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## **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**

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## **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.

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## **CHAPTER ONE**

### **INTRODUCTION**

‘Keepe therefore your owne limits towards the King, towards other Courts, and towards other Lawes, bounding your selues within your own Lawe, and make not new Lawe. You are Judges, to declare, and not to make Lawe: For when you make a Decree neuer heard of before, you are Lawe-giuers, and not Lawe-tellers.’

(Speech delivered by King James I in the Starre-Chamber, 20 June 1616: *The Political Works of James I* at 336)

After the ‘Glorious Revolution’ of 1688-89 the prerogatives of the King were substituted by the privileges of Parliament, so the struggle for supremacy moved from the King and his judges to the Parliament and an independent judiciary. Royal absolutism was replaced with parliamentary absolutism. In contemporary Australia, the struggle between Parliament and the judiciary has re-intensified. The primary argument of this thesis is that parliamentary supremacy is a major principle of Australian constitutional law (Federal and State). This is so notwithstanding the waning influence in contemporary constitutional thinking of the theory of the sovereignty of parliament, and an increased recognition of a doctrine of popular sovereignty. This thesis will argue against the legitimacy and necessity of an activist High Court establishing an ‘extra-constitutional’ individual rights doctrine to limit parliamentary supremacy. This is of course not to say that the 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 in most cases to the expressed will of the electors through their elected representatives.

Moreover, 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 in most cases be left to the elected parliaments, with the courts incrementally developing rights at common law. The Founders of the Australian Constitution

instituted those broad traditions when they envisaged the institutional design and normative scheme of the Constitution. Such traditions included the embracing of the doctrine of parliamentary sovereignty (albeit in modified form for a federation) and the specific rejection of a bill of rights.

For the judiciary to now show infidelity to the institutional design of the Founders would mean that the checks, balances and principles envisaged by the Founders are subverted, potentially leading to a dysfunctional constitutional order. 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. To entertain such ‘extra-constitutional rights’ would amount to a judicial implication of a bill of rights and hence a judicial alteration of the Constitution.

As was submitted by the Solicitor-General for the Commonwealth, for the Attorney-General for the Commonwealth, intervening in the 2001 case of *Durham Holdings Pty Ltd v New South Wales*, and accepted by the majority of the court:

The doctrine by which legislative power is limited by pre-existing common law rights has no place in Australian constitutional jurisprudence, in which parliamentary supremacy remains the underlying norm. The identification of fundamental common law rights is inherently problematic and would replace parliamentary supremacy with judicial supremacy.<sup>1</sup>

The written submissions for the Attorney-General for the State of Victoria in the same case concurred: “The notion that courts have jurisdiction to declare legislation invalid on the ground of interference with fundamental common law rights is not part of the Australian law... Such a

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<sup>1</sup> (2001) 75 ALJR 501; (2001) 205 CLR 399 at 404 per Mr Bennett QC, Solicitor-General. The majority consisted of Gaudron, McHugh, Gummow and Hayne JJ who delivered a joint judgment.

restraint would represent a major shift in the constitutional balance between the judiciary and Parliament".<sup>2</sup>

This thesis draws the distinction between 'implied rights' and 'extra-constitutional rights'. 'Implied rights' discerned from the text and structure of the Constitution are an example of legitimate judicial exegesis.<sup>3</sup> Rights that are discerned from some other source standing outside the Constitution are not. As such, rights discerned from any non-textual source such as overarching notions said to support the Constitution, such as popular sovereignty or social contract or fundamental (common or natural) law doctrines, are termed by this thesis 'fundamental rights' or 'deep rights', and are an example of 'extra-constitutional rights' and a dangerous course indeed.

As Bede Harris has noted:

The opprobrium directed against the High Court from some quarters when it took the far less radical step of recognizing the implied right of political communication...would pale into insignificance in comparison with what would happen if the courts recognized rights standing outside the text of the Constitution.<sup>4</sup>

The doctrine of popular sovereignty is now said to underpin the Australian Constitution and is often seen as inextricably linked with concepts of 'fundamental rights' and 'deep rights'. Some judges and jurists see this newly expressed concept of popular sovereignty as implicitly reserving some rights to the Australian people which a Parliament can not invade.<sup>5</sup> Because of the

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<sup>2</sup> *Ibid* at 405.

<sup>3</sup> See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 where the High Court confirmed that the Constitution contains an implied freedom of political communication. The implied freedom not only applies to communication by 'words' but also by 'actions': see *Levy v State of Victoria (The Duck Shooters case)* (1997) 189 CLR 579.

<sup>4</sup> B. Harris, *A New Constitution for Australia* (2002) at 10.

<sup>5</sup> M. Kirby, 'Deep Lying Rights – A Constitutional Conversation Continues', The Robin Cooke Lecture 2004, 25 November 2004, from web, <http://www.hcourt.gov.au/speeches/kirbyj.html;2/12/04;5>.

ubiquitous promotion of popular sovereignty by both judges in the ‘implied rights cases’<sup>6</sup> and academics, this thesis engages the discourse of both groups. Justice Kirby for one has “sought to intensify the judicial engagement with the academic community”.<sup>7</sup> This synergy in the discourse between the judges and academics has produced the loud proposition that popular sovereignty is the legal basis of the Constitution. Justice Kirby has said:

Most lawyers – and virtually all political scientists – regard the ultimate foundation for the binding force of the Australian federal Constitution as the acceptance of that document by the Australian people in successive referenda in the 1890’s, the fact that it was approved by the electors authorised to vote at the time, and its acceptance thereafter by the people of Australia as the basic law for their governance.<sup>8</sup>

Justice Selway of the Federal Court has also said:

They concluded that Australian independence necessarily meant that whatever significance had been afforded to the role of the Imperial Parliament had disappeared. Increasingly, instead of the Imperial Parliament as the source of the Commonwealth Constitution, they suggested that the Australian people were now the source of the continuing authority of the Constitution. This view has become the accepted orthodoxy.<sup>9</sup>

In contrast, the once orthodox view, that the United Kingdom Parliament is the legal basis of the Constitution, has become somewhat muted. It is nevertheless the United Kingdom Parliament view that this thesis promotes. As such, I no doubt form part of “a dwindling band of

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<sup>6</sup> The ‘implied rights cases’ are most notably *Australian Capital Television Pty Ltd v The Commonwealth* (ACTV) (1992) 177 CLR 106, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, *Leeth v Commonwealth* (1992) 174 CLR 455, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, *Ridgeway v The Queen* (1995) 184 CLR 19, *Langer v The Commonwealth* (1996) 186 CLR 302, *Kable v DPP (NSW)* (1996) 189 CLR 51, *McGinty v Western Australia* (1996) 186 CLR 140, *Levy v State of Victoria* (1997) 189 CLR 579, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, *Commonwealth v Mewett* (1997) 191 CLR 471, *Kruger v The Commonwealth* (1997) 190 CLR 1. See also *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501, *Minister for Immigration, Multicultural and Indigenous Affairs v B* (2004) 75 ALJR 737, *Al-Kateb v Godwin* (2004) 78 ALJR 1099, and *Coleman v Power* (2004) 209 ALR 182 and others to be referred to throughout this thesis.

<sup>7</sup> Kirby, above n 5 at 2.

<sup>8</sup> *Ibid* at 3.

<sup>9</sup> B. Selway, ‘Methodologies of constitutional interpretation in the High Court of Australia’, (2003) *Public Law Review*, 14, 4 at 236, referring to Murphy J in *Bisticic v Rokov* (1976) 135 CLR 552 at 566-567, Deane J in *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351 at 442, James Thomson, Geoff Lindell and others.

traditionalists point[ing] to the Imperial lineage”.<sup>10</sup> However, I do so not out of a strict recitation of orthodoxy for orthodoxy’s sake, but because even as Justice Kirby and new protagonists must admit, the new view has “various historical and political flaws”.<sup>11</sup>

See Table 1 below for a comprehensive but not exhaustive list of the more prominent proponents of popular sovereignty. This thesis views this group of proponents as exemplars of the popular sovereignty discourse in Australia. As Justice Selway has said, although “the academic debate about why the Constitution is binding still continues” popular sovereignty “has become the accepted orthodoxy”.<sup>12</sup>

## TABLE 1

### PROPONENTS OF POPULAR SOVEREIGNTY

**Firstly, see the following curial statements to be found in the ‘implied rights cases’:**

[A similar list was provided to the High Court by Mr Castan QC for the plaintiff in *Levy v The State of Victoria* (1997) to support the principle that ‘...ultimate sovereignty resides with the people. This is the foundation of the Commonwealth and State Constitutions which cannot be used to deprive the sovereign people of their ultimate control over the agencies they create...’ (582)].

- Deane and Toohey JJ in *Nationwide New Pty Ltd v Wills* (1992): ‘The rational basis of that doctrine [representative government] is the thesis that all powers of government ultimately belong to, and are derived from, the governed.’ (70) ‘In implementing the doctrine of representative government, the Constitution reserves to the people of the Commonwealth the ultimate power of governmental control.’ (71)
- Brennan J in *Nationwide News Pty Ltd v Wills* (1992): ‘The principles [of representative democracy] and responsible government are constitutional imperatives which are intended...to make both the legislative and executive branches of the Commonwealth ultimately answerable to the Australian people.’(47)

<sup>10</sup> Kirby, above n 5 at 3.

<sup>11</sup> *Ibid.*

<sup>12</sup> Selway, above n 9 at 236 and 238.

- Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* (1992): ‘Translated into constitutional terms [the concept of representative government], denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives.’ (137) ‘...the *Australia Act* 1986 (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people.’ (138)
- Deane and Toohey JJ in *Leeth v The Commonwealth* (1992): ‘The States themselves are, of course, artificial entities. The parties to the compact which is the Constitution were the people of the federating colonies.’ (484)
- Deane J in *Theophanous v Herald & Weekly Times Ltd* (1994): ‘The present legitimacy of the Constitution as the compact and highest law of our nation lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people.’ (171) And further quoting Madison: ‘[t]he people, not the government, possess the absolute sovereignty.’ (180) (Note the extension of the argument from his Honour’s comments in *Kirmani*. The argument now adopted is substantially that of Murphy J’s from *Kirmani*; both reproduced below)
- McHugh J in *Ridgeway v The Queen* (1995): ‘Since the enactment of the *Australia Act* 1986 (UK), the powers of government in this country are derived from the people who are the ultimate sovereign.’ (91)
- McHugh J in *McGinty v Western Australia* (1996): ‘[N]otwithstanding some considerable theoretical difficulties, the political and legal sovereignty of Australia now resides in the people of Australia.’ (230) ‘Since the *Australia Act* 1986 (UK), ...the sovereignty of the Australian nation has ceased to reside in the Imperial Parliament and has become embedded in the Australian people.’ (237)
- Gummow J in *McGinty v Western Australia* (1996): ‘Broad statements as to the reposition of “sovereignty” in “the people” of Australia, if they are to be given legal rather than popular or political meaning, must be understood in the light of the federal considerations contained in s 128.’ (275)
- Kirby J in *Levy v Victoria* (1997): ‘With the passage of time since federation in Australia and changing notions of Australian nationhood, the perception that the Australian Constitution is binding because of its imperial provenance has given way (at least since the *Australia Acts* 1986) to an often expressed opinion that the people of Australia are the ultimate repository of sovereignty. That view is not without conceptual and historical difficulties.’ (634)
- McHugh J in oral argument in *Commonwealth v Mewett* (1997): ‘The question is why is the Constitution binding on the people today? Until the *Australia Act* one could say it was the product of a British statute and, therefore, it had the force of the statute. Since the *Australia Act* the British Parliament has washed its hands. So what is the basis? Why is it binding on the Parliament[s] of the Commonwealth and States? I do not know that there is any clear answer to it but I am not sure that we can go on treating it as if it was a British statute... It may no longer be proper to look at the Constitution as a British statute. It may be that since the *Australia Act* we should look at it as a compact between the peoples of Australia, which is in effect renewed from day to day.’ (Transcript 12 February 97, from web, <http://www.austlii.edu.au/do/11>)

- Kirby J in oral argument in *Commonwealth v Mewett* (1997): ‘You will be aware of the decisions of this Court that suggest that the fundamental basis of the Constitution is now to be seen as the people of Australia not the Imperial Act… I am not pressing any view on the matter, but there are some observations in the Court of late which suggest that [the Imperial Act], in a sense, is spent and that the true foundation of the Constitution, given the provisions of section 128, must now be seen as the people of Australia.’ (Transcript 12 February 97, from web, <http://www.austlii.edu.au/do/isp;10>)
- Brennan CJ in *Kruger v The Commonwealth* (1997): ‘The Constitution, though in form and substance a statute of the parliament of the United Kingdom, was a compact among the peoples of the federating colonies, as the preamble to the Constitution declares.’ (42)
- Toohey J in *Kruger v The Commonwealth* (1997) at 89, where his Honour in effect repeated his and Deane J’s view from *Nationwide News*. (69-70)
- Kirby J in *Al-Kateb v Godwin* (2004): ‘The Constitution speaks not only to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.’ (169)

**To this list one could add the following curial statements that pre-date the ‘implied rights cases’. Clearly at this time the popular sovereignty view was unorthodox:**

[In respect of Justice Murphy’s judgment’s, Kirby J has said they have “exerted a considerable influence on the High Court, which it simply refuses to acknowledge”: M. Kirby, ‘Lionel Murphy and the Power of Ideas’ (1993) 18 *Alternative Law Journal* 254 at 255.]

- Murphy J in *Bistricic v Rokov* (1976) 135 CLR 552 at 566: ‘The original authority for our Constitution was the United Kingdom Parliament, but the existing authority is its continuing acceptance by the Australian people.’
- Murphy J in *McGraw-Hinds (Australia) Pty Ltd v Smith* (1979) 144 CLR 633 at 668 stated that some rights arose ‘from the nature of the society which operates the Constitution.’
- Deane J in *University of Wollongong v Metwally* (1984) 158 CLR 447 at 476-7: ‘The Australian federation was and is a union of people and that, whatever may be their immediate operation, the provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called Commonwealth and States derive their authority.’
- Murphy J in *Kirmani v Captain Cook Cruises Pty Ltd [No. 1]* (1985) 159 CLR 351 at 383: ‘The authority for the Australian Constitution then [1 January 1901] and now is its acceptance by the Australian people.’ (Note the inconsistency with the passage from *Bistric v Rokov*, with respect to the original authority of the Constitution. Justice Murphy’s view in *Kirmani* has been questioned as being ‘inherently and manifestly improbable’: G. Craven, *Secession* (1986) at 138).

- Deane J in *Kirmani v Captain Cook Cruises Pty Ltd [No. 1]* (1985): ‘The practical effects of [s 128] are that, whatever be the theoretical explanation, ultimate authority in this country lies with the Australian people.’ (442) (This argument is different from Murphy J’s in *Kirmani*, in that Deane J asserts popular sovereignty at some time before the passage of the Australia Acts, but not necessarily in 1901).

- Deane J in *Breavington v Godleman* (1988) 169 CLR 41 at 123: ‘the compact of between the Australian people, rather than the past authority of the United Kingdom Parliament, offers a more acceptable contemporary explanation of the authority of the basic law of the Constitution.’ (Note that in *Theophanous*, Deane J discarded ‘the past authority of the United Kingdom Parliament’).

**Further, one could delve into extra-curial statements that subsequently picked up on the ‘popular’ discourse in the ‘implied rights cases’:**

- Justice Toohey extra-curially (1993): ‘...where the people of Australia, in adopting a constitution, conferred power... upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties.’ (J. Toohey, ‘A Government of Laws, and Not of Men?’, (1993) 4 *Public Law Review*, 158 at 170).

- Chief Justice Brennan extra-curially (1995): ‘[T]he Constitution can now be abrogated or amended only by the Australian people in whom, therefore, the ultimate sovereignty of the nation resides.’ (G. Brennan, ‘Speech on Swearing in as Chief Justice’, 21 April 95, from web, <http://www.hcourt.gov.au/swearing.htm>;1).

- Justice Kirby extra-curially (1997): ‘[I]t is impossible to ignore the growing movement which suggests that the ultimate sovereignty reflected in the Australian Constitution, is now to be taken as reposing in the Australian people themselves.’ (M. Kirby, ‘Deakin - Popular Sovereignty and the True Foundation of the Australian Constitution,’ 1997 Deakin Law School Public Oration, 22 August 1997, from web, <http://www.hcourt.au/deakin2.htm>;5.).

- Chief Justice Mason extra-curially (1998): ‘This would be a very strange outcome [that s 128 could not be used to amend the preamble or covering clauses] and all the more so when it is considered that by means of s 128 legal as well as political sovereignty resides in the Australian people.’ (Sir A. Mason, ‘Constitutional Issues relating to the Republic as they affect the States’ (1998) 21 (3) *University of New South Wales Law Review*, 750 at 753).

- Chief Justice Gleeson extra-curially (2000): ‘The sovereignty of our nation lies with the people, both as a matter of legal principle and as a matter of practical reality.’ (M. Gleeson, *The Boyer Lectures 2000* at 6).

- Justice Kirby extra-curially (2004): ‘In the Australian Commonwealth, sovereignty belongs to all of the people who are Australian nationals... In this context, “sovereignty” does not belong to Parliament, whether the Federal Parliament or a State Parliament any more than to the Crown...Only the people conceived as a whole, enjoy the entire ultimate sovereign governmental power.’ (M. Kirby, ‘Deep Lying Rights – A Constitutional Conversation Continues’, The Robin Cooke Lecture 2004, 25 November 2004, from web, <http://www.hcourt.au/speeches/kirbyj.htm>; 12).

**Further, one could delve into academic statements occurring before and after the ‘implied rights cases’:**

- J. Thomson (1985): ‘The Constitution’s *grundnorm* would be the consent and authority of the Australian people... Popular, rather than parliamentary, sovereignty constitutes the people, not governments, as the repository of authority.’ (J. Thomson, ‘The Australian Constitution: Statute, Fundamental Document or Compact?’ (1985) *Law Institute Journal* 59, 1199 at 1199).
- G. Lindell (1986): ‘...the agreement of the people to federate, supported by the role given to them in s 128, as well as their acquiescence in the continued operation of the Constitution as a fundamental law [promotes the view that] the Constitution now enjoys its character as a higher law because of the will and authority of the people.’ (G. Lindell, ‘Why is Australia’s Constitution Binding?’, (1986) 16 *Federal Law Review*, 29 at 37).
- Constitutional Commission (1988): ‘As [the British] Parliament no longer has any authority in Australia, the legal basis of the Constitution no longer rests on any paramount rule of obedience to that institution. The legal theory that sustains the Constitution today is its acceptance by the Australian people as their framework of government.’ (*First Report of the Constitutional Commission* 1988, Volume 1 at 107).
- M. Stokes (1990): ‘For the purposes of th[is] article... I have confined myself to considering the people [and not the Imperial Parliament] as the source of constitutional authority...’ (M. Stokes, ‘Is the Constitution a Social Contract?’ (1990) 12 *Adelaide Law Review*, 249 at 250).
- Professor Leslie Zines (1991): ‘The basic constitutional instruments *were* law because they were enacted by a superior law-maker. They are *now* law because they are accepted as fundamental legal rules of [the] system and the basic constitutive documents of [the] community.’ (L. Zines, *Constitutional Change in the Commonwealth* (1991) at 27. See also L. Zines, *The High Court and the Constitution* (1997) at 318).
- B. Galligan (1995): ‘The Australian Constitution is republican because it is entirely the instrument of the Australian people who are sovereign.’ (B. Galligan, *A Federal Republic*, (1995) at 1).
- Professor Paul Finn (as he then was) (1995): ‘Because the people, not the parliament, are sovereign the implication seems necessarily to be that it is beyond the competence of the parliament...to exercise its powers in a way that unduly interferes with such ‘inherent rights’ as the people may have despite or because of their union in our polity.’ (P. Finn, ‘A Sovereign People, A Public Trust’ in P. Finn (ed.) *Essays on Law and Government Vol 1* (1995) at 20-21).
- C. Saunders (1996): ‘Other more dramatic developments [in the Mason Court] in constitutional doctrine were the result of conceptual shifts. The growing acceptance of popular sovereignty as the legal as well as political foundation of the Constitution, made practicable by the consolidation of Australian independence through the Australia Acts and reinforced by Australia’s new perception of itself led to greater emphasis on the individual in the constitutional system. In turn, this contributed directly to the cases in which the High Court drew [an] implied protection for political rights.’ (C. Saunders, ‘The Mason Court in Context’ in C. Saunders, (ed.) *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 2 at 4).

- K. Mason (1996): 'The era of the Mason Court has been notable for its discovery and nurturing of express or implied constitutional rights. A major springboard has been a shift, for some Justices at least, in the judicial perception of the role of "the people" as the ultimate source of governmental authority in Australia.' (K. Mason, 'Citizenship' in C. Saunders, (ed.) *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 35 at 36).
- Professor George Winterton (1998): 'As the reasoning of Mason CJ [in *ACTV* 1992] and McHugh J [in *McGinty* 1996] has demonstrated, orthodox methods of constitutional interpretation are not incompatible with recognition that the Constitution is founded upon the ultimate sovereignty of the people.' (G. Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 (1) *Federal Law Review* 1 at 13).
- P. Loftus (1999): The Court in *Lange* 'asserts and holds as [a] truth the realignment of sovereignty, political and legal, in the people of Australia.' (P. Loftus, 'Proportionality, Australian Constitutionalism and Governmental Theory- Changing the Grundnorm', (1999) 3 *Southern Cross University Law Review*, 30 at 74) Loftus also emphatically supports the views of McHugh J in *McGinty* at 230 and 237. (81)
- A. Fraser (2001): 'Chief Justice Gleeson has expressly rejected the operation of British parliamentary supremacy, saying that 'the sovereignty of our nation lies with the people, both as a matter of legal principle and as a matter of practical reality.' (A. Lynch, 'Comment and Book Review. The High Court – Legitimacy and Change: Review Essay: Haig Patapan, Judging Democracy – The New Politics of The High Court of Australia' (2001) 29 (2), *Federal Law Review* 295 at 303-304).

### ***Reasons for the New Discourse***

It might be useful to early on acknowledge why the High Court and many commentators have, since about the time of the passage of the Australia Acts in 1986, and especially during the 'implied rights cases' from about 1992-1997, felt the necessity to commence this new rights discourse by promoting such concepts as popular sovereignty and individual rights. At least three interrelated contributing factors can be identified:<sup>13</sup>

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<sup>13</sup> Justice Kirby has identified similar reasons for change under the Chief Justiceship of Sir Anthony Mason (1987-1995) such as: the end of appeals to the Privy Council, as brought about by the Australia Acts; a growing sense of independent nationhood for Australia; the introduction of the procedure for special leave to appeal to the High Court; the decline and fall of the declaratory theory of the judicial function in Australia; parliamentary disillusionment; an increased outreach by the Court to the media and community and the growing influence of international law: M. Kirby, 'A.F. Mason – From *Trigwell* to *Teoh*', Sir Anthony Mason Lecture, Melbourne University 6/9/96, from web 17/2/99; <http://www.hcourt.gov.au/mason.htm>.

### ***1. Impoverished individual rights doctrine***

Australia's international position with respect to an individual rights doctrine is perceived by many to be impoverished. As a result, it is clear the High Court is increasingly facing direct calls for parliamentary sovereignty and simple majoritarian democracy to be abandoned (or at least overlaid) in favour of popular sovereignty and individual rights;

### ***2. Withdrawal of the British hegemony***

In the face of a retreating British hegemony, the traditional view of the legal source of the Constitution being the United Kingdom Parliament, is seen as not supporting a popular ideological basis to the Constitution as an expression of the will of the people of Australia;

### ***3. Realism, the Founders and the High Court***

The emergence (or resurgence) of a jurisprudential school of thought known as 'American Realism' which in the hands of some High Court judges has meant a change in constitutional interpretation from more literal methods to progressive methods. This new method is seen as relying on some of the Founders' of the Constitution views (primarily Andrew Inglis Clark) who saw the Constitution as being interpreted as a 'living force'. Whilst it is doubtful the High Court has deliberately adopted American Realism, the move by some judges to progressive methods of interpretation reflects the style of the School which saw law as being constantly in action.

### **1. Impoverished individual rights doctrine**

Possibly the primary reason for the new discourse is that the High Court is acutely aware, as is the present writer, of Australia's international position with respect to what might be perceived as an impoverished individual rights doctrine. This is especially so when Australia's position is contrasted with other progeny of the British Empire such as Canada, New Zealand, the new South Africa, and since 1998 the United Kingdom itself, each of which has an elaborate individual rights regime.<sup>14</sup>

A close study of human rights protection afforded by international law is not within the scope of this thesis.<sup>15</sup> However, it is noted that international norms are playing an increasingly important role in the area of human rights. The present writer has little difficulty with judges invoking international human rights law for the incremental and necessary development of the Australian common law where it is uncertain and ambiguous. What are troublesome are other suggestions. First, there is Sir Robin Cooke's<sup>16</sup> suggestion that in extreme cases, international norms or the common law itself, can be used to strike down formally valid and unambiguous legislation. Secondly, there is Justice Kirby's suggestion that international law can be used to limit legislative

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<sup>14</sup> See Human Rights Act 1998 (UK); The Constitution of the Republic of South Africa 1996 (Chapter 2), Bill of Rights 1990 (NZ) and Charter of Rights and Freedoms 1982 (Can). The United Kingdom was in 1950, one of the first countries to ratify the European Convention on Human Rights (ECHR). However, it wasn't until "the coming into force of the Human Rights Act 1998 on 2 October 2000" that the ECHR was incorporated into domestic law "to allow British citizens direct access to enforceable rights under the Convention in the British courts": J. McEldowney, 'Modernizing Britain: Public Law and Challenges to Parliament', in J. Mackinnon and P. Havemann (eds) *Modernizing Britain: Public Law and Challenges to Parliament*, (2002) at 23.

<sup>15</sup> For further analysis of how international law has come to involve 'issues of how nations treat their own citizens' see G. Williams, *Human Rights under the Australian Constitution* (1999); R. Piotrowicz and S. Kaye, *Human Rights in International and Australian Law* (2000) and M. Flynn, *Human Rights in Australia: Treaties, Statutes and Cases* (2003) amongst other relevant writings.

<sup>16</sup> Formerly of the New Zealand Court of Appeal now Baron Cooke of Thorndon of Wellington, New Zealand, and described by Justice Kirby as "New Zealand's greatest judge": Kirby, above n 5 at 1.

power under the Constitution, thus suggesting that the Constitution affords an array of fundamental rights and protections.

In 1997 Justice Kirby in *Newcrest Mining (WA) Ltd v Commonwealth*<sup>17</sup> suggested that where there is ambiguity in a constitutional head of power “the Court should adopt a meaning which conforms to the principles of universal and fundamental rights rather than an interpretation that would involve a departure from such rights”.<sup>18</sup> However Justice Selway has said that in respect of the influence of international law on the Constitution “the approach of Kirby J is fundamentally opposed by the rest of the court, or at least, they fundamentally oppose it most of the time”.<sup>19</sup> One only has to note the number of solitary dissents by Justice Kirby in the law reports. Justice McHugh has been strident in his opposition to Justice Kirby’s views: “The claim that the Constitution should be read consistently with the rules of international law... must be regarded as heretical”.<sup>20</sup> In any event Justice Kirby’s views on international law as it impinges on the Constitution in cases such as *Newcrest Mining* and *Kartinyeri v The Commonwealth* are given some treatment in this thesis. There is also brief reference to recent cases such as *Al-Kateb v Godwin*, which consider the issue of mandatory detention of unlawful non-citizens, and where Kirby J expands on his views on international law.

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<sup>17</sup> (1997) 190 CLR 513.

<sup>18</sup> *Ibid* at 655-657. See also *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-418, per Kirby J.

<sup>19</sup> Selway, above n 9 at 242. Selway’s comments reflect a court consisting of Gleeson CJ, McHugh, Gaudron, Gummow, Hayne and Callinan JJ before the retirement of Gaudron J. George Williams has said “Kirby J is the only current judge of the High Court to have made general reference to international norms”: G. Williams, ‘Globalisation of the Constitution- The Impact of International Norms’ in R. French, G. Lindell and C. Saunders (eds) *Reflections on the Australian Constitution* (2003) 192 at 200.

<sup>20</sup> *Al-Kateb v Godwin* (2004) 208 ALR 124 at 140.

In 2004, in *Al-Kateb v Godwin*, Justice McHugh considered the question of a judicial implication of a bill of rights and “joined the intellectual battle”<sup>21</sup>:

It is an enduring – and many would say just – criticism of Australia that it is now one of the few countries in the Western world that does not have a bill of rights. But desirable as a bill of rights may be, it is not to be inserted into our Constitution by judicial decisions drawing on international instruments that are not even part of the law of this country. It would be absurd to suggest that the meaning of a grant of power in s 51 of the Constitution can be elucidated by the enactments of the parliament. Yet those who propose that the Constitution should be read so as to conform with the rules of international law are forced to argue that rules contained in treaties made by the executive government are relevant in interpreting the Constitution. It is hard to accept, for example, that the meaning of the trade and commerce power can be affected by the Australian Government entering into multilateral trade agreements. It is even more difficult to accept that the Constitution’s meaning is affected by rules created by the agreements and practices of other countries.<sup>22</sup>

This thesis has purposely not entered the debate surrounding the worth of a bill of rights for Australia, suffice to say that bills of rights should be assessed for their ‘effective worth’. If they do empirically provide for a more effective enjoyment of individual liberty, Australia’s Parliaments should seriously consider promulgating a bill of rights.<sup>23</sup> If they don’t empirically (discarding any philosophical view) provide for a more effective enjoyment of individual liberty, why adopt them? Justice Toohey admits:

It cannot be said that individual liberties are as well *protected* in Australia as in those jurisdictions which have express constitutional guarantees of such liberties... [But] that is not to say that liberties are not *enjoyed* in Australia to a greater extent than elsewhere...<sup>24</sup> (emphases in original)

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<sup>21</sup> Kirby, above n 5 at 11.

<sup>22</sup> *Al-Kateb v Godwin* (2004) 208 ALR 124 at 144.

<sup>23</sup> See the Human Rights Act 2004 (A.C.T.). See arguments noted for and against a bill of rights in Harris, above n 4 at 7-74. See also Legal, Constitutional and Administrative Review Committee, ‘The Preservation and Enhancement of Individuals’ Rights and Freedoms: Should Queensland Adopt a Bill of Rights?’ (1997) Issues Paper No. 3.

<sup>24</sup> J. Toohey, ‘A Government of Laws, and Not of Men’ (1993) 4 (3) *Public Law Review* 158 at 163.

The lack of a charter or bill of rights in Australia<sup>25</sup> should not be the impetus for the High Court to fill the void. Such concerns are, according to my standpoint, better left to a parliament, although not necessarily with unlimited legislative power. In Australia, the strong respect for the democratic process itself ensures this. Even a century later, the words of Bryce still ring true: in our struggle for a fuller freedom, we should endeavour to “make Parliament a more truly popular and representative body and not restrict its authority”.<sup>26</sup> Even Justice Kirby has said that “Under the Australian Constitution, it is not necessary to depend on judges to prevent, or cure, all injustices... At least in theory, it is open to the electors to do so”<sup>27</sup>

## ***2. Withdrawal of the British hegemony***

As Hutley has noted: “Australia obtained the advantages of independence without having to fight for it. But winning without having a fight carries the disadvantage of an ideological neutral legal system”.<sup>28</sup> In respect of the protection of rights, the Founders of the Australian Constitution explicitly rejected a bill of rights, so as this rejection does reflect an ideological position, perhaps Hutley’s view is a little too simplistic. However, it is clear that in the face of a retreating British hegemony, proponents of popular sovereignty wish to imbue the Australian Constitution with a new form of ideology to search for an autochthonous (or home-grown) Constitution. The traditional view of the legal source of the Constitution being the United Kingdom Parliament, it is

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<sup>25</sup> The vote for a bill of rights was lost 19 votes to 23 in the 1890’s Constitutional Convention. The proposals for incorporation of a schedule of rights into the Commonwealth Constitution, when put to the people in referendums in 1942 and 1988, were rejected: F. McGrath, *The Framers of the Australian Constitution: Their Intentions* (2003) at 2. Attempts at enacting non-constitutional Commonwealth statutory bills of rights were unsuccessful in 1973, 1984 and 1985.

<sup>26</sup> J. Bryce, *Studies in History and Jurisprudence* Vol II (1901) at 502-503. See McEldowney, above n 14 at 103-107 where Professor McEldowney notes some recommendations of the Hansard Society Commission on Parliamentary Scrutiny: *The Challenge for Parliament: Making Government Accountable*, 2001, with one of the recommendations being ‘Parliament must communicate more effectively with the public’.

<sup>27</sup> *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501 at 515.

<sup>28</sup> F. Hutley, ‘The Legal Traditions of Australia as Contrasted with Those of the United States’, (1981) *Australian Law Journal* 55 at 65.

said, cannot support a popular ideological basis to the Constitution and emphasise individual rights.

This thesis considers that this new view can, in large part, be traced back to a seminal article written by Geoff Lindell in 1986 which has been cited and referred to by judges in the ‘implied rights cases’ and also academics who have entered the discourse. Most notably, Mason CJ in 1992 in *Australian Capital Television Pty Ltd v The Commonwealth* stated “The Australia Act 1986 (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people” then cited Lindell immediately in a footnote.<sup>29</sup> Lindell had stated:

...the agreement of the people to federate, supported by the role given to them in s 128, as well as their acquiescence in the continued operation of the Constitution as a fundamental law [promotes the view that] the Constitution now enjoys its character as a higher law because of the will and authority of the people.<sup>30</sup>

Although, note that in 1998 Lindell was to suggest that his 1986 explanation may be an *additional* way, (not necessarily *alternative* way - in a *grundnorm* sense), of explaining the reason for the legally binding and fundamental character of the Constitution.<sup>31</sup> A point not always heeded by proponents of popular sovereignty who seek to rely on his explanation.

### ***3. Realism, the Founders and the High Court***

Until recent times the use by the High Court of the debates in the Australasian Federation Conference of 1890 and the Australasian Federal Conventions of 1891 and 1897-8, which led to

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<sup>29</sup> ACTV (1992) 177 CLR 106 at 138. See also McHugh J in *Ridgway v The Queen* (1995) 184 CLR 19 at 91 citing Mason CJ in ACTV and McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140 at 230 citing Mason CJ in ACTV.

<sup>30</sup> G. Lindell, ‘Why is Australia’s Constitution Binding?’, (1986) 16 *Federal Law Review*, 29 at 37.

<sup>31</sup> G. Lindell, ‘Expansion or Contraction? Some Reflections about the recent Judicial Developments on Representative Democracy’ (1998) 20 *Adelaide Law Review* 111 at 144.

the framing of the Australian Constitution in 1900, has been limited. However, as McGrath has noted: “A major change in the attitude of the High Court to the use of the Convention Debates occurred with the decision of *Cole v Whitfield* in 1988”.<sup>32</sup> Not only has the new individual rights discourse seen a resurgence of reliance on the Convention Debates but the views of the Founders are gaining more prominence. In particular, Andrew Inglis Clark’s ‘living force’ formula of constitutional interpretation has made a remarkable impact in the rights discourse. Justice Kirby has said:

In my reasoning, I have left no doubt as to where I stand. I stand with A I Clark, Windeyer, Murphy and Deane. I stand with the proposition that the Australian Constitution is a living document whose meaning must necessarily vary with the ages.<sup>33</sup>

Thus Clark’s doctrine of popular sovereignty neatly dovetails with Lindell’s *alternative* explanation and the search for a new legal basis of the Constitution in place of the Imperial Parliament. Relying on Clark, Justice Kirby extols progressivism and rejects originalism. This thesis will show that other Justices in the ‘implied rights cases’ such as Mason CJ and McHugh, Toohey JJ and in particular Deane J have also been close to accepting progressivism and rejecting the traditional theories such as literalism, originalism and intentionalism.<sup>34</sup>

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<sup>32</sup> (1988) 165 CLR 360. McGrath, above n 25 at 1-4.

<sup>33</sup> M. Kirby, ‘Andrew Inglis Clark and the High Court of Australia’ in R. Ely (ed.) *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 378 at 385 and 388. See also Kirby J in *Eastman v The Queen* (2000) 203 CLR 1 at 79-80.

<sup>34</sup> See Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138, McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140 at 230-237 and McHugh J in *Commonwealth v Mewett* (1997) 191 CLR 471 in oral argument. See also Deane and Toohey JJ in *Leeth v Commonwealth* (1992) 174 CLR 455 and Toohey J in *Kruger* (1997) 190 CLR 1 and their preoccupation with equality before the law. Particularly Deane and Toohey JJ in *Leeth* where their equality before the law doctrine seemed to be derived from some undecided moral standard founded on the nature of humanity.

The link that Clark provides to American Legal Realism (and especially the work of Oliver Wendall Holmes Jr)<sup>35</sup> has often been noted.<sup>36</sup> It is also clear that many of the exemplars as noted in Table 1 in this chapter as proponents of popular sovereignty are reflecting an approach akin to the American Realists. Indeed in examining this whole discourse one is reminded of parallels with previous debates between the perspectives of Analytical Positivism and Realism (and to a degree natural law).<sup>37</sup> The present writer stands with Bentham, Austin, Mill, Dicey, Hart and even Kelsen<sup>38</sup> and the analytical positivists and utilitarians. Even the Critical Legal School and writers such as Mark Tushnet would assist the present writer. In his book *Taking the Constitution away from the Courts* (2000):

Tushnet challenges hallowed American traditions of judicial review and judicial supremacy. Tushnet vigorously encourages us all to take responsibility for protecting our liberties. Guarding them is not the preserve of judges but a commitment of the citizenry to define itself as ‘We the People of the United States’ through the polling booth and dialogue.<sup>39</sup>

#### ***Six interrelated concepts arising in the ‘implied rights cases’***

Whilst since the passage of the Australia Acts, there has been a move away from the inherently British concept of parliamentary sovereignty in Australian constitutional thought, it does not

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<sup>35</sup> Oliver Wendall Holmes Jr was a judge of the U.S. Supreme Court and a noted exponent of American Realism, by which he “provided the crucial link between the Realists and pragmatic philosophy or sociological jurisprudence... Sociological jurisprudence had lost its initiative and rather petered out after 1918”: A. Hunt, *The Sociological Movement in Law* (1978) at 41.

Williams has said “Clark was a disciple of Oliver Wendall Holmes Jr”: J. Williams, ‘Battery Point Revisited: Andrew Inglis Clark’s Studies in Australian Constitutional Law 1901-1905’ in R. Ely (ed.) *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 355 at 359.

<sup>36</sup> J. Williams, *Ibid.* J. Reynolds, ‘A I Clark’s American Sympathies and his Influence on Australian Federation’, (1958) 32 *Australian Law Journal* at 62.

<sup>37</sup> See the H.L.A. Hart- Lord Devlin debate as a result of the Wolfenden Report published in England in 1958. The Report was concerned with whether the criminal law should concern itself with the enforcement of morals.

<sup>38</sup> Kelsenian theory is seen as from the ‘pure’ school rather than the analytical school, see chapter two. It is pure because it is divorced from all non-legal notions such as sociology, morality, politics, history and the like. Kelsen does not deny the value of these. “All he says is that a theory of law must keep clear of such considerations”: R. Dias, *Jurisprudence* (1970)(3rd ed), at 407.

<sup>39</sup> Book Review from web 9/9/2004: <http://www.powells.com/cgi-bin/biblio?inkey=62-0691070350-3>.

necessarily follow that this should be reflected in any greater role for the High Court in the area of individual rights. Why then is this thesis necessary? In short, to many minds, the ‘implied rights cases’, and much academic commentary surrounding those cases exactly represent this search for a new judicial legitimacy and greater role for the High Court in the area of individual rights. Although the ‘implied rights cases’ ushered in a legitimate form of judicial implication of rights from the text and structure of the Constitution, the cases also represent the emergence of a disturbing discourse suggesting the possible existence of ‘extra-constitutional rights’.

This thesis will deconstruct the elements of this new 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. Justice McHugh noted in 2004:

The doctrine of separation of powers does more than prohibit the parliament and the executive from exercising the judicial power of the Commonwealth. It prohibits the Ch III courts from amending the Constitution under the guise of interpretation.<sup>40</sup>

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.

This thesis notes that six interrelated concepts arose coherently for the first time in the ‘implied rights’ cases. Such concepts, it was said, would justify the new activist individual rights jurisprudence and discourse. These concepts are: a change in the perceived philosophical

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<sup>40</sup> *Al-Kateb v Godwin* (2004) 208 ALR 124 at 145.

foundations of the Constitution, popular sovereignty, fundamental rights, autochthony, social contract/ federal compact and legal/ political sovereignty. I have employed these concepts in this thesis to understand to the debate. This thesis depends upon a shared understanding of these concepts and their inter-relationship. Moreover, understanding these concepts provides the conceptual framework to understand the ‘implied rights’ discourse. These concepts will be revealed as incorrect in legal reasoning and/or historical fact as they have been applied by their proponents to Australia’s current constitutional arrangements. As such, an individual rights doctrine cannot (and should not) be maintained on flawed concepts and reasoning.

The six interrelated concepts are:

***1. Philosophical foundations and constitutional interpretation***

First, numerous Justices, such as Kirby and Deane JJ began looking back to the writings of Founders such as Inglis Clark to discern an alternative understanding of what philosophical foundations underpinned the Constitution and how the Constitution should be interpreted. A bottom up philosophical foundation based on natural law concerns about the primacy of the individual as espoused by Clark, rather than a top down foundation based on utilitarian and expansive principles has gained substantial acceptance. This change in understanding also dovetailed with Clark’s ‘living force’ formula of constitutional interpretation and doctrine of popular sovereignty. Clark’s ‘living force’ formula of constitutional interpretation has become ‘progressivism’ in the hands of judges such as Kirby and Deane JJ.

***2. Popular Sovereignty***

Secondly, and as a corollary of this change in philosophical understanding, numerous Justices and commentators began pointing to the fact that an un-stated premise of the Australia Acts is that, since s 128 of the Constitution is now the only method of altering the Constitution, and that since its provisions are primarily popular, the people of Australia are now the local legal

source of all constitutional authority, including their own fundamental rights. As such, a theory of popular sovereignty was promulgated.

### ***3. Higher law and fundamental rights***

Thirdly, and as a corollary of the promotion of popular sovereignty, some judges suggested in *obiter* that some rights are so fundamental that they exist outside the constitution or are implied *into* the constitution so fundamentally, that parliament cannot override them. As such, a theory of fundamental rights and/or higher law was promulgated.

### ***4. Autochthony***

Since at least 1986, Australia has had an autochthonous<sup>41</sup> or locally home-grown constitution. This is because “as a fully autonomous independent nation, we must explain our constitutional arrangements [including the rights of the Australian populace] wholly in home-grown terms”,<sup>42</sup> and not in terms of the doctrine of British parliamentary sovereignty, because that parliament can no longer legislate for Australia, including amending the Constitution.

### ***5. Social Contract***

Fifthly, and as a corollary of the autochthony argument, the traditional view (which espoused the United Kingdom Parliament as the legal source of the Constitution) was discarded. Moreover, it was mooted that the nature of the Constitution had changed. If the United Kingdom Parliament is no longer the legal source of constitutional authority, the Constitution

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<sup>41</sup> Defined as a completely home-grown or indigenous Constitution; Greek origin: sprung from the land itself. Autochthony is concerned with how “at some stage, a state must cease to be the offspring and derivative of an Imperial predecessor and exist as a complete and self-contained entity, as a law-constitutive fact itself”: P.A. Joseph, *Constitutional and Administrative Law in New Zealand* (1993) at 398.

<sup>42</sup> A.R. Blackshield, ‘The Implied Freedom of Communication’ in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 232 at 242.

should no longer be viewed as an Imperial Statute but a social contract or some other form of document that promotes rights.

## ***6. Legal and Political Sovereignty***

Many proponents of popular sovereignty and fundamental rights doctrines saw the need to conflate the legal and political sources of constitutional authority. As a result Professor Finn (as he then was) has noted: “Dicey’s two sovereignties appear to be coalescing as they did in the United States more than two centuries ago”.<sup>43</sup> There has also been a tendency to “conflate the idea of sovereignty at International Law and sovereignty under the municipal constitutional system”.<sup>44</sup>

To support the thesis statement of judicial deference to the expressed will of the people through their elected representatives, this thesis provides evidence against all six of the above conceptualisations to reveal them as incorrect in legal reasoning and/or historical fact as they have been applied to Australia’s constitutional arrangements.

In short, I argue that:

### ***1. Philosophical foundations and constitutional interpretation* (Chapters 2 & 3)**

In the process of constitutional interpretation the High Court should show fidelity to the accepted institutional design and normative scheme as devised by the majority of the Founders. Theories of constitutional interpretation such as progressivism do not, in the main, do so and should therefore be discarded.

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<sup>43</sup> P. Finn, ‘A Sovereign People, A Public Trust’, in P. Finn (ed.) *Essays on Law and Government Vol 1* (1995) at 4.

<sup>44</sup> N. Aroney, ‘A Public Choice? Federalism and the Prospects of a Republican Preamble’ (1999) 20 *University of Queensland Law Journal* 262 at 278 at f/n 123.

## **2. Popular Sovereignty** (Chapter 4)

Parliamentary supremacy remains a major principle of Australian constitutional law and hence popular sovereignty has only a limited (and possibly confusing and dangerous) role in Australia's current constitutional arrangements.

## **3. Higher law and fundamental rights** (Chapters 5 and 6)

The promulgation and enforcement of rights chosen by the judiciary, against a democratically elected parliament, should be seen as a “massive transfer [appropriation] of political power from parliaments to judges”<sup>45</sup> and more disturbingly be seen as extra-constitutional, and a dangerous course indeed.

## **4. Autochthony** (Chapters 7 and 8)

The Constitution was not autochthonous in 1901 and is still presently not formally autochthonous, despite the passage of the Australia Acts in 1986. Our Constitution is not a locally home-grown constitution. Formally, Australia's constitution is still part of an Imperial Statute; the Constitution Act. That Act, even after the passage of the Australia Acts, applies in Australia by paramount force.

## **5. Social Contract** (Chapters 9 and 10)

No matter what the position of the *political* source/basis of the Constitution, popular sovereignty is not the *legal* source/basis of the Constitution. A change in the traditional legal source/basis of the Constitution from the United Kingdom Parliament has therefore not occurred. As such, the Constitution should still be viewed as an Imperial Statute and not a social contract or some other form of document promoting rights.

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<sup>45</sup> J. Goldsworthy, *The Sovereignty of Parliament* (1999) at 3.

## **6. Legal and Political Sovereignty (Chapters 9 and 10)**

This thesis argues for the distinction between the legal and political sources of constitutional authority to be carefully and clearly maintained. Not merely for conceptual tidiness but for pragmatic reasons relating to the integrity of the constitutional order under the separation of powers and the rule of law.

A more detailed working out of these arguments is as follows:

### **1. The Founders envisaged a philosophical foundation based on utilitarianism not natural law**

The fact that Justices Deane and Kirby elevate Clark to the “primary architect of our Constitution”<sup>46</sup> causes me concern. Although it is accepted that Clark drafted around eighty percent of the Constitution, his views clearly did not prevail on some important issues. Clark’s views about republicanism, American-style separation of powers, a bill of rights, progressive constitutional interpretation and American jurisprudence in general, were all rejected by the other Founders who favoured the Westminster tradition. As Lynch has noted whilst commenting on Haig Patapan’s book *Judging Democracy- The New Politics of the High Court of Australia*:

The very limited number and nature of the express rights contained in the Constitution reflect the commitment of the drafters to the traditions of English constitutionalism and their faith in the wisdom of Parliament. The republicanism of Andrew Inglis Clark found little favour with most of his contemporaries at the Constitutional Conventions of the 1890’s.<sup>47</sup>

Moreover, Justice Toohey has noted:

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<sup>46</sup> Kirby, above n 32 at 380-381 citing Deane J in *Theophanous v Herald and Weekly Times Limited* (1994) 182 CLR 102 at 172

<sup>47</sup> A. Lynch, ‘Comment and Book Review. The High Court – Legitimacy and Change: Review Essay: Haig Patapan, Judging Democracy – The New Politics of The High Court of Australia’, (2001) 29 (2) *Federal Law Review*, 295 at 309. Also citing historian Helen Irving, *To Constitute a Nation* (1998) at 69-72.

In the United Kingdom, Parliament had been the liberating agent of monarchical despotism, so that it was perceived as the guardian of liberty... In the United States, by contrast, the American colonists had been galvanised by what they considered to be the abuse of plenary power by the United Kingdom Parliament.<sup>48</sup>

In 1904 Barton J said that: "Individual opinions are not material except to show the reasoning upon which the Convention formed certain decisions. The opinion of one member could not be a guide as to the opinion of the whole".<sup>49</sup> As such, the fact that Clark's opinions can be shown to be at odds with the majority of the Founders on many issues, especially the protection of rights and constitutional interpretation, calls into question the practice of relying on minority views.

## ***2. Popular Sovereignty has only a limited role in the Constitution and Constitutional Interpretation***

Justice Selway has said: "Whether or not it was strictly necessary for the court to identify the 'sovereignty of the people' as the source of the authority of the Constitution, it has nevertheless done so".<sup>50</sup> This thesis argues that, despite the passage of the Australia Acts, popular sovereignty has a limited and possibly unhelpful place in Australia's current constitutional arrangements. That is, the people already have an important role ascribed to them in section 128 of the Constitution, (and other sections, notably sections 7 and 24) but they cannot be the Law-Giver.<sup>51</sup> It is the

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<sup>48</sup> Toohey, above n 24 at 164.

<sup>49</sup> *The Municipality of Sydney v The Commonwealth* (1904) 1 CLR 208, noted by McGrath, above n 24 at 1.

<sup>50</sup> Selway, above n 9 at 236.

<sup>51</sup> The Law-Giver was a concept used by Jean Jacques Rousseau and adapted valuably to Australian conditions by Professor Atkinson in 1993 in *The Muddle-Headed Republic*. The great strength of a Law-Giver is that it is apolitical and impartial and as such is "the hidden force sustaining peace, order and good government". As Justice French has said: "Popular sovereignty is limited to the choice of representatives and the approval or disapproval of proposed alterations to the Constitution put to it by its representatives": R. French, 'The Constitution and the People' in R. French, G. Lindell and C. Saunders (eds) *Reflections of the Australian Constitution* (2003) 60 at 73.

Crown that acts as “a very real constraint on the behaviour of our elected political executive”.<sup>52</sup>

Embracing popular sovereignty does not mean that the High Court now has a new popularist legitimacy in discerning principles related to the legal basis or source of the Constitution and in finding rights in the democratic constitutional system of Australia.

Worse still, as chapter three discusses, to jurisprudentially and theoretically rely on such an ambiguous concept as popular sovereignty may bring about confusion in constitutional interpretation. As Justice Selway has said: “The important question flowing from this change in the source of the authority of the Constitution is whether it has had any effect upon its interpretation. Obviously it could”.<sup>53</sup>

Moreover, I argue that popular sovereignty is, in terms of Australia’s current constitutional arrangements, a nebulous and ahistorical concept and cannot stand at the apex of our current constitutional arrangements. As Lynch has said: “It is quite clear that a simplistic portrayal of the federation process as an exercise in popular sovereignty involves a degree of historical revisionism”.<sup>54</sup> It is noted however, that many proponents and sponsors of popular sovereignty are not deterred by mere history (constitutional or otherwise) and consequently “admit that the paradigm... is not justified by history, but argue that this dissonance is irrelevant ” in pragmatic terms.<sup>55</sup>

My argument against this likewise rests in a practical concern for the institutional design and normative scheme of the constitutional order as provided for by the Founders of the Constitution.

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<sup>52</sup> Noted by The Western Australian Constitutional Committee, *The Report of the Western Australian Constitutional Committee*, at 64.

<sup>53</sup> Selway, above n 9 at 236.

<sup>54</sup> Lynch, above n 47 at 304.

<sup>55</sup> H. Wright, ‘Sovereignty of the People – The New Constitutional *Grundnorm*?’ (1998) 26 *Federal Law Review* 165 at 184.

In such an order popular sovereignty had a limited role as a ‘We, The People...’ style constitution was not enacted. Moreover, even if parliamentary supremacy and the sovereign state in general, are now qualified by reference to international and global forces, so is the doctrine of popular sovereignty.

### ***3. Australia does not have a fundamental law/rights doctrine***

My argument is that, it would be a breach of the doctrines of judicial deference and the separation of powers for the High Court to arrogate to itself a jurisdiction to enunciate rights going beyond those which are essential for the proper interpretation of the text and structure of the Constitution. Indeed, “if the courts asserted an extra-constitutional jurisdiction to review the manner of legislative power, there would be no logical limit to the grounds on which legislation might be brought down”. <sup>56</sup> Similarly, International law should not be seen as a panacea to all of Australia’s shortcomings in relation to a lack of a rights based regime. It does not provide judges with a broad mandate to enforce international obligations.

### ***4. Australia does not formally have an autochthonous constitution***

Whether the evolutionary achievement of Australia’s autonomy (culminating in 1986) now means that both the political *and legal* sources of Australian constitutional authority now lie in some concept of popular sovereignty (as mooted by some Justices of the High Court in the ‘implied rights cases’), is a next step. This thesis questions the necessity for the judiciary alone to take this next step. As noted in chapters seven and eight, Australians do not have to explain their autonomous arrangements *wholly* in home-grown terms. It is perfectly logical that a former dominion but now autonomous nation such as Australia, can explain such arrangements by the “gradual and, to a degree, imperceptible” <sup>57</sup> process of the withdrawal of the British hegemony,

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<sup>56</sup> Justice Brennan in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 44.

<sup>57</sup> *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 183 per Barwick CJ.

but still within the British legal framework. To say that Australia is an independent sovereign nation does not imply that the Australian people are the sovereign. The Crown-in-Parliament is the sovereign, thus embracing the people through the parliament.

***5. The Constitution should still be viewed as an Imperial Statute and not a social contract or some other form of document supportive of rights, other than those implied from the text and structure of the Constitution.***

This is because Australia's constitutional arrangements are still legally derived from, but not subordinate to, the United Kingdom Parliament. It does not matter that the Imperial Parliament lacks power to make new legislation for Australia. It provides authority by derivation not subordination. It is an error of many of the sponsors of popular sovereignty to assert that a body which lacks authority to legislate in the present cannot provide authority for legislation made in the past.

Formally, Australia's constitution is still part of an Imperial Statute; the Constitution Act. That Act, even after the passage of the Australia Acts in 1986, applies in Australia by paramount force. It is clear that existing Imperial Acts applicable to Australia in 1986, continue in force after 1986 until amended or repealed by valid Australian legislation. This applies particularly to the Constitution Act, and the Constitution it incorporates.

***6. The distinction between legal and political sources of constitutional authority should be clearly maintained***

Throughout this thesis the present writer argues against those who promote the idea that there is little point in distinguishing between the legal and political sources of constitutional authority, and legal and political norms in general. In this sense the present writer could be considered a disciple of Dicey and the (until recently) orthodox view. However, there are good pragmatic

reasons. For as recently demonstrated by increasing numbers of Australia's near Pacific and Asian neighbours, the rule of law is a precious but too often fragile construct. Australia is indeed fortunate to have seen a greater amount of this (arguably) most important of constitutional values during its century of evolution from former dominion to sovereign state.

However, to now say there is no such distinction between legal and political sources of constitutional authority may be harmful for discerning and upholding the rule of law should Australia ever find itself in a constitutionally unstable or revolutionary situation, or even more certainly a situation where Australia's monarchical constitutional arrangements were formally sought to be replaced with republican arrangements. As such, this thesis has sought to avoid criticism that many of the concepts espoused are merely a rigid recitation of orthodoxy for its own sake. It will be shown there are useful pragmatic reasons in both legal and constitutional principle and practice for maintaining the normative dichotomy between the legal and the political.

It is conceded that some of what is discussed in each chapter is drawn from *obiter dicta* in the cases considered rather than a strict consideration of each *ratio decidendi*. This has been necessary. As Justice Heydon has noted, the judicial activism evident from the Mason court in the 'implied rights cases' has had undesirable consequences for the rule of law. Some of the more notable consequences have been incongruity, uncertainty, lack of clarity, lack of decisiveness, inconsistency and indeterminate justifications.<sup>58</sup> Further, his Honour notes:

there can be total chaos within, and total contradiction between, the reasoning of each of the judges favouring the majority orders. The case decided by the making of orders which are supported by chaotic or contradictory reasoning is not an authority – it lacks a *ratio decidendi* – but the *obiter dicta* of particular judges may have considerable influence. A

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<sup>58</sup> D. Heydon, 'Judicial Activism and the Death of the Rule of Law', Speech delivered to the Quadrant Dinner in October 2003, (2003) *Quadrant* at 17-22. In December 2003, Justice Heydon was appointed to the High Court.

radical measure of instability can arise by the repetition of discordant opinions in case after case.<sup>59</sup>

Following is an overview of the chapters:

### **Chapter One: Introduction**

This chapter sets out the thesis statement and identifies the scope of the research and the issues to be discussed. It notes this thesis depends upon a shared understanding of the six concepts that arose in the ‘implied rights cases’ and their inter-relationship. Understanding these concepts provides the conceptual framework to understand the ‘implied rights’ discourse. The chapter then sets out a narrative outline of the methods used in each chapter to dismantle the elements of the new discourse said to support the discarding of parliamentary supremacy.

### **Chapter Two: Philosophical Foundations**

It is argued the Australian Constitution was established on utilitarian rather than natural law doctrines, utilitarian because there was no primacy of the individual. To this one could add the Constitution was established on positivist philosophical foundations. Positivist because laws were viewed in the domestic paradigm and not the international paradigm. Parliamentary supremacy was favoured because there was no fear of Parliament in the minds of the Founders and there was a clear faith in responsible government and the democratic process both to express the popular will and to protect individual rights. As such, the emphasis on virtue was reflected in the needs of the community (top down utilitarianism) and not those of the individual (bottom up natural law). This can be contrasted with the United States and is clearly reflected in the differing formulae for making laws. In Australia it is for ‘peace, order and good government’, while in the American Declaration of Independence the search is for ‘life, liberty and the pursuit of happiness’.

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<sup>59</sup> *Ibid* at 19.

This chapter discusses the philosophical foundations and historical context of the Australian Constitution, and the role of the High Court and Parliament as envisaged in the Convention Debates. The chapter also explains the concepts of parliamentary sovereignty/supremacy, responsible government and representative government in the context of the Australian Constitution as they were conceived and have evolved over time. It will be noted that a new activist individual rights jurisprudence based on either a mooted change in the legal basis of the Constitution or the adoption of popular sovereignty, operates to the detriment of judicial deference to parliament.

It cannot be doubted that the High Court's understanding of individual rights presupposes a certain vision of liberalism which it articulates and entrenches by its decisions. A transformation in its jurisprudence has far-reaching consequences for the character of the Australian regime.<sup>60</sup> Although the High Court is gravely concerned with the institutional legitimacy of its role and has taken steps to justify its implied rights jurisprudence in those terms, it has not articulated and justified to the same extent the philosophical foundations of the changes it is implementing.<sup>61</sup>

The chapter argues a contemporary philosophical foundation based on natural law as mooted in the 'implied rights cases' is inconsistent with the nature of the rights the Court is enunciating; that is, residual not absolute. Moreover, such a move would impose a particular restrictive political philosophy (based on the individual) on the Australian polity which is diametrically opposed to the polity's fundamental underpinnings of an expansive political philosophy (based on utilitarian principles) but tempered by federalism.<sup>62</sup>

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<sup>60</sup> H. Patapan, 'Rewriting Australian Liberalism: The High Court's Jurisprudence of Rights' (1996) 31 *Australian Journal of Political Science* at 226.

<sup>61</sup> *Ibid* at 241.

<sup>62</sup> J. Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 (1) *Federal Law Review* 37 at 65.

As Professor Frank Scott has said (in the Canadian context, but equally applicable to Australia) “Ultimately the question narrows down to a choice between a faith in the parliaments or a faith in the courts. History has shown that either may become the enemy of freedom”.<sup>63</sup> As a matter of *logic*, it is as open for the High Court and others to draw the conclusion that it is the best protector of rights, as it is for others to conclude that Parliament is. However, as a matter of Australian historical commitment: “What is beyond all question, is that the Founders opted for Parliament”.<sup>64</sup>

The chapter also notes that in the language of Hans Kelsen, the basic norm of every constitutional order is that those who laid down the first constitution ought to be obeyed, so it is important to determine what the Founders laid down in a philosophical and historical context. The chapter argues that if popular sovereignty is elevated to the basic norm, there is an immediate conflict with parliamentary supremacy (which previously did not exist), and the legal justification for the Australian legal system is imperilled.

### **Chapter Three: Constitutional interpretation**

This chapter argues the method behind the judicial move to popular sovereignty and the consequences of adopting such a doctrine are interrelated. The move was an example of judicial activism in constitutional interpretation under the Mason Court. It could also be argued the primary consequence (probably intended), of adopting a doctrine such as popular sovereignty, is to legitimise judicial activism in constitutional interpretation to promote individual rights-based

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<sup>63</sup> F. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (1977) at 214-215.

<sup>64</sup> G. Craven, ‘The High Court and the Founders; an Unfaithful Servant’, *Papers on Parliament* No. 30, *The Constitution Makers*, Dept of Senate (1997) at 75. See also Sir Anthony Mason, ‘The Australian Constitution in Retrospect and Prospect’ in R. French, G. Lindell and C. Saunders (eds) *Reflections on the Australian Constitution* (2003) 7 at 9: “The absence of rights [in the Constitution] is entirely consistent with the prevailing sentiments of the Convention delegates [that] the protection of citizen’s rights were best left to Parliament and the common law. This was not unexpected. The influence of Dicey at that time was considerable in Australia”.

jurisprudence as against Diceyan parliamentary sovereignty principles. As Patapan has said: “The judgments [in the ‘implied rights cases’] reveal a greater acceptance by the majority of an implied rights jurisprudence that relies on the sovereignty of the people as a justification for a more extensive judicial activism”.<sup>65</sup>

Also discussed is the use of legal history (especially the Convention Debates) in constitutional interpretation. It is noted that the use of legal history by courts should generally be welcomed, provided such courts focus their efforts on thorough and faithful historical analyses. Many have noted the ‘implied rights cases’ produced inconsistent and often incredulous individual readings of the historical record which were nothing short of astounding. To be sure, some readings of the historical record appear demonstrably mistaken; eg. ‘The Australian Constitution has been based upon popular sovereignty since federation’.<sup>66</sup>

It could be asked whether this imprecision might lead to incongruous results? As such, the chapter also discusses the possible impact of the location of the sovereign on theories of constitutional interpretation. The chapter argues that if some members of the High Court now consider the legal source of constitutional authority to be the people of Australia, one would have to question whether in constitutional interpretation, this might result in the discerning of ‘extra-constitutional’ fundamental rights for the Australian populace? This is because “the source of authority of the Constitution has significant consequences for the way in which the powers of government are exercised and interpreted”.<sup>67</sup>

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<sup>65</sup> Patapan, above n 60 at 230.

<sup>66</sup> See Murphy J in *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 383.

<sup>67</sup> M. Moshinsky, ‘Re-enacting the Constitution in an Australian Act’ (1989) 18 *Federal Law Review* 134 at 135.

The present writer submits that a theory of constitutional interpretation based on a faithful historical commitment is to be generally preferred, and theories such as progressivism that do not rely on such a commitment, are to be, in the main, discarded. This chapter concludes by constructing an argument for the reinvigoration of ‘text or structure implied rights’ jurisprudence by the High Court. However, it does so by laying down careful principles which should accompany such jurisprudence. Paramount is the need to exorcise popular sovereignty from such a process.

#### **Chapter Four: Sovereignty as a contested concept**

This chapter discusses the concept of sovereignty and how it has been used by those who would ascribe such a notion to the Australian people in place of the parliament. It is noted that sovereignty is an inherently difficult and ambiguous concept and the debate has suffered much by an often cursory treatment of its true meaning, or even meanings. The chapter distinguishes between two known facets of sovereignty, those being external and internal sovereignty, but notes that many who use the concept are not so inclined. External sovereignty is concerned with the notion of Australia taking its place within the international family of nations. Internal sovereignty is concerned with what is the legal (not political) sovereign body within Australian municipal law, for example the parliament or the people. The chapter concludes that these two aspects of sovereignty, external and internal, appear to be coalescing through a want of imprecision.

There has been no unanimity of definition of the term ‘popular sovereignty’ from its judicial and academic proponents. Moreover, depending on which definition of ‘internal sovereignty’ one accepts, this may reflect on who one accepts to be the sovereign. In respect of Australia, ‘internal sovereignty’ has a variety of definitions, for instance:

- the supreme law-making body, or
- the body whose ‘will’ is ultimately obeyed and which is therefore sure ultimately to prevail on all subjects,
- the body empowered to alter all the constitutional arrangements of Australia, that is, the Constitution Act as well as the Constitution,
- *the body empowered to amend the ultimate law, that is, the Constitution,*
- *the source from which the written constitution derives its authority.*

Many proponents of popular sovereignty see the last two concepts as reposing in the Australian people. The present writer moots that such assertions are consistent with the notion of popular sovereignty as it arose in Whig ideology in the late seventeenth and eighteenth centuries. As such popular sovereignty embodies a consensual relationship between the government and the governed where all power (political *and* legal) emanates from the people, and the government either holds such power as a trustee or because of a social contract. In such a model, the apolitical Law-Giver is the State (in the name of the people) and the political and legal sovereigns and sources of constitutional authority are all fused in the people. This is the concept of popular sovereignty upon which this thesis proceeds.

This model contrasts with what the present writer moots as the model underpinning Australia’s constitutional monarchy where the apolitical Law-Giver is the Crown. The legal sovereign is the Crown-in-Parliament while the political sovereign is the electorate. The legal source of authority of the Constitution is the Imperial Parliament while the political source of authority of the Constitution is either the people (electorate) or the federal compact.

## **Chapter Five: Deep Rights as limitations on legislative power**

After the high water mark of the doctrine of parliamentary sovereignty has seemingly receded, there are those who seek to impose checks on the modern descendants of this once sovereign body. Many proponents of popular sovereignty believe defences of individual rights and liberties should be constructed (by the courts) against the people themselves; that is, Parliament. As a result, in the last decade Australian jurists and judges alike have awoken from an ‘unthinking acceptance of Diceyan theory’; after all, Dicey is not fashionable these days.

