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Democracy, parliament and responsible government

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**Democracy, Parliament
and Responsible Government**

by Chandran Kukathas

with additional observations by
David Lovell
and
William Maley

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NOTE

This paper was given as one of the Australian Senate's occasional lecture series in May 1990 by Dr Chandran Kukathas and includes additional observations made by Dr David Lovell and Mr William Maley. All three speakers are members of the Department of Politics at the Australian Defence Forces Academy and are co-authors of the book *The Theory of Politics: An Australian Perspective*, (Longman Cheshire, Melbourne, 1990).

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Democracy, Parliament and Responsible Government

Chandran Kukathas

I begin with a quotation from F.A. Hayek a former Austrian economist, now a British subject, a Nobel laureate who wrote a famous book in the 1940s called *The Road to Serfdom*. There he said,

we have no intention however, of making a fetish of democracy. It may well be true that our generation talks and thinks too much of democracy and too little of the values it serves.

These words, penned by Hayek at the height of the Second World War, were prompted by fears that, in their haste to defeat the forces of German and Italian Fascism, the people of democratic nations had become blind to the threats to their freedom coming from within. He further wrote,

The fashionable concentration on democracy as the main value threatened, is not without danger. It is largely responsible for the misleading and unfounded belief that so long as the ultimate source of power is the will of the majority, the power cannot be arbitrary.¹

It is not the source, Hayek insists, but the limitation of power which prevents it from being arbitrary.

Democratic control may prevent power from becoming arbitrary, but it does not do so by its mere existence. If democracy resolves on a task which necessarily involves the use of power which cannot be guided by fixed rules, it must become arbitrary power.²

I take these words as my text for today, because although they were written in somewhat different circumstances, they go to the heart of an issue we need to consider: the issue of the place of Parliament in a system of responsible government. We need to consider this issue because there is a view prevalent today that it is the democratic nature of parliamentary government which provides us with a justification for it. The party which secures a majority of seats in the lower house of Parliament, it is held, thereby acquires the right to rule. It receives a 'mandate to government', and obstacles placed in its path constitute an impediment, some would say an affront, to the democratic process. Not all of those who hold to such views, of course, are simple-

1. F.A. Hayek, *The Road to Serfdom*, Routledge and Kegan Paul, 1944, p.52

2. *ibid.* p.53

minded majoritarians who believe that the will of elected governments enjoys the right of unrestricted realisation. Some make it quite clear that democratic government must be founded on a constitutional order, in which powers of government are clearly circumscribed or limited.³ Nonetheless, they argue that democracy requires that we be careful not to place too many checks on government power by allowing too much power to the Governor-General, the High Court or indeed the Senate.

I wish to put a contrary view here, to argue that we must be less concerned about democracy and much more concerned about the values it serves. These are, fundamentally, the values embodied in the ideal of constitutional government. Rather than view constitutional government or constitutionalism as a precondition, or as the hand-maiden of democratic government, I suggest, we should regard democracy as good because it serves other more important ends. It has point for as long as it protects constitutional values; it is not to be valued for its own sake.

To put this argument, I think, is to do more than engage in a merely academic exercise (although, as an academic, I am very fond of academic exercises). This argument has some practical consequences for how we view, and treat, some of our most important social and political institutions. Allow me to elaborate on this particular topic by firstly, expanding on what I think are the most important of these values; secondly, by pointing out the implications of accepting the importance of these values and thirdly, by indicating, as Lenin once put it, what is to be done?

The most important and fundamental value which is the task of our social and political institutions to protect is individual liberty. To say this is to do more than utter a simple platitude. There are some who suggest that other values such as collective self-government are more important. Here I might remind you of a remark made by Mahatma Gandhi when he said 'a good government is no substitute for self-government'. It is against such views that I wish to assert that what is most important is that the individual is free to choose how he or she wishes to live, or to pursue his or her own ends. It is important not because this will mean greater economic efficiency, or a larger gross domestic product, or a more competitive workforce; it is important for its own sake.

What is of greatest moment to people is the capacity to pursue their private goals, to try to fulfil their personal aspirations; and to ensure this possibility is preserved. It is most important that people are left free to do so. The most serious threat to this ideal comes from those who elevate the importance of the collective pursuit of common goals. More particularly, it comes from our political masters, from government. And this

3. See, for example, Graham Maddox, *Australian Democracy in Theory and Practice*, Longman Cheshire, 1985, p.60

threat is no less serious when government claims to represent the democratic will of the people.

