TITLE PAGE

A response to the Jurisprudence of the High Court in the 'implied rights cases': An autochthonous Australian Constitution, Popular Sovereignty and Individual Rights?

Thesis submitted by

Anthony Matthew DILLON, BA-LLB (Hons I) *(JCU)*

Submitted in First Semester 2005
for the degree of Doctor of Philosophy
in the School of Law
James Cook University

STATEMENT OF ACCESS

I, the undersigned, author of this work, understand that James Cook University will make this thesis available for use within the University Library and, via the Australian Digital Theses network, for use elsewhere.

I understand that, as an unpublished work, a thesis has significant protection under the Copyright Act and I do not wish to place any further restrictions on access to this work.

---------- **----------**

Signature **Date**

STATEMENT OF SOURCES

DECLARATION

I declare that this thesis is my own work and has not been submitted in any form for another degree or diploma at any university or other institution of tertiary education. Information derived from the published or unpublished work of others has been acknowledged in the text and a list of references is given.

---------- **----------**

Signature **Date**

ACKNOWLEDGEMENTS

I thank the James Cook University School of Law for the assistance and resources generously made available to me in the preparation of this thesis. This assistance included financial support to present a paper at a conference on legal history at the Australian National University, Canberra. My studies were also partially financially supported by an Australian Postgraduate Award Scholarship and part-time tutoring within the School of Law.

The long and lonely task of writing this thesis was made much easier by the intellectual stimulation I received from fellow students and staff. Their perceptive comments and questioning helped focus important aspects of my research. In particular I thank Dr Alex Amankwah, Graham Nicholson and the late Marylyn Mayo for their discussions with me about all things constitutional and jurisprudential. I also thank the Head of the School of Law, Professor Steve Graw for his assistance in the final stages of writing and presenting the thesis to the University.

Naturally, in the preparation of this thesis, I owe a significant intellectual debt to my supervisors. My initial supervisor Professor Paul Fairall, was not only encouraging, but generous with his time to ensure focus of my ideas. My supervisor Professor Paul Havemann perhaps had the hardest task of all in supervising the final stages of researching and writing my thesis, including the dreaded review of the final draft. He is to be sincerely thanked for the generosity of his time and the guidance and support he gave me. His skill in ensuring my ideas were fully refined was invaluable.

I also owe a great deal of acknowledgment to my friend Dr Peter Oliver of Kings College, London whom at one point I constantly annoyed by e-mail. I was so moved by his writings in constitutional law that I had to see if he would at least discuss some of my ideas. He proved also to be extremely generous with his time, reading and discussing some draft material that I sent him.

Professor George Winterton of the University of New South Wales, is also to be thanked sincerely for the helpful feedback he gave me on particular areas. This feedback came without hesitation and with the added challenge that we did not always agree on certain propositions. I also whole-heartedly thank Professor Leslie Zines, whom I called upon unannounced at the Australian National University. He was very obliging to speak with me for a lengthy time in his office. I also remember approaching him around the campus whenever I would see him, as he was so approachable. Adrienne Stone is to be thanked for her involvement and patience during the publishing of my thesis article in the Federal Law Review.

My thanks also go to my manager Peter Smid and my fellow work colleagues at the Office of the Director of Public Prosecutions, Townsville. They always offered cheerful encouragement when I would arrive at work after a long night spent on the thesis. In the final few months it seemed like I would take time out from the thesis to attend work.

Finally, my thanks go to my brother Paul whom I can say without any hesitation fired my imagination for all things scholarly and for an interest in the law generally. His wisdom and knowledge on matters ranging from philosophical to historical and to of course legal, is astounding. I was lucky to have him as my own private tutor, even if it was over the dinner table on many occasions. He also showed me the way to enlightenment from my ‘thesomania’ in that “A work of art is never finished, it is abandoned”.