This chapter discusses the concept of how a deep or fundamental right might exist outside accepted constitutional arrangements as a limit on legislative power. The chapter discusses the historical and political genesis of the concepts of parliamentary sovereignty and fundamental law in seventeenth-century England. As such, there is reference to such classical expositions as Lord Coke and Blackstone. It then traces how contemporary judges such as Sir Robin Cooke and Justice Kirby have reinvigorated such debates to appeal to a principle higher than parliamentary supremacy (natural law or common law).

The major problem however, for the higher law theory is that many judges do not find unanimity in expressing the source of rights that may act as a limit upon legislative sovereignty. Because of the uncertainty about the scope and effect of fundamental rights, the thesis argues against the notion of extra-constitutional deep or fundamental rights being judicially discovered and protected. Further, the thesis argues that “if the courts asserted a jurisdiction to review the manner of legislative power, there would be no logical limit to the grounds on which legislation might be brought down”.<sup>68</sup>

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<sup>68</sup> Justice Brennan in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 44.

## **Chapter Six: International law and common law limitations on legislative power**

Do the Australian people have rights which derive from a law higher than the Constitution, which can limit parliament's legislative power? We are not concerned about traditional common law rights which can always be abrogated by legislation if the parliament makes its intention unambiguously clear. What some judges have suggested exist, are some rights that are so fundamental that they exist in common law or international law outside the Constitution or can be implied *into* the Constitution so fundamentally, that Parliament cannot override them. For, as gleaned from the writings of many judges, an inherent jurisdiction for the High Court to strike down legislation appears too tantalising a prospect for the Court to ignore.

This chapter also discusses whether ambiguity in the Constitution or legislation will allow for judges to strike down legislation that is not in conformity with international norms and principles of universal and fundamental rights. The chapter also discusses Sir Owen Dixon's claim that the common law is the ultimate constitutional foundation. It is noted others have used such a proposition to say that parliamentary sovereignty is a doctrine of the common law and therefore a law which judges can unmake, to promote precedent over legislation.

Although the common law is a robust vehicle for the protection of some rights, and this is what the courts do well in the context of the incremental development of the common law, "a culture of legal remedies rather than positive rights appeared".<sup>69</sup> Moreover, the common law must fall away in the face of unambiguous legislation. Any strident assertion that it does not fall away displays infidelity to the institutional design of the Founders and means that the checks, balances and principles the Founders envisaged are subverted.

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<sup>69</sup> McEldowney, above n 13 at 24 and 27.

## **Chapter Seven: Autochthony by the Parent**

Chapter Seven considers the notion of an autochthonous constitution for Australia. This concept has attained relevance in current constitutional law because many proponents of popular sovereignty and fundamental rights doctrines now assert that “as a fully autonomous independent nation, we must explain our constitutional arrangements wholly in home-grown terms”,<sup>70</sup> and not in terms of British doctrines, such as parliamentary sovereignty, because that Parliament can no longer legislate for Australia.

Autochthony is a concept that is most frequently discussed with respect to the members of the Commonwealth of Nations and its predecessors, becoming sovereign independent states, whether they remain within the Commonwealth or not. Examples of truly autochthonous constitutions have been held to be of course those that have been proclaimed by revolution, such as the American and the Irish, and those proclaimed in the drive for independence, such as India’s. Other autochthonous constitutions are those enacted by a means not authorised by the existing legal order, or deliberate procedural error, such as New Zealand’s.<sup>71</sup>

It is considered whether there is confusion in Australia between autochthony and autonomy. The whole question of autochthony arises today because Australia’s constitution is still part of an Imperial Statute. Thus when Judges assert that the Constitution should no longer be interpreted as an Imperial Statute, they are asserting the concept of autochthony for the Australian Constitution. As Justice Kirby has noted:

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<sup>70</sup> A.R. Blackshield, ‘The Implied Freedom of Communication’ in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 232 at 242.

<sup>71</sup> Eminent New Zealand scholars F. M. Brookfield and P.A. Joseph have assessed the Constitution Act 1986 (NZ) as having favourable consequences for the autochthony of New Zealand when the Act used a constitutionally unauthorized means to facilitate a legal break.

The notion of a wholly autochthonous constitution, made by the people of Australia at the Convention in Adelaide or elsewhere, would have seemed to most of the Founders, and to the people of Australia at that time, to have been bizarre and illegitimate.<sup>72</sup>

So the position in 1901 was clear as to autochthony, but what about today? It is noted Australia is a fully autonomous sovereign nation. However, it is argued the Constitution Act, even after the passage of the Australia Acts in 1986, applies in Australia by paramount force. It is clear that existing Imperial Acts applicable to Australia in 1986, continue in force after 1986 until amended or repealed by valid Australian legislation. This applies particularly to the Constitution Act, and the Constitution it incorporates.

As such, the constitutional chain of continuity is still available to trace the legal links from the United Kingdom to Australia. As Justice Kirby has said:

Dire warnings were given of the perils that awaited any severance of the chain, whether in the name of autochthonous legitimacy or of facing up to revolutionary reality. In Australia, we missed the first and have happily avoided the second.<sup>73</sup>

This legal and constitutional continuity allows Australians to uphold the validity of the present fundamental legal order, including the Constitution Act (incorporating the Constitution), the Statute of Westminster and the Australia Acts, while at the same time accepting that Australia is a completely independent sovereign nation.<sup>74</sup>

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<sup>72</sup> M. Kirby, 'Deakin - Popular Sovereignty and the True Foundation of the Australian Constitution,' 1997 Deakin Law School Public Oration, 22 August 1997, from web, <http://www.hcourt.au/deakin2.htm>; 4.

<sup>73</sup> M. Kirby, 'The Struggle for Simplicity: Lord Cooke and Fundamental Rights,' Speech Delivered to New Zealand Legal Research Foundation, 4-5 April 1997, from web, <http://www.hcourt.au/cooke.html>; 2.

<sup>74</sup> See also the Canadian Supreme Court decision of *Quebec Secession Reference* [1998] 2 SCR 217 at paras 46 and 47 where the Court cited Canada's independence from the United Kingdom as an example of how a state can become 'fully independent' from another state consistently with the concept of 'legal continuity' and the demands of the 'rule of law': noted by M. Walters,

The chapter also distinguishes between different approaches to the cessation of the authority of the United Kingdom Parliament and concludes that any such action to date by that parliament in respect of Australia's attainment of autochthony, is equivocal, and as a result, the search for autochthony is firmly in the hands of Australians.

### **Chapter Eight: Autochthony by the Offspring: a critique**

This chapter notes that although there are different approaches to the acquisition of autochthony, an approach relying on democratic and peaceful means is to be preferred. The chapter analyses two possible and relatively radical approaches: 1. the repeal of the Constitution Act, or 2. a declaration of popular sovereignty. Either of these approaches might have consequences for the rule of law, and therefore these must also be considered. This chapter argues that if Australia (by democratic means with popular approval) was to repeal the Constitution Act *in toto* or make a declaration of popular sovereignty, (most comfortably accommodated within a move to a republic), autochthony might be achieved. This is because it would no longer be possible to invoke a logically prior legislative power, namely the Imperial Parliament. Further, the legal source of the Constitution would have shifted from Westminster to Australia. Moreover, these approaches could be categorised as legally *revolutionary*.

However, this chapter also analyses a more moderate or *evolutionary* means for the achievement of autochthony based on looser criteria discerned from the works of noted Commonwealth scholar Geoffrey Marshall.<sup>75</sup> In particular, Marshall's criteria for autochthony are applied to Australia in a detailed manner. Peter Hogg has applied the criteria to Canada, and P.A. Joseph and F.M. Brookfield have applied them to New Zealand. To date the Marshall test has not been applied in scholarly writing about Australia. Lastly, this chapter briefly discusses opposing

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<sup>75</sup> 'Nationalism and the Pathology of Legal Systems: Considering the *Quebec Secession Reference* and its Lessons for the United Kingdom', (1999) 62 *Modern Law Review*, 371 at 392.

<sup>75</sup> G. Marshall, *Constitutional Theory* (1971).

juristic approaches as to why the Australian Constitution is binding in an autochthonous sense. It notes that whereas legal and political sources were once thought to be best kept distinct, this appears under threat.

### **Chapter Nine: A change in the legal basis of the Constitution?**

This chapter concerns the fundamental nature of the Australian Constitution and what consequences the High Court's move towards popular sovereignty may have had on its legal basis. It discerns that at the very least, there now appears a "persistent doctrinal confusion over the source of legitimate constitutional authority in Australia".<sup>76</sup> It identifies numerous flawed claims as to why the Imperial Parliament is no longer the legal basis. It also discusses at length the philosophical fiction known as the social contract, and traces its chequered history from the likes of Locke and Hobbes to Rousseau. The chapter critiques the writings of contemporary contractarians who would wish to resurrect the concept to sustain the theory popular sovereignty and rights reserved by the Australian people as against their parliaments.

Popular sovereignty cannot stand at the apex of our current legal system because it is completely repugnant to historical reality. The Australian constitutional system was not founded upon popular sovereignty nor a wholly autochthonous constitution. Hence, in many contemporary minds a republican justification is sought, such as 'the authority for the Australian constitution then and now is its acceptance by the Australian people'.<sup>77</sup>

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<sup>76</sup> A. Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 213 at 215-216 citing Mason CJ in *ACTV* (1992) 177 CLR 106 at 138.

<sup>77</sup> See Murphy J in *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351, Deane J in *Theophanous* (1994) 182 CLR 104 and Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138 and McHugh J in *Ridgway v The Queen* (1995) 184 CLR 19 at 91 citing Mason CJ in *ACTV* and McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140 at 230 citing Mason CJ in *ACTV* and Table 1 in this chapter.

Many suggest that Australia enjoys popular sovereignty of some sort in s 128 of the Constitution. However, the peoples' express role is prescribed and entrenched by the terms of the Constitution, and it is not appropriate to imply any further constitutional role to them. To seek an additional legal role for the people adds nothing to the *legal* validity of the Constitution.

Thus, this chapter argues that in spite of the 'implied rights cases', and in an autochthonous sense, the *legal* source of the Constitution is still the United Kingdom Parliament. This is because Australia's constitutional arrangements are still legally derived from, but not subordinate to, the United Kingdom Parliament. It enacted the Constitution as part of one of its statutes. This British statute, even after 1986, has not ceased to hold its paramount status. The fact that the United Kingdom Parliament lacks authority to legislate in the present for Australia, does not mean that it cannot provide authority for legislation made in the past, that is, the Constitution Act containing the Australian Constitution.

### **Chapter Ten: The political basis of the Constitution: A federal compact**

At this juncture, the thesis considers that there is no national indignity in acknowledging legal continuity. However, this chapter notes that one day Australians might ultimately consider it unsatisfactory and symbolically inappropriate, for the legal source of the Australian Constitution to be derived from an external source (in an autochthonous not autonomous sense). I argue that should the current legal source be discarded (and popular sovereignty is not unequivocally inserted into a new republican constitution), a federal compact between the colonies is a more historically correct interpretation of federation than a social contract giving rise to popular sovereignty. This conclusion is reached by a comparative analysis of the Australian and United States constitutions and their preambles in respect of the notions of colonial unanimity, federalism and nationalism.

At this point, many would point to the wording of the preamble of the Constitution and the agreement of the people of the colonies to unite as a historical source. Whilst the thesis acknowledges that this has some force, it is argued in chapter ten that the *political and historical (not legal)* process that brought the draft Constitution into being, was a federal compact between the colonies, not a contract to which the people were a party. At best, the reference to the people (in contrast to an unequivocal ‘We the people...’ statement) highlights that the Constitution may have mixed political foundations, but only one source from which it derives its legal force; the Imperial Parliament.

It is considered that the Australian constitution is much more federal than national in its character and can therefore be distinguished from the national United States Constitution. Unlike the Australian Constitution, the United States Constitution is based upon a ‘We, the People’ declaration of popular sovereignty and reflects the deliberate discontinuity with the past wrought by the American Revolution and the War of Independence.

Most might have thought that much of the foregoing discussion would only draw interest from very keen surveyors of political philosophy and legal history. However, the ‘implied rights cases’ and the 1999 attempt to reconstitute Australia as a republic only at the Commonwealth level (both of which proceeded without adequate respect for the States’ integral position in the federal compact), has rejuvenated such concerns and thrust them into mainstream constitutional law. In respect of the ‘implied rights cases’, would all the States (especially those without the referendum mechanism) really accept the following proposition: “as a matter of *legal principle* the ultimate sovereignty in this country, federal **and State**, rests on the people of this country”? <sup>78</sup>

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<sup>78</sup> *Levy v The State of Victoria* (1997) 189 CLR 579 at 582.

Thus, any continued judicial alteration of the Constitution (ie. the continued promotion of popular sovereignty) which might be detrimental to the States' interests (or even some) could be extremely divisive and could see rigorous political and legal challenges ensue. Further, proceeding to a republic (or even judicially imbuing a republican ideology in the Commonwealth Constitution), at the expense of federal compact considerations, where the position of the States is seriously undervalued, might force the States to decide whether the compact made by them at federation had been violated and therefore required their intervention.

## **CHAPTER TWO**

### **PHILOSOPHICAL FOUNDATIONS**

#### **INTRODUCTION**

Part A of this chapter discusses the philosophical foundations and historical context of the origins of the Australian Constitution. It argues that the Constitution was founded upon utilitarian and positivist notions and that the Founders clearly embraced the doctrine of parliamentary supremacy. The chapter also discusses the roles of the High Court and Parliament as they were promulgated by the Founders of the Constitution and discusses how these roles have evolved over time. The chapter argues that as a matter of logic, it is as open for the High Court and others to draw the conclusion that the Court is the best protector of rights, as it is for others to conclude that Parliament is. However, as a matter of historical commitment in the context of the Australian Constitution: “What is beyond all question, is that the Founders opted for Parliament”<sup>1</sup> and the doctrine of parliamentary supremacy.

Part B then analyses the discourse relating to an expanded role for the High Court in the ‘implied rights cases’. The chapter explains the concepts of parliamentary supremacy, responsible government, popular sovereignty and representative government in the context of the Australian Constitution as it was conceived by the Founders and as it has evolved over time, especially in the ‘implied rights cases’. Part C discusses the location of Australia’s *grundnorm*. The concept of a basic norm or *grundnorm* was developed by Hans Kelsen as a pre-supposition in juristic thinking. It is the highest norm in any national legal order, and by identifying it, the jurist is able to

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<sup>1</sup> G. Craven, ‘The High Court and the Founders; an Unfaithful Servant’, Papers on Parliament No. 30, The Constitution Makers, Dept of Senate (1997) at 75.

interpret all subsidiary norms as valid, and as a non-contradictory field of meaning.<sup>2</sup> The chapter argues that if popular sovereignty is elevated to the basic norm, there is an immediate conflict with parliamentary supremacy (which previously did not exist), and the legal justification for the Australian legal system is imperiled.

## PART A - THE FOUNDER'S INTENT?

### ***Natural law based on the individual or Utilitarianism based on Institutionalism?***

In 1994 Lindell set the stage well when he asserted that: “Implied rights and restrictions on legislative authority have become the most important and current topic of Australian constitutional law”.<sup>3</sup> In 2005, with Australia still without a bill of rights, this sentiment still holds true. With the expanded use of constitutional implications, there has also been a resurgence of reliance on the 1890’s Convention Debates, and the views of the Founders are gaining more prominence. In particular, Andrew Inglis Clark’s “living force” formula of constitutional interpretation has made a remarkable impact in the ‘implied rights’ discourse. Justice Kirby has said:

In my reasoning, I have left no doubt as to where I stand. I stand with A I Clark, Windeyer, Murphy and Deane. I stand with the proposition that the Australian Constitution is a living document whose meaning must necessarily vary with ages and be ascertained... by those who are trusted by the Constitution itself with its authoritative exposition... It will be observed that Clark’s theory of constitutional interpretation is founded, at its base, in his conception that the people of Australia are the fundamental source of the legitimacy of all legal power...<sup>4</sup>

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<sup>2</sup> H. Kelsen, *The Pure Theory of Law* (1970)(2nd ed).

<sup>3</sup> G. Lindell, ‘Recent Developments in the Judicial Interpretation of the Australian Constitution’ in G. Lindell (ed.) *Future Directions in Australian Constitutional Law* (1994) at 27.

<sup>4</sup> M. Kirby, ‘Andrew Inglis Clark and the High Court of Australia’ in R. Ely (ed.) *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 378 at 385 and 388. See also Kirby J in *Eastman v The Queen* (2000) 203 CLR 1 at 79-80.

The link that Clark provides to the jurisprudential school of thought known as ‘American Legal Realism’ has often been noted.<sup>5</sup> Indeed in examining this whole discourse one is reminded of the parallels between the perspectives of Analytical Positivism and American Realism generally. It is this emergence (or resurgence) of an approach akin to American Realism that has in the hands of some High Court judges, meant a change in constitutional interpretation from more literal methods to progressive methods. Realists have moved from methods that treat the Constitution as an Imperial Statute, thereby drawing very few implications, to methods that mean the Constitution must be continually interpreted as a ‘living force’. Brian Galligan has said that “realist views are becoming dominant among the judiciary”.<sup>6</sup> The previous Chief Justice of the High Court, Sir Anthony Mason has said: “In Australia we have moved away from the declaratory theory and the doctrine of legalism to a species of legal realism”.<sup>7</sup>

However, the fact that Justices Deane and Kirby elevate Clark to the “primary architect of our Constitution”<sup>8</sup> causes me concern. Although it is accepted Clark with Sir Samuel Griffith drafted around eighty percent of the Constitution, on some important issues, Clark’s views clearly did not prevail. His views about republicanism, American-style separation of powers, a bill of rights,

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<sup>5</sup> J. Williams, ‘Battery Point Revisited: Andrew Inglis Clark’s Studies in Australian Constitutional Law, 1901-1905’ in R. Ely (ed.), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth*, (2001) 355 at 359 and J. Reynolds, ‘A I Clark’s American Sympathies and his Influence on Australian Federation’, (1958) 32 *Australian Law Journal* at 62. The American Realists were “especially hostile to the so-called British empirical school derived from Hume, and to which Bentham, Austin and Mill adhered. For while it is true that these thinkers [analytical jurisprudence] were positivist and anti-metaphysical, they were for the ‘realists’, not empirical enough, since they were associated with *a priori* reasoning not based on actual study of the facts...The realists were concerned to emphasise the need to enlarge knowledge empirically, and to relate it to the solution of the practical problems of man in society at the present day”: D. Lloyd, *Introduction to Jurisprudence* (1965, second edition) at 256-257.

<sup>6</sup> B. Galligan, ‘The Australian High Court’s Role in Institutional Maintenance and Development’ (1996) in C. Samford and K. Preston (eds) *Interpreting Constitutions*, 184 at 185.

<sup>7</sup> A. Mason, ‘The Role of the Courts at the Turn of the Century’ (1993) 3 *Journal of Judicial Administration* at 164.

<sup>8</sup> Kirby, above n 4 at 380-381 citing Deane J in *Theophanous v Herald and Weekly Times Limited* (1994) 182 CLR 102 at 172

progressive constitutional interpretation and American jurisprudence in general, were all rejected by a majority of the Founders who favoured the Westminster tradition. At the formation of the Australian Commonwealth the Founders were not striving for republican principles and fundamental rights or autochthonous enactments. More like the Canadian model, the Founders searched for ways to divide the power of governments in a federation under the aegis of the Crown. Canada's model showed how a federal system could be adapted to an Imperial, monarchical and parliamentary system.

It cannot be doubted that the High Court's understanding of individual rights is inspired by a certain vision of liberalism which it articulates and entrenches by its decisions. A transformation in its jurisprudence has far-reaching consequences for the character of the Australian regime.<sup>9</sup> Although the High Court is concerned with the institutional legitimacy of its role and has taken some steps to justify its implied rights jurisprudence in those terms, it has not articulated and justified to the same extent the philosophical foundations of the changes it is implementing.<sup>10</sup> These philosophical foundations should not be confused with the Court's attempt in *Lange*<sup>11</sup> to develop the interpretative methodology underlying the freedom of political communication.<sup>12</sup> Indeed, Justice Heydon has said that the decision in *Lange* "may be a compromise in the sense of an agreement by seven people to do what at different stages all seven had thought was wrong".<sup>13</sup>

This thesis argues that the High Court should show fidelity to the institutional design and normative scheme promulgated by a majority of the Founders. Not out of blind respect for

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<sup>9</sup> H. Patapan, 'Rewriting Australian Liberalism: The High Court's Jurisprudence of Rights' (1996) 31 *Australian Journal of Political Science* at 226.

<sup>10</sup> *Ibid* at 241.

<sup>11</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>12</sup> G. Williams, *Human Rights under the Australian Constitution* (1999) at 241.

<sup>13</sup> D. Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) Jan-Feb 2003 *Quadrant* at 17.

orthodoxy, but because to do otherwise could lead to a dysfunctional constitutional system. First, a philosophical foundation based on natural law or deep rights is inconsistent with the nature of the rights the Court has enunciated (for example in *Lange*), that is the enunciation of residual freedoms not absolute or natural rights. Secondly, a philosophical foundation based on natural law would impose a particular restrictive political philosophy (based on the individual) on the Australian polity<sup>14</sup> which is diametrically opposed to the polity's fundamental underpinnings of utilitarian principles and positivist theories.

The dominance of utilitarianism in the Australian polity has often been forcefully recognized. Collins has said:

[T]he mental universe of Australian politics is essentially Benthamite... [T]he dominant ideology of this society conforms to the essential character of Jeremy Bentham's political philosophy. Three aspects of Bentham's thought are crucial here: his utilitarianism, his legalism, and his positivism... Although a theory of individual interests, utilitarianism rejects the notion of natural rights... In an ideology faithful to Bentham's system, natural rights will be an alien tradition.<sup>15</sup>

Goldsworthy has noted that Australia is "often described as a paradigmatically utilitarian society". Thus, the ideas of Bentham and his disciples has "led to the almost total eclipse of the idea of natural rights in English [and Australian] political thought".<sup>16</sup> The force of such argument has been recognised as recently as July 1999 in the Queensland Constitutional Review

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<sup>14</sup> J. Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 (1) *Federal Law Review* 37 at 65.

<sup>15</sup> H. Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) Winter *Daedalus*, 147 at 148-149. See J. Bentham, *Works* (1843) which contains two of Bentham's most important works, namely *An Introduction to the Principles of Morals and Legislation* and *A Fragment on Government*. The principle of utility is explained at the outset and runs through most of Bentham's work.

<sup>16</sup> J. Goldsworthy, 'The Constitutional Protection of Rights in Australia' in Craven G. (ed.) *Australian Federation Towards the Second Century* (1992) at 153 citing Collins, above n 13. So too "In the tradition of the English utilitarians Dicey rejects any 'abstract' or 'metaphysical' rights. Remedies precede and determine rights, not the contrary. For this reason Dicey rejects the entrenchment of a bill of rights": Patapan ,above n 9 at 226. Even Dworkin had noted that rights are essentially anti-utilitarian and counter-majoritarian: *Taking Rights Seriously* (1977) Chapters 7 and 12.

Commission's *Issues Paper*. However, the Commission notes that "other deviations [from Utilitarian doctrines] may appear, possibly in constitutional law and reform". As such, the Commission notes the growing influence of such works as John Rawl's *A Theory of Justice* (1971) and the growing concern with the possible 'tyranny of the majority'.<sup>17</sup> However, even if the judiciary is conceded an important role of protecting against majoritarian tyranny, there also exist numerous other mechanisms.

Wright has also noted "the Australian Constitution was grounded in theories of utilitarianism rather than those of natural law";<sup>18</sup> utilitarian because there was no primacy of the individual. Very recently Bede Harris comments: "There was... little credit given to the idea that the individual should have a sphere of rights which are immune from override by the majority acting through the agency of Parliament. This again illustrates a failure to focus on the primacy of the citizen...".<sup>19</sup>

To the view that the Australian Constitution was grounded in theories of utilitarianism, one could add the Constitution was established on positivist foundations, assigning sovereignty to the Monarch in Parliament. Positivist because laws were viewed in the domestic paradigm and not the international paradigm. Rights and obligations were institutional and not transcendental or stemming from natural law concerns. Whatever express guarantees are to be found in the Constitution are "essentially scattered and internally limited".<sup>20</sup> Thus, as noted by Brennan CJ in *Kruger v The Commonwealth*<sup>21</sup> "the leading object of the Constitution was the creation of the

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<sup>17</sup> Queensland Constitutional Review Commission, *Issues Paper*, 1/5/99, from web, <http://www.constitution.qld.gov.au/ref.htm>; at 304 and 307.

<sup>18</sup> H. Wright, 'Sovereignty of the People - The New Constitutional *Grundnorm*?' (1998) 26 (1) *Federal Law Review* 165 at 190.

<sup>19</sup> B. Harris, *A New Constitution for Australia*, (2002) at 4.

<sup>20</sup> Craven, above n 1 at 75.

<sup>21</sup> (1997) 190 CLR 1 at 42.

Federation”, thus leaving the State Parliaments with plenary power to legislate for the rights of their citizens if that was felt necessary. This is confirmed by Alfred Deakin:

Canada is a centralized Federation. Any proposals that have been supported in Australia have been made with a view to preserve the State rights of the separate colonies... Instead of as in Canada, bestowing unlimited power on the federal body and limiting the States, limited power only should be given to the central Government in Australia and unlimited power outside of it be left to the States.<sup>22</sup>

In Australia, parliamentary supremacy was favoured because there was no fear of Parliament in the minds of the majority of the Founders and there was a clear faith in responsible government and the democratic process both to express the popular will and to protect individual rights. See the judgment of Mason CJ in *ACTV*: “The framers of our constitution accepted, in accordance with prevailing English thinking, the citizen’s rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy.”<sup>23</sup> Justice Dawson of the High Court captures this well in *ACTV*, where his Honour asserts that the Australian Founders’ model was “not the United States Constitution, but the British Parliament”,<sup>24</sup> and in *Cunliffe v Commonwealth* where his Honour notes the Founders exhibited “none of the distrust of the will of the majority which is a feature of American political life”,<sup>25</sup> and in oral argument in *Levy v State of Victoria*: “[The Australian people] put their faith in the democratic process, not in the Court”.<sup>26</sup>

Why this rejection of a rights based approach? Dorothy Otto suggests that George Williams has laid to rest the reason for the Founders’ “lack of concern for individual rights”. She supports his insight that the Founders “were motivated by a complex web of factors including the desire to

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<sup>22</sup> Federal Council of Australia, Official Record of Debates, Seventh Session, Tasmania, 1897 at 89.

<sup>23</sup> *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 136.

<sup>24</sup> (1992) 177 CLR 106 at 186.

<sup>25</sup> (1994) 182 CLR 272 at 361.

<sup>26</sup> Transcript, 6 August 96, from web <http://www.austlii.edu.au/do/Disp...itps/1995/M42/8.html> at 7. See also Mason CJ in *ACTV* at 136, but cf Deane J in *Theophanous* at 167.

protect States' powers, to regulate Aborigines as they saw fit and to enable all Australian parliaments to maintain race-based distinctions".<sup>27</sup>

Some Founders also saw great differences between the geo-political and ideological needs for the American and Canadian colonies to federate and the desire for the colonies of Australia to federate. In 1897, the Attorney-General for Queensland, Thomas Byrnes said:

I believe that in our union with the British Empire we have one of the most ideal connections which the world has ever seen between practically a self-governing community and a great Imperial body such as the Crown of Great Britain is. We, then, have not the circumstances that were to be feared in the case of the American people or in the case of the Canadian people... People say we are not a nation; but I say we are a nation. I am part of a bigger nation than Australasia – I am part of the British Empire.<sup>28</sup>

As such, the emphasis in the Australian model was a reflection of the needs of the community (top down) and not those of the individual (bottom up). This is clearly reflected in the differing formulae for making laws. In Australia it is for 'peace, order (or welfare) and good government', while in the American Declaration of Independence the search is for the citizen's 'life, liberty and the pursuit of happiness'.<sup>29</sup> Bede Harris confirms this view of the United States Constitution:

[O]ne can deduce that a key element of American federalism was that it was the product of a 'bottom up' view of the direction in which constitutional authority flowed: Constitutions were made by a process of agreement between the people or their representatives, rather than being imposed from above.<sup>30</sup>

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<sup>27</sup> D. Otto, 'Human Rights Under the Australian Constitution' (1999) 21 (1) *Adelaide Law Review* 139 at 142 analyzing Chapter 2 of G. Williams, *Human Rights Under the Australian Constitution* (1999).

<sup>28</sup> Federal Council of Australia, Official Record of Debates, Seventh Session, Tasmania, 1897 at 82-83. At federation America had a population 3.9 million and a revenue of 2 million pounds, Canada had a population of 3.5 million and a revenue of 2 million pounds. On the other hand Australia had 4.2 million people but a revenue of 28 million pounds: Sir Phillip Fysh, Federal Council of Australia, Official Record of Debates, Seventh Session, Tasmania, 1897 at 117-118.

<sup>29</sup> D. Flint. 'The Australian Constitution', 11/4/99, from web, [http://www.norepublic.com.au/Pages/Essays\\_Flint\\_No\\_Case\\_Paper.htm](http://www.norepublic.com.au/Pages/Essays_Flint_No_Case_Paper.htm); 4.

<sup>30</sup> Harris, above n 19 at 126.

The view that in the area of individual rights, as a matter of historical commitment, the Founders opted for Parliament,<sup>31</sup> finds support in Greg Craven's 1997 article 'The High Court and the Founders: an Unfaithful Servant' under a discussion of the nature of the 'parliamentary government' that the Founders so profoundly embraced.<sup>32</sup> Craven confirms "there was no role for the courts in striking down Acts of... the legislature... as being contrary to *a priori* concepts of human rights".<sup>33</sup> Moreover, "the protection of rights was located with the elected parliament... on the basis that history had proven that it could be relied upon to act as a safe harbour for the legitimate aspirations of both majorities and minorities".<sup>34</sup> Contrast that with the following 1999 statement of High Court Justice, Toohey J (although extra-curially): "Society looks to the courts to protect minorities and individuals against... 'the overreaching of their legal interests by the political branches of government'".<sup>35</sup> Such claims for the courts in the Australian system leaves unanswered the questions: If the courts are looking to protect minorities, what is the definition of what constitutes a minority?, and further how do the courts assess the will of the people said to comprise this minority?

### ***Parliaments or Courts?***

In 1977 writing in the context of Canada's struggle to entrench a Charter of Rights and repatriate her Constitution, Professor Scott noted: "Ultimately the question narrows down to a choice between a faith in the courts and a faith in legislatures. History has shown that either may become

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<sup>31</sup> So too Justice Kirby has said that "Under the Australian Constitution, it is not necessary to depend on judges to prevent, or cure, all injustices... At least in theory, it is open to the electors to do so. They may do so by dismissing the government and the Parliament responsible for creating such laws": *Durham Holdings* (2001) 75 ALJR 501 at 515.

<sup>32</sup> Craven, above n 1 at 68.

<sup>33</sup> *Ibid* at 69.

<sup>34</sup> *Ibid* at 69-70.

<sup>35</sup> J. Toohey, "Without Fear or Favour, Affection or Ill-Will": The Role of Courts in the Community", (1999) 28 *Western Australian Law Review* at 10.

the enemy of freedom".<sup>36</sup> For a United States example of legislative abuse and subsequent judicial deference, witness the internment of over 100,000 American citizens of Japanese ancestry after the bombing of Pearl Harbour; upheld in such decisions as *Korematsu v United States*.<sup>37</sup> In one sense, the decision in *Korematsu* has been seen as an unthinking knee-jerk attempt to uphold the constitutional proposition of judicial deference fuelled by the rigors of wartime. For an example of untrammeled substitution of a court's "social and economic beliefs for the judgment of a legislative body" witness the 'dark days' of the *Lochner era* in the United States Supreme Court, commencing with *Lochner v New York*<sup>38</sup> and lasting till about WWII.<sup>39</sup> Professor Scott's observation is equally applicable in the Australian context but it is clear that the Founders placed their faith in the legislatures and parliamentary supremacy.

The Australian Founders embracing of the concept of parliamentary supremacy was contemporaneous with Dicey's formulation of parliamentary sovereignty. Dicey's parliamentary sovereignty does not mean that parliament is bound by no principle whatever, but merely that the courts cannot question the validity of an Act of Parliament. Dicey himself recognised two 'actual' limitations on the sovereign power of Parliament. One is the external possibility of popular resistance, and the other is the internal moral obligation on the consciences of members of Parliament, "moulded by the society in which they live and the moral feelings of the time".<sup>40</sup> As noted throughout this thesis, Australian parliaments are not sovereign in the sense outlined by

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<sup>36</sup> F. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (1977) at 214-215.

<sup>37</sup> 323 U.S. 214 (1944). See also *Plessy v Ferguson* 163 U.S. 537 (1896) which upheld segregation in 1896. Sherry has said "We condemn some judges who lacked the courage to exercise their independence. We do not praise the majority in *Plessy* or the majority in *Korematsu*. We admire instead the Justices who dissented in each of those cases": S. Sherry, 'Independent Judges and Independent Justice', (1988) 61 *Law and Contemporary Problems* at 15.

<sup>38</sup> 198 U.S. 45 (1905). Justice Kirby in *Al-Kateb v Godwin* said *Korematsu* is "now viewed with embarrassment in the United States and generally regarded as incorrect": 208 ALR 124 at 166.

<sup>39</sup> Noted by D. Solove 'The Darkest Domain: Deference, Judicial Review and the Bill of Rights' (1999) 84 *Iowa Law Review* at 943-947.

<sup>40</sup> Queensland Constitutional Review Commission, above n 17 at 503. See a further discussion of these two limitations as they arose after the 'Glorious Revolution' in chapter five.

Dicey above, they are supreme *under* the Constitution. “The distinction between *supremacy* and *sovereignty* is critical”.<sup>41</sup> However, both of Dicey’s two supposed limitations equally apply in the Australian paradigm.

The Founders asserted that legislatures are the source of rights and legislatures have proved to be just that. To those who would disparage simple majoritarian democracy, a cursory glance at the statute books of both the Commonwealth and States sees them bristling with legislation specifically designed to protect minorities and individuals. Anti-discrimination legislation (disability, racial and sex),<sup>42</sup> freedom of information legislation, privacy legislation, ombudsman legislation, whistle-blowers legislation and judicial review of administrative decisions are but a few more obvious examples. The Commonwealth also established the Human Rights and Equal Opportunity Commission in 1986. In Queensland, there is also a legislatively protected right to peacefully assemble; Peaceful Assembly Act 1992 (Qld).

Further, Queensland has enacted the Legislative Standards Act 1992 (Qld) which seeks to ensure that Queensland legislation “has sufficient regard to the rights and liberties of individuals”.<sup>43</sup> The Scrutiny of Legislation Committee of the Legislative Assembly reports any concerns it may have about potential breaches to the Legislative Assembly. As the Queensland Constitutional Review Committee reported in 1994: “there have not been any areas of significant concern expressed in

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<sup>41</sup> M. Wait, ‘The Slumbering Sovereign: Sir Owen Dixon’s Common Law Constitution Revisited’ (2001) 29 *Federal Law Review*, 57 at 66. “Thus the legislature of a federation cannot be supreme in the sense that the Parliament of the United Kingdom possesses supremacy: E. Wade, and G. Phillips, *Constitutional Law*, (1936) at 431.

<sup>42</sup> The Commonwealth Parliament has used its external powers in s 51 of the Constitution in relation to external affairs to enact legislation which prohibits discrimination against persons on the grounds of race and sex; see *Toonen v Australia* (1994) 1 Int Human Rights Reports 97 (No 3) and Human Rights (Sexual Conduct) Act 1994 (Cth).

<sup>43</sup> See s 4(2)(a). The Act enshrines ‘fundamental legislative principles’ which although they provide guidelines for the creation of statute law, they are not grounds for challenge once the law is enacted.

the three years the Scrutiny of Legislation Committee has been in operation".<sup>44</sup> So too, that sometimes maligned<sup>45</sup> upper house of the Commonwealth Parliament, the Senate continues to play an important role in protecting individual rights. It also has a Scrutiny of Bills Committee "to alert senators to features of bills which could threaten personal liberties".<sup>46</sup> Further, its role in curbing any excesses of recent anti-terrorism laws has been crucial from a civil liberties perspective.

In the United States, from which at least some ideas for the Australian Constitution are derived, the success of legislators to protect individuals is also confirmed:

Currently, at least, the majoritarian political process is not insensitive to claims of individual rights and liberties, quite the contrary. The vast bulk of rights and liberties possessed by the citizens of the United States are the product of that political process.<sup>47</sup>

David Wood suggests that "individual rights may be better protected by legislators than courts". He cites American commentator G. A. Spann who has discussed the "disappointing" record of the U.S. Supreme Court in civil rights performance, and concluded that "the court's decisions serve more as a refutation than a validation of counter-majoritarian judicial capacity".<sup>48</sup>

In Australia, the High Court is continually facing direct calls for parliamentary supremacy and majoritarian democracy to be abandoned. Galligan has said: "In considering the High Court's role

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<sup>44</sup> Queensland Constitutional Review Commission, above n 17 at 513.

<sup>45</sup> Does the Senate really fulfill the following role?: "The delegate said that in the Federal Constitution the States would be asked to surrender their State rights. That is the very thing we have said they will not be asked to do. It is the very thing which a powerful Senate will take care that they do not do": Henry Dobson, Federal Council of Australia, *Official Record of Debates*, Seventh Session, Tasmania, 1897 at 153.

<sup>46</sup> Goldsworthy, above n 16 at 158.

<sup>47</sup> H.P. Monaghan noted by J. Thomson, 'Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes' (1982) 13 *Melbourne University Law Review* 597 at 613.

<sup>48</sup> D. Wood, 'Judicial Invalidation of Legislation and Democratic Principles' in C. Samford and K. Preston (eds) *Interpreting Constitutions: Theories, Principles and Institutions* (1996) at 173 f/n 15.

and legitimacy, it is best to abandon altogether the inapplicable doctrines of parliamentary sovereignty and majoritarian democracy".<sup>49</sup> Justice Toohey has outlined his view of the judicial role in relation to parliamentary supremacy: "The democratic system goes so far and when the representatives of the people reach a point which the High Court considers to be too far, it steps in and exercises the ultimate sovereignty [of the people] on their behalf".<sup>50</sup> This view is at odds with the mandated powers assigned to the High Court under the Constitution. McDonald has criticized this form of judicial review:

Rights-based judicial review transfers power from the legislature to a counter-majoritarian institution. Indeed in Australia the critics go further: not only is this new rights-based review counter-majoritarian, but the constitutional rights have been smuggled in the back-door by the judges themselves, avoiding the s 128 referendum process for formally amending the Australian Constitution. This, then, is doubly counter-majoritarian. To the extent some implied rights are now firmly part of Australian constitutional doctrine, the legitimacy of rights-based review is an important, if not preoccupying, question of Australian constitutional theory.<sup>51</sup>

Justice Toohey rebuffs the counter-majoritarian and anti-democratic suggestions by stating:

[T]he will which judicial review may frustrate, is that of a current majority of members of the legislature, which *does not necessarily* coincide with the will of a majority of citizens. Hence when judicial review occurs pursuant to a written constitution which was adopted and can be amended by means reflective of the popular will, it may be regarded as not even anti-majoritarian.<sup>52</sup> (emphasis added)

However, it is equally possible that the will which judicial review may frustrate is that of a current majority of members of the legislature, which **may well** coincide with the will of a majority of, or even (though unlikely) all the citizens. Elections provide us with a sense of the view of the majority. Judges have access to no such technique for gauging the popular will.

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<sup>49</sup> Galligan, above n 6 at 186.

<sup>50</sup> Noted by Dawson J in respect of the arguments put before the Court in *Levy*, transcript 6 August 96, from web, <http://www.austleii.edu.au/do/disp;10>.

<sup>51</sup> L. McDonald, 'Rights, 'Dialogue' and Democratic Objections to Judicial Review', (2004) 32 *Federal Law Review*, 1 at 7.

<sup>52</sup> J. Toohey, 'A Government of Laws, and Not of Men?', (1993) 4 *Public Law Review* at 172.

Loftus quotes Samford: “[I]f Commonwealth legislation is invalidated by the original intent of the Constitution, the parliaments elected according to the late twentieth century democratic ideals are being trumped by the democratic ideals of the late nineteenth century”.<sup>53</sup> However, if Commonwealth legislation is invalidated by a judicially created freedom or right, the parliaments elected according to the late twentieth century democratic ideals are being trumped by the undemocratic ideals of the High Court. As noted by Justice Dawson “[T]he whole point of the democratic process is that... you put your faith in the representatives whom you elect, not in a court whom you do not elect”.<sup>54</sup> This is because, as U.S. scholar Ackerman has noted: “For strong [parliamentary] democrats, it is more important to uphold the right of the People to rule themselves even at the cost of abridging fundamental individual rights”.<sup>55</sup>

The notion of giving a right to one portion of the community raises the real risk that it will operate to the detriment of another portion; witness the current abortion debate in America against the George W. Bush administration. A review of Hohfeld’s analysis would quickly confirm this.<sup>56</sup> It is admitted that this is what the courts do, and do well, in the context of the incremental development of the common law, but it is submitted policy has no place in judicial veto of legislative action, or in constitutional interpretation. This is exactly the point, how can the judiciary possibly hope to assess the will of the community. Justice Heydon has said:

Australian politicians collectively have an immense experience of life and of the almost infinitely various points of view within the population... Judges on the other hand, are lawyers with a relatively confined experience of life...[Parliament’s] mechanisms are superior to the fumbling discussions which can take place when judges attempt to reason towards radical legal changes... In short, radical legal change is best effected by professional politicians who have a lifetime’s experience of assessing the popular will...

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<sup>53</sup> P. Loftus, ‘Proportionality, Australian Constitutionalism and Governmental Theory- Changing the Grundnorm’ (1999) 3 *Southern Cross University Law Review*, at 39.

<sup>54</sup> Transcript Levy, from web, <http://www.austleii.edu.au/do/disp>, 6 August 1996; 7.

<sup>55</sup> B. Ackerman, ‘The New Separation of Powers’ (2000) 113 *Harvard Law Review* at 722.

<sup>56</sup> W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*: Noted by Wood, above n 44 at 173 f/n 15 and G. Winterton, ‘The Separation of Judicial Power as an Implied Bill of Rights,’ in G. Lindell (ed.) *Future Directions in Australian Constitutional Law* (1994) at 205-206.

Sir Owen Dixon might have asked the following question. How are contemporary ‘community values’ to be discovered? <sup>57</sup>

Can it be seriously entertained for a moment that the “courts, as much as the legislatures, are in continuous contact with the concrete needs of the community?”<sup>58</sup> In *Durham Holdings*<sup>59</sup> Justice Kirby took into account the defeat of a referendum proposal in 1988 whereby the Australian populace rejected a proposal to add to the federal Constitution a new provision requiring the States to provide just compensation for compulsory acquisition. This seems one of the only transparent ways that the judiciary is able to discern the will of the people, even though it emanates from judicial notice of the political process. However, the orthodox view in Australia is that parliament, with its representative character and superior resources is the correct body for determining the popular will. Further, the Commonwealth Parliament and the state legislatures, not the judges of the High Court, are elected and can claim to represent the people.

Justice Toohey is however unconcerned to distinguish between judicial activism in the common law and constitutional interpretation. For he states that the power of the popular referendum to remedy any failure of a constitution, as interpreted by the courts, is far from theoretical.<sup>60</sup> As such, this view is a partial restatement of his judgment in *Theophanous v Herald & Weekly Times Ltd*<sup>61</sup> where his Honour states that the maintenance of the Constitution by the acquiescence of the people assumes that by not amending the Constitution the people consent to its *alteration* by the High Court. After all, as noted in respect of the Canadian Constitution, but equally applicable

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<sup>57</sup> Heydon, above n 13 at 18-22.

<sup>58</sup> M. McHugh, ‘The Law Making Function of The Judicial Process – Part II’ (1988) 62 *Australian Law Journal* 116 at 124.

<sup>59</sup> (2001) 75 ALJR 501 at 514.

<sup>60</sup> Toohey, above n 52 at 173; Toohey, above n 35 at 3.

<sup>61</sup> (1994) 182 CLR 104 at 171.

to Australia, “it is clear that the courts’ interpretation of the constitution adds up to a significant degree of ‘alteration’ to the constitution”.<sup>62</sup>

However, as Craven has pointed out in respect of referenda, “the financial and political costs which must attend any use of this machinery are such that its deployment against an activist Court, in all but the most exceptional of circumstances, would be an empty threat”.<sup>63</sup> This is because constitutional amendment is so difficult to achieve. Once again this was confirmed by the 1999 republican referendum. See also the comments of Justice Heydon, quoting Ian Callinan QC (as he then was):

[L]egislative abolition was not possible in relation to constitutional developments in the High Court. The relative recency of the new activism meant that it was too early to draw any conclusions from legislative passivity, and it would never be easy for parliaments to abolish by legislation decisions of so august a body as the High Court.<sup>64</sup>

This has also been noted in the Canadian context. Oliver says “Assuming... that the Supreme Court of Canada interprets the constitution in a particular way, and a political consensus subsequently develops that this judicial determination should be reversed, the only way that this can happen is by using the formal process of constitutional amendment”.<sup>65</sup> This may be in theory. In practice, Canadian constitutional amendment has been seriously inhibited by a lack of federal and provincial agreement and co-operation. This problem is not limited to the Canadian federation.

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<sup>62</sup> P. Oliver, ‘Canada, Quebec, and Constitutional Amendment’ (1999) 49 *University of Toronto Law Journal* 519 at 585.

<sup>63</sup> G. Craven, ‘Judicial Activism in the High Court-A Response to John Toohey’, (1999) 28 *Western Australian Law Review* at 221-222.

<sup>64</sup> Heydon, above n 13 at 21.

<sup>65</sup> Oliver, above n 62 at 585. It should be noted that part of the Canadian amendment process does not involve the use of a referendum. Therefore it may be that by co-operation between the federal Parliament and legislatures of the provinces, a ‘judicial amendment’ could be speedily overturned.

Thus although in theory, the Australian people (along with the Crown-in-Parliament) possess the ultimate authority to alter the text of the Constitution, until this occurs, the High Court retains the great authority to say what the law is under the Constitution's text. As such the Court should show respectful restraint by a combination of great fidelity to the literal text of the document, the original meanings of the text and the original intentions of the Founders.

## PART B - IMPLIED RIGHTS DISCOURSE

Patapan has said: "It is now accepted that the High Court is in the process of developing a jurisprudence that gives greater recognition to individual rights".<sup>66</sup> Professor Winterton also notes it is possible to discern a "concern [by the High Court] to afford the rights of Australians some constitutional protection".<sup>67</sup> There is no doubt that in the 'implied rights cases' the orthodox doctrine of parliamentary supremacy was under some threat. The seminal 1920 case of *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers)* in part stood for the proposition that the implication of any doctrine, is significantly reduced when the nature of the Constitution is stressed as an Act of the Imperial Parliament.<sup>68</sup> K. Mason quotes a passage from the majority in *Engineers* representing the notion that any extravagant use of legislative power is to be guarded against by the people and not the Courts:

If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the powers of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper.<sup>69</sup>

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<sup>66</sup> H. Patapan, 'A Return to Dicey? The Philosophical Foundations of the Australian High Court's Implied Rights Jurisprudence' in Samford, C. and Preston, K. (eds) *Interpreting Constitutions* (1996) 146 at 150.

<sup>67</sup> G. Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 (1) *Federal Law Review* 1 at 3.

<sup>68</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 151-152.

<sup>69</sup> K. Mason, 'Citizenship,' in C. Saunders (ed.) *Courts of Final Jurisdiction* (1996) at 46.

Mason then assesses that this passage affirmed the theory of parliamentary supremacy, but now sits very uneasily with some of the implications drawn in the ‘implied rights cases’ (in particular *Leeth v The Commonwealth*).<sup>70</sup> In *Leeth*, Justices Deane and Toohey concluded that the legal basis of the Constitution was the free agreement of the people. Judgments in *Leeth* and similar cases that rely on the notion of popular sovereignty cannot be interpreted consistently with the old basic norm of parliamentary supremacy as provided for by the Constitution and confirmed by *Engineers*.

George Williams also quotes the same passage from *Engineers*, relied upon by K. Mason, and notes that the ‘implied rights cases’ “undermined the *Engineers* reliance upon parliamentary sovereignty”.<sup>71</sup> Thus, in conflict with the tenor of *Engineers*, in *Australian Capital Television*, “the High Court showed no deference to the Parliament, but acted to protect the civil liberties of the people”.<sup>72</sup> “This conception was underpinned by the emerging notion of popular, rather than parliamentary, sovereignty”.<sup>73</sup>

Also commenting on the ‘implied rights’ cases, Adrienne Stone suggests: “[T]he High Court rather quickly allied itself with a philosophical tradition based on a suspicion of government, a choice which does not necessarily follow from its identification of the freedom of political

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<sup>70</sup> *Ibid* at 37 and 46. Deane and Toohey JJ stated “the people who, in a basic sense, now constitute the individual States, just as in the aggregate and with the people of the Territories, constitute the Commonwealth”: *Leeth v The Commonwealth* (1992) 174 CLR 455 at 484.

<sup>71</sup> G. Williams, ‘Engineers and Implied Rights’ in M. Coper and G. Williams, (eds) *How Many Cheers for Engineers*, 105 at 109. Note however, at the prompting of Professor Zines, Williams has admitted a tenuous argument that, of the ‘implied rights cases’, ACTV might represent a fulfilment of parliamentary supremacy, because the decision facilitated ‘the ballot box exercise by which people would make their decision’: *Ibid* at 113. As a result Geoff Lindell suggested that if one wanted to defend the thesis that there is an inconsistency, the passage in *Engineers* which stresses parliamentary supremacy, should be relied upon; page 153 start of second paragraph (the paragraph quoted by K. Mason above): noted by F. Wheeler, ‘A Third Perspective’ in M. Coper and G. Williams, (eds) *How Many Cheers for Engineers*, 129 at 136.

<sup>72</sup> Williams, *Ibid* at 109.

<sup>73</sup> *Ibid* at 110.

communication with representative government".<sup>74</sup> Although the Court has clearly enunciated that the freedom of political communication is not of the American ilk (that is, freedom of speech) and therefore not an absolute right,<sup>75</sup> it is when choosing the attendant reasoning to be used, that the Court stands on the precipice of admitting extra-constitutional notions. If the Court is not looking at the individual and absolute rights, but at institutional foundations and residual rights, why is it that the notion of popular sovereignty must become the source of authority? As Professor Winterton has asked, is popular sovereignty really "the cause or merely an excuse" for the change in judicial thinking.<sup>76</sup>

Patapan admits the potential for implied rights jurisprudence to go beyond or transcend, at some point, its pragmatic foundations.<sup>77</sup> It is submitted that this potential is greatly enhanced by referring to an extra-constitutional principle such as popular sovereignty. See the judgments of Deane and Toohey JJ in *Leeth v Commonwealth* and Toohey J in *Kruger*, and their preoccupation with equality before the law. Particularly Deane and Toohey JJ in *Leeth* where such a doctrine seemed to be derived from some undecided moral standard founded on the nature of humanity. With the departure of both Deane and Toohey JJ from the Court, it may be that the tendency is reduced (perhaps greatly), but it is strongly argued that the potential is still ever present unless recourse to the unarticulated, unconfined 'slogan' of popular sovereignty is completely exorcised.

Patapan is partly right to conclude that the freedom of political communication, as fashioned,

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<sup>74</sup> A. Stone, 'Freedom of Political Communication, the Constitution and the Common Law,' (1998) 26 (2) *Federal Law Review* 219 at 235.

<sup>75</sup> See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. Professor Goldring has said: "Justice Deane [in *Theophanous*] seemed to attempt to imply from the words of the Constitution something like an absolute right"; from web, 28/12/00, <http://www.uow.edu.au/law/civics/expert;9>.

<sup>76</sup> Winterton, above n 67 at 3.

<sup>77</sup> Patapan, above n 66 at 153.

does not really represent “a major break from the orthodox view of rights”. On this view, implied rights jurisprudence closely based on the text and structure of the Constitution does not amount to a substantially different judicial method. However, if the notion of popular sovereignty is not removed, the complex question of the people’s will arises. Most opinion would suggest that it is impossible for an unelected and unrepresentative court to discern the will of the people. Professor McEldowney has said:

[P]arliament carries through the wishes of the majority of the electorate, through the government which carries out its election manifesto. In this way parliamentary sovereignty translates into the wishes of the people, as opposed to the decisions of unelected judges.<sup>78</sup>

It cannot be doubted that the people’s elected representatives are the most legitimate and best equipped institution to undertake such a process. After all, as Sir Gerard Brennan said in 1995 on his swearing in as Chief Justice, the High Court is “not a Parliament of policy; it is a court of law”.<sup>79</sup> However, Justice Heydon said in 2003 that in *ACTV* the Mason Court “tended to treat itself as a legislator even though it was not chosen by the people... This is despite Justice Mason (as he then was) in *SGIO v Trigwell* stating that the court was ‘neither a legislature nor a law reform agency’”.<sup>80</sup>

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<sup>78</sup> J. McEldowney, ‘Modernizing Britain: Public Law and Challenges to Parliament’, in J. Mackinnon and P. Havemann (eds) *Modernizing Britain: Public Law and Challenges to Parliament*, (2002) at 8. Although Professor McEldowney was commenting on the “tension between United Kingdom and European Community law”, it is submitted the comments are equally apposite in Australia.

<sup>79</sup> G. Brennan, ‘Speech on Swearing in as Chief Justice’, 21 April 95, from web, <http://www.hcourt.gov.au/swearing.htm>; 3.

<sup>80</sup> Heydon, above n 13 at 22.

## ***Parliamentary Supremacy and Responsible Government versus Popular Sovereignty and Representative Government?***

In 1987, Sir Anthony Mason stated:

Our evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will. It embraces the notion of *responsible* government which respects the fundamental rights and dignity of the individual...<sup>81</sup> (emphasis added)

However, it would seem that Sir Anthony subsequently modified his view as to what doctrine was the most fertile for discerning new rights. In 1992, at the height of the ‘implied rights cases’, it was clear that ‘responsible government’ was no longer on centre stage. See his Honour’s comments in *ACTV*: “The very concept of *representative* government and *representative* democracy signifies government by the people through their representatives”.<sup>82</sup> (emphases added)

Four years after *ACTV*, the case of *McGinty* seemed to discard ‘responsible government’ altogether. The focus was now firmly on ‘representative government’ or ‘representative democracy’, but which one, and was there a difference? Mason CJ had left the Court. Lindell suggested the judgments in *McGinty* “preferred to use the term representative ‘government’ rather than ‘democracy’”.<sup>83</sup> This is not readily apparent. Certainly the term representative democracy was discarded (in favour of representative government) as less precise by Dawson J<sup>84</sup> and Gummow J used the term representative government.<sup>85</sup> However, Brennan CJ seemed quite oblivious to any imprecision and used both representative democracy and representative

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<sup>81</sup> A. Mason, ‘Future Directions in Australian Law’ (1987) 13 *Monash University Law Review* 149 at 163.

<sup>82</sup> (1992) 177 CLR 106 at 137.

<sup>83</sup> G. Lindell, ‘Expansion or Contraction? Some Reflections About the Recent Judicial Developments on Representative Democracy’ (1998) 20 *Adelaide Law Review* 111 at 128-129.

<sup>84</sup> (1996) 186 CLR 140 at 182.

<sup>85</sup> *Ibid* at 269 and 274.

government,<sup>86</sup> in the end using representative democracy more often. McHugh J also used both representative government<sup>87</sup> and democracy.<sup>88</sup> As minority judges both Toohey J<sup>89</sup> and Gaudron J<sup>90</sup> seemed to prefer representative democracy. For a clear endorsement of representative government (and a belated return of responsible government) one would have to wait until the unanimous decision of the Court in *Lange*. Here the Court seemed to realize the “expanse and consequent uncertainty of representative democracy”, thus rejecting the notion that representative government and representative democracy are interchangeable.<sup>91</sup> In *Lange* the Court asked: “What is required by representative and responsible government?”<sup>92</sup>

Professor Zines has highlighted the changing meaning and effect of ‘representative government’ initiated by the ‘implied rights cases’. There are those who, as a position of orthodoxy, would see this doctrine (along with responsible government) as a foundation of parliamentary supremacy. Zines has said:

If parliamentary supremacy is seen as a major principle and the judicial implication of representative government is in aid of that principle (as seems to be the case), the High Court should keep in mind that object and avoid wide interpretations of implied freedoms which are more suited to the ideology of a state with a bill of rights, rather than one which has, since the *Engineer’s* case, relied on representative and responsible government as its central principle.<sup>93</sup>

However, Zines has also said there is a growing body of opinion who wish to see representative government, not as an aid to parliamentary supremacy, but as a plank to abolish parliamentary

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<sup>86</sup> *Ibid* at 169.

<sup>87</sup> *Ibid* at 229.

<sup>88</sup> *Ibid* at 232-235.

<sup>89</sup> *Ibid* at 198.

<sup>90</sup> *Ibid* at 219.

<sup>91</sup> See A. Lynch, ‘Comment and Book Review. The High Court – Legitimacy and Change: Review Essay: Haig Patapan, Judging Democracy – The New Politics of The High Court of Australia’ (2001) 29 (2), *Federal Law Review* 295 at 307-308.

<sup>92</sup> (1997) 189 CLR 520 at 566-7.

<sup>93</sup> L. Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) at 393, also noted and agreed with by Lindell, above n 83 at 145.

supremacy.<sup>94</sup> In this new paradigm, responsible government is relegated to a position of inferiority, while conversely, much emphasis is placed upon popular sovereignty as a central tenet of representative government, if not the Constitution itself. Warnings against wide interpretations of implied freedoms fall on the deaf ears of those who no longer see parliamentary supremacy as a major principle.

Writing in 1997 Lindell nominated only Toohey and Gaudron JJ as “more likely to fall into the category of those who wish to abolish parliamentary supremacy in respect of rights and freedoms”.<sup>95</sup> For the reasons outlined throughout this thesis, the present writer would nominate other Justices who might associate with this standpoint; of the current Court, Kirby J and possibly McHugh and Gummow JJ, and even Gleeson CJ. After all, it must be remembered that Chief Justice Gleeson’s return to ‘strict and complete legalism’ is based on a complete acceptance of legal and political sovereignty residing in the people.<sup>96</sup>

There is no doubt that in this new paradigm, representative government and popular sovereignty could reach some sort of zenith while responsible government and parliamentary supremacy could sink to a nadir. Loftus suggests that this is, in part, what the Court is actively promoting: “[T]hrough a change in its constitutional interpretation... we have seen the development of the repudiation of parliamentary supremacy”.<sup>97</sup> Further, what is the fate of responsible government? As noted by Justice Dawson in *ACTV*: “In the *Engineers’ case*, the principle of responsible government was described as pervading the Constitution. And in the *Boilermakers’ case*<sup>98</sup> it was

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<sup>94</sup> *Ibid* at 392.

<sup>95</sup> Lindell, above n 83 at 146.

<sup>96</sup> See Murray Gleeson, *Boyer Lectures 2000 – The Rule of Law and the Constitution* (2000). See also Murray Gleeson, ‘Judicial legitimacy’ (Paper presented at the Australian Bar Association Conference, New York, 2 July 2000).

<sup>97</sup> Loftus, above n 53 at 47. See a similar view espoused by J. Doyle ‘At the Eye of the Storm’ (1993) 23 *Western Australia Law Review* at 120.

<sup>98</sup> *Attorney-General (Cth) v The Queen (Boilermakers case)* (1957) 95 CLR 529.

referred to as ‘the central feature of the Australian Constitutional system’”.<sup>99</sup> However, Deane and Toohey JJ in *Nationwide News v Wills* relegated responsible government from its rightful place, according to the convention debates as a main general doctrine underlying the Constitution, to a mere footnote.<sup>100</sup> Responsible government seemed to be half-heartedly restored in *Lange* by the whole court, but it seems that it is forever doomed to play second fiddle to representative government.

At this point, one could contrast the waning of responsible government in Australia with the fortune of equally great Canadian doctrines. In *Reference re: Secession of Quebec*, the Supreme Court held that “these [equally] defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other”.<sup>101</sup> It remains to be seen whether in Australian judicial discourse popular sovereignty and representative government will trump parliamentary supremacy and responsible government.

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<sup>99</sup> (1992) 177 CLR 106 at 185.

<sup>100</sup> (1992) 177 CLR 1 at 69-71.

<sup>101</sup> (1998) 161 DLR (4<sup>th</sup>) 385 at 410 para 49. These principles had been identified as federalism; democracy; constitutionalism and the rule of law and respect for minorities.

## PART C - KELSEN AND THE GRUNDNORM

Professor Blackshield is correct in stating that ‘responsible’ and ‘representative’ government “must be understood as *alternative* political theories, based on *alternative* understandings of the *grundnorm* <sup>102</sup> on which the validity of the Australian Constitution depends”. <sup>103</sup> (emphases added) At the core of responsible government in Australia is parliamentary supremacy while at the core of representative government is popular sovereignty. <sup>104</sup> Thus it must follow that parliamentary supremacy and popular sovereignty are alternative and competing theories, based on alternative understandings of the *grundnorm*. In this respect Blackshield goes further than Lindell and discerns a clear paradigm shift from responsible government linked to parliamentary supremacy to representative government linked to popular sovereignty. <sup>105</sup> However, he does not view responsible government and representative government as mutually exclusive, because such a paradigm shift would “restore much-needed meaning to the notion of responsible government”. <sup>106</sup> He does however acknowledge that: “[T]he arguments which flow from a model of popular sovereignty will often be subtly different”. <sup>107</sup>

Blackshield states that “a true *grundnorm* contains within itself all logical possibilities, so that

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<sup>102</sup> According to Hans Kelsen, the *grundnorm* is the highest norm in any national legal order, and by identifying it, the jurist is able to interpret all subsidiary norms as valid, and as a non-contradictory field of meaning. After all, logical consistency is not only one of the aims of legal philosophy, but also one of the aims of a legal system. All subsidiary norms can be traced hierarchically back to the *grundnorm*, each subsidiary norm being validated by the norm above it: Kelsen, above n 2 at 208. The *grundnorm* is the legally ‘uncaused cause’ of all the other laws in the system. In this sense it may have some relation to Plato’s ‘unmoved mover’. The basic norm has a second function which is not, for present purposes, necessary for discussion in this thesis; to ‘make it possible to regard a coercive order (ie a policeman’s direction as distinct from a robber’s demand) as objectively valid’: R. Wacks, *Jurisprudence* (1995) (4th ed) at 75.

<sup>103</sup> A.R. Blackshield, ‘The Implied Freedom of Communication’ in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 232 at 240.

<sup>104</sup> See Deane J in *Theophanous* at 172-173.

<sup>105</sup> Blackshield, above n 103 at 240.

<sup>106</sup> *Ibid* at 267.

<sup>107</sup> *Ibid* at 245.

differing *interpretations of it* in successive historical epochs are merely exploring different facets of an inexhaustible fund of meaning”<sup>108</sup> (emphasis added). This view may well be historically sound to an extent, especially where the Constitution is considered the *grundnorm*. In theoretical terms however, it presents problems when the *grundnorm* is defined using the specific logic laid down by Hans Kelsen. When the Kelsenian *grundnorm* is discovered (as a norm to the effect that those who laid down the constitution ought to be obeyed), the *grundnorm* is more vulnerable to change, and it is the duty of the jurist to recognise when this occurs.

Why is the Constitution not the *grundnorm*? Kelsen tells us: “*Presupposing the grundnorm*, the constitution is then the highest level within national law” (emphasis added).<sup>109</sup> Thus, the *grundnorm* is that the *material Constitution* (to be explained shortly) ought to be obeyed.<sup>110</sup> Thus the disobedience to that founding order by the judiciary will displace the old basic norm and give

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<sup>108</sup> *Ibid* at 243.

<sup>109</sup> H. Kelsen, *General Theory of Law and State*, (1945) at 124. Kelsen does not give any indication of the content of the basic norm, only that “one cannot account for the validity of the *grundnorm* by pointing to another *rule of law*”: R. Dias, *Jurisprudence* (1970)(3rd ed), at 411. Thus, if the *grundnorm*’s content is not legal, it must be non-legal. It has been left to others to flesh out the basic norm as a “theoretical construct, designed to summarise the way in which,... the law’s normativity is rooted in history...”: J. W. Harris, ‘Overruling Constitutions’ in Samford, C. and Preston, K. (eds) *Interpreting Constitutions* (1996) at 233. Stewart states it is “the nodal point at which the pure part of legal science passes over into the empirical part”: Noted in Wacks, above n 101 at 74. It is akin to a window through which the sunlight streams to give warmth to the household, but streaming through the *grundnorm* is ‘juristic consciousness’ to give validity to the legal system. Which window is selected to be opened is not chosen arbitrarily. “[I]t is selected by reference to whether the legal order as a whole is by and large efficacious”: Wacks, *Ibid*.

<sup>110</sup> H. Kelsen, *General Theory of Law and State*, *Ibid* at 115, and Kelsen, above n 2 at 201. Both Sir John Salmond and H.L.A. Hart also confirm this: “Where there is a written constitution, the *grundnorm* will be that the constitution ought to be obeyed”: P. Fitzgerald, *Salmond on Jurisprudence*, (1957: 11<sup>th</sup> ed) at 48, and “Kelsen’s basic norm has in a sense always the same content; for it is, in all legal systems, simply the rule that the constitution or those ‘who laid down the first constitution’ ought to be obeyed”: Hart, H.L.A. *The Concept of Law*, (1994: 2<sup>nd</sup> ed) at 293. See also Joseph: ‘For Kelsen, the *grundnorm* underlying a constitutional order is simply that the Constitution ought to be obeyed’: P. Joseph, *Constitutional and Administrative Law in New Zealand* (1993) at 398. See also S. de Smith and R. Brazier, *Constitutional and Administrative Law* (1994) (7<sup>th</sup> ed) at 72. See also Wacks, above n 102 at 76. See also F. Brookfield, ‘Kelsen, the Constitution and the Treaty’, (1992) 15 *New Zealand Universities Law Review* at 164.

rise to a new one.<sup>111</sup> However, Hart wants to take issue with Kelsen's apparent 'misleading simplicity and uniformity':

It seems a needless reduplication to suggest that there is a further rule to the effect that the constitution (or those who laid it down) are to be obeyed. This is particularly clear where, as in the United Kingdom, there is no written constitution.<sup>112</sup>

The present writer acknowledges that this argument has some force, but not where a written constitution is involved. According to Kelsenian theory, the following distinction (one that Hart defends) must be made. The written Australian Constitution comprises the *formal* constitution, while the written Australian Constitution *and* the doctrines of parliamentary supremacy and precedent as embraced by the Founders, comprise the constitution in a *material* sense. Kelsen explains:

The constitution in the *formal* sense is a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions [s. 128]... The constitution in the *material* sense consists of those rules [parliamentary supremacy and precedent] which regulate the creation of the general legal norms, in particular the creation of statutes [and judicial decisions].<sup>113</sup>

Kelsen then explains why relying solely on the formal constitution as the basic norm is unwise: "The formal constitution, the solemn document called 'constitution', usually contains also other norms, norms which are no part of the material constitution".<sup>114</sup> Raz expands to inform us that the "first constitution [formal constitution] is not necessarily one norm; it may be ...a set of norms which came into force by the exercise of one legislative power [the parliament at Westminster]."<sup>115</sup> A formal constitution may include several norms, each conferring different legislative powers on different bodies. For example s 51 of the Australian Constitution confers

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<sup>111</sup> Kelsen, above n 109 at 118.

