Constitutional Aspects

of the

Royal Commission

on the

Communist Party

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Australian Council for Civil Liberties

(Non-Party, Undenominational)

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During the thirteen years since the Council was founded, it has defended individuals and groups, irrespective of their political affiliations, when they have been treated unjustly or have stood in peril of injustice.

The express aim of the Council, printed in its constitution in 1936, is to assist in the maintenance of citizens' rights "against infringement by executive or judicial authority contrary to due process of law, or by the tendency of governmental or other agencies to use their powers at the expense of the liberties which citizens of this country have enjoyed."

To-day, as in 1936, signs of such a tendency to abuse powers are to be observed. In the opinion of the Council's legal advisers, the Victorian Royal Commission (Communist Party) Act 1949 is a grave abuse of the powers of Parliament at the expense of the independence of the Judiciary.

So the Council, according to its practice, applies itself to informing the public of facts and implications of this measure which the Victorian Government initiated and the parliamentary majority carried—though after strong protest from leading members of the Labor Party and one of the two conservative parties.

In the pages which follow, the Council quotes not only such known anti-Communists as these, but also more august authorities, in evidence of the hurt which this legislation does, not Communists in particular, but the structure and operation of parliamentary democracy in the State.

THE main objection to the appointment in May, 1949, of a Royal Commission to investigate the Communist Party in Victoria has nothing to do with the pros and cons of Communism or with the case for or against the Communist Party, on its State record, which the Commissioner was required to examine. The objection resides in the lack of concern which Parliament showed, not only for principles of common fairness and natural justice, but also for the Constitution or basic law of the State.

For by the Royal Commission (Communist Party) Act, the parliamentary majority swept away the principle of the independence of the Judiciary from party-political disputes and thence from subjection to pressure by Governments and by the parties and pressure-groups behind them.

> **Mr. Cain (Leader of the Labor Party): Under the Victorian Constitution there are three forms of government. The first is this Legislature, comprising the Legislative Assembly and the Legislative Council; the second is the Executive which administers the law—the Government of the day—and thirdly, there is the Judiciary which enforces the law. The two branches for the administration of justice are separate, and it is not right for the Executive, or even for this Parliament, to compel the Judiciary to act in this way.**

On the part of Parliament this is a most serious failure of responsibility; a flouting of constitutional principles which were surely understood at least by the Premier and the Attorney-General of the offending Government. It is a threat to maintenance of that delicate balance of opinion, which, when persons known to have had political party affiliations become Judges, has still conceded that constitutional practice permits citizens to rely on their impartial administration of justice. For, on the Bench, in their aloofness from political controversy, they have been able to comport themselves without fear of Government pressure, or hope of Government favour.

> **Mr. McDonald (Country Party, Leader of the Opposition): I hope I am not wronging him [Mr. Reynolds, Liberal member for Toorak, who had originally suggested the appointment of the Royal Commission], but I suggest that because of what appeared in the newspapers . . . those associated with the present Government felt that it was necessary to ready-up something that might have a political significance.**
>
> **Mr. Reynolds: That is untrue.**
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> **Mr. McDonald: I am sorry if I am not stating the facts, but in view of what happened I can only suggest that what I have stated is correct.**
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> **Mr. Reynolds: It is a perverted view.**
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> **Mr. McDonald (Country Party, Leader of the Opposition): It has been the tradition of Parliament that the prestige and the absolute independence of the judiciary should be upheld. . . . However, here is a Liberal and Country Party Government seeking to direct the judiciary in what it should do. There has never been a greater departure from the high principle that the judiciary**

should be completely free and untrammelled and should administer the laws of the State without direction from anybody, including Parliament.

This is no longer the case. The Government has impressed the Supreme Court into political service, and it is not true now, as it was for Mr. Hollway's predecessor of 1923 in the Premiership, that "the Government feels it is powerless to interfere with a Supreme Court Judge." That was "absolutely a sound basic principle" to the Premier then, but not the Premier now. For this willingness to leave the Judges untroubled in their function of doing justice, Mr. Hollway has substituted the statement, "Parliament is above the Judges."