ABSTRACT

Parliamentary supremacy is a major and important principle of Australian constitutional law. Popular sovereignty, on the other hand, has come to occupy a confusing and possibly dangerous position in Australia's current constitutional arrangements. In the 'implied rights cases', popular sovereignty was said to replace (or at least heavily qualify) parliamentary supremacy, and was seen as a springboard for the protection of individual rights. This thesis argues that the promulgation and enforcement of individual rights chosen by the High Court, against a democratically elected parliament, should be seen as a massive appropriation of political power from parliaments to judges. This is of course not to say that the High Court has no role to play in the development of rights in constitutional law, but it is to say that this role should be exercised cautiously and with restraint, and with due deference to the expressed will of the people through their elected representatives. As a result, any notion of 'extra-constitutional rights' not discerned from the text and structure of the Constitution, that might be said to limit parliamentary supremacy, should not be entertained. The broad traditions, including judicial deference to Parliament and separate roles of the legislature and the judiciary should be maintained, such that the enunciation of rights of general application should be left to parliaments.

The Founders of the Australian Constitution instituted these broad traditions when they envisaged the institutional design and normative scheme of the Constitution. Such traditions were based on positivist and utilitarian notions, and also included the embracing of the doctrine of parliamentary supremacy and the specific rejection of a bill of rights. For the High Court to now show infidelity to the institutional design of the Founders would mean that the checks, balances and traditions envisaged by the Founders are subverted, potentially leading to a dysfunctional constitutional order. Moreover, it is argued this shift in the role of one of the key components of the federation can have a destabilising effect on the High Court itself, and no less the federation. For if Australia ever found itself in the midst of a constitutional crisis, Australians must be able to have utmost faith in the High Court as an apolitical institution to determine the validity of Australian laws.

Since the passage of the Australia Acts in 1986, some Justices of the High Court have sought to imbue the Australian Constitution with a republican form of ideology to search for an autochthonous or 'home-grown' Constitution. It is said the traditional view of the legal basis of the Constitution being the United Kingdom Parliament, cannot support a popular ideological basis to the Constitution and emphasise individual rights. However, the fact that the United Kingdom Parliament can no longer legislate for Australia, does not necessarily mean the legal basis of the Constitution is now popular sovereignty. Nor does it follow that the withdrawal of the British hegemony or Australia's lack of a bill of rights should sanction any greater role for the High Court.

It is this discourse in the 'implied rights cases' surrounding the legal basis of the Constitution and individual rights that this thesis takes up in detail. This thesis will deconstruct the elements of this discourse to show that it constitutes a pernicious challenge to orthodox methods of constitutional interpretation previously based upon the rule of law and the separation of powers. It will be argued that in the 'implied rights cases' the High Court was less concerned about trespassing upon parliament's traditional and separate role than it was in promulgating a new rights discourse for Australia. Whilst doing so, every effort has been made to state the law as at November 2004.

OVERVIEW

Chapter One- Introduction

Chapter Two – Philosophical foundations

Part A- The Founder's Intent?
Part B- Implied rights discourse
Part C– Kelsen and the Grundnorm

Chapter Three - Constitutional interpretation

Part A- The difficulty with popular sovereignty in constitutional interpretation
Part B- The Founder's Intent?

Chapter Four – Sovereignty as a contested concept

Part A- Sovereignty: A Very Slippery Concept
Part B- External Sovereignty
Part C- Internal Sovereignty
Part D- A conflation of legal and political sovereignty

Chapter Five – Deep Rights as limitations on Legislative Power

Part A- Higher Law before 1688-89
Part B- Parliamentary Sovereignty after 1688-89
Part C- A Contemporary revival of Higher Law

Chapter Six – International Law and common law limitations on Legislative Power

Part A- The influence of International Law
Part B- The Common Law Revival
Part C- The Common Law as an Ultimate Constitutional Foundation

Chapter Seven – Autochthony by the parent

Part A- A persistent confusion?
Part B– Actions of the parent: History as equivocal and indefinite
Part C– The Australia Acts: The Australian people or parliaments as heirs?

Chapter Eight – Autochthony by the offspring: a critique

Part A- The strict view of autochthony
Part B- A less strict view of autochthony: Marshall's criteria
Part C- Autochthony by any means: the legal and the political

Chapter Nine– A change in the Legal Basis of the Constitution?