<sup>112</sup> Hart, above n 110 at 293.

<sup>113</sup> Kelsen, above n 109 at 124.

<sup>114</sup> *Ibid.*

<sup>115</sup> J. Raz, *The Concept of a Legal System*, (1970) at 101.

the power of the Commonwealth Parliament, while s 107 determines the powers of the State Parliaments. Thus, the formal Australian Constitution contains norms belonging to different chains of validity ie. Federal and State. Only the basic norm of obedience, that the material constitution ought to be obeyed, belongs to every chain of validity.

Thus coercive acts in the both the Federal and State chains of validity ought to be carried out in the way determined by the Founders of the Constitution.<sup>116</sup> Obedience to the *grundnorm* laid down by the Founders requires the High Court to show fidelity to the *formal* text of the Constitution as an Imperial Statute, and not a document supportive of rights, apart from those rights necessarily implied from the text and structure. However, obedience to the *grundnorm* also requires obedience to the Constitution *and* the doctrines of parliamentary supremacy and precedent (and the established relationship between them, including the doctrine of judicial deference) that comprise the constitution in a *material* sense.

The present writer must admit some force in the reasoning of Wright: “[I]t would be a mistake to think that a particular legal system is theoretically pure, or operates on one model to the exclusion of the other [eg. Locke’s or Dicey’s]. The real world is more complex than legal theory [Kelsen’s or otherwise] will sometimes admit”.<sup>117</sup> However, do we need the real world to become any more complex and uncertain? Above all, the High Court must not usurp the Parliaments of Australia as the source of fundamental rights. Moreover, if a constitutional crisis arises, constitutional certainty is needed and therefore the integrity of the High Court’s decision making process is paramount. Using J.W. Harris’s<sup>118</sup> schema as a template, the following Kelsenian hierarchy is suggested for Australia:

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<sup>116</sup> See Kelsen, above n 109 at 115-16; Kelsen, above n 2 at 201.

<sup>117</sup> Wright, above n 18 at 169.

<sup>118</sup> J. W. Harris suggests: “To achieve a more discriminating logic for revolutions, it would be necessary to make a more detailed taxonomy of ultimate sources of the *grundnorm*... [with a]

**TABLE 2 – KELSEN’S HEIRARCHY OF NORMS**

<i>The Australian Legal System</i>	
Historical Source:	1688-89 ‘Glorious Revolution’
Basic Norm:	Coercive acts ought to be applied only under the conditions and the way determined by the founders of the Constitution (a presupposition, not a norm of positive law) (all subsequent norms are particularisations of the basic norm)
Historically first constitution:	Australian Constitution ( <i>Formal</i> Constitution - highest norm of positive law)
Ultimate constitutional norm:	Australian Constitution ( <i>Formal</i> Constitution) <i>plus</i> Coercive acts ought to be applied in accordance with statutes enacted by the Crown in Parliament (parliamentary supremacy) equals Constitution in a <i>material</i> sense
Ultimate constitutional norm:	Australian Constitution ( <i>Formal</i> Constitution) <i>plus</i> Coercive acts ought to be applied in accordance with judge-made rules established in conformity to the doctrine of binding precedents (doctrine of precedent) equals Constitution in a <i>material</i> sense. But because of the doctrine of judicial deference, the precedent norm is not higher than the parliamentary supremacy norm. <b>Kelsen’s notion is that precedent is a lower individual norm which must conform with the higher norm of statute law.</b> <sup>119</sup>
General norm:	Legislation eg. Act of Commonwealth Parliament
General norm:	Decision of an Australian Court
Individual norms....	(with an increasing level of concretisation)

As noted earlier, popular sovereignty has been espoused as the fundamental basis of representative government.<sup>120</sup> The Queensland Constitutional Review Commission cited Mason CJ’s judgment in *ACTV* as explaining “the evolution of the concept [representative government],

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written constitution, by reference to the kind of group which promulgated [it] - were they, for instance, socialist or non-socialist ‘fathers’”? J.W. Harris, ‘When and Why Does the Grundnorm Change?’, (1971) 29 *Cambridge Law Journal* at 103 and 111.

<sup>119</sup> Kelsen, above n 109 at 154.

<sup>120</sup> See Deane and Toohey JJ in *Nationwide* at 69 and *Kruger* at 175.

especially in relation to the potentially competing idea of parliamentary sovereignty”.<sup>121</sup> According to Wright, popular sovereignty may be the new *grundnorm* of constitutional interpretation<sup>122</sup> but what position precisely does popular sovereignty occupy in our legal system? Where does popular sovereignty stand in Kelsen’s constitutional hierarchy above? According to the ‘implied rights’ jurisprudence it can not stand co-ordinate with, or inferior to, parliamentary supremacy. Activist judges promote that popular sovereignty must stand above parliamentary supremacy so that legislative enactments can be vetoed in accordance with the people’s fundamental rights.<sup>123</sup> This is surely dangerous for the established constitutional order. If popular sovereignty occupies anything more than the status of an interpretative presumption in Australia’s current constitutional arrangements (and even that is doubted), it may do so at the expense of constitutional certainty and institutional legitimacy.

The present writer submits that whatever the balance between responsible government and representative government, parliamentary supremacy and popular sovereignty are conflicting norms. It is argued that, no matter what level popular sovereignty is promoted to, in terms of Kelsen’s hierarchy, (as it can be applied to Australia), popular sovereignty becomes a conflicting norm with parliamentary supremacy. For example:

### **Apex**

Norms:	Parliamentary supremacy } in conflict Popular sovereignty } in conflict Precedent } <i>prima facie</i> in conflict with parliamentary supremacy but resolved by the Westminster tradition of judicial deference or by analogy with Kelsen’s notion that precedent is a lower individual norm which must conform with the higher norm of statute law.
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<sup>121</sup> Queensland Constitutional Review Commission, above n 17 at 803.

<sup>122</sup> Wright, above n 18.

<sup>123</sup> See chapter six where a similar observation (relying on the works of Sir Owen Dixon and Sir John Salmond) is made, but in relation to common law supremacy over parliamentary supremacy.

As Wright has noted: “For the High Court to cast itself as the protector of individual rights would require nothing less than a ‘revolution’ in the constitutional *grundnorm*”.<sup>124</sup> This would be certainly true if the High Court’s future ‘implied rights’ jurisprudence went beyond or transcended the notion of deriving only those freedoms necessarily implied from the text and structure of the Constitution. Indeed, those writers who refuse to acknowledge the possible revolution, no matter how painful, might only be considered to be “performing a praiseworthy piece of propaganda”.<sup>125</sup> After all, if one refers to the concept of a *grundnorm* “where a revolution is, or is predicted to be going to be, successful, Kelsens’s theory (directly) requires the legal scientist... to presuppose a new *grundnorm*”.<sup>126</sup>

## CONCLUSION

This chapter discussed the philosophical foundations and historical context of the Australian Constitution, and the role of the High Court and Parliament as envisaged in the Convention Debates. It argued that the Constitution was founded upon utilitarian and positivist notions and the doctrine of parliamentary supremacy. It argued that a contemporary philosophical foundation based on popular sovereignty as mooted in the ‘implied rights cases’, is inconsistent with the Founder’s intentions and the nature of the rights the Court is enunciating; residual not absolute. Moreover, such a move would impose a particular restrictive political philosophy (based on the

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<sup>124</sup> Wright, above n 18 at 165. See also the comments of Paul McHugh when commenting on the New Zealand legal system: “It may be that the rule of Parliamentary supremacy is the Kelsenian *Grundnorm* or fundamental rule of our legal system. This would make it not just a mere rule of the common law, but something more vital and essential – the ultimate political, non-legal fact in which our legal system rests. If that is the case, then judicial encroachment upon Parliamentary supremacy would be unlikely unless it can be shown that the New Zealand *Grundnorm* has moved to modify the bare rule... The *Grundnorm* is (or may be) moving, although how far and at what pace remains uncertain... The ferocity of debate which this movement of the *Grundnorm* is producing in New Zealand is a sure sign that it is indeed moving”: P. McHugh, *The Maori Magna Carta* (1991) at 58-59 and 64-65.

<sup>125</sup> Harris, above n 118 at 124-125.

<sup>126</sup> *Ibid* at 126.

individual) on the Australian polity which is diametrically opposed to the polity's fundamental underpinning's of an expansive political philosophy (based on utilitarian principles). <sup>127</sup>

This chapter also mooted that as a matter of *logic*, it is as open for the High Court and others to draw the conclusion that the Court is the best protector of rights, as it is for others to conclude that Parliament is. However, it was argued that as a matter of historical commitment: "What is beyond all question, is that the Founders opted for Parliament". <sup>128</sup> Implied rights jurisprudence based on representative government, especially if the doctrine of representative government is said to rest on popular sovereignty, <sup>129</sup> could prove to be a problematic course indeed. Only by divorcing implied rights jurisprudence from popular sovereignty and the associated notion of fundamental and deep rights, can dangerous 'extra-constitutional' notions be banished.

In terms of Kelsen's theory, obedience to the *grundnorm* laid down by the Founders requires the High Court to show fidelity to the formal text of the Constitution as an Imperial Statute, and not a document supportive of rights. However, obedience to the *grundnorm* also requires obedience to the Constitution and the doctrines of parliamentary supremacy and precedent; and the established relationship between them, including the doctrine of judicial deference. Further, if popular sovereignty is elevated into Kelsen's hierarchy, there is an immediate conflict with the norm of parliamentary supremacy (which previously did not exist), and the legal justification for the Australian legal system is imperiled

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<sup>127</sup> Kirk, above n 12 at 65.

<sup>128</sup> Craven, above n 1 at 75.

<sup>129</sup> See Mason CJ in *ACTV* at 137-138. See also Blackshield, above n 102 at 240, L. McDonald, 'The Denizens of Democracy: The High Court and the "Free Speech" Cases' (1994) 5 *Public Law Review* 160 at 182 but cf Winterton, above n 71 at 7.

It is noted that many of the concerns and investigations of this chapter might be said to “lie on the periphery of constitutional law and jurisprudence”,<sup>130</sup> but the importance of such can be found at the very heart of constitutional interpretation, which is the focus of chapter three. As Justice Selway of the Federal Court has said as recently as 2003: “The important question flowing from the change in the source of the authority of the Constitution is whether it has had any effect upon its interpretation. Obviously it could”.<sup>131</sup>

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<sup>130</sup> Joseph, above n 110 at 396.

<sup>131</sup> B. Selway, ‘Methodologies of constitutional interpretation in the High Court of Australia’, (2003) *Public Law Review*, 14, 4 at 236.

# **CHAPTER THREE**

## **CONSTITUTIONAL INTERPRETATION**

### **INTRODUCTION**

Part A of this chapter notes that some members of the High Court now consider the legal source of constitutional authority to be the people of Australia (popular sovereignty). One possible outcome of this paradigm shift is that in constitutional interpretation, there is the danger of the Court implying ‘extra-constitutional rights’ as well as discerning legitimate ‘implied rights’ for the Australian populace. This is because “the source of authority of the Constitution has significant consequences for the way in which the powers of government are exercised and interpreted”.<sup>1</sup> I argue that this paradigm shift constitutes a pernicious challenge to orthodox methods of constitutional interpretation previously based upon the rule of law and the separation of powers.

Part B addresses the late nineteenth century Convention Debates and the question whether the Founders themselves intended the Constitution to be subject to a particular type of interpretation. We find that a type of interpretation known as progressivism, which was seemingly in favour with members of the High Court in the ‘implied rights cases’, was not advocated by a large number of the Founders. As a result, the present writer submits that a theory of constitutional interpretation based on a historical commitment, is to be generally preferred. Progressivism which overtly ignores that commitment, is to be, in the main, discarded. This is because it empowers the High Court to act in a manner not envisaged in the design and scheme of the Constitution, by its positivist and utilitarian Founders.

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<sup>1</sup> M. Moshinsky, ‘Re-enacting the Constitution in an Australian Act’ (1989) 18 *Federal Law Review* 134 at 135.

This chapter also argues that ‘implied rights’ jurisprudence may be reinvigorated by the present Court, and that this need not provoke controversy, provided it derives from the text and structure of the Constitution. In any reinvigoration however, the Court must shun the notions of progressive interpretation and popular sovereignty and sustain fidelity to the text and structure of the Constitution. It is a primary theme of this chapter that should the notion of popular sovereignty not be exorcised from constitutional interpretation, the danger exists that ‘extra-constitutional rights’ might be promoted.

## **PART A - THE DIFFICULTY WITH POPULAR SOVEREIGNTY IN CONSTITUTIONAL INTERPRETATION**

In 1996 Counsel for the Attorney-General for the State of South Australia intervening in support of the defendant in *McGinty* said:

Sovereignty of the people is either erroneous or an unhelpful concept for constitutional interpretation. The fact that the Commonwealth Parliament is elected by the people does not provide a constitutional source for popular sovereignty. References to ‘the people’ and ‘the electors’ [in the Constitution] may support an implication of representative government but *they do not* and did not in 1900 create a new sovereign or what Kelsen has called a *grundnorm*.<sup>2</sup> (emphasis added)

Although Aroney has noted that “since *McGinty*, the court has tended to avoid the issue, [the source of authority for the Constitution] focusing rather on the text and structure of the Constitution as the starting point in its reasoning”,<sup>3</sup> this has not, and may not always be the case. The nature and source of the Constitution, along with the notion of sovereignty is still at the heart of a persistent doctrinal confusion.

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<sup>2</sup> (1996) 186 CLR 140 at 162.

<sup>3</sup> N. Aroney, *Freedom of Speech in the Constitution* (1998) at 148.

In 2001 Andrew Lynch said that:

Chief Justice Gleeson has expressly rejected the operation of British parliamentary supremacy, saying that ‘the sovereignty of our nation lies with the people, both as a matter of legal principle and as a matter of practical reality’... However, he made no direct comment about how an appreciation of popular sovereignty may affect constitutional interpretation and the nature of the Australian political arrangement. Indeed *it can only be presumed* that far from throwing open the sort of questions raised by Patapan, the Chief Justice considered that the derivation of constitutional authority from a base of popular sovereignty only goes further to justifying his trenchant faith in ‘strict and complete legalism’.<sup>4</sup> (emphasis added)

This passage captures the difficulty with embracing popular sovereignty but not then outlining what effect such a proposition may have on constitutional interpretation. It is left to the ‘shadow court’ (jurists and legal practitioners) to attempt to discern (or presume) such consequences. One does not know how in Chief Justice Gleeson’s thinking popular sovereignty justifies legalism, when in other Judges’ thinking it clearly justifies progressivism. Is the debate forever doomed to these presumptions and contradictions? The present writer would agree with Patapan that popular sovereignty throws open a myriad of questions about how the court assesses community values,<sup>5</sup> and indeed, the Courts’ *locus standi* to be the arbiter of these values.

It is argued that an understanding of the location of the sovereign clearly impacts on the judicial process. On one view, a judge called upon to settle a dispute sees law as a system of rules to guide her or his decision, and such a system needs a criterion of validity determining which rules belong to it.<sup>6</sup> It needs a supreme norm/rule, providing directly or indirectly the criteria of validity

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<sup>4</sup> See A. Lynch, ‘Comment and Book Review. The High Court – Legitimacy and Change: Review Essay: Haig Patapan, *Judging Democracy – The New Politics of The High Court of Australia*’ (2001) 29 (2), *Federal Law Review* 295 at 303-304.

<sup>5</sup> See generally H. Patapan, *Judging Democracy – The New Politics of The High Court of Australia* (2000) at 24, 150, 161 and 171 amongst others.

<sup>6</sup> Salmond, Kelsen or Hart’s analysis would suffice in this respect. Sir John Salmond promoted a theory of ultimate principles, although there are notable differences with that of Kelsen. Most notably, Salmond places considerably more reliance on history as the foundation of ultimate principles. For a criticism of the need for any distinction, see C.K. Allen, *Law in the Making* (1964)(7th ed), at 269-70. However, Hart defends the distinction between ‘legal’ and ‘historical’

of all other norms, and not itself open to challenge.<sup>7</sup> Thus it is argued the content of the *grundnorm* has a clear influence on judicial decision making.

Professor Winterton has noted that “as the reasoning of Mason CJ [in *ACTV* 1992]<sup>8</sup> and McHugh J [in *McGinty* 1996]<sup>9</sup> has demonstrated, orthodox methods of constitutional interpretation are not incompatible with recognition that the Constitution is founded upon the ultimate sovereignty of the people”.<sup>10</sup> To be sure, in *McGinty*, Justice McHugh expressed that proper interpretation should recognise that “since the people have agreed to be governed by a constitution enacted by a British statute, it is surely right to conclude that its meaning must be determined by the ordinary techniques of statutory interpretation and no other means”.<sup>11</sup> Therefore, to Justice McHugh the assertion of popular sovereignty has no discernible consequences for constitutional interpretation, or does it? The answer is not simple, for example Wright has noted:

The tenuous nature of the link between the location of sovereignty and a theory of interpretation is clearly demonstrated by McHugh J in *McGinty* who recognised that ‘the political and legal sovereignty of Australia now resides in the people of Australia’ yet simultaneously decried a perceived rejection by other judges of the ‘principles of interpretation laid down in the *Engineer’s* case’.<sup>12</sup>

Aroney has said that “[differing] views on the nature of the Constitution can lead to divergent methods of interpretation, *but not necessarily*”.<sup>13</sup> (emphasis added) As support for this statement,

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sources of law, but suggests a dichotomy between ‘permissive’ and ‘mandatory’ sources. Note also Ronald Dworkin’s contribution, with his use of principles.

<sup>7</sup> S. Benn, ‘The uses of Sovereignty’ in A. Quinton, *Political Philosophy* (1967) at 69.

<sup>8</sup> In *ACTV* (1992) 177 CLR 106 at 136 and 138.

<sup>9</sup> In *McGinty* (1996) 186 CLR 140 at 230-236 and 237.

<sup>10</sup> G. Winterton, ‘Popular Sovereignty and Constitutional Continuity’ (1998) 26 (1) *Federal Law Review* 1 at 13.

<sup>11</sup> (1996) 186 CLR 140 at 230. J. Daley, *The Bases for the Authority of the Australian Constitution* (1999) unpublished D. Phil thesis, Oxford at ch 6.4 has suggested that McHugh J in *McGinty* also “played down the consequences of popular will for constitutional interpretation”.

<sup>12</sup> H. Wright, ‘Sovereignty of the People - The New Constitutional *Grundnorm*?’ (1998) 26 (1) *Federal Law Review* 165 at 179.

<sup>13</sup> Aroney, above n 3 at 67.

he compares the approach of Dawson J in *ACTV* and McHugh J in *McGinty*, as an example of two judges declaring competing views on the nature of the Constitution, [Dawson J: Imperial Statute; McHugh J: popular sovereignty] but then both avowing that it must be interpreted by the “ordinary techniques of statutory interpretation”.<sup>14</sup> As a result, it would seem correct to place McHugh J alongside Dawson J (strictly on the issue of how the Constitution ought to be interpreted) in some sort of minority, as opposed to the rest of the Court.

However, this assessment was sorely tested in the 1997 case of *Commonwealth v Mewett*. This case brings both Justices to loggerheads on the very nature of the Constitution and its interpretation; if only in the course of oral argument.<sup>15</sup> In what appears an irreconcilable *volte face* from *McGinty*, McHugh J opines:

The question is why is the Constitution binding on the people today? Until the Australia Act one could say it was the product of a British statute and, therefore, it had the force of the statute. Since the Australia Act the British Parliament has washed its hands. So what is the basis? Why is it binding on the Parliament[s] of the Commonwealth and States? I do not know that there is any clear answer to it ***but I am not sure that we can go on treating it as if it was a British statute.***<sup>16</sup> (emphasis added)

This is a clear departure with his Honour’s thinking in *McGinty*.<sup>17</sup> It is not apparent what brought about such a change, but could popular sovereignty have been the catalyst? His Honour also noted:

***This whole notion may have fundamental consequences for even the interpretation of the Constitution.*** It may no longer be proper to look at the Constitution as a British statute. It may be that since the Australia Act we should look at it as a compact between the peoples of Australia, which is in effect renewed from day to day, and the authority of the Constitution rests on some such... [interjection during proceedings: Dawson J

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<sup>14</sup> *Ibid* at 67-68.

<sup>15</sup> It could be said that oral argument is more important in a Court’s decisional process than many realise. See further the transcript from *Levy* on 6 August 96 from web, <http://www.austlii.edu.au/do/Disp>, which ranges over the same ground for nearly 60 pages.

<sup>16</sup> Transcript 12 February 97, from web, <http://www.austlii.edu.au/do/Disp;11>.

<sup>17</sup> P. Loftus, ‘Proportionality, Australian Constitutionalism and Governmental Theory- Changing the Grundnorm’ (1999) 3 *Southern Cross University Law Review*, at 41 also notes a contradiction in McHugh J’s judgment in *Theophanous* at 197 in regard to interpretation of the Constitution as a statute or a living tree.

rebuffed the comments of McHugh J: “That is just surely to turn your face against history”].<sup>18</sup> (emphasis added)

In the end Justice McHugh’s conflicting position (from *McGinty* to *Mewett*) was philosophically untenable. The present writer would see this as a clear example of different views on the nature of the Constitution leading to divergent methods of interpretation (ie. British Statute = ordinary techniques of statutory interpretation *versus* Compact between the people = progressivism?). Thus, like the strong ‘link between the location of sovereignty and a theory of interpretation’, there is a similarly strong (and not unrelated) link between the perceived nature of the Constitution and a theory of interpretation. See the extremely apt comments of Moshinsky: “The source of the authority of the Constitution has *significant consequences* for the way in which the powers of government are expressed and *interpreted*”.<sup>19</sup> (emphases added)

The *volte face* of Justice McHugh in *Mewett* serves to highlight the unnecessary confusion and patent illogicality that surrounds the notion of popular sovereignty, and how it may mystify and confuse such important matters. It also serves to highlight that ‘the link between the location of sovereignty and a theory of interpretation’ is far from tenuous. The link is strong, and it is only tenuous when an adherent maintains an untenable and conflicting conclusion, such as Justice McHugh. His Honour’s ‘half way’ house could not be maintained and his Honour’s location of sovereignty in the people inevitably had an impact on the philosophical foundations of his Honour’s theory of interpreting the Constitution. Subsequent to *Mewett*, Justice McHugh seems to have retreated somewhat from his Honour’s paradigm shift. However, it was not until 2004 that his Honour recanted to somewhere near his original position in *McGinty* to view the

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<sup>18</sup> Transcript 12 February 97, from web, <http://www.austlii.edu.au/do/disp;10>.

<sup>19</sup> Moshinsky, above n 1 at 135.

Constitution as a British statute. In *Singh v Minister for Immigration and Multicultural and Indigenous Affairs*, McHugh J said:

Because the Constitution is contained in a statute of the Imperial Parliament and the people of the Commonwealth have agreed to be governed under the Constitution, it seems obvious that the best guides to its interpretation are the general rules of statutory interpretation.<sup>20</sup>

Commentators have forewarned about the possible impact of popular sovereignty on constitutional interpretation. George Williams has said:

The consequences of recognising that ultimate sovereignty in Australia lies with the people have yet to be fully explored. [I]t seems that this shift will have an *important impact* on how members of the High Court approach the task of constitutional interpretation... Once it is recognised that constitutional power ultimately resides in and is derived from the Australian people, it is arguable that the product of that power, the Constitution, should be construed in a manner that is sympathetic to the rights of the Australian people... One consequence of this approach would be to enhance the power of the judiciary over the legislature.<sup>21</sup> (emphasis added)

And further: “While [parliamentary supremacy] may have been persuasive for much of this century, it must now be set against the emerging doctrine of popular sovereignty. The notion of popular sovereignty can be applied...as a *powerful new catalyst* capable of supporting substantive interpretations of rights thus far given little or no scope”.<sup>22</sup> (emphasis added)

Further, as Professor Zines has noted: “It is difficult to be certain in clear legal terms what the notion of the sovereignty of the people means. The concept of sovereignty of the people... must be regarded as either purely symbolic or theoretical”<sup>23</sup> If the concept is purely symbolic, there

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<sup>20</sup> (2004) 209 ALR 355 at 372, citing his judgment in *McGinty* at 230.

<sup>21</sup> G. Williams, ‘Engineers and Implied Rights’ in M. Coper and G. Williams, (eds) *How Many Cheers for Engineers*, at 93-94. See also S. Donaghue, ‘The Clamour of Silent Constitutional Principles’ (1996) 24 (1) *Federal Law Review* 133 at 146; Wright, above n 12 at 178 and J. Kirk, ‘Constitutional Interpretation and a Theory of Evolutionary Originalism’ (1999) 27 (3) *Federal Law Review* 323 at 338.

<sup>22</sup> Williams, above n 21 at 230.

<sup>23</sup> L. Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) at 395-397.

would appear less risk of an adverse effect on constitutional interpretation. However, if popular sovereignty assumes any higher role, such as a

theoretical explanation of our system of government, it might have an effect on the interpretation... of the Constitution... impliedly restricting the scope of legislative and executive powers and giving rise to rights derived from the notion of the individual as a member of the sovereign people.<sup>24</sup>

As Aroney has noted: “In either case [symbolic or theoretical], there is a problem of definition, which must be addressed”.<sup>25</sup> In any event, this chapter further explores the possible undesirable consequences on constitutional interpretation.

Although some commentators suggest that the recognition of popular sovereignty “neither requires nor justifies a radical change in constitutional interpretation”,<sup>26</sup> this chapter diverges. It is a primary theme of this chapter that should the notion of popular sovereignty (particularly the theoretical concept) not be exorcised from such jurisprudence, the danger exists that a different judicial method will be **greatly facilitated** or may inexorably follow. Daley has recognised that “increasingly it is claimed that [popular] sovereignty has consequences for constitutional interpretation”.<sup>27</sup> Lindell recognises that “if used in this way it *increases immeasurably* the potential of judges to give effect to their own subjective beliefs regarding limitations that should be placed on the role of governments in our society”.<sup>28</sup> (emphasis added) Wright has noted “the contrast between theoretical models [popular sovereignty and parliamentary supremacy] shows that, in legal theory at least, the location of sovereignty makes a fundamental difference to the

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<sup>24</sup> *Ibid* at 396 and 415. After all, individuals can never be sovereign, only the people.

<sup>25</sup> Aroney, above n 3 at 288.

<sup>26</sup> Wright, above n 12 at 194.

<sup>27</sup> Daley, above n 11 at 2.1.

<sup>28</sup> G. Lindell, ‘Expansion or Contraction? Some Reflections About the Recent Judicial Developments on Representative Democracy’ (1998) 20 Adelaide *Law Review* 111 at 144.

way in which the constitution is viewed and interpreted”<sup>29</sup> by the Court.

See also the comments of Professor Zines: “The danger of treating the ‘sovereignty of the people’ or their decision to unite in a Commonwealth... as a starting point in reasoning is that they are so broad and abstract that it could encourage a judge to ‘discover’ in the Constitution his [sic] own political philosophy”.<sup>30</sup> And further: “If [popular sovereignty] goes beyond representative government (and is not merely symbolic) it opens a wide choice of political theories, not readily discernible in the Constitution”.<sup>31</sup> A judicial method not based upon utilitarian principles but natural law derived individual rights will be almost inevitable.

Otto has said that “the notion of popular sovereignty... has potentially far-reaching implications for constitutional interpretation which is sympathetic to the protection of human rights”.<sup>32</sup> Moreover, McDonald suggests that “representative government, linked to a new narrative of ultimate constitutional authority—the sovereignty of ‘We the People’—can now be seen as the central concept of constitutional interpretation”.<sup>33</sup> A less emphatic acknowledgment at least recognises that “the appropriate principles of constitutional interpretation are at least *influenced* by views as to the location of ultimate sovereignty”.<sup>34</sup> (emphasis added)

For a more strident acknowledgment of the effect popular sovereignty may have on constitutional interpretation, see the comments of Professor Finn (as he then was):

Because the people, not the parliament, are sovereign the implication seems *necessarily* to be that it is beyond the competence of the parliament...to exercise its powers in a way

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<sup>29</sup> Wright, above n 12 at 169.

<sup>30</sup> Zines, above n 23 at 422.

<sup>31</sup> *Ibid* at 397.

<sup>32</sup> D. Otto, ‘Human Rights Under the Australian Constitution’, (1999) 21 (1) *Adelaide Law Review* 139 at 144.

<sup>33</sup> L. McDonald, ‘The Denizens of Democracy: The High Court and the “Free Speech” Cases’ (1994) 5 *Public Law Review* 160 at 162.

<sup>34</sup> Winterton, above n 10 at 5.

that unduly interferes with such ‘inherent rights’ as the people may have despite or because of their union in our polity.<sup>35</sup> (emphasis added)

And also: “I suggest that [this] same concern become[s] seemingly *inescapable*, though no less controversial, for the law in a system of government such as our own, once recognition is given to popular sovereignty...”<sup>36</sup> (emphasis added) Professor Finn then goes on to suggest that because such matters are so fundamental to the Australian people and their governance, “it should be the Australian people themselves who are asked to resolve this, both as a matter of right and responsibility, and in doing so define in a Bill of Rights what is essential to [them]. The issues... are too important to be cast in their present crude form to [the] judiciary...”<sup>37</sup> See also Aroney who in 1998 was commenting on the cases of *ACTV*, *Nationwide* and *Theophanous*: “By stressing [the] doctrine of ‘popular sovereignty’ and a ‘social contract’ interpretation of the Constitution, it was easier to conclude that a guarantee of freedom of communication is necessarily implied”.<sup>38</sup>

Smallbone in 1993, suggested that this new method of interpretation “travels a good distance down [the] road ...to popular sovereignty, but not the full distance in the American sense”.<sup>39</sup> This statement begs the question as to how we determine when we actually arrive at our destination? For many proponents of the popular sovereignty theory, we are already there, having arrived at a time dating as far back as 1901, or as recent as 1986. The better view would be that popular sovereignty could not arrive until a wholly autochthonous Constitution is implemented. See the comments of Williams: “Popular support for the Constitution must therefore be sought from other

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<sup>35</sup> P. Finn, ‘A Sovereign People, A Public Trust’ in P. Finn (ed.) *Essays on Law and Government Vol 1* (1995) at 20-21.

<sup>36</sup> *Ibid* at 20.

<sup>37</sup> *Ibid* at 21.

<sup>38</sup> Aroney, above n 3 at 22.

<sup>39</sup> D. Smallbone, ‘Recent Suggestions of an Implied “Bill of Rights” in the Constitution, Considered as a Part of a General Trend in Constitutional Interpretation’ (1993) 21 *Federal Law Review* 254 at 259.

avenues or from future referenda”.<sup>40</sup> For as Justice Kirby warned in 1997: “We cannot naively assert that the Australian people are sovereign [natural law conceptions] without considering the consequences of this assertion for a Constitution which, in many ways, was framed upon quite a different hypothesis [utilitarianism]”.<sup>41</sup>

In the judicial context, it would seem far easier to discern an implied right if the people were thought to be the legal as well as political sovereigns. This is because the political sovereignty of the community has no judicial enforceability. Thus it would seem that the “adoption of the popular sovereignty theory can thus be seen to have ramifications for the interpretation of the Constitution”.<sup>42</sup> For as many proponents of popular sovereignty would assert, “once it is accepted that the Constitution’s binding authority derives from the people, it becomes difficult to conceive of it as a communication between the framers and modern society. The Constitution is not speaking from the past, but from the present”.<sup>43</sup>

## PART B - THE FOUNDER’S INTENT?

As noted by Justice McHugh in *McGinty*: “Any theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself”.<sup>44</sup> That accepted, the difficulty is which theory? Chief Justice of South Australia, John Doyle has stated: “One cannot help thinking that there must be a true theory of constitutional interpretation... but the reality is that, if there is, neither the High Court nor the US Supreme Court has yet reached

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<sup>40</sup> G. Williams, ‘The High Court and the People’, in Selby, H. (ed.) *Tomorrow’s Law* (1995) at 287.

<sup>41</sup> M. Kirby, ‘Deakin - Popular Sovereignty and the True Foundation of the Australian Constitution,’ 1997 Deakin Law School Public Oration, 22 August 1997, from web, <http://www.hcourt.au/deakin2.htm>; 5 at 8.

<sup>42</sup> Donaghue, above n 21 at 146.

<sup>43</sup> *Ibid.*

<sup>44</sup> (1996) 186 CLR 140 at 230.

agreement upon its principles".<sup>45</sup> This is not to suggest that the High Court or Supreme Court would reach agreement in any event, given the fact that the Australian and United States' constitutions derive their authority from a different source.

In the discussion that follows the present writer submits that a theory with a historical commitment is to be generally preferred, and theories such as progressivism that do not rely on such a commitment, are to be discarded. This is because a theory with a historical commitment will best ensure fidelity to the principles which informed the institutional and normative design of the Australian constitutional system of governance as envisaged by the Founders. In terms of constitutional interpretation Cooray has discerned conflicting approaches founded, *inter alia*, upon "an exclusion of history v reference to history" and "a federal compact v charter of nationhood".<sup>46</sup> J.W. Harris tells us that "in constitutional interpretation we have a date with history".<sup>47</sup> He has observed:

No doubt the constitutional theory [of interpretation] appropriate to a particular jurisdiction must embody some conception of *historical commitment*, such as this is (1) a representative democracy; (2) this is a federal representative democracy; (3) this is a federal representative democracy with a commitment to a particular conception of human rights; or whatever.<sup>48</sup> (emphasis added)

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<sup>45</sup> Noted in D. Solomon, *The Political High Court* (1999) at 237.

<sup>46</sup> L.M. Cooray, *Conventions, The Australian Constitution and the Future*, (1979) at 15-16.

<sup>47</sup> J.W. Harris, 'Overruling Constitutional Interpretations' in C. Samford and K. Preston (eds) *Interpreting Constitutions: Theories, Principles and Institutions* (1996) at 239.

<sup>48</sup> *Ibid* at 240.

What constitutional theory embodies the *appropriate* historical commitment in the Australian context? It seems clear that the High Court is operating under Harris's third paradigm, as after the dust has settled on the first spate of 'implied rights cases', the emphasis is clearly on representative government as opposed to responsible government, and popular sovereignty as opposed to parliamentary sovereignty. And further, the Court's "particular conception of human rights" is that they are best protected by the courts and not parliaments.

However, should not the High Court, to be true to the historical record, be using a constitutional theory consistent with the following paradigm; a federal parliamentary democracy? In this paradigm, there is an equally sincere commitment to human rights, it is just that the particular conception as to such rights sees parliaments as the best protectors. This would best ensure fidelity to the principles which informed the institutional and normative design of the Australian Constitution. See the comments of Dawson J in *ACTV* where his Honour agrees with Murphy J that freedom of movement and communication are indispensable to a free society. However, their Honours would "differ as to the institutions in which the founding fathers placed their faith for the protection of those freedoms".<sup>49</sup> As correctly noted by Justice Dawson, the Founders opted for Parliament, because "you put your faith in the representatives whom you elect, not in a court whom you do not elect".<sup>50</sup>

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

Not only has the new individual rights discourse seen a resurgence of reliance on the Convention Debates but the views of the Founders are gaining more prominence, in particular, Andrew Inglis Clark. It has been noted that:

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<sup>49</sup> (1992) 177 CLR 106 at 186.

<sup>50</sup> Transcript Levy, from web, <http://www.austleii.edu.au/do/Disp>, 6 August 1996; 7.

The great bulk of the 1891 draft constitution was the work of Sir Samuel Griffith and Andrew Inglis Clark, who was a "closet" republican and a strong admirer of the American constitutional system. Thus the federal division of powers is Clark's drafting, and so too is the separation of powers between Parliament, Executive and Judicature, and are derived directly from the US model. Clark was a close friend and life-long correspondent with the famous US jurist and jurisprudential scholar Oliver Wendell Holmes. Although Clark only attended the 1890 and 1891 Conventions, it has been estimated that around 80% of the words of Australia's Constitution are the work of Clark.<sup>51</sup>

Clark did not accept many of the accepted Diceyan propositions prevailing at the time, nor did he accede to a complete faith in responsible government. However, the prevailing mood of the majority of delegates that did, made it impossible for a bill of rights or, for that matter, an American-style separation between Parliament and Executive, to be instituted. For Clark, a written federal constitution necessitated that the judiciary be the supreme arm of government. As such, the constitutional entrenchment of the High Court's judicial review role was pivotal. For Clark, this meant that Australia was intended to have a system characterised at least in some respects by the supremacy of the High Court, as opposed to Dicey's prized notion of parliamentary supremacy which was so central to the British system.<sup>52</sup> Clark's position has been resurrected by the High Court in the 'implied rights cases' which facilitates a greater role for the Court and a progressive style of constitutional interpretation.

Greg Craven asks the question whether a majority of the Founders intended that the Australian Constitution should be the subject of 'progressive' interpretation? His answer is that "there exists

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<sup>51</sup> Northern Territory University, Teaching Materials on Constitutional Law from web, 9/9/04: <http://www.ntu.edu.au/faculties/lba/schools/Law>; 3-4. The statement that "the separation of powers between Parliament, Executive and Judicature, are derived directly from the US model" seems an over-statement as a true American-style separation of powers was not adopted. However, Australia's written constitution does provide a more rigid separation than the United Kingdom where "there is no formal separation of powers": J. McEldowney, 'Modernizing Britain: Public Law and Challenges to Parliament', in J. Mackinnon and P. Havemann (eds) *Modernizing Britain: Public Law and Challenges to Parliament*, (2002) at 6.

<sup>52</sup> Northern Territory University, *Ibid*.

no plausible evidence that the Founders in general or a significant number of them envisaged progressive judicial interpretation of the Constitution".<sup>53</sup> He notes that while some scattered statements in the Convention Debates "do disclose a progressivist tone, these are isolated, ambivalent and heavily affected by context".<sup>54</sup> Indeed, "only three out of the 78 delegates who served in the Conventions between 1891 and 1898 made interventions that contain even a serious hint of progressivist tendencies. Were all of these interventions to be combined, they might comprise a single page of the debates".<sup>55</sup>

Further, virtually all the progressivist contributions from the Debates referenced Lord Bryce and in turn his adulation for the Supreme Court of the United States.<sup>56</sup> However, the judicial activism in that court (particularly evident after *Marbury v Madison* in 1803) was thought to stem from the practical impossibility of amending the United States Constitution, because of the lack of a referendum provision. Patrick McMahon Glynn was to note in the Melbourne debates, that the precedent of a constitutionally active American Supreme Court should be rejected: "What will be the result if we do not make more elastic provision for the amendment of the Constitution? We are creating a Judiciary which will become legislators".<sup>57</sup> Further, most delegates suggesting a

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<sup>53</sup> G. Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' (2003) 31 (1) *Federal Law Review* 87 at 89. 'Progressivism' is an approach to constitutional interpretation that maintains the provisions should be given a meaning that is most consonant with contemporary society: H. Patapan, 'The Dead Hands of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia' (1997) 25 (2) *Federal Law Review* 211 at 220.

<sup>54</sup> *Ibid.* Craven notes that judicial and extra-judicial statements on the issue have been more grounded in general historical impression, isolated historical instances, and relatively limited analyses of historical materials rather than a detailed historical analysis of historical resources such as the Convention Debates: *Ibid* at 95.

<sup>55</sup> See Sir John Downer, *Convention Debates*, Melbourne, 1898, 274, Sir Isaac Isaacs, *Convention Debates*, Melbourne, 1898, 283 and Sir Josiah Symon, *Convention Debates*, Adelaide, 1897, 129 and *Convention Debates*, Melbourne, 1898, 344 as noted by Craven, *Ibid* at 99.

<sup>56</sup> See particularly Isaacs and Symon, *Convention Debates*, Melbourne, 1898, 283 and 374. Bryce's *The American Commonwealth* was an obvious source-book on American government and federalism.

<sup>57</sup> *Convention Debates*, Melbourne, 1898, 739 noted by Craven, above n 53 at 105. See also the comments of Henry Dobson: "Is it not the fact that every statesman who has written or spoken on this matter has said that one of the essential conditions of this constitution is that it should be

greater role for the High Court did so because of a concern to limit appeals from that court to the Privy Council. Moreover, even where there is a progressivist tone evident in the Debates, it is difficult to determine whether what is being endorsed is much more than what is today called connotation-denotation (to be explained shortly).<sup>58</sup>

Craven also notes that some Justices of the High Court have rather erroneously placed too much emphasis on these scattered statements in the Convention Debates. Craven has said that Justice Deane in *Theophanous*, relying heavily on Andrew Inglis Clark

ridiculed reliance upon historically-based methods of interpretation as submitting to the clutch of the ‘dead hand’ of the past... Whilst the views of Deane J hardly represented the consensus of the Mason Court, their disdain for historically derived constitutional analysis were to find sympathizers among both judges and commentators.<sup>59</sup>

Further, Craven suggests Deane J “elevates Andrew Inglis Clark to the status of a super-Founder, and attributes a (disputable) progressivist version of Inglis Clark’s views on constitutional interpretation to the Founders as a whole”.<sup>60</sup> However, this enthusiasm must be tempered by the fact that Inglis Clark “was not a major figure in the federal movement after the 1891 Convention, and was not even a delegate to the Second Convention that met between 1897 and 1898”. Indeed most of Inglis Clark’s progressivist comments are to be found in his book *Studies in Australian Constitutional Law* published in 1901.<sup>61</sup> Inglis Clark said:

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elastic, that it should give scope for the expansion of the Australian people into a nation as big as that of the United States”: Federal Council of Australia, Official Record of Debates, Seventh Session, 1897 at 153. See also the argument of R. G. Menzies (as he then was) before the High Court in the *Engineer’s case* (1920) 28 CLR 129 at 132-133: The Australian Constitution “is distinct from the American Constitution by reason of its statutory character, the existence of the royal veto, and the power of easy amendment”. As it has turned out however, the Australian Constitution has been anything but easy to amend.

<sup>58</sup> Craven, above n 53 at 100.

<sup>59</sup> *Ibid* at 91. So too Deane J said in *McGinty*: “The Constitution must be construed as a living force”: (1996) 185 CLR 140 at 200.

<sup>60</sup> Craven, *ibid* at 94.

<sup>61</sup> *Ibid* at 108.

The Constitution must be applied... not as containing a declaration of the will and intentions of men long since dead... but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it... It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document.<sup>62</sup>

However, this passage quoted by Deane J in *Thephanous* and Kirby J in *Eastman* to substantiate progressivist interpretation, in fact meant to Inglis Clark, the living force of the Constitution expressed through popular amendment *and not* judicial alteration.<sup>63</sup> The current populace ‘maintain the Constitution and have the power to alter it’ not the High Court. As such, the Parliament must make the Constitution a ‘living force’ by passing contemporary laws for contemporary times. It is the parliamentarians that view the Constitution with the eyes of their own times instead of delving deep into the Convention Debates. As Patapan has noted: “It is accepted that the Constitution is to have a ‘living force’, yet the substance, meaning and direction of its force is to be given by the Parliament and people and not by a ‘progressivist’ judiciary. In other words, the judiciary is not entitled to endow the Constitution with a meaning that neither the Founders nor the people intended”.<sup>64</sup>

Apart from the fact that any statements of particular Founders that suggest a greater role for the High Court or a progressivist interpretation, are essentially few and far between, there are the structural considerations in the institutional design of Australia’s constitutional arrangements that need to be considered. These structural considerations, perhaps more so than the views of any particular Founder, give the best indication as to the limited role of the High Court in the area of

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<sup>62</sup> A. Inglis Clark, *Studies in Australian Constitutional Law* (1901) at 21 as noted by Craven, *Ibid* at 109.

<sup>63</sup> Craven, *ibid* at 110. This passage from Inglis Clark is quoted by Kirby J in *Eastman v The Queen* (2000) 203 CLR 1 at 79-80, where Justice Kirby says “I have stated elsewhere my views on this question” referring to *Kartinyeri v The Commonwealth* (1998) 152 ALR 540; *Re Wakim; Ex parte McNally* (1999) 73 ALJR 389 and *Grain Pool of Western Australia v Commonwealth* (2000) 74 ALJR 648; 170 ALR 111 in a footnote.

<sup>64</sup> Patapan, above n 5 at 233.

rights jurisprudence and constitutional interpretation. These structural considerations are also consistent with the positivist and utilitarian philosophies of the Founders:

- First, it seems reasonable to approach the interpretation of the Constitution from the premise that it was a statute (albeit a very special one) and normal statutory considerations applied, namely “the Founders meant what they meant and meant what they wrote”.<sup>65</sup>
- Secondly, the Constitution was contained in an Imperial statute and not an autochthonous document derived from a declaration of popular sovereignty (political implications of the 1890’s referenda aside)
- Thirdly, “the overwhelming determination of the Founders in respect of the High Court was that it should be the custodian of federalism, and crucially, that it should protect the states”.<sup>66</sup>
- Fourthly, “the Founders determination that the Constitution not be the subject of excessively easy amendment”<sup>67</sup> by either the electors, the Commonwealth, the states, or the High Court for that matter, but as noted earlier it must be elastic enough to allow expansion.
- Fifthly, the long drawn out, fiercely debated and pains-taking nature of the process leading towards federation does not readily suggest a group of legislators comfortable with the idea that their hard won concessions and compromises could be judicially revised.<sup>68</sup>

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<sup>65</sup> Craven, above n 53 at 96.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid* at 97.

<sup>68</sup> *Ibid.*

### ***Progressivism: sidestepping the Founder's intentions?***

Craven suggests that the departure by the Mason Court from the more traditional literal methods of constitutional interpretation to progressivism has corresponded with the discovery of 'implied rights'.<sup>69</sup> Lindell is concerned about progressivism and warns against "the Court interpreting the Constitution in a way that is completely divorced from the original meaning which that document was intended to have".<sup>70</sup> Professor Winterton also warns:

Were the Constitution to be construed as 'a living force' reflecting only 'the will and intentions' of the contemporary Australian people [progressivism], *unencumbered* by the 'dead hands' of the constitutional framers [originalism, intentionalism and literalism] or the Australian people of 1900 and heard only by the justices of the High Court... long established constitutional doctrines and interpretations would be imperiled.<sup>71</sup> (emphasis added)

The present writer agrees emphatically with this statement but questions Professor Winterton's final conclusion that "orthodox methods of constitutional interpretation are not incompatible with recognition that the Constitution is founded upon the ultimate sovereignty of the people".<sup>72</sup> The present writer refers to Justice McHugh's *volte face* (from *McGinty* to *Mewett*) as an example of the untenable nature of this proposition.

Craven also outlines two further attacks upon progressivism:

First, progressivism is a device whereby unelected judges assume power over a range of matters not confided to them by the Constitution, matters which properly fall for disposition by elected legislatures. Secondly, progressivism... involves nothing less than

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<sup>69</sup> *Ibid* at 90. Craven, writing in 1992 while the decisions in *ACTV* and *Nationwide News* were pending, seem to skillfully assess the situation: "Progressivism... allied with some fairly broad concept of constitutional implication, would be a far more congenial ally": G. Craven, 'The Crisis of Constitutional Literalism in Australia' in H. Lee and G. Winterton (eds) *Australian Constitutional Perspectives* (1992) 1 at 24.

<sup>70</sup> Lindell, above n 28 at 123.

<sup>71</sup> Winterton, above n 10 at 13. As Sir Anthony Mason has noted: After all "progressive interpretation is sometimes called 'living instrument [force]' interpretation": A. Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in C. Samford and K. Preston (eds) *Interpreting Constitutions: Theories, Principles and Institutions* (1996) at 16.

<sup>72</sup> *Ibid*.

the judicial amendment of the Constitution in usurpation of the rights of the electors of the Commonwealth and the states acting under s 128.<sup>73</sup>

As this chapter has constantly argued, the institutional and normative design of the Founders and established methods of constitutional interpretation will all be imperiled depending on what degree the method of progressive interpretation is seen to be unencumbered by the ‘dead hands’ of the past. The Constitution as a living instrument might be unencumbered in either of the following methods and degrees:

- the understandings and intentions of the Founders are denied as irrelevant, or
- it is simply denied that those views were decisive for all time.

Craven suggests Sir Anthony Mason has interpreted Justice McHugh’s and Justice Deane’s judgments in *Theophanous* as examples of the latter.<sup>74</sup> It seems clear that Deane J sees the ‘dead hands theory of construction’ as erroneous, and “the Constitution must be treated as a ‘living force’ and not as ‘a declaration of the will and intentions of men long since dead’”.<sup>75</sup> As for Justice McHugh, it is true that his Honour is concerned that “each generation must read the provisions of the Constitution in their context and that includes the historical context of the Constitution”.<sup>76</sup> But as Sir Anthony notes, McHugh J’s approach in *Theophanous* when read closely “does not seem to be all that different from the approach of Deane J”.<sup>77</sup>

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<sup>73</sup> Craven, above n 53 at 88.

<sup>74</sup> *Ibid* at 19. A point subsequently resiled from, or at the very least tacitly discarded in A. Mason, ‘Constitutional Interpretation: Some Thoughts’, (1998) 20 (1) *Adelaide Law Review* at 50.

<sup>75</sup> (1994) 182 CLR 104 at 174.

<sup>76</sup> *Ibid* at 197.

<sup>77</sup> Mason, above n 74 at 51.

Goldsworthy goes further however, and states that far from simply denying that the Founder's views were decisive for all time "in dealing with implied rights, majority Justices have often either side-stepped, or *denied the relevance of*, [the Founders] intentions".<sup>78</sup> (emphasis added) The clearest evidence of ambivalence can be found in the reasoning of several Justices in *McGinty*. So too, Craven has said: "The recent emergence of progressivism as a widespread, explicit force in Australian constitutional interpretation essentially has corresponded with the discovery by the High Court in the Constitution of implied rights. On any real analysis, this process has represented large-scale judicial modification of the Constitution".<sup>79</sup> Thus, after *Theophanous*, (and despite *Lange* to a point) the way seems clear for progressivism to facilitate a relationship between the judiciary and contemporary Australia. However, as noted earlier, it is the Parliament that must make the Constitution a 'living force' by passing contemporary laws for contemporary times, not the judiciary by implication.

It is accepted that "the Constitution is to have a 'living force', yet the substance, meaning and direction of its force is to be given by Parliament and people and not by a 'progressivist judiciary'".<sup>80</sup> Therefore the present writer rejects in principle progressivism, when interpreting the Constitution to discern the rights of Australian citizens. But what is to be progressivism's replacement? This is not at all easy to respond to, because no one theory seems capable of "resolving all questions of interpretation".<sup>81</sup> Craven has said any attempt to synthesise elements of the many approaches into a single, principled methodology should be welcomed as a worthwhile contribution to the discussion.<sup>82</sup> However, Craven admits that a limb of his 'contextualism' synthesis "encapsulates the policy-choice elements of progressivism", but then

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<sup>78</sup> J. Goldsworthy, 'Originalism in Constitutional Interpretation', (1997) 25 (1) *Federal Law Review* at 2.

<sup>79</sup> Craven, above n 53 at 90.

<sup>80</sup> Patapan, above n 5 at 233.

<sup>81</sup> Mason, above n 74 at 50.

<sup>82</sup> Craven, above n 53 at 115.

states that this limb is constrained by the requirement of the High Court to “attach great weight to the fundamental constitutional values of the Founders”.<sup>83</sup>

### ***A Theory of Constitutional Interpretation Based on an Historical Commitment to the Founder’s intentions: Originalism, Literalism, Intentionalism, Legalism***

In what follows the present writer would wish to embrace some aspects of such theories as originalism, literalism, intentionalism and legalism, acknowledging that no present model is exclusively right and the truth must lie somewhere between the extremes.<sup>84</sup> Goldsworthy similarly argues for a ‘moderate originalism’ which embraces “both original meanings [originalism] and original intentions [intentionalism] to help determine the contemporary meaning of the Constitution”.<sup>85</sup> In *Eastman v The Queen* Justice Kirby said “This Court should adopt a single approach to the construction of the basic document placed in its care”.<sup>86</sup> Justice Selway of the Federal Court has said that

[A]part from Kirby J, McHugh J is the only other High Court judge to attempt to articulate a single, principled approach to issues of constitutional interpretation... The remaining justices of the court (Gleeson CJ, Gaudron [before her Honour retired], Gummow, Hayne and Callinan JJ- called hereafter the ‘flexible five’) have declined to be bound by any particular approach to constitutional interpretation... [They] take a flexible approach to constitutional interpretation that will involve, on occasions, applying different interpretative techniques to different provisions with no clear explanation why... These considerations suggest that the proper approach in constitutional interpretation is essentially the approach that the flexible five have undertaken.<sup>87</sup>

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<sup>83</sup> *Ibid* at 30.

<sup>84</sup> D. Dawson, ‘Intention and the Constitution- Whose Intent? (1996) *Australian Bar Review* 93 at 95. Justice Selway has said that Sir Anthony Mason has identified five separate approaches: originalism, intentionalism, literalism, progressive interpretation and evolutionary interpretation: B. Selway, ‘Methodologies of constitutional interpretation in the High Court of Australia’, (2003) 14 (4) *Public Law Review*, at 240 noting Sir Anthony Mason, ‘Interpretation in a Modern Liberal Democracy’ in Samford C. and Preston K. (eds) *Interpreting Constitutions* (1996) at pp 13-30.

<sup>85</sup> Goldsworthy, above n 78 at 1. See also Kirk’s ‘evolutionary originalism’, above n 21.

However, query his view that intentions of the Australian people of 1899-1900, and not the Founders, are authoritative?: above n 21 at 343.

<sup>86</sup> (2000) 172 ALR 39 at 97-98. McHugh J in *Singh* (2004) 209 ALR 355 at 372 said “There is no consensus as to any single approach to the interpretation of the Constitution”.

<sup>87</sup> Selway, above n 84 at 244, 246, 249 and 250.

It must be acknowledged that in no small degree originalism and intentionalism can be at odds. See the case of *Sue v Hill*, where it was held that Britain was a foreign power. It is apparent that this decision could certainly be seen as embracing progressivism, but could it be consistent with either intentionalism or originalism? It would seem difficult to reconcile it with intentionalism, as it is clear that the Founders would not have considered Britain a foreign power. However, originalists would “concede that the terms of a constitution can be given application to new physical [political] realities which did not exist when the constitution was adopted”. <sup>88</sup> See a discussion of the technique of connotation-denotation below. What is not sanctioned is changing the meaning of the terms of the Constitution to sustain new developments.

The appealing feature of theories such as originalism, literalism, intentionalism and legalism is that in their own way, they all, for the most part, keep faith with historical conceptions, and we rely on historical conceptions for the functionality of the present constitutional order. As Gibbs J (as he then was) said in 1975: “[I]n construing the Constitution, as in the case of any other statute... regard may be had to the state of things existing when the statute was passed, and therefore to historical facts”. <sup>89</sup> Progressivism (or any theory for that matter) that displays infidelity to the institutional design of the Founders means that the checks, balances and principles the Founders envisaged are subverted, potentially leading to a dysfunctional constitutional order. Progressivism also surprisingly seems content to give up on the democratic process through parliament and defaults to the courts. As Justice Callinan said only recently: “The constitutional conservatism of the Australian people reflected in the failure of so many referenda cannot justify a supposed antidote of judicial ‘progressivism’”. <sup>90</sup>

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<sup>88</sup> Mason, above n 71 at 14.

<sup>89</sup> *AG (Cth); ex rel. McKinley v Commonwealth* (1975) 135 CLR 1 at 17.

<sup>90</sup> *Singh* (2004) 209 ALR 355 at 436.

(i) Originalism is endorsed in this thesis and connotes that the Constitution should be interpreted according to the original meanings disclosed in the text, context, purpose and structure of the Constitution, and as such seems to acknowledge the decisive authority of the text.<sup>91</sup> The High Court adopted this approach in 1988 in the case of *Cole v Whitfield*.<sup>92</sup>

(ii) Literalism is endorsed by virtue of recognising that the ‘legal’ source of the Australian constitution is its enactment by the Imperial Parliament. As a result the ordinary techniques of statutory interpretation should be applied. Sir Anthony Mason has noted. “literalism can be placed under the more sophisticated rubric of originalism”.<sup>93</sup> The present writer would not disagree with this statement but also wish to promote that literalism also encompasses intentionalism by its premise that the words discern the objective intentions of the Founders.

(iii) Intentionalism is endorsed by reference to the work of Hans Kelsen and his notion of a *grundnorm* of the legal order. The *grundnorm* for the Australian legal order is ‘that coercive acts ought to be applied only under the conditions and way determined or intended by the Founders of the Constitution’. Thus Kelsen’s theory seems to adopt a form of intentionalism, and if it can be shown that coercive acts are not being applied in such a way, there may be a change in the *grundnorm*.

Intentionalism is also endorsed in an attempt to determine the Founders beliefs and intentions objectively determined, not subjectively.<sup>94</sup> *Cole v Whitfield* specifically proscribed determining

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<sup>91</sup> Mason, above n 71 at 14-15.

<sup>92</sup> (1988) 165 CLR 360.

<sup>93</sup> Mason, above n 71 at 16. Literalism is often mooted as arising from *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (‘the Engineers case’) (1920) 28 CLR 129.

<sup>94</sup> McHugh J in Singh (2004) 209 ALR 355 at 373. Hill notes McHugh J stated in *McGinty* “that the task of the court is to give effect to the intention of the framers, objectively ascertained”. G. Hill, ‘Originalist vs Progressive Interpretations of the Constitution – Does it Matter?’ (2000) 11 *Public Law Review* 159 at 159.

the Founders intentions subjectively, but it did allow reference to the Convention Debates to determine “the contemporary meaning of the language used... *and the nature and objectives of the movement towards federation* from which the compact of the Constitution finally emerged”.<sup>95</sup> (emphasis added) I argue the object of the movement towards federation was to establish a federation upon positivist and utilitarian doctrines, not natural law doctrines. The objective intentions of the Founders was to embrace parliamentary supremacy and reject a bill of rights. If, on the authority of *Cole v Whitfield*, and for historical context, Callinan J in *Singh* can refer to the defeat of Dr Quick’s 1898 proposal to confer power on the Federal Parliament to enact laws relating to citizenship (21 to 15),<sup>96</sup> surely one can refer to the defeat of the proposal for a bill of rights (23 to 19) in the same Constitutional Convention.

(iv) Legalism is endorsed because as Justice Dawson has said “it can fashion new rules [while remaining] in conformity with the requirement of underlying legal principles”.<sup>97</sup>

At base, all the above theories could be seen to fit within the paradigm of legal positivism. In contrast the more liberal approaches to constitutional interpretation lumped together under the rubric of progressivism, could be seen to embody (at least tacitly) natural law concerns. This is evident by many of the arguments raised by progressivists such as ‘living instrument’, ‘fundamental rights’, ‘fundamental law’, ‘contract theory’ and ‘popular sovereignty’. See the comments of Aroney: “Of the views of the fundamental nature of the Constitution, this view [progressive interpretation] is most closely associated with popular sovereignty”.<sup>98</sup> Thus it seemingly comes down to this, the never ending dialogue between positive and higher law theories. As Gummow J has noted, arguments such as those by the plaintiffs in *Levy* “turn th[e]

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<sup>95</sup> (1988) 165 CLR 360 at 385.

<sup>96</sup> (2004) 209 ALR 355 at 436.

<sup>97</sup> D. Dawson, (1996) 3 *Judicial Review* 1 noted by Loftus, above n 17 at 40.

<sup>98</sup> Aroney, above n 3 at 68.

notion of [popular] sovereignty into some natural law concept”.<sup>99</sup> As Hanks and Cass note: “Underlying the choice of interpretive method, and judges’ preference for stability or change, is a deeper issue: What is the underlying jurisprudential theory behind the preference?”<sup>100</sup>

The progressivist criticism often levelled at originalism is that it will not bear a construction allowing the constitution to “change and expand so that its meaning changes from time to time”.<sup>101</sup> Thus some commentators concerned to foster a rights orientated constitution see decisions such as *Cole v Whitfield* in 1988 as “highly problematic for constitutional rights”.<sup>102</sup> So too intentionalism is criticized in that “it offers no answer to many questions which the Founders did not foresee”.<sup>103</sup> The better view is that both (along with literalism to a lesser degree) have as an underlying concern the preservation of the federation, but that certain adaptions become from time to time necessary, if the intention of the Founders is to be fulfilled amidst changing circumstances. As Patapan notes, “there is a difference between applying the terms of the Constitution to changing circumstances and changing the meaning of its terms to accommodate modern developments”.<sup>104</sup>

Writing in 1998, Sir Anthony Mason takes progressivism as a ‘given’ and discerns the “underlying question of principle” as: “in what circumstances is it legitimate to interpret the

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<sup>99</sup> Transcript 6 August 96, from web at 7. A point also noted by Wright, above n 12 at 2.

<sup>100</sup> P. Hanks, and D. Cass, *Australian Constitutional Law, Materials and Commentary* (1999) at 14.

<sup>101</sup> Mason, above n 71 at 15.

<sup>102</sup> Otto, above n 32 at 143.

<sup>103</sup> Mason, above n 71 at 16. McGrath has commented that “The Justices who reject the primacy of the intentions of the framers tend to enunciate their viewpoint in terms of the ‘living force’ theory of interpretation, enunciated by Andrew Inglis Clark”: F. McGrath, ‘The Use of the Convention Debates before the High Court after the Decision in *Cole v Whitfield*’, 19/1/05, from web: <http://www.samuelgriffith.org.au/papers/html/vol13>; 6.

<sup>104</sup> Patapan, above n 5 at f/n 113 at 20 from web. Note: text of f/n 113 from web is not the same as published version in *Federal Law Review*.

Constitution by reference to doctrines and principles prevailing in 1900?”<sup>105</sup> Since *Lange* in 1997 (and arguably *McGinty* a year earlier), only if there is a ‘clear manifestation of a doctrine in the *text or structure*’ is it legitimate for the Constitution to be interpreted in light of it. Thus, the question is answered. Another question would be: in what circumstances is it legitimate to interpret the Constitution by reference to doctrines and principles prevailing in the contemporary year?<sup>106</sup> The answer to this latter question (with no link to the text or structure of the Constitution) is difficult, although it might be answered by the ‘evolutionary interpretation of some terms in the Constitution’ and not by an underlying theory of progressivism. See for example whether the words ‘jury’ in s 80 and ‘people’ in s 24 include women. Clearly by reference to contemporary doctrines and principles they should.<sup>107</sup> This process has been consistently described by Craven as:

connotation-denotation, whereby a constitutional expression includes not only the specific instances which fell within that expression in 1900 (denotation), but also any further instances which have come into being since that time but which are nevertheless within the idea represented by the expression in question (connotation).<sup>108</sup>

Popular sovereignty with its insistence on the Constitution being interpreted as a ‘living instrument’, is analogous to ‘progressive interpretation’ or ‘progressivism’. Progressivism ultimately requires “the Court consciously to revise the meaning of the Constitution in

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<sup>105</sup> Mason, above n 74 at 51.

<sup>106</sup> After all, it might be thought by many that 1900 was “the relevant time for determining the essential meaning of terms used in the Constitution”: Lindell, above n 28 at 124.

<sup>107</sup> In respect of the question as to s 80 (jury) see *Cheatle v The Queen* (1993) 177 CLR 541. However, note the argument presented by Goldsworthy, above n 78 that the Constitution left such matters to parliament.

<sup>108</sup> Craven above n 53 at 90. The connotation-denotation distinction was given some recent support by Gummow, Hayne and Heydon JJ in *Singh* (2004) 209 ALR 355 at 404: “It may be that tools like the distinction between connotation and denotation or the distinction between concepts and conceptions are thought to be useful in understanding or explaining decisions like *Sue v Hill*”. However, in *Eastman v The Queen* (2000) 172 ALR 39 at 97, Justice Kirby contested the “disputable philosophical distinction between the connotation and denotation of verbal meaning”.

accordance with the perceived needs and desires of the contemporary Australian populace".<sup>109</sup> If the word 'progressivism' in the previous sentence was substituted with the term 'popular sovereignty', would the result be different in either context or effect? Constitutional interpretation based on popular sovereignty is an unnecessary obfuscation of the issues unless the scope and limits of popular sovereignty are transparent and objectively ascertained.

## CONCLUSION

This chapter warned that confusion surrounding the promotion of popular sovereignty into Australia's constitutional arrangements is most likely to manifest itself in the difficult area of constitutional interpretation. Hence, a method of constitutional interpretation based on a faithful historical commitment to Australia's constitutional arrangements was promulgated, endorsing some aspects of originalism, intentionalism and literalism. Reference to the late nineteenth century Convention Debates showed that the Founders themselves did not intend the Constitution to be subject to a form of interpretation known as progressivism. It was noted that progressivism was linked with the notion of popular sovereignty in the 'implied rights cases' and as such does not rely on an historical commitment. Progressivism was therefore discarded because it displays infidelity to the institutional design of the Founders meaning that the checks, balances and principles envisaged by the Founders are subverted, potentially leading to a dysfunctional constitutional order.

The discovery of 'implied rights' seems to have floundered in cases subsequent to about 1994, and seems to have waxed and waned through decisions such as *McGinty; Langer; Kable; Lange; Mewett, Levy, Kruger, Pfeiffer* and *Coleman*. The present writer argues that 'text and structure' implied rights jurisprudence may be reinvigorated by the present Court, and that this need not

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<sup>109</sup> Craven, above n 53 at 72.

provoke controversy. That said however, there can only be limited scope for such implications arising from the ‘text and structure’ of the Constitution itself, and such implications can only advance the cause of individual/human rights to a limited extent. Unfortunately they “will always be inadequate and piecemeal”.<sup>110</sup>

In any reinvigoration, the Court must shun the notions of progressive interpretation and popular sovereignty and cleave close to the text and structure of the Constitution. This of course echoes the warning of Professor Zines some years before that, the Court, in inferring what rights are necessary for the purposes of representative government, “should cleave closely to that conception and not be tempted to adopt broad and liberal constructions”.<sup>111</sup> This is especially important with regard to any further implications to be derived from any structural aspects of the Constitution, the presence of which, might necessarily imply other rights and freedoms as essential elements.<sup>112</sup> For as noted by Kirby J in *Kartinyeri v Commonwealth* “judicial interpretation of the Constitution risks the loss of legitimacy if it shifts its ultimate focus of attention away from the text and structure of the document”.<sup>113</sup> Some commentators, such as Stone and Foley, suggest that implications have to date, not been securely grounded in considerations of text and structure.<sup>114</sup> See the 2000 case of *Pfeiffer*<sup>115</sup> where Foley has noted:

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<sup>110</sup> Smallbone, above n 39 at 268 and Otto, above n 32 at 148.