No doubt Parliament is. But no Parliament of the past has been so ill-advised as to assert its supremacy in the manner the present Government has chosen by ordering a Judge from his Court and requiring him to conduct an enquiry which every informed sensible person well understands to be a mere political manoeuvre.

The terms of reference which the Act lays down for the Royal Commissioner fall for the most part into two classes. Either they are inappropriate for judicial enquiry, or else they are capable of being investigated, under existing laws, in the law courts according to ordinary principles of justice. An example of unsuitable matters for reference to a Royal Commissioner is "the origins, aims and objects of the Communist Party in Victoria." These are surely matters for experts—political scientists and philosophers. Another such, from the terms of reference in the Act, is "the indoctrination of children and young people with beliefs and ideas." This also is a matter for experts—educationists, child psychologists, social workers, philosophers and theologians. Matters for the Royal Commission which are capable of being investigated under existing laws are—"whether that party . . . advocates or encourages the overthrow by force or violence of established government . . . intimidation or fraudulent practices . . . the dislocation, interruption or retardation of industrial production." These are acts for which offenders may be prosecuted under the Crimes, Arbitration and other Commonwealth and State legislation. There is no occasion for a Royal Commission on them.

Without necessity, indeed, and without exercise of powers already available under the law, the Victorian parliamentary majority has simply scrapped the principle, fundamental to our democratic separation of the Judiciary from the Executive or governmental power, which was enunciated for example sixty years ago by Lord Randolph Churchill on the occasion of the Parnell Commission, and upheld by the practice since of United Kingdom Governments, including that led by Lord Randolph's son, Mr. Winston Churchill."

It is submitted that it is the highest degree unwise and, indeed, unlawful, to take the Judges of the land out of their proper sphere of duty, and to mix them up in political conflict. In this case, whichever way they decide, they will be the object of political criticism and animadversion. Will any Judge emerge from this enquiry the same for all judicial purposes, moral weight and influence as he went into it? Have you a right to expose your Judges, and in all probability your best Judges, to such an ordeal?

WHAT are the specific matters which the Premier told Parliament justified the appointment of a Royal Commission in Victoria to investigate the Communist Party (which has its headquarters in another State)? They are allegations by a former Communist, Cecil Sharpley, which were published in daily newspapers in April, regarding "rigging" of ballots for the election of officials in trade unions, and similar allegations which were made, about the same time, by some delegates to the annual conference of the Australian Labor Party (Victoria). What was alleged was that Communists had taken part in "rigging" ballots, to the stultification of trade union democracy.

Now, ballot "rigging" is criminal—a criminal conspiracy where, as in these instances, concerted action is alleged. Interference with the proper conduct of elections is to be deplored wherever and whenever it appears, and it is in the public interest to prosecute and punish offenders, of course whether they are Communists or of another political colour. But the Criminal Court is the regularly appointed place for the investigation of such charges; a Royal Commission is not.

Moreover, in this context the extraordinary means of enquiry by a Royal Commission is singularly inapt and objectionable, in the circumstance that already before the Royal Commission was projected by the Government, publication of allegations by Sharpley had been followed by the issue of Supreme Court libel writs, by officials of the Communist Party in Victoria, and a trade union officer alleged to have participated in "rigging," against three publishers of the allegations. Thus, by the ordinary process of law, substantial matters named in the terms of reference for the Royal Commission were to be investigated, in the judicial atmosphere of the courts, by a Supreme Court Judge.

Mr. McDonald (Country Party, Leader of the Opposition): This is another important aspect: Communists have issued writs against the Herald and other newspapers, and so it would be possible for the Royal Commission to be enquiring into similar matters and taking similar evidence to that being given before the Supreme Court in relation to those writs. No matter how much the Government dissembles and tries to hide responsibility, probably both the Royal Commissioner and a Judge sitting in the Supreme Court could subpoena witnesses on similar issues at the same time.