And this is a point well recognised by those Western political thinkers who, over the past 300 years, have made the most significant contributions to the development of modern liberal political institutions. I have in mind thinkers such as Montesquieu, James Madison, and Alexis de Tocqueville among numerous others. They saw, and argued that, if the liberty of citizens was to be preserved what was of primary importance was the preservation of *constitutional* government.

It is constitutional government, or constitutionalism, much more than democracy, which we ought to recognise as the corner-stone of a free society. Yet it is an idea which is all too little appreciated or understood. Two political doctrines lie at the heart of constitutionalism. The first is the doctrine of the *rule of law*. The second is the doctrine of *the separation of powers*.

The rule of law prevails when rulers and ruled alike are subject to the law, and the law is not merely an instrument which rulers may use to govern. There is a distinction to be drawn then between the rule *of* the law and rule *by* the law. This distinction is sometimes expressed in the contrast drawn between the rule of law and the rule of men. At the heart of the ideal of the rule of law is the thought that arbitrary power should be curbed by recognising an authority higher than that of any ruler or government, the authority of law.

Admittedly, governments as legislators are themselves in the business of promulgating laws, but under the rule of law this power is circumscribed by several important requirements. First, laws must be prospective (not retrospective), should be published and available to members of the public, and must be as easy to understand as possible; otherwise the law cannot act as a guide to behaviour. Second, laws must be general in their coverage, and not be used to single out particular individuals or groups for favoured or unfair treatment. Third, the enforcement of the law should be in the hands of an independent and accessible and unbiased judiciary. And fourth, this judiciary should interpret the law in accordance with established principles of precedent and interpretation, rather than simply in accordance with their own social and political inclinations. When these requirements are fulfilled there is a greater likelihood that the rule of law prevails; but it is in the nature of the ideal that there can be no power that will guarantee its persistence.

It is at this point that the second aspect of constitutionalism – the separation of powers – comes into play. If the rule of law requires the subservience of government to the authority of the law, it becomes extremely important that the power of such an agency be constrained. Since it cannot in principle be contained by a higher power, the

solution is to divide power, so that no single agency is strong enough to turn the law into an instrument of its own ends.

The separation of powers can take a number of different forms. The most famous form, the *functional*, received its classic treatment at the hand of Montesquieu, who argued that liberty required the separation of judicial power from the executive, and executive power from the legislative. This formulation had a profound impact on the founders of the American constitution who saw fit to devise a formal structure of government in which the powers of the three main branches were clearly separated. Yet they also thought it necessary to fragment power even further, by adopting the British tradition of bicameral legislatures as a safeguard against the exercise of arbitrary power. Arguably, in societies such as Australia in which the executive is drawn from and *controls* the legislature, this further safeguard is of special value.

The other major form which the separation of powers may take is federal. A federal governmental structure divides power not functionally but spatially or territorially. The power to govern is divided between central and regional institutions by a constitution which cannot be unilaterally altered by any single power-holder, and which is interpreted by an authoritative judicial body. Once again, when the executive branch of government is as powerful as it is in Australia, it may be of particular importance that the separation of powers also takes this form.

I say all this to suggest that the fundamental values of our society have everything to do with the protection of individual liberty, and that our most important political institutions reflect this since they seek, above all, to constrain the exercise of power by those most likely to threaten that liberty. Recognising this, however, has some important, if neglected, implications upon which I will now elaborate.

In the most general terms, the implication of an appreciation of the values underlying our social and political institutions is that it is important that the powers of government be securely constrained or limited. In particular, it means that we should appreciate the importance of those mechanisms which act as a check on executive power mechanisms ranging from the powers of the upper house to review, amend and reject legislation, to the powers of the states to challenge the jurisdiction of the Commonwealth. More importantly, however, we need to recognise that mere mechanisms of this formal nature will not suffice to limit government if the general view of its role is so demanding as to see it as, if not the saviour of society, at least a great benefactor capable of dealing successfully with most of society's ills. Such a view I think is all too common. Many argue that so urgent are the tasks of government that it is vitally important that it be given the powers needed to complete them. Yet if we accept this we forget why our political institutions were created the way they were: to protect the liberty of the individual against encroachment by government power.