<sup>111</sup> Zines, above n 23 at 178.

<sup>112</sup> The separation of powers under Chapter III of the Constitution is an obvious structural dimension of the Constitution. On the other hand, “implications from responsible government are more difficult to derive than implications from other sources”: G. Williams, *Human Rights Under the Australian Constitution* (1999) at 60. Federalism can also support results protective of human rights; *R v Smithers; Ex parte Benson* (1912) 16 CLR 99. However, “with the departure of the federalist ideal”: Loftus, above n 17 at 33, the federal compact view of the Constitution appears to be superceded by a social contract view.

<sup>113</sup> (1998) 195 CLR 337 at 400.

<sup>114</sup> See *Dietrich v The Queen* (1992) 177 CLR 292, *Polyukhovich v Commonwealth* (1991) 172 CLR 501 and *Kable v DPP (NSW)* (1996) 189 CLR 51.

<sup>115</sup> (2000) 203 CLR 503 at 534-535.

*Lange*'s strict approach to constitutional interpretation was not evident in *Pfeiffer*. In contrast to *Lange*, the *Pfeiffer* joint judgment focused upon broader concepts underlying the Constitution rather than being tied down to particular provisions. Indeed, the joint judgment is marked by the absence of any real attempt to demonstrate the constitutional basis for the matters said to arise from the Australian constitutional text and structure and deemed relevant to the development of the common law... An issue of concern is that drawing conclusions from broader concepts underlying the Constitution is a process that affords courts a considerable degree of latitude. This increases the scope for the development of constitutional law to be influenced by judges' subjective values.<sup>116</sup>

As such many, such as Adrienne Stone, have suggested a return to bottom-up constitutional reasoning and a rejection of top-down constitutional reasoning.<sup>117</sup> Bottom-up reasoning (whether it be in the common law or constitutional interpretation) is more likely to avoid the enunciation of over-arching principles, while top-down reasoning is usually theory laden and involves ambitious statements about an underlying principle. Justice McHugh stated in *McGinty* "top-down reasoning is not a legitimate method of interpreting the Constitution".<sup>118</sup>

Thus any future implied right must be derived from the text, structure and intent of the Constitution without extrapolating a whole shadow bill of rights to sustain the implied right. In other words, implied rights jurisprudence must be applied in a cautious, and clear manner with a faithful adherence to its core terms of reference:

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<sup>116</sup> K. Foley, 'The Australian Constitution's influence on the Common Law', (2003) 31 (1) *Federal Law Review* at 153.

<sup>117</sup> A. Stone, 'Freedom of Political Communication, the Constitution and the Common Law', (1988) 26 *Federal Law Review* at 219.

<sup>118</sup> (1996) 186 CLR 140 at 232 quoting Judge Posner in R. Posner, 'Legal Reasoning from the Top Down and from the Bottom Up: The Question of Un-enumerated Constitutional Rights', (1992) 59 *University of Chicago University Law Review* at 433. See also J. Williams, 'The Australian Constitution and the Challenge of Theory' in C. Samford and T. Round (eds) *Beyond the Republic* (2001) 119 at 120.

## A reinvigoration of ‘implied rights’ jurisprudence

### *1. The philosophical foundation of implied rights*

Firstly, the Court’s understanding of implied rights *should*, for the purposes of implied rights jurisprudence, be based upon a utilitarian understanding. The present writer does not presumptuously pretend to instruct the Court. However, I suggest a cogent philosophical foundation to develop ‘text and structure’ implied rights, would assist to legitimize the Court’s work in this regard. This is because, generally, the discussions concerning the legitimacy of implied rights jurisprudence have paid insufficient attention to the philosophical foundations of the individual rights being protected.<sup>119</sup>

The development of implied rights based on utilitarian principles would dovetail with Australia’s constitutional underpinnings. Dawson J captured the link when he stated “fundamental freedoms do not lie in any constitutional mandate but in the capacity of a democratic society to preserve for itself its own shared values.”<sup>120</sup> This accords with Goldsworthy’s view that

implications [other than logical implications which can be derived from the words of a document] are derived from the words together with something else. The ‘something else’ is generally based upon evidence of authorial intention, which can include the... common knowledge of the beliefs, values and goals of the authors.<sup>121</sup>

Thus, in discerning implied rights or freedoms in the Australian Constitution, the High Court should interpret the text and structure together with the common knowledge that the Founders’ beliefs, values and goals were clearly embedded within a utilitarian paradigm emphasising the

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<sup>119</sup> Patapan, above n 5 at 150. See also H. Patapan, ‘Rewriting Australian Liberalism: The High Court’s Jurisprudence of Rights’, (1996) 31 (2) *Australian Journal of Political Science* 225 at 228.

<sup>120</sup> Dawson J in *ACTV* at 183.

<sup>121</sup> J. Goldsworthy, ‘Implications in Language, Law and the Constitution’ in G. Lindell (ed.) *Future Directions in Australian Constitutional Law* (1994) at 172. See also J. Goldsworthy, ‘The

democratic process and parliamentary supremacy. To do otherwise (ie rely on natural law concerns) would be to construct a new paradigm wholly irreconcilable with Australia's constitutional traditions.

## ***2. The nature of the implied 'right'***

Secondly, the present writer argues the Court's enunciation of implied rights to date, can be seen to be in essence utilitarian rather than based on natural law, even if some members of the Court and some commentators do not view it this way. In this respect, one should note the work of H. Patapan who has consistently asserted that "such rights are not abstract or personal rights [natural]; they are those of process and procedure, secured by institutional arrangements [utilitarian] rather than a sense of inherent entitlements".<sup>122</sup> Thus the freedom of political communication "is a 'right', not because human beings have a natural or innate right to it, but because the democratic, parliamentary institutions entrenched in the Constitution, presupposes and requires such a right".<sup>123</sup>

Accordingly the Court in *Lange* held that the right is not an absolute or natural right, but acts as a restriction on legislative and executive power, and as such it is not personal but residual: "It is limited to what is necessary for the operation of that system of representative and responsible government provided for by the Constitution".<sup>124</sup> After all, while utilitarianism assures people that their interests will not be ignored or discounted, it does not assume that their interests,

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Constitutional Protection of Rights in Australia' in Craven G. (ed.) *Australian Federation Towards the Second Century* (1992) at 152.

<sup>122</sup> H. Patapan, 'A Return to Dicey? The Philosophical Foundations of the Australian High Court's Implied Rights Jurisprudence' in Samford, C. and Preston, K. (eds) *Interpreting Constitutions* (1996) 146 at 153.

<sup>123</sup> Patapan, above n 119 at 225-226.

<sup>124</sup> (1997) 189 CLR 520 at 561.

however fundamental, will not be out-weighed by the interests of large numbers of other people.<sup>125</sup>

### ***3. Institutional groundings in text and structure***

Thirdly, and as a direct corollary of the previous two points, reliance on the concept of popular sovereignty as the legal source of the Constitution ought to be avoided. For as Justice Kirby has noted the concept is “too nebulous, unhistorical or unpredictable”.<sup>126</sup> Lindell has suggested that the Court, after the departure of Brennan CJ, in an attempt to contain the new constitutional law, consciously failed to rely on or endorse popular sovereignty.<sup>127</sup> While it is acknowledged *Lange* might represent an ebb in discerning rights from such a notion, there is no limit nor predictability of what may flow from such a heretical postulate.

At this point, the present writer seeks to depart from Patapan, and argues the “tendency” not merely “potential” of implied rights jurisprudence based on popular sovereignty to move from “institutional groundings”, that is, text and structure implications, to broad liberal constructions only tethered to over-arching theoretical explanations.<sup>128</sup> Further, Smallbone’s comment is extremely persuasive: “In an age which has demonstrated that democracy can exist without constitutional recognition of the concept of popular sovereignty, there is no need to adopt so dangerous and unsatisfying notion into the fundamental fabric of our Constitution”.<sup>129</sup>

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<sup>125</sup> J. W. Nickel quoted in T. Jones, ‘Legal Protection for Fundamental Rights and Freedoms: European Lessons for Australia’, (1994) 22 (1) *Federal Law Review* 57 at 63. See also J. Bentham, *An Introduction to the Principles of Morals and Legislation* (extract) in D. Lloyd, *Introduction to Jurisprudence* (1965) at 128.

<sup>126</sup> Kirby, above n 41 at 2. This may be why his Honour has recently asserted international norms as protective of human rights. See chapter six for a discussion.

<sup>127</sup> Lindell, above n 28 at 144.

<sup>128</sup> Such as using representative democracy/government (based on popular sovereignty) as a free standing principle operating independently of the express provisions of the Constitution.

<sup>129</sup> Smallbone, above n 39 at 269.

The separation of powers and the division of labour between the executive, judiciary and legislature, and the structure to set these in place in the Australian Constitution, were made clear and unambiguous by the Founders. Such a structure left no Pandora's box from which to pluck new rights, or to alter institutional roles or structural arrangements of authority and responsibility. Popular sovereignty may be the political notion we prefer to legitimate the liberal democratic state. However, as chapter four will note there has been little unanimity or consistency of approach in its promotion into Australia's constitutional structure.

## **CHAPTER FOUR**

### **SOVEREIGNTY AS A CONTESTED CONCEPT**

#### **INTRODUCTION**

As noted in Table 1 in chapter one of this thesis, one can point to an increasing number of judicial and academic statements which canvas the notion of popular sovereignty. In judicial terms they range from a cautious extra-curial flagging of the issue to a forthright curial statement promoting or eschewing popular sovereignty as a component of Australia's legal and constitutional arrangements. As was seen in the previous chapter, judges who promote popular sovereignty often do so as a basis for adopting a progressive 'living force' interpretation of the Constitution. Jurists also argue for or against the notion of popular sovereignty, but as also noted earlier, not all of the protagonists have considered possible consequences for constitutional interpretation. Much of the debate does not consider whether the popular sovereignty discourse has since the early 1990's attempted to legitimate a new rights oriented jurisprudence.

This chapter attempts to examine in what sense the term sovereignty has been used by proponents of popular sovereignty as a legitimating basis for Australia's constitutional evolution. However, Part A notes there has been little unanimity or consistency of approach in the promotion of popular sovereignty. This discordance of opinion amongst the judiciary in the cases discussed means that reference to *obiter dicta* as well as *ratio decidendi* is needed.

Some proponents of popular sovereignty argue the Australian people are 'the body empowered to amend the Constitution' as well as 'the source from which the written constitution derives its authority'. Such propositions are consistent with a republican presumption about popular sovereignty as a basis for government where all power (political *and* legal) emanates from the

people, and the government holds such power as a trustee or under the social contract. In such a model, the apolitical Law-Giver is the State (in the name of the people) and the political and legal sovereigns and sources of constitutional authority are all fused in the people. It is this concept of popular sovereignty that this chapter criticises as inapplicable in historical and legal terms to the Australian context.

Parts B and C further distinguish between two facets of sovereignty, those being external and internal sovereignty. Many who use the concept of sovereignty do not make this distinction despite its importance. External sovereignty is concerned with the notion of Australia taking its place within the international family of nations. Internal sovereignty is concerned with what is the legal (not political) sovereign body within Australian municipal law, for example the parliament or the people. Clearly, Australia is a sovereign nation state in external terms, but recognising this does not assist with identifying the legal sovereign internally.

The chapter concludes that these two aspects of sovereignty, external and internal, appear to be coalescing in the minds of protagonists through a want of precision. Moreover, the debate about internal sovereignty may have been confused by blurring and rolling into one the differing constituent elements of internal sovereignty. As such it might be thought praiseworthy if all the aspects of sovereignty (including external) were separated in order to determine who are the beneficiaries of each (if they are distinct) and when did each obtain it? On such an analysis, it seems clear there is only one external sovereign; the Executive of the Commonwealth Government. However, under the Federal system set up under the Constitution, there may be more than one internal sovereign and further, each may have acquired sovereignty at different times. The whereabouts and identity of the internal sovereign for Australia will be examined later in this chapter. Part D argues that in such a process Dicey's dichotomy between legal and political sovereignty should be maintained.

## PART A- SOVEREIGNTY: A VERY SLIPPERY CONCEPT

In 1997 when the plaintiff in *Levy v State of Victoria*,<sup>1</sup> argued before the High Court that “there is a limit [based on popular sovereignty] on the extent of State legislative power”, one Justice was quick to ask “What is the state of the authority of the Court?”<sup>2</sup> In response, the Court was given a list of references by Mr Castan QC for the plaintiff “in relation to the concept of *legal* sovereignty now residing in the people”.<sup>3</sup> (emphasis added) Mr Castan QC submitted that “the current authority of the Court is that as a matter of *legal principle* the ultimate sovereignty in this country, federal *and State*, rests on the people of this country”.<sup>4</sup> (emphases added) Less than a month after *Levy* was heard, Justice Kirby mooted: “[I]t is impossible to ignore the growing movement which suggests that the ultimate sovereignty reflected in the Australian Constitution, is now to be taken as reposing in the Australian people themselves”.<sup>5</sup>

However, for all this enthusiasm, there has been little unanimity of view. To be sure, in the same year, 1997, Gummow and Kirby JJ in *Commonwealth v Mewett* quoted Joseph Story, an influential U.S. jurist of the 1840’s, in opining that the terms ‘sovereign’ and ‘sovereignty’ “were [often] used in different senses... something which led ‘to a confusion of ideas, and sometimes to very mischievous and unfounded conclusions’”.<sup>6</sup> Hayne J a year later (in oral argument) in

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<sup>1</sup> (1997) 189 CLR 579.

<sup>2</sup> *Levy v State of Victoria*, Kirby J transcript from web 6 August 1996, <http://www.austlii.edu.au/do/disp...https://1995/M42/8.html> at 8.

<sup>3</sup> By A.R. Castan QC for the plaintiff in oral argument. The list included Mason CJ in *ACTV* (1992) 177 CLR 106 137-138; Deane and Toohey JJ in *Nationwide News* (1992) 177 CLR 1 at 70; Brennan J in *Nationwide News* (1992) 177 CLR 1 at 47; McHugh J in *McGinty* (1996) 134 ALR 344 at 349 and Gummow J in *McGinty* (1996) 134 ALR 344 at 378-379. See Table 1 in chapter one.

<sup>4</sup> *Levy v State of Victoria*, transcript from web, 6 August 1996, <http://www.austlii.edu.au/do/disp...https://1995/M42/8.html> at 10. Would all the States *really* accept that proposition? See chapter ten for a further discussion.

<sup>5</sup> M. Kirby, ‘Deakin - Popular Sovereignty and the True Foundation of the Australian Constitution,’ 1997 Deakin Law School Public Oration, 22 August 1997, from web, <http://www.hcourt.au/deakin2.htm>; 5.

<sup>6</sup> (1997) 191 CLR 471 at 541.

*Joosse v Australian Securities and Investment Commission* asked: “The question is: do those laws bind? Now, you can analyse that in terms of sovereignty if you like, but sovereignty is a very slippery concept”.<sup>7</sup>

My task in this chapter is to examine in what sense the term sovereignty has been used by those proponents of popular sovereignty as a legitimating basis for Australia’s constitutional evolution. This task is however, different from attempting to fully define and determine the ambit and operation of this notoriously ambiguous concept. That task has been the preoccupation of many of the greatest legal scholars and political philosophers of history. It is also a different task from that undertaken by Daley where he contended that “no definition of ‘sovereignty’ will assist in understanding the moral and legal basis of the Australian Constitution”.<sup>8</sup> Daley instead uses the concept of “authority”.

There are many who question whether there is even a need to locate a sovereign. Professor Zines has said: “The idea of a sovereign of any sort is not essential”.<sup>9</sup> However, Hobbes, Locke, Rousseau, Bentham, Austin and Dicey any many other philosophers did regard locating a sovereign as essential. Some of this esteemed group were natural lawyers, others were positivists. Some thought the sovereign was popular, others thought the sovereign was Parliament. Whilst this thesis does not purport to analyse in a general manner the writings of these great scholars, there is reference to important aspects of their constitutional theories as they have been touched upon by the ‘implied rights’ discourse, which derives its legitimacy from the idea of popular

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<sup>7</sup>(1998) 159 ALR 260.

Transcript from web, 15 December 1998, <http://www.austlii.edu.au/do/disp...998/M35/1.html>; 15.

<sup>8</sup> J. Daley, *The Bases for the Authority of the Australian Constitution* (1999) unpublished D. Phil thesis, Oxford at ch 2.1.

<sup>9</sup> L. Zines, ‘Constitutionally Protected Individual Rights’ in P. Finn (ed.) *Essays on Law and Government Volume 2*, (1996) 136 at 151. See also L. Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) at 396.

sovereignty. As such, some of Hobbes', Locke's and Rousseau's natural law concerns about the surrender or reservation of rights, social contract, trust and reciprocal duties will be discussed in later chapters. However, neither Jeremy Bentham nor John Austin was prepared to accept ideas of natural rights and discarded Hobbes', Locke's and Rousseau's social contract basis of sovereignty and replaced it with the idea of a factual basis of sovereignty in actual habitual obedience.<sup>10</sup> This was known as the 'Command' or 'Imperative Theory'. Although Austin's *The Province of Jurisprudence Determined* was published in 1832 (the year of Bentham's death), it was not until 1945 that the influence of Bentham's ideas upon Austin's account of law in terms of 'sovereign commands' was fully appreciated.<sup>11</sup>

We have already encountered Bentham's utilitarianism and Dicey's two 'actual' limitations on the sovereign power of Parliament, in chapter two. For Dicey, one limitation is the external possibility of popular resistance (political sovereignty), and the other is the internal moral obligation on the consciences of members of Parliament, in whom legal sovereignty is vested. Thus as noted by J. Gough, Dicey's dichotomy is that "legal sovereignty is the regular exercise of the power of government, vested in the Crown-in-Parliament, which is itself the 'only lawful source of governmental authority'. Political sovereignty is the non lawful origin of that power, which is vested in the people".<sup>12</sup>

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<sup>10</sup> R. Cotterrell, *The Politics of Jurisprudence* (1989) at 68. D. Lloyd says that Kelsen has recognized broad similarities between the pure theory and the command/imperative theory, but has equally emphasized the differences. Primarily, Austin makes the cardinal error of basing the validity of the legal order (or sovereignty) on a factual situation, viz., habitual obedience, and ignores the logical objection to basing the validity of a norm on anything but another norm: D. Lloyd, *Introduction to Jurisprudence*, (1965: 2<sup>nd</sup> edition) at 191-193.

<sup>11</sup> J. Finch, *Introduction to Legal Theory*, (1974: 2<sup>nd</sup> edition) at 72.

<sup>12</sup> J. Gough, *Fundamental Law in English Constitutional History*, (1955) at 221-223. See also J. Pyke, 'Globalisation – The Bane of Popular Sovereignty' in C. Samford and T. Round (eds) *Beyond the Republic* (2001) 205 at 206: "Under this model, the people's political sovereignty depends, in law, absolutely on the grace of the legally sovereign Parliament".

In promoting these limitations on parliamentary sovereignty, Dicey was trying to address what he, and many others, saw as difficulties with Austin's concept of sovereignty. Firstly, Dicey saw Austin as confusing legal and political sovereignty.<sup>13</sup> Dicey states that Austin overlooked the fact that

the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. *But this is a political, not a legal fact.* The electors can in the long run always enforce their will. But the courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament... The political sense of the word 'sovereignty' is, it is true, fully as important as the legal sense or more so. But the two significations, though intimately connected together, are essentially different, and in part of some of his work Austin has apparently confused the one sense with the other.<sup>14</sup> (emphasis added)

Secondly, Austin was not seeking a legal sovereign- that is, an active, ultimately authoritative lawmaker. He was identifying only the location of ultimate authority underlying the constitutional order.<sup>15</sup> Thirdly, Austin excluded legal limitations on, or division of, sovereign power. These difficulties have "produced more controversy than any other aspect of Austin's conception of sovereignty",<sup>16</sup> and that controversy is also evident in this thesis. Fourthly, Dicey appreciated Austin's difficulty in finding the sovereign in King, Lords and Commons, but he rightly rejected the Austinian explanation that members of the Commons are trustees for the electors.<sup>17</sup>

For Austin the idea of law was the command of a sovereign supported by sanction. The characteristics of the sovereign were twofold:

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<sup>13</sup> A.Dicey, *An Introduction to the Study of the Law of the Constitution*, (1959: 10<sup>th</sup> edition) at 76.

<sup>14</sup> A.Dicey, *An Introduction to the Study of the Law of the Constitution*, (1956: 9<sup>th</sup> edition) at 73.

<sup>15</sup> Cotterrell, above n 10 at 71.

<sup>16</sup> *Ibid* at 69.

<sup>17</sup> Dicey, above n 14 at xli.

(1) the generality of the given society must render habitual obedience to that certain individual or body; (2) whilst that individual or body must not be habitually obedient to a determinate human superior.<sup>18</sup>

Thus for Austin, sovereignty in the English Constitution is shared between the Monarch, the Lords and the electorate of the Commons.<sup>19</sup> In the United States sovereignty lies with the body of people that has ultimate authority to alter the written Constitutional document.<sup>20</sup> Thus it is the electors of Congress who form the sovereign body. Finding who is sovereign in Australia, as we shall see in later chapters, is not easy. The exercise is compounded by the fact that s 128 of the Constitution has been held incapable (on one view) of amending the Commonwealth of Australia Constitution Act 1900 (Imp) of which the Constitution is but a section.<sup>21</sup>

Clearly in the ‘implied rights’ discourse there has been no unanimity about the exact nature of sovereignty. What can however, be said from the outset is that sovereignty possesses two (at least) distinct aspects; external and internal. New Zealander Paul McHugh states that in late nineteenth century British practice in respect to ‘protectorates’ in Africa and the Pacific:

The hallmark of a protectorate is the division of legal sovereignty. The Crown assumes the ‘external’ sovereignty, leaving the original ruler(s) with the ‘internal’. The external sovereignty is the power to conduct the foreign relations of the protected power. The internal sovereignty was untouched by the treaty of protection. The pre-existing system of government and law continued unaffected by the loss of external sovereignty.<sup>22</sup>

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<sup>18</sup> C. Harlow, ‘Power from the People? Representation and Constitutional Theory’ in P. McAuslan and J. McEldowny (eds) *Law, Legitimacy and the Constitution* (1985) 62 at 71 citing *Province* (Wiedenfeld, 1955) at 214.

<sup>19</sup> J. Austin, ‘The Province of Jurisprudence Determined’ reprinted in *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (1832) at 230-231.

<sup>20</sup> *Ibid* at 250-251.

<sup>21</sup> The Australian Constitution is contained in clause 9 of the Commonwealth of Australia Constitution Act 1900 (Imp).

<sup>22</sup> P. McHugh, *The Maori Magna Carta* (1991) at 46-47.

In Australian in 1998 Hayne J (in oral argument) in *Joosse v ASIC* stated: “Sovereignty relevantly might be thought to be concerned not so much with the status of this country in international relations [external] but the question of what laws govern within this country [internal]”. <sup>23</sup>

## PART B- EXTERNAL SOVEREIGNTY

### *A conflation of external and internal sovereignty*

External sovereignty relates to the notion of Australia as a sovereign independent nation taking its place within the international family of nations. It is said to be represented by the splendour of the Crown as the legal external expression of the sovereignty of the Australian state. It is *usually* less controversial, save for the fact no one can agree at what putative time Australia attained this sovereignty of statehood. The polarised views are some 85 years apart; 1901 or 1986, with intermediate claims also making a bid; see Table 3 below. However, as will be noted elsewhere in this thesis in relation to legal and political concepts, it would appear that it is all too easy to blur the demarcation between external and internal sovereignty.

Professor Winterton, commenting on the slogan ‘Parliament is sovereign’ has said: “Use of ‘sovereign’ in this context has, inevitably, led to confusion between ‘parliamentary [internal] sovereignty’ and ‘national [external] sovereignty’”. <sup>24</sup> Aroney observed that: “Brennan J’s comment in *Kirmani v Captain Cook Cruises Pty Ltd [No. 1]* <sup>25</sup> that, on Australia gaining independence ‘the Commonwealth Parliament received a plenary power equivalent to that of the

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<sup>23</sup> Transcript from web, 15 December 1998, <http://www.austlii.edu.au/do/disp...998/M35/1.html>; 14. See also *Sue v Hill* (1999) 163 ALR 648 at 662 and 665-671 per Gleeson CJ, Gummow and Hayne JJ. See also *New South Wales v Commonwealth (Seas and Submerged Lands case)* (1975) 135 CLR 337 at 376 per McTiernan J, at 452-453 per Stephen J, at 480 per Jacobs J. See also D. Lloyd, *The Idea of Law*, (1987) at 173.

<sup>24</sup> G. Winterton, ‘The British Grundnorm: Parliamentary Supremacy Re-examined’ (1976) 92 *The Law Quarterly Review* 591 at 592.

<sup>25</sup> (1985) 159 CLR 351 at 410.

Imperial Parliament', appears to conflate the idea of sovereignty at International Law and sovereignty under the municipal constitutional system".<sup>26</sup> Daley has also noted: "[T]o say that 'Australia is an independent sovereign nation' does not imply that the Australian people are sovereign";<sup>27</sup> (commenting on Murphy J's judgment in *Kirmani*<sup>28</sup> which "linked international sovereignty to the authority of the people"). See also Hayne J in *Joosse*: "The sovereignty of Australia at international law has limited significance for sovereignty within Australia".<sup>29</sup>

### ***Sue v Hill***

A most important decision of the High Court dealing with notions of external sovereignty and Australian independence is the 1999 case of *Sue v Hill*.<sup>30</sup> In that case, the dual citizenship of One Nation Senator Heather Hill was challenged as being unconstitutional, because at the date of her nomination she was a 'subject or citizen of a foreign power' within the meaning of s 44(i) of the Constitution. A majority consisting of Gleeson CJ, Gummow, Hayne and Gaudron JJ considered that the United Kingdom answered the description of a foreign power, and as a result Mrs Hill was not duly elected. The joint judgment of Gleeson CJ, Gummow and Hayne JJ put the question as whether "[A]ustralian courts are, as a matter of fundamental law of this country, immediately bound to recognise and give effect to the exercise of legislative, executive and judicial power by the institutions of government of the United Kingdom".<sup>31</sup> Predictably, their Honours held that since at least the commencement of the Australia Act 1986 this has not been the case, tacitly approving of the 'evolutionary theory'.

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<sup>26</sup> N. Aroney, 'A Public Choice? Federalism and the Prospects of a Republican Preamble' (1999) 20 *University of Queensland Law Journal* 262 at 278 at f/n 123.

<sup>27</sup> Daley, above n 8 at ch 2.6.

<sup>28</sup> (1985) 159 CLR 351.

<sup>29</sup> (1998) 159 ALR 260 at 263-265.

<sup>30</sup> (1999) 163 ALR 648.

<sup>31</sup> *Ibid* at 665.

This theory (probably most influentially argued by Geoff Lindell)<sup>32</sup> holds that by the passage of time and a series of ‘milestones’ the United Kingdom has become a power foreign to Australia. Moreover, after the passage of the Australia Acts, the Constitution “now enjoys its character as a higher law because of the will and authority of the people”.<sup>33</sup> However, does the latter proposition logically flow from the former? As noted earlier, to say that Australia is an independent sovereign nation does not necessarily imply that the Australian people are sovereign. The heirs to the former sovereignty of the Imperial Parliament might be the Australian Parliaments, not necessarily the Australian people. Professor Zines has noted: “Mason CJ [in *ACTV*], spoke of the people as heirs to the British Parliament”.<sup>34</sup> However, Professor Zines reconciled that as the term ‘sovereign’, was being employed in a different sense from parliamentary sovereignty, “the sovereignty of the people is not a substitute for the sovereign British parliament, but something quite different”.<sup>35</sup>

In *Sue v Hill* Justice Gaudron embraced the evolutionary theory and considered “whether there had been a change in the relationship between the United Kingdom and Australia so that the former is now a foreign power”.<sup>36</sup> Naturally enough, her Honour only had to recite four cases (two in a footnote)<sup>37</sup> which have noted such a change. Her Honour then went on to recount the ‘big three’ milestones of the evolutionary theory which ‘gradually and imperceptibly’ transformed the Australian federation into a sovereign independent nation, at the very latest in 1986. These were:

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<sup>32</sup> G. Lindell, ‘Why is Australia’s Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence’ (1986) 16 *Federal Law Review* 29.

<sup>33</sup> *Ibid* at 37.

<sup>34</sup> Zines, *The High Court and the Constitution* above n 9 at 394.

<sup>35</sup> *Ibid* at 394-395.

<sup>36</sup> (1999) 163 ALR 648 at 694.

<sup>37</sup> *Ibid*. The cases referred to by her Honour were *New South Wales v The Commonwealth (Seas and Submerged Lands case)* (1975) 135 CLR 337 at 373; *Nolan* (1988) 165 CLR 178 at 184; *China Ocean Shipping Co v South Australia* (1979) 27 ALR 1 and *Joosse v ASIC* (1998) 159 ALR 260 at 264-265.

1. the adoption of the Statute of Westminster 1931 (Imp) in 1942 and
2. the process by which former British Empire subjects became citizens of independent nation states and
3. finally the passage of the Australia Acts in 1986.<sup>38</sup>

The second milestone referred to by Gaudron J is the introduction of Australian citizenship by the Australian Citizenship Act 1948 (Cth). This was the milestone pointed to in 2002 by the appellant in *Sharples v Arnison*<sup>39</sup> in the Queensland Court of Appeal. The appellant submitted that at the time of the enactment of the Australia Act 1986 (UK), the United Kingdom was already a “foreign power”, and that country’s Parliament possessed no legislative power over or in respect of Queensland. In dismissing the appellant’s claim, McPherson JA stated:

[The Citizenship Act 1948 (Cth)] is yet another of the many hypotheses about the ‘true’ date on which Australia is said to have attained independent status. What matters is, however, not when, in relation to Australia, Great Britain became a ‘foreign power’, but when its legislative authority came to an end. As to that, the competence of the United Kingdom to legislate for Queensland continued to be recognised as a subsisting constitutional and legal fact... until at the latest at 5.00am GMT on 3 March 1986, when the Australia Act 1986 (UK) came into force.<sup>40</sup>

Thus the United Kingdom may have already been a ‘foreign power’ in 1986 when it enacted the Australia Act 1986 (UK). In *Sue v Hill*, Justices McHugh, Kirby and Callinan found it inappropriate to answer the question of whether the United Kingdom was a foreign power, because they held that the Court of Disputed Returns did not have jurisdiction to determine the issues raised in the petition. Of most interest is the judgment of Callinan J, where in *obiter* his Honour felt compelled to question the validity of the ‘evolutionary theory’ of Australian independence. Justice Callinan states that the theory

is to be regarded with great caution... In propounding it, neither the petitioners nor the Commonwealth identify a date upon which the evolution became complete... Nor could

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<sup>38</sup> *Ibid* at 694-695.

<sup>39</sup> [2002] 2 Qd R 444.

<sup>40</sup> *Ibid* at 448.

they point to any statute, historical occurrence or event which necessarily concluded the process... The great concern about an evolutionary theory of this kind is the doubt to which it gives rise with respect to peoples' rights, status and obligations... The truth is that the defining event in practice will, and can only be a decision of this Court ruling that the evolutionary process is complete... [A] decision of this Court upon that basis would change the law by holding that, notwithstanding that the Constitution did not treat the United Kingdom as a foreign power at Federation and for some time thereafter, it may and should do so now.<sup>41</sup>

What in effect is Justice Callinan saying? At first blush, these remarks would seem certainly to be unhelpful to the many proponents that now hold the search for an alternative legal basis of the Constitution based on popular sovereignty is complete. Moreover, Callinan J's view seems to consign the evolutionary debate to a state of limbo, until the High Court authoritatively pronounces when Australia's evolutionary process is complete. In effect, his Honour seems to be relying on notions of 'revolution' rather than 'evolution'. His Honour's reasoning seems to accord with Hart's notion of the 'rule of recognition' changing, or even a new *grundnorm* being discerned on the doctrine of necessity and/or the test of efficacy. Further, what is the effect of such reasoning on the legal basis of the Constitution? Until the pronouncement mooted by Justice Callinan, presumably the Constitution derives its legal force from its character as a British statute. Chapters seven, eight and nine of this thesis discuss these issues: Whether Australia's Constitution is now locally home-grown, whether the *grundnorm* or rule of recognition may have changed and whether the legal basis of the Constitution has changed.

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<sup>41</sup> (1999) 163 ALR 648 at 730-731. See also the comments of G. Lindell, 'Further Reflections on the Date of the Acquisition of Australia's Independence' in R. French, G. Lindell and C. Saunders (eds) *Reflections on the Australian Constitution* (2003) at 56: Callinan J "had in mind the practical consequences of the evolutionary nature of Australia's independence, some of which might have implications for the liberty of the subject in statutory provisions that made in an offence to improperly assist foreign governments such as the meaning of 'foreign power' in s 78 of the Crimes Act 1914 (Cth)... However, the High Court's decision in *Re Patterson* (2001) 207 CLR 391 illustrates the ability of the Court to avoid visiting what are perceived to be unjust consequences on persons who could be otherwise adversely affected by the process of independence".

### ***The timing of Australia's independence***

Omar, in a recent Constitutional Law question and answer textbook provided a ‘model’ student answer and examiner’s comments, in a discussion of the “timing of Australia’s independence and the attainment of full sovereignty”. The comment the examiner failed to make in reviewing the answer was that the student’s conclusion was deficient in a vital respect. The examiner commented: “Whether one accepts the evolutionary [theory (which the student did)]... or the more radical explanation of full independence at 1901, no one would argue that since 1986, the ‘Commonwealth Government’s’ sovereign powers are circumscribed in any way”. <sup>42</sup> If by ‘Commonwealth Government’ the student meant the executive in its capacity to represent Australia in all foreign policy matters and enter into treaties and the like (external sovereignty), the view appears sound by virtue of the evolutionary theory and notions of autonomy. (However, note the influence of international norms on the development of the common law, <sup>43</sup> the review of administrative decisions, <sup>44</sup> and notions of extra-territoriality). However, if the student meant the term to include the Commonwealth Parliament in its role as municipal law-maker (internal sovereignty), there are numerous judges and jurists who would take issue and assert that such legislative power is most certainly circumscribed by reference to several sources. In fact, the passage from Mason CJ’s judgment in *Australian Capital Television Pty Ltd v The Commonwealth* <sup>45</sup> quoted by the student, declares clearly one of the more aggressive bases relied upon; that of popular sovereignty.

Australia is undoubtedly a sovereign independent nation, in spite of any disagreement about timing. If the present writer were asked to critique which proposal about the timing of

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<sup>42</sup> I. Omar, *Constitutional Law*, (1998) at 10.

<sup>43</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>44</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>45</sup> (1992) 177 CLR 106 at 138.

independence is to be preferred, Murphy J's suggestion of 1901 in *Kirmani*<sup>46</sup> would be quickly discounted. Contrary to Murphy J's view, as the historians Hudson and Sharp noted, at the end of the nineteenth century no one in the United Kingdom or Australia saw federation as being in any way linked with independence.<sup>47</sup> Federation achieved the *potential* for independence, but this was not desired for some time. In 1897 the Attorney-General for Queensland, Thomas Byrnes expressed the prevailing sentiments clearly:

I believe that in our union with the British Empire we have one of the most ideal connections which the world has ever seen between practically a self-governing community and a great Imperial body such as the Crown of Great Britain is... People say we are not a nation; but I say we are a nation. I am part of a bigger nation than Australasia – I am part of the British Empire.<sup>48</sup>

The views of Hudson and Sharp and the 1988 Constitutional Commission are to be preferred to that of Murphy J's, depending on the level of specificity sought. Particularly attractive about the Hudson and Sharp view is the distinction drawn between independence and separation in the precise historical concept. Australia's independence did not take the form of an abrupt and complete separation. In 1901, it took the form of a partial but sufficient separation. Later, the passage of the Statute of Westminster was a solemn (but only *partial*) relinquishment by the United Kingdom of control over the federal government.<sup>49</sup> As such Australia could not be considered politically subordinate or inferior from the adoption of the Statute in 1942. Complete separation, however, and complete independence did not arrive until 1986.<sup>50</sup> The 1988 Constitutional Commission's premise was that the Australian Government shared external

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<sup>46</sup> (1985) 159 CLR 351 at 383, Murphy J had stated: "The authority for the Australian Constitution then [1 January 1901] and now is its acceptance by the Australian people".

<sup>47</sup> W. Hudson, and M. Sharp, *Australian Independence: Colony to Reluctant Kingdom*, (1988) at 35.

<sup>48</sup> Federal Council of Australia, *Official Record of Debates*, Seventh Session, 1897 at 82-83.

<sup>49</sup> See also Brennan J in *Kirmani*: "Subject to the provisions of ss. 7, 8 and 9 [of the Statute of Westminster], the Dominion Parliaments became in law, as they were in political arrangement, equal in status to and independent of the Imperial Parliament" at 410. The Statute of Westminster Adoption Act 1942 (Cth) did not adopt ss. 7, 8 or 9. Section 7 did not, in any event, relate to Australia, but Canada.

<sup>50</sup> Hudson and Sharp, above n 47 at 133.

sovereignty with the United Kingdom Government until Australia ‘came of age’ during World War II; fixing some emphasis on Australia’s separate declaration of war on Finland, Romania, Hungary and Japan in 1941 to illustrate this.<sup>51</sup> The competence to declare war being universally recognised as the mark of a sovereign state. From about this point, the Australian federal government exercised sole external sovereignty. Others view Australia’s signing of the Treaty of Versailles in 1919 as the moment of independence.

In any event, the previous discussion has highlighted the disagreements about the timing of Australia’s status as an independent sovereign state in an effort to show how such confusion, and confusion about the notion of sovereignty generally, have often corrupted the discussion of internal sovereignty. This corruption has then led proponents of popular sovereignty to conflate the concepts of external and internal sovereignty. This allows such proponents to then assert that because of the withdrawal of the British hegemony, Australia is a fully autonomous nation externally. Further, they say, Australia is also a fully autochthonous nation internally and that as a result, the legal basis of the Constitution has changed from an Imperial external source to a popular internal source. Moreover, after the passage of the Australia Acts the Constitution “now enjoys its character as a higher law because of the will and authority of the people”.<sup>52</sup> The position of this thesis is that this conflation is unhistorical and inaccurate at law.

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<sup>51</sup> *Final Report of Constitutional Commission* 1988 vol 1, at 74.

<sup>52</sup> Lindell, above n 32 at 37.

**TABLE 3**  
**MODELS OF EXTERNAL SOVEREIGNTY**

<b>Murphy J in <i>Kirmani</i></b>	<b>G. Lindell (evolutionary theory) and Gaudron J in <i>Sue v Hill</i>.</b>
<b>1901</b>	<b>1986</b>
What is sovereignty ? An independent sovereign nation state able to take its place in the family of nations in its own right.	What ? Same
When ? 1901 - On federation and the establishment of the Commonwealth.	When ? 1986
How ? Passage of Australian Constitution by the Imperial Parliament	How ? Passage of Australia Acts
Who ? The splendour of the Crown as the legal external expression of the sovereignty of the state. In Australia the Governor-General and the Executive represent the external appearance of sovereignty.	Who ? Same
Why ? To effect a legal separation to allow Australia to take its place in the world as an independent nation.	Why ? Same
<i>Postscript:</i> The Statute of Westminster and Australia Acts did not alter the repository of sovereign power being the people.	<i>No Postscript:</i> The Statute of Westminster and Australia Acts were the instruments that granted Australia external sovereignty.

**Hudson and Sharp**  
*Australian Independence*

**1931**

What ?  
Same

When ?  
1931

How?  
Passage of the Statute of  
Westminster in 1931

Who ?  
Same

Why ?  
Same

*Postscript:* The Australia Act merely dealt  
with position of the States. From 1931 Australia  
had a federal parliament free of United Kingdom  
control.

**Callinan J in *Sue v Hill***

?

What ?  
same

When ?  
When the High Court makes the  
declaration.

How ?  
Fiat of High Court

Who ?  
Unknown

Why ?  
Unknown

*No Postscript*

Note: In 2003 both Professor Winterton and Professor Lindell (who was “previously undecided”) adopted Hudson and Sharp’s view that “Australia became an independent state on 11 December, 1931. Dependence after that was all in the Australian mind”: Hudson and Sharp, above n 47 at 7. See G. Winterton, ‘The Acquisition of Independence’ in R. French, G. Lindell and C. Saunders (eds) *Reflections on the Australian Constitution* (2003) 31 at 43 and G. Lindell, ‘Further Reflections on the Date of the Acquisition of Australia’s Independence’ in R. French, G. Lindell and C. Saunders (eds) *Reflections on the Australian Constitution* (2003) 51 at 54.

### **The 1988 Constitutional Commission**

**1941, or  
1931-1942**

See a similar view from Barwick CJ in *China Ocean's case*:  
Australia became independent at some period of time  
subsequent to the passage and adoption of the  
Statute of Westminster.

What ?

Same

When ?

Sometime between 1931 and 1942.  
Or in 1941 when Australia declared war.

How?

Recognition by the world community,  
and the British government ceased to have  
any responsibility in relation to Australian governmental matters

Who ?

Same

Why ?

Same

*Postscript:* The Australia Acts merely  
regularised and recognised Australia's legal separation.

## **PART C- INTERNAL SOVEREIGNTY**

### ***Parliamentary Sovereignty/Supremacy***

The debate around identifying the internal sovereignty of the Australian Commonwealth precipitates much of the real trauma of current constitutional thinking. Two questions are at the core of this debate. These are: Who or what is the beneficiary of internal sovereignty, and what

are such a sovereign's powers? Is the sovereign popular as in 'the people' or is the sovereign Parliament? Wherever the common law of the British Empire has gone, the theory of parliamentary sovereignty has gone, but its transfer to lands outside Britain was not straightforward because local conditions had a profound impact. It was rejected outright in the American colonies where the Constitution (and its amendments, including the Bill of Rights) imposes an inexorable constraint upon legislative action. In the late eighteenth century when the thirteen American colonies made their unilateral declaration of independence from the sovereignty of the British Parliament they did not transfer that parliament's omnipotence to their own legislatures; for that would not have been consistent with their foundational republican principles. The supremacy they established was the supremacy of the law (that is, the Constitution) emanating from the sovereign people. Thus they established an important distinction from a constitution established by the government and alterable by the government (as in the United Kingdom); to a constitution established by the people and alterable by the government.

On one view the Australian Constitution was established by the government (an Act of the Imperial Parliament) and alterable by the people, or on another view, alterable by the government invoking the people. When the Australian Constitution was enacted, what was given supremacy; the law as an expression of the people, as in the United States or the parliament as in the United Kingdom? In a unitary system, legislation is free from the trammels of the law, and the actions of a sovereign organ (that is, an Act of Parliament) are never disputed, and thus never measured by any external standard. However, in the United States the actions of the organs of government have to be measured by an external standard expressed by the sovereign people.

In Australia, a colonial legislature (unlike its matriarch at Westminster) was not supreme over the law, its powers were limited by law. Those limitations arose from the express terms of the written

instrument creating it.<sup>53</sup> So too, the Commonwealth and State Parliaments are supreme ‘under the Constitution’. The present writer acknowledges that as such, parliaments in the Australian federation are more accurately described as supreme not sovereign.<sup>54</sup> As Smallbone has said: “It must be remembered that Australian parliaments are, in any event, the creatures of written constitutions and do not enjoy the benefit of the doctrine of parliamentary supremacy in its fullest and purest form”.<sup>55</sup> See also the Court’s decision in *Lange v Australian Broadcasting Corporation*: “The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature”.<sup>56</sup> Loftus has suggested this passage represented “the formal notation of the inapplicability of the Diceyan notion of parliamentary sovereignty”.<sup>57</sup> However, this seems inaccurate by omission. A more accurate statement would have acknowledged that Dicey himself was well aware of the considerations in applying his doctrine to federations. Thus as Dicey argues: “In federal states, parliamentary sovereignty must be understood differently”<sup>58</sup> (as supremacy) not that parliamentary sovereignty should be abandoned.

The present writer would disagree with Galligan’s view: “to say... that Australian parliaments are supreme or sovereign within limited areas of jurisdiction makes little sense and should be

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<sup>53</sup> In relation to the colonies, if parliamentary sovereignty was a common law doctrine, only that portion of the doctrine “was introduced as was ‘reasonably applicable to the circumstances of the Colony’”: Deane and Gaudron JJ in *Mabo* at 79 citing Blackstone. See also Brennan J in *Mabo* at 34 and 38 also citing Blackstone.

<sup>54</sup> Even in the United Kingdom some writers prefer the term ‘parliamentary supremacy’ to ‘parliamentary sovereignty’, but whatever label is used, it is conceded the parliament at Westminster is a differently operating institution from those found in Australia.

<sup>55</sup> D. Smallbone, ‘Recent Suggestions of an Implied “Bill of Rights” in the Constitution, Considered as a Part of a General Trend in Constitutional Interpretation’ (1993) 21 *Federal Law Review* 254 at 258.

<sup>56</sup> (1997) 189 CLR 520 at 564.

<sup>57</sup> P. Loftus, ‘Proportionality, Australian Constitutionalism and Governmental Theory- Changing the Grundnorm’ (1999) 3 *Southern Cross University Law Review*, at 73.

<sup>58</sup> Dicey, above 13 at 144.

abandoned”.<sup>59</sup> Why should a perfectly logical and legally accepted view be abandoned without good cause? The only justification Galligan gives is that “Australia is not a majoritarian democracy but a federal republic”.<sup>60</sup> This is as illogical and unconvincing as it is inaccurate. It has been consistently recognised by the High Court that within the sphere of their federal limitations (that is, within their jurisdiction and competence), Australian parliaments have full and plenary powers; in fact “the same plenitude of power that the Imperial parliament possessed or could bestow”.<sup>61</sup> This sentiment has recently been reinforced in 2002 in *Durham Holdings Pty Ltd v New South Wales*<sup>62</sup> where a majority of Gaudron, McHugh, Gummow and Hayne JJ assessed the power of the New South Wales Parliament again as plenary, this time in respect of compulsory acquisition without just compensation. In a separate judgment Justice Kirby forcefully argued that the grant of legislative power to the New South Wales Parliament in the form of ‘peace, welfare and good government’ are not words of limitation, but as established in *Union Steamship* the words are a grant and are to be given the widest possible operation.<sup>63</sup>

This ‘supremacy’ view has also been recognised as applying in Canada: “[W]ithin the spheres of jurisdiction assigned to them under the British North America Act... our Parliament and provincial legislatures are supreme”.<sup>64</sup> However, see now the 1982 Quebec Superior Court decision of *Quebec Protestant School Boards v A.-G. Quebec (No.2)*:

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<sup>59</sup> B. Galligan, ‘The Australian High Court’s Role in Institutional Maintenance and Development’ in C. Samford and K. Preston (eds) *Interpreting Constitutions*, (1996) 184 at 186.

<sup>60</sup> *Ibid.* This view of the Australian Constitution tears the “British heart out of an otherwise American federal body”: S. Gageler, ‘Foundations of Australian Federalism and the Role of Judicial Review’ (1987) 17 *Federal Law Review* 162 at 172. Galligan cites the superior authority of the Australian people as the reason for his republican sentiments.

<sup>61</sup> *Victorian Stevedoring Co v Dignan (Dignan’s case)* (1931) 46 CLR 73 per Dixon J at 95. Further, see *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 per the Court at 9-10: “The power conferred on the New South Wales Parliament... is as ample and plenary as the power possessed by the Imperial Parliament itself”.

<sup>62</sup> (2001) 75 ALJR 501.

<sup>63</sup> *Ibid* at 512. See also *Trethowan’s case* (1931) 44 CLR 394 per Dixon J at 426 for the contrast between sovereign and subordinate legislatures.

<sup>64</sup> F. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (1977) at 213.

Formerly, Parliament or a legislature which remained within the limits of its competence, as defined by the Constitution Act 1867 [BNA Act], held absolute authority... [D]efeat at the ballot-box constituted the only remedy for parliamentary abuse. But, the Charter [of Rights and Freedoms] has radically changed the rules of the game.<sup>65</sup>

Whereas the rules of the game in Canada were changed by the democratic enactment of the Charter of Rights and Freedoms and the repatriation of the Constitution from Westminster, in Australia the rules of the game are seemingly being changed by the (constitutional) umpires.<sup>66</sup>

Thus far I have suggested that the doctrine of parliamentary supremacy still applies in Australia. I now turn to suggestions that popular sovereignty has usurped parliamentary supremacy. Depending on which definition of internal sovereignty one accepts, this may reflect on who one accepts to be the sovereign. Internal sovereignty has a number of definitions, including:

- the supreme law-making body, (the Crown-in-Parliament; legal sovereignty: Dicey); or
- the body whose 'will' is ultimately obeyed and which is therefore sure ultimately to prevail on all subjects, (the Australian people; political sovereignty: Dicey);
- the body empowered to alter all the constitutional arrangements of Australia, that is, the Constitution Act as well as the Constitution, (all the State Parliaments and the Crown-in-Parliament and the Australian people by s 15 of the Australia Acts and s 128);

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<sup>65</sup> (1982) 140 DLR (3d) 33 at 52 per Deschenes CJSC. Goldsworthy notes that Hogg opines that even after the Charter, the supremacy of Parliament principle still obtains; J. Goldsworthy, *The Sovereignty of Parliament* (1999) at 1.

<sup>66</sup> See A. Lynch, 'Comment and Book Review. The High Court – Legitimacy and Change: Review Essay: Haig Patapan, Judging Democracy – The New Politics of The High Court of Australia' (2001) 29 (2), *Federal Law Review* 295 at 304: "Patapan is quick to highlight the ... consequences of any adoption of the Social Contract theory to the Australian constitutional story. It certainly bolsters the Court in the role of protector of the people after several decades of being the distant umpire in federal scuffles".

- *the body empowered to amend the ultimate law*, that is, the Constitution, (the Crown-in-Parliament and the Australian people by s 128; *quasi*-sovereignty);
- *the source from which the written constitution derives its authority*, (the United Kingdom Parliament, **or** the Australian people if a new ultimate rule of recognition/*grundnorm* has been recognised: Austin).

### ***Popular Sovereignty: The Power to Amend the Constitution***

The last two definitions above, that is the sovereign is *the body empowered to amend the ultimate law* and *the source from which the written constitution derives its authority*, have been recognised by Professor Winterton where he identifies some Justices who have employed both concepts.<sup>67</sup>

Indeed, for present purposes, the present writer wishes to focus on an apparent confusion between these concepts, the ‘source of the authority’ of the Constitution and the ‘location of the power to amend’ the Constitution.<sup>68</sup> It might be thought convenient that the ‘one body’ would exercise both powers; that is, ‘source’ and ‘amendment’, as suggested by McHugh J in *McGinty v Western Australia*: “In [a country governed by a rigid Constitution], ultimate sovereignty resides in the body which made *and* can amend the Constitution”.<sup>69</sup> (emphasis added) In his Honour’s view, this body apparently was and is the Australian people. However, this logic is fraught with “considerable theoretical difficulties”<sup>70</sup> and one could argue that it is even historically inaccurate to say that the Australian people made the Constitution, even if their representatives in the colonial legislatures did so. Further, as noted by Professor Winterton: In Australia, it “is not

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<sup>67</sup> G.Winterton, ‘Popular Sovereignty and Constitutional Continuity’ (1998) 26 (1) *Federal Law Review* 1: notably Deane and McHugh JJ in *McGinty*.

<sup>68</sup> See the comments of Aroney, above n 26 at 277 at f/n 122: “Kelsen’s *grundnorm* is often misapplied to the current constitution or to the power to amend the constitution rather than the historically first legislator”.

<sup>69</sup> (1996) 186 CLR 140 at 237. See also Gummow J in *McGinty* at 274-275.

<sup>70</sup> *McGinty* at 230 per McHugh J.

necessarily the case”<sup>71</sup> that the one body would exercise both powers. <sup>72</sup> Daley similarly notes “it is possible for the body which makes the constitution to confer power on a different body to amend it”.<sup>73</sup>

My argument is that the popular role in amending the Constitution should not be elevated to a source of authority for the Australian Constitution. The Australian populace at the end of the nineteenth century did not make the Constitution. Thus as Daley notes “the wider claims of McHugh and Gummow JJ [in *McGinty*] that the people are sovereign because they have power to make and amend the Constitution is flawed”.<sup>74</sup> Further, they purported to rely on Bryce<sup>75</sup> for their proposition. However, this is not Bryce’s view. Bryce claimed that sovereignty was divided between two authorities, one (the Legislature) in constant, the other (which made *and* can amend the Constitution) only in occasional action. Thus Bryce’s claim is merely that the body with the power to amend has ‘ultimate sovereignty’ over those matters beyond the power of the legislature under the Constitution.<sup>76</sup>

The Imperial Parliament enacted the Australian Constitution, but that institution can no longer claim any sovereignty in respect of amending that document, nor the Constitution Act for that matter. (Section 128 is pre-eminent in respect of the former, s 15 of the Australia Act in respect of the latter). However, for the reasons to be outlined more fully in chapter nine, such an institution can, and should still be, seen formally as the legal source of the authority for the document.

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<sup>71</sup> Winterton, above n 57 at 4-5. In contrast, in the United Kingdom both powers are exercised by the Crown-in-Parliament.

<sup>72</sup> Further, it would seem that this omnipotence is rarely the case in federal states. By the very essence of federalism and its preoccupation with a stance against concentration, there is no logical nor legal impediment to accepting that both powers may be vested in different bodies.

<sup>73</sup> Daley, above n 8 at ch 2.5.

<sup>74</sup> *Ibid* at ch 2.5. But contrast Gummow J in *McGinty* at 274-275 where his Honour emphasised the federal considerations in s 128 which circumscribe the popular provisions.

<sup>75</sup> J. Bryce, *Studies in History and Jurisprudence Vol II* (1901) at 53.

<sup>76</sup> Daley, above n 8 at ch 2.11. Compare McHugh and Gummow JJ in *McGinty* who represent Bryce as claiming that only the amending body has sovereignty.

### ***Popular Sovereignty: Source of Authority of the Constitution (Lindell's contribution)***

In their Text, Hanks and Cass are clear that “sovereignty in constitutional law refers to the source of legitimacy which supports the constitutional arrangements of the state”. They are equally clear and emphatic that “the sovereignty of the Commonwealth Constitution, [by contrast with the U.S. Constitution], derived from an Act of the United Kingdom Parliament”. However, without any disavowal or discussion whatsoever, they then note that “some judges and commentators have suggested that sovereignty of the Commonwealth Constitution resides with the Australian people”.<sup>77</sup> A convenient starting point to analyse this trend is a 1986 article by Geoff Lindell which has been cited regularly by jurists and members of the High Court. Lindell had stated:

...the agreement of the people to federate, supported by the role given to them in s 128, as well as their acquiescence in the continued operation of the Constitution as a fundamental law [promotes the view that] the Constitution now enjoys its character as a higher law because of the will and authority of the people.<sup>78</sup>

However, did Lindell go as far as the people who rely on him would have us believe? Many protagonists readily assert that the Australian people are now the ‘legal as well as political foundation of the Constitution’. As Moshinsky has suggested: “The virtue of such a theory is that the legal explanation for the authority of the Constitution conforms with the political reality”.<sup>79</sup>

Professor Blackshield correctly suggested that Lindell’s version stopped short of asserting a wholesale paradigm shift. That is, Lindell’s thesis is based on an *additional*, not necessarily *alternative* approach. Lindell was (and arguably still is) comfortable that the historical

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<sup>77</sup> P. Hanks and D. Cass, *Australian Constitutional Law, Materials and Commentary* (1999) at 4.

<sup>78</sup> Lindell, above n 32 at 37. Notable proponents relying on Lindell are Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138. See also McHugh J in *Ridgway v The Queen* (1995) 184 CLR 19 at 91 citing Mason CJ in ACTV and McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140 at 230 citing Mason CJ in ACTV.

<sup>79</sup> M. Moshinsky, ‘Re-enacting the Constitution in an Australian Act’ (1989) 18 *Federal Law Review* 134 at 136.

explanation encompassing the Constitution as a British enactment, “is constitutionally and legally sound”.<sup>80</sup> However, Blackshield then asserts that Lindell’s approach *would not* have important implications for constitutional interpretation.<sup>81</sup> However, a more accurate assessment of Lindell’s view might be that his explanation *should not* “open the way to the dangers associated with subjective processes”.<sup>82</sup> The latter would seem to accord more with the apparent cautionary tone present in Lindell’s 1986 article. To be sure, Lindell states:

It seems to this writer at any rate, unrealistic to assume that either the fact of independence or the different [additional?] explanation which should now be adopted to explain the fundamental character of the Constitution *should* have the effect of changing basic principles of interpretation...<sup>83</sup> (emphasis added)

However, in 1998 Lindell had to revisit his previous assertions, possibly after the horse had bolted. He re-emphasised that the adoption of his original (1986) *additional* explanation should not have involved major changes in the judicial interpretation of the Constitution. However, he appears at least surprised as to how this benign ‘additional’ explanation of why the Constitution is legally binding, has in the hands of others, become a full blown ‘alternative’ explanation, based upon an aggressive promotion of popular sovereignty. This has been most vividly borne out by those proponents of popular sovereignty who claim that fundamental or deep rights exist which cannot be abrogated by Parliament, such as Sir Robin Cooke and Justice Toohey. Not infrequently, the ‘will and authority of the people’ which Lindell suggested may have *supplemented* the historical explanation, transforms ‘Jekyll and Hyde like’ into popular sovereignty which *supplants* the historical explanation. The extremely apt comments of Donaghue in relation to Mason CJ’s judgment in *ACTV* capture this: ‘It picked up a discussion

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<sup>80</sup> Lindell, above n 32 at 37.

<sup>81</sup> A.R. Blackshield, ‘The Implied Freedom of Communication’ in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 232 at 242. Blackshield and Donaghue suggest that Lindell’s analysis may have had an overly narrow focus; *Ibid* and S. Donaghue, ‘The Clamour of Silent Constitutional Principles’ (1996) 24 (1) *Federal Law Review* 133 at 145.

<sup>82</sup> Lindell, above 32 at 44.

<sup>83</sup> *Ibid.*

re-invigorated by Lindell about the source of the Constitution's binding authority, although in Mason CJ's hands the argument had more far-reaching consequences than Lindell might have envisaged or intended".<sup>84</sup>

Indeed, in 1998 Lindell applauded the High Court's retreat in *Lange v Australian Broadcasting Corporation*<sup>85</sup> as "wise, given the inherent dangers involved in its [popular sovereignty] use as a factor in constitutional interpretation. If used in this way it increases immeasurably the potential of judges to give effect to their own subjective beliefs regarding limitations that should be placed on the role of government in our society".<sup>86</sup> This appears a clear recognition that Lindell's earlier view that the 'additional' explanation "need have no impact on the interpretation of the Australian Constitution" has been developed in a way Lindell had not foreseen nor intended.

He bemoans:

[M]y attempt, however unsuccessful, [was] to stress that the influence of history, and the nature of the Constitution as part of a British enactment, could not be ignored to the extent that the original agreement of the Australian people was to the adoption of the Constitution in the form in which it emerged, namely, as a British statute. It was therefore to be interpreted in the way in which such instruments were interpreted at the time, subject of course to the necessary modifications required by its organic character... It seemed to me unrealistic to treat either the fact of independence or my explanation for the binding character of the Constitution as a reason for changing basic principles of interpretation or constitutional doctrine without there being a more explicit indication that this was intended by the Australia people or their representatives.<sup>87</sup>

In a footnote to his 1998 article Lindell states that he believes the member of the Court who has come closest to adopting his correct view was McHugh J, especially in his Honour's judgment in *McGinty* in 1996.<sup>88</sup> However, as was noted in chapter three of this thesis, Justice McHugh

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<sup>84</sup> Donaghue, above n 81 at 145.

<sup>85</sup> (1997) 189 CLR 520.

<sup>86</sup> G. Lindell, 'Expansion or Contraction? Some Reflections About the Recent Judicial Developments on Representative Democracy' (1998) 20 Adelaide *Law Review* 111 at 144.

<sup>87</sup> *Ibid* at 144-145.

<sup>88</sup> *Ibid* at 144 f/n 100; McHugh J in *McGinty* at 229-235.

performed a *volte face* from *McGinty* on this very issue in *Commonwealth v Mewett* in 1997.

Thus there is presently no member of the Court who has expressed (curially) a view in line with Lindell's 1998 explanation. Only Justice Dawson (when he was on the bench) has consistently adhered to the view that the Constitution should be interpreted according to ordinary techniques of statutory interpretation (of course with due deference to its character as a fundamental law), which the present writer elsewhere confirms as correct. Although Justice Dawson would of course see no need for an additional explanation of the Constitution's bindingness.

## **PART D- A CONFLATION OF LEGAL AND POLITICAL SOVEREIGNTY**

Several Justices of the High Court have attributed the phrase 'ultimate sovereignty' to the people of Australia.<sup>89</sup> However, it is often not clear in what sense it is used. Does it mean 'legal' or 'political' or both, or something else again? As a counterpoint, both Mason CJ<sup>90</sup> and Dawson J<sup>91</sup> have resorted to it. However, it seems unlikely that both Justices used it to mean the same thing. It would appear Mason CJ (in *ACTV*) used it to signify 'legal' *and* 'political' sovereignty, much like McHugh J was to signify in *Ridgeway v The Queen*<sup>92</sup> and *McGinty v Western Australia*.<sup>93</sup> On this view, at the end of the legal sovereignty of the British Parliament, it must mean that sovereignty is now vested in the Australian people. For if 'ultimate' means anything else, it would seem that legal sovereignty has been terminated by the British Parliament, but is not vested with any Australian entity. The comments of Professor Zines counter this: "The people of Australia cannot be direct heirs of the Imperial Parliament... It is clear, therefore, that the sovereignty of the people is not a substitute for the sovereign British Parliament, but something

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<sup>89</sup> See Brennan CJ, 'Speech on Swearing in as Chief Justice', 21 April 95 from web, 28/1/99, <http://www.hcourt.gov.au/swearing.htm>; 1. McHugh J in *McGinty* and Kirby, above n 5 at 5.

<sup>90</sup> *ACTV* (1992) 177 CLR 106 at 138.

<sup>91</sup> *Commonwealth v Mewett* (1997) 191 CLR 471, transcript of oral argument 6/8/96 from web, 12/9/99, <http://www.austlii.edu.au/do/dispt...ipts/1995/M42/8.html;9>.

<sup>92</sup> (1995) 184 CLR 19 at 91 (citing Mason CJ from *ACTV*).

<sup>93</sup> (1996) 186 CLR 140 at 230 (citing Mason CJ from *ACTV*).

quite different.”<sup>94</sup> On another view, if ‘ultimate’ means political sovereignty, how is this different from accepted Diceyan theory<sup>95</sup> and how does the passage of the Australia Acts in any way affect the legal/parliament and political/people dichotomy? This is the patent difficulty with describing the people of Australia as having ‘ultimate’ sovereignty vested in them. If a judge (or commentator for that matter) means both political and legal sovereignty, or just legal, or just political then this should be made clear.

Four years after *ACTV* (in 1996) in ‘The Interpretation of a Constitution in a Modern Liberal Democracy’ in C. Samford and K. Preston (eds) *Interpreting Constitutions: Theories, Principles and Institutions*,<sup>96</sup> Sir Anthony Mason reiterates his views from *ACTV* about the passage of the Australia Acts in 1986, but states that it is now possible to say “that *political* sovereignty resides in the people”. (emphasis added) In this respect the word ‘political’ is substituted for the word ‘ultimate’ as used in *ACTV*. What is the nature of this imprecision? Surely they cannot have the same meaning. If in *ACTV*, ‘ultimate’ meant legal (and political), it would seem impossible for ‘political’ to mean legal. If ‘ultimate’ meant political, it can only be reiterated: how is this different from Dicey, and more disturbingly how can such an orthodox view stand with his Honour’s previously (as early as 1986) strongly unorthodox statements such as “the status of the Constitution as a fundamental law springs from the authority of the Australian people”.<sup>97</sup> It would appear that like many who have sought to promote the legal sovereignty of the Australian people in the face of historical considerations, theoretical and philosophical inconsistencies arise.

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<sup>94</sup> Zines, above n 9 at 394-395.

<sup>95</sup> P. McHugh notes that “the relationship between legal and political sovereignty is more dynamic than Dicey depicted it”, and gives constitutional conventions as an example of the political influencing the legal: above n 22 at 14.

<sup>96</sup> (1996) 13 at 30.

<sup>97</sup> A. Mason, “The Role of a Constitutional Court in a Federation” (1986) 16 *Federal Law Review* 1 at 24.

Daley has assessed Sir Anthony's writings on sovereignty. He moots that in 1986 "he may have had in mind a similar distinction between legal and moral [political] reasons for obedience when he wrote of [Murphy J's] 'untenable view... that the Constitution derived its legally binding force from the sovereignty of the Australian people' yet claimed that 'the status of the Constitution as fundamental law springs from the authority of the Australian people'".<sup>98</sup> However, it does not follow from Sir Anthony's strong 1986 claims for the people as the authority of the Constitution, that he is prepared to maintain (as distinct from tacitly recognise) the distinction between the legal and the moral/political. Further, in *ACTV* the distinction is completely discarded to grant full legal sovereignty to the Australian people. It is only the 1996 writing that seems to retract some of the 'lost line' and imprecisely addresses the legal and political dichotomy. However, this is where it has been left. No matter what can be made of the difference between the earlier use of 'ultimate' and the later use of 'political', the earlier reasoning is contained in the majority judgment of a 'landmark' case, in which many of his Honour's fellow Justices had also discarded the distinction between the legal and the political. In contrast to Mason CJ, Dawson J appears to have consistently used 'ultimate' to signify 'political' sovereignty, in the sense that the peoples' will is ultimately obeyed.