ON yet another practical ground there is serious objection to the procedure which the Government has adopted. If it is proper to pass an Act of Parliament to investigate the doctrines, associations and finances of one lawful organisation, then it would appear to be proper to do the like by any other. A Labor Government of the future, which desired to expose the associations and finances of the Liberal Party and the Australian Constitutional League, or the Institute of Public Affairs, could reasonably point to the precedent which this Royal Commission Act of 1949 furnishes.

> **Sir Albert Dunstan (Country Party): The Government has submitted a Bill which in my opinion will create an undesirable and dangerous precedent which could be used by future Governments for the purpose of dealing with anyone with whom it had a political quarrel. There is nothing to prevent any future Government from ... appointing a Royal Commission to determine the activities of an organisation which could be of a religious nature.**

In this new theory of law in relation to voluntary organisations of citizens, no such organisation is secure from public investigation, at the instance of an unfriendly Government, by a Royal Commissioner who is given power to force citizens to give evidence and to punish witnesses who on grounds perhaps of repugnance to the role of common informer, are "recalcitrant," and refuse to answer tendentious questions. As Lord Randolph Churchill pointed out in the 1889 statement which is published at length on other pages:

> **The tribunal will conduct its proceedings by methods different to a court of law. The examination will be mainly conducted by the tribunal itself: a witness cannot refuse to reply on the ground that the answer will incriminate himself. Evidence in this way will be extracted which might be made the basis of a criminal prosecution against other persons. Indemnities might be given to persons actually guilty of very grave crime, and persons much less guilty of direct participation in grave crime might, under such protected evidence, be made liable to prosecution.**

The nature of the injury which constitutional democracy suffers through the Victorian Government's action is stated clearly in the observations of Sir William Irvine and Lord Randolph Churchill, which are quoted below.

SIR WILLIAM IRVINE'S STATEMENT.

Mr. Lawson (Premier): I informed the House last week that the Government proposed to ask that the services of a Supreme Court Judge should be made available for the purposes of this investigation. Pursuant to that decision, the Attorney-General wrote to the Chief Justice and asked that a Judge might be made available. In reply to our request, we have received from His Honour the following letter, which I will read for the information of the House:—

Judges' Chambers, Melbourne.
14th August, 1923.

My dear Attorney-General,

After full consideration I have decided that I cannot accede to the request of the Government to invite one of my colleagues to act as a Royal Commissioner to enquire into the charges made in connection with the Warrnambool breakwater. I have come to this conclusion after consultation with, and with the full concurrence of all the Judges of the Supreme Court.

As this decision involves a refusal to comply with the expressed desire of the Government, I think it is necessary that I should state fully the reasons which compel me to take this course.

The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the King and a subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the Judiciary.

It is mainly due to the fact that, in modern times at least, the Judges in all British communities have, except in rare cases, confined themselves to this function, that they have attained, and still retain, the confidence of the people. Parliament, supported by a wise public opinion, has jealously guarded the Bench from the danger of being drawn into the region of political controversy.

Nor is this salutary tradition confined to matters of an actual or direct political character, but it extends to informal enquiries, which, though presenting on their face some features of a judicial character, result in no enforceable judgment, but only in findings of fact which are not conclusive and expressions of opinion which are likely to become the subject of political debate.

The subject-matter of the Commission proposed in this case involves charges of both departmental inefficiency and of corruption in the Public Service. The enquiry must, in its very nature, extend beyond the investigation of any particular charge of bribery against any named person or persons.

If it could be limited to such a charge it may be the subject of judicial determination in the Criminal Court; until it is so limited it cannot strictly become the subject of judicial determination at all. Even assuming that the Judges might, where a public necessity demands it, be asked to deal with questions of fact of a purely non-political colour, it seems to me impossible to frame any Commission which could in this case disentangle such

issues from subjects of parliamentary controversy, whether such controversy turned upon suspicions of corruption or allegations of administrative incapacity.

Having stated these reasons for the course taken, I desire to add that my colleagues and myself are conscious that only weighty considerations would be sufficient to justify us in declining to comply with the request contained in your letter.

I have the honour to be,

Yours truly,
(Sgd.) W. H. Irvine,
Chief Justice.

Mr. Lawson (Premier): The Government feels it is powerless to interfere with a Supreme Court Judge. That is absolutely a sound basic principle. We must not attempt to disturb that position.