Now at this point it may be asked: why say all this? After all, we are not really under serious threat from government here today. The rule of law prevails; the federation is intact; the judiciary is independent; and the arbitrariness of the totalitarian state is a nightmare from other shores. It seems like an exaggeration to suggest that fundamental institutions are in any way in danger.

Yet here it is worth quoting a remark made by the Scottish philosopher, David Hume, who wrote: 'It is seldom that liberty of any kind is lost all at once'. The institutions which help to preserve freedom here are not at the brink; nonetheless two important developments have profoundly affected them.

The first of these is the growth of what some have described as 'party government'. This phrase, in many ways, gives us a clearer picture of the system of government we now have than does the more commonly used term 'responsible government'. The description of the political system as one in which the government was responsible to parliament, and parliament was responsible to the electorate, is no longer as accurate as it once was. To some extent this is a reflection of the decline of parliament as an institution; more importantly, however, it reflects the extent to which parliament is dominated by political parties, and in particular the party controlling government through its majority in the lower house.

The essence of the system of responsible government as described by Walter Bagehot more than a century ago was the responsibility of the executive to the legislature. That responsibility was enforceable through the parliament's power to remove a government from office or, in less extreme cases, through its capacity to criticise and question the ministry in the House. Today, however, the focus of responsibility has changed. As the Clerk of the Senate has put it, 'The modern party is a device for ensuring that a government formed by the party is not responsible to Parliament'.⁴ Through its discipline of its members the party is generally able to ensure that its members of parliament are responsible to the party rather than to parliament. Indeed, those who are powerful within the party can often exert much more influence on the conduct of government than some who hold even senior positions in the ministry.

Now to be sure, a kind of responsibility is enforced in this system of government. Party members in parliament have to answer to their party branches, and of course to their electorates. Nonetheless there is a cause for concern on at least two scores. First, the responsibility that is enforced is not public but takes place within the confines of a private organisation with its own interests. To the extent that the purpose of enforcing responsibility will generally be to serve the interested parties, the primary interest

4. H. Evans, 'Constitutionalism and Party Government', *Australasian Study of Parliament Group, Occasional Paper No. 1*, August 1988

served would be that of gaining or staying in power. Second, to the extent that parties are successful in maintaining discipline across the broad range of its members, the separation of powers is compromised. This is already more than plain to see in the fact that the legislature is dominated by party in both houses. More worrying, however, is the growing pressure of argument calling for the judiciary itself to become sensitive to the ideological complexion of the legislature: 'the more democratic the political process', one commentator has suggested, 'the stronger the case for the judges to defer to it'.⁵ What protection against the excesses of government might be afforded us by a bench subordinated to the 'democratic process'?

The second development which has profoundly affected the evolution of our institutions is more subtle in nature. It consists in a change in general expectations about the role of government. Now clearly it would be an exaggeration to suggest that there was a time when government was merely an umpire in the game of society, intervening rarely to deal with the occasional market failure. Government has long perhaps too long been a significant player in the game. Yet we have come to a point at which government is involved in so many aspects of social life, from commerce, education and healthcare to sport and entertainment, not only as regulator but also as provider, that there is scarcely a part of society which is independent of government direction. This is worrying for a number of reasons. The first is one which John Stuart Mill identified more than a century ago when he wrote as follows:

If the roads, the railways, the banks, the insurance offices, the great joint-stock companies, the universities, and the public charities, were all of them branches of government; if, in addition, the municipal corporations and local boards, with all that now devolves on them, became departments of the central administration; if the employes of all these different enterprises were appointed and paid by government, and looked to the government for every rise in life; not all the freedom of the press and popular institutions of the legislature would make this or any other country free otherwise than in name.⁶

What Mill had recognised was that the involvement of the central power in all aspects of society could not help but compromise liberty, for the autonomy of the multitude of associations which go to make up society would be entirely lacking. This is something I think our universities are now discovering as government makes it increasingly plain that they are little more than departments of the administration to be harnessed to serve the national interest.

