a system of government as close to the British Constitution as possible. In fact the hero of our present day republicans, Dr Lang, was a sectarian bigot who wished to create a Calvinist utopia in Australia. His inspiration was Thomas Chalmers, whose experiments in creating such Calvinist communities had failed in Scotland.[12]

No, most colonists wanted the British Constitution, although they often did not agree as to what it was.[13] This is not surprising given the rapid process of evolution that the Constitution was undergoing. Hence there was, to our eyes, the almost bizarre attempt to create a colonial aristocracy by W C Wentworth. But to his eyes, and to those of many of his contemporaries, a mixed Constitution meant that you had to have "the few" to balance the many. To the eyes of many colonial conservatives, pure democracy meant anarchy.

Their problem was that they did not understand that one could apply the principles of the British Constitution to a new society, without being limited by the form of that Constitution.

What mattered was creating a structure that both consolidated and diffused power. And it was the British who supplied the solution in the shape of federalism.

As J M Ward has demonstrated, the granting of responsible government, the "decolonisation" of the Australian Colonies, was meant to be complemented by federalism.[14] The British knew by experience that small self-governing Colonies could adopt selfish and obnoxious policies, such as the protection of industry and laws harmful to the indigenous inhabitants. They saw federalism as a means of encouraging free trade and of overcoming the possible excesses of which small political units are capable. They understood that the principle of democracy all too easily allied itself with that of unlimited power, much to the detriment of those who stood outside the magic circle of power. This is illustrated in Thucydides, where the democratic empire of Athens ceased to be a *hegemon* and became an *arche*, exercising power in a ruthless fashion and in defiance of the accepted values of the Greek world.[15]

Federation did not happen in the 1850s. The new political élites of the various Colonies were more interested in consolidating responsible government within their own Colonies than in joining together with the other Colonies. Nevertheless, advocates of federalism such as John West were able to put forward solid arguments in favour of federation that made it seem to be the "natural" next step for the Colonies to take. West argued that a federal system was the form that the British Constitution necessarily took outside of Britain. West believed that the local institutions that favoured liberty and the expression of individual responsibility were weaker in the Colonies than in the Mother country. Given that, at the time of responsible government in New South Wales, local municipal government hardly existed, he did have a point. Federalism was meant to recreate through its institutional forms the balance between power and liberty that had evolved slowly in Britain.[16]

Responsible government in the Colonies was quite different from the system of the separation of powers that the Americans had devised to limit corruption. Instead it tended to concentrate power in the hands of the popularly elected politicians. Did it lead to democratic excess in the manner described by Thucydides?

The first point that can be made is that the various Upper Houses of the various Colonies, either nominated as in the case of New South Wales, or elected on a restricted franchise, proved incapable of resisting the democratic power of the Lower Houses. Responsible government, without the federal principle, did combine democracy and power in ways that were worrying. It is no accident that several of the State governments of Australia were subject to crises in the 1980s and 1990s relating to corruption, whereas the Commonwealth government was not. I think this reflects the fact that government at the State level in Australia still lacks adequate checks and balances.

Examples of the excesses of democratic power can be seen in the Robertson *Land Acts* in New South Wales, the introduction of protectionist economic policies in Victoria and the various actions of colonial governments against the Chinese. At another level, democratic excess can be seen in the introduction of bureaucratised State education systems rather than subsidising schools run by churches and other voluntary agencies.[17] The 45 years between the granting of responsible government and Federation allowed the development of political structures and a political culture in Australia that favoured the consolidation of power under democratic auspices because responsible government failed to act as a form of mixed government. This has led to democracy coming to be confused with bureaucratic centralism in Australia.

The Federal movement of the 1890s was able to bring the long engagement between responsible government and federalism to an end and finally to allow their marriage in the new Australian Commonwealth. This union can be described as an innovation, and as an attempt to marry the American and British systems of government, the so-called "Washminister

system". Such descriptions are misleading. They tend to equate responsible government with the British Constitution and hence the Crown, and the American system and federalism with republicanism. Hence Alan Atkinson developed what to me is a wrong-headed theory that the Crown in Australia is only to be associated with a centralised interfering state.[18]

I believe that the nature of the Australian system of government is best understood as the creation of a polity embodying the essential principles of the British Constitution, of Constitutional Monarchy, for Australian conditions. Whether by design or otherwise, it recreated a mixed system of government such as had been lacking in the colonial regimes.

The crucial principle, as mentioned earlier, is establishing a balance between liberty and power. This balance was lacking under a political system that was based on responsible government alone, just as it is still lacking in the Australian States. By finally introducing the federal principle into the Australian political system, it restored the balance between the two. And it did so not by grafting a "foreign" principle onto the British Constitution, but by melding together two different versions of that Constitution to create a new version, an Australian version, appropriate for Australian conditions.

John West was right; under Australian conditions the British Constitution needed federalism. Both responsible government and federalism are compatible with the Crown, and both were needed to re-create mixed government in Australia.

