POLISH CONSTITUTION COMMEMORATION

MELBOURNE - 3 MAY 2005

AN IDEA OF POWER

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I am honoured by your invitation to take part in this commemoration of the Polish Constitution of 1791.

The 3rd of May Constitution represented a brief interval of light in two centuries of constitutional darkness. It was followed by more than a hundred years of the subjugation of Poland by its three powerful neighbours: Russia, Austria and what is now Germany. It contains many internal signs of the nation's struggles. It provides for a monarchy; but it refers to disastrous experiences of gaps in the line of succession to the throne, leaving the nation vulnerable to foreign powers. The king is to be elected by powerful families in accordance with a prescribed sequence of succession. Specific provision is made for what is to happen if the king is captured in battle. The landed nobility are assured of their privileges and property, but serfdom is ameliorated. The status of free cities and their citizens is protected. The Roman Catholic Church is declared to be the dominant national religion, and apostasy is penalised, but

freedom is assured to religious minorities. A bicameral parliament is created and its law-making powers are defined.

The Constitution declares that: "All authority in human society takes it origin in the will of the people". This was a revolutionary concept which reflected the influence of recent events in France and America. There is also a paragraph, of special interest in the light of Australian experience, providing for formal review of the Constitution every 25 years. This is said to achieve a balance between the need to avoid abrupt and frequent changes in constitutional arrangements, and the need to have reasonably regular review of the adequacy of those arrangements. Perhaps Australia's Founders could have taken a lesson from that.

What is most striking to me, however, is another feature of the 1791 Constitution. It embodies an idea of extraordinary power; an idea about the nature of power itself. The source of the idea is obvious: it comes from political philosophers of pre-Revolution France and of England. The constitutional model on which it is based is equally obvious: it is the United States Constitution of 1788. The same idea was taken up, and the same model followed, 100 years later, by the Founders of the Australian Constitution.

A written Constitution, a formal instrument of government, declaring and dividing authority, granting and limiting power, and identifying and protecting rights, was a rare thing in 1791. Poland's

was the second such Constitution, but Poland's need for a written Constitution was different from that of the United States and, later, Australia. When the American colonies unilaterally declared their independence of Great Britain, and established that independence by force of arms, they agreed to form a federal union. When, at the end of the 19th century, the Australian colonies, with the encouragement and assistance of Great Britain, decided to form a union under the British Crown, they also agreed that it should be a federal union. A Federation requires a written Constitution. The essence of federalism is an agreed division of governmental powers between a central authority and States. The terms of any agreed division of power need to be in writing. Federalism, and federation, are words that take their meaning from the Latin term for a treaty. Poland, however, was not a Federation. Its need for a written Constitution arose from other considerations.

The United States Constitution of 1788, the Polish Constitution of 1791, and the Australian Constitution of 1901 have one notable feature in common. It is the idea to which I have referred. Of the three, it is only the Polish Constitution that spells that idea out in terms. In the case of both the United States and Australia, it is left to interpretation: an implication arising from text, and from structure.

All three Constitutions distribute power. In a Federal Constitution, such a distribution is essential. It is what Federation is

about. In the case of Poland, it was not essential, but evidently it was seen as natural. The division of power that is essential for a federal constitution is a division between the central or federal government, and the state governments. That kind of division is not at work in a unitary state such as Poland in 1791. What is also of interest, however, is the analysis of power that was made in all three cases. The power dealt with by the Constitution was divided into three kinds: legislative power; executive power; and judicial power. Those three different kinds of power were separated from one another, and given to different authorities.

The structure of each Constitution is eloquent. The United States Constitution contained seven Articles. Article VII dealt with ratification of the Constitution, and may be put to one side. Each of the other six Articles was divided into a number of sections. The Articles were what the Australian Constitution later described as Chapters. It is the first three Articles that are of present importance. It is in those three Articles that the powers of the new Federal government were defined. Article I dealt with legislative powers. They were to be vested in a Congress of the United States, which would consist of a Senate and a House of Representatives. The Article went on to provide for the composition and the election of those bodies, and to specify the topics upon which Congress could legislate. (In the United States, as in Australia, and unlike Canada, the Federal legislatures have defined power, and the residual power is in the State legislatures). Article II dealt with the executive

power, which was to be vested in a President of the United States. Provision was made for the election of the President, and for specific powers given to the President. Article III dealt with judicial power. It provided that the judicial power of the United States was to be vested in one Supreme Court and such inferior courts as the Congress may, from time to time, establish. The judges of such federal courts were to be appointed for life. The original and appellate jurisdiction of the federal courts was defined.