(Victorian Parliamentary Debates, Session 1923-4, vol. 164, p. 523, August 14, 1923. "Warrnambool Breakwater and Outer Port Development," Appointment of Commission.)

LORD RANDOLPH CHURCHILL'S MEMORANDUM.

THE case of "Parnellism and Crime" is essentially a political and Parliamentary difficulty of a minor kind. A newspaper has made against a group of Members of the House of Commons accusations of complicity in assassination, crime, and outrage. In the commencement the parties accused do not feel themselves specially aggrieved. They take no action; the Government responsible for the guidance of the House of Commons does not feel called upon to act in the matter. A Member of Parliament, acting on his own responsibility, brings the matter before the House of Commons as a matter of privilege, and a Select Committee is moved for to enquire into the allegations.

The Government take up an unexceptionable and perfectly constitutional position. They refuse the Select Committee on the ground marked out by Sir Erskine May, that matters which may or ought to come within the cognisance of the courts of law are not fit for enquiry by a Select Committee. The Government press upon the accused parties their duty, should they feel themselves aggrieved, to proceed against the newspaper legally, and, with a generosity hardly open to condemnation, offer to make the prosecution of the newspaper, so far as expense is concerned, a Government prosecution. The offer is not accepted, the view of duty is disagreed from by the accused persons, the motion for a Select Committee is negatived, and the matter drops, the balance of disadvantage remaining with the accused persons.

Owing to an abortive and obscurely originated action for

libel, the whole matter revives. The original charges are reiterated in a court of law by the Attorney-General, but owing to the course of the suit no evidence is called to sustain the allegations. A fresh demand is made by the accused persons for a Select Committee, and is refused by the Government on the same grounds as before, and, as before, with a preponderating assent of public opinion. So far, all is satisfactory, except to the accused persons and their sympathizers.

For reasons not known, the Government take a new departure of a most serious kind. They offer to constitute by statute a tribunal with exceptional powers, to be composed entirely of Judges of the Supreme Court, to enquire into the truth of the allegations. To this course the following objections are obvious and unanswerable:—

1. The offer, to a large extent, recognizes the wisdom and justice of the accused persons in avoiding recurrence to the ordinary tribunals.

2. It is absolutely without precedent. The Sheffield case, and the Metropolitan Board of Works case, are by no means analogous. Into these two cases not a spark of political feeling entered. The case of "Parnellism and Crime," in so far as it is not criminal, is entirely political. In any event, the political character of the case would predominate over the criminal.

3. It is submitted that it is in the highest degree unwise and, indeed, unlawful, to take the Judges of the land out of their proper sphere of duty, and to mix them up in political conflict. In this case, whichever way they decide, they will be the object of political criticism and animadversion.

Whatever their decision, speaking roughly, half the country will applaud, the other half condemn, their action; their conduct during the trial in its minutest particulars, every ruling as to evidence, every chance expression, every question put by them, will be keenly watched, canvassed, criticised, censured, or praised.

Were Judges in England ever placed in such a position before? Will any Judge emerge from this enquiry the same for all judicial purposes, moral weight and influence as he went into it? Have you a right to expose your Judges, and in all probability, your best Judges, to such an ordeal?

4. The tribunal will conduct its proceedings by methods different to a court of law. The examination will mainly be conducted by the tribunal itself; a witness cannot refuse to reply on the ground that the answer will in-

criminate himself. Evidence in this way will be extracted which might be made the basis of a criminal prosecution against other persons. Indemnities might be given to persons actually guilty of very grave crime, and persons much less guilty of direct participation in grave crime might, under such protected evidence, be made liable to prosecution.

The whole course of proceeding, if the character of the allegations is remembered, will, when carefully considered, be found to be utterly repugnant to our English ideas of legal justice, and wholly unconstitutional. It is hardly exaggerating to describe the Commission contemplated as "a revolutionary tribunal" for the trial of political offenders. If there is any truth in the above or colour for such a statement, can a Tory Government safely or honourably suggest and carry through such a proposal?