Part A – Imperial Statute: The Legal Basis
Part B – Social Contract: No Basis of the Constitution at all

Chapter Ten – The Political Basis of the Constitution: a Federal Compact

Part A- A comparison with United States structures
Part B- A revival of federal compact theory
Part C- Secession, republican ideals and state unanimity: a critique

Chapter Eleven - Conclusion

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

CHAPTER TWO

PHILOSOPHICAL FOUNDATIONS

CHAPTER THREE

CONSTITUTIONAL INTERPRETATION

INTRODUCTION

PART A- THE DIFFICULTY WITH POPULAR SOVEREIGNTY IN CONSTITUTIONAL INTERPRETATION

PART B- THE FOUNDER'S INTENT?

The contribution of Andrew Inglis Clark: the Constitution as a living force

Progressivism: sidestepping the Founder's intentions?

A theory of Constitutional Interpretation based on an Historical Commitment to the Founder's intentions

CONCLUSION

A reinvigoration of 'implied rights' jurisprudence

CHAPTER FOUR

SOVEREIGNTY AS A CONTESTED CONCEPT

INTRODUCTION

PART A- SOVEREIGNTY: A VERY SLIPPERY CONCEPT

PART B- EXTERNAL SOVEREIGNTY

A conflation of external and internal sovereignty

Sue v Hill

The timing of Australia's independence

Table 3 – Models of external sovereignty

PART C- INTERNAL SOVEREIGNTY

Parliamentary sovereignty/supremacy

Popular sovereignty: The power to amend the Constitution

Popular sovereignty: Source of authority of the Constitution (Lindell's contribution)

PART D- A CONFLATION OF LEGAL AND POLITICAL SOVEREIGNTY

An attractive but problematic relationship: the court and the people

CONCLUSION

CHAPTER FIVE

DEEP RIGHTS AS LIMITATIONS ON LEGISLATIVE POWER

INTRODUCTION

PART A- HIGHER LAW BEFORE 1688-89

Lord Coke and Dr Bonham's Case: Dangerous heresy

PART B- PARLIAMENTARY SOVEREIGNTY AFTER 1688-89

Accepted external and internal limitations on parliamentary sovereignty

PART C- A CONTEMPORARY REVIVAL OF HIGHER LAW

Lord Cooke and 'The Dream of an International Common Law'

The source of fundamental and deep rights: natural law or common law?

Lord Coke's and Lord Cooke's influence in Australian judicial discourse

CONCLUSION

CHAPTER SIX

INTERNATIONAL LAW AND COMMON LAW LIMITATIONS ON LEGISLATIVE POWER

CHAPTER SEVEN

AUTOCHTHONY BY THE PARENT

CHAPTER EIGHT

AUTOCHTHONY BY THE OFFSPRING: A CRITIQUE

CHAPTER NINE

A CHANGE IN THE LEGAL BASIS OF THE CONSTITUTION?

INTRODUCTION

PART A – IMPERIAL STATUTE: THE LEGAL BASIS

A critique: If successful, would the 1999 republican model have altered the legal basis of the Constitution and achieved popular sovereignty?

PART B – SOCIAL CONTRACT: NO BASIS OF THE CONSTITUTION AT ALL

Contract theory in judicial discourse

Social Contract Proper and Contract of Government

Historical criticism

Contemporary arguments arising from contract theory

Contemporary contractarians

A maelstrom of conceptual and theoretical difficulties

Mason CJ: Government as a Trustee?

Mason CJ: Government as a delegate?

A maelstrom of conceptual and historical difficulties

CONCLUSION

CHAPTER TEN

THE POLITICAL BASIS OF THE CONSTITUTION: A FEDERAL COMPACT

CHAPTER ELEVEN

CONCLUSION

Table 7 – Summary and rebuttal of the six interrelated concepts from the 'implied rights' cases

TABLE OF CASES

D

E

F

M

N

Y