Popular sovereignty may be well placed in both legal and academic circles to overtake the orthodox view of parliamentary supremacy. Further, popular sovereignty as the legal basis for the Constitution appears increasingly to have gained ground as the orthodox view. It may continue to do so despite the 1999 referendum questions on becoming a republic and changing the preamble being defeated. Some political leaders continue the search for a local root or an autochthonous source of political legitimacy. If a local root is to be found, it must exist in both political and more importantly, legal reality, and not merely the product of theorising without legal, historical

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<sup>98</sup> Daley, above n 8 at ch 2.9.

and factual support. Further, the burden ought to be on those who propound the case that popular sovereignty is a part of the Australian legal and constitutional system.

### ***An attractive but problematic relationship: the court and the people***

Judicial statements that promote popular sovereignty as the source of authority of the Constitution often reflect what Blackshield would term an “attractive but problematic relationship” between the sovereign people and the peoples’ judges.<sup>99</sup> So too, they represent “a dialogue between the people and the court”.<sup>100</sup> At this point one may ask: To what or whom does the judiciary owe its duty: the people or the law? Chief Justice Brennan would say ‘the law’ to counter the suggestion that judges should be *accountable* to the electorate as politicians are accountable.<sup>101</sup> However, how does this stand with the view of Mason CJ in *ACTV* that as a result of representative government, established by the people, the legislature, executive and judicial institutions are *responsible* to their sovereign master, the people?<sup>102</sup> Can the judiciary at the same time, be responsible to, but not accountable to, the people? A hypothetical duty statement for a new ‘peoples’ judge’ seems inherently contradictory.

The present writer would agree with Chief Justice Brennan that the duty of the judiciary is to ‘the law’. However, the present writer does so to counter the suggestion that judges should or do have a relationship with the populace out of deference to popular sovereignty. Just as problematic is the idea that popular sovereignty can authorise judges to give effect to their own subjective

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<sup>99</sup> Blackshield, above n 81 at 267-268.

<sup>100</sup> L. McDonald, ‘The Denizens of Democracy: The High Court and the “Free Speech” Cases’ (1994) 5 *Public Law Review* 160 at 191.

<sup>101</sup> G. Brennan, ‘The State of The Judicature’, Speech delivered at the opening of the 30<sup>th</sup> Australian Legal Convention, Melbourne, 19 September 97, from web <http://www.hcourt.gov.au/judicat.htm>:9. Justice Kirby has also said “Members of a legislature... are regularly answerable to the electors, whereas judges in Australia are not”: *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501.

<sup>102</sup> As noted by Zines, above n 9 at 394.

beliefs regarding limitations that should be placed on the role of government in our society. Justice Selway noted while commenting on Justice Kirby's 'living force' method of constitutional interpretation:

An approach to constitutional interpretation based upon 'contemporary meaning' faces a number of obvious difficulties: the first is in determining whose 'contemporary meaning' is to be applied [parliaments or courts]; another is to explain why the courts have the relevant skill and expertise to make the relevant contemporary assessment; a third is in attempting to apply a 'contemporary meaning' to provisions which may only make sense if understood in a historical context. It would seem reasonably clear that the contemporary meaning to which Kirby J ascribes is not the meaning of the man in the street. This can be seen in his Honour's use of human rights instruments. (citing *Kartinyeri v The Commonwealth* per Kirby J at 417-418)<sup>103</sup>

The High Court itself owes its existence to the Constitution, and all its members have been appointed under it. The difficult question arises that if the legal basis of the Constitution has altered, does this have any implications for the Court's role and status under the new foundation? Moreover, it is **not** the judge, but the jurist who presupposes the *grundnorm*. Geoffrey Marshall has said: "No one can deny that revolutions [violent or peaceful] have occurred in the course of history. But it is not the job of judges... to urge them on. The only way in which they can take part in a revolution is to resign their offices or be dismissed".<sup>104</sup> Alternatively, courts may be able to initiate change, provided that the other branches of government are willing to accept it. In respect of popular sovereignty, this acquiescence is not evident in Australia. Moreover, the onus to secure the change is on those promoting it, and the burden is high.

By declaring the Australian people sovereign the High Court could be seen as seeking a new legitimacy emanating directly from the people; that is, no longer Her Majesty's judges but the peoples' judges. It is little wonder that "constitutional doctrine is bound to become something of a

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<sup>103</sup> B. Selway, 'Methodologies of constitutional interpretation in the High Court of Australia', (2003) 14 (4) *Public Law Review* at 241.

<sup>104</sup> G. Marshall, *Constitutional Theory* (1971) at 63.

logical muddle... Under this vague standard our unelected and unaccountable High Court... finds it a simple matter to portray itself as the virtual representative of the people at large".<sup>105</sup> However, Carol Harlow quotes John Ely: "How dismayed the exponents of judicial activism are when they hear judicial power attacked as undemocratic".<sup>106</sup>

Judges' commissions come from the Sovereign. All current and former High Court Chief Justices and Justices have sworn a judicial oath of allegiance to the current constitutional monarch and Her heirs and successors<sup>107</sup> not an oath of allegiance to the people of Australia. True it is that their Honours must 'do right to all manner of people', but this must also be done 'according to law', and that law ultimately is of course the Australian Constitution, including its legal foundation as an Imperial statute. As Justice Heydon has said in relation to judges of the Supreme Court of New South Wales, who swear a similar oath:

Thus judges swear to apply the existing laws and usages, not to unsettle them by critical debates about them and speculations about their future, and certainly not to develop new laws and usages. It is legislatures which create new laws. Judges are appointed to administer the law, not elected to change it or undermine it.<sup>108</sup>

## CONCLUSION

This chapter has examined in what sense the terms 'sovereignty' and 'popular sovereignty' have been used by those proponents who would ascribe such notions to the people of Australia. However, it was noted much confusion has accompanied the promotion of popular sovereignty

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<sup>105</sup> A. Fraser, 'In Defence of Republicanism: A Reply to George Williams', (1995) 23 (2) *Federal Law Review*, at 10.

<sup>106</sup> Harlow, above n 18 at 67.

<sup>107</sup> ss.11 and 14 High Court of Australia Act 1979 (Cth).

<sup>108</sup> D. Heydon, 'Judicial Activism and the Death of the Rule of Law', Speech delivered to the Quadrant Dinner in October 2003, (2003) *Quadrant* at 17. Daley notes that Wade suggests that altering the judicial oath might be a means to alter the doctrine of parliamentary supremacy: Daley, above n 8 at ch 10.1.

into Australia's constitutional arrangements. It was argued that the people of Australia do not have the sole power to amend the Constitution and are not the source of authority of the Constitution.

The chapter differentiated between sovereignty in International Law (external sovereignty) and sovereignty in municipal law (internal) but noted these concepts appear to be coalescing. It discussed the permutations in the contested meaning of internal sovereignty and suggested the doctrine of parliamentary supremacy still applies in Australia. The discussion highlighted the disagreements about the timing of Australia's status as an independent sovereign state in an effort to show how such confusion, and confusion about the notion of sovereignty generally, have often corrupted the discussion of internal sovereignty. This corruption has then led proponents of popular sovereignty to conflate the concepts of external and internal sovereignty. This allows such proponents to then assert that because Australia is a fully autonomous nation it is also a fully autochthonous nation. This then allows for such proponents to argue that the legal basis of the Constitution has changed from an imperial source to a popular source, and finally that the people of Australia have individual rights that need to be judicially protected.

However, my argument is that the legal source of the Constitution is its enactment as a British statute, not a "supreme law proceeding from the people's inherent authority to constitute a government".<sup>109</sup> Moreover, the Founders relied on notions of parliamentary supremacy and responsible government and not popular sovereignty and fundamental rights. Whether some Justices have purported to abrogate the Constitution by discerning rights that rely on some notion external to the Constitution (that is, common law; fundamental law, international law etc.) is a focus of chapters five and six. If such an abrogation occurs, how can it be rectified? The answer is of course, not easily, nor inexpensively.

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<sup>109</sup> Dixon CJ, noted by Mason CJ in *ACTV* at 138.

The High Court has no direct access to the peoples' will so it should not place itself in a position to be seen to be overriding the legitimate expression of the electorate through the parliamentary process. Supporters of the new constitutionalism often hide more than they reveal: “[T]he people are sovereign and paramount in determining legislative validity”.<sup>110</sup> If this is not done through the democratic process and ‘political sovereignty’, how are the people determinative? Only by a process of subrogation can the courts become a ‘Platonic guardian’<sup>111</sup> and enter into “an attractive but problematic relationship”<sup>112</sup> with the people.

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<sup>110</sup> Loftus, above n 57 at 45.

<sup>111</sup> *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501 at 514 per Kirby J.

<sup>112</sup> Blackshield, above n 81 at 267-268.

## **CHAPTER FIVE**

### **DEEP RIGHTS AS LIMITATIONS ON LEGISLATIVE POWER**

#### **INTRODUCTION**

This chapter assesses judicial claims that popular sovereignty has given the High Court a duty or power to arrogate to itself a jurisdiction to enunciate rights that act as a limit on legislative power, over and above those implied within the text or structure of the Constitution. These ‘extra-constitutional’ rights are said to be more ‘fundamental’ or ‘deep’ and based on higher law concepts and theories that stand outside the Constitution and the arrangements it supports. This chapter argues that because of the uncertainty about the source, scope, effect and enforcement of a fundamental rights doctrine, the notion of such rights being judicially discovered and protected should not be entertained.

The primary argument against a higher law doctrine being that, “if the courts asserted an extra-constitutional jurisdiction to review the manner of legislative power, there would be no logical limit to the grounds on which legislation might be brought down”.<sup>1</sup> Indeed, it would be a breach of the doctrines of judicial deference and the separation of powers for the High Court to arrogate to itself a jurisdiction to enunciate rights going beyond those which are essential for the proper interpretation of the text and structure of the Constitution.

Parts A, B and C of this chapter trace how contemporary judges such as Lord Cooke (formerly Sir Robin Cooke of the New Zealand Court of Appeal) and Justice Kirby have reinvigorated the fundamental law and deep rights debate to appeal to a principle higher than parliamentary

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<sup>1</sup> Justice Brennan in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 44.

supremacy. The chapter discusses the historical and political genesis of the concepts of fundamental law and parliamentary sovereignty in seventeenth-century England. Reference is made to classical expositions by the judge Lord Coke<sup>2</sup> and the jurist Sir William Blackstone<sup>3</sup> to show that recourse to such doctrines that rely on higher law is constitutionally unsafe. Moreover, such reliance does not show fidelity to the institutional design and normative scheme provided for by the Founders of the Australian Constitution.

## **PART A- HIGHER LAW BEFORE 1688-89**

To promote fundamental or deep rights, contemporary judges such as Lord Cooke<sup>4</sup> and Justice Kirby often rely as a starting point “on a number of old cases, decided in England mostly in the seventeenth century, where a number of distinguished judges rejected as erroneous the notion of parliamentary omnipotence in law-making”.<sup>5</sup> Usually exhumed is Lord Coke’s decision in *Dr Bonham’s case*<sup>6</sup> in 1610.<sup>7</sup> In *Dr Bonham’s* case Lord Coke had said in *obiter*: “[W]hen an Act of Parliament is against common right and reason, or repugnant...the common law will control it and adjudge such an Act to be void”.<sup>8</sup> Lord Coke had ruled that the Royal College of Physicians lacked authority, under a parliamentary statute, to convict and imprison Dr Thomas Bonham for practising medicine without a certificate.

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<sup>2</sup> *Dr Bonham’s case* (1610) 8 Co Rep 113b.

<sup>3</sup> *Commentaries on the Laws of England* (1765).

<sup>4</sup> R. Cooke, ‘Fundamentals’ (1988) *New Zealand Law Journal* at 164. *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398; *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121. Cooke, Lord ‘The Dream of an International Common Law’ in Saunders C. (ed.) *Courts of Final Jurisdiction*, (1996) at 138.

<sup>5</sup> M. Kirby, ‘Deep Lying Rights – A Constitutional Conversation Continues’, The Robin Cooke Lecture 2004, 25 November 2004, from web, <http://www.hcourt.gov.au/speeches/kirbyj.html;2/12/04;4>.

<sup>6</sup> (1610) 8 Co Rep 113b. In 1610 Sir Edward Coke was Chief Judge of the Court of Common Pleas. Later being promoted to Chief Justice of the King’s Bench.

<sup>7</sup> Or on rarer occasions the hollow endorsements of natural law by Blackstone in his *Commentaries on the Laws of England* (1765) I at 41. Blackstone’s views occurring as they did after the ‘Glorious Revolution’ are said to be a “faint echo” of Coke’s: W. Geldart, *Elements of English Law* (1966) at 3.

<sup>8</sup> (1610) 8 Co Rep 113b at 188a.

In *BLF v Minister for Industrial Relations*<sup>9</sup> in 1986, President Kirby of the New South Wales Court of Appeal (as he then was) summarised this ‘form of ancestor worship’<sup>10</sup>: “Calling upon this long stream of authority, dating back to 1610, the BLF urge that there should be implied into [in?] the constitutional arrangements of New South Wales, a common law right [or natural law?] ‘so deep’ that the legislature could not invade it”.<sup>11</sup> Even after the ‘Glorious Revolution’ Chief Justice Holt in *City of London v Wood* was to say in 1701 that the observations of Lord Coke in *Dr Bonham’s* case were “not extravagant, but very reasonable and true”.<sup>12</sup>

### ***Lord Coke and Dr Bonham’s case: Dangerous heresy***

When, before the Petition of Right in 1628, Coke first began to assert the power of courts to declare Acts of Parliament unconstitutional, why was the common law and not the English Constitution (of which *Magna Carta* was at that time the cornerstone) appealed to? It may have been that the *Magna Carta*, although sacrosanct, suffered the “perennial medieval problem of law enforcement”.<sup>13</sup> In fact if it “were truly fundamental, why was it necessary to confirm [or reaffirm] it so frequently?”<sup>14</sup> Thus Coke may have felt the cause better served by referring to

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<sup>9</sup> (1986) 7 NSWLR 372.

<sup>10</sup> M. Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship’, (2000) *Melbourne University Law Review* 24.

<sup>11</sup> (1986) 7 NSWLR 372 at 404. In this case legislation had been passed empowering a Minister to issue a certificate leading to cancellation by the Governor of the registration of the Builders Labourers Federation union. The union challenged the legislation.

<sup>12</sup> 12 Mod. Rep. 669 and 678 (K.B. 1701). In contrast, King James I was to state just before the desperate times of the struggle between King and Parliament, that “in Coke’s reports there were many dangerous conceits of his own, uttered for law, to the prejudice of the crown, parliament, and subjects”: F. Lieber, *Legal and Political Hermeneutics* (1994 Special Edition) at 169.

<sup>13</sup> J. Gough, *Fundamental Law in English Constitutional History* (1955) at 16.

<sup>14</sup> *Ibid.* Maybe as many as forty-seven but no less than thirty-two occasions, including the Petition of Right in 1628 and the Bill of Rights in 1688: A. Hamilton, Paper No. 84, *The Federalist* at 536. The *Confirmatio Cartarum* was agreed to by Edward I in 1297, just in time to avert outright revolution by the Barons of the realm. Its principal effect was to help “establish Magna Carta as the fundamental law of the land by declaring judgments [of courts] contrary to that document to be null and void”: R. Perry and J. Cooper, *Sources of our Liberties*, (1990 Special Edition) at 26. However, a less emphasised but no less important effect was brought about by section 1 where the provisions of the *Magna Carta* were allowed to be pleaded before royal officers as part of the common law, thus establishing its provisions as part of the common law. Perry and Cooper have

such intangibles as ‘common right and reason’ and higher principles. Goldsworthy also usefully suggests that Coke’s statement that “Magna Carta is such a fellow, that he will have no sovereign” is now regarded as a misquotation:

Coke was rejecting a suggestion made by the House of Lords that the Petition of Right, in reaffirming the Magna Carta, should include a qualification ‘saving’ the King’s ‘sovereign power’ (or absolute prerogatives) from its reach, and what he really said was “Magna Carta is such a fellow, that he will have no saving”. He was therefore affirming the authority of statute, which he describes in the relevant passage as “absolute without any saving of sovereign power”.<sup>15</sup>

Notwithstanding contemporary claims by judges such as Lord Coke and Justice Kirby to reinvigorate the deep rights debate, the six short answers against any notion of judicial enforcement of deep rights flowing from Lord Coke’s writings are as follows:

#### 1. Lord Coke’s rebuke of his own theory

A higher law theory is inevitably weakened by Coke’s own later absolute rebuke of any law higher than Parliament in volume four of his *Institutes Proemium*: “Of the power and jurisdiction of Parliament, for making of laws..., it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds”.<sup>16</sup> All of Coke’s comments must be understood in the political and historical context in which they were uttered. Coke’s earlier, more controversial views were accompanied by his writing of the *Reports* and him being seen as the champion of the common law as against the Royal Prerogative and Parliament. However, in 1616 King James I dismissed Coke from his position as Chief Justice of the King’s Bench.

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also said: “The legal machinery for the enforcement of the higher law embodied in the [United States] Constitution is now called judicial review. By applying the essential idea found in *Confirmatio Cartarum* to the Constitution of the United States, this principle was established by Chief Justice Marshall in 1803 in the case of *Marbury v Madison*”: *Ibid* at 29.

<sup>15</sup> J. Goldsworthy, *The Sovereignty of Parliament* (1999) at 114.

<sup>16</sup> *The Institutes Proemium* at 36 (quoted from 1797 ed.).

Coke's later views, from about 1620, were accompanied by his being a prominent member of the House of Commons, his reinstatement to the Privy Council and his attempts to re-establish himself in the court of King Charles I by marrying his daughter to the brother of the Duke of Buckingham, who was a close personal advisor to the King. It must therefore be asked what real weight can be placed on his *obiter* in *Dr Bonhams* case, when in the *Fourth Institute* he advocates the star-chamber in round terms, and calls it "the most honourable court in the Christian world, the parliament excepted".<sup>17</sup>

As Goldsworthy notes "more important is the fact that even if in *Dr Bonham's* case Coke did advocate something like a power of judicial veto, he later changed his mind".<sup>18</sup> And further, "Apart from the ambiguity of his famous *dictum*, there is persuasive evidence that it was an embellishment he added, after judgment had been delivered, when preparing his report of the case... and in 1616 he was ordered to remove it from his *Reports*".<sup>19</sup> Goldsworthy also notes that there are other passages in Coke's *Institutes Proemium* where Coke contemplated statutes contrary to *Magna Carta* without any hint that they would be invalid.<sup>20</sup> Dias has correctly stated:

All [Coke's] statements need to be scrutinised in their contexts. They should not lightly be thought to propound a doctrine that Acts of Parliament can be rendered nugatory by appeal to some higher law. Even Coke himself has emphatically asserted elsewhere the supremacy of Parliament.<sup>21</sup>

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<sup>17</sup> *Ibid* at 235. "The fact that the statement [from *Dr Bonham's* case] makes no appearance in Coke's *Institutes*, though the last three *Institutes* appeared when Coke was quite safe from imprisonment in the Tower, has also been a constant source of embarrassment": S. Thorn, 'The Constitution and the Courts: A Re-examination of the famous case of Dr Bonham' in C. Read, (ed.) *The Constitution Reconsidered* (1968), 15 at 17.

<sup>18</sup> Goldsworthy, above n 15 at 112. See also Rt Hon Dame S. Elias: "Coke himself apparently changed his mind": 'Sovereignty in the 21<sup>st</sup> Century: Another Spin on the merry-go-round' (2003) 14 (3) *Public Law Review* 148 at 149 at f/n 11.

<sup>19</sup> Goldsworthy, above n 15 at 123.

<sup>20</sup> *Ibid* at 113.

<sup>21</sup> See also R. Dias, *Jurisprudence* (1970, 3<sup>rd</sup> edition) at 97.

This contradiction in Coke's writings has meant that he has been cited by both supporters of a 'higher law' restriction on parliamentary sovereignty and supporters of the plenary power of a parliament. Brennan CJ and McHugh J in *Kartinyeri v The Commonwealth* said:

The legislative powers conferred on the Commonwealth Parliament by s 51 of the Constitution are plenary powers... The power to make laws is a power as ample as that described by Sir Edward Coke and later adopted by Blackstone: 'Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds'.<sup>22</sup>

Why Chief Justice Brennan and Justice McHugh would cite such ancient authority as Coke and Blackstone in support of the principle that the Commonwealth's legislative power under a constitutional head of power is plenary, is unclear. Perhaps they thought another member of the Court might cite the very same authority to support the restriction of parliamentary sovereignty?

## 2. Coke suggested a power of equitable construction of a statute, not nullification

Even restricting oneself to Coke's comments in *Dr Bonham's* case, his reasoning does not credibly go as far as many would hope. Coke's comments in *Dr Bonham's* case cannot be used as a sweeping endorsement of judicial veto. In the 1950's Gough stated:

Admittedly his phraseology was wide, but it is not necessary to suppose that he meant to claim for the courts general powers to declare statutes void on the ground of conflict with higher law. When he said that the common law would 'control' an act of parliament he meant that the courts would *interpret* it in such a way as not to conflict with accepted principles of reason and justice... Similarly when he spoke of adjudging an Act to be void, he did not mean that the court could declare it to have been beyond the power of parliament to enact, but that the court would *construe* it strictly, if this were necessary in order to bring it into conformity with these recognised principles.<sup>23</sup> (emphases added)

Goldsworthy has said that in *Dr Bonham's* case, Coke only intended to claim for the courts a large power of equitable construction,<sup>24</sup> rather than an assertion of popular sovereignty and deep rights. He also notes that in 1615 "Chief Justice Hobart made comments similar to Coke's in *Day*

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<sup>22</sup> (1998) 195 CLR 337 at 355.

<sup>23</sup> Gough, above n 13 at 34.

<sup>24</sup> Goldsworthy, above n 15 at 111.

*v Savage*,<sup>25</sup> but they too have been interpreted as asserting a power of equitable construction rather than of nullification".<sup>26</sup> Goldsworthy also notes Trevor Allan's doubtful proposition that even "if judges were to refuse to apply a statute, because it violated a fundamental common law principle, that would merely be an extreme example of the kind of 'interpretation' they have always practiced".<sup>27</sup> To refuse to apply a statute would amount to a kind of judicial veto not a barrier of interpretation.

### 3. Judicial review was not connected with fundamental law in Coke's time

While fundamental law doctrines and higher law theories have come to be associated with judicial review, the two were not essentially connected in Coke's day. Fundamental law then stood for the principle that politics is subordinate to ethics. It would therefore be rash to simply assume that seventeenth-century politics necessarily conveyed the modern implications of judicial review found in the eighteenth century United States Constitution and the nineteenth century Australian Constitution. Elias has expressed an almost identical sentiment: "It is not self evident that that the political accommodation reached in England after the struggles between King and Parliament of the 17<sup>th</sup> century, is a sufficient explanation of the constitutions of Australia and New Zealand in the 21<sup>st</sup> century".<sup>28</sup>

One should note that it was the seminal United States case of *Marbury v Madison*<sup>29</sup> in 1803 that elevated judicial review to its acknowledged place in American constitutional practice, and set the seed for the process to be adopted in the Australian Constitution.<sup>30</sup> The English constitution

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<sup>25</sup> (1614) Hob 85 at 87 per Hobart CJ: "...even an Act of Parliament, made against natural equity, as to make man Judge in his own case, is void in itself".

<sup>26</sup> Goldsworthy, above n 15 at 123.

<sup>27</sup> *Ibid* at 250.

<sup>28</sup> Elias, above n 18 at 149.

<sup>29</sup> I Cranch 137 (1803).

<sup>30</sup> *Marbury v Madison* itself does not appear to have been well known to the Australian Founders: J. La Nauze, *The Making of The Australian Constitution* (1972) at 233-234, but principles

could never have developed along these lines. Americans who have read back into the judgments and speeches of Coke and other English lawyers and politicians of the seventeenth century, and even the *Magna Carta*, an anticipation of modern American doctrine were reading it acontextually and from their standpoint. They found in the reports what they wanted not what Coke meant. Gough had suggested as early as 1955, that when Americans approached such eras and their references to fundamental law, they were apt to greet such references with misplaced enthusiasm, as forerunners of their own constitutional principles. In 1968 Thorn reiterated this view:

[Coke's *dicta*] furnished a form of words which soon became separated from the case in which they had been uttered, but when they are returned to their proper place, Coke's ambitious political theory is found to be not his, but the work of a later generation of judges, commentators and lawyers.<sup>31</sup>

Wilheim too makes the point forcefully while reviewing Jeffrey Goldsworthy's book *The Sovereignty of Parliament*:

Judicial repudiation of the doctrine [of parliamentary sovereignty] would amount to an attempt unilaterally to alter [a] political fact. This would be a dangerous step for the judges to take. The judges cannot justify taking that step on the ground that it would revive a venerable tradition of English law, a golden age of constitutionalism, in which the judiciary enforced limits to the authority of Parliament imposed by the common law or natural law. *There never was such an age.*<sup>32</sup> (emphasis added)

In an effort to establish a fundamental law doctrine, are Australians displaying the same (or even more so) misplaced enthusiasm? In 2001 Justice Kirby in *Durham Holdings Pty Ltd v New South*

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sufficiently similar were adopted to ensure “the role of the High Court was to be a federalist one”: Queensland Constitutional Review Commission, *Issues Paper* at 705.

<sup>31</sup> Thorn, above n 17 at 24. See also Gough, above n 13 at 221-223. See also D. Farber and S. Sherry, *Desperately Seeking Certainty- The Misguided Quest for Constitutional Foundations* (2002). Coke has been called “the father of American Judicial Review”: S. Sherry, ‘Independent Judges and Independent Justice’ (1998) 61 *Law and Contemporary Problems* at 15.

<sup>32</sup> E. Wilheim, ‘Book Review: Jeffrey Goldsworthy, *The Sovereignty of Parliament*’ (2001) 29 *Federal Law Review*, 115 at 117. See also Winterton “It is grossly anachronistic to interpret dicta of 1701 [*City of London v Wood*] in the retrospective light of *Marbury v Madison*”: G. Winterton, ‘Constitutionally Entrenched Common Law Rights’ in C. Samford and K. Preston (eds) *Interpreting Constitutions* (1996), at 141.

Wales said: “The assertion of the right of the courts in [the United States] to strike down laws which were found to be invalid may have been influenced by assertions of common law judicial authority in [seventeenth and eighteenth century] England”.<sup>33</sup>

#### 4. The ‘High Court of Parliament’

It must also be remembered that in Coke’s time, the relationship between parliament and the courts was fundamentally different from what it was to become after the ‘Glorious Revolution’. In the time of Coke, Parliament was considered the ‘High Court of Parliament’, and not the sovereign body that it subsequently developed into during the eighteenth and nineteenth centuries. Even Coke would attest that there was a blurring of judicial and legislative tasks as between judges and legislators. In fact in 1620 Coke was himself reinstated to the Privy Council and elected to Parliament and became a prominent parliamentary adversary of the Crown. In 1628 he drew up *The Petition of Right* which set out the rights and liberties of the subject as opposed to the prerogatives of the Crown. Some have attempted to read into Coke’s discussion in the *Fourth Institute* of the “transcendent and absolute” power of Parliament as being limited to Parliament’s judicial power as the ‘High Court of Parliament’. However, Goldsworthy argues that this is not plausible and that Coke in the *Fourth Institute*, was concerned with all aspects of Parliament’s activities.<sup>34</sup>

#### 5. Coke never clearly defined the source of the doctrine

Many lawyers refer to Lord Coke’s comments in *Dr Bonham’s* case without noting the interrelationship between the common law and natural law. Smallbone suggests that Coke

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<sup>33</sup> (2001) 75 ALJR 501 at 510.

<sup>34</sup> Goldsworthy, above n 15 at 114-116.

founded his theory in *Dr Bonham's* case on natural law.<sup>35</sup> However what is the importance of Coke's reference to the common law? Should future generations have read it as equating with natural law? Is there a difference? What is the effect of distinguishing or not distinguishing between the two?

Goldsworthy quotes Burgess as arguing that 'common right and reason' are the "crucial words used in *Dr Bonham's* case, [and] Coke meant the common law, not natural law" as the source of his doctrine.<sup>36</sup> This is because Coke's identification of the common law with natural law was only partial. He insisted that only part of the common law of England was founded on natural law and may be distinguished from the balance of the common law which was not. However, R. Berger suggests that Coke meant 'against natural law'.<sup>37</sup> In any event, the failure by Coke to clearly define his doctrine and its source, could be seen as another reason for its downfall.

## 6. Coke's theory never received systematic judicial sanction

Although Dicey stated that Coke's doctrine "once had real meaning", he concluded that "it has never received systematic judicial sanction and is now obsolete".<sup>38</sup> Elias too described Coke's doctrine as "more of a last stand than a statement of orthodox doctrine".<sup>39</sup> Even Justice Kirby in 2001 also had to admit that Coke's theory "had so far gathered few adherents".<sup>40</sup>

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<sup>35</sup>D. Smallbone, 'Recent Suggestions of an Implied "Bill of Rights" in the Constitution, Considered as a Part of a General Trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254 at 262.

<sup>36</sup> Goldsworthy, above n 15 at 112.

<sup>37</sup> R. Berger, '*Doctor Bonham's case: Statutory Construction or Constitutional Theory?*' (1969) 117 *Univ. Pa. L.R.* at 521.

<sup>38</sup> A. Dicey, *Law of the Constitution* (1956, 9<sup>th</sup> edition) at 62.

<sup>39</sup> Elias, above n 20 at 149.

<sup>40</sup> *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501 at 514.

## PART B- PARLIAMENTARY SOVEREIGNTY AFTER 1688-89

Coke's theory did not survive the turmoil of the 'Glorious Revolution' in 1688-89. In 1701 Chief Justice Holt in *City of London v Wood* said: "An act of parliament can do no wrong, although it may do several things that look pretty odd".<sup>41</sup> The principle of parliamentary sovereignty has thereafter occupied such a fundamental position in our legal and constitutional arrangements that until recently no one has challenged it, and as such there is very little weighty authority for the proposition. The supremacy of Parliament over the Royal Prerogative was confirmed in 1920 in the United Kingdom in *Attorney-General v De Keyser's Royal Hotel*<sup>42</sup> and then in Australia in 1935 by *R v Bradley and Lee*.<sup>43</sup> However, the supremacy of Parliament's legislative role is often only traced back to 1974, when Lord Reid said in *British Railways Board v Pickin*:

In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.<sup>44</sup>

Kennett has said the *dicta* of some recent English cases that suggest the doctrine of parliamentary sovereignty has limits

do not directly challenge Lord Reid's denial in *British Railways Board v Pickin* that British courts have any power to disregard Acts of Parliament. They can be rationalised as referring to the interpretation of statutes and, in any event, have not found many overt supporters among the Law Lords.<sup>45</sup>

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<sup>41</sup> 12 Mod. Rep. 669, 678 (K.B. 1701).

<sup>42</sup> [1920] AC 508.

<sup>43</sup> (1935) 54 CLR 12.

<sup>44</sup> [1974] AC 765 at 782. See also Lord Morris' judgment in the same case: "When an enactment is passed, there is finality unless and until it is amended or replaced by parliament. In the courts, there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the statute book at all": [1974] AC 765 at 789. There is also other authority; see also *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 ER 279 as noted by B. Harris, *A New Constitution for Australia* (2000) at 9. See also *Lee v Bude and Torrington Junction Railway Co* (1871) LR 6 CP 576 at 582 per Willes J.

<sup>45</sup> G. Kennett, 'Individual Rights, The High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581 at 601.

In 1983 Megarry V.C. in *Manuel v Attorney General* noted that counsel in that case had “failed to indicate how th[e] ancient law, when investigated, could alter the conclusion that the court could not declare an Act of Parliament void”.<sup>46</sup> In contemporary times the doctrine of parliamentary sovereignty can still seem powerful. Goldsworthy has said: “Even the most basic human rights, to life, liberty, and property, can be overridden in unusual circumstances”.<sup>47</sup> Indeed, the *Magna Carta* itself is often given short shrift in courts at all levels. In the Queensland case of *R v Essenberg*<sup>48</sup> the applicant appealed against his conviction before a Magistrate of an offence under the Weapons Act 1990 (Qld). He contended that he did not receive a trial by jury, which was said to be contrary to the provisions of *Magna Carta*. McPherson JA of the Queensland Court of Appeal stated:

The simple fact is that it is enough to say here that the legislatures of the Australian States... have complete power to repeal *Magna Carta* or amend it, either expressly or by passing legislation like the Weapons Act 1990 that is or may be inconsistent with it.<sup>49</sup>

#### ***Accepted external and internal limitations on parliamentary sovereignty***

After the tumultuous events of the ‘Glorious Revolution’ it seemed impossible to ignore the sovereignty and supremacy of a Parliament. Even so, there were some who sought to impose checks on Parliament’s actions, usually to protect or enhance individual rights. However, such checks could no longer be found effectively in the sanctity of custom or higher law. They were accordingly impelled to rely on two doctrines. One said to be external, the other internal:

First, an external doctrine based on the sovereignty of the people as the source of all lawful power. The doctrine could be used against a Parliament or an absolutist executive like King

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<sup>46</sup> [1983] 1 Ch 77 at 88.

<sup>47</sup> Goldsworthy, above n 15 at 258.

<sup>48</sup> [2002] QCA 4.

<sup>49</sup> *Ibid.* McPherson JA also noted in passing that *Magna Carta* did not guarantee trial by jury, because at the time there was no such thing as a jury.

George III. This was of course the situation in America in 1776 when the colonies successfully forswore allegiance to the King George III.<sup>50</sup> As the American example shows, this type of popular sovereignty did not manifest itself in any *legal* form, but only in the possibility of popular *political* resistance as a ‘just revolution’. This was to be the foundation of Dicey’s ‘political sovereignty’ vested in the people (see discussion below). Here, to a point, even John Locke’s reciprocal duties and Thomas Hobbes’ notion of severing the Leviathan’s one way contract would be supportive.

The second doctrine was the essential internal moral obligation on the consciences of members of Parliament implied in an appeal to a higher law.<sup>51</sup> However, there could only be an appeal to a higher law, such as natural law or divine law, if no human agency, *not even the courts*, could make such laws legally enforceable against Parliament. It was to be left to the consciences of those who had inherited absolute legislative sovereignty from the absolute monarch. For as Jeffrey Goldsworthy correctly points out: Like medieval monarchs, the power of parliament was not only derived from but also limited by higher laws, however there was no humanly lawful means of forcing such sovereigns to comply with the laws of God or nature.<sup>52</sup>

In this way, it is said parliamentary sovereignty is perfectly compatible with higher law theories by which statutes are evaluated, as long as that law is neither enforceable by the courts nor any other human agency.<sup>53</sup> It is this doctrine that allowed Sir William Blackstone to write of parliament as omnipotent, and yet having duties.<sup>54</sup> Blackstone’s support for natural law early in

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<sup>50</sup> The great popular rising in 1832 in London where the Duke of Wellington had to make ready his troops to meet a revolutionary march was probably an example of a threatened use of this notion of popular sovereignty.

<sup>51</sup> Gough, above n 13 at 160.

<sup>52</sup> Goldsworthy, above n 15 at 16-18.

<sup>53</sup> *Ibid* at 17.

<sup>54</sup> Blackstone, above n 3, Book I at 41 and 160-161.

his *Commentaries*<sup>55</sup> is “hardly consistent with what the author later says about the legislative power of Parliament”.<sup>56</sup> Later in his *Commentaries* Blackstone adopts Lord Coke’s passage from the *Fourth Institute* (the one cited by Brennan CJ and McHugh J in *Kartinyeri*) and continues: “Parliament hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations”.<sup>57</sup> Indeed, many commentators dismiss Blackstone’s references to the law of nature as perfunctory lip-service, and treat Blackstone as authoritative on the sovereign omnicompetence of the parliament. Goldsworthy notes that the American Alexander Hamilton “was another... who at one time believed in both natural law and legislative sovereignty... He was able to accept both propositions because, like Blackstone, he held natural law to be enforceable by extra-legal means, and not legal means”.<sup>58</sup>

These two limitations, namely external and internal, correspond with Dicey’s two limits on the sovereign power of a parliament. The external limitation aligned with his vesting of ‘political sovereignty’ in the people. Dicey pragmatically recognised that at the end of the day, Parliament “is limited on every side by the possibility of popular resistance”.<sup>59</sup> But for Dicey ‘political sovereignty’ “was a moral and wholly non-legal force [which] made its presence felt in the hubbub of everyday political life: demonstrations, lobbying, sloganeering, and public debate”.<sup>60</sup> The internal limitation was an appeal to the moral imperatives of the members of Parliament, for Dicey recognised “even a despot exercises his powers in accordance with his character”.<sup>61</sup>

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<sup>55</sup> *Ibid* at 41.

<sup>56</sup> Geldart, above n 7 at 3.

<sup>57</sup> Blackstone, above n 3, Book I at 160-161.

<sup>58</sup> Goldsworthy, above n 15 at 206.

<sup>59</sup> Dicey, above n 38 at 76-80.

<sup>60</sup> P. McHugh, *The Maori Magna Carta* (1991) at 16.

<sup>61</sup> Dicey, above n 38 at 76-80.

In contemporary Australia these two limitations (external and internal) appear to be undergoing modification to form part of a judicial arsenal to abrogate legislation. To this end, popular sovereignty is appealed to as a legal (not political) concept. Further, some judges extra-curially claim a jurisdiction to enforce higher law theories which they link to popular sovereignty. They wish to assert a judicially enforceable natural or common law doctrine against Parliament. Hence popular sovereignty is elevated from a non-legal concept of popular resistance and political sovereignty, to a legal concept and legal sovereignty. In New Zealand Elias has said “Those who feel unable to shed the “law as command” approach in favour of an ultimate static norm, are driven to move sovereignty to the electorate. That seems to me to confuse legal sovereignty with political sovereignty”.<sup>62</sup> Justice Kirby has continually identified this trend in Australia:

In the Australia Commonwealth sovereignty belongs to all the people who are Australian nationals. [Parliaments] are instruments, in their own particular spheres, of the people’s sovereignty. Necessarily each sphere is limited. Only the people, conceived as a whole, enjoy the entire ultimate sovereign governmental power.<sup>63</sup>

Judges such as Lord Cooke and Kirby J assert that after the ‘Glorious Revolution’, Coke’s notion that an Act of Parliament could be judicially disregarded in so far as it was contrary to the law of nature, had not become obsolete. In fact, the judiciary appears to have astutely left the issue open to this day. It achieved this by not challenging the supremacy of an ever increasingly powerful Parliament during the events of the ‘Glorious Revolution’, thereby not giving Parliament any ‘cause to suppress them’. As Goldsworthy has noted: “Neither the King nor the two Houses would have accepted that the judges had authority to resolve their dispute, since both claimed to possess an authority superior to the judges”.<sup>64</sup> Moreover, as Dias has noted: “The apparent docility of the judges in 1689 was deceptive... By not flaunting their independence of Parliament

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<sup>62</sup> Elias, above n 18 at 151.

<sup>63</sup> Kirby, above n 5 at 12.

<sup>64</sup> Goldsworthy, above n 15 at 242. See also Dias, above n 21 at 107.

they preserved to themselves a considerable degree of power the limits of which have never been defined".<sup>65</sup>

That 'degree of power' and those 'undefined limits' are now ripe for determination. Increasingly some judges, such as Lord Cooke, and Kirby and Toohey JJ, mostly in extra-judicial statements but also tentatively (or boldly if you prefer) in *obiter*, are setting the courts against parliaments in a conflict which centres on who is to exercise jurisdiction over individual rights. Because the Australian constitutional system revolves around a written Constitution and the closely associated notions of judicial independence and review, these claims should be taken seriously.

In 1689, after nearly a century of turmoil, and as a matter of political expediency and legal necessity (but not by judicial decision) the English courts supported Parliament over the Royal Prerogative and absolutist pretensions of the Stuart kings. Not to do so then would undoubtedly have led to an escalation in the struggle and the possible subordination of the judiciary. In Australia in the third millennium for the judiciary to not support parliamentary supremacy, would the risks be anywhere near as high? My argument is that the risks would be extremely high for the rule of law, for democratic processes and for constitutional certainty in this country.

Should not the judiciary keep faith with the Founder's institutional design and normative scheme under the present constitutional order? The High Court was not endowed with an overly creative role in constitutional interpretation and although the common law is a robust area for the protection of some rights, it must fall away in the face of unambiguous legislation. A progressive interpretation of the Constitution reliant on reference to higher law theories, or indeed popular sovereignty, displays infidelity to the institutional design of the Founders. This infidelity means

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<sup>65</sup> Dias, *ibid* at 117.

that the checks, balances and principles the Founders envisaged are subverted, potentially leading to a dysfunctional constitutional order.

In such a dysfunctional constitutional order the independence of the judiciary itself might be at risk. The academic commentator Greg Craven has warned:

One highly likely and deeply troubling outcome of the High Court's progressivism is that of an eventual, massive confrontation with government. There is little doubt that if the Court continues sufficiently far along a politically intrusive path of rights jurisprudence, there eventually will come a point at which the executive... will no longer be able to tolerate its pretensions. At this point, there will be a clash between judiciary and executive over that most fundamentally political of issues, namely which branch of government is to have the final say as to the configuration of society according to basic questions of rights. The possibility of such a clash is extremely concerning, both from the point of view of the maintenance of judicial independence, and the preservation of constitutional stability.<sup>66</sup>

However, in the light of increased global human rights aspirations many suggest that "parliamentary sovereignty seems diminished".<sup>67</sup> In Australia, where there is no bill of rights, statutory interpretation, implied constitutional rights and even use of international jurisprudence it seems, can only take us so far. Some Australian judges and jurists have appealed for a higher authority to be found to source fundamental rights. In 1991 Brennan J said that the absence of any power in the courts to invalidate Acts of Parliament that are oppressive of human rights should rightly be seen as the Achilles heel of a society which aspires to constitutionally protected freedom.<sup>68</sup>

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<sup>66</sup> G. Craven, 'The High Court of Australia: A Study in the Abuse of Power' (1999) 22 (1) *University of New South Wales University Law Review* at 242.

<sup>67</sup> Elias, above n 18 at 148.

<sup>68</sup> G. Brennan, 'Courts, Democracy and the Law' (1991) 65 *Australian Law Journal* at 32.

## PART C – A CONTEMPORARY REVIVAL OF HIGHER LAW

Since World War II and the holocaust it is clear that many Western liberal democracies have searched for a body of law to stand for human rights against Nazi-like positivism. Many judges and jurists began asking: are there inalienable deep rights that are transcendental, *a priori* and innate? Are such rights so inviolable that Parliament cannot override them? Some also began to assert that a law must have “some minimal moral criterion in order for it to count as law”.<sup>69</sup> For instance laws passed by tyrannical legislatures such as those in Nazi Germany or apartheid South Africa. Such legislatures have rightly been considered “insufficiently democratic... and unworthy of supremacy”.<sup>70</sup> In 1976 in *Oppenheimer v Cattermole (Inspector of Taxes)* English judges refused to enforce the laws of Nazi Germany depriving Jews of German citizenship and it was noted that: “some laws are so grave an infringement of human rights that the courts of this country [England] ought to refuse to recognise [them] as laws at all”.<sup>71</sup>

The United Nations, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights have been some of the vehicles for many sovereign states to express human rights aspirations. There have also been constitutional reforms relating to bills or charters of rights in Canada, New Zealand, South Africa and the United Kingdom and in many other countries. By contrast, Australia seems to have a rights recognition deficit.

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<sup>69</sup> C. Sypnowich, ‘Proceduralism and Democracy’ (1999) 4 *Oxford Journal of Legal Studies* 649 at 651.

<sup>70</sup> D. Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order*, (1998) noted by Sypnowich, *Ibid* at 654.

<sup>71</sup> [1976] AC 249 at 278.

### ***Lord Cooke and ‘The Dream of an International Common Law’***<sup>72</sup>

Lord Cooke (formerly Sir Robin Cooke of the New Zealand Court of Appeal) has been a chief proponent of a fundamental rights doctrine and his views have gained much attention in Australia. Lord Cooke has consistently stated: “Honesty compels one to admit that the concept of a free democracy must carry with it *some* (they may be almost as few as they are vital) limitations on legislative power... Some common law rights presumably lie so deep that even Parliament could not override them”.<sup>73</sup> Paul McHugh says:

The American Revolutionaries argued that the Crown’s colonial subjects held certain ‘fundamental’ or ‘natural rights’ which were incorporated into the common law and hence incapable of abridgement by the Westminster Parliament. This is virtually identical to the position which Sir Robin Cooke suggested in the New Zealand Court of Appeal.<sup>74</sup>

Caldwell has said: “F.A. Mann, [in an article referred to by Lord Cooke in the judgment of *Taylor v New Zealand Poultry Board*], postulated that in extreme circumstances there was a real prospect that Judges could revert to the tradition of fundamental law”.<sup>75</sup> Lord Cooke sees the reliance on higher law as a sort of reserved judicial power to be resorted to in extreme circumstances when the very nature of our society seems in peril. He has also given grave or extreme instances of when this kind of judicial override might be activated.<sup>76</sup> However, it has often been noted that if society has descended to the depths of despair as noted in the extreme examples (such as the

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<sup>72</sup> Cooke, ‘The Dream of an International Common Law’ in Saunders C. (ed.) *Courts of Final Jurisdiction*, (1996) above n 4 at 138.

<sup>73</sup> Cooke, ‘Fundamentals’ (1988) *New Zealand Law Journal* above n 6 at 164. *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398; *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121. Cooke, ‘The Dream of an International Common Law’ in Saunders C. (ed.) *Courts of Final Jurisdiction*, (1996) above n 4 at 138.

<sup>74</sup> McHugh, above n 60 at 58.

<sup>75</sup> J. Caldwell, ‘Judicial Sovereignty - A New View’, (1984) *New Zealand Law Journal* 357 at 358.

<sup>76</sup> Cooke, ‘Fundamentals’ (1988) *New Zealand Law Journal* above n 4 at 164: “Suppose that an Act of the legislature purported to strip Jewish people of their citizenship and their property; or to disenfranchise women (or men)...” See also the examples given by F.A. Mann, ‘Britain’s Bill of Rights’, (1978) 94 *Law Quarterly Review*, 512 at 513.

classic example of a statute requiring all blue-eyed babies to be killed <sup>77</sup>), any judicial intervention would probably be next to useless anyway. As Justice Kirby said in the *BLF* case:

If the legislature were to enact such a manifestly unacceptable statute as postulated, it is unlikely to be restrained either by the Constitution or the courts. Our protection against such predicaments remains, fundamentally, a political and democratic one. Whether there should be more significant legal protections is a matter of current debate in the Australian community. <sup>78</sup>

Like Lord Coke, Lord Cooke's views have not always displayed a forthright promotion of higher law theories. Lord Cooke was deferential to the New Zealand Parliament's ability to override *Treaty of Waitangi* rights in *New Zealand Maori Council v Attorney-General*.<sup>79</sup> Paul McHugh has also said that "careful inspection of the text of Sir Robin's judgment in *Tainui Maori Trust Board v Attorney-General* (the *Coalcorp case*) <sup>80</sup> shows the case is hardly a judicial displacement of Parliamentary supremacy".<sup>81</sup> Goldsworthy also notes that in the United Kingdom in 1996 Lord Cooke did not "put up much opposition" to Lord Irvine who criticised statements by senior judges challenging the doctrine of parliamentary sovereignty as unwise, and disparaged the alternative they advocated as obsolete.<sup>82</sup>

In spite of these later observations, it could be argued that Lord Cooke's earlier judgments and extra-curial writings attempted to displace parliamentary sovereignty. Indeed, the New Zealand Prime Minister at the time Geoffrey Palmer, criticized Lord Cooke's "personal observations" in these earlier cases in the harshest terms: "New Zealanders have made it plain they do not want an

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<sup>77</sup> The classic example of blue-eyed babies hails from Sir L. Stephen, *Science of Ethics* (1882) at 143.

<sup>78</sup> (1986) 7 NSWLR 372 at 406.

<sup>79</sup> [1987] 1 NZLR 641 at 651-668. Paul McHugh noted that Sir Robin "reiterated the orthodoxy that Parliament was capable of overriding Treaty rights": above, n 60 at 60.

<sup>80</sup> [1989] 2 NZLR 513.

<sup>81</sup> McHugh, above n 60 at 60.

<sup>82</sup> Goldsworthy, above n 15 at 3.

unelected judiciary to have the power to constrain and overturn the decisions of elected politicians".<sup>83</sup>

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

Many contemporary jurists and judges in promoting a higher law than parliamentary sovereignty do not find unanimity in expressing the source of rights that may act as a limit upon legislative competence. This is most notable in the 'implied rights' cases where there is some conjecture on the reliance by the Court of natural law doctrines. Lord Cooke has said that these "implied limitations are in essence natural and fundamental rights in a democracy, albeit tied by the Mason Court to the Australian Constitution..."<sup>84</sup> However, other commentators have mooted that no Justice of the High Court has to date fully embraced natural law doctrines. Lord Cooke's own comments (as Sir Robin Cooke of the New Zealand Court of Appeal) have been assessed as "a new discourse [that has] addressed what might loosely be called natural law concerns".<sup>85</sup> But compare the comments of Paul McHugh:

Ironically, were our judges inclined, as Sir Robin Cooke has hinted, to return to any doctrine of unenforceable natural or fundamental rights they might use the common law. The common law would recognise such fundamental rights, whatever they may be, and protect them from disruption. Such rights would then have status not as being 'natural' but as being insulated by the common law.<sup>86</sup>

So when the 'common law' is cited, do judges and commentators mean the common law as distinct from natural law or do they mean that part of the common law that may be imbued in natural law, or just simply some higher source of authority. For example Justice Toohey quotes

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<sup>83</sup> Address by the Prime Minister, the Right Honourable Geoffrey Palmer to the Wellington District Law Society, 14 December 1989.

<sup>84</sup> Cooke, 'The Dream of an International Common Law' in Saunders, C. (ed.) *Courts of Final Jurisdiction* (1996) above n 4 at 139.

<sup>85</sup> P. A. Joseph and G. R. Walker, 'A Theory of Constitutional Change' (1987) *Oxford Journal of Legal Studies* at 177 noted by M. Kirby, 'The Struggle for Simplicity: Lord Cooke and Fundamental Rights,' (1997) Speech Delivered to New Zealand Legal Research Foundation, 4-5 April 1997, from web, <http://www.hcourt.au/cooke.html>; 6.

<sup>86</sup> McHugh above n 60 at 380.

Lord Cooke in *Fraser v State Services Commission* and *Taylor v New Zealand Poultry Board*:

“...some *common* law rights may go so deep...”,<sup>87</sup> but then states that: “In short, the statements suggest a revival of *natural* law jurisprudence”.<sup>88</sup> However, Justice Toohey does so without outlining the relationship between the common law and natural law. The judgments of Justice Murphy also recognised fundamental rights. These appear to divine two alternative sources; Dixonian common law rights or Lockean natural law rights, according to Professor Winterton.<sup>89</sup> This perpetual confusion about the source of any contemporary fundamental rights is reminiscent of the ills that befell Lord Coke’s doctrine. Surely the proponents of all higher law doctrines bear the onus of some unanimity and clarity.

### ***Lord Coke’s and Lord Cooke’s influence in Australian judicial discourse***

In Australia, the appeal to a principle higher than parliamentary supremacy was, according to President Kirby (as he then was) in the *BLF* case, “certainly out of line with the mainstream of constitutional theory” in 1986.<sup>90</sup> President Kirby in the *BLF* case said:

I agree with Lord Reid’s conclusion [in *British Railways Board v Pickin*]. I do so in recognition of years of unbroken constitutional law and tradition in Australia, and beforehand, in the United Kingdom. That unbroken law and tradition has repeatedly reinforced and ultimately respected the democratic will of the people as expressed in Parliament. It has reflected political realities in our society and the distribution of power within it. I also do so in recognition of the dangers which may attend the development by judges (as distinct from the development by the people’s representatives) of a doctrine of fundamental rights more potent than Parliamentary legislation. Such extra-constitutional notions must be viewed with reservation not only because they lack the legitimacy that attaches to the enactments ultimately sanctioned by the people. But also because, once allowed, there is no logical limit to their ambit. *They may thereby undermine the rule of law and invite the only effective substitute, viz the rule of power.* In the end, it is respect for long standing political realities and loyalty to the desirable notion of elected democracy that inhibits any lingering judicial temptation, even in a hard case, to deny loyal respect to the commands of Parliament by reference to suggested fundamental rights that run ‘so deep’ that Parliament cannot disturb them. This conclusion does not

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<sup>87</sup> [1984] 1 NZLR 398.

<sup>88</sup> J. Toohey, ‘A Government of Laws, and Not of Men?’, (1993) 4 *Public Law Review* at 167.

<sup>89</sup> G. Winterton, ‘Extra-Constitutional Notions in Australian Constitutional Law,’ (1986) 16 *Federal Law Review* 223 at 299-300.

<sup>90</sup> (1986) 7 NSWLR 372 at 405.

leave our citizens unprotected from an oppressive majority in Parliament. The chief protection lies in the democratic nature of our Parliamentary institutions.<sup>91</sup> (emphasis added)

However, Justice Kirby now appears increasingly receptive to continually reinvigorate the ‘deep rights’ debate.<sup>92</sup> Eighteen years after the *BLF case*, his Honour delivered the ‘Robin Cooke Lecture’ in New Zealand on 25 November 2004. The title of the lecture was: “Deep Lying Rights- A Constitutional Conversation Continues”.<sup>93</sup> However, his Honour bemoans that many recent High Court cases are

discouraging to the notion that the law, and the judiciary, will hasten to the assistance of people where their ‘deep’ or ‘fundamental’ rights are denied. Far from embracing Lord Cooke’s concept about inalienable ‘fundamental’ or ‘deep’ rights, the trend of decisions in Australia at least, must now be seen as generally unhelpful to such protection.<sup>94</sup>

For Justice Kirby the door quietly opened<sup>95</sup> to the deep rights debate in 1994 when his Honour publicly acknowledged that he no longer has “an unquestioning faith in the parliamentary system”.<sup>96</sup> Then in a speech delivered at the New Zealand Legal Research Foundation conference in Auckland in April 1997 to celebrate Lord Cooke’s contribution to jurisprudence, his Honour extensively canvassed the notion of deep rights residing in a sovereign people. In doing so his Honour referred to both the pronouncements of Lord Coke and Lord Cooke. Justice Kirby however concluded that talk of deep rights which have the authority to check and limit what Parliament can do is dangerous heresy:

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<sup>91</sup> *Ibid.*

<sup>92</sup> Loftus suggests that Kirby and Toohey JJ have mirrored the views of Sir Robin Cooke, albeit extra-curially: P. Loftus, ‘Proportionality, Australian Constitutionalism and Governmental Theory- Changing the Grundnorm’ (1999) 3 *Southern Cross University Law Review*, at 80.

<sup>93</sup> Kirby, above n 5.

<sup>94</sup> *Ibid* at 8 and 12.

<sup>95</sup> *Ibid* at 6.

<sup>96</sup> M. Kirby, ‘Looking to the Courts to Fight Political Paralysis’, (1994) 19 *Issues for the Nineties*, 4 at 5.

My approach [in the *BLF Case* in 1986<sup>97</sup>] was, I regret to report, criticised by some academic commentators who considered it insufficiently attentive to the protection of truly fundamental rights and unduly influenced by Diceyan positivism. However, I remain unrepentant believing, as I do, that the survival of common law system and the entrustment of great powers to judges, depends on their common sense acceptance of the legal and political setting in which they operate. To claim ‘sovereignty’ to themselves (because they have a residual power to submit legislative or administrative acts to scrutiny for lawfulness) is to misunderstand the subordinate and residual function of a judge operating in a political system with an elected parliament and an accountable Executive Government.<sup>98</sup>

And further:

If such pretensions were actually believed by the judges themselves, they would run the peril of converting the judicial belief to a conviction that the judges opinions about deep rights were worth more than those of the members of the legislature, elected by and accountable to the people. Without a legal foundation for such an assertion, it is my view that judges should not make it, still less convert it into action.<sup>99</sup>

However, just four months later at the Deakin Law School Public Oration in August 1997, his Honour seems to have had a complete *volte face* on the issue. His Honour noted a number of developments that were occurring and were relevant to the deep rights debate, including:

- “The greater willingness of constitutional courts to construe the constitutional instrument and other legislation against a presumption of respect for fundamental human rights; and
- Their greater willingness to invoke the international law of human rights to lend support to this endeavour
- Their greater sensitivity to constitutional implications found in the language and structure of the document
- Their insistence upon the protection of the integrity of the judicial process
- The independence of the judiciary

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<sup>97</sup> (1986) 7 NSWLR 372.

<sup>98</sup> Kirby, above n 85 at 8.

<sup>99</sup> *Ibid.*

- The availability of constitutional judicial review.”<sup>100</sup>

Note the emphasis on the independence of the judiciary in the August speech as distinct from the ‘subordinate and residual function of a judge’ in the April speech. In any event his Honour stated that:

If the Australian people are (as is suggested) now the ultimate foundation of the legitimacy of the Constitution, we must realise that this hypothesis has possible consequences. They may lie not only in the arguments that will be advanced about the fundamental ‘deep lying rights’ which the people have reserved themselves. They will also lie in the work of the courts. If the people are the ultimate source of constitutional authority in Australia, may it not be the duty of the courts in their mode of reasoning to be more accessible to the people? [S]hould different modes of reasoning and explanation be adopted? A different judicial method?<sup>101</sup>

And further, “if it is accepted that the people of Australia are the source of legitimacy of the Australian Constitution, does this mean that the people have reserved to themselves some rights [not ceded by the people] which even the Constitution... cannot extinguish?”<sup>102</sup> And further “Are there people’s rights which the people have never surrendered to Parliament but jealously reserve to themselves?”<sup>103</sup> This appears to be the language of social contract theory.<sup>104</sup>

This approach is clearly supportive of the notion of a sovereign people carefully and jealously depositing their inalienable rights for safe-keeping. Professor Winterton has said: “[T]he Ninth

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<sup>100</sup> M. Kirby, ‘Deakin - Popular Sovereignty and the True Foundation of the Australian Constitution,’ 1997 Deakin Law School Public Oration, 22 August 1997, from web, <http://www.hcourt.au/deakin2.htm;6>.

<sup>101</sup> *Ibid* at 7.

<sup>102</sup> *Ibid* at 5.

<sup>103</sup> *Ibid* at 7.

<sup>104</sup> See chapter nine for an extended discussion of the philosophical phenomenon known as the ‘social contract’. Note the philosophical objection to deep rights connected with social contract theory. “If man possesses rights, he must possess them against or in relation to somebody else; it is therefore meaningless to attribute rights to isolated individuals, and that in fact means rights necessarily involve society”: J. Gough, *The Social Contract* (1936) at 228. In other words, rights can only evolve and be enforced in a society. To say that the rights existed prior to the social contract, and that the contract was the basis of society is to deny that unless society already existed there could be no rights to guarantee.

Amendment to the United States Constitution has been regarded by some [Kauper included] as a recognition that the rights guaranteed by the Bill of Rights predate that document and do not owe their existence to it".<sup>105</sup> As such, the United States Bill of Rights did not *create* the people's rights, but was simply a repository where the people's rights were declared.<sup>106</sup>

In the same year as the two speeches delivered by Justice Kirby, 1997, his Honour had to grapple with these very same questions in *Levy v Victoria*,<sup>107</sup> where the plaintiff in that case, *inter alia*, made an appeal to the rights of the 'sovereign people' as a basis for a limitation on State legislative power. Justice Kirby noted:

With the passage of time since federation in Australia and changing notions of Australian nationhood, the perception that the Australian Constitution is binding because of its imperial provenance has given way (at least since the *Australia Acts* 1986) to an often expressed opinion that the people of Australia are the ultimate repository of sovereignty. *That view is not without conceptual and historical difficulties.* However, relying upon these opinions, the plaintiff submitted that no Australian Parliament, federal or State could deprive the 'sovereign people' of their fundamental democratic rights.<sup>108</sup> (emphasis added)

However, under the circumstances of the case, his Honour reasoned that it was "possible to put these [conceptual and historical] and other difficulties to one side".<sup>109</sup> Much like the Court's 1988 *dicta* in *Union Steamship Co of Australia Pty Ltd v King*:

Whether the exercise of that legislative power [Parliament of New South Wales and arguably the Commonwealth] is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law, a view which Lord

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<sup>105</sup> G. Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-examined' (1976) 92 *The Law Quarterly Review* 591 at 599.

<sup>106</sup> Conversely, the Australian Constitution relies on the principles of representative government, responsible government, the common law and parliamentary supremacy to create and nurture rights for the people. In the founders scheme "the people's salvation therefore lay in parliamentary democracy": L. Zines, 'Courts Unmaking the Laws,' in Australian Institute of Judicial Administration (ed.) *National Conference: Courts in a Representative Democracy* (1994) at 13.

<sup>107</sup> (1997) 189 CLR 579; decision handed down 31 July 1997.

<sup>108</sup> *Ibid* at 634.

<sup>109</sup> *Ibid* at 643.

Reid firmly rejected in *British Railways Board v Pickin*, is another question which we need not explore.<sup>110</sup>

*Union Steamship* was the first time the spectre of *Dr Bonham's* case had appeared in the High Court. According to Professor Zines, *Union Steamship* was the first time that it had been suggested in the High Court that there might be restrictions on legislative power which are not found, express or implied, in the Constitution or some other binding superior law.<sup>111</sup>

Like the other Justices in *Levy*, Justice Kirby decided the case on the basis of the Court's previous rulings on the implied freedom of political communication. They concluded that the freedom could be derived only from the text and structure of the Constitution.<sup>112</sup> However, Justice Kirby was the only Justice to discuss the notion of fundamental rights, also recounting the defendant's objection to the plaintiff's appeal to the sovereignty of the people as a limitation on legislative power:

[The defendants] pointed out that, under the Victorian Constitution (unlike its federal counterpart) any provision of the Constitution could be amended without direct involvement of the people. They argued that this fact made it impossible to apply to Victoria the suggested limitations said to be derived from popular sovereignty.<sup>113</sup>

Justice Kirby then opined:

Whatever may be the case elsewhere (and there are many problems) [contrasting *Kable* per Dawson J, the *BLF* case per his Honour and *Pickin* per Lord Reid and the *dicta* from Sir Robin Cooke in New Zealand in a footnote] the concept of fundamental rights of the people which lie so deep that a Parliament cannot remove them, seems *specially inapplicable* to a constitution such as the Victorian Constitution and a parliament such as the Victorian Parliament.<sup>114</sup> (emphasis added)

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<sup>110</sup> (1988) 166 CLR 1 at 10, citing the New Zealand stream of authority per Sir Robin Cooke.

<sup>111</sup> L. Zines, 'A Judicially Created Bill of Rights' (1994) 16 *Sydney Law Review* 166 at 180.

<sup>112</sup> See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>113</sup> (1997) 189 CLR 579 at 643.

<sup>114</sup> *Ibid.*

Kirby J draws a distinction between some State Constitutions that can be amended without recourse to the people on the one hand, and others, along with the Commonwealth Constitution which require the agreement of the people. As a result, the former would be immune from the burden of legislative restraint. However, the latter's position is to say the least doubtful, as highlighted by Kirby J's emphasis of the defendant's argument in *Levy*. In the former category would be Tasmania and Victoria which can alter their Constitutions by legislative majorities. In the latter category would seem to be the constitutions of the remaining States and the Commonwealth which require a referendum.

However, there is of course a significant difference in the 'manner and form' provisions between these State constitutions and the Commonwealth Constitution. The Commonwealth Constitution can only be altered by s 128. However, in States utilising the referendum process, only certain matters have been entrenched. Any other matter not subject to approval at referendum, may be altered by legislative majority. A common matter entrenched is the number of Houses constituting Parliament. However, in both Queensland and Western Australian the office of Governor (thereby the institution of the Crown) is entrenched in the constitution, making a shift to a republic potentially difficult to achieve.

If the defendant's argument in *Levy* is logically concluded, and as Kirby J has flagged, a defence might be found lacking in respect of that pale shadow of a parliament, the Commonwealth Parliament. In that instance the concept of fundamental rights might seem specially applicable. This would be further enhanced if one accepts Bryce's view of sovereignty that ultimate (though not legal) sovereignty resides with the authority or body which, according to the constitution, may amend the constitution, and not the supreme law-making body.<sup>115</sup> It would then only need a submission for Commonwealth legislative constraint, based on popular sovereignty similar to that

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<sup>115</sup> Noted by Gummow J in *McGinty v Western Australia* (1996) 136 CLR 140 at 274.

as flagged by Kirby J in *Levy*, to be raised before a High Court (even if seen as doctrinal) receptive to the notion of a social contract, and the Commonwealth Parliament may find it difficult to raise a satisfactory defence. As Wright has astutely noted: “Even though the popular sovereignty arguments were unsuccessful in *Levy*, it may be premature to suggest that this failure is indicative of a lack of resonance of popular sovereignty in the High Court. [T]he test of the strength of popular sovereignty is yet to come...”<sup>116</sup>

However, in the present Court, it would appear that very few Justices apart from Justice Kirby would accept a vigorous deep rights view. “Looking to the common law for ‘deep’ rights is not likely to be a fruitful exercise in Australia. For, although sometimes judicial relief is given, it is a comparatively rare event”.<sup>117</sup> However, if there is a connection between popular sovereignty and deep rights, Justices McHugh and Gummow explicitly as far back as *McGinty* accepted popular sovereignty.<sup>118</sup> Moreover, Gleeson CJ, Hayne and Gaudron JJ (along with Gummow J) formed the majority in *Sue v Hill* to declare the United Kingdom a foreign power. Chief Justice Gleeson has explicitly extra-curgially endorsed popular sovereignty and his Honour’s “Boyer Lectures were suffused with the idea that individuals are protected by the rule of law as upheld in the courts and the High Court can operate to shield individuals from the excesses of institutional power”.<sup>119</sup>

Like Justice Kirby, Justice Dawson has also judicially discussed the notion of fundamental or deep rights. In *Kable v Director of Public Prosecutions (NSW)*<sup>120</sup> his Honour concluded that the words ‘peace, welfare, and good government’ are not words of limitation, but confer plenary

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<sup>116</sup> H. Wright, ‘Sovereignty of the People - The New Constitutional *Grundnorm*?’ (1998) 26 (1) *Federal Law Review* 165 at 176.

<sup>117</sup> Kirby, above n 5 at 8.

<sup>118</sup> *McGinty* at 237 and 274-275 respectively.

<sup>119</sup> A. Lynch, ‘Comment and Book Review. The High Court – Legitimacy and Change: Review Essay: Haig Patapan, Judging Democracy – The New Politics of The High Court of Australia’ (2001) 29 (2), *Federal Law Review* 295 at 304.