The United States Constitution did not say, expressly, that one of the powers and responsibilities of the new Federal Supreme Court was the power to make final and binding decisions upon disputes as to the meaning of the Constitution itself, and upon the distribution and limitation of legislative and executive authority effected by the Constitution. Indeed, that proposition was resisted by some of the Founding Fathers, including Thomas Jefferson, but it was established by the 1803 decision of the Supreme Court in *Marbury v Madison* and, by the time of Australian federation, was treated as self-evident. This is not the occasion to embark upon a reasoned justification of the proposition. Chief Justice Marshall provided an elaborate theoretical justification. There is also a simple pragmatic explanation, which is that it is difficult to see any viable alternative. What Chief Justice Marshall said in 1803 was that the whole of the federal judicial power was vested in the federal judiciary. Both the positive and the negative aspects of that conclusion are important. The conclusion not only asserts the power of the judiciary; it denies

judicial power to the legislature and the executive. This denial was, in fact, anticipated by the Polish Constitution.

The Polish Constitution of 1791 not only followed the same analysis and separation of powers: it dealt with it expressly. Under the heading: "The Government, or Designation of Public Authorities", it provided, in Chapter V:

> "All authority in human society takes it origin in the will of the people. Therefore, that the integrity of the states, and liberty, and social order remain forever in equal balance, the government of the Polish nation ought to, and by the will of the present law forever shall, comprise three authorities to wit, a legislative authority in the assembled estates, a supreme executive authority in a king ... and a judicial authority in jurisdictions to that end instituted or to be instituted".

Chapter VI established a bicameral parliament, consisting of a Chamber of Deputies and a Senate. It conferred on that body power to make laws in accordance with certain requirements. Chapter VII dealt with the executive authority, the king. That authority included carrying out or putting into effect the laws enacted by the parliament. Various aspects of executive power, both domestic and international, were defined. The Constitution expressly prohibited the king, as the executive authority, from either enacting laws or interpreting laws. Chapter VIII dealt with the judicial authority. It began by stating that "the judicial authority shall not be carried out either by the legislative authority or the king". That is the clearest constitutional statement I have seen of the separation of judicial power from legislative and executive power. Chapter VIII provided

for the establishment of regional and central courts, and a Supreme Court whose members were to be appointed by Parliament at the opening of each parliamentary term. Thus, in the Polish Constitution of 1791, not only was power divided into legislative, executive and judicial power, and assigned to different authorities; there was an express prohibition against the exercise by the king (the executive) of either the legislative power to make laws or the judicial power to interpret the laws. There was also an express prohibition against the exercise of judicial power by Parliament. There was an explicit separation of powers. At that time, there was disputation in the United States about whether their Constitution made an implicit separation of powers which assigned, to the judiciary, the sole authority to interpret the laws, including the Constitution. The issue was not resolved judicially until 1803, and it was accepted governmentally even later. Yet it was dealt with in terms in Poland in 1791.

The Australian Constitution of 1901 was influenced powerfully by the United States model. Chapter I of the Constitution is headed "The Parliament". It begins by stating that the legislative powers of the Commonwealth shall be vested in a federal Parliament. The Parliament is to have two chambers, a Senate and a House of Representatives. This being a Federal Union under the Crown, the Parliament consists of the Queen, the Senate and the House of Representatives. A Governor-General appointed by the Queen is to be her representative in the Commonwealth. Detailed provision is