5. Henry Burmester, 'The presumption of constitutionality', *Federal Law Review*, Vol. 13, 1982-83, pp.277-298, at p.294

6. J.S. Mill, *On Liberty in Utilitarianism; Liberty; Representative Government*, J.M. Dent, 1954, p.165

A second reason to be concerned about the expansion of the government's interests is the opportunities it creates for corruption. The danger is in part one of fiscal irresponsibility of the kind we have seen lately in Victoria and Western Australia. But there is also the problem that in an extensive network of public operations it is difficult for any minister or department to keep track of the activities of the various agencies it ought to be able to bring to account. This problem obviously becomes even more serious when corruption spreads into the very heart of government unchecked by any countervailing parliamentary power such as an upper house – as our experience of the former Queensland government testifies.

Thirdly, we should be concerned about the expansion of government activity because government is so often captured and swayed by the sectional interests upon which it depends for its political survival.

Finally, I think we ought to be worried by the extent of government's 'vaulting ambition' in seeking to 'reform' society in ways which are completely beyond its capacity. The aspirations of the promoters of multiculturalism are of this nature. Yet while the Office of Multicultural Affairs maintains that it 'seeks to reinforce social harmony by encouraging all Australians to recognise the reality of cultural diversity in our society, promoting tolerance and equality, and particularly by helping ensure effective use of all the nation's human resources',⁷ there is no popular perception that multiculturalism promotes equity. Indeed, the Fitzgerald Report suggested that for all the government's best efforts, many people were beginning to see multiculturalism as a form of social engineering which served to promote rather than reduce injustice, inequality, and divisiveness.⁸ Now the danger in all this is quite simply that the hubris of social engineers can lead to great harm and the loss of important liberties. Recently enacted laws proscribing 'racial vilification' in New South Wales raise precisely these concerns as freedom of speech is sacrificed in the name of the highly dubious claim that ethnic tensions will thereby be reduced. Such is the hubris of government that one fully expects to hear it proclaim that by 1993 no child will live with racial prejudice ever again.

This, then, is the nature of the problem. And yet there are many who are clamouring for the power of government to be expanded to deal with all sorts of problems, from social cohesion to the threat of environmental disaster. Chief among their arguments are the

7. *ibid.*, pp.30-31,59

8. *Immigration – A Commitment to Australia: The Report of the Committee to Advise on Australia's Immigration Policies*, Australian Government Publishing Service, Canberra, 1988.

claims, first, that catastrophe is so imminent that nothing short of massive political intervention is appropriate, and second, that government, by virtue of its democratic 'mandate', is most fit to intervene. What is to be done?

Well, just as there are no easy solutions to social problems, there are really no easy solutions to political ones. There are no kinds of institutional re-design which will resolve the difficulties I have alluded to. What is needed, however, is for more people to recognise what is perhaps the fundamental point of this lecture: that of the many environments we inhabit, from the local to the global, the most important and most fragile is the political environment.

We live in a political environment in which the most important life sustaining elements are the institutions which uphold individual liberty by placing a check on political power. The power we have most cause to be concerned about is the power of the government claiming the authority to carry out the democratic will of the people. The institutions which protect us from their excesses are those institutions which enforce a kind of responsibility upon them. Free elections do this to some extent. But also necessary are the existence of a free and independent press, and private sources of power capable of challenging the authority of government. And of crucial importance are the institutions of this Parliament which look to enforce another kind of responsibility in government, by drawing the business of government out into public light, reviewing and challenging its conduct.

In saying this I am not suggesting that government should be challenged for its own sake. But in the light of persistent demands for its powers to be expanded, and its 'democratic mandate' recognised, it seems to me that the most important thing to do is to point out that such calls neglect the most important values implicit in our political inheritance. We should be more mindful of these values, and less enamoured of the blessings conferred on parties by fleeting electoral majorities.

Party Government

David Lovell

Dr Kukathas has outlined a view of responsible government which casts some doubts on the ability of the institution of parliament to keep governments accountable to the people.

The separation within the Westminster system of parliament from government, of legislature from executive, and the supremacy of the legislature, are difficult to maintain in part because the personnel of the cabinet are drawn from the legislature, and because the cabinet must organise to ensure that it can count on the day-to-day support of a stable majority within the legislature.

The danger to the institution of parliament seems to come less from the wearing of two hats, or playing two roles, that is, legislative and executive, as some Members must do, than it does from the second of these difficulties — the need to organise secure majorities.

It is at this point within the general framework of our argument in *The Theory of Politics*⁹ that I want to add some further remarks about the role of political parties and their effect on parliament, because parties have become the chief modern way of organising these parliamentary majorities.