<sup>120</sup> (1996) 138 ALR 577.

power upon the legislature, and that this was put beyond question by s 2 of the Australia Act.<sup>121</sup>

As with Kirby J in *Levy*, Dawson J in *Kable* was the only Justice to discuss the issue of fundamental rights directly. Only Brennan CJ agreed with Dawson J's reasons, thus forming the dissenting minority in *Kable*, adding that:

I would add a further comment to Dawson J's conclusion that 'no non-territorial restraints upon parliamentary supremacy arises from the nature of a power to make laws for peace, order (or welfare), and good government or from the notion that there are fundamental rights which must prevail against the will of the legislature. If there were any restraints on the exercise of the powers of the Parliament, they would arise from entrenched provisions of the particular State Constitution.'<sup>122</sup>

After assessing the New South Wales Parliament's power as plenary, Dawson J then went on to decisively deal with the question reserved by the Court from *Union Steamship* and his Honour's own question from *Polyukhovich v Commonwealth*<sup>123</sup> as to whether "legislative power is subject to restraints to be found in fundamental principle". In *Polyukhovich* Dawson J raised the question whether a court might in "quite extraordinary circumstances" judge that Commonwealth legislation which otherwise falls within its power, is invalid as not being for 'peace, order and good government'.<sup>124</sup> Justice Dawson's definitive answer to the questions in *Union Steamship* and *Polyukhovich* is that there are "no non-territorial restraints upon parliamentary supremacy that arise... from the notion that there are fundamental rights which must prevail against the will of the legislature".<sup>125</sup> His Honour's answer refers to Constitutions of any kind, and as such no State Parliament, nor the Commonwealth Parliament, suffer the disability of constraints on their power to legislate, apart from those delimiting their scope. The present writer submits that this is the preferable view.

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<sup>121</sup> *Ibid* at 587.

<sup>122</sup> *Ibid* at 582.

<sup>123</sup> (1991) 172 CLR 501.

<sup>124</sup> *Ibid* at 636.

<sup>125</sup> (1996) 138 ALR 577 at 590. This answer was no less forcefully reiterated by his Honour in *Kruger v Commonwealth* (1997) 190 CLR 1 at 73.

Justice Toohey left unanswered a similar question in *Polyukhovich*<sup>126</sup> and left the specific question from *Union Steamship* open in *Kable*<sup>127</sup> and again in *Kruger*.<sup>128</sup> In *Kruger* his Honour stated that “it is also necessary to bear in mind the comment of the Court in *Union Steamship...*”<sup>129</sup> In the context of his Honour’s judgment in *Kruger*, the question must be asked, Why? His Honour does not in any way deal with the question, but leaves it there like a pregnant pause, value laden and doomed to apparently reappear continually without decisive treatment. Possibly imbued with the same mystique and uncertainty surrounding Lord Coke’s comments in *Dr Bonham’s* case.

In 2001 Justice Kirby was again squarely confronted with a Lord Coke/Lord Cooke deep rights argument in *Durham Holdings Pty Ltd v New South Wales*.<sup>130</sup> *Durham* was a case involving a claim by the applicant coal company that the New South Wales Parliament could not compulsorily acquire its coal reserves without just compensation. The legislation compulsorily acquiring the applicant’s land was in every way formally valid and unambiguous.<sup>131</sup> Hence, the applicant was forced back to a claim that “the exercise of legislative power is limited by the inviolability of fundamental legal rights”,<sup>132</sup> in this case, the right to just compensation. Moreover, the applicant suggested “Dicey’s theory of parliamentary sovereignty was an unfounded oversimplification... historically inaccurate, wrong in principle and tragic in its

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<sup>126</sup> *Ibid* at 687.

<sup>127</sup> (1996) 138 ALR 577 at 602.

<sup>128</sup> (1997) 190 CLR 1 at 79-80.

<sup>129</sup> *Ibid* at 79.

<sup>130</sup> (2001) 205 CLR 399 and (2001) 75 ALJR 501.

<sup>131</sup> Coal Acquisition Act 1981 (NSW).

<sup>132</sup> (2001) 205 CLR 399 at 401 citing the New Zealand stream of authority per Sir Robin Cooke and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 and *Kartinyeri v The Commonwealth* (1998) 195 CLR 337. [The Australian Law Journal Reports do not reproduce the submissions of the applicant, respondent or interveners].

legacy”.<sup>133</sup> The argument was unanimously rejected. However, like *Levy*, only Justice Kirby undertook a thorough analysis of this ‘dilution of Dicey’.<sup>134</sup>

In *Durham*, Justice Kirby came to the same conclusion as the majority, but went on to confront the spectre of *Dr Bonham’s* case head on. His Honour’s own reasoning in the *BLF Case* and *Levy* was even taken to task by the applicant. Justice Kirby retraced the bold steps of those seventeenth century judges who were prepared to hold that “an Act of parliament could be treated as invalid where it conflicted with a basic principle of the common law”, including of course Lord Coke.<sup>135</sup> His Honour also naturally referred to the similar New Zealand stream of authority propounded by Lord Cooke. His Honour also noted a third line of authority submitted by the applicant as a check on parliamentary supremacy. That being “Sir Owen Dixon’s reminder that the principle of parliamentary supremacy is itself a doctrine of the common law”.<sup>136</sup> (See chapter six).

However, Justice Kirby was to ultimately hold that in Australia the notion that “some basic common law rights ‘lie so deep’ that even Parliament... cannot contradict them, had so far gathered few adherents”.<sup>137</sup> This was because most judges were prepared to accept both a “modest” role for themselves and the common law itself. The duty of obedience to a law derives from the observance of parliamentary procedures and not by reference to the judge’s own notions of fundamental rights. Further, “in Australia, the common law operates within an orbit of written constitutional laws and political realities”.<sup>138</sup>

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<sup>133</sup> (2001) 205 CLR 399 at 401.

<sup>134</sup> A. Ross, ‘Diluting Dicey’ (1995) *Auckland University Law Review* at 176.

<sup>135</sup> (2001) 75 ALJR 501 at 510. Also including Lord Chief Justice Hale, Lord Chief Justice Holt, Lord Chief Justice Kenyon, Lord Mansfield and Lord Chief Justice Camden.

<sup>136</sup> *Ibid* at 511.

<sup>137</sup> *Ibid* at 514.

<sup>138</sup> *Ibid*.

According to Justice Kirby, under normal conditions there were no extra-constitutional constraints on State legislative power. State law is only invalid because of constitutional considerations such as it being inconsistent with federal law, or with an express prohibition in the Constitution or with an implication drawn from the language and structure of the Constitution.<sup>139</sup> His Honour noted “Protection against extreme departures of fundamental rights... does not arise from a belated attempt to assert for the common law (and the judges who expound and apply it) a role superior to legislation which judicial authority, legal history and political realities deny”.<sup>140</sup> As such: “Whereas the role of the common law, in the face of legislation, is ‘modest’, the role of the Constitution is substantial”.<sup>141</sup>

However, his Honour still has to grapple with the natural law proposition that some laws may be so extreme they may not be laws at all. Such a law might not be a law of a kind envisaged by the Constitution. His Honour noted “Ultimately, a ‘law’ of a State made by a Parliament, could only be a ‘law’ of a kind envisaged by the Constitution. Certain ‘extreme’ laws might fall outside that constitutional presupposition”.<sup>142</sup> This proposition along with the “significance of the contemporary realization that the foundation of Australia’s Constitution lies in the will of the people, has not yet been fully explored”.<sup>143</sup> Just because the applicant’s argument in *Durham Holdings* fell

far short of the extreme instances that would enliven any of the forgoing constitutional implications... it is not impossible that this conception [popular sovereignty] would, in an extreme case affect judicial recognition of a purported ‘State law’ that was not, in truth, a ‘law’ at all.<sup>144</sup>

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<sup>139</sup> *Ibid* at 509.

<sup>140</sup> *Ibid* at 515-516

<sup>141</sup> *Ibid* at 516.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid* at 516-517.

One wonders whether Justice Kirby's view might have been any different if the sovereign people had not, in 1988, rejected a referendum proposal to insert a provision in the Commonwealth Constitution, protective against inadequately compensated State acquisitions?

In *Durham*, the majority of Gaudron, McHugh, Gummow and Hayne JJ preferred to simply hold that the applicant had not provided sufficient authority to bring the argument within the unexpressed limits on State legislative powers as mooted in *Union Steamship*. Callinan J in short reasons generally agreed. Further, there were no discernable implications (logical or practical) from the federal structure within which the State Parliaments legislate, to limit their power in respect of compulsory acquisition. In reaching this proposition their Honours had regard to the "federal system and the text and structure of [both] the State and Commonwealth Constitutions".<sup>145</sup>

The submissions by the Solicitor-General for the Commonwealth, for the Attorney-General for the Commonwealth intervening were accepted. These were that:

- "The grant of State legislative power is plenary and unlimited as to subject matter, save for territorial restrictions;
- Under the doctrine of parliamentary supremacy, there is no scope for the curtailment of legislative power by reference to 'rights deeply rooted in our democratic system of government and the common law';<sup>146</sup>

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<sup>145</sup> *Ibid* at 504.

<sup>146</sup> Citing the New Zealand stream of authority per Sir Robin Cooke.

- The doctrine by which legislative power is limited by pre-existing common law rights has no place in Australian constitutional jurisprudence, in which parliamentary supremacy remains the underlying norm;<sup>147</sup>
- The identification of fundamental common law rights is inherently problematic and would replace parliamentary supremacy with judicial supremacy.”<sup>148</sup>

The written submissions for the Attorney-General for the State of Victoria concurred: “The notion that courts have jurisdiction to declare legislation invalid on the ground of interference with fundamental common law rights is not part of the Australian law... Such a restraint would represent a major shift in the constitutional balance between the judiciary and Parliament”.<sup>149</sup>

## CONCLUSION

This chapter argued against the notion of extra-constitutional deep or fundamental rights being judicially discovered, protected and enforced against Parliament. The judiciary do not currently have such an authority and should not have. As such, it was argued the enforcement of certain rights selected by the judiciary as deep or fundamental, against a democratically elected parliament, should be seen as a “massive transfer of political power from parliaments to judges”.<sup>150</sup> The result of such a transfer is huge uncertainty about the source, scope, effect and enforcement of a fundamental rights doctrine.

This chapter traced how contemporary judges such as Lord Cooke and Justice Kirby have reinvigorated the fundamental law and deep rights debate to appeal to a principle higher than

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<sup>147</sup> Citing *Kable v DPP* (NSW) (1996), *the BLF Case* (1986) and *Kartinyeri v The Commonwealth* (1998).

<sup>148</sup> (2001) 205 CLR 399 at 404.

<sup>149</sup> *Ibid* at 405.

<sup>150</sup> Goldsworthy, above n 15 at 3.

parliamentary supremacy. As a result, the chapter discussed the historical and political genesis of the concepts of parliamentary sovereignty and fundamental law in seventeenth-century England to show that recourse to such doctrines is constitutionally unsafe and does not show fidelity to the institutional design and normative scheme provided for by the Founders of the Constitution. Even Dworkin notes that judges “must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality”.<sup>151</sup>

Notwithstanding the contemporary claims by judges such as Lord Cooke and Justice Kirby to reinvigorate fundamental law and deep rights have, to date, not been fully explored by other members of the High Court, does not mean such claims will forever go unheeded. The High Court has its 1988 dicta in *Union Steamship Co of Australia Pty Ltd v King* to reinvigorate and extrapolate: “Whether the exercise of legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law... is another question which we need not explore”.<sup>152</sup> Because as Justice Kirby has said: “the decisions of *Union Steamship* and *Polyukovich*<sup>153</sup> have not closed the door to the deep rights argument raised in *BLF*”.<sup>154</sup>

The High Court also Justice Kirby’s dicta from *Durham Holdings* to enliven: “It is not impossible that this conception [popular sovereignty] would, in an extreme case affect judicial recognition of a purported ‘State [or Commonwealth] law’ that was not, in truth, a ‘law’ at all”.<sup>155</sup> However, just because the ‘deep rights’ doctrine has to date not proved fruitful, are there limitations to be found in international law or the principle that parliamentary supremacy is itself a doctrine of the common law? These considerations are the focus of the next chapter.

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<sup>151</sup> Noted by Goldsworthy, above 15 at 253.

<sup>152</sup> (1988) 166 CLR 1 at 10.

<sup>153</sup> (1991) 172 CLR 502 at 636.

<sup>154</sup> Kirby, above n 85 at 7.

<sup>155</sup> (2001) 75 ALJR 501 at 516.

# **CHAPTER SIX**

## **INTERNATIONAL LAW AND COMMON LAW LIMITATIONS ON LEGISLATIVE POWER**

### **INTRODUCTION**

Part A of this chapter discusses the increasing influence of international law on Australian domestic law. It discusses whether the courts might invoke international law to veto legislation that is clear and unambiguous on its face. It further discusses whether international law can be *prima facie* used to limit plenary legislative power under the Constitution, thus suggesting that the Constitution affords an array of fundamental rights and protections.

Part B asks: Do the Australian people have common law rights which can limit parliament's legislative power? We are not concerned about *traditional* common law rights which can always be abrogated by legislation if the parliament makes its intention unambiguously clear. What some judges have suggested exist, are some common law rights that are so fundamental that Parliament cannot override them. For, as gleaned from the writings of many judges (some discussed in the previous chapter), an inherent jurisdiction for the High Court to strike down legislation appears too tantalising a prospect for the Court to ignore.

Part C discusses whether Sir Owen Dixon's claim that the common law is 'the ultimate constitutional foundation',<sup>1</sup> supports a fundamental law doctrine. It is noted others have used Sir Owen's proposition to say that parliamentary sovereignty is a doctrine of the common law and therefore a law which judges can unmake, to promote precedent over legislation. In discussing Sir

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<sup>1</sup> Sir O. Dixon, *Jesting Pilate* (1965).

Owen's claims there is a need to refer to writings of the jurist Sir John Salmond <sup>2</sup> whom Sir Owen relied upon to some extent.

My argument is that although the common law and international law can be (in their own way) robust vehicles for the protection of some rights, they must fall away in the face of unambiguous legislation. Any strident assertion that they do not fall away displays infidelity to the institutional design of the Founders and means that the checks, balances and principles the Founders envisaged are subverted, potentially leading to a dysfunctional constitutional order.

## **PART A- THE INFLUENCE OF INTERNATIONAL LAW**

International law is playing an increasingly important role in the area of human rights within Australia. Firstly, there is Australia's 1980 signature to the *International Covenant on Civil and Political Rights* (ICCPR) which "renders Australia accountable to the United Nations Human Rights Committee". <sup>3</sup> However, it should be noted that decisions of the Human Rights Committee are not automatically binding within the Australian legal system. <sup>4</sup> In 1994 the Committee upheld a complaint which challenged Tasmanian criminal laws against adult homosexual conduct between males. <sup>5</sup> However, even after the ruling, the Tasmanian Government still failed to amend the Tasmanian Criminal Code. As a result, the Commonwealth Parliament (pursuant to the external affairs power in s 51(xxix) of the Constitution) enacted the Human Rights (Sexual

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<sup>2</sup> Sir J. Salmond, *Jurisprudence* (1902).

<sup>3</sup> M. Kirby, '2000 Mayo Lecture- Law, like the Olympics, is now international but will Australia win Gold?', 16 October 2000, from web, <http://www.hcourt.gov.au/speeches/kirbyj> at 8. The ICCPR was adopted by the United Nations in 1966 and came into force in 1976. It expands upon the civil and political rights contained in the Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948.

<sup>4</sup> See the comments of Kirby J in *Coleman v Power* (1994) 209 ALR 182 at 243-244: "[It] is not to say that treaty provisions such as those expressed in the ICCPR are directly binding. They are not. They have not become enacted as part of Australian municipal law".

<sup>5</sup> *Toonen v Australia* (1994) 1 Int Human Rights Reports 97 (No 3).

Conduct) Act 1994 (Cth) to overrule the Tasmanian law. However, the Australian Federal Government has shown that it also will not always follow the Committee's decisions.<sup>6</sup>

Secondly there is the influence of international norms on the common law. In 1988 at a conference in Bangalore, India mainly attended by Commonwealth Judges, the 'Bangalore Principles' were adopted. This meant that "in respect of international human rights norms... judges of the common law tradition may properly utilise such international rules in filling the gaps in the precedents of the common law".<sup>7</sup> Thus in 1992, in *Mabo v Queensland [No. 2]*<sup>8</sup> the High Court upheld the rights of indigenous peoples in Australia to title in land with which they could prove a long association. To not do so would be a serious breach of Australia's international human rights obligations. Justice Brennan said:

the common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development on the common law, especially where international law declares the existence of universal human rights".<sup>9</sup>

Thirdly, there is the influence of Australia's treaty obligations or international conventions on the interpretation of an ambiguous statute or subordinate legislation; to be discussed shortly. Fourthly, the High Court has held that the external affairs power in the Constitution is wide enough to allow the Commonwealth Parliament to legislate to implement obligations under treaties to which Australia is a party regardless of the content of the treaty.<sup>10</sup>

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<sup>6</sup> See *A v Australia* (1997) Communication No 560/1993, UN Doc, CCPR/59/560/1993 (30 April 1997).

<sup>7</sup> Kirby, above n 3 at 10. See also M. Kirby, 'The Australian use of International Human Rights Norms: From Bangalore to Balliol- A View from the Antipodes', (1993) 16 *University of New South Wales Law Journal* 363.

<sup>8</sup> (1992) 175 CLR 1.

<sup>9</sup> *Ibid* at 41-42, with whom Mason CJ and McHugh J agreed. In 1996 the High Court held that such rights were not necessarily extinguished by the grant of pastoral leases: *Wik Peoples v Queensland* (1996) 187 CLR 1.

<sup>10</sup> See for example the Human Rights (Sexual Conduct) Act 1994 (Cth) mentioned above and cases such as *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania*

Fifthly, in the area of administrative law, the High Court has accepted that ratification of an international convention may give rise to a ‘legitimate expectation’ (something less than a legal right), thus enlivening administrative law remedies through notions of procedural fairness.<sup>11</sup>

Most commentators have no difficulty with judges invoking international human rights law or Australia’s treaty obligations for the incremental and necessary “development”<sup>12</sup> of the Australian common law, where it is uncertain and ambiguous.<sup>13</sup> After all the common law must give way in the face of unambiguous legislation. Further, there appears little difficulty with interpreting an ambiguous statute (which is an exercise of legislative power, not a source of legislative power) in line with international obligations that have been incorporated into domestic law. In 1982 “it was accepted by the High Court... that where legislation specifically enacted an International treaty into domestic law, reference to treaties was permitted”.<sup>14</sup> This adheres to the ‘dualist’ notion that norms of international law do not become part of the domestic law unless made so by the municipal lawmaker.<sup>15</sup> What is troublesome however, are further suggestions that:

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(1983) 158 CLR 1 and *Victoria v Commonwealth* (1996) 187 CLR 416. However, note the argument that such actions have enabled the Executive to enlarge the scope of the constitutional power with the result that the federal balance between State and Commonwealth powers has been radically disturbed: H. Gibbs, ‘Teoh: Some Reflections’, 19/1/05 from web:

<http://www.samuelgriffith.org.au/papers/html/vol15>; 1.

<sup>11</sup> K. Walker, ‘Treaties and the Internationalisation of Australian Law’ in C. Saunders (ed.) *Courts of Final Jurisdiction*, (1996) at 218. See *Teoh* (1995) 183 CLR 273.

<sup>12</sup> Walker notes that Brennan J in *Mabo* saw the ‘development’ of the common law as a “process of change that makes the common law a dynamic, and not static, branch of the Australian legal system”: *ibid* at 213.

<sup>13</sup> *Dietrich v The Queen* (1992) 177 CLR 292 at 306. Brennan J dissented in *Dietrich* because change in the common law in that particular case would have taken the court beyond the judicial role: Walker, *ibid* at 214.

<sup>14</sup> Walker, *ibid* at 209: see *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

<sup>15</sup> J. McEldowney, ‘Modernizing Britain: Public Law and Challenges to Parliament’, in J. Mackinnon and P. Havemann (eds) *Modernizing Britain: Public Law and Challenges to Parliament*, (2002) at 23. See also R. Higgins, ‘The role of National Courts in the international legal process’ in *Problems and Process: International Law and how we use it* (1994) at 205.

- (i) international law can be *prima facie* used to limit plenary legislative power under the Constitution, thus suggesting that the Constitution affords an array of fundamental rights and protections (Kirby and Toohey JJ); and
- (ii) international treaties and conventions (ratified or not) that have not been incorporated into domestic law can be used to limit domestic legislative power (Toohey J)
- (iii) ratified international treaties and conventions (incorporated or not) can be used to strike down unambiguous legislation (Toohey J)<sup>16</sup>
- (iv) fundamental common law rights exist which cannot be legislatively abrogated (Cooke, Kirby and Toohey JJ).

During the Hawke/Keating Labor term in office in the late 1980's, early 1990's, there were a lot of international law promises made but few were delivered. In fact, as at 1995 Australia was already a party to about 900 treaties.<sup>17</sup> As such, the High Court began to speculate about these treaties that Australia had signed, but which had not become part of the municipal law because there is no validating local legislation. Suggestions were that a treaty might be used even though it had not been domestically incorporated.<sup>18</sup>

International law should not be seen as a panacea to all of Australia's shortcomings in relation to a lack of a rights based regime. It does not provide judges with a broad mandate to enforce international obligations. As former Chief Justice Gibbs has commented:

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<sup>16</sup> As Gummow and Hayne JJ point out in *Kartinyeri*: "The provisions of an ambiguous [Commonwealth or State] law must be applied and enforced even if they be in contravention of accepted principles of international law": (1998) 195 CLR 337 at 384 citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204.

<sup>17</sup> Counsel for the Minister in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>18</sup> Walker, above n 11 at 209.

Naturally one would not wish Australia's standards of fairness and decency to fall below international norms, but it does not follow that it is necessary or desirable for every treaty to which Australia is a party to be incorporated verbatim into our municipal law. For one thing, treaties are often expressed in terms of broad generalities... To apply them literally, and without appropriate qualifications, may have unfortunate consequences... Further, our law is not necessarily less fair and just than the law laid down by international treaties.<sup>19</sup>

### ***Construing the Constitution to conform to international law***

G. de Q. Walker has noted that in the 1981 case of *Attorney-General (Vic) ex rel. Black v Commonwealth*,<sup>20</sup> and similar cases, a general rule was postulated that “grants of legislative power to the Commonwealth [in the Constitution] will be construed broadly...”<sup>21</sup> As a result “any doubts are thus to be resolved in favour of the legislature and against the people’s constitutional rights”.<sup>22</sup> However, Justices Kirby and Toohey have sought to extend the ‘Bangalore Principles’ to the Commonwealth Constitution itself. They propound that an implication exists in the Constitution that constitutional heads of power generally should be construed to conform to the rules of international human rights law which in turn promotes a theory of fundamental (common law?) rights.

In 1997 in *Newcrest Mining*, Justice Kirby first introduced what he calls the ‘interpretive principle’: “Where the Constitution is *ambiguous*, this Court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights”.<sup>23</sup> (emphasis added) And again: “Where there is an *ambiguity* in the meaning of the Constitution, ...it should be resolved in favour of upholding

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<sup>19</sup> Gibbs, above n 10 at 5.

<sup>20</sup> (1981) 55 ALJR 155 at 172 and 187.

<sup>21</sup> de Q. Walker, ‘Dicey’s Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion’ (1985) 59 *Australian Law Journal* at 276 at 283-284.

<sup>22</sup> *Ibid.*

<sup>23</sup> (1997) 147 ALR 42 at 147; (1997) 190 CLR 513 at 657.

fundamental rights".<sup>24</sup> (emphasis added) His Honour states that this occurs because: "[I]nternational law is a legitimate and important influence on the common law, and *constitutional law*, especially when international law declares the existence of universal and fundamental rights".<sup>25</sup> (emphasis added). Is this, in the words of Justice Toohey, a "revival of natural law jurisprudence"?<sup>26</sup> or, in the words of Lord Cooke "The Dream of an International Common Law"?<sup>27</sup> A number of very recent 'phenomenological punishment'<sup>28</sup> and mandatory detention cases have not helped the international dream though, and we already know from the previous chapter that *Durham Holdings* was a set back for Lord Cooke's 'deep rights' theory.

*Fardon v Attorney General (Qld)*<sup>29</sup> and *Baker v The Queen*<sup>30</sup> concerned State laws imposing additional detention on convicted sex-offenders after their full-time prison release dates had passed. Such laws were said to be necessary because of a predicted phenomenological risk<sup>31</sup> of re-offending. In both cases Justice Kirby was the solitary dissentient, with the majority deciding that no one could suggest that the laws were other than formal 'laws' duly passed. In *Fardon*, Chief Justice Gleeson reviewed the appellant's grounds:

The constitutional objection to the legislative scheme was not directly based upon a suggested infringement of the appellant's human rights... The contrariety is said to lie in the attempt by the Queensland Parliament to confer on the Supreme Court a function which is incompatible with the Court's position, under the Constitution, as a potential repository of federal jurisdiction, the function being repugnant to the Court's institutional

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<sup>24</sup> *Ibid* at 150 and 661.

<sup>25</sup> *Ibid* at 147 and 657. Justice Kirby reiterated his views on international law a year later in *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417. See also *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 522-525.

<sup>26</sup> J. Toohey, 'A Government of Laws, and Not of Men?', (1993) 4 *Public Law Review* at 167.

<sup>27</sup> Cooke, Lord 'The Dream of an International Common Law' in Saunders C. (ed.) *Courts of Final Jurisdiction*, (1996) at 138 and *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266.

<sup>28</sup> Kirby J in *Fardon v Attorney General (Qld)* (2004) 210 ALR 50 at 101.

<sup>29</sup> (2004) 210 ALR 50 and 78 ALJR 1519.

<sup>30</sup> (2004) 76 ALJR 1483.

<sup>31</sup> Justice Kirby compared the law to intrusions into judicial functions that occurred in Germany in the 1930's. "Rather than sanctioning specified criminal conduct, the phenomenological school of criminal liability procured the enactment of laws prescribing punishment for identified criminal archetypes": (2004) 210 ALR 50 at 101-102.

integrity. The repugnancy is claimed to be similar to that identified in *Kable v DPP (NSW)*.<sup>32</sup>

As such “the outcome turns upon a relatively narrow point, concerning the nature of the function which the Act confers upon the Supreme Court”.<sup>33</sup> In the end, the principle from *Kable*: that State legislation which purports to confer upon a State Supreme Court a function which substantially impairs its institutional integrity is invalid, did not apply to the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld). This was because the New South Wales legislation in *Kable* (NSW Community Protection Act) operated upon one named person only, Gregory Wayne Kable, thus impairing the New South Wales Supreme Court’s impartiality and its institutional integrity. In contrast the Queensland Act is directed at a class of persons. “The Queensland Parliament was attempting to ensure that the powers [of the Supreme Court of Queensland] would be exercised independently, impartially and judicially”.<sup>34</sup> The Queensland Act did not compromise the integrity of the Supreme Court or conflict with the power conferred on Federal Parliament by the Constitution to invest State courts with federal jurisdiction. One doubts whether an appeal to international law by the appellant would have been any more successful.

In the 2004 mandatory detention case of *Minister for Immigration, Multicultural and Indigenous Affairs v B*,<sup>35</sup> Kirby J discussed international law but was unable to invoke it because s 51(xix) (naturalization and aliens) of the Constitution and the provisions of the Migration Act 1958 (Cth) were clear and unambiguous. The case involved the compulsory detention of children in immigration custody. The children and their parents arrived in Australia as unlawful non-citizens and claimed refugee status. The High Court unanimously upheld the detention orders, and in December 2004 the family was deported to Pakistan. Justice Kirby was prepared to accept there

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<sup>32</sup> *Ibid* at 52.

<sup>33</sup> *Ibid* at 53.

<sup>34</sup> *Ibid* at 55, per Gleeson CJ.

<sup>35</sup> (2004) 78 ALJR 737.

might have been a breach of international law contrary to Australia's obligations under the *Covenant on the Rights of the Child*. Further, the Commonwealth Parliament was aware of these obligations but failed to amend the mandatory detention requirements of the Migration Act. Thus, in the face of such clear legislative intent and provisions, even a fundamental infraction of a basic human right could not render the statute invalid. Justice Kirby noted:

In the face of such clear provisions, the requirements of international law... cannot be given effect by a Court such as this. This Court can note and call attention to the issue. However, it cannot invoke international law to override clear and valid provisions of Australian national law.<sup>36</sup>

However, in the later 2004 case of *Al-Kateb v Godwin*,<sup>37</sup> Justice Kirby dissented and the case is noteworthy for the clash between Kirby J and McHugh J on the question of international law's influence on the Constitution. Al-Kateb was a Palestinian and stateless. He arrived in Australia without authority and was denied refugee status. He was compulsorily detained under the Migration Act 1958 (Cth). He was refused a protection visa by the Refugee Review Tribunal, and the Federal Court subsequently affirmed this decision. The appeal question for the High Court was whether Australia's obligations under international law precluded his mandatory detention. By a 4-3 majority the Court held that Al-Kateb's detention was authorized by the Migration Act. It was held the detention of non-citizens for the purposes of exclusion and removal was a valid exercise of parliamentary power under s 51(xix) (naturalization and aliens) of the Constitution and international law could not be invoked to give a different construction. Of the minority, Chief

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<sup>36</sup> *Ibid* at 768. Similarly "the Human Rights Act 1998 (UK) falls short of allowing [British] courts to hold that an Act of Parliament is unconstitutional or illegal. The most the courts may do is rule on the incompatibility between the 1998 Act and the legislation under review. Since the Act came into force there have been three declarations of incompatibility. It is then for Parliament, not the courts, to resolve any incompatibility": McEldowney, above n 15 at 36. The first of these cases was *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, however reversed on appeal to the House of Lords, discussed at length in McEldowney, above n 15 at 36 to 39 and 62 to 69.

However, as noted by the editors of Professor McEldowney's essays: "The [Human Rights] Act is allowing positive, rights based jurisprudence to evolve"; at p v.

<sup>37</sup> (2004) 208 ALR 124; (2004) 78 ALJR 1099.

Justice Gleeson and Justice Gummow rested their dissent on their interpretation of the Migration Act. Nor did Justice Kirby's dissent specially rely on international law,<sup>38</sup> but he discussed the growth of his 'interpretative principle' as "but another step in the process of evolution of the understanding of the Constitution in the High Court".<sup>39</sup> His Honour also made reference to his formulation of popular sovereignty from *Newcrest Mining*: "The Constitution speaks not only 'to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community'".<sup>40</sup> In commenting on 'Courts declaring new rights', his Honour stated:

It is true that, consistently with the Constitution, it is not part of the judicial function to insert a comprehensive Bill of Rights into the Constitution. Nor may the judiciary 'by the back door' incorporate an international treaty (even one ratified by Australia) as part of Australian law where the parliament has not done so by legislation [citing *Teoh*]. Whether a Bill of Rights should be adopted in Australia, by legislation, constitutional amendment or at all, is a political question. The limits inherent in the 'interpretive principle' favouring consistency with the principles of international law, specifically the law of human rights and fundamental freedoms, must be observed by the courts. Where the Constitution or a valid national law are clear, the duty of the court, which derives its power and authority from the Constitution, is to give effect to the law's requirements [citing *Minister for Immigration, Multicultural and Indigenous Affairs v B*]. As such international law is not part of, nor superior to, our constitutional or statute law. Unless incorporated, it is not part of our municipal law. Nevertheless it is incorrect, with respect, to say that Australian courts, including this court, have no function in finding 'rights' in the text of the Constitution. Some of this court's decisions, declaring what are in effect 'rights', would have been regarded by the founders as astonishing. In deriving a number of them, McHugh J has played a notable part [citing *Kable*, *Lange* and *Mabo*].<sup>41</sup> (emphases added)

The above passage is troubling as it is not demonstrated by Justice Kirby how the link is to be made between unincorporated international law which is "no part of the Constitution", and to the

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<sup>38</sup> Kirby J referred to the constitutional principle that punishment in federal matters is a judicial function. After the passage of sufficient time, indefinite detention could convert a law about aliens into a law about punishment: (2004) 208 ALR 124 at 163-164; (2004) 78 ALJR 1099 at 1128-1497.

<sup>39</sup> (2004) 208 ALR 124 at 167.

<sup>40</sup> *Ibid* at 169.

<sup>41</sup> *Ibid* at 169-170.

Court finding rights “in the text of the Constitution”. As with implied rights that are not discerned from the ‘text and structure’ of the Constitution, international law has a tendency to be untethered from the Constitution. As such, ‘implications’ and ‘rights’ from broader concepts outside the Constitution affords courts a considerable degree of latitude. This increases the scope for the development of constitutional law to be influenced by judges’ subjective values.<sup>42</sup> Still Justice Kirby in *Al-Kateb* was able to find ambiguity in the legislation and “read ss 196 and 198 [of the Migration Act] in a way that restricts any assertion that a purely literal construction might otherwise sustain, that unlimited executive detention was there enacted”. This is because “that construction is available in the language of the Act and the assumptions disclosed by that language”. This is also because “that interpretation is consistent with the principles of the international law of human rights and fundamental freedoms that illuminate our understanding both of the provisions of the Act and of the Constitution applicable to this case”.<sup>43</sup> Thus despite being in the minority again on the issue of international law, Kirby J was able to predict that “with every respect to those of a contrary view, opinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail”.<sup>44</sup>

However, in a majority judgment, Justice McHugh confronted Justice Kirby’s growing international law doctrine and ‘interpretive principle’ head on:

Finally, contrary to the view of Kirby J, courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900. Rules of international law at that date might in some cases throw some light on the meaning of a constitutional provision... But rules of international law that have come into existence since 1900 are in a different category. The claim that the Constitution should be read consistently with the rules of international law has been decisively rejected by members of this court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical...*This court has never accepted*

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<sup>42</sup> K. Foley, “The Australian Constitution’s influence on the Common Law” (2003) 31 (1) *Federal Law Review* 130 at 153.

<sup>43</sup> (2004) 208 ALR 124 at 173-174.

<sup>44</sup> *Ibid* at 173.

*that the Constitution contains an implication to the effect that it should be construed to conform with the rules of international law. The rationale for the rule and its operation is inapplicable to a Constitution – which is a source of, not an exercise of, legislative power...Most of the rules now recognized as rules of international law are of recent origin. If Australian courts interpreted the Constitution by reference to the rules of international law now in force, they would be amending the Constitution in disregard of the direction in s 128 of the Constitution.*<sup>45</sup> (emphases added)

Justice McHugh then goes onto distinguish between taking into account in constitutional interpretation, political, social and economic developments inside and outside Australia since 1900, and taking into account the rules of international law. The former approach may allow later generations to deduce propositions from the words of the Constitution that earlier generations did not perceive (connotation-denotation). However, the later approach is an error:

Rules are specific. If they are taken into account as rules, they amend the Constitution. That conclusion cannot be avoided by asserting that they are simply ‘context’ or elucidating factors. Rules are too specific to do no more than provide insights into the meanings of the constitutional provisions. Either the rule is already inherent in the meaning of the provision or taking it into account alters the meaning of the provision.<sup>46</sup>

At least, according the Kirby J, Justice McHugh has “joined the intellectual battle”.<sup>47</sup>

### ***Ambiguity in the Constitution?***

In *Newcrest Mining* Justice Kirby stated: “It has been argued that the requirement of ambiguity is unnecessary. However, it is unnecessary to consider that argument here because ambiguity there certainly is”.<sup>48</sup> Thus in *Newcrest Mining* it was unclear whether an unambiguous constitutional head of power could ever be narrowly construed in favour of fundamental rights. However, Justice Kirby resolved this question in *Kartinyeri v The Commonwealth* and later applied it in *Minister for Immigration, Multicultural and Indigenous Affairs v B* (finding no ambiguity) and

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<sup>45</sup> *Ibid* at 140-142.

<sup>46</sup> *Ibid* at 143-144.

<sup>47</sup> M. Kirby, ‘Deep Lying Rights – A Constitutional Conversation Continues’, The Robin Cooke Lecture 2004, 25 November 2004, from web, <http://www.hcourt.au/speeches/kirbyj.htm>; at 11.

<sup>48</sup> (1997) 147 ALR 42 at f/n 495; (1997) 190 CLR 513 at f/n 508.

*Al-Kateb v Godwin* (finding ambiguity). To adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights:

does not involve the spectre... of mechanically applying international treaties, made by the Executive Government of the Commonwealth, and perhaps unincorporated, to distort the meaning of the Constitution. *It does not authorise the creation of ambiguities by reference to international law where none exist.* It is not a means for remaking the Constitution without the ‘irksome’ involvement of the people required by s 128. There is no doubt that, if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the Constitution or any law validly made under it.<sup>49</sup> (emphasis added)

In contrast, Justice Toohey would adopt a meaning which conforms to the principles of fundamental rights in international law, whether an ambiguity is present or not in the head of power. In 1993 Justice Toohey said extra-curially: “It might be thought that, in construing a constitution, to deny plenary scope to heads of power where a wide reading would afford capacity to infringe fundamental liberties is an analogous approach to that which is well settled in relation to the construction of statutes.”<sup>50</sup> Professor Winterton has said this “is an audacious and imaginative argument which is somewhat reminiscent of the argument of some of the leading American Founders”.<sup>51</sup> This is in direct contrast to the broad approach adopted in *Attorney-General (Vic) ex rel. Black v Commonwealth*, and even further than Justice Kirby has ventured. Indeed, Justice Toohey’s 1993 Darwin speech suggests that, in an analogy with statutory construction, grants of power in a written constitution could be read as *prima facie* not authorising the abrogation of fundamental rights and in this sense an implied Bill of Rights might

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<sup>49</sup> (1998) CLR 195 337 at 417-418.

<sup>50</sup> Toohey, above n 26 at 170. However, his Honour appears to use the common law more than international law as the source. However, we know that international law has informed the common law since at least *Polites v The Commonwealth*, and Justice Toohey also speaks in terms of natural law, so would the result be any different?

<sup>51</sup> G. Winterton, ‘Constitutionally Entrenched Common Law Rights’ in C. Samford and K. Preston (eds) *Interpreting Constitutions* (1996) at 133.

be construed.<sup>52</sup> However, there is clear opposition to such suggestions. Justice McHugh said in *Al-Kateb v Godwin*: “This court has never accepted that the Constitution contains an implication to the effect that it should be construed to conform with the rules of international law. The rationale for the rule and its operation is inapplicable to a Constitution – which is a *source of*, not an *exercise of*, legislative power”.<sup>53</sup> (emphases added)

### ***Construing a statute to conform to international law***

As early as 1945, in *Polites v The Commonwealth*, the High Court accepted that, so far as the language of a statute permits, it should be interpreted and applied in conformity with existing international law.<sup>54</sup> Mason CJ reaffirmed this approach in 1977 in *Yager v R*, but emphasised the requirement of ambiguity:

There is no basis on which the provisions of an international convention can control or influence the meaning of words or expressions used in a statute, unless it appears that the statute was intended to give effect to the convention, in which event it is legitimate to resort to the convention to resolve an ambiguity in the statute.<sup>55</sup>

In 1992, Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* affirmed the requirement of ambiguity and said: “[C]ourts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty”.<sup>56</sup> In 1995 in *Teoh*, some members of the Court added a temporal claim, that is, that the legislation be enacted after or in contemplation of ratification of the treaty. Mason CJ and Deane J (with whom Gaudron J agreed) said:

Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia’s [international law] obligations... at least in

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<sup>52</sup> G. Kennett, ‘Individual Rights, The High Court and the Constitution’ (1994) 19 *Melbourne University Law Review* 581 at 610. See Toohey, above n 26 at 167-170.

<sup>53</sup> (2004) 208 ALR at 141.

<sup>54</sup> (1945) 70 CLR 60.

<sup>55</sup> (1977) 139 CLR 28 at 43-44.

<sup>56</sup> (1992) 176 CLR 1 at 38.

those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant instrument. That is because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law.<sup>57</sup>

Thus, apart from the requirement of ambiguity, the important aspect is that such presumptions about conformity with international law obligations can only arise if the legislation in question was enacted after the treaty in which the obligations arise.<sup>58</sup> As Walker has noted "the doctrine thus attempts to ensure that Australia is not placed in breach of international obligations inadvertently or unnecessarily, whilst clearly preserving the ability of the Parliament to legislate in breach of its treaty obligations".<sup>59</sup>

Gleeson CJ recently reinforced the temporal aspects in *Coleman v Power*. Coleman was arrested for using insulting words to a person in a public place contrary to s 7(1)(d) of the Vagrants, Gaming and Other Offences Act 1931 (Qld). Although the case didn't strictly turn on the freedom of expression as disclosed in the first protocol of the ICCPR,<sup>60</sup> Gleeson CJ and Kirby J disagreed on the possible influence of a 1980 international covenant on a 1931 Queensland statute. Gleeson CJ concluding:

The proposition that the ICCPR can control or influence the meaning of an Act of the Queensland Parliament of 1931 is difficult to reconcile with the theory that the reasons for construing a statute in the light of Australia's international obligations, as stated in *Teoh*, is that parliament, *prima facie*, intends to give effect to Australia's obligations under international law. Of one thing we can be sure: the Queensland Parliament, in 1931, did not intend to give effect to Australia's obligations under the ICCPR.<sup>61</sup>

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<sup>57</sup> (1995) 183 CLR 273 at 287. Gummow and Hayne JJ said: "It has been accepted that a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law": *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

<sup>58</sup> Dawson J in *Kruger v Commonwealth* (1997) 190 CLR 1 at 71.

<sup>59</sup> Walker, above n 11 at 211.

<sup>60</sup> The case more turned on whether the Vagrants Act 1931 (Qld) effectively burdened the implied freedom of communication on political matters as prescribed in *Lange*.

<sup>61</sup> (2004) 209 ALR 182 at 190.

Thus, Chief Justice Gleeson's reasoning about the temporal aspects (derived in *Teoh* and affirmed in *Coleman*) relating to statutes, accords with Justice McHugh's reasoning in *Al-Kateb* regarding the Constitution: "Courts cannot read the Constitution by reference to the provisions of international law that have become accepted since the Constitution was enacted in 1900".<sup>62</sup> We already know Justice Kirby disagreed with Justice McHugh in *Al-Kateb* over this issue in constitutional interpretation. In regard to statutory interpretation he disagrees with Gleeson CJ:

The suggestion that the meaning of the Act in question here is forever governed by the 'intention' of the legislators who sat in the Queensland Parliament in 1931 is not one that I would accept... It is true, subject to the Constitution, the duty of this Court is to give effect to the Queensland law in question according to its true meaning and to achieve its ascertained purpose. It is a task that involves reading the law with today's eyes... That means analysing the Act with more than a pre-1931 dictionary and the 1931 Hansard debates on the Bill at hand.<sup>63</sup>

Given that Justice Kirby's views on international law have not gained widespread acceptance with the rest of the court, could the common law be a more fruitful area for the restriction of legislative power?

## **PART B – THE COMMON LAW REVIVAL**

Notwithstanding principles (both statutory and common law based) relating to construing statutes in accordance with what Parliament intended, an ambiguous Act can be interpreted to minimise its impact on rights, viz. the court favours a rights reading. However, the statute is not adjudged invalid in this process. In this sense the interpretive approach is only a constraint, not a barrier to legislative power. The courts will presume that legislation does not amend the common law to derogate from important rights enjoyed under that law. The principle rests on an imputed aspiration of the law to attain, and not to deny, basic precepts of justice. As Professor Winterton

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<sup>62</sup> (2004) 208 ALR 124 at 140.

<sup>63</sup> (2004) 209 ALR 182 at 244-245.

has noted: “Judges engaged in statutory interpretation regularly refer to non-constitutional [extrinsic] considerations, such as the rules and doctrines of the common law, and widely-held ethical principles, such as fundamental notions of liberty, fairness and natural justice”.<sup>64</sup>

However, Parliament can overcome these limitations if it makes its intention unmistakably and unambiguously clear through the use of unambiguous language. For as noted by Justice Kirby: “[A] point will be reached where the law in question is clear and unambiguous... Once that point is reached, subject to any constitutional invalidity, the judge has no authority to ignore or frustrate the commands of the lawmaker. To do so would be to abuse judicial power, not to exercise it”.<sup>65</sup> But do some Judges, such as Lord Cooke<sup>66</sup> and Justice Toohey,<sup>67</sup> still want to depart from the clear words of a statute because its intention is all too clear?<sup>68</sup>

If there is no ambiguity present, (and there is no constitutional invalidity present) an activist judge has no option but to assert that her or his assessment of the issue is higher than parliaments. Thus

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<sup>64</sup> G. Winterton, ‘The Separation of Judicial Power as an Implied Bill of Rights,’ in G. Lindell (ed.) *Future Directions in Australian Constitutional Law* (1994) at 225. See such cases as *Bropho v Western Australia* (1990) 171 CLR 1; *Plenty v Dillon* (1991) 171 CLR 635 (police officer not authorized by common law to enter private property to serve a summons without express or implied consent); *Marion’s case* (1992) 175 CLR 218 (the right to the integrity of one’s own body) and *Coco v R* (1994) 120 ALR 415 (the right to exclude others from one’s property). Noted by Justice Kirby as a ‘presumption’, ‘rule of construction’ or ‘imputed intention’: *Durham Holdings* (2001) 75 ALJR 501 at 506.

<sup>65</sup> *Durham Holdings* (2001) 75 ALJR 501 at 507.

<sup>66</sup> Note Lord Cooke’s ‘deep rights’ proposition in extreme cases.

<sup>67</sup> Note Justice Toohey’s notion of the lack of any requirement of ambiguity.

<sup>68</sup> In one sense one is reminded of the radical South Australian Supreme Court judge of the nineteenth century Mr Justice Boothby, who “working with his own very wide test of repugnancy, [regularly] found local colonial legislation repugnant to what he believed the common law [of England] to be”: Queensland Constitutional Review Commission, above n 32 at 204. Professor Winterton has compared some of Boothby’s *dictums* to that of Coke in *Dr Bonham’s case*: Winterton, above n 51 at 134 at f/n 98. However, unlike the Boothby indiscretions which could be rectified by validating Imperial legislation (s 3 of The Colonial Laws Validity Act 1865 (Imp) provided that “No colonial Law shall be or deemed to have been void or inoperative on the ground of repugnancy to the law of England”), modern incarnations cannot be so rectified because there is no limit to which statutes may be struck down once the judiciary refutes the doctrine of judicial deference.

a constraint of interpretation gives way to a barrier of veto. Applying a principle, especially one derived extra-constitutionally, to strike down otherwise-valid legislation is far more questionable than any form of restrictive interpretation. As Ely has commented: “For judges to divine community values for the purposes of their own sphere of law-making is one thing; for them to override the legislature’s views of community values is another”.<sup>69</sup>

Some jurists and judges, in an attempt to recognise individual rights, wish to rely on a notion that “the limits on the power of a democratic majority to achieve its legislative will are ultimately to be found in the common law; and the common law is too subtle to tolerate the absurdity - even constitutional contradiction - of wholly unlimited legislative power”.<sup>70</sup> Ardent judicial supporters of the common law acting as a check on the power of parliaments notably include Deane and Toohey JJ. In their minority judgment in *Leeth v Commonwealth*, their Honours embraced the doctrine that there is an implied right to equality in the Australian Constitution. Their judgment relied on several interrelated grounds, however the main ground for their decision seemed to be that the Constitution had to be interpreted consistently with fundamental rights under the common law.<sup>71</sup> However, it is not always clear whether Deane and Toohey JJ and even Kirby J mean the common law always or even international law “especially when international law declares the existence of universal and fundamental rights”.<sup>72</sup> In any event Deane and Toohey JJ in *Leeth*

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<sup>69</sup> L. Zines, ‘Courts Unmaking the Laws,’ in Australian Institute of Judicial Administration (ed.) *National Conference: Courts in a Representative Democracy* (1994) at 20.

<sup>70</sup> T. Allan, ‘The Common Law as Constitution: Fundamental Rights and First Principles,’ in C. Saunders (ed.) *Courts of Final Jurisdiction* (1996) 146 at 156. See also P. Finn, ‘A Sovereign People, A Public Trust’ in P. Finn (ed.) *Essays on Law and Government Vol 1* (1995) at 19: “should we now add limitations [to the legislative powers of our parliaments] imposed by the common law?”

<sup>71</sup> L. Zines, ‘Constitutionally Protected Individual Rights’ in P. Finn (ed.) *Essays on Law and Government Vol 2* (1996) at 153.

<sup>72</sup> Kirby J in *Newcrest Mining* (1997) 147 ALR 42 at 147.

suggested the legislative power of the Commonwealth (and perhaps the States) is limited by the fundamental principles of the common law.<sup>73</sup> This has been roundly criticized:

Professor Zines has said:

Such a suggestion of equality has to contend with the clear historical fact that the framers expressly and intentionally deleted from the draft Constitution in 1898 a provision which would have guaranteed 'equal protection of the laws'...It is true that the courts are required to determine what are fundamental rights for purposes of the rule that statutes are to be interpreted so as not to impair them, unless Parliament clearly indicates otherwise; *Coco v R*. But if this rule applied to the interpretation of the Constitution, the legislatures will be limited by the judiciary's view of what is required for a good society.<sup>74</sup> (emphasis added)

Doyle also suggests:

The Australian Constitution assumes the existence of the common law. But is the Constitution based upon and supported by fundamental common law principles which limit even the powers conferred by the Constitution?... It is one thing to treat grants of power as limited in their scope by reference to common law rights and freedoms. It would be another thing for the courts to say that there are certain common law rights or principles which the Parliament may not touch at all. That would produce a new and significant tension between judicial law making and the supremacy of Parliament.<sup>75</sup>

Deane and Toohey JJ's view from *Leeth* was repeated by their Honours in *Nationwide News Pty Ltd v Wills*, where this time they added a temporal factor. They referred to those common law rights recognised "at the time the Constitution was adopted as the compact of the Federation".<sup>76</sup>

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<sup>73</sup> (1992) 174 CLR 455 at 487. The reasoning which led to that conclusion did not commend itself to the other members of the Court, and has since been rejected by Brennan CJ, Dawson, McHugh, Gummow and Gaudron JJ in *Kruger v The Commonwealth*. *Leeth* has also been interpreted as addressing the question of whether "Chapter III of the Constitution guarantee[s] substantive (cf. procedural) due process against the Commonwealth?": A.R. Blackshield, 'The Implied Freedom of Communication' in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 232 at 260.

<sup>74</sup> L. Zines, 'A Judicially Created Bill of Rights' (1994) 16 *Sydney Law Review* 166 at 180.

<sup>75</sup> J. Doyle, 'Implications of Judicial Law-Making' in Saunders, C. (ed.) *Courts of Final Jurisdiction* (1996) 84 at 89.

<sup>76</sup> (1992) 177 CLR 1 at 69.

This statement throws up many difficulties. Their Honours may suggest that *because of* the compact, some such rights may now be used to veto legislation. However, if their Honours suggest that these rights were not the result of the compact, but *merely existed* at the time of Federation, the problem is no less vexing. As Zines suggests “This principle, if accepted, would present two main difficulties, namely, what rights are fundamental and which ones were recognised in 1901?”<sup>77</sup> Further, “What if the common law rule has changed since 1901... Interestingly, the common law rule of parliamentary supremacy is not for this purpose regarded as a fundamental principle”.<sup>78</sup> As Sir Anthony Mason has noted: ‘Constitutionalising the common law as at 1901, has an air of unreality about it.’<sup>79</sup> John Doyle questions how one puts the concept of common law rights beyond the reach of parliament, when the people who are sovereign and who made the compact accepted the very converse of that.<sup>80</sup>

The persuasive argument in the judgment of Kirby P (as he then was) in the *BLF case* is worth quoting: “Substituting judicial opinion about entrenched rights for the lawful powers of Parliament, unless anchored in a Bill of Rights duly enacted, inevitably runs into the difficulties of *defining* what those ‘common law rights’ are and of *explaining* how they are so basic that they cannot be disturbed”.<sup>81</sup> (emphases added) In respect of “definition” note Professor Winterton’s warning that not all common law doctrines are particularly libertarian; ie. attaider, and some rights may operate to the detriment of others.<sup>82</sup> In respect of “explaining” how some rights are so basic:

[H]ow is one to distinguish between those common law doctrines which are ‘fundamental’ and thereby constitutionally entrenched and able to invalidate

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<sup>77</sup> Zines, above n 71 at 154.

<sup>78</sup> Zines, above n 69 at 23. Goldsworthy has said parliamentary sovereignty is quite unlike ordinary common law rules: J. Goldsworthy, *The Sovereignty of Parliament* (1999) at 248.

<sup>79</sup> A. Mason, ‘Reflections on Law and Government’ in P. Finn (ed.) *Essays on Law and Government Vol 2* (1996) at 312.

<sup>80</sup> Doyle, above n 75 at 89.

<sup>81</sup> (1986) 7 NSWLR 372 at 406.

<sup>82</sup> Winterton, above n 64 at 205-206.

Commonwealth legislation, and those which are ‘obsolete’ and no longer applicable...? Why, for instance, is the doctrine of ‘*terra nullius*’ [rightly] obsolete, and not ‘fundamental’...? <sup>83</sup>

Why, for instance, is adequate compensation for compulsorily acquired property not a “kind of fundamental” common law right that ‘lay so deep...?’” <sup>84</sup> Why, as a further more pertinent instance, is the doctrine of parliamentary supremacy itself obsolete, when nothing has happened to change the ‘legal’ status and underlying authority of the Constitution? Doyle QC (as he then was) questioned how the recognition of fundamental rights (by Deane and Toohey JJ in *Leeth*) “displaces from our system the fact that parliamentary supremacy is itself a common law principle”. <sup>85</sup>

The High Court faced such conundrums in *Kruger* where the plaintiffs sought to restrict Commonwealth legislative power. Justice Gummow frankly surveyed the problem:

The problem is in knowing what rights are to be identified as constitutionally based and protected, albeit they are not stated in the text, and what methods are to be employed in discovering such rights. Recognition is required of the limits imposed by the constitutional text, the importance of the democratic process and the wisdom of judicial restraint. <sup>86</sup>

Moreover, although the common law is a rich source of freedoms it is not exhaustive, and the freedoms are rarely fashioned in the form of a ‘positive’ right. Professor McEldowney has said that “Disappointingly, the common law restrained any development of a specialist public law but

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<sup>83</sup> *Ibid.* See also Winterton, above 51 at 142.

<sup>84</sup> *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501 at 511 per Kirby J.

<sup>85</sup> J. Doyle, ‘Common Law Rights and Democratic Rights’ in P. Finn (ed.) *Essays on Law and Government Vol 1* (1995) 144 at 166. See also L. Zines, ‘The Common Law in Australia: Its Nature and Constitutional Significance’ (2004) 32 (3) *Federal Law Review* 337 at 354: “As Professor Goldsworthy has pointed out, if any doctrine of the common law could be regarded as fundamental in 1901 it would be the supremacy of Parliament”.

<sup>86</sup> *Kruger v Commonwealth* (1997) 190 CLR 1 at 156.

instead prioritised a system of remedies rather than rights”.<sup>87</sup> Common law freedoms are seldom declaratory, but are merely the balance remaining after prohibited conduct has been dealt with. For example, there is no enforceable right to freedom of speech. The reference is to an immunity from restraint - an immunity after allowing for the impact of common law and statutory rules. Indeed, the common law concept of freedoms is so often a residual one.<sup>88</sup> Further, Kennett has said, “the common law might not be an appropriate source of individual rights. Its basis is the customary law of a heavily class-bound, patriarchal society in which most people had no right to vote, religious difference was not tolerated and radical political debate was routinely limited by persecution and imprisonment”.<sup>89</sup> Apart from any historical criticism of the common law’s past performance it is “too amorphous and adaptable to constitute an effective constraint”.<sup>90</sup>

## **PART C- THE COMMON LAW AS AN ULTIMATE CONSTITUTIONAL FOUNDATION**

### ***Dixon CJ and the old theological and juristic riddle***

Much recent juristic and judicial discussion attempting to promote the notion of fundamental common law rights, has relied on the extra-curiel writings of Sir Owen Dixon ‘Sources of Legal Authority’, ‘The law and the Constitution’ and in particular ‘The Common Law as an Ultimate Constitutional Foundation’ all reproduced in *Jesting Pilate*.<sup>91</sup> Justice Kirby notes this in *Durham Holdings*:

The applicant invoked Sir Owen Dixon’s reminder that the principle of parliamentary supremacy is itself a doctrine of the common law. What the judges had recognized for a time to be an omnipotent and unqualified supremacy, they could now recognize to be subject to specified limitations.<sup>92</sup>

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<sup>87</sup> McEldowney, above n 15 at 27.

<sup>88</sup> Doyle, above n 84 at 148. See also *Wheeler v Leicester City Council*. [1985] 1 AC 1054 and T. Jones, ‘Legal Protection for Fundamental Rights and Freedoms: European Lessons for Australia,’ (1994) 22 (1) *Federal Law Review* at 57.

<sup>89</sup> Kennett, above n 52 at 611.

<sup>90</sup> Winterton above n 51 at 144.

<sup>91</sup> Dixon, above n 1.

<sup>92</sup> (2001) 75 ALJR 501 at 511.

The short answer against such assertions is given by Professor Winterton: “parliamentary supremacy is not like other common law rules because it is not subject to amendment or repeal by parliament”.<sup>93</sup>

Sir Owen’s writings appear to have promulgated widely divergent and often conflicting, views on the consequences of declaring the common law an ultimate constitutional foundation. In 1994, Mason CJ and Toohey and Gaudron JJ in *Theophanous* stated: ‘Sir Owen was not suggesting that the common law is superior or inferior to the Constitution. He was, we think, doing no more than setting the scene in which the Constitution operates.’<sup>94</sup> However, two years later, Sir Anthony Mason was not so restrained when his Honour stated extra-curially: “Sir Owen Dixon’s address... might suggest that he had in mind possible limitations on legislation arising from common law principles”.<sup>95</sup> Sir Anthony then qualifies this statement by referring to the passage from his Honour’s joint judgment in *Theophanous* cited above, and goes on to pursue a less conservative interpretation of Sir Owen’s work:

Although it is impossible to extract support from Sir Owen for the implication of general common law rights in the Australian Constitution, the emergence of the view that there may be limits to parliamentary supremacy arising from rights or values deeply embedded in the common law has encouraged the allied notion that the Constitution may embody such rights or values.<sup>96</sup>

So the distinction that Sir Anthony would like the reader to draw, it would seem, from the work of Sir Owen is that the Constitution cannot *contain* (by implication) common law rights but it may *embody* such rights. The distinction seems elusive if not illusory. It is this apparent ambiguity in Sir Owen’s writings that has been seized upon by the less orthodox quarters in the

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<sup>93</sup> Winterton, above n 51 at 136.

<sup>94</sup> (1994) 182 CLR 104 at 126.

<sup>95</sup> A. Mason, ‘The Interpretation of a Constitution in a Modern Liberal Democracy’ in C. Samford and K. Preston (eds) *Interpreting Constitutions: Theories, Principles and Institutions* (1996) at 28.

<sup>96</sup> *Ibid.* Referring immediately then to Sir Robin Cooke’s dicta.

debate to promote the notion of fundamental common law rights. The argument might run as follows: If parliamentary supremacy should be restricted by these common law doctrines which lie outside the Constitution itself, (common law supremacy) it may be accepted that the common law is the foundation on which our legal system, including the Constitution, is built.

Notable proponents of a similar view include Lord Cooke and as noted earlier, Justices Deane and Toohey who in *Nationwide News* stated: “They [the grants of legislative power contained in s 51 of the Constitution] must be read and construed in the context of other more particular implications which... flow from the fundamental rights and principles recognised by the common law at the time the Constitution was adopted...”<sup>97</sup> Both Lord Cooke and Justice Toohey were noted by Sir Anthony as suggesting ‘further developments’ of Sir Owen’s thinking.<sup>98</sup>

However, there are also writings and judgments that seem to benignly reproduce the words of Sir Owen without adumbrating that any further activist developments be proposed. Justice Brennan has said: “To adopt the words of Sir Owen Dixon, constitutional questions should be considered and resolved in the context of the whole law, of which the common law,... forms not the least an essential part”.<sup>99</sup> It is submitted Justice Brennan was suggesting that limitations on legislative power may be implied in and from the text of the Constitution... and the text of the Constitution must be read in the light of the general law.<sup>100</sup>

Thus Sir Owen’s particular comments on the common law seem to be amenable to the most divergent of views, although all still faithfully reproduce the central tenet that the common law should be conceived as an anterior system of jurisprudence. As P.A. Joseph has astutely noted:

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<sup>97</sup> (1992) 177 CLR 1 at 69.

<sup>98</sup> Mason, above n 95 at 28.

<sup>99</sup> Brennan J in *Nationwide News* (1992) 177 CLR 1 at 45.

<sup>100</sup> *Ibid* at 44-45 citing *Engineers*. See also Gaudron J in *ACTV* at 208-209, and the Court’s judgment in *Lange* at 564.

Sir Owen said the common law should be conceived as an anterior body of jurisprudence, but he did not demonstrate why. His logic failed to answer Salmond's, whom he quoted against himself. All rules of law have historical sources, but not all, wrote Salmond, have legal sources. Salmond asked: "[W]hence comes the rule that Acts of Parliament have the force of law? This is legally ultimate: its source is historical only, not legal." Sir Owen nevertheless thought it "satisfactory" to give it a legal source. "An English lawyer who accepts [Salmond's] view may at the same time find it *satisfactory* to describe the ultimate principle as part of the common law" Why? <sup>101</sup> (emphasis in original)

Joseph was right in surmising that the 'old theological and juristic riddle' was of Sir Owen's own making.

The reason *why* an English lawyer (or an Australian lawyer for that matter, as in Justices Deane and Toohey; or a New Zealand lawyer for that matter, as in Lord Cooke) might find it satisfactory to describe parliamentary sovereignty as part of the common law is to promote common law supremacy, and hence elevate fundamental common law rights as against parliament. This is why Sir Owen's comments have found much favour in recent 'implied rights' jurisprudence. However, it is submitted, it does not follow that any fundamental common law rights, although anterior, act as anything more than a touchstone in the process of interpreting legislation. <sup>102</sup> Such rights should not be used to any greater degree than at present to impose limits on the exercise of legislative power, lest the approach be considered in the words of Sir Anthony Mason 'ahistorical'. <sup>103</sup> In this respect, it follows that the present writer favours the comments of Mason CJ, Toohey and Gaudron JJ in *Theophanous* (although Toohey J at least may have subsequently resiled from this position): "If the Constitution, expressly or by implication, is at variance with a doctrine of the common law, the latter must yield to the former... The antecedent common law can at most be guide in this analysis". <sup>104</sup>

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<sup>101</sup> P.A. Joseph, *Constitutional and Administrative Law in New Zealand* (1993) at 455 referring to 'The Common Law as an Ultimate Constitutional Foundation' in *Jesting Pilate* at 207.

<sup>102</sup> See *Morris v Beardmore* [1980] 2 All ER 743 and *Coco v The Queen* (1994) 179 CLR 427.

<sup>103</sup> Mason, above n 95 at 28.

<sup>104</sup> (1994) 182 CLR 104 at 126.

An equally interesting and indeed important question is *how* did Sir Owen ‘find it satisfactory to describe parliamentary supremacy as part of the common law’? The short answer would be that the principle of parliamentary sovereignty is a doctrine of the common law and therefore a ‘law which judges have made’. Therefore ‘may they unmake it?’ Goldsworthy has noted that the argument usually proceeds by a process of elimination: (1) There are only two kinds of law, statute and common law; (2) parliamentary sovereignty could not have been established by statute because that would have been question-begging (ie a bootstraps argument); (3) parliamentary sovereignty must therefore be a matter of common law; and (4) the common law is judge-made law.<sup>105</sup>

### ***Sir John Salmond and Ultimate Principles***

The present writer submits that Sir Owen may have also followed the unexpressed logic of Sir John Salmond. Parliamentary sovereignty, said Salmond in 1902, is

legally ultimate; its source is historical only, not legal...No statute can confer this power upon Parliament, for this would be to assume and act on the very power that is to be conferred [bootstraps]. So also the rule that judicial decisions have the force of law is legally ultimate and underived. No statute lays it down. It is certainly recognised by many precedents, but no precedent can confer authority upon precedent [bootstraps]...*From any one ultimate legal source it is possible for the whole law to be derived, but one such there must be. A statute for example, may at any time give statutory authority to the operation of precedent, and so reduce it from an ultimate to a derivative source of law.*<sup>106</sup> (emphases added)

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<sup>105</sup> Goldsworthy, above n 78 at 114. See also M. Kirby, ‘The Struggle for Simplicity: Lord Cooke and Fundamental Rights,’ (1997) Speech Delivered to New Zealand Legal Research Foundation, 4-5 April 1997, from web, <http://www.hcourt.au/cooke.html>; 6.

<sup>106</sup> Salmond, *Jurisprudence* (11th edition), above n 2 at 137-138. Sir John Salmond’s monograph *Salmond on Jurisprudence* first canvassed such weighty issues in 1902 and has been reprinted through twelve subsequent editions. The twelfth edition appears to suffer an editorial error on page 112 and most of this passage - apart from the words ‘derivative source of law’ - is mistakenly deleted.

The correlative example, that which Salmond failed to give, is, it is submitted, the crucial example that Sir Owen based his writings upon. By analogy the example would be as follows: The doctrine of precedent (common law) may at any time give authority to the operation of a statute, and so reduce it from an ultimate to a derivative source of law; ie. common law supremacy.

This is what Sir Owen means when he states that the common law should be conceived as an anterior body of jurisprudence. Anterior in the sense that it should be considered ultimately legal (even though its source is still historical) and underived, while parliamentary supremacy is relegated from a legally ultimate principle to a derivative source of law. Anterior in the sense that Salmond recognises a hierarchy of principles (norms in the language of Kelsen) and the common law is now the ultimate legal principle from which the whole law can be derived; see Table below.

Like Kelsen, Salmond's theory promotes a system of hierarchical rules, although the apex contains different rules. Kelsen only deems parliamentary sovereignty and precedent to be ultimate constitutional norms (lower in the hierarchy from both the basic norm and the historically first constitution). Parliamentary sovereignty, at the very least, cannot be the *grundnorm* because of Kelsen's rejection of Austin's theory of law as the command of a sovereign.

Salmond meanwhile, declares parliamentary sovereignty and precedent to be ultimate principles (*grundnorms* in the language of Kelsen), and promotes them to the apex of his hierarchy: "The English legal system would appear to be based on several different such basic rules, one of which concerns parliamentary legislation, others of which deal with the binding force of judicial

precedents".<sup>107</sup> Thus parliamentary sovereignty and precedent are ultimate principles (basic norms) in themselves. Salmond states: "These ultimate principles are the grundnorms or basic rules of recognition [Hart] of the legal system... [they] are indeed rules of law, though differing in some respects from ordinary less basic legal rules".<sup>108</sup> They assume the mantle as being underived sources, and no legal source of law stands behind them. However, we are told that each has a historical source: "But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal". Thus like Kelsen, an ultimate source of law in any particular legal system may be historical (although Kelsen seems to only tacitly acknowledge this because of his concern for the 'pure' theory of law only).