I would suggest that the constitutional legality of this proposed tribunal be submitted to the Judges for their opinion.

It is not for the Government, in matters of this kind, to initiate extra-constitutional proceedings and methods. One can imagine an excited Parliament or inflamed public opinion forcing such proceedings on a Government. In this case there is no such pressure.

The first duty of a Government would be to resist being driven outside the lines of the Constitution. In no case, except when public safety is involved, can they be justified in taking the lead.

They are the chief guardians of the Constitution. The Constitution is violated or strained in this country when action is taken for which there is no reasonable analogous precedent.

The proceedings of the tribunal cannot be final. In the event of a decision to the effect that the charges are not established, proceedings for libel against the newspaper might be resorted to, the newspaper being placed under a most grossly unjust disadvantage. In the event of a decision to the contrary effect, a criminal prosecution would seem to be imperative.

(Lord Randolph Churchill's Memorandum, July 17, 1889, quoted in T. P. O'Connor's "Memoirs of an Old Parliamentarian," vol. 2, p. 175.)

A ROYAL Commission having been legislated for, in spite of the convincing argument on record from the authorities just quoted, it remains to inform citizens of the powers vested in the Royal Commission. They are as follows:

Any citizen may be subpoenaed to give evidence to the Royal Commission and to answer such questions as the Royal

Commissioner, Mr. Justice Lowe, may permit to be put to him by counsel assisting the Commission, and by other legal counsel appearing.

Having the same powers as are vested in any Judge of the Supreme Court trying any Court action, the Commissioner may compel witnesses to attend, to answer, and to produce books and documents as called for.

The Commissioner may order the punishment of persons guilty of contempt or disobedience.

The Commissioner will formulate his own rules for the conduct of the enquiry, and no doubt one of the few reassuring features of the whole sorry business is the high standing and the twenty-two years' judicial experience of Sir Charles Lowe, the Royal Commissioner.

Moreover, the Premier (Mr. Hollway) stated in the Legislative Assembly, on May 10, 1949, that the normal provisions for protecting witnesses would not be diminished. A witness could not be compelled to incriminate himself, and if he did incriminate himself it could not be used against him.

Citizens who are ordered to appear to give evidence should bear in mind that they can seek the protection of the Commissioner against questions which counsel may put to them, which they feel may place them in a false position. For example, should counsel require a "Yes or No" answer to a question, and the witness feels that an answer in such a form would be inappropriate, he may turn to the Commissioner and request that he be permitted to answer in his own way, with what he feels to be proper qualification.

But one of the unfair features of an enquiry such as that which has now been legislated for, is that witnesses may not be protected by the ordinary procedural rule that they need answer only questions which are relevant to the matters at issue. In this instance where the terms of reference range from matters as comprehensive as"the subversion of law and order" to fraudulent activity within trade unions, almost anything might be held to be relevant, and a heavy burden of responsibility falls upon the Commissioner to restrain counsel from turning the proceedings into a witch hunt of the character which has made proceedings of the Un-American Activities Committee of the United States House of Representatives a byword throughout the democratic world.

That Committee is notorious for its browbeating of suspected persons haled before it for political reasons, for its utter disregard of the law of evidence.

Citizens may with profit note the Premier's implied admis" sions, in the Legislative Assembly on May 10 and 11 (Mel-

bourne Age, May 11, 12, checked by Hansard), that the Supreme Court Judges objected to the coercion of one of their number, or any Judge of the County Court, to preside at a political enquiry.

MAY 10.

Sir Albert Dunstan: Could you obtain a Supreme Court Judge to act as Commissioner without the passage of the Bill?

Mr. Hollway said the Supreme Court Judges were not anxious to take part in Royal Commissions. In this case it had been suggested that the Bill should be passed. It would clear the way for a Supreme Court Judge to act.

Mr. Cain: Is it a fact that Judges have refused to act as Royal Commissioners?

Mr. Hollway said the Judges felt they should not be called upon by a Government to conduct enquiries.

Mr. Cain: Do you not realise that you are embarrassing Parliament by asking the Judges to do something they do not want to do?