There is no doubt that parties are very important in every modern political system in the world. They do a number of very useful things in our political system and the competition between them is often argued to give effect to democracy, as in the contrast between a democracy and a one-party state.

The sort of diverse society we inhabit gives rise to a variety of interests, and parties are a way of articulating and giving political effect to those interests. So interests become policies, and parties in power make some attempt to implement those policies. In addition, parties ensure that votes are translated fairly directly into decisions about who forms a government. Without parties, elections would only be a first step on the road to forming coalitions of members and striking deals to form a government.

9. Chandran Kukathas, David Lovell, William Maley, *The Theory of Politics: An Australian Perspective*, Longman Cheshire, Melbourne, 1990

So parties make the formation of government, as well as the conduct of government business in parliament, a more predictable affair. They do what they do so well, and they seem to have an extraordinary ability to adapt to changing social cleavages and changing issues that they seem to have become indispensable. Very little political activity takes place, or takes place for long, outside the framework of the political parties.

I am not concerned here so much with the effect that parties have on channelling the expression of diverse interests into a few, well-defined paths, thus closing off options. That is something which is of more concern to full-blooded democrats.

I am concerned rather with the problem of what we call 'party government'. The success of parties underlines the seriousness of the problem, and highlights the difficulties in solving it.

The problem relates primarily to the fact that responsible government is now taken to require, not just the accountability of a government to the parliament, but a stable and disciplined majority in the lower house. In a sense, the very requirements of responsible government have, with the rise of parties in the last century or so, become a liability to it.

Our concern, then, relates to the ability of parties to discipline their members to such an extent that not only are stable majorities achieved in the lower house, but that governments are thereby protected from proper parliamentary scrutiny of their doings, and that legislative initiative passes from the legislature to the executive.

Even though the ideologies of the major parties differ, they concur in the basic *modus operandi* of controlling parliament and dividing the spoils.

As I said before, this is sometimes described as the problem of 'party government'. But such an expression is used in two quite different senses in the literature. One is the way in which I am using it; the other is to suggest that parties are not strong enough to impose their electoral programs on a recalcitrant bureaucracy. This is the 'Yes, Minister' approach, which suggests that governing is really done by public servants. It boils down to a question about 'Who governs?' It seems that there is, indeed, a continuing tension between ministers on the one side and public servants on the other, based, among other things, on their quite different perspectives of what the nation requires. This situation, where neither side is able to overwhelm the other, seems to us desirable. But both sides need, in addition, to be checked by a vigorous and inquisitive parliament. In no way does it diminish the need for a strong legislature.

For more than a hundred years there have been criticisms that within the Westminster system cabinet seems to enjoy an increasing immunity from parliamentary scrutiny. It is not a new problem, and there are no easy solutions.

But it is, I think, too strong to say that 'party government' spells the end of responsible government. The Senate still behaves, in many ways, as a genuine house of review, even if its committees seem to be the last bastions within parliament against party spirit. On the other hand, we must accept that in attempting to make governments accountable, the role of the popular house can no longer be large. Yet devising ways of emptying parliament of party spirit, as an attempt to end 'party government', seems to have little prospect of success. Politics is, and for the foreseeable future will continue to be, party politics. The constitutionalist measures which can strengthen responsible government may, in the end, have to be based outside the institution of parliament: in an independent judiciary above all. Perhaps the other hope for responsible government is that we reduce our expectations of what politics can and should do.

Democracy, Parliament and Responsible Government: Some Additional Observations

William Maley

The famous characterisation of the Byzantine Empire as despotism tempered by assassination can also be used to capture a central element of democracy. In a democratic political system despotism is tempered by metaphorical assassination. This requires, as Sir Karl Popper pointed out in his famous book *The Open Society and Its Enemies*, a set of institutions 'which permit public control of the rulers and their dismissal by the ruled, and which make it possible for the ruled to obtain reforms without using violence, even against the will of the rulers'.¹⁰ In the Australian context, these ends are served by periodic general elections, and the doctrine of responsible government.

Yet neither of these appears particularly robust. Let me point to two problem areas.

First, at the March 1990 election, the Government secured a clear majority of seats in the House of Representatives, even though the Opposition, it appears, obtained a majority of the two-party preferred vote. This might be dismissed as an historical curiosity, were it not for the fact that this is the fourth occasion of which this has occurred in the last thirty six years (1954, 1961, 1969 and 1990). Furthermore, there are good reasons to believe that the present State Governments of Victoria and Western Australia hold office even though a majority of the two-party preferred vote in the most recent elections in those states went to the Opposition.