The historical source of parliamentary sovereignty in the Westminster system is the politico-historical machinations of the events surrounding the 'Glorious Revolution'. The historical source of the doctrine of precedent is the growth of the common law system in England from customary law. Thus both the ultimate principles in Salmond's model have a historical legitimacy and no internal tension is present because of the lack of the 'fundamental law' in the United Kingdom (and the present Australian constitutional order). To be sure, Salmond states that the historians of the English Constitution know the exact origins of both the ultimate principles, because "all rules of law have historical sources...but not all of them have legal sources".<sup>109</sup> In an Australian model of Salmond's theory (see Table below), both parliamentary sovereignty and precedent have at least one legal source, the Commonwealth Constitution. If popular sovereignty was promoted into Australian Constitutional arrangements as an ultimate principle (as suggested in the 'implied rights cases'), in terms of Salmond's theory, the disturbing and de-stabilising consequence would be that it would have no legitimate historical source, no legitimate legal source, in fact no source at all.

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<sup>107</sup> J. Salmond, *Jurisprudence* (12<sup>th</sup> edition) above n 2 at 49.

<sup>108</sup> *Ibid* at 112.

<sup>109</sup> *Ibid* at 111.

### ***Subordination or Derivation?***

At this point, one could note the apparent disagreement of HLA Hart with Salmond's notion of the possibility of all law being derived from one ultimate legal source. Hart wants to take issue with Salmond's notion (presumably Salmond, since no one is named as the author) of derivation. Hart said: "It is important to distinguish *subordination* of [a source of law] to another from *derivation*, since some spurious support for the view that all law is essentially or "really" (even if only "tacitly") the product of legislation, has been gained from confusion of these two ideas".<sup>110</sup> If this rebuke is directed at Salmond's view (as noted earlier) it appears, at least to the present writer, an incorrect interpretation. Salmond gave the hypothetical view that one source of law, *may at any time*, give authority to another source of law, thereby reducing it to a derivative source of law; citing legislation as a mere example. This is in no way promotes the view that 'all law *is* essentially the product of legislation', or for that matter, that all law is essentially the product of the common law. It has been left to later jurists, such as Sir Owen, to actually promote the view that one source of law has relegated another.

In doing so, Sir Owen is quick to give some solace: "In saying that it [parliamentary sovereignty/supremacy] is a common law rule, I do not intend to suggest that the Parliament of the United Kingdom was established by or under the common law".<sup>111</sup> However, to accept this does not dilute common law supremacy and its notion that obedience to parliament as expressed in a statute, is of itself a doctrine of the common law made by judges, and laws are only valid because the courts say they are. S. de Smith and R. Brazier would want to emphasise the rule as being a "common law rule, albeit a rule of outstanding importance".<sup>112</sup> The distinguished jurist H.W.R. Wade stated: "The rule of judicial obedience is in one sense a rule of common law, but in another sense - which applies to no other rule of common law - it is the ultimate *political* fact

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<sup>110</sup> H.L.A. Hart, *The Concept of Law* (2nd edition, 1994) at 101.

<sup>111</sup> Dixon, above n 1 at 207-208.

<sup>112</sup> S. de Smith and R. Brazier, *Constitutional and Administrative Law* (1994, 7th edition) at 89.

upon which the whole system of legislation hangs".<sup>113</sup> (emphasis added) However, Wade does not elevate the common law to legal supremacy, only political supremacy. This concurs with Winterton's description of such rules as *sui generis*: "it is by no means conceded that Parliament can alter these rules of the common law [ultimate political fact] and it would only exacerbate the confusion about the nature of parliamentary supremacy if any importance is attached to the fact that these rules are classified as part of the common law".<sup>114</sup>

George Winterton while commenting on the British *grundnorm*, disagrees with Fazal's view (who relies on Salmond) of the twin ultimate principles (basic norms) of parliamentary sovereignty and precedent. Winterton asserts that parliamentary sovereignty is the true basic norm because the precedent norm "is impliedly derived therefrom because it exists at the mercy of parliament" (in some respects according with Kelsen). And further, if the precedent norm can be altered by Parliament, how can it be basic? He reminds those who would assert that the courts could refuse to recognise the rule of parliamentary supremacy, that Parliament can dismiss judges and control the purse.<sup>115</sup> So too Dicey reminded us that the courts as law-making bodies exercise their authority at the sufferance of Parliament.<sup>116</sup> Thus Winterton sees precedent as a derivative source of law while Dixon sees parliamentary sovereignty as a derivative source of law. Needless to say, Hart does not see either as a derivative source of law, but he still views precedent as subordinate to legislation, dispelling any notion of common law supremacy: "In our own system, custom and precedent are subordinate to legislation since customary and common law rules may be deprived of their status as law by statute".<sup>117</sup> The 'old theological and juristic riddle' remains.

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<sup>113</sup> H.W.R. Wade, 'The Basis of Legal Sovereignty,' [1955] *Cambridge Law Journal* 172 at 188.

<sup>114</sup> G. Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-examined' (1976) 92 *The Law Quarterly Review* 591 at 592.

<sup>115</sup> *Ibid* at f/n 591.

<sup>116</sup> Noted by de Smith & Brazier, above n 112 at 68.

<sup>117</sup> Hart, above n 110 at 101.

**TABLE 4 - SALMOND'S THEORY OF ULTIMATE PRINCIPLES**

Legislation	Precedent
<p>A Historical Source: 1688-89 'Glorious Revolution'</p> <p><b>Apex</b></p> <ul style="list-style-type: none"> <li>• Salmond's Ultimate Principle: Acts of Parliament have the force of law (Parliamentary supremacy) <ul style="list-style-type: none"> <li>- In Australia has both a historical source</li> <li>- and a legal source: ie. Commonwealth of Australia Constitution Act 1900 (Imp)</li> </ul> </li> <li>• S 51 of Commonwealth of Australia Constitution</li> <li>• Act of Commonwealth Parliament</li> </ul>	<p>A Historical Source: Growth of the common law from custom</p> <p><b>Apex</b></p> <ul style="list-style-type: none"> <li>• Salmond's Ultimate Principle: Judicial decisions have the force of law (Doctrine of precedent) <ul style="list-style-type: none"> <li>- In Australia has both a historical source</li> <li>- and a legal source: ie. S 24 Australian Courts Act 1828 (Imp) and Commonwealth of Australia Constitution Act 1900 (Imp)</li> </ul> </li> <li>• Chapter III of Commonwealth of Australia Constitution</li> <li>• Decision of a Federal Court</li> </ul>

## CONCLUSION

This chapter argued that courts cannot invoke international human rights law or the common law to veto legislation that is clear and unambiguous on its face. Further, reference to the common law in general or Sir Owen Dixon's claim that 'the common law is the ultimate constitutional foundation' does not support a fundamental law doctrine. The confusion surrounding an appeal to such theories makes it constitutionally unsafe to do so. My argument is that although international law and the common law can be robust vehicles for the protection of some rights, they must fall away in the face of unambiguous legislation. An overly strident assertion that they do not fall away displays infidelity to the institutional design of the Founders and means that the checks, balances and principles the Founders envisaged are subverted, potentially leading to a dysfunctional constitutional order.

This chapter and the preceding chapter assessed judicial claims that popular sovereignty has given the High Court a duty or power to arrogate to itself a jurisdiction to enunciate rights that act as a limit on legislative power, over and above those implied within the text or structure of the Constitution. These ‘extra-constitutional’ rights are said to be more ‘fundamental’ or ‘deep’ and based on higher law concepts and theories, such as international law, that stand outside the Constitution and the arrangements it supports. These chapters argued that because of the uncertainty about the source, scope, effect and enforcement of ‘extra-constitutional’ rights, the notion of such rights being judicially discovered and protected should not be entertained. Professor Winterton quotes Professor Zines: “The doctrine of fundamental law rests on weak historical foundations but also faces serious difficulties of principle, the most fundamental objection being the doctrine’s unavoidable selectivity”.<sup>118</sup>

A perceived change in the legal basis of the Constitution from an Imperial Statute to popular sovereignty has prefaced many of the higher law theories discussed in this chapter and the previous. However, as Justice Kirby has noted:

With the passage of time since federation in Australia and changing notions of Australian nationhood, the perception that the Australian Constitution is binding because of its imperial provenance has given way (at least since the *Australia Acts* 1986) to an often expressed opinion that the people of Australia are the ultimate repository of sovereignty. *That view is not without conceptual and historical difficulties.*<sup>119</sup> (emphasis added)

So too Justice McHugh has said “Since the passing of the Australia Act (UK) in 1986, notwithstanding some *considerable theoretical difficulties*, the political and legal sovereignty of Australia now resides in the people of Australia”.<sup>120</sup> (emphasis added) It is these ‘conceptual, historical and theoretical difficulties’ about the move of the legal basis of the Constitution from Westminster to Canberra that chapters seven and eight take up in detail.

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<sup>118</sup> Winterton above n 51 at 142.

<sup>119</sup> Levy (1997) 189 CLR 579 at 634.

<sup>120</sup> McGinty (1996) 186 CLR 140 at 230.

## **CHAPTER SEVEN**

### **AUTOCHTHONY BY THE PARENT**

#### **INTRODUCTION**

This chapter assesses whether judicial claims to autochthony can be sustained. We ask whether the doctrine of British parliamentary sovereignty has ceased to be the source of the Australian Constitution, because that parliament can no longer legislate for Australia, nor amend the Australian Constitution? How compatible are such assertions with the rule of law, especially in a State grounded in political stability and legal continuity not revolution?

As recently demonstrated in Fiji and Samoa and increasing numbers of Australia's near Pacific and Asian neighbours, the rule of law is a precious but too often fragile construct. Australia has seen legal and constitutional evolution occur through a planned and fully lawful process of succession from the Crown in right of the British Empire to the Crown in right of Australia. Can the following therefore be asserted: that (a) Australia's constitution needs to be 'patriated' from London to Canberra, or that (b) de-facto there has been a transfer already?

Part A of this chapter notes that as a result of the passage of the Australia Acts in 1986, some members of the High Court in the 'implied rights cases' have instigated a move away from the traditional basis of the Constitution, namely the United Kingdom Parliament, to a new basis in popular sovereignty. However, as the Australia Acts only dealt unequivocally with autonomy, and not autochthony, this move opens a host of questions and invites confusion. Part B distinguishes between different approaches to the cessation of the authority of the United Kingdom Parliament and concludes that any such action to date by that parliament is equivocal,

and as a result, the search for autochthony is in the hands of Australians. Part C discusses the unsatisfying notion of popular sovereignty as recently promoted as an autochthonous basis for the Australian constitutional order and notably as a source of legitimacy for implied rights.

## **PART A – A PERSISTENT CONFUSION?**

The debate as to the basis of the Australian Constitution depends on two fundamental concepts: ‘autonomy’ and ‘autochthony’. This Part begins with a discussion of those concepts before turning to consider whether the Australia Acts might be taken to have established ‘autochthony’. Understanding the implications of this distinction is critical to my argument about the dangers of altering the constitutional allocation of powers, rights and duties by implication.

### ***Autonomy***

Paradoxically, it has been possible to sever Australia’s operational constitutional ‘links’ with the United Kingdom without severing the legal ‘chain’. As such, the chain of legal continuity is still available to trace the links back to the United Kingdom. This allows Australians to uphold the validity of the present fundamental legal order, including the Constitution Act (incorporating the Constitution), the Statute of Westminster (as amended by the Australia Acts) and the Australia Acts, while at the same time accepting that Australia is a completely independent sovereign nation. In other words, Australians can refer to their links with the United Kingdom as they evolved, to show legal continuity and constitutional validity. However, since the passage of the Australia Acts 1986, Australia is free to chart its own legal and constitutional future in accordance with the basic constitutive documents of Australia. As a result, Australia is fully autonomous, but as a result of a legal process, not by any process involving popular sovereignty.

Further, the Constitution in an autonomous and practical sense, is no longer an Imperial statute but the primary constitutional document of Australia. This is because the Westminster Parliament has ceased to have any domestic constitutional role in Australia, and even the Queen acts as Queen of Australia (not the United Kingdom) when acting as Australian head of state.<sup>1</sup> As such, any attempt by the Westminster Parliament to repeal or amend the Constitution Act (Imp) (or even the Statute of Westminster (Imp) (in its application to Australia) or the Australia Act (UK)) would be met with Australian rejection and disdain, as *ultra vires* the United Kingdom Parliament. See the comments of Gleeson CJ, Gummow and Hayne JJ in *Sue v Hill* in 1999: “[W]hatever effect the courts of the United Kingdom may give to an amendment or repeal of the Australia Act 1986 (UK), Australian courts would be obliged to give their obedience to s 1 of the statute passed by the Parliament of the Commonwealth”.<sup>2</sup> In this sense the Court decided that the ultimate standard of legality was to be found in local rather than United Kingdom legislation

We ask does this evolutionary achievement of autonomy now mean that both the political *and legal* sources of Australian constitutional authority now lie in some concept of popular sovereignty (as mooted by some Justices of the High Court)?<sup>3</sup> This chapter argues against the necessity for the judiciary alone, to take this next step. This thesis argues that the High Court ought not, and does not need to resort to the concept of popular sovereignty to affirm the authority to grow our own constitution. Professor Blackshield has said: “As a fully *autonomous* independent nation, we must explain our constitutional arrangements *wholly* in homegrown

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<sup>1</sup> Royal Style and Titles Act 1973 (Cth). As Gerard Carney has noted: “This development was accompanied by a recognition that the Crown was no longer indivisible – the Crown in right of Australia developed as a distinct entity from the Crown in right of the United Kingdom”: G. Carney, *Members of Parliament: law and ethics* (2000) at 32.

<sup>2</sup> (1999) 163 ALR 648 at 666. In all probability, the High Court would regard the unwanted law as having no status at all: the law would be a nullity in Australia. Also noted by P. W. Hogg, *Constitutional Law of Canada* (3rd edition 1992) at 56 in relation to Canada.

<sup>3</sup> See Table 1, chapter one.

terms”.<sup>4</sup> (emphases added) Why? Australians do not have to explain their autonomous arrangements *wholly* in homegrown terms. It is perfectly logical that a former Dominion which is now an autonomous nation, can explain such arrangements by the “gradual and, to a degree, imperceptible”<sup>5</sup> withdrawal of the British hegemony, but still within the British legal framework. This is an ordered and deliberate process of succession envisaged by Westminster and the Federation Convention participants for the gradual de-colonization of Australia, the creation of a Dominion and now a nation state sovereign in all aspects. The operational links and authority for the Constitution has shifted from Westminster to Canberra Parliament with the express consent of both Parliaments. Parliamentary supremacy survives and does not need to be replaced by popular sovereignty. Indeed to do so undermines the structure and intent of the Australian Constitution.

### ***Autochthony*<sup>6</sup>**

Although the concept of autochthony has been described as “neither very clear, nor very useful”,<sup>7</sup> and only “sensitive dominions and fussy persons”<sup>8</sup> might trouble themselves with it, it will be pursued in this chapter because of an apparent confusion in some circles in Australia between the concept and that of autonomy. As such, the term autochthony is employed in this chapter in the sense used by noted Commonwealth scholar Sir Kenneth Wheare, in *Constitutional Structure of the Commonwealth* (1960).<sup>9</sup> Sir Kenneth had said an autochthonous or homegrown constitution

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<sup>4</sup> A.R. Blackshield, ‘The Implied Freedom of Communication’ in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 232 at 242.

<sup>5</sup> *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 183 per Barwick CJ.

<sup>6</sup> The etymology is from the Greek ‘autokhthonos’ (from the land itself) from ‘auto’ meaning “self” and ‘khthon’ meaning “earth, land”.

<sup>7</sup> Hogg, above n 2 at 54 at f/n 41.

<sup>8</sup> R. Dawson, quoted in Queensland Constitutional Review Commission, *Issues Paper*, (1999) at 212.

<sup>9</sup> K. Wheare, *Constitutional Structure of the Commonwealth* (1960) chapter 4, esp. at 89.

is said to be one that has “sprung from the land itself... and is rooted in the local soil”<sup>10</sup> in a legal, and not only practical sense.

As P.A. Joseph pointed out “uninterrupted legal devolution [can] prove a mixed blessing, providing stability through regular development, yet confounding national sovereignty through continuing Westminster ties”.<sup>11</sup> So too, Detmold has said that “autonomy does not need autochthony... but autochthony is oddly attractive”.<sup>12</sup> Autochthony is concerned with how “at some stage, a state must cease to be the offspring and derivative of an Imperial predecessor and exist as a complete and self-contained entity, as a law-constitutive fact itself”.<sup>13</sup> As such, autochthony requires that a constitution be indigenous: in Australian terms, deriving its authority *solely* from events within Australia. In other words, the *only* claim to authority of the Australian Constitution must spring from within Australia itself. Therefore, it is necessary for any successful claim to autochthony (not autonomy as Professor Blackshield suggests) for Australia’s constitutional arrangements to be explained *wholly* in homegrown terms.

Based on Wheare’s definition, and by dint of legal history, Australia does not have a formally autochthonous Constitution. For a similar claim in relation to Canada’s patriated Constitution, see the comments of another noted Commonwealth scholar G. Marshall in *Constitutional Conventions* (1984): “[I]f patriation is equated with the idea of ‘autochthony’... Canada’s new

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<sup>10</sup> *Ibid.*

<sup>11</sup> P.A. Joseph, ‘Foundations of the Constitution’ (1989) 4 *Canterbury Law Review* 58 at 69.

<sup>12</sup> M. Detmold, *The Australian Commonwealth* (1985) at 95 and 105.

<sup>13</sup> P.A. Joseph, *Constitutional and Administrative Law in New Zealand* (1993) at 398.

Autochthony is said to be “the autonomy [ability] of a constitutional structure to give itself a fundamental law”: Queensland Constitutional Review Commission, *Issues Paper*, above n 8 at p viii.

Constitution is not (in the term popularised by Sir Kenneth Wheare) ‘autochthonous’.<sup>14</sup> Australia does not have a constitution *solely* adopted by the spontaneous will of the Australian people, nor a constitution enacted by means of a break in legal continuity; such as for example, that of the United States or the Republic of Ireland. Further, until the High Court or the Parliament finally settle the matter, there appear competing claims to the authority of the Constitution. A persuasive claim is that of an Imperial statute. To be sure, most of the constituent documents of the Australian legal order, have an external rather than a local root. As a result, Australia, which seems more interested in the “substance, rather than the trappings of independence”,<sup>15</sup> (apparently unlike New Zealand and to a lesser degree Canada),<sup>16</sup> might seem fated to be content with autonomy and not autochthony.

At this point many might ask “So what?” or “Why does autochthony matter?”. As noted earlier, *prima facie* it does not matter practically in one sense, because autonomy is (arguably) the more important constitutional value, and Australia’s autonomy is complete and irreversible. That said however, autochthony may matter emotionally or symbolically; witness the ever present republican debate. Further, in a very practical and legal sense, much of the present debate promoting popular sovereignty, in the search for an autochthonous constitution, might bring forth unintended and unforeseen legal confusion; quite possibly in constitutional interpretation. This is because as noted in chapters two and three, “the [autochthonous] source of authority of the

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<sup>14</sup> G. Marshall, *Constitutional Conventions* (1984) at 206. In contrast, Marshall’s earlier writing in 1971 *Constitutional Theory* seemed to reflect a broader and less strict view of autochthony. This earlier view will be discussed with respect to Australia at length in chapter eight.

<sup>15</sup> R.T. E. Latham, ‘The Law and the Commonwealth’ in W.K. Hancock (ed), *Survey of British Commonwealth Affairs* (1937) Vol. 1 at 526.

<sup>16</sup> “Probably, due in part to the fact that Australia had benefited early on from the highest degree of constitutional independence of any of the three”: noted by P. Oliver, ‘The Constitution of Independence’, Paper delivered to the Australia and New Zealand Law and History Society, Melbourne, 4 July 1998.

Constitution has significant consequences for the way in which the powers of government are exercised and interpreted".<sup>17</sup>

In 1902, W. Harrison Moore was able to dismiss any "doubt or speculation as to the theoretical origin or legal foundation of the Commonwealth and the Constitution" namely that the source and foundation of the Australian Constitution was the United Kingdom Parliament.<sup>18</sup> However, in 1994 Andrew Fraser rightly noted that there now appears a "persistent doctrinal confusion over the sources of legitimate constitutional authority in Australia" (citing the judgment of Mason CJ in *Australian Capital Television (ACTV)* as an example).<sup>19</sup> As a result of the 'implied rights cases' one might hint that the current bench has been left in a 'constitutional void' over what legal principle should be seen as sustaining the Constitution.

Australia's Constitution is not autochthonous. It is my argument that the *legal* source of the Constitution is the United Kingdom Parliament.<sup>20</sup> This is because Australia's constitutional arrangements are still legally derived from, but not subordinate to, the United Kingdom Parliament. That Parliament enacted the Constitution as (part of) one of its statutes: Commonwealth of Australia Constitution Act 1900 (Imp). This statute, even after 1986, has not ceased to hold its paramount status. It is clear that existing Imperial Acts applicable to Australia

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<sup>17</sup> M. Moshinsky, 'Re-enacting the Constitution in an Australian Act' (1989) 18 *Federal Law Review* 134 at 135. See also J. Thomson, 'The Australian Constitution: statute, fundamental document or compact?' (1985) *Law Institute Journal* 1199 at 1199, but cf G. Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 (1) *Federal Law Review* 1 at 5.

<sup>18</sup> W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902, 2nd edition rep 1910) at 66.

<sup>19</sup> A. Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 213 at 215-216 citing Mason CJ in *ACTV* (1992) 177 CLR 106 at 138.

<sup>20</sup> See also J. Daley, *The Bases for the Authority of the Australian Constitution* (1999) unpublished D. Phil thesis, Oxford (copy on file with author) at ch 5.6.2.

in 1986, continue in force after 1986 until amended or repealed by valid Australian legislation. This applies particularly to the Constitution Act, and the Constitution it incorporates.

To maintain that the United Kingdom Parliament is still the legal source of the Constitution rejects the flawed claim that a “body which lacks authority to legislate in the present cannot provide authority for legislation made in the past... The old regime may remain the authority for the new, even if the old regime can no longer make new laws”.<sup>21</sup> As Moshinsky notes, “acceptance of the... view that we do not have an autochthonous constitution, does not necessarily mean that the British Parliament can repeal or amend the Constitution Act”.<sup>22</sup> As Detmold has pointed out: “[T]here is no difficulty... as long as authority [derivation] is distinguished from continuing power [subordination]... Thus the common law may recognise the Westminster Parliament as the authority for the Australian Constitution and also recognise that any continuing power in the Westminster Parliament has ceased”.<sup>23</sup>

In this respect the present writer questions Joseph’s interpretation,<sup>24</sup> of the effects of one legal system being legally derived from another. This chapter rejects the view that a legally derived (but now fully autonomous) system must necessarily in any way (historically or otherwise) be subordinate. As Professor Winterton has noted: “It is surely a confusion to identify *continuity* between an old and a new system with *subordination* of the new institutions to the old”.<sup>25</sup> See also Daley, “A legislature whose authority is derived from a source need not remain subordinate to that source”,<sup>26</sup> and further “[T]he rhetorical desire to assert that Australia’s constitutional law

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<sup>21</sup> *Ibid* at ch 5.3 See also Moshinsky, above n 17 at 144.

<sup>22</sup> Moshinsky, *Ibid* at 136.

<sup>23</sup> Detmold, above n 12 at 95.

<sup>24</sup> Joseph, above n 13 at 397.

<sup>25</sup> Winterton, above n 17 at 7, quoting G. Marshall, *Constitutional Theory* above n 14 at 63.

<sup>26</sup> Daley, above n 20 at ch 5.3.

is independent of any other country is [often] based on the mistaken belief that derivation from a source implies subordination”.<sup>27</sup> It is certainly an ‘unsettling implication’ for Australia to be considered in any way subordinate. As such, the notion of subordination should be exorcised from lawyers’ and citizens’ minds alike. However, as will be discussed shortly: Is it still similarly unsettling for Australia’s constitutional arrangements to be considered legally *derived* from an external source?

The *political* source of the Constitution might be the people of Australia, (or more precisely the electorate), because in political terms, “the Constitution ultimately depends for its continuing validity upon the acceptance of the people, but the same may be said of any form of government which is not arbitrary”.<sup>28</sup> In this sense only, can the people of Australia be rightly regarded as politically sovereign. In other words, the people of Australia are the source of legitimacy for a democratically elected government. In this sense “the Constitution is only ‘homegrown’ in a practical, not legal, sense”.<sup>29</sup> As this thesis has consistently argued, under the present constitutional arrangements, popular sovereignty is a legally and factually incorrect autochthonous basis for empowering judges to imply rights. The current political basis of the Constitution is however a matter of some controversy. It might be a social contract between the people of Australia, or the federal compact between the colonies, or even some form of compact between the individual inhabitants of the colonies.

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<sup>27</sup> *Ibid* at ch 5.6.3.

<sup>28</sup> *ACTV* (1992) 177 CLR 106 at 181 per Dawson J. See also J. Kirk, ‘Constitutional Interpretation and Evolutionary Originalism’ (1999) 27 (3) *Federal Law Review* 323 at 339. See also the 1985 New Zealand Royal Commission on Electoral Reform: “The exercise of government’s powers and responsibilities is legitimate only because it is based on the *political* sovereignty of the people” (emphasis added), noted by J. Bolger, ‘Building the Constitution’ (2000) 11 *Public Law Review* 141 at 144. For a detailed investigation of the moral legitimacy of obeying the Constitution, see Daley, above n 20.

<sup>29</sup> Moshinsky, above n 17 at 136.

However, the preferable view of popular sovereignty is to adopt the 1901 view of Quick and Garran:

In the Constitution of the Commonwealth of course there is no absolute sovereignty, but a *quasi*-sovereignty which resides in the people of the Commonwealth, who may express their will on constitutional questions through a majority of the electors voting and a majority of the States.<sup>30</sup>

Further, the Australia Acts did not vest legal sovereignty in the Australian people, but should be correctly interpreted as a deliberate redistribution of Imperial sovereignty in favour of the Australian parliaments. In effect, the *sovereignty* of the Imperial Parliament was replaced by the *supremacy* of the Australian parliaments under the Constitution in succession to the power of the Imperial Parliament.

However, if the issues surrounding the source of the Australian Constitution are to be left to the High Court and popular sovereignty receives a majority of support, (with Justices concurring on its true definition (symbolic or theoretical) and beneficiaries), it could be seen that the legal source of the Constitution had shifted from Westminster to Australia. Autochthony would then have been achieved. After all, many would consider it “unsatisfactory [and symbolically inappropriate]<sup>31</sup> for the legal authority of... [the Australian Constitution] to be derived from an external source”.<sup>32</sup> However, this thesis argues that if the traditional legal basis is to be discarded by the High Court, a federal compact between the colonies is a more historically correct interpretation of federation than a social contract based on popular sovereignty. A detailed investigation of the legal and political bases of the Constitution is undertaken in chapters nine and ten.

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<sup>30</sup> J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901 rep 1976) at 988.

<sup>31</sup> N. Aroney, ‘A Public Choice? Federalism and the Prospects of a Republican Preamble’ (1999) 20 *University of Queensland Law Journal* 262 at 271, noting Moshinsky, above n 17 at 135.

<sup>32</sup> Winterton, above n 17 at 6.

If on the other hand, Australia was (by democratic means with popular approval) to repeal the Constitution Act or make a declaration of popular sovereignty (both to be discussed in the next chapter), autochthony would also be achieved.

## **PART B - ACTIONS OF THE PARENT: HISTORY AS EQUIVOCAL AND INDEFINITE**

### *Achievement of autochthony*

The crux of the difficulty with the achievement of autochthony is the dilemma of whose actions should be seen as legally decisive: the parent or the offspring. This chapter discusses the actions to date of our British parent, while the next chapter discusses the possible actions of Australians. To achieve autochthony, an “independent future [must be] irrevocably sealed off from the dependent past”.<sup>33</sup> In contemporary Australia, this notion has taken on some importance in both academic and judicial circles because “the position with respect to autonomy is satisfactory, [but] the position with respect to autochthony is by no means as strong”.<sup>34</sup> As a result, in the ‘implied rights cases’ there is a symbolic yearning to make up for any perceived missed opportunities.

The difficulty of explaining, in an autochthonous sense, Australia’s removal from the orbit of the United Kingdom legal system is seemingly aggravated by a number of interrelated factors:

First, by the dominance of a traditional understanding of British parliamentary sovereignty as ‘continuing’ which promotes the view that the United Kingdom Parliament “cannot protect its statutes from repeal, because no one sovereign parliament could effectively bind a future

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<sup>33</sup> Marshall, *Constitutional Theory* above n 14 at 57.

<sup>34</sup> Moshinsky, above n 17 at 135.

sovereign parliament”.<sup>35</sup> R.T.E. Latham pointed out (citing Dicey) that this is because “established constitutional doctrine held that it was in *strict law* impossible for the Imperial Parliament to put it beyond its own power to repeal any of its own Acts.”<sup>36</sup> (emphasis added) On this view the United Kingdom Parliament (through the Statute of Westminster 1931 (Imp) and the Australia Act 1986 (UK)) has not *irrevocably* ceded legal authority to Australia. (However, an alternative to the traditional theory will also be discussed; the ‘self-embracing’ theory. The ‘self-embracing’ theory recognises the United Kingdom Parliament can limit or terminate its own powers, and therefore its actions can be seen as ‘genuinely abdicative’).<sup>37</sup>

Secondly, and as a direct corollary of the continuing sovereignty noted in the first point, is the dominance of a strict view that for any former dominion or colony to obtain autochthony, a break in legal continuity must occur. However, a less strict view emanating from the work of Geoffrey Marshall will also be canvassed in the next chapter.<sup>38</sup>

Thirdly, and compounding the previous point, is an Australian desire to conform to existing constitutional procedures for sanctioning legal change. Fourthly, by allowing such momentous issues to be cast in crude form to the judiciary.

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<sup>35</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1st edition 1885; 10th edition 1959) at 39-41 and 67-68. See also H.L.A. Hart, *The Concept of Law* (2nd edition 1994) at 149. See also Wheare, above n 9 at 111 and H.W.R. Wade, ‘The Basis of Legal Sovereignty’ [1955] *Cambridge Law Journal* 172 at 187-189.

<sup>36</sup> Latham, above n 15 at 530.

<sup>37</sup> Noted by Hart, above n 35 at 149; Latham, above n 15 at 533; Marshall, *Constitutional Theory* above n 14 at 45-47 and I. Jennings, *The Law and the Constitution* (5th edition 1959) at 151-172. See also P. McHugh, *The Maori Magna Carta* (1991) at 55-56.

<sup>38</sup> Marshall, *Constitutional Theory* above n 14 at 57-64.

### ***The continuing view***

Traditional theory views the parent's sovereignty as 'continuing', thereby precluding the attainment of autochthony, unless a break in legal continuity has been instituted by the offspring.<sup>39</sup> When an offspring initiates a break (no matter what view the traditional theory takes of the parent's powers), such action is seen as decisive and autochthony is achieved because the offspring has repudiated the very source of its autonomy, and there is no longer a stream of authority flowing from the parent.

The pervasiveness and seemingly inextinguishable allure of the traditional theory should not be underestimated. Because of Australia's insistence on proceeding by way of Westminster to complete its evolution to independence and sovereignty, Australian autochthony might always be imperilled by the traditional theory. On this view, any legal consequences of the actions to date by the United Kingdom are at best equivocal, and could be said to have only dealt unequivocally with the notion of autonomy. In the end, according to R.T. E. Latham:

Any measure of emancipation at the hands of the Imperial Parliament [for example, the Australia Act 1986 (UK)]... suffer[s] from the vital flaw that it [is] revocable at the Imperial Parliament's pleasure... [N]othing that Westminster could do would remove this taint from its gifts.<sup>40</sup>

Thus, if the traditional view of the parent's sovereignty engenders most support,<sup>41</sup> the search for autochthony would likely need to focus on the actions of the offspring, and possibly

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<sup>39</sup> But cf Marshall, *Constitutional Theory* above n 14 at 61 noted by Joseph, above n 13 at 413.

<sup>40</sup> Latham, above n 15 at 530.

<sup>41</sup> Both versions (continuing and self-embracing), are comprehensible and neither can be logically preferred for all legal systems: P. Oliver, 'The 1982 Repatriation of the Constitution of Canada: Reflections on Continuity and Change' (1994) 28 *La revue Juridique Themis* from web, 24/3/00, <http://www.droit.umontreal.ca/pub/themis/94vol28n2-3/OLIVER.html>; 17.

revolutionary (peaceful and legal) concerns, to seal off the past. Possible actions will be discussed in the next chapter.

When the British Empire began reinventing itself into the more egalitarian (British) Commonwealth of Nations (primarily through the Balfour Declaration of 1926 and the Statute of Westminster 1931 (Imp)),<sup>42</sup> the traditional understanding of British sovereignty was at times forcefully stated. In respect of the Statute of Westminster, it was said in 1935 by Viscount Sankey L.C by way of *obiter dicta*:

It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada [or any dominion] remains in theory unimpaired: indeed the Imperial Parliament could, as a matter of abstract law, repeal or disregard s 4 of the Statute of Westminster.<sup>43</sup>

To be sure, the ‘continuing’ theory’s perceived inadequacies were only brought into sharp focus when the United Kingdom Parliament ultimately purported to ‘abdicate’ power and terminate *completely* its ability to legislate for the dominions by a series of ‘Independence Acts’ in the 1980’s.<sup>44</sup> In contrast, the pre-World War II Statute of Westminster, is at most usually seen as

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<sup>42</sup> The Balfour Declaration was the result of proceedings at the 1926 Imperial Conference. The declaration read in part: “They [Great Britain and the dominions] are autonomous communities within the British Empire, equal in status, [and] in no way subordinate one to another in any aspect of their domestic or external affairs”. The Statute of Westminster was a result of proceedings at the 1930 Imperial Conference and attempted to give legal force to the political will evident in the Balfour Declaration. However, as noted by Oliver these “forward-looking sentiments... were difficult to convert into legal language”: P. Oliver, ‘Canada, Quebec, and Constitutional Amendment’ (1999) 49 *University of Toronto Law Journal* 519 at 530.

<sup>43</sup> *British Coal Corporation v The King* [1935] AC 500 at 520 per Viscount Sankey L.C. In respect of similar comments (to those of Viscount Sankey) made in relation to New Zealand see the observations of Mr Downie Stewart in the New Zealand Parliament in 1931: noted by P. Oliver, ‘Cutting the Imperial Link’ in P.A. Joseph (ed) *Essays on the Constitution* (1995) 368 at 383. Similar comments in relation to Australia can be observed in W.A. Wynne, *Legislative, Executive and Judicial Powers in Australia* (3rd edition 1962) at 73-74.

<sup>44</sup> This occurred by means of a series of ‘Independence Acts’ commencing as early as 1982 with the Canada Act 1982 (UK), s 2, and in more patient quarters by the New Zealand Constitution Act 1986 (NZ), s 15(2) (although this is more of a unilateral repudiation by New Zealand; see chapter eight), and the Australia Act 1986 (UK) and (Cth), s 1.

only a *partial* abdication in respect of the dominions because of the Imperial Parliament's retention of the ability to legislate 'on newly restricted terms' by 'request and consent', that is section 4. According to the traditional view however, even the fact of legislative 'abdication' *partial or complete*, is disputed and cannot therefore satisfy the requirement for autochthony. According to Dicey's traditional theory of parliamentary sovereignty, a sovereign parliament can only divest itself of authority in two ways. It can abdicate its sovereignty entirely (that is by dissolving or extinguishing itself) or transfer its sovereignty to a new person or body of persons.<sup>45</sup>

However, the traditional view came under increasing pressure in the 1980's. By the time the British Parliament had completely terminated all legislative power for Canada in 1982, the doctrine was under serious threat, or was it? *Manuel v Attorney General*<sup>46</sup> was a case which went on appeal to the Court of Appeal from the Chancery Division, in which a Canadian Indian Chief challenged the Canada Act 1982 (UK) as being *ultra vires*. The basis of the claim was that the enactment of the Canada Act 1982 was inconsistent with, or a derogation from, the constitutional safeguards provided for the Indian peoples by the Statute of Westminster 1931 (Imp) and the British North America Acts (Imp) (from hereon referred to as BNA). Those

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<sup>45</sup> Dicey, above n 35 (1956, 9<sup>th</sup> edition) at 69. Noted also by Oliver, above n 43 at 394 at f/n 145, quoting Marshall, *Constitutional Conventions* above n 14 at 209. See also Wade, above n 35 at 196 at f/n 69 and D. Lloyd, *The Idea of Law* (1964, rep 1987) at 182. See also *Trethewan's case* (1931) 44 CLR 394 at 425-426 per Dixon J. As such it is accepted that a sovereign can abolish or reconstruct one or more of its composite elements. It can transfer part (Locke), or the whole (Hobbes) of its sovereignty to another body. See the example of the Barebones Parliament when, in 1653, it resigned its power into the hands of Cromwell. See also the example of the Parliaments of both England and Scotland, when at the time of the Union, each transferred sovereign power to the new sovereign body, namely, the Parliament of Great Britain; see Act of Union (1707). See also the example of the Irish Parliament when in 1800, in seeking the security of British authority, voted itself out of existence and around 100 of the Members of Parliament moved to the House of Commons in London. This move was instigated by the level of unrest in the northern counties and sanctioned by the Act of Union (1800) which united Ireland politically with Britain.

<sup>46</sup> [1983] 1 Ch 77.

safeguards consisted of special rights set out in the schedule to the BNA Act 1930 which along with earlier BNA Acts, formed the Canadian Constitution. Moreover, since neither the Canadian Parliament nor the provincial legislatures could alter or amend the BNA Acts (that is, the Canadian Constitution) “the rights of the Indians were entrenched”. The Canada Act 1982 (UK) was argued to be *ultra vires* because it repealed section 4 and subsection 7(1) of the Statute of Westminster and provided for a locally operated amendment procedure,<sup>47</sup> thereby derogating from the Indians’ rights.

Sir Robert Megarry V-C (in Chancery) held that the claim must be struck out. This was simply on the basis that he did not doubt “the simple rule that the duty of the court is to obey and apply every Act of Parliament, and that a court cannot hold any such Act to be *ultra vires*”.<sup>48</sup> The Court of Appeal affirmed the decision of Megarry V-C, and although it did not question the Vice-Chancellor’s reasoning, it appeared to not proclaim such a wide view of the traditional theory. In the end, the Court of Appeal merely satisfied itself that Canada had by express declaration (in the preamble to the Canada Act 1982) requested and consented to the impugned enactment.<sup>49</sup>

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<sup>47</sup> By virtue of s 7(1) of the Statute of Westminster, the request and consent provisions of s 4 did not apply to Canada, thereby preserving the United Kingdom’s power to legislate for Canada. Canada did not insist on a local amending formula for its Constitution until patriation occurred in 1982. Even in 1981, the Supreme Court of Canada acknowledged that the United Kingdom Parliament’s powers to legislate for Canada were “unimpaired” and “undiminished”: *Reference re Amendment of the Constitution of Canada (Patriation Reference)* [1981] SCR 753 at 799 and 801. However, as Oliver has noted the Court did not say, and was not asked to say, “whether those powers were sovereign in a continuing or self-embracing sense”: above n 41 at 3 from web. According to Oliver the effect of the 1981 pronouncement was that “the Canadian legal system was not coordinate with, but rather subordinate to, the British Parliament”: above n 41 at 11 from web.

<sup>48</sup> [1983] 1 Ch 77 at 86.

<sup>49</sup> [1983] 1 Ch 95 at 100.

In dealing with the challenge however, Megarry V-C also made important observations which neatly emphasise the difficulty of considering autochthony at the hands of the parent. Sir Robert referred to that ‘abstract’ part of traditional theory that holds that even if a “constitutional convention had grown up that the United Kingdom Parliament would not legislate for that colony without the consent of the colony. Such a convention would not limit the powers of Parliament”.<sup>50</sup> The Vice-Chancellor then in *obiter*, referred to the judgment of Viscount Sankey L.C. in *British Coal Corporation* to suggest that the result would not be different even if the convention matured into a provision within an Act of Parliament, and that even that provision could be repealed without consent. Such is the power of the traditional view taken to its logical conclusion.

However, Sir Robert had to admit that even though it would be “correct in British law”<sup>51</sup> to say that the United Kingdom Parliament “could as a matter of abstract law” repeal a statute granting independence to a country, it could not do so effectively.<sup>52</sup> This is because any such repeal “will not make the country dependent once more; what is done is done, and is not undone by revoking the authority to do it”.<sup>53</sup> Parliament must be taken at its word. Similar concerns were also recognised by Murphy J in *Bistradic v Rokov*<sup>54</sup> where his Honour mooted that the United Kingdom Parliament “could... repeal the Statute of Westminster... [and] the Constitution Act. But such repeals would have no effect in Australia”.<sup>55</sup> In other words the High Court would

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<sup>50</sup> [1983] 1 Ch 77 at 87.

<sup>51</sup> Hart, above n 35 at 121.

<sup>52</sup> [1983] 1 Ch 77 at 88-89. Not expressly overruled on this point by the Court of Appeal: [1983] 1 Ch 95 at 105.

<sup>53</sup> *Ibid* at 88. See also *Ndlwana v Hofmeyr* [1937] A.D. 229 at 237: “freedom, once conferred, cannot be revoked”. In practice, the Imperial Parliament has never tried to revoke a purportedly irrevocable grant of authority to another body. Because it has never done so, the question has never arisen legally.

<sup>54</sup> (1976) 135 CLR 552.

<sup>55</sup> *Ibid* at 567.

simply ignore the repeal. Courts of the United Kingdom however, could not, it would seem, hold the repealing statute void.

However, there appear subtle variations in the respective reasoning between the Vice-Chancellor and Murphy J. The Vice-Chancellor seems at pains to maintain the distinction between continuing ‘legal validity’ and ‘practical enforceability’ (for the United Kingdom). Addressing this issue Murphy J discards abstract legal validity when it cannot conform to, or explain, practical reality. Murphy J stated that: “In my opinion (notwithstanding many statements to the contrary) Australia’s independence and freedom from United Kingdom legislative authority should be taken as dating from 1901”.<sup>56</sup> This discarding of abstractly legal concerns in favour of practically expedient ones (or the blurring of the two), seems to typify many of the judgments in the ‘implied rights cases’, which promote popular sovereignty as the new legal basis of the Constitution. As Daley has noted, there are two implicit claims: “[T]he agreement of the people provides the ultimate moral reason for obedience to the Constitution, and the traditional legal reason for obedience (ie, enactment by the Imperial Parliament) should be supplanted by this moral reason”.<sup>57</sup>

The legal and political bases of the Australian Constitution can be fused (as with some other Commonwealth countries) but such momentous problems require and demand a ‘clear democratic decision’ by the Australian people through the parliamentary democratic process. However, there may also be good reasons not to pursue this fusion. Daley has said that the ability

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<sup>56</sup> *Ibid.* See also Deane J in *Kirmani v Captain Cook Cruises Pty Ltd [No. 1]* (1985) 159 CLR 351 at 442 where his Honour intimates that “it may be necessary at some future time to consider whether traditional legal theory can properly be regarded as providing an adequate explanation of the process which culminated in the acquisition by Australia of full ‘independence’ and ‘Sovereignty’”.

<sup>57</sup> Daley, above n 20 at ch 6.1.2.

to carry on current political debates “without undermining legal certainty” is a good reason for differing (legal and political) bases of the Constitution. Further, “it is quite possible to create a unique Australian law even if one of its original sources is a UK Act”. The creation of such law is “incongruous only if one assumes that derivation implies subordination”.<sup>58</sup>

However, no matter how forcefully legal considerations are eschewed by Australian judges and jurists alike, theories such as continuing sovereignty (even in its most abstract form), which according to Murphy J, may have “no relation to realities” and may therefore be “suspect”,<sup>59</sup> can still exercise considerable influence. This is because “conventional and practical considerations seem precarious pegs on which to hang the independence of... any... modern legal system”.<sup>60</sup> As Marshall has noted: “[W]e are operating at the untested limits of the traditional doctrine”.<sup>61</sup> Even if such theories have “no relation to realities” in their application to Australia, they still obtain in the United Kingdom.

Note the learned controversy evident in the United Kingdom as a result of the *Factortame* cases. In these cases the House of Lords considered the effect on British law of Britain’s entry into the European Union in 1972 (see the European Communities Act 1972 (UK)). Some have broadly interpreted these cases as stating that the United Kingdom Parliament’s voluntary limitation of its sovereignty now means that “Parliament can bind its successors”.<sup>62</sup> In other words the earlier European Communities Act “may prevail over a later statute unless the later statute expressly

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<sup>58</sup> *Ibid* at ch 5.6.1 but cf Moshinsky, above n 17 at 135.

<sup>59</sup> Murphy J in *Bistradic v Rokov* (1976) 135 CLR 552 at 566-567 quoting and commenting on Viscount Sankey L.C.’s judgment in *British Coal Corporation v The King* [1935] AC 500 at 520.

<sup>60</sup> Oliver, above n 42 at 561. See also Oliver, above n 43 at 394.

<sup>61</sup> Marshall, *Constitutional Conventions* above n 14 at 209.

<sup>62</sup> H.W.R. Wade, ‘Sovereignty-Revolution or Evolution’ (1996) 112 *The Law Quarterly Review* 568 at 573 referring to Lord Bridge’s speech in *R v Secretary of State for Transport, ex p. Factortame (No 2)* [1991] 1 AC 603 at 658. See also [1989] 2 CMLR 353, [1990] 2 AC 85, [1992] QB 680, [1996] QB 404, [2001] AC 524.

stipulates otherwise. This is a recognition of a limitation of manner and form".<sup>63</sup> A glimmer of hope for the traditional doctrine still remains if it is considered possible for the United Kingdom Parliament to legislate to withdraw the United Kingdom from the European Union. Professor McEldowney has commented on these two approaches:

On the question of the United Kingdom sovereignty it might be possible to envisage two distinct approaches. The first is a narrow approach that argues that strictly speaking the proposed European Constitution changes nothing fundamental. Here the emphasis is on the European Communities Act 1972 that remains intact and consequently remains the basis for the relationship between the United Kingdom and the European Union. On this view the legal sovereignty of the House of Commons is constant in terms of the authority of Commons to revise or amend [or even repeal?] the 1972 Act, thus permitting the continuity of sovereignty. The second approach is broader. It is possible to consider that many of the attributes granted to the European Union under the proposed Constitution are analogous to a wholly sovereign state but explicitly stop short of creating a sovereign state.<sup>64</sup>

### ***The self-embracing view***

The broader approach has gained many adherents. Increasingly, many argue that the traditional understanding of sovereignty as 'continuing' must give way to a broader view described as 'self-embracing'. It is only by adopting this new view that a sovereign parliament (such as Westminster) could be deemed to have brought "its omnipotence to an end",<sup>65</sup> without the need for intervention by the offspring. Thus it would seem that if the notion of autochthony is to be assessed successfully and decisively in terms of the actions of the parent, the self-embracing view must prevail. Proponents of this view suggest "the better view is that without a break in

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<sup>63</sup> P. McHugh, above n 37 at 56.

<sup>64</sup> J. McEldowney, 'Memorandum' (2003) Select Committee on Constitution, Ninth Report, House of Lords, 8/10/04 from web: <http://www.publications.parliament.uk/pa/ld200203>; 4. See also J. McEldowney, 'Modernizing Britain: Public Law and Challenges to Parliament', in J. Mackinnon and P. Havemann (eds) *Modernizing Britain: Public Law and Challenges to Parliament*, (2002) at 8-10.

<sup>65</sup> Marshall, *Constitutional Theory* above n 14 at 45. However, it must be a type of self-embracing sovereignty that accepts restrictions of substance and content, not merely restrictions of manner and form: P. McHugh, above n 37 at 55 but cf Wade, above n 35 at 174.

legal authority, the UK Parliament can irrevocably cede authority over an area to a new constitutional structure”.<sup>66</sup> Indeed, to some, there now seems no theoretical or practical justification for the continuing authority of the United Kingdom Parliament. H.W.R. Wade has discussed a distinction between “cession of territory” and “cession of Parliament’s powers”. He views the former as uncontroversial and notes that “Parliament has... repeatedly accepted limitations of its sovereignty in confirming independence...”<sup>67</sup> However, if the latter were accepted a “technical revolution” has taken hold.<sup>68</sup>

Such notions were tested when Canada ‘patriated’ the BNA Act 1867 (UK) in 1982,<sup>69</sup> and Australia passed the Australia Act 1986 (Cth). However, these processes took the form of another United Kingdom statute - the Canada Act 1982 (UK) and the Australia Act 1986 (UK)- which were of course “the gift of the United Kingdom Parliament, not the Canadian [or Australian] peoples”.<sup>70</sup> As a result, patriation threw up the paradox that “the legal continuity represented by Canada’s [and Australia’s] strict adherence to existing legal procedure... is assumed by some to have achieved a break in continuity”.<sup>71</sup> P.W. Hogg questions whether patriation really occurred for Canada since there was no formal attempt to give the Canada Act 1982 (UK) “some form of Canadian imprimatur”.<sup>72</sup> In this sense Australia has gone further than

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<sup>66</sup> Daley, above n 20 at ch 5.4.7.

<sup>67</sup> Wade, above n 64 at 573-575. See also J. McEldowney, ‘Modernizing Britain: Public Law and Challenges to Parliament’, in J. Mackinnon and P. Havemann (eds) *Modernizing Britain: Public Law and Challenges to Parliament*, above n 64 at 10 where Professor McEldowney commenting on the devolved government to Wales, Scotland and Northern Ireland states that “in strict constitutional theory devolution may be retracted, modified, suspended or amended. In practical and political terms it is unlikely that the unitary nature of the United Kingdom will be restored”.

<sup>68</sup> Wade *Ibid.*

<sup>69</sup> The BNA Act was renamed the Constitution Act 1867.

<sup>70</sup> Joseph, above n 11 at 70 and n 13 at 412. Unlike the Constitution Act 1986 (NZ), the Canada Act 1982 (UK) was not a unilateral repudiation of United Kingdom legislative power.

<sup>71</sup> Oliver, above n 41 at 2 from web, <http://www.droit.umontreal.ca/pub/themis/94vol28n2-3/OLIVER.html>.

<sup>72</sup> Hogg, above n 2 at 54.

Canada, by re-enacting the Australia Act 1986 (UK). Marshall suggested that “such re-enactment [is] legally redundant” anyway, but as noted earlier in this chapter, the High Court mooted in *Sue v Hill* that it would give obedience to the Commonwealth Act.<sup>73</sup>

Noted New Zealand constitutional scholar F.M. Brookfield has mooted that patriation was completed for Australia by the Australia Acts, if not securing autochthony, surely not diminishing it.<sup>74</sup> In respect of both Canada and Australia, it would depend on what meaning one placed on patriation. If it meant the termination of Imperial authority, the present writer would agree. If it meant the securing of autochthony, the present writer would disagree. As Aroney has noted: “[T]rue’ or ‘complete’ patriation requires autochthony”.<sup>75</sup> Moreover, Marshall’s view of the Canadian Constitution is equally applicable to the Australian Constitution: “[I]f patriation is equated with the idea of ‘autochthony’... Canada’s new Constitution is not (in the term popularised by Sir Kenneth Wheare) ‘autochthonous’”.<sup>76</sup>

According to Dr Peter Oliver, these paradoxes are only resolved by “consider[ing] the matter not as a question of British constitutional theory... but rather as a question of Canadian [or Australian] constitutional theory regarding the evolution of the ultimate legal principle of the Canadian [or Australian] legal system”.<sup>77</sup> If such concerns are “understood as a matter of British constitutional theory the answer could only be indefinite or qualified” because “British legal

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<sup>73</sup> Marshall, *Constitutional Conventions* above n 14 at 207 but cf *Sue v Hill* (1999) 163 ALR 648 at 666 per Gleeson CJ, Gummow and Hayne JJ. On a less strict view, because the original United Kingdom statutes of the Constitution Act, the Statute of Westminster and the Australia Act have now been presented to Australia as a gift, “can it be that the physical location of statutes determines whether they have been patriated?”: Oliver, above n 42 at 572.

<sup>74</sup> F.M. Brookfield, ‘Kelsen, the Constitution and the Treaty’ (1992) 15 *New Zealand Universities Law Review* 163 at 172.

<sup>75</sup> Aroney, above n 31 at 271.

<sup>76</sup> Marshall, *Constitutional Conventions*, above n 14 at 206.

<sup>77</sup> Oliver, above n 41 at 13. See also Oliver, above n 42 at 562.

opinion leaned and arguably still leans toward continuing sovereignty".<sup>78</sup> However, as a matter of Canadian or Australian constitutional theory it is possible to assess Westminster's sovereignty as self-embracing. Oliver's argument is persuasive and achieves the desired autochthony for Canada by recognising that the 'ultimate rule of recognition' (the attitude of courts and officials)<sup>79</sup> of the Canadian legal system has evolved to the point where Westminster sovereignty can be viewed as self-embracing. Note a similar argument developed by John Finnis and noted by Walters:

A law of a parent state providing for the independence of a new state remains in force and relevant to the continued legality of the legal system it creates, but it is not in force in a forward-looking sense and its existence does not diminish the fact that a true and complete severance of systems has taken place.<sup>80</sup>

### ***A change in the grundnorm?***

A new attitude of courts and officials as to the 'ultimate rule of recognition' can be understood and explained in Hartian terms; but what about Kelsen? Oliver necessarily eschews the need to use Kelsen's *grundnorm* because such an approach could not comfortably accommodate legal continuity while explaining Canada's *legal* emancipation from Westminster sovereignty. To pursue a Kelsenian analysis might inevitably lead to a recognition of some form of break in continuity. Oliver explicitly rejects the presence of any break in continuity in Canada's arrangements, given that the penumbral question whether Westminster's sovereignty was really continuing or self-embracing was always an open question. This is because the ultimate rule of

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<sup>78</sup> *Ibid* n 41 at 19.

<sup>79</sup> See Hart, above n 35 at 292-293. H.W.R. Wade has questioned whether the House of Lords in the *Factortame* cases "adopted a new 'rule of recognition' or 'ultimate legal principle'... [when they] elected to allow the Parliament of 1972 to fetter the Parliament of 1988...": above n 62 at 574.

<sup>80</sup> J.M. Finnis, 'Revolutions and Continuity in Law' in A.W.B. Simpson (ed) *Oxford Essays in Jurisprudence* (Second Series) (1973) 44 at 64 noted by M. Walters, 'Nationalism and the Pathology of Legal Systems: Considering the *Quebec Secession Reference* and its Lessons for the United Kingdom', (1999) 62 *Modern Law Review*, 371 at 393.

recognition can have a certain core (Parliament is sovereign) but an uncertain penumbra (is it continuing or self-embracing sovereignty?).<sup>81</sup>

The nub of the objection to Kelsen's theory might be that it cannot (otherwise than at the expense of continuity), explain "how a legal system might divide into two independent systems by process of law".<sup>82</sup> As Walters has noted:

It is often assumed that an autochthonous constitution can only be achieved by revolutionary act, so that to obtain a local root for a new legal system connections with the old system must be severed in a manner not recognized as lawful by the old system. Kelsen went so far as to argue that if the independence of a new state is gained through the laws of a parent state then the new state's laws can be traced back through a chain of validity to the parent state's laws and therefore the two systems are still in fact one; therefore only an unlawful break with the parent state can secure a separate legal order.<sup>83</sup>

A change in the *grundnorm* has previously been associated with a revolutionary form of government coming to power in such countries as Pakistan, Uganda and Southern Rhodesia. To be sure, in the 1950's it was widely considered the *grundnorm* only ever 'shifted' by revolutionary means.<sup>84</sup> J.W. Harris has observed that Kelsen's theory licensed judges in these countries to accept the legality of the *successful* revolutions occurring in their respective countries, without entering the political arena.<sup>85</sup> F.M. Brookfield has addressed the question of whether a court created under a pre-revolutionary constitution has jurisdiction to recognise a revolutionary regime as lawful.<sup>86</sup> Brookfield notes the majority in *Madzimbamuto v Lardner-Burke* supported a view that "courts, including those created by a written constitution, are

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<sup>81</sup> Oliver, above n 43 at 398.

<sup>82</sup> Finnis, above n 80 at 60.

<sup>83</sup> Walters, above n 80 at 393.

<sup>84</sup> Noted by Oliver, above n 42 at 556 at f/n 140.

<sup>85</sup> J. W. Harris, 'When and Why Does the Grundnorm Change,' (1971) 29 *Cambridge Law Journal*, 103 at 104.

<sup>86</sup> F.M. Brookfield, *Waitangi & Indigenous Rights* (1999) at pp 23-28.

authorised and required to decide when and if a revolutionary regime has become lawful... It is assumed that the court has a supra-constitutional jurisdiction, exercisable in extreme revolutionary circumstances". However, Brookfield also notes another view:

The rule that judges cannot inquire into the validity of the constitution under which they hold office, clearly applicable in circumstances that are not revolutionary, applies also in circumstances that are. As such, they are precluded from recognising a new revolutionary regime as lawful, even if it is firmly established. They must maintain this non-recognition as long as the revolutionaries permit the court to function or until the judges themselves resign or are driven from office.”<sup>87</sup>

To the present writer's knowledge no Australian High Court Justice has expressly recognised (curiously) the need to presuppose a new Australian *grundnorm*. This is in spite of the fact that some have been able to discern a new legal basis for the Constitution; ie. popular sovereignty. However, according to President Mahoney of the New South Wales Court of Appeal in *Egan v Willis and Cahill*: “The effect... and purpose [of the Australia Act, was] to alter the *grundnorm* of the Australian legal system”.<sup>88</sup> So too, some academic writing is supportive of the promotion of popular sovereignty as an explanation for the political-legal basis of the Australian Constitution, but at the same time is paradoxically reticent about assessing the change as paradigmatic.<sup>89</sup> As such, concerns to emphasise complete continuity ‘at all costs’ might obfuscate an explanation based upon a process which is evolutionary but which yields an outcome measured in terms of the changed basis of valid legal authority for Australia. After all, “where a revolution is, or is

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<sup>87</sup> *Ibid.*

<sup>88</sup> (1996) 40 NSWLR 650 at 685.

<sup>89</sup> See Winterton, above n 17. Indeed, those writers who promote popular sovereignty and refuse to acknowledge the possible revolution, no matter how painful, might only be considered to be “performing a praiseworthy piece of propaganda”: J.W. Harris, above n 85 at 124-125. But contrast those jurists who have been prepared to assess the elevation of popular sovereignty as amounting to a change in the “*grundnorm* of constitutional interpretation”: H. Wright, ‘Sovereignty of the People - The New Constitutional *Grundnorm*?’ (1998) 26 (1) *Federal Law Review* 165 at 165. See also L. McDonald, ‘The Denizens of Democracy: The High Court and the “Free Speech” Cases’ (1994) 5 *Public Law Review* 160 at 161-162.

predicted to be going to be, successful, Kelsen's theory (directly) requires the legal scientist... to presuppose a new *grundnorm*".<sup>90</sup>

### ***Summary of the achievement of autochthony***

For Australian constitutional theory, any choice in affirming in constitutional terms, a local legal and sovereign source for the Constitution might ultimately include consideration of the following:

- (a)** assessing Westminster sovereignty as self-embracing (ie able to cede sovereignty) and recognising that a legislative cession of sovereign power has occurred; or
- (b)** assessing Westminster sovereignty as continuing thereby requiring Australia to institute a peaceful and legal revolution by implementing some sort of 'technical' break in legal continuity (see chapter eight);
- (c)** assessing Westminster sovereignty as continuing or self-embracing (there is no absolute standard here) but merely 'claiming' that legal continuity has been broken (see chapter eight);
- (d)** assessing Westminster sovereignty as continuing or self-embracing, but recognising that a new local attitude has taken hold which is more in tune with Australian needs and which amounts *de jure* (Hart or Kelsen) to a new efficacious source of authority (see chapter eight).

On view (a) the actions of the parent are legally decisive. On views (b) to (d) the actions of the offspring are legally decisive. On view (b) legal continuity is broken. On views (c) and (d) the process is evolutionary (thereby in effect preserving continuity) but tacitly revolutionary, thereby according with Marshall's criteria to be discussed in chapter eight.

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<sup>90</sup> Harris, above n 85 at 126.

(e) the possibility also remains as leaving the question open until it really needs to be decided in practice, as opposed to theory (after all Australia's autonomy is secure on any analysis), although the theoretical should be satisfactory practically. Even though many would assert that practically the continuing sovereignty of the United Kingdom Parliament has "no relation to realities" and is therefore "suspect",<sup>91</sup> it would be undesirable to leave a theoretical explanation of independence unresolved.

Indeed, theory should form the basis for practice and form should follow function. Dysfunction between theory and practice and form and functionality are the fault lines that become dysfunctional chasms when the politico-legal order is under stress and the need for overt, well understood and respected 'rules of recognition' need to be deployed to ensure the stability, certainty, legality and efficacy of government.

## **PART C – THE AUSTRALIA ACTS: THE AUSTRALIAN PEOPLE OR PARLIAMENTS AS HEIRS?**

In 1990 Greg Craven stated:

Perhaps the most profound issue to arise in the wake of the Australia Acts relates to the present legal basis of the Australian Constitution. Traditionally, that basis was thought to lie in the quality of the Constitution as an enactment of the United Kingdom Parliament. However, since the apparent disappearance of the power of that Parliament to legislate for Australia via section 1 of the Australia Acts, the triumphant suggestion is increasingly made that the true basis of the Constitution now lies simply in its acceptance by the people.<sup>92</sup>

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<sup>91</sup> Murphy J in *Bistricic v Rokov* (1976) 135 CLR 552 at 566-567 quoting and commenting on Viscount Sankey L.C.'s judgment in *British Coal Corporation v The King* [1935] AC 500 at 520.

<sup>92</sup> G. Craven, 'A Few Fragments of State Constitutional Law', (1990) 20 *Western Australian Law Review*, 353 at 360.

In an attempt to give effect to the Australia Acts and the indisputable position that Australia is an independent sovereign nation, some members of the High Court “expressed interest in finding an autochthonous source for the Australian constitutional system”.<sup>93</sup> However, it is not clear that the scheme of the Australia Acts amounted to such an invitation.<sup>94</sup> The Australia Acts certainly dealt unequivocally with autonomy, but in recognising this, some Justices made a further step in reasoning, which does not necessarily follow. The traditional legal basis of the Australian Constitution (the Imperial Parliament) was discarded because it can no longer sustain the perceived practical reality of a substituted basis; that is, the sovereignty of the Australian people: see particularly Mason CJ,<sup>95</sup> Deane and Toohey JJ<sup>96</sup> and McHugh J<sup>97</sup> and those proponents listed in Table 1 in chapter one.

The present writer agrees with comments that these assertions amount to a “radical relocation of sovereignty”<sup>98</sup> and “grossly exaggerate the impact of the Australia Acts”.<sup>99</sup> As Daley has noted:

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<sup>93</sup> Aroney, above n 31 at 284.

<sup>94</sup> In contrast, any purported British attempt to exercise legislative authority for Australia would amount to a clear invitation, if not imperative for the Court to deny the force of law to such enactments.

<sup>95</sup> *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138.

<sup>96</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70-72. *Leeth v The Commonwealth* (1992) 174 CLR 455 at 484 and 486. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 89 per Toohey J, where his Honour in effect repeated his and Deane J’s view from *Nationwide News*.

<sup>97</sup> *Ridgeway v The Queen* (1995) 184 CLR 19 at 91. *McGinty v Western Australia* (1996) 186 CLR 140 at 230 and 237. Further Justices such as Brennan CJ (when on the bench) and Gleeson CJ, Gaudron (when on the bench), Gummow and Kirby JJ are increasingly concerned to look for ways to protect individual rights, and all accept as a starting point that the people of Australia are sovereign. However, it would appear that neither Gaudron nor Gummow JJ have explicitly claimed that such sovereignty is now the legal basis of the Constitution. K. Mason has suggested that while “other Justices have not been as fulsome [as Mason CJ and Deane and Toohey JJ, in recognising popular sovereignty]… only Dawson J has repudiated it expressly”: K. Mason, ‘Citizenship’ in C. Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 35 at 37-38.

<sup>98</sup> McDonald, above n 89 at 182.

<sup>99</sup> Winterton, above n 17 at 10. Although Professor Winterton argues “the Constitution has long been based on popular sovereignty”: *Ibid* at 9.

“The attainment of Australian independence does not necessarily imply that authority for the entire legal system transfers to another source”.<sup>100</sup> See also the comments of P. Hanks and D. Cass: such independence “need not affect the original rationalisation for the paramountcy of the Commonwealth Constitution”.<sup>101</sup> So too Winterton has said: “[A]t least as a matter of logic, it is difficult to see how the Australia Act could have effected the legal authority which the Constitution derived from enactment at Westminster”.<sup>102</sup> Further, as Moshinsky has astutely noted:

It is not clear the legal independence of Australia brought about by the passage of the Australia Acts *has altered the source of the authority of our Constitution...* Even if the Australia Acts have effectively terminated the power of the United Kingdom to legislate for Australia in the future, it does not necessarily follow that the laws of the United Kingdom [he gives s 8 of the Statute of Westminster as an example] ceased to hold their paramount status.<sup>103</sup> (emphasis added)

The present writer agrees with McDonald that the Australia Acts should correctly be interpreted as a “remedial redistribution of Imperial sovereignty in favour of the Australian parliaments”.<sup>104</sup> To be sure, the Australia Acts primarily dealt with the legislative power of Australian parliaments by merely regularising and recognising Australia’s legal separation. In no way did those Acts “invoke the people as a legislator”. In effect the *supremacy* of the Australian parliaments under the Constitution was substituted for the *sovereignty* of the Westminster Parliament. As noted by Professor Finn (as he then was), this views the “parliaments *under* our Constitutions as the ‘Supreme Sovereigns’ in this country”.<sup>105</sup> (emphasis added) Lindell and Rose have commented: “The residual ability of the United Kingdom Parliament to deal with

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<sup>100</sup> Daley, above n 20 at ch 5.5.4.

<sup>101</sup> P. Hanks and D. Cass, *Australian Constitutional Law* (1994) at 18.

<sup>102</sup> Winterton, above n 17 at 6.