Australian Constitutional Monarchy, then, is about creating a strong system of government that can protect the interests of its citizens while at the same time enabling those citizens to enjoy the maximum amount of liberty.

Responsible government is the major means through which a strong system of government is created in Australia, because it allows for a concentration of authority that can be exercised by the government. Federalism is one of the checks and balances that ensure that this concentration of authority does not become excessive and hence turn into a form of despotism. The others are the separation of powers as set out in the Commonwealth Constitution, and the establishment of the Senate as a States' House with powers almost equal to the House of Representatives.

Responsible government, with its obvious tendency to concentrate power if left unchecked, has long been associated with "democracy" in Australia. For a long time the Labor Party allied itself with the cause of abolishing the States and the Senate, leaving only a single House of Parliament to rule the country. If that had happened we would no longer possess a constitutional state, but a sort of elective dictatorship free to do as it pleases. One has only to look at the example of Queensland in its glory days to imagine what Australia could have been like.

It is perhaps instructive that Australia has never swung to the extremes of either welfare state or libertarianism, unlike our trans-Tasman cousins who also only possess one House in a centralised structure. As we have already noted, democracy combined with power, if left unchecked, can do terrible things. One has only to read the pages of Thucydides and encounter the demagogue Cleon, goading the democratic Athenians on to what we today would call genocide, to see that.[19] The genius of the Australian variety of Constitutional Monarchy is that it does not let that power go unchecked.

That does not mean that federalism and responsible government are in harmony, or that one does not seek to dominate the other. One could object to my argument by citing the obnoxious legislation that the early Commonwealth Parliaments introduced, from immigration restriction to industry protection. In response one can only respond that, when democratic prejudice is rampant, there is only so much that even a mixed Constitution can do. All it can do is to provide some mechanism through which the worst of that excess can be tamed.

I think also that the habits learnt prior to 1901, in the period of colonial responsible government, continued to infect the operations of the new Commonwealth government.

Australians had come to associate democracy and government action, and came to expect the Commonwealth government to do things for them, as opposed to doing things for themselves. It was almost as if, having created a federal system, they preferred to act as if what they had created was a "national" government.

For most of the 20th Century it was federalism that was on the defensive as the Commonwealth government claimed more and more power. This was done with the active connivance of the High Court after 1922, and through the acquisition of financial power, particularly of income tax. The States became mendicants forced to take their begging bowls annually to Canberra. Moreover the Senate early ceased to be effectively a States' House and was for a long time dominated by the major parties. It appeared for a long time as if the "checks and balances" were not doing a lot of checking, let alone balancing.

In some ways the balance has moved back a little the other way in recent times. The High Court became more active in the 1980s and early 1990s, although its activism was hardly beneficial to the States. It was the ruling of that Court on the meaning of excise that created the crisis that has only really been resolved by the decision of the current government to give the proceeds of the GST to the States. The States are still the financial dependants of the Commonwealth, and perhaps are in danger of developing the political equivalent of welfare dependency. Rather than whingeing about the way in which the Commonwealth Grants Commission divides up the cake they should be working to resurrect a more active federalism.

The major development of the past twenty years in Australian politics has been the growing power of the Senate. No government has controlled the Senate since 1980, and none is likely to in the foreseeable future. This is a consequence both of the mathematics of the method of election and of the fact that Australians are increasingly voting for candidates from minor parties to be their Senators. The minor parties in the Senate have flexed their muscles, and sought to use their power to make that House more powerful and the government of the day more accountable.

The result has been that governments of both persuasions have found themselves unable to get legislation passed, and have complained in the name of "democracy" and what I believe to be the indefensible idea of the "mandate". The idea of the mandate is as spurious as that of "virtual representation", and is used in a similar way to justify governments wielding power without resorting to consultation. As we have seen, under responsible government, "democracy" is closely allied to power, and those who speak most loudly about democracy often seek the greatest power. What governments really object to is the fact that their power is being curbed and checked. At least some of the Australian people understand this and "perversely" continue to vote for these minor parties.

The advocates of the power of the Senate claim that its power means greater accountability and better legislation. The critics claim that its power frustrates the passage of necessary legislation and hence is the enemy of good government, by which they invariably mean efficient government. Perhaps the real consequence of the power of the Senate is that, in true British (and, I should add, Austro-Hungarian) tradition, we muddle through rather than being decisive. In other words, as noted before, we avoid extremes. We make a trade-off between decisive government and the need that legislation be good legislation. The level of popular support for the Senate indicates to me that Australians now recognise the value of checks and balances and are no longer so addicted to the old democratic/bureaucratic culture.

In any case, it will have to be left to the Australian people to decide ultimately if they wish to emasculate the power of the Senate should any such measure ever be put to a referendum. Nevertheless, I think that we should be extremely wary of the claims of efficiency in deciding to take such a radical step with regard to our system of government.