Second, four-year terms have recently replaced three-year terms in a number of State Lower Houses, and are now being seriously discussed as an option for the House of Representatives.

The passive acceptance of these things seems to me to illustrate a deeper malaise in the Australian polity. As Chandran Kukathus has so depressingly observed, there are no easy solutions to political problems. Nonetheless, I should like to pass a few brief comments on the problems I have raised, and on their implications for the operation of the polity.

10. K.R.Popper, *The Open Society and its Enemies*, Routledge & Kegan Paul, 1966, Vol II, p.151

First, the pattern of election results which I have described should prompt us to watch out when commentators unthinkingly use expressions like 'The People's House' to describe lower houses in Australian parliaments. When I hear this phrase, I am reminded of a *New Yorker* cartoon in which a legislator speaking in his chamber says: 'When my distinguished colleague refers to the will of the "people", does he mean his "people" or my "people"?' Now I may be eccentric, but it seems to me that we have reached a curious pass when the Western Australian Premier, like her government in office solely through a quirk of the electoral system, can refer to the possible rejection of supply by the upper house as 'constitutional vandalism'.

Second, and in my view much more seriously, the arguments to support lengthened Parliamentary terms deserve far more critical attention than hitherto they have received. Two arguments in particular seem to figure in the arsenal of those who favour this proposal, first that the public 'will be spared the disruption of having too many elections' and that a four-year term 'will create an environment for more responsible long-term government planning which will assist both the private and public sectors'.¹¹

As to the first of these arguments: if disruption to the public is a serious concern, surely the best way to address it would be through the abolition of compulsory voting. Compulsory voting, to the extent that it means more than the mere attendance of the voter at the polling booth, can oblige an elector who is indifferent between candidates to express an insincere preference ordering, which offends against one of the most important philosophical requirements of meaningful social choice. It seems to me problematical whether indifferent voters will feel enormous relief at being dragged to the polls only once every four years rather than once every three. On the other hand, to the caring voter, such further limitation of what are already very limited opportunities for formal political participation is deeply troubling. This is especially so in the light of the fallibilities of lower house electoral systems which I have already noted. To put it bluntly, four years is too long to wait for an opportunity to be rid of a minority government whose failings come to light shortly after an election.

As to the second of the arguments in favour of four-year terms: even if one puts aside the question of whether 'responsible long-term government planning' is desirable in principle, one is left with the question of whether a four-year term would increase its likelihood. This seems to me to be at best unproven. The absence of political courage is a failing of the *rulers* not the ruled. Why should the latter suffer through the reduced opportunity to eject the incompetent for the failings of the former? In any case, one should not forget that if four years is long enough for voters to forget the pain

11. *Yes or No? Referendums. The Cases for and Against*, Australian Electoral Commission, Canberra, 1988

of tough but courageous decisions, it may also be long enough for voters to forget scandalous mismanagement which less frequent elections may foster.

Where are we likely to find ourselves if these problems are not addressed? Part of the answer, I suspect, is that we will be forced to rely more heavily on legal institutions as protectors of individual liberty, and that our society will become increasingly litigious. But more generally, I fear that the sense of disillusionment with politics which was widely noted during the recent election will become more widespread. While this was undoubtedly linked to a large degree with adverse perceptions of the particular teams offering themselves for election, one cannot exclude the possibility that it goes deeper, and embraces disillusionment with the polity in general. Constitutionalism can thrive only where the institutional separation of powers is reinforced by appropriate social attitudes; and if these are dissipated, then we might expect to see government increasingly able to interfere with the liberty of the subject at the behest of organised interest groups. This is not a prospect which I can regard with any sense of equanimity.

Discussion Period

Question:

Could I make a comment and ask Chandran for his comments, in return? I think what I have to say is relevant to the third speaker's address, too.

Chandran, in the first part of your address, I took you to be linking your notion of constitutionalism, to an individualistic society. Your citation from Hayek suggested your own concept of society. What I want to put to you is that there is no necessary connection between constitutionalism and an individualistic society, but one can have a society or have social arrangements which reflect the rule of law, which reflect separation of powers, including if you like federalism. That is usually seen as part of our concept. One can have a society which reflects constitutionalism in that sense, while at the same time giving great weight to collective values, in the sense that individuals are restrained in order to promote social values. Now I say that because those concepts – the rule of law and the separation of powers are largely devoid of any programmatic element. They do not say anything about what laws should prescribe.