Mr. Hollway said Parliament was above the Judges.

MAY 11.

Sir Albert Dunstan asked Mr. Oldham (Attorney-General) to deny that the reason for the Bill to establish the Royal Commission was to force a Judge to act as Commissioner.

Mr. Oldham did not reply when Sir Albert Dunstan first asked the question, but when it was repeated he said, "No, there will be no compulsion." . . . The Chief Justice (Sir Edmund Herring) was approached and asked could he appoint a senior Supreme Court Judge as Commissioner. Sir Edmund Herring had drawn attention to a memorandum by a former Chief Justice (Sir William Irvine), which emphasised the dangers of Judges being drawn into political controversies . . .

Sir Albert Dunstan: Will not a Judge be compelled to act. He cannot defy an Act of Parliament. . . .

Sir Albert Dunstan said no Judge, in his opinion, would refuse to accept dictation by the Government in face of an Act of Parliament.

Mr. Cain (Leader of the Labor Party): This is one of the most unjustified measures that have been submitted to Parliament for many years. Having been taken out of the hands of the Attorney-General, it was left to the Premier to submit the Bill. That honourable gentleman made such an exhibition of himself in its presentation that it is now proposed to permit the Attorney-General to say what the Premier forgot to say.

SUMMARILY, then, the position is that at the Victorian Government's instigation Parliament forced the Supreme Court into a situation where it had either to supply a Judge to do what Judges conveyed it was improper for them to do, or else defy the Government (and almost certainly precipitate an election in which the Judges and their views would have been a bone of party contention.

The Government insisted on proceeding with its legislation to coerce the Judges, although the Chief Justice had made known to the Premier and the Attorney-General that it would be wrong of the Government to assign a Judge to preside at a "political" enquiry.

The Government of Victoria wilfully strained the constitutional fabric of the State, coerced the Judges, in order to hold an investigation quite inappropriate to the substantial matters which have been alleged—when the executive officers of the affected Party had already brought civil actions in relation to allegations made, and when the Government for its part had the plain and proper alternative of taking criminal proceedings against Communists or others suspected of breaking the law.

Mr. Cain (Leader of the Labor Party): If I understood his correctly, the Attorney-General said that the Chief Justice of the Supreme Court had asked him to have this legislation passed through Parliament, and that he would then provide a Judge.

Mr. Oldham (Attorney-General): I did not say that.

Mr. Cain: I wish to ask the Attorney-General whether the Chief Justice advised him to have the Bill passed and state that he would then provide a Judge, or did the Attorney-General suggest that?

MR. OLDHAM: I DEPLORE THE SORT OF COMMENT WHICH THE LEADER OF THE LABOR PARTY HAS MADE BY INFERENCE. NATURALLY I, AS ATTORNEY-GENERAL, HAVE HAD INTERVIEWS WITH THE CHIEF JUSTICE WHEN SEEKING THE SERVICES OF A SUPREME COURT JUDGE. I DO NOT PROPOSE TO BE CROSS-EXAMINED. I PREPARED A CAREFUL STATEMENT AND I SUBMITTED IT TO HIS HONOUR THE CHIEF JUSTICE, WHO GAVE ME PERMISSION TO MAKE COPIES AVAILABLE TO PARLIAMENT. I NOW HAND COPIES TO THE LEADER OF THE LABOR PARTY, TO THE LEADER OF THE COUNTRY PARTY, AND TO HANSARD. THE STATEMENT HAS BEEN CAREFULLY PREPARED AND IT IS IMPROPER THAT I SHOULD BE ASKED TO SAY ANYTHING MORE ABOUT IT.

(The sitting was suspended at 5.57 p.m.).

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STOP PRESS.

Melbourne Argus, May 28, 1949, published on p. 5 an item beginning "A challenge to the Victorian Government to appoint a Royal Commission to enquire into the source of all political parties' funds was issued last night by Mr. McDonald, Opposition Leader.

Here is the logical next step in a process introduced by this Royal Commission (Communist Party) Act. That the suggestion should have been made at this time by the Country Party leader is surely confirmation of one of the points made in this booklet.

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