made for the election of Senators and members of the House of Representatives, and the legislative powers of the Parliament are spelled out. Chapter I corresponds with Article I of the United States Constitution. Chapter II corresponds with Article II. It is headed "The Executive Government". The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative. It extends to the execution and maintenance of the Constitution, and of the laws of the Commonwealth. The command in chief of the armed forces is vested in the Governor-General as the Queen's representative. Provision is made in Chapter II for the appointment of Ministers and Departments of State. Chapter III corresponds with Article III of the United States Constitution. It is headed: "The Judicature". In s 71, which is obviously modelled on the opening words of Article III, it states that the judicial power of the Commonwealth is to be vested in a Federal Supreme Court to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it vests with federal jurisdiction. (Those last words, and some other provisions of Chapter III, reflect an Australian innovation: the vesting of federal jurisdiction in State Courts.) The High Court is to consist of a Chief Justice and so many other Justices, not less than two, as the Parliament provides. They are to be appointed by the Governor-General in Council. Originally, like their United States counterparts, they were appointed for life, but by an amendment in the 1970's a compulsory retiring age of 70 was

introduced. Chapter III states the content of the original and appellate jurisdiction which it confers.

The idea behind this pattern, adopted by all these Constitutions, and spelled out most clearly in the Polish Constitution, came from political philosophers such as Montesquieu and Locke. It involves a combination of two propositions. The first is that governmental power is of three kinds: legislative, executive and judicial. Government involves making laws, implementing them, and interpreting them, typically in the course of resolving legal disputes. The second proposition is that the liberty of those who are subject to governmental authority is best preserved by keeping those three powers separate, and the best way to do that is to vest the powers in authorities that are independent of one another. As a political theory, it places faith in the decentralisation of power.

Like all political theories, this is contestable. There are those who say that Montesqueiu misunderstood the English system of government, which he compared favourably to the French system of the 18th century, but which did not involve a formal separation of powers. On the contrary, it involved a considerable fusion of powers. Moreover, the boundaries between the three kinds of power are unclear. It is one thing to say they are different, and should be kept separate. It is another thing to assign difficult cases to one category rather than another. This is a problem that confronts the High Court regularly. My present purpose is not to

argue the merits of the theory, but to point out its influence. The Polish Constitution of 1791 may now be of historical interest only, but the United States and Australian Constitutions continue to define the structures of government in those two nations.

In neither system is separation absolute. In Australia, the monarch, through her representative the Governor-General, is a constituent element of the Parliament as well as the formal repository of executive authority. Because the Governor-General acts on advice, the practical repository of executive authority is the Ministry. Ministers, in Australia, unlike the United States, are members of the Parliament. The executive's practical, as distinct from formal, power depends upon the confidence of the legislature. Federal judges are appointed by the Executive government, and are removable by the Governor-General upon an address of Parliament. However, once in office, and while they remain there, they are independent. The federal judicial power which they exercise cannot be conferred on either the legislative or the executive authorities. There are certain forms of power that may take on the character of either legislative or executive or judicial power, according to the authority in which they are vested. But there is also power which is strictly and exclusively judicial. That includes the power to make final, binding and definitive decisions as to the meaning of the Constitution itself. Of course, anyone who can read may interpret the Constitution. Lawyers do it regularly in advising their clients. Parliaments and officials of the executive government form their own

opinions for their own purposes. But if a dispute arises as to the meaning of the Constitution, then the making of a final and authoritative decision in resolution of that dispute is an exercise of judicial power, and the authority to exercise that power is given by Chapter III exclusively to the judicial arm of government.

So influential has the idea of separation of governmental powers become that it is now widely regarded as bound up, not only with the idea of the independence of the judiciary, but also with the concept of the rule of law. The opposite of the rule of law is the rule, perhaps despotic, or perhaps benevolent, of a person or group: perhaps an individual, or a Party. A wise and just ruler in whom all powers are concentrated might, in theory, promote the welfare of a people. But in liberal democracies of the 21st century, concentration of power is distrusted. We prefer to place our trust in laws, rather than in individuals, or Parties. This is not merely a question of efficient government, although that is an important consideration. In the case of judicial power, it is not merely a question of credible and effective dispute resolution, although that also is an important consideration. It is a matter of human rights. Article 10 of the Universal Declaration of Human Rights of 1948 declares that all people have the right to have their disputes, civil and criminal, decided fairly and publicly by an independent and impartial tribunal. When it is remembered that many civil disputes, and almost all criminal cases, involve a contest between a citizen and the executive government, the implication of the requirement for

an independent and impartial tribunal is obvious. Judicial power is to be exercised by an authority that is independent of the executive government.