Now if I can go back to the second part of your address in which you made fairly swinging attacks on recent laws and suggest that the premise that you start from, that constitutionalism has those two components, does not really justify those attacks. Take for example the racial vilification law. That law can satisfy rule of law concepts. It can be administered by impartial judiciaries. It can satisfy all the demands of constitutionalism. So it is not unconstitutional. I had my own concerns about the racial vilification law, but they do not proceed from any notion of constitutionalism in the sense that you put it. That notion is largely empty of any basis for criticism of those kind of laws. In some aspects it might be, but in general it is not.

Response by Dr Kukathas:

I agree entirely with about 95% of what you said. I do not think that there is any link between valuing constitutionalism and the rule of law and thinking of society in, as you put it, individualistic terms. There is no reason why you can not have a constitutional order in which people form all sorts of associations to do things collectively. Indeed it would be a very strange society in which we found people not doing such things. So I have no argument with you whatsoever there. The only point at which we diverge is in relation to your remarks about the latter part of my paper and once again I do not want to suggest that some of these laws that I refer to are objectionable simply on narrow constitutional grounds, because you can fulfil the requirements of the rule of law and so on by these measures. But one of things I try to draw out is that it is not enough simply

Discussion Period

to have the rule of law formally accepted, because what becomes dangerous is when government tries to operate within the terms of the law as it construes it in order to take on tasks which are beyond it. Now in this circumstance, it seems to me "that is what we have got." It is not that these laws they have passed do not conform to certain requirements of the rule of law. The problem is that some of these laws threaten things like freedom of speech, for the very dubious reason that governments happen to think that they can somehow organise society in such a way as to eliminate these evils, and they are using that as a justification for doing certain things to long-standing principles like freedom of speech. So in one sense, I do not think we are fundamentally in disagreement, because I think you are mistakenly attributing to my premises which I do not accept. The quotation from Hayek was there for no other reason than that I thought it was a neat statement, not because I thereby endorse everything that is to be found in Hayek's political writings.

Question:

It seems to me that the basic problem that we are trying to deal with is the relationship of man and his government and all three speakers seem to some extent to be concerned more with the legality and the problems of the erosion of the legality of institutions, rather than the much more fundamental question of legitimacy which, I submit, is probably one of the more difficult problems. The fundamental problem one looks at is the question of practice of democracy, parliament and representative government. It seems to me that what has happened in the past is that the concept of legitimacy has been increasingly eroded to the extent that we are much more concerned with legality. Hence the comments on the party system as well as the electoral system. These are means to an end and I think we need to go back to the ends themselves and to question whether the public is more affected by the rule of the law, or by the concepts of democracy and responsible government. One could also ask if the public could impress on those in authority the view that there is a need on their part to revert back to some type of ethical and spiritual dimension when one talks about the public good. One is not only talking about the public legally submitting to what the law requires the government to be responsible for, but that the government must be responsible for fundamental values of society. I would wonder whether either Dr Kukathas or the other speakers would care to comment on the whole question of the erosion of the ethical concept of legitimacy and the evolution of the idea of government as a more legalistic, instrument of dominance.

Response by Dr Kukathas:

I am not sure if I have completely understood the thrust of your question, so please interrupt me if I have not. It seems to me that there are two distinct questions here: one, a question about legitimacy of government and the other a question about the quality or the acceptability, in other terms, of government.

You may have a government which is recognised as legitimate, but which nonetheless does things which we do not like or which we think threatening or which perhaps only a few of us think threatening, but which others do not yet recognise as threatening. I admit we did not really discuss the problem of legitimacy, but we discussed the latter problem. In that context the focus on legality was really quite deliberate because it seems to us that among the most important institutions for securing some form of responsibility in government are really legal institutions because as I put it in the paper, given the powers of government and given that you can not have government controlled by some higher power which will then itself stand in need of control, one useful mechanism or set of institutions that is available to control that power, is in fact the mechanism of law, if law is recognised to stand above this.