The system of government that has evolved in Australia out of the British Constitution,

that is to say our unique form of Constitutional Monarchy, has, like that Constitution, sought to bring together power and liberty through the marriage of responsible government and federalism. In that marriage, responsible government has long been the dominant party, and it has only been in recent times that Australians have come to appreciate the value of checks and balances. It is time that they also came to appreciate the importance of federalism. It is not time to increase the centralist powers of the government and to upset the balance of the Constitution.

We should never forget that power has a tendency to devour liberty. The current state of Australian federalism illustrates that point all too starkly. We should seek to preserve as many of those checks and balances as possible in our system of government. Democracy and efficiency are fine words, but too often in practice they mean riding roughshod over the concerns of those who do not share the majority view. "Muddling through" may sound unattractive, but in practice it reflects the reality of the world. That reality is about compromise, it is about avoiding foolish decisions, and most importantly it is about preserving liberty. In this sense, "muddling through" is in line with the original ideals of mixed government and its practice of not only checking and balancing but also consultation and consensus.

And it strikes me that "muddling through" are good words for a Constitutional Monarchist to use. We have inherited a system of government that has evolved out of the British Constitution and that, like the British Constitution, seeks to combine liberty and power. We need strong government, and we need to be free. We need responsible government, combined with federalism and a system of checks and balances. This means avoiding extremes, it means keeping to the "golden mean". It may mean at times muddling through, rather than adopting radical means that appear to be superficially attractive, but in the end have as their major consequence the destruction of the balance of our Constitution.

Endnotes:

1. See Jean Bodin, *On Sovereignty,* ed & trans Julian H Franklin, Cambridge University Press, Cambridge, 1992, p. 104; Sir Robert Filmer, *Patriarcha and other Writings*, ed Johann P Sommerville, Cambridge University Press, Cambridge, 1991, pp. 154–161.

2. On Sparta, see A Andrewes, *The Government of Classical Sparta,* in Michael Whitby (ed) *Sparta*, Edinburgh University Press, Edinburgh, 2002, pp. 49–68; on Rome, Andrew Lintott, *The Constitution of the Roman Republic*, Clarendon Press, Oxford, 1999; on Sumeria, Charles Keith Maissels, *Early Civilizations of the Old World,* Routledge, London, 1999, p. 170; and on Athens, C Hignett, *A History of the Athenian Constitution to the End of the Fifth Century BC,* Clarendon Press, Oxford, 1952, pp. 192–213.

3. *Elective Principle No. 6,* in *The Sydney Morning Herald,* 7 May, 1857.

4. See J G A Pocock, *The Ancient Constitution and The Feudal Law*, Cambridge University Press, Cambridge, 1957.

5. Susan Reynolds, *Kingdoms and Communities in Western Europe, 900 –1300*, Clarendon Press, Oxford, 1997.

6. On the military revolution see Geoffrey Parker, *The Military Revolution: military innovation and the rise of the West 1500–1800*, Cambridge University Press, Cambridge, 1988. Also B M Downing, *The Military Revolution and Political Change: Origins of Democracy and Autocracy in Early Modern Europe,* Princeton University Press, Princeton, 1992; T Ertman, *Birth of the Leviathan: Building States and Regimes in Early Modern Europe,* Cambridge University Press, Cambridge, 1997; Jan Glete, *War and the*

State in Early Modern Europe, Routledge, London, 2002.

7.   On this point see Pierre Manent, *The City of Man*, trans Marc LePain, Princeton University Press, Princeton, 1998, pp. 11–17.

8.   See Ertman, *op. cit.*, Chapter 4.

9.   See B Bailyn, *The Ideological Origins of the American Revolution*, Harvard University Press, Cambridge, Mass, 1967.

10. See J M Ward, *Colonial Self-Government: The British Experience 1759–1856*, MacMillan, 1976, Chapter 6.

11. Mark Mackenna, *The Captive Republic: A History of Republicanism in Australia 1788–1996* , Cambridge University Press, Cambridge, 1996, Chapters 3 & 4.

12. See Stewart Brown, *Thomas Chalmers and the Godly Commonwealth*, Oxford University Press, Oxford, 1982, Chapter 3.

13. See for example Pickering, Paul, *The Oak of English Liberty: Popular Constitutionalism in New South Wales, 1848–1856*, in *Journal of Australian Colonial History* , Volume 3, No. 1, 2001.

14. J M Ward, *Earl Grey and the Australian Colonies 1846–1857: a study of self-government and self-interest*, Melbourne University Press, Melbourne, 1958.

15. See Richard Ned Lebow, *The Tragic Vision of Politics*, Cambridge University Press, Cambridge, 2003, pp. 122–6.

16. John West, *Union Among the Colonies*, ed Gregory Melleuish, Australian Scholarly Publishing, Melbourne, 2001.

17. On this see in particular John Hirst, *The Strange Birth of Colonial Democracy*, Allen & Unwin, Sydney, 1988, Chapters 9, 10, pp. 263–4.

18. Alan Atkinson, *The Muddle Headed Republic*, Oxford University Press, Melbourne, 1993, Chapter 2.

19. Thucydides, III, 37–40.