A striking example of the reach of these ideas was given recently in a speech made in Queensland by the Chief Justice of the People's Republic of China, the Honourable Xiao Yang. Addressing the 11th Conference of Chief Justices of Asia and the Pacific, on 20 March 2005, on judicial reform in China, he began by pointing out that the direction of judicial reform is determined by what people expect of the judiciary. Thirty years ago, he said, in China law was focused on punishment. "[T]he judiciary's function of impartial judgment was totally obliterated. Judicial organs and officials were equated with other government departments and ... civil servants, while judicial independence was totally neglected." A process of reform commencing in 1978 produced new and different expectations of the judicial system. He said: "A new set of judicial concepts as part of political civilization are taking shape. Though such terms as 'judicial justice' and 'independence of the judiciary' sound very familiar to judges in other countries, the acceptance of those concepts in China represents a radical change and has provided a theoretical basis for China's judicial reform."

Recent developments in the United Kingdom, perhaps in response to the need to accommodate the process of integration with Europe, reflect the same theoretical influence. Until this year,

the most senior judges in England and Wales were members of the Parliament, as Law Lords, and the House of Lords was the final court of appeal. A new Supreme Court of the United Kingdom has now been created, and the judiciary has been separated formally from the legislature. For similar reasons, the role of the Lord Chancellor, whose office previously straddled all three branches of government, has been altered radically. It is surprising how little attention has been paid in Australia to the far-reaching changes that are going on at this moment in the United Kingdom for the purpose of increasing the separation of legislative, executive and judicial powers. The *Constitutional Reform Act* 2005 (UK) seems to have passed almost unnoticed in Australia.

It is a curious turn of history. The theoretical basis for judicial reform in China is also the theoretical basis for constitutional change in the United Kingdom. It shows, again, how much we Australians take for granted. More than a century ago, the Founders of our Constitution, following the example of the United States, provided us with a structure of government. Sir Owen Dixon and three of his judicial colleagues, in the *Boilermakers Case* in 1956 (94 CLR 254), explained the historical and theoretical basis of our version of the separation of powers. In the case of the separateness of the judicial power from the legislative and executive powers, they quoted Sir Isaac Isaacs who called it "the dominant principle of demarcation". They did not mention that, as long ago as 1791, the Polish nation produced a Constitution that forbade the legislature and the

executive from exercising judicial authority: the same principle of demarcation.

The examples of China and the United Kingdom show the continuing relevance and vitality of the theory reflected in the United States and Australian Constitutions, and in the 1791 Polish Constitution. The idea that good government, respect for human rights, and the rule of law, demand that judicial authority be vested in a separate and independent arm of government, is one of the most dominant political ideas of the last three centuries.

To this day, there are Australians, including some who should know better, who are surprised to be told that judges are not public servants, committed to implementing the policy of the executive government. What do such people suppose judges do when they are required to decide cases between citizens and the government; or between different governments? How do they suppose criminal justice is administered, when the executive government is always on one side of the record - where the prosecution is brought in the name of the Crown by an instrumentality of the executive government?

In our system of government, members of Parliament are elected, and those who in practice exercise the powers of executive government depend upon the confidence of Parliament. This is the way our democracy, with all its imperfections, represents the will of

the people. But we also believe in the rule of law, and the protection of human rights, even when those rights are not respected by a majority. So our system provides for an independent and impartial judiciary, separate from the political arms of government, to which judicial power is committed exclusively. This is consistent with democracy. Indeed, it stems from a political philosophy fundamental to our democratic system. Yet it is not widely understood, and assertions of judicial independence are sometimes resented as undemocratic.

Some years ago an English commentator made the astute observation that the importance of the Queen lies not in the power she exercises, for in truth she exercises very little, but in the power which her existence denies to other people. The same can be said of a Governor-General, and could also be said of a certain kind of President. In times of insecurity, resulting from internal or external threats, citizens look to the executive for protection, and they may welcome expansion of executive power. Political theorists, and the practical lawyers and politicians who framed our Constitution, like the framers of the United States Constitution, and of the Polish Constitution of 1791, understood this very well. They placed their confidence in separation, rather than concentration, of powers. As to judicial power, they granted it to judges and denied it to the political arms of government. Of all the ideas that have shaped free societies, this has been one of the most powerful.