Now saying that does not in fact suggest that once you have got the mechanism of law that everything is going to be fine. You may still have a deeply unsatisfactory society, even though it is quite law-abiding and in which the laws constrain government. It may just be an awful society on many other accounts.

Question:

Do you think the separation of powers and individual access, accountability and so on would be improved if there was some form of recognition of local government, perhaps under the constitution?

Response by Dr Kukathas:

In my view, it would not really make a great deal of difference. It is the substance that matters more than the formality and I can not see any way in which formal recognition of local government would in any way operate to improve the quality of local government.

Now this is clearly something that those who put forward the recent referendum proposals would disagree with quite strongly, but I take comfort in the fact that I am on the majority side on this issue.

Question:

Last night on television a former Deputy Prime Minister of Australia described the anti-Vietnam moratorium of 1970 as the greatest advance in democracy in Australia this century. I'm interested in your views as to whether the devolution of power downwards to the people, in this case by taking over the streets, is in fact an increase of a betterment of democracy, or does it undermine democracy by undermining the rule of law?

Response by Dr Kukathas:

I will give you a very academic answer to that. All academic answers begin with: well it all depends ... I think that it really does depend on the circumstance. I would not ever want to say that you should never take to the streets. There may be times when you want to take to the streets because measures that are being proposed by governments are so foul that extreme measures are called for. On the other hand, it obviously is not going to be appropriate to take to the streets every time you think that some minor administrative detail is something you can not really live with.

As far as the question of devolution of power is concerned, my basic position is I am all for it. The main problem I think with the devolution of power to the people in the sense in which you are speaking of it, that is, persons collecting in large groups usually at the behest of some organisers, is that you do not really get a devolution of power. Those who take the power there are those who are in control of the masses of the mobs or the majorities however you want to describe it. Power is in the hands of those who are best able to manipulate the masses.

It is on very rare occasions that people genuinely express views which are not manipulated in some way. Now this is in no way a view on the Vietnam demonstrations on that occasion. Quite clearly they were very successful and there was strong popular feeling and I have no particular view about that.

Question:

Perhaps my question could be directed to any of the speakers. I seem to get the impression that what we may care to define as parliamentarism seems to be regarded just as some sort of Utopian dream; that we can not really have a strong legislature unless that is achieved at the expense of a weak party system, which apparently the electorate are totally against or a weak government the sorts of things that we see in the United States where there are rows in Congress all the time and the government can not decide on what course of action to take.

Would you like to comment on that?

Response by Dr Kukathas:

It is often said that is the price that they pay in the United States for the sort of system that they have got there; that it is very difficult for the Executive to act, simply because it can not be assured of the support of the Houses of Congress. I agree that that is certainly a problem. On the other hand it means both that it is difficult to do evil as much it is to do good. Now the question then, it seems to me, is one of on which side are you going to err. For my own part, I think that things which obstruct government are good things. There is then considerable pressure on government to re-consider what

it is doing. Maybe this will make things more difficult, maybe it will slow some things down, maybe there will be good things that might have been done that will not be done. Equally it might mean that some bad things will not be done.

Response by Mr Maley:

It seems to me that we need to distinguish between different parliaments, and different ways of structuring parliament, if we are going to assess the extent to which parliament as an institution is going to be an effective check on the Executive.

If one looks at the experience of Queensland, which has the only unicameral state legislature in Australia, I think one can see that there have been certain costs incurred by virtue of the fact that since 1922 there has been no upper house to slow down the legislative process, and delay the passage of legislation which the elected Government wished to rush through the lower house in the wee small hours of the morning.

In a parliament like the Commonwealth Parliament, clearly there are opportunities for issues to be de-politicised and addressed in a very serious way, particularly through the Committee system. On the odd occasion, even where an issue *is* politicised, producing evidence before a Committee may be sufficient to turn around the attitudes of members on a party-political basis. Here I am thinking in particular of the Senate Select Committee which investigated Repatriation and Compensation proposals in 1975. It brought in a unanimous report which was highly critical of different elements of that scheme, leading to the Labor Senators on that committee being scarified in Mr Whitlam's memoirs.

Now for that reason I think it is difficult to talk in the abstract. I would not want to set up a sharp, black-and-white dichotomy, saying that Parliament is utterly debilitated or that the Executive is entirely dominant. It will depend upon the degree of politicisation of the issue, and the structure of the particular legislature under discussion.