<sup>103</sup> Moshinsky, above n 17 at 144.

<sup>104</sup> McDonald, above n 89 at 182.

<sup>105</sup> P. Finn, ‘A Sovereign People, A Public Trust’, in P. Finn (ed.) *Essays on Law and Government Vol 1* (1995) at 4 at f/n 24.

Australia's constitutional arrangements was transferred (by s 15(1) of the Australia Act 1986 (UK)) to all the Australian parliaments acting together".<sup>106</sup> Thus the Commonwealth Parliament's power (although primarily dealt with by the Statute of Westminster) was further enhanced by the passage of the Australia Acts.

However, it could be said the real beneficiaries of the Australia Acts were the Australian States.

In 1999, the Queensland Constitutional Review Commission in an *Issues Paper* questioned whether the Australia Acts, while no doubt freeing State parliaments from Imperial control, went so far as to displace the theory of parliamentary supremacy from application to such parliaments. If so, could State Parliaments "now bring in, even welcome in, the people, and establish their superior authority over the three traditional branches of government?"<sup>107</sup> In short, after the Australia Acts, is the legal basis of the Queensland Constitution now the sovereignty of the Queensland people? An answer was not forthcoming from the Commission, suffice to say that the discussion was concluded by mooted that a move to a republic and/or a democratic "invocation of the people as a legislator" would "more readily allow the reshaping of institutions and power relationships".<sup>108</sup>

In 2000, the Queensland Constitutional Review Commission in a Report arising from the 1999 *Issues Paper*, included a draft Queensland Constitution. The Preamble read in part:

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<sup>106</sup> G. Lindell and D. Rose, 'A Response to Gageler and Leeming: "An Australian Republic: Is a Referendum Enough?"' (1996) 7 *Public Law Review* 155 at 160.

<sup>107</sup> Queensland Constitutional Review Commission above, n 8 at 511.

<sup>108</sup> *Ibid.*

“Parliament’s reasons for enacting this Act are-

1. Since the Australia Acts 1986 no law made by the Parliament of the United Kingdom extends to the State of Queensland.
2. Previously the Parliament of the United Kingdom was the ultimate authority for the Acts, Laws and Documents relating to the Constitution of the State of Queensland.
3. We, the people of the State of Queensland, wish to continue as free and equal citizens under the Rule of Law, and to be governed in accordance with the democratic processes contained in this Constitution...”<sup>109</sup>

This preamble is the democratic “invocation of the people as a legislator” referred to in the *Issues Paper* (a declaration of popular sovereignty) and hence such a Constitution’s legal basis would be the sovereignty of the Queensland people. However, there is no indication as to when such a Constitution will be enacted. The Commonwealth Government might consider such a declaration in relation to the Commonwealth Constitution (discussed in chapter eight). At present though, the Queensland Constitution (as with other State Constitutions) appears to have less scope than the Commonwealth Constitution for popular sovereignty as a basis. This is because in Queensland, only four matters (unlike s 128) are controlled by the constitutional referendum.

As a result of the severance of the residual constitutional links with the United Kingdom being achieved by relying on a combination of the Australian Constitution’s provisions and Westminster legislation, a truly autochthonous Australian Constitution was not achieved.<sup>110</sup> Thus the assertion of popular sovereignty to resolve this is, in terms of Australia’s constitutional

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<sup>109</sup> Queensland Constitutional Review Commission, *Report* (2000) from web, 8/9/04: <http://www.constitution.qld.gov.au/review/final>; 8.

<sup>110</sup> J. Thomson, ‘Altering The Constitution: Some Aspects of Section 128’ (1983) 13 *Federal Law Review* 323 at 344.

arrangements, a too ahistorical and nebulous rule of recognition for a reliable, stable and transparent basis for the politico-legal order. Justice Hutley has said: “Australia does not have to pretend that power comes from the people. The polity has an historical legitimacy which America does not have”.<sup>111</sup> Smallbone has said that “In an age which has demonstrated that democracy can exist without constitutional recognition of the concept of popular sovereignty, there is no need to adopt so dangerous and unsatisfying notion into the fundamental fabric of our Constitution”.<sup>112</sup> Daley notes that popular sovereignty is not even “a desirable fiction”.<sup>113</sup>

Moreover, many of the questions posed by P. Russell as to whether Canadians have constituted themselves a sovereign people, also apply to Australians: For example, the current Australian debate about popular sovereignty almost entirely excludes any notion of indigenous sovereignty or reconciliation. In this sense, “so deep are [Australians] current differences on fundamental questions of political justice and collective identity that [Australians] may now be incapable of acting together as a sovereign people”.<sup>114</sup> Further, which people or combination of peoples should be constitutionally sovereign? As Kirk has noted: “[T]here is a question of who and where ‘the people’ are”.<sup>115</sup> So too Craven has noted:

The theorists of popular sovereignty have not, perhaps, sufficiently refined their thesis, or appreciated its full implications. The problem with any theory of popular acceptance, as has long been realized, lies in the concept of the people: ‘Which people, and in what units?’, the perennial question rings out. The sorry truth is that to say that the Australian Constitution rests on popular acceptance could mean that it derives its validity from any of at least three quite different sources, the selection of any one of which might have profound implications for Australian constitutional law.<sup>116</sup>

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<sup>111</sup> F. Hutley, ‘The Legal Traditions of Australia as contrasted with those of the United States’ (1981) 55 *Australian Law Journal* 63 at 64.

<sup>112</sup> D. Smallbone, ‘Recent Suggestions of an Implied “Bill of Rights” in the Constitution, Considered as a Part of a General Trend in Constitutional Interpretation’ (1993) 21 *Federal Law Review* 254 at 269.

<sup>113</sup> Daley, above n 20 at ch 5.6.1

<sup>114</sup> P. Russell, *Constitutional Odyssey: Can Canadians be a Sovereign People?* (1992) at 5.

<sup>115</sup> Kirk, above n 28 at 341.

<sup>116</sup> Craven, above 92 at 360.

Many popular sovereignty proponents however, are not deterred by mere history (constitutional or otherwise) and consequently “admit that the paradigm... is not justified by history, but argue that this dissonance is irrelevant”.<sup>117</sup>

*If* one adopts the self-embracing theory of parliamentary sovereignty, it might well be necessary to discern a local legal constitutional source.<sup>118</sup> That is, on one view the Australia Acts created a void or gap in constitutional authority. Professor Finn (as he then was) has referred to an “apparent void, as divergent views can be taken on this matter”.<sup>119</sup> See also Aroney: “The Courts will then [after adopting the self-embracing view of sovereignty] have to search for an autochthonous source of bindingness”.<sup>120</sup> As such the question may come down to either s 15 of the Australia Acts or s 128 as the source. See Aroney: “If the Imperial Parliament has now abdicated its legislative powers over Australia, legal theory seems to require that we understand at least one of these powers as the source, rather than a tributary, of the stream”.<sup>121</sup> However, others are more forthright about the existence of a void. C. Gilbert says: “Now that the British Parliament has abdicated all remaining legislative power over Australia, it will be necessary to find a new legal *grundnorm* for the Australian constitutional and legal system”.<sup>122</sup>

If (as discussed in chapter two), the *grundnorm* is that the Constitution ought to be obeyed, Gilbert’s assertion that s 128 of the Constitution and s 15 of the Australia Act are competing *grundnorms* can be dismissed. For, Gilbert’s argument is premised on the assumption that a

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<sup>117</sup> Wright, above n 89 at 184.

<sup>118</sup> See also M. Kirby, ‘Constitutional Interpretation and Original Intent’ (2000) 24 *Melbourne University Law Review* 1 at 7.

<sup>119</sup> Finn, above n 105 at 4 at f/n 24.

<sup>120</sup> Aroney, above n 31 at 285.

<sup>121</sup> *Ibid* at 287.

<sup>122</sup> C. Gilbert, ‘Section 15 of the Australia Acts: Constitutional Change by the Back Door’ (1989) 5 *Queensland University of Technology Law Journal* 55 at 66.

“method of constitutional change corresponds to [a] *grundnorm*”. <sup>123</sup> This is erroneous, for as noted earlier, the *grundnorm* of Australia is not the Constitution much less one (albeit important) section of the Constitution. Further, even if Gilbert’s assertion is accepted, Dias has interpreted Kelsen as stating that a system of law cannot be founded on two conflicting *grundnorms*. <sup>124</sup> Gilbert is aware of this anomaly, but says that s 128 and s 15 “do not clash unless or until one is invoked in an effort to downgrade the importance of the other”. <sup>125</sup> This is no answer, as neither of the two so-called *grundnorms*, separately allow for all legal norms to be interpreted as a non-contradictory field of meaning. For example, section 15 says nothing about the validity of state laws in conflict with Commonwealth laws. The Constitution does, so all legal norms of the Australian federation (Commonwealth laws and state laws) can be interpreted, when the Constitution is obeyed, as a consistent field of meaning. Failure in this respect takes away all semblance of a *grundnorm* which “supremacy constitutes the assurance that there will be no conflict within a system”. <sup>126</sup>

Whatever the current state of judicial and academic recognition of a new *grundnorm* or ‘rule of recognition’, if Australians do not democratically choose the local legal source of their constitution (by autochthonous enactment, patriation or otherwise), how can they be sure the judges or jurists will choose the correct one for them? It is recognised that every constitution must have a legal source of authority, however, popular sovereignty is only one possibility. Others include authority derived from a divine being, or from the State itself, or from indigenous-non-indigenous reconciliation or even from provincial autonomy reflected in a federal

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<sup>123</sup> *Ibid* at 68.

<sup>124</sup> R. Dias, *Jurisprudence* (1970)(3rd edition) at 411.

<sup>125</sup> Gilbert, above 122 at 68.

<sup>126</sup> Latham, above n 15 at 523.

compact.<sup>127</sup> This question goes to heart of the issue of institutional design and the division of labour and distribution of power envisaged by the Federation Founders. The Founders were clear that Parliament not the High Court was to be the basic source of legal change in the Commonwealth. So for the High Court to reverse this, and discern a legal basis in popular sovereignty, amounts to a revolution indeed.

In spite of the Australia Acts limited mandate, many sponsors of popular sovereignty have cited their passage as the decisive and defining moment for the ascendancy of popular sovereignty. Mason CJ in *ACTV* was emphatic: “[T]he Australia Act 1986 (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people”.<sup>128</sup> On one level it is difficult to dispute the first proposition of Mason CJ’s statement. However, does it necessarily follow that the beneficiary of this relinquishing of sovereign power is the Australian populace? Where is it recognised, and by what process was it, that this redistribution of Westminster sovereignty should become the property of, and ‘embedded in’, the Australian people? The Australia Acts make no reference to ‘the people of Australia’, let alone anything that could be construed as a declaration of popular sovereignty, or an invocation of the ‘people as a legislator’. Moreover, the scheme of the Australia Acts was not approved by referendum,<sup>129</sup> but by s 51(xxxviii) of the Constitution (that is, by the

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<sup>127</sup> See generally F. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (1977) at 248-249. The Supreme Court of Ireland has accepted the legitimacy of both the Irish Constitution and the Irish judiciary are derived from natural law- principles of reason available to all self-reflective persons: Daley, above n 20 at ch 10.2.

<sup>128</sup> (1992) 177 CLR 106 at 138. “Mason CJ, therefore, spoke of the people as heirs to the British Parliament”: L. Zines, *The High Court and the Constitution* (1997) at 394. However, Professor Zines reconciled that as the term ‘sovereign’, was being employed in a different sense from parliamentary sovereignty, “the sovereignty of the people is not a substitute for the sovereign British parliament, but something quite different”: *Ibid* at 394-395.

<sup>129</sup> In *McGinty* (1996) 186 CLR 140 at 274-275, Gummow J noted that “none of the Australia Acts followed approval at referendum”. This “purely parliamentary process” was therefore “long on legality but short on democratic legitimacy”: Oliver, above n 42 at 588 at f/n 227. Although, surely Parliament is the extended vehicle for democratic participation.

Commonwealth Parliament at the request of the parliaments of all the States), as well as United Kingdom legislation at the request, and with the consent, of the Commonwealth government and parliament; s 4 Statute of Westminster. As such, the process took place within a federal (not popular) framework; based squarely on state unanimity.

Undeterred however, many sponsors point to the fact that an unstated premise of the Australia Acts is that s 128 is now the only method of altering the Constitution, and that by virtue of its popular provisions, the people (as a collective entity) are now the legal source of constitutional authority. In this respect many rely on Bryce's notion that "ultimate sovereignty resides with the authority or body which... may amend the constitution".<sup>130</sup>

However, a number of points can be made:

***s 128 is expressed in federal terms not national terms***

First, the peoples' will in s 128 is expressed as residents of the component units of the federation, the States, not in a conglomerate mass of national citizens. As such it is accepted that Australia enjoys popular sovereignty of some sort in s 128 of the Constitution, but it is best described by Quick and Garran as a *quasi*-sovereignty.<sup>131</sup>

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<sup>130</sup> J. Bryce, *Studies in History and Jurisprudence* (1901) Vol 2 at 53. See chapter eight for other arguments that have been mooted to sustain the theory of popular sovereignty as the source of authority of the Constitution; ie, approval of the Constitution by 'acceptance by acquiescence' and/or by 'adoption by referenda'

<sup>131</sup> See n 30 above for Quick and Garran's comment that the Australian people possess only a "quasi-sovereignty". In this sense one might see parallels with Austin's view of sovereignty residing with the Monarch, the Lords *and* the electors.

### *The people do not possess plenary power under s 128*

Secondly, the plenary legal power which many seem to suggest resides in the people, does not in fact exist. Any sovereignty of the Australian populace is certainly not ‘equivalent’ to that formerly wielded by the Imperial Parliament. It is sufficient to note that the Australian people have a *joint* legal role (with the Commonwealth Parliament and the Governor-General) under s 128. The democratically elected executive must persuade the Commonwealth Parliament to initiate constitutional change before the people are invited into the process through a referendum to either approve or disapprove of the proposed alteration, that is, to express the popular will.

However, this expression of popular will is not the same as sovereignty. See the comments of Fraser: “Section 128 establishes a procedural condition precedent to the exercise of the constituent power vested in the Commonwealth Crown-in-Parliament, not an alternative locus of sovereign authority”.<sup>132</sup> As such, the peoples’ express role is prescribed and entrenched by the terms of the Constitution, and it is neither necessary (nor appropriate) to imply any further constitutional role to them as a sovereign.<sup>133</sup> To ascribe an additional legal role to the people (as identified in s 128) adds nothing to the *legal* validity of the Constitution.<sup>134</sup> As Professor

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<sup>132</sup> Fraser, above n 19 at 217.

<sup>133</sup> Thus, in legal terms, are the following statements at all helpful: “Only the people can now change the Constitution”: *McGinty* (1996) 186 CLR 140 at 237 per McHugh J, and “It is a Constitution the text of which the people alone can change: s. 128”: *Nationwide News* (1992) 177 CLR 1 at 47 per Brennan J. It must be remembered that the people alone can do no such thing. If “the people [of Queensland] are required to take two bites to change the [Queensland] Constitution”: Queensland Constitutional Review Commission, above n 8 at 907, the people of the Commonwealth are required to take three bites. First, the people of Australia have to elect a parliamentary majority that produces a Commonwealth government that wishes to facilitate constitutional reform. (The government must then present the proposed alteration in the correct manner to the people). Secondly, the people must record a majority vote in favour of the proposal. The third bite is that the people (as inhabitants of the States), must achieve a majority vote in at least four States. (The parliament must then legislate to effect the approved change).

<sup>134</sup> The Australian people must be s 128, but s 128 cannot change everything in the Australian constitutional matrix, ie, the Constitution Act. So the Australian people’s power must come not from the Australia Acts or s 128, but from something preceding both. The people also have a

Winterton has astutely noted: “The s 128 electors derive their authority from the Constitution and, therefore, logically cannot constitute the source of its authority”.<sup>135</sup> Daley has noted: “If Australia has ‘popular sovereignty’ because the people have the power to amend, then to the same extent Australia has ‘Commonwealth Parliamentary sovereignty’. Indeed it is arguable that the Commonwealth Parliament’s power to propose rather than merely veto amendment is the greater power”.<sup>136</sup>

### ***The people might not be the sole repository of constitutional change***

In 1986 Lindell noted that:

What is... not so explicit is the answer to the question as to who is the ultimate beneficiary of the legal power previously capable of being exercised by the United Kingdom Parliament to alter the Constitution, notwithstanding the existence of the power to alter the Constitution contained in s 128 of the same document. The efficacy of arguing that the Australian people now enjoy *sole* power to alter the Constitution by virtue of s 128 and, on a broader note, that the legally binding character of that document is now derived from the will of the people, would seem to be significantly undermined if it can be found that the power to alter the constitution also resides elsewhere...<sup>137</sup> (emphasis added)

Section 15 of the Australia Acts also provide for constitutional change, (possibly even, though not likely, without popular approval). See the comments of Fraser: “Far from establishing the “ultimate sovereignty of the people” section 15 of the Australia Act (UK) actually made it possible for the Commonwealth and State parliaments acting together to bypass section 128...”<sup>138</sup>

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fundamental and essential continuing *political* role, which they exercise by directly electing both Houses of the Commonwealth Parliament at regular elections.

<sup>135</sup> Winterton, above n 17 at 7 at f/n 47.

<sup>136</sup> Daley, above n 20 at ch 2.5.1.

<sup>137</sup> G. Lindell, ‘Why is Australia’s Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence’ (1986) 16 *Federal Law Review* 29 at 39. This has been noted as the ‘equivalence of sovereignty’ argument.

<sup>138</sup> Fraser, above n 19 at 217. See also Lindell, *Ibid* at 40: The Australia Acts might “create a new method of altering the Constitution without complying with s 128”, and Winterton, above n 17 at 8. Indeed since it has been widely accepted that s 128 is not authorised to alter the Constitution Act, but s 15(1) of the Australia Acts (admittedly in conjunction with other provisions) can be used to alter both the Constitution Act and the Constitution (with the

Note also Daley's comments: "To the extent that British parliamentary sovereignty impaired popular sovereignty before 1986, s 15 of the Australia Acts appears to have transferred that power not to the people, but to the Commonwealth Parliament".<sup>139</sup>

Further, controversial models of judicial alteration occasionally arise, which is an example of the High Court appropriating the authority of the people without the consent of the people. Notable is Justice Toohey's Darwin speech:

[T]he courts would over time articulate the content of the limits on [Commonwealth] power arising from fundamental common law liberties. It would then be a matter for the Australian people whether they wished to amend their Constitution to modify those limits.<sup>140</sup>

As Michael Coper rightly noted, this promotes the notion "that once the High Court has divined the true meaning of the existing Constitution, further change [to alter that view] is a matter for the people".<sup>141</sup> For a judicial acknowledgment of judicial alteration, see the comments of McHugh J in *McGinty*:

I regard the reasoning in *Nationwide News, ACTV, Theophanous and Stephens* in so far as it invokes an implied principle of representative democracy as fundamentally wrong and as an alteration of the Constitution without the authority of the people under s 128 of the Constitution.<sup>142</sup>

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appropriate popular support), s 15(1) is a better measure of municipal sovereignty. If not a better measure, it certainly impairs the concept of popular sovereignty *per se*. To some extent this view underrates the operation of s 15(3) of the Australia Acts. This is justified because use of this subsection could be inimical to the States' interests. In contrast, for a clear recognition of the supremacy of s128 over s 15 see R.D. Lumb, 'The Bicentenary of Australian Constitutionalism: The Evolution of Rules of Constitutional Change' (1988) 15 (1) *University of Queensland Law Journal* 3. See also Winterton, above n 17 at 9. See also Gilbert, above n 122 at 67 where he views s 128 as "the new Australian legal *grundnorm*".

<sup>139</sup> Daley, above n 20 at ch 6.4.5.

<sup>140</sup> J. Toohey, 'A Government of Laws, and Not of Men?', (1993) 4 *Public Law Review* 170.

<sup>141</sup> M. Coper, 'The People and the Judges: Constitutional Referendums and Judicial Interpretation' in G. Lindell, (ed.) *Future Directions in Australian Constitutional Law*, 73 at 77.

<sup>142</sup> (1996) 186 CLR 140 at 235-236.

Williams refers to Justice McHugh's comments and declares them to be an example of popular sovereignty underpinning judicial restraint. This is because "it is inappropriate for judges... to shape the Constitution by implying new rights as this would be to usurp the role of the people... to amend the [Constitution]".<sup>143</sup>

### ***The sovereignty of the people might not be continuing***

Fifthly, the authority of s 128 is by no means constant or continuous. If one adopts a self-embracing view of s 128, "the [tripartite] body with power to amend at one time may confer that power on another body".<sup>144</sup>

Thus there seems an extreme paradox. The very same jurisprudence (implied rights that attempts to legitimise itself on popular sovereignty) in an effort to protect the fundamental rights of the sovereign people, may be draining what little sovereignty the people ever may have had, and concurrently undermining their claim to be the fundamental basis of the Constitution. After all "the jurisdiction of the Court is here expanded at the expense of the body which is supposed to represent the will of the electors".<sup>145</sup>

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<sup>143</sup> G. Williams, *Human Rights under the Australian Constitution* (1999) at 94-95.

<sup>144</sup> Noted by Daley, above n 20 at ch 2.3.4: After all, s 128 does not "forbade self-reference".

<sup>145</sup> G. Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in G. Lindell (ed.) *Future Directions in Australian Constitutional Law* (1994) at 38.

The following table might briefly be used to interpret the passage of the Australia Acts and the cession of sovereignty by the Imperial Parliament:

**TABLE 5 – PASSAGE OF THE AUSTRALIA ACTS**

<b>Before 1986</b>	<b>After 1986</b>
<b><u>Legal</u></b>	
Australia was legally derived and subordinate (legal source was U.K. Parliament)	Australia is <i>still</i> legally derived but not subordinate (legal source is U.K. Parliament)
* Although there were federal <sup>146</sup> /state variations, Australia was subordinate on legislative, executive and judicial levels before 1986.	
<b><u>Historical</u></b>	
Australia was historically derived but not subordinate (historical source was U.K. Parliament)	Australia is historically derived but not subordinate (historical source is U.K. Parliament)
* There will never be any point denying this derivation. <sup>147</sup>	
<b><u>Political</u></b>	
Australia was politically independent and hence not subordinate	Australia is politically independent and hence not subordinate
* Although Australia's political institutions derive from Westminster, it is clear Australia had attained diplomatic freedom (political and international independence) sometime before 1986.	

<sup>146</sup> Section 4 of the Statute of Westminster 1931 (Imp) provided for British legislation applying to the Commonwealth only by request and consent. Australia adopted the Statute in 1942, but taking effect from the commencement of World War II in 1939. See Statute of Westminster Adoption Act 1942 (Cth).

<sup>147</sup> See also Oliver, above n 41 at 2, for the same claim in relation to Canada. See Marshall, *Constitutional Theory* above n 14 at 60 for the same claim in relation to South Africa.

## CONCLUSION

After 1986, in light of Australia's constitutional development being evolutionary and not revolutionary, the current legal source is still grounded in the historical source. As Daley has noted: “[T]he Australia Acts manifested an intention to sever the future legal relationship between Great Britain and Australia. However, they did not manifest an intention to sever the historic legal relationship”.<sup>148</sup> However, as Oliver has noted “the historical source is not necessarily the current legal source... as many other constitutions show”.<sup>149</sup> Witness Joseph's comment on the New Zealand position: “This development [the Constitution Act 1986 (NZ)] symbolically separated the legal and historical roots of the New Zealand Constitution”.<sup>150</sup> In any event, as Marshall has noted: “[P]reservation of the British historical *and* legal root is compatible with its being the case that the Westminster Parliament is no longer able to legislate for [Australia]”.<sup>151</sup> (emphasis added) In Australia, which has suffered no break in legal continuity, the question is no longer merely academic but also judicial.

This chapter has noted an apparent confusion in the discourse between autochthony and autonomy. Australia's autonomous arrangements are satisfactorily explained by this chapter's emphasis on both complete independence *and* legal continuity. After all, it has been noted that “legitimacy emerging over time can be at least as powerful as legitimacy expressed at a particular

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<sup>148</sup> Daley, above n 20 at ch 5.5.2.

<sup>149</sup> Oliver, above n 42 at 560.

<sup>150</sup> P.A. Joseph, ‘The Legal History and Framework of the Constitution’, Paper delivered to the Institute of Policy Studies “Building the Constitution” Conference. Wellington. New Zealand, 8 April 2000 from web, 11/7/00, [http://www.vuw.ac.nz/inst-policy-studies/conferences/p\\_joseph.html](http://www.vuw.ac.nz/inst-policy-studies/conferences/p_joseph.html); 5.

<sup>151</sup> Marshall, *Constitutional Conventions* above n 14 at 207. Marshall also noted that “if there is no... break in legal continuity the question whether the legal and historical roots are the same is academic and is not likely to be put to the test”: *Constitutional Theory* above n 14 at 60.

moment in a country's history".<sup>152</sup> Moreover, in Australia's constitutional arrangements, continued derivation does not imply continued subordination. If "there is no national indignity in acknowledging legal continuity",<sup>153</sup> one wonders why there is indignation in acknowledging legal derivation. If notions of subordination were discarded, memories of the source of the Constitution in the historical sense would not offend nationalist sentiment.

Despite the fact that it is not intrinsically illogical nor incongruous for the legal authority of the constitution of an independent nation to be derived from an external source,<sup>154</sup> some now consider it unsatisfactory and symbolically inappropriate.<sup>155</sup> However, as Daley has noted: "The symbolism of deriving the Constitution's authority from another country is only superficially inappropriate. At a more mature level, such a derivation is inevitable".<sup>156</sup>

For many, autochthony is sought. But as this chapter has argued, popular sovereignty is not the autochthonous source. Unless Australian constitutional theory assesses Westminster's sovereignty as 'self-embracing', any actions of that Parliament to date have been equivocal and indefinite and autochthony has not been achieved. If Westminster sovereignty is assessed as 'continuing' then the search for autochthony is firmly in the hands of Australians, which is the focus of chapter eight.

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<sup>152</sup> Oliver, above n 42 at 551, noting J. Beetz, 'Reflections on Continuity and Change in Law Reform' (1972) 12 *University of Toronto Law Journal* 129.

<sup>153</sup> Winterton, above n 17 at 7.

<sup>154</sup> *Ibid* at 6.

<sup>155</sup> Aroney, above n 31 at 271, noting Moshinsky, above n 17 at 135.

<sup>156</sup> Daley, above n 20 at ch 5.6.1.

## **CHAPTER EIGHT**

### **AUTOCHTHONY BY THE OFFSPRING: A CRITIQUE**

#### **INTRODUCTION**

For Australian constitutional theory, any choice in affirming in constitutional terms a local legal and sovereign source for the Constitution might ultimately include consideration of the following:

- (a)** assessing Westminster sovereignty as self-embracing (ie able to cede sovereignty) and recognising that a legislative cession of sovereign power has occurred (previous chapter); or
- (b)** assessing Westminster sovereignty as continuing thereby, on the strict view, requiring Australia to institute a ‘disguised revolution’ (peaceful and legal) by implementing some sort of ‘technical’ break in legal continuity (Part A of this chapter);
- (c)** assessing Westminster sovereignty as continuing or self-embracing (there is no absolute standard here) but merely ‘claiming’ that legal continuity has been broken (Part B of this chapter);
- (d)** assessing Westminster sovereignty as continuing or self-embracing, but recognising that a new local attitude has taken hold which is more in tune with Australian needs and which amounts *de jure* to a new efficacious source of authority (Part B of this chapter).

This chapter notes that although there are different approaches to the acquisition of autochthony, an approach relying on democratic and peaceful means is to be preferred. Part A analyses two possible and relatively radical approaches: 1. the repeal of the Constitution Act, or 2. a declaration of popular sovereignty. Either of these approaches might have consequences for the rule of law, and therefore these must also be considered. This chapter argues that if Australia (by democratic means with popular approval) was to repeal the Constitution Act *in toto* or make a

declaration of popular sovereignty, (most comfortably accommodated within a move to a republic), autochthony might be achieved. This is because it would no longer be possible to invoke a logically prior legislative power, namely the Imperial Parliament. Further, the legal source of the Constitution would have shifted from Westminster to Australia. Moreover, these approaches could be categorised as legally *revolutionary*.

Part B of this chapter analyses more moderate or *evolutionary* means for the achievement of autochthony based on looser criteria discerned from the works of noted Commonwealth scholar Geoffrey Marshall.<sup>1</sup> In particular, Marshall's criteria for autochthony are applied to Australia in a detailed manner. Peter Hogg has applied the criteria to Canada, and P.A. Joseph and F.M. Brookfield have applied them to New Zealand. To date the Marshall test has not been applied in scholarly writing about Australia. Part C briefly discusses opposing juristic approaches as to why the Australian Constitution is binding in an autochthonous sense. It notes that whereas legal and political sources were once thought to be best kept distinct, this appears under threat.

## ACTIONS OF THE OFFSPRING: HISTORY IN THE MAKING

Autochthony becomes significant as one means of achieving political independence, or, as a way of constitutionalising political autonomy into a formal legal State through the identification of an autochthonous source of valid authority. Australia has achieved both independence and autonomy. Both have been achieved without breaking the chain of constitutional validity traceable back to the United Kingdom and without much reference to the notion of autochthony.

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<sup>1</sup> G. Marshall, *Constitutional Theory* (1971).

As Justice Kirby has noted:

Dire warnings were given of the perils that awaited any severance of the chain, whether in the name of autochthonous legitimacy or of facing up to revolutionary reality. In Australia, we missed the first and have happily avoided the second.<sup>2</sup>

Although the desire to achieve autochthony (remaining within or leaving the Commonwealth) is not always connected with the desire to achieve republicanism, autochthony for Australians is unlikely to be an isolated phenomenon. However, political forces previously evident in other former self-governing dominions such as South Africa (apartheid) and Ireland (conflict with Britain), and in India (independence), are not present in Australia.<sup>3</sup> In discussing the possible methods of achieving autochthony, Mark Moshinsky's 1989 article is valuable. However, he only discussed re-enacting the current monarchic constitution. He did not question the effect of removing the Crown in the search for autochthony, but for the purpose of his labours, he assumed that "the Constitution itself would be re-enacted in identical terms".<sup>4</sup>

Whilst this is a possibility, it seems more likely that any Australian constitution-making in the twenty-first century will undoubtedly have a republican dimension. Any removal of the Crown and substitution with the sovereignty of the people adds another dimension to the project. If the removal of the Crown were achieved by unauthorised means there would be negative consequences for the chain of legal continuity, but positive consequences for autochthony. If the removal of the Crown is achieved by authorised means, the converse may be true. By whatever means republicanism is achieved, the people must be elevated to a legal constitutional role to replace the Crown, so that the arms of government are constantly reminded of where they derive

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<sup>2</sup> M. Kirby, 'The Struggle for Simplicity: Lord Cooke and Fundamental Rights,' Speech Delivered to New Zealand Legal Research Foundation, 4-5 April 1997, from web, <http://www.hcourt.au/cooke.html>; 2.

<sup>3</sup> M. Moshinsky, 'Re-enacting the Constitution in an Australian Act' (1989) 18 *Federal Law Review* 134 at 151.

<sup>4</sup> *Ibid* at 137.

their constitutional power.<sup>5</sup> Thus if it was felt that an autochthonous constitution was desirable because the current constitutional arrangements are unsatisfactory, a number of legally revolutionary methods to achieve autochthony may be pursued. Two obvious methods (the repeal of the Constitution Act and a declaration of popular sovereignty) will be discussed shortly.

## PART A- THE STRICT VIEW OF AUTOCHTHONY

According to the strict orthodox view, to achieve autochthony there must occur a contrived break in legal continuity, usually by means of adopting new constitutional arrangements by peaceful legal revolution, but in a manner unauthorised by the pre-existing constitution.<sup>6</sup> Oliver (as does Wheare, Joseph and Moshinsky) gives the Irish Constitution as an example of being “no longer connected to Westminster; it now has a root in popular sovereignty”. He then continues: “[T]his transition was revolutionary (at least in the legal sense) or autochthonous...”<sup>7</sup> Although sounding drastic, such a ‘revolution’ would be benign in the Australian context, as “all that is required is to change a legal principle without changing in any way the legal behaviour”; or to replace the

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<sup>5</sup> In the present writer’s view, a strong argument can be developed against the failed 1999 Australian Republican Movement republican model for failing to adopt such a principle; see chapter nine.

<sup>6</sup> The strict view was espoused by K. Wheare, *Constitutional Structure of the Commonwealth* (1960) ch. 4, at 111. It was also asserted by S. De Smith and R. Brazier (eds), *Constitutional and Administrative Law* (7th ed 1994) at 70. Also by J. Thomson, ‘Altering The Constitution: Some Aspects of Section 128’ (1983) 13 *Federal Law Review* 323 at 344-345. Also by E. Campbell, ‘An Australian-made Constitution for the Commonwealth of Australia’ in *Report of Standing Committee D to the Executive Committee of the Australian Constitutional Convention* (1974) 95 at 100, and approved by Moshinsky, above n 3 at 150-151, thereby requiring him to conclude that “if constitutional autochthony is all important, only the [peaceful legal revolution] method will do”.

<sup>7</sup> P. Oliver, ‘Canada, Quebec, and Constitutional Amendment’ (1999) 49 *University of Toronto Law Journal* 519 at 560. So too “the New Zealand Constitution is not derived from an uninterrupted chain of legal processes but is instead ‘self-existent’”: P. Oliver, ‘Cutting the Imperial Link’ in P.A. Joseph (ed) *Essays on the Constitution* (1995) 368 at 390 analysing the work of F.M. Brookfield, ‘Kelsen, the Constitution and the Treaty’ (1992) 15 *New Zealand Universities Law Review* 163.

weary Imperial turtle with an Australian one.<sup>8</sup> Although in enacting such an autochthonous Constitution, the people should realise they are exercising both their ‘political’ and ‘legal’ sovereignty,<sup>9</sup> and (on one view) at the same time, breaking the chain of legal continuity that can be traced back (with the exception being from 1649 to 1660) for almost one thousand years.<sup>10</sup>

Such considerations were canvassed in the 2001 case of *Republic of Fiji v Prasad*<sup>11</sup> where the Fijian Court of Appeal quoted Prime Minister Sitiveni Rabuka when he moved the second reading of the Bill which became the 1997 Constitution of Fiji:

In urging the support of all members of the House of Representatives for a ‘truly home grown’ Constitution which reflected ‘the dreams and wishes of every section of society’, [Mr Rabuka] said: ‘Let us not forget that what will give legitimacy to our Constitution is the principle that it has been developed with the free and full participation of everyone, including all of us here as elected representatives of the people and that it provides for a system of Parliamentary Government based on the consent of the people’.<sup>12</sup>

Such considerations would not be unhelpful in Australia’s search for a truly home grown constitution. The problem<sup>13</sup> with the strict view requiring a break in continuity is that Australians

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<sup>8</sup> F. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (1977) at 248-249. This analogy is drawn from Professor Scott’s work where he relates an eastern myth to describe the Canadian Constitution as an elephant standing upon the turtle of the sovereignty of the United Kingdom Parliament. It is said that all Commonwealth countries must eventually remove the Imperial turtle and replace it with a local one, but without destabilising the whole superstructure. However, even after patriation of the Canadian Constitution, “it is not entirely clear whether in the sense intended by Professor Scott, Canada now has its own turtle”: G. Marshall, *Constitutional Conventions* (1984) at 206. Before, during and after such a peaceful revolution, Australians would still recognise the Constitution as the supreme law of the Commonwealth, but that a “once only breach in the rule of law is required”: Oliver, ‘Canada, Quebec, and Constitutional Amendment’ above n 7 at 608.

<sup>9</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1st edition 1885; 10th edition 1959) at 73-76.

<sup>10</sup> Justice Kirby has noted this (almost) unbroken legal lineage of a millennium: above n 2 at 2. Others would however suggest other discontinuities also, eg, 1688-89.

<sup>11</sup> [2001] FJCA 1.

<sup>12</sup> [2001] FJCA 1 at 4.

<sup>13</sup> A further problem might be that such action might be challenged in the High Court. However, Aroney has noted a popular majority in all six States would effectively place the legitimacy of the new order beyond doubt: N. Aroney, ‘A Public Choice? Federalism and the Prospects of a

seem unlikely (on past constitutional performance) to adopt a new constitution by means unauthorised by the existing Constitution. As noted Commonwealth scholar Sir Kenneth Wheare noted as early as the 1960's, many members of the Commonwealth "are not interested in the technicalities of law when they have the substance of power".<sup>14</sup> However, this perceived reluctance ought not be the cue for the High Court to step in and tidy up, in constitutional terms, what Australians are unwilling to do for themselves. That is, clarify the source of legality for the constitutional order. As noted earlier, the preferable view is that, at present, Australia does not have an autochthonous constitution. Further, the Constitution does not have the force of law independently of the Constitution Act. This thesis argues that those members of the High Court who eschew the Imperial Parliament's role in the Constitution Act and further, declare the legal source of the Australian Constitution to be the sovereignty of the people invite confusion and inconsistency. My thesis is that strict legality, whilst not always descriptive of practical realities, should not be discarded in favour of 'precarious practical pegs' such as popular sovereignty.

This is not to downplay the role of courts, for at last resort it is the judiciary that must recognise and thereby legitimate legal change. As one example, witness the recognition of the illegally convened (and constituted?) Convention-Parliament which offered the English Crown to William III and Mary II in 1689 as a result of the 'Glorious Revolution'. Marshall has said:

No one can deny that revolutions [violent or peaceful] have occurred in the course of history. But it is not the job of judges... to urge them on. The only way in which they can take part in a revolution is to resign their offices or be dismissed.<sup>15</sup>

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Republican Preamble' (1999) 20 *University of Queensland Law Journal* 262 at 271. Further, Moshinsky, above n 3 at 149 has noted that "a constitutional change designed to achieve autochthony has inherent validity".

<sup>14</sup> Wheare, above n 6 at 106.

<sup>15</sup> Marshall, above n 1 at 70. Fieldsend AJA of the Rhodesian Appellate Division of the High Court said in *Madzimbamuto v Lardner-Burke* "A court created by a written constitution can have no independent existence apart from that constitution; it does not receive its power from the common law and declare what its own powers are; it is not a creature of Frankenstein which once created can turn and destroy its master...": [1968] 2 SA 284 at 430-432.

However, Greg Craven has noted some High Court Justices, including Sir Anthony Mason, have suggested that since the Australian public is unsympathetic to constitutional change, the High Court is justified in “their effective amendment of the Constitution”.<sup>16</sup> Similarly, Justice Kirby has noted that courts labelled as activist might have only filled the vacuum left by political and legislative paralysis.<sup>17</sup>

### ***Legal Revolution: New Zealand’s repeal by constitutionally unauthorised means***

Australians can benefit from a careful study of the actions of New Zealanders in their quest for autochthony. On one view, New Zealand could be deemed to have achieved autochthony by democratic, not judicial means. In contrast to Canada’s problematic patriation, New Zealand embraced these difficult issues by (to some minds) ‘deliberate procedural error’<sup>18</sup> contained within the Constitution Act 1986 (NZ) (“the 1986 Act”). The crucial provision of the 1986 Act is s 26(1) which provides that on 1 January 1987 “The New Zealand Constitution Act 1852 (Imp); The Statute of Westminster 1931 (Imp) and The New Zealand Constitution (Amendment) Act 1947 (Imp) shall cease to have effect as part of the law of New Zealand”.

The 1986 Act could be seen as a unilateral repudiation of United Kingdom legislative power. New Zealand scholars P.A. Joseph and F.M. Brookfield, have reviewed the 1986 Act as having favourable consequences for the autochthony of that country. In particular Joseph assesses it in the following terms: “Though itself a product of New Zealand’s legislative autonomy gifted by

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<sup>16</sup> G. Craven, ‘Australian Constitutional Battlegrounds of the Twenty-First Century’ (1999) 20 *University of Queensland Law Journal* 250 at 257, noting Sir Anthony Mason, ‘The Role of a Constitutional Court in a Federation’ (1986) 16 *Federal Law Review* 1 at 22-23.

<sup>17</sup> (1994) 19 *Issues for the 90’s* 4 at 4.

<sup>18</sup> Other former British colonies to effect a deliberate or contrived legal break in continuity include Eire (The Republic of Ireland) by doing away with the oath of allegiance and claiming sovereignty for the six counties of the North in 1937, India and Sri Lanka (Ceylon). However, note that the Republic of Ireland did not leave the British Commonwealth until 1949, thus confirming that autochthony can be achieved for former colonies and dominions whilst remaining within the Commonwealth.

the Westminster Parliament, [the 1986 Act] repudiates the source of that autonomy and denies the gift was ever made".<sup>19</sup> As such it is "New Zealand's ultimate proclamation of autochthony".<sup>20</sup> Brookfield concurring with Joseph, then provides a valuable analysis of the achievement of autochthony, and of the New Zealand *grundnorm*, which he presupposes had changed as a result; if one analyses the process in terms of Kelsen's theory.<sup>21</sup>

Brookfield notes the effect of the 1986 Act's repudiation of the fundamental New Zealand constitutional enactments of British origin was to amount to no less than a break in legal continuity, which meant that "it is now no longer possible for [the New Zealand Parliament] to invoke a logically prior legislative power".<sup>22</sup> Brookfield noted "it is autochthony of the sort achieved by a revolutionary break in which, according to Kelsen, a change in the *grundnorm* takes place, the links of legal and constitutional dependence being clearly cut by those provisions".<sup>23</sup> This was because the New Zealand Parliament used constitutionally unauthorised means to facilitate the legal break.

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<sup>19</sup> P.A. Joseph, 'Foundations of the Constitution' (1989) 4 *Canterbury Law Review* 58 at 74. Joseph has also discussed a possible earlier breach in legal continuity in 1973: P.A. Joseph, *Constitutional and Administrative Law in New Zealand* (1993) at 408.

<sup>20</sup> Joseph, 'Foundations of the Constitution' above n 19 at 74. See also P.A. Joseph, 'The Legal History and Framework of the Constitution', Paper delivered to the Institute of Policy Studies "Building the Constitution" Conference. Wellington. New Zealand, 8 April 2000 from web, 11/7/00, [http://www.vuw.ac.nz/inst-policy-studies/conferences/p\\_joseph.html](http://www.vuw.ac.nz/inst-policy-studies/conferences/p_joseph.html); at 2 from web: "The Constitution has a local legal root, notwithstanding the devolution of legal powers from Britain". See also Paul McHugh: "Some [commentators] have described how the 1986 Act displays the autochthony of the New Zealand constitution, meaning that its transplantation into the native soil is complete": (referring to P.A. Joseph), P. McHugh, *The Maori Magna Carta* (1991) at 63.

<sup>21</sup> See H. Kelsen, *General Theory of Law and State* (Harvard ed 1945) at 118 and J.W. Harris, 'When and Why Does the Grundnorm Change?' [1971] 29 *Cambridge Law Journal* 103 at 126. Brookfield, above n 7 at 163-177. Brookfield's and (possibly) Joseph's writings reflect a Kelsenian *grundnorm* approach and therefore require each scholar to assess such notions in terms of 'disguised revolutions' and autochthony. For a Hartian interpretation of the evolution of New Zealand's ultimate rule of recognition eschewing the need for any implication of revolutionary concerns see Oliver, 'Cutting the Imperial Link' above n 7 at 368-403 esp. 399-403.

<sup>22</sup> Brookfield, above n 7 at 171.

<sup>23</sup> *Ibid.*

The New Zealand Constitution (Amendment) Act 1947 (Imp) (“the 1947 Act”) had overcome the limitation placed on New Zealand by s 8 of the Statute of Westminster, thereby enabling the New Zealand Parliament to repeal or alter the New Zealand Constitution Act 1852 (Imp). However, as noted by Brookfield, the 1947 Act did not confer power on New Zealand to “repeal the Act of 1947 itself”.<sup>24</sup> Thus, the New Zealand Parliament was unauthorised to do so, and when it did so by virtue of s 26(1) of the 1986 Act, a legal break was secured. Brookfield recognises this but bemoans the fact that “autochthony could have been sufficiently achieved without the repeal of the useful Act of 1947”<sup>25</sup> if other less revolutionary criteria for autochthony, as suggested by Marshall, (to be discussed later) were given credence.

Can any of this be applied to Australia’s search for autochthony? Initially, one must recognise that the provisions of each country’s ‘independence’ statutes differ. These are the 1947 Act and the 1986 Act in respect of New Zealand and the Australia Acts (UK) and (Cth). Both regimes provided for the termination of the power of the Parliament of United Kingdom to legislate for their respective countries; s 15(2) 1986 Act, s 1 Australia Act. However, there are differences in respect of each country’s ability to alter its constitution. It should be noted that the New Zealand Parliament is sovereign. The Commonwealth Parliament is not a sovereign parliament. In Australia because of the complexities under a federation, and to ensure the supremacy of the Constitution over the Commonwealth and the States, neither was given the power to unilaterally alter the Constitution or the Constitution Act; s 5(b) Australia Act in respect of the States and s 8 Statute of Westminster in respect of the Commonwealth.<sup>26</sup> In New Zealand (a unitary state) the

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<sup>24</sup> *Ibid.* Unlike the 1947 Act, the Australia Act (Cth) does specifically allow for repeal of itself and its British counterpart.

<sup>25</sup> *Ibid* at 172.

<sup>26</sup> As noted by Gageler and Leeming, the purpose of these provisions was “to preserve the effect of s 2 of the Colonial Laws Validity Act 1865 (Imp) [ie, the doctrine of repugnancy] [on both the Commonwealth and the States], in relation to both the Constitution and the Constitution Act”: S. Gageler and M. Leeming, ‘An Australian Republic: Is a Referendum Enough?’ (1996) 7 *Public Law Review* 143 at 147. This was because the Statute of Westminster destroyed the protected

1947 Act empowered the New Zealand Parliament to directly “alter, suspend or repeal” the New Zealand Constitution Act 1852.

In Australia, to alter the Constitution Act, the six State parliaments must first empower the Commonwealth (by the use of s 15(1) of the Australia Act) to amend (not necessarily repeal, as Moshinsky suggested) s 8 of the Statute of Westminster<sup>27</sup> to remove the limitation placed on the Commonwealth. The limitation so removed, the Commonwealth Parliament would then be empowered by either s 2(2) of the Statute or s 51(xxxviii) of the Constitution, or both, to amend the Constitution Act. This process, although somewhat convoluted, is still using the means currently authorised by the constitutional arrangements of Australia. This was the method chosen by the States to implement changes to the covering clauses of the Constitution Act had the 1999 republican referendum been successful. This also affirms the view that s 128 cannot amend anything outside what covering clause 9 of the Constitution Act defines as ‘the Constitution of the Commonwealth’. As Wade and Phillips observed in 1936 “There is no provision in the Constitution enabling the amendment of sections 1 to 8 of the Constitution Act which establish the federation”.<sup>28</sup> However in 1993, the acting Solicitor-General for the Commonwealth Dennis Rose QC, was of the view that s 128 could be used to amend or repeal the preamble and covering clauses.<sup>29</sup>

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status of Imperial statutes generally, by repealing the Colonial Laws Validity Act in its application to the dominions. Canada also insisted on the exemption of its constituent statute by requesting s 7(1) of the Statute of Westminster be inserted.

<sup>27</sup> See Constitution (Requests) Bill 1999 (Qld), Schedule 1, s 2.

<sup>28</sup> E. Wade, and G. Phillips, *Constitutional Law*, (1936) at 438.

<sup>29</sup> *An Australian Republic, The Options-The Appendices*, The Report of the Republican Advisory Committee (1993) Vol 2 Appendix 8 at 298. For a recent detailed discussion of constitutional alteration, see Aroney, above n 13 at 262-293.

### ***Legal Revolution: Repeal of the Constitution Act to achieve autochthony***

What would be the effect of a Commonwealth Act passed pursuant to s 15(1) of the Australia Act which purported to repeal (not merely amend) the Constitution Act *in toto*, including the long and short titles and all the covering clauses? Bede Harris suggests that his new draft constitution would only come into force on “the assumption that the Commonwealth Constitution of 1901 [the Constitution Act] would be replaced in its entirety”.<sup>30</sup> It is not explicitly clear that merely amending<sup>31</sup> (or even repealing) s 8 of the Statute of Westminster will authorise the repeal of the Constitution Act.<sup>32</sup> Stephen Gageler and Mark Leeming,<sup>33</sup> and others,<sup>34</sup> are of the opinion that the Constitution Act can be repealed as easily as it can be amended.<sup>35</sup> If this is the preferred view, could such action secure autochthony? Moshinsky concluded that, according to Wheare’s strict view, such a process would not amount to a break in legal continuity and therefore could not obtain true autochthony.<sup>36</sup> However, the present writer would favour an interpretation that repeal

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<sup>30</sup> B. Harris, *A New Constitution for Australia* (2001) at 265.

<sup>31</sup> The amendment would have to take a form such as: ‘At the end of section 8, Add: Nothing in this section prevents the repeal of the Commonwealth of Australia Constitution Act by omitting the preamble and the long title and repealing covering clauses 1 to 8’.

<sup>32</sup> This is due in part to the uncertainty surrounding the true scope and effect of s 2(2) of the Statute of Westminster and s 51(xxxviii) of the Constitution, although the better view might be to adopt an interpretation that promotes the “completeness of Australian legislative power”: Dawson J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 638.

<sup>33</sup> Gageler and Leeming, above n 26 at 151.

<sup>34</sup> See speech by Queensland Premier, Mr Beattie: *Queensland Parliamentary Debates*, Legislative Assembly 8/6/99, at 2184.

<sup>35</sup> If the repeal of the Constitution Act were considered unauthorised, the claim to autochthony would be even stronger.

<sup>36</sup> Moshinsky, above n 3 at 150-151. So too, Thomson’s view of any such use of s 15(1) of the Australia Act is that “there would still exist an unbroken stream of authority flowing from the United Kingdom Parliament”: above n 6 at 344. At this point there is a need to refer to Kelsen’s theory. He makes a distinction between the principle of ‘legitimacy’ and a ‘revolution’ in the wide sense. Both may invalidate legal norms. Under the first principle, legal norms “remain valid as long as they have not been invalidated in the way which the legal order itself determines. This is the principle of legitimacy”: Kelsen, above n 21 at 117. Thus, the use of s 15(1) of the Australia Act to repeal the Constitution Act, would invalidate many norms within the existing hierarchy, but this would still be regarded as legitimate. Such action may also amount to a change in the basic norm. Kelsen defines a revolution, in the wide sense, as that which “occurs whenever the legal order of a community is nullified and replaced by a new order... in a way not prescribed by the first order itself”: *Ibid.* Wacks produces this very same quote and then continues: “If some

of the Constitution Act by this process could secure autochthony. To do so, it would need to be seen that such a repeal would repudiate the source of Australia's legislative autonomy and deny a legislative gift was ever made. To the present writer, this view appears at least open, because such a course means that it would be "no longer possible for the [offspring] to invoke a logically prior [parental] legislative power".<sup>37</sup> Moreover, if popular approval was obtained in all the States, it could be said that any new constitution subsequently enacted would have been adopted by the spontaneous will of the people of the Australian States. It "would appear on its face to be an expression of the national will";<sup>38</sup> but really expressed in the units of States.

As Moshinsky, has noted: "It would have to be considered whether popular approval need also be received from a majority of voters in *each State* as it is arguable that it is in the units of States that popular will is expressed in Australia as a federation".<sup>39</sup> (emphasis added) Thus Moshinsky concludes, as does Aroney, (and the present writer agrees) that to obtain popular approval in *all the States* would be *politically* "cautious" and "desirable". Such unanimity would surely head off any possible attempt to dispute the validity of the purportedly autochthonous enactments. Further, as Aroney has noted: "[T]he ultimate reason for turning to unanimity for the alteration of the Constitution Act is that it embodies the formative basis of the federation".<sup>40</sup> In terms of Australia becoming a republic, such unanimity would in practice give one State the power of veto.

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*unlawful* or *unconstitutional* act is required to create a new, valid legal order then a peaceful transfer in sovereignty implies no change in the basic norm": R. Wacks, *Jurisprudence* (1995) (4th ed) at 81. It is submitted that this statement only addresses Kelsen's revolutionary theory and not the principle of legitimacy. Certainly an unlawful or unauthorised act is required to create a new legal order by means of revolutionary theory. However, under the principle of legitimacy, a peaceful transfer of sovereignty may amount to a change in the basic norm, because legal norms have been invalidated in a way authorised by the present legal order. This would be clearly the situation with the establishment of an Australian republic and repeal of the Constitution Act by means of s. 15(1).

<sup>37</sup> Brookfield, above n 7 at 171.

<sup>38</sup> Moshinsky notes this less strict view: "Even if legal continuity were preserved... so long as the enactment of the constitution took place in Australia, it would be legally homegrown.": above n 3 at 150.

<sup>39</sup> *Ibid* at 151.

<sup>40</sup> Aroney, above n 13 at 290.

Although on the other hand, for the sake of the unity of the federation, all the constituent elements should agree to become republican at the same time.

Following this path, Australia's claim to autochthony might even be stronger than New Zealand's, (even though on one view Australia has not acted by unauthorised means). New Zealand repealed by means not authorised by the Constitution, a British enactment (the 1947 Act), which merely sought to regularise and recognise its legal separation from Britain. However, if Australia repealed (even legally) the Constitution Act,<sup>41</sup> it would in effect be repudiating the very source of Australia's autonomy. The effect would be a declaration that the Constitution Act no longer has any legal force in Australia. As a result a claim that a break in continuity took place could be made, which might make it jurisprudentially necessary to postulate a change in the *grundnorm*. In other words, the outcome (not necessarily the process) would be revolutionary and consequentially meriting classification as autochthonous.

### ***Legal revolution: use of plebiscite to declare autochthony***

James Thomson cites Professor Sawer as suggesting:<sup>42</sup>

Perhaps the best way of dealing with the desire for a local source for the Constitution is to put to the people as a constitutional amendment a declaratory provision stating that the sovereignty of the United Kingdom Parliament ends on a named future date and is replaced by that of the Australian people. (emphasis added)

This sort of proposal has a great deal to commend it. It is trite to say that had such a proposal been put to the people and accepted to take effect from the date of the passage of the Australia

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<sup>41</sup> A more equivocal variation might see a Commonwealth Act declare the Constitution Act (Imp), the Statute of Westminster (Imp) (notwithstanding the Statute of Westminster Adoption Act 1942 (Cth)) and the Australia Act (UK) (notwithstanding the Australia Act 1986 (Cth)) 'shall be deemed to be Acts of the Commonwealth Parliament, and shall be construed accordingly'. This process was undertaken by the Union of South Africa by the Status of the Union Act 1934 in respect of the Statute of Westminster. See Wheare, above n 6 at 109-110; Moshinsky, above n 3 at 139; Scott, above n 8 at 247 and Aroney, above n 13 at 285-286.

<sup>42</sup> Thomson, above n 6 at 344-345 at f/n 138.

Acts, the constitutional arrangements of Australia (in respect of *grundnorm* and autochthony issues) would no longer be in such hot debate. In the end however, the Australia Acts alone could only achieve so much, (that is, the first proposition of Professor Sawer's proposal). Their failure to use 'unauthorised means' spelt disaster for autochthony, (but was a vindication for perhaps the most important constitutional value; the rule of law). Moreover, the failure to democratically invest legal sovereignty in the Australian people, means that the true beneficiary of such power is still contestable. Hence this thesis argues that any void should not be filled by the High Court. The institutional design and normative scheme of the Founders was that the Constitution clearly intended the Parliament to be the vehicle for the people to initiate constitutional change.

However, this does not mean that Australia cannot adopt such a course as proposed by Professor Sawer even today. In preparation for the drafting of new constitution, a plebiscite question could include a declaratory provision similar to that suggested by Professor Sawer. A proposal for Australia to become a republic might or might not also be included.<sup>43</sup> The declaratory provision should assert that 'all the prerogatives of the Crown and the sovereignty of the Queen are transferred to the people'.<sup>44</sup> Further, as Moshinsky has suggested: "[T]he Australian Parliament, probably after having secured popular approval, declares the Constitution Act no longer has any legal force in Australia..."<sup>45</sup> As such, the process could further enhance the claim for autochthony by repealing (not merely amending) the Constitution Act as discussed previously.

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<sup>43</sup> As noted earlier, any such momentous changes should achieve popular approval in all the States.

<sup>44</sup> Such an assertion of popular sovereignty might take in part, the following form: 'Whereas all the constitutional authority ever possessed by the monarchs of the Crown of England and later imposed by the monarchs of the Crown of the United Kingdom of Great Britain and Ireland, and of the Crown of the United Kingdom of Great Britain and Northern Ireland over the Commonwealth of Australia, such allegiance is hereby withdrawn, and is now vested in the sovereign people of the Commonwealth Republic of Australia.' (Adapted in small part from the Constitution of New Jersey 1776).

<sup>45</sup> Moshinsky, above n 3 at 149. Further, Moshinsky (as does Wheare, above n 6 at 112) suggest in doing so the Australian Parliament might "call itself a Constituent Assembly to further distance itself from the preceding constitutional order".

Such a course of action would put to rest many of the strictly legal views noted throughout this chapter, and bring other opportunities forward. First, the Crown is replaced with the sovereignty of the people, and as such they constitute both the legal and political bases of the Constitution.<sup>46</sup> In other words the Constitution is proclaimed in the name of the people. Secondly, the people can deal with their fundamental rights as they wish. They can place their faith in whichever institution they believe will best protect their liberty; that is, a parliament or a court. Judicially enforceable rights might be protected in a Bill of Rights, or even reserved (as distinct from those surrendered) by means of a social contract. Thirdly, Australians could embrace indigenous reconciliation issues in any new constitutional arrangements.<sup>47</sup> Fourthly, the whole process, including a successful plebiscite,<sup>48</sup> the declarations, the repeal of the Constitution Act and the enactment of a new constitution, could be seen as a fundamental repudiation of the existing legal order thereby securing autochthony by a ‘technical’ break in legal continuity, and a ‘disguised revolution’.<sup>49</sup> Lastly, as a consequence, academic observers of this process could be constrained to posit a new *grundnorm* in order to explain the validity of the new legal system.

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<sup>46</sup> Such an exercise would accord with Marshall’s comment that autochthony might be achieved if “a new constitution has been promulgated and claims made that the People... rather than the British Parliament, in some sense stand behind it”: above, n 1 at 58.

<sup>47</sup> Although as Professor Finn (as he then was) has noted, collective popular sovereignty “poses a direct obstacle to acceptance of sovereignty in indigenous Australians”: P. Finn, ‘A Sovereign People, A Public Trust’, in P. Finn (ed.) *Essays on Law and Government Vol 1* (1995) at 5.

<sup>48</sup> Even a *unanimous* state referendum result may suffice because this would also repudiate the existing legal order. In this sense one could see parallels with the popular process that gave the 1937 constitution of Eire legal validity.

<sup>49</sup> H.W.R. Wade, ‘The Basis of Legal Sovereignty’ [1955] *Cambridge Law Journal* 172 at 191-197.

## TABLE 6 – POPULAR DECLARATION OF AUTOCHTHONY

The changes outlined above could then be interpreted as follows:

<b>Prior to declaration</b>	<b>After declaration</b>
<b>Legal</b>	
(a) Australia was legally derived but not subordinate.	Australia is no longer legally derived.
<b>Historical</b>	
(b) Australia was historically derived.	Australia is historically derived.
<b>Political</b>	
(c) Australia was politically independent.	Australia is politically independent.

In respect of (a) the chain of legal continuity is broken.

In respect of (b) Australia would still be historically derived from the United Kingdom Parliament. However, the pre-eminent historical source of the new constitution would be the plebiscite/referendum process. The passage of the ‘first’ Australian Constitution through the Westminster Parliament in 1901 would be merely one of a number of progressively earlier derivative historical sources, that is 1688 and 1066.

In respect of (c), the political source of the ‘first’ constitution would have been the federal compact between the colonies. The political source of a “We, The People...” republican constitution, based on state unanimity would be the people, but expressed in the units of the States.

However, Professor Sawer also noted that if such a measure as the declaratory procedure is not adopted “we may find yet the High Court in a suitable case... doing it for us by a sort of judicial UDI, taking effect on the date of the decision”.<sup>50</sup> Geoffrey Marshall has noted that “when a Commonwealth country asserts the home-grown nature of its legal system with Imperial approval and complicity, the sonorous label of autochthony is attached. However, if this assertion is contentious - as in Rhodesia - it is dubbed ‘UDI’”.<sup>51</sup>

Professor Sawer’s and Marshall’s reference to a ‘UDI- unilateral declaration of independence’ is to *Madzimbamuto v Lardner-Burke*<sup>52</sup> where the Privy Council held that the usurping government (Smith’s UDI) in Southern Rhodesia in 1965 could not be regarded as lawful, since the United Kingdom Government was still taking steps to regain control. As De Smith and Brazier have noted: “The Privy Council (Lord Pearce dissenting) rejected the principle of necessity as *applied* by the Rhodesian Appellate Division of the High Court”.<sup>53</sup> (emphasis added) However, their Lordships “[did] not appear to have dissented from the general principle that successful revolutions create new legal orders whose validity may be adjudged by courts within the territory subject to the revolution”.<sup>54</sup> In fact, the Pakistani and Ugandan cases were cited without disapproval: “Their Lordships would not accept all the reasoning in these judgments but they see no reason to disagree with the results”.<sup>55</sup> Referring to Beadle CJ’s judgment in the Appellate Division of the High Court of Southern Rhodesia, the Privy Council in *Madzimbamuto* remarked: “The authorities upon which his Honour sought to rely, namely Kelsen, Lord Lloyd, Bryce and Salmond, may afford an accurate jurisprudential analysis of a change in the basic laws of a

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<sup>50</sup> Noted by Thomson, above n 6 at 344-345 at f/n 138.

<sup>51</sup> Marshall, above n 8 at 171.

<sup>52</sup> [1969] 1 AC 645 at 725.

<sup>53</sup> De Smith and Brazier, above n 6 at 74 at f/n 23.

<sup>54</sup> Harris, above n 21 at 104.

<sup>55</sup> [1969] 1 AC 645 at 725.

country..."<sup>56</sup> And in a clear endorsement of Kelsenian theory, Sir Muhammed Munir CJ of the Pakistan Supreme Court, in *The State v Dosso* was cited: "Thus the essential condition to determine whether a Constitution has been annulled is the *efficacy* of the change".<sup>57</sup> As Detmold has noted "[I]f in fact the revolutionary contest had been settled on the ground in Southern Rhodesia in favour of the new regime the Privy Council would have recognised it as legitimate".<sup>58</sup> However, since the United Kingdom Government was still taking steps to regain control, Smith's usurping government could not be regarded as lawful.

See also the decision of the Court of Appeal of the Fiji Islands in *Republic of Fiji v Prasad*<sup>59</sup> which had the effect of restoring the 1997 Fiji Constitution. In this important decision the Court enunciated the test for the doctrine of effectiveness. The test consisted of three criteria:

A court may hold a revolutionary government to be lawful, and its act to have been legitimated *ab initio*, where it is satisfied that (a) the government is firmly established, there being no other government in opposition thereto; and (b) the government's administration is effective, in that the majority of people are behaving, by and large, in conformity therewith.<sup>60</sup>

The third criterion being "such conformity and obedience must be due to popular acceptance and support and not mere tacit submission to coercion or fear of force". Like in *Madzimbamuto* the Court held "the effectiveness test was not satisfied by the Interim Military Government because [in part] there was a rival (or opposition) government striving for power".<sup>61</sup> However, unlike many earlier cases on legal change, *Prasad* was different in that it was the purported rulers of a country (not the revolutionaries) seeking through the court process an endorsement that they were still the legal government of Fiji.

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<sup>56</sup> *Ibid* at 668.

<sup>57</sup> [1958] 2 P.S.C.R. 180.

<sup>58</sup> M. Detmold, *The Australian Commonwealth* (1985) at 94.

<sup>59</sup> [2001] FJCA 1.

<sup>60</sup> These criteria are from *Mokotso v HM King Moshoeshow II* [1989] LRC (Const) 24 at 133.

<sup>61</sup> G. Williams, 'Republic of Fiji v Prasad' (2001) *Melbourne Journal of International Law*, 144 at 149.

See also the 1998 Canadian Supreme Court decision of *Quebec Secession Reference*<sup>62</sup> where the Court considered whether the province of Quebec could secede from Canada unilaterally or under Canadian law? Thus the Court confronted the same basic legal issue as did the Judicial Committee of the Privy Council in *Madzimbamuto v Lardner-Burke* although, as Walters has noted, the difference was that in Canada the UDI had not happened yet.<sup>63</sup> The answer given by the Court on the question of unilateral secession was negative. On the other hand, a negotiated settlement with Canada could have achieved secession and indeed, the separatist Parti Quebecois (PQ) had made important preparations in this respect. However, Walters assessed that any negotiated settlement with Canada would not have been “the legal fountain from which their new sovereign legal order would spring”<sup>64</sup> and would not have achieved autochthony. A declaration of popular sovereignty was needed. As such, *after* any negotiated secession with Canada, the PQ would draft a new constitution for Quebec, the validity of which would derive from a confirmatory referendum. This expression of popular sovereignty would be “the assertion by the new sovereign Quebec state of autochthony, or (as Sir Kenneth Wheare said) a ‘home-grown’ constitutional root”.<sup>65</sup>

Has the High Court of Australia instigated a ‘judicial UDI’? It would appear that the present constitutional void in Australia since the passage of the Australia Acts has led some members of the High Court in the ‘implied rights cases’, to see themselves under a duty to fill the void. Can it be suggested that the High Court has in fact single-handedly altered Australia’s constitutional arrangements; a possibility to be discussed shortly under Marshall’s criteria? To reiterate, the present writer sees no problem with the High Court confirming the autonomy that results from the

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<sup>62</sup> [1998] 2 SCR 217.

<sup>63</sup> M. Walters, ‘Nationalism and the Pathology of Legal Systems: Considering the *Quebec Secession Reference* and its Lessons for the United Kingdom’, (1999) 62 *Modern Law Review*, 371 at 392.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid* at 392-393.

Australia Acts in 1986, but questions the Court's mandate to imply rights under the guise of a purported autochthony that the Court, not the Parliament, has activated. Such a self-referential justification goes to the heart of the separation of powers and parliamentary supremacy as designed into the 1901 Constitution.

## **PART B- A LESS STRICT VIEW OF AUTOCHTHONY: MARSHALL'S CRITERIA**

Are there less revolutionary means of achieving autochthony than repealing the Constitution Act or declaring popular sovereignty? Commonwealth constitutional theory scholar Geoffrey Marshall has argued that there is no need for an unauthorized break to secure autochthony. In his 1971 work he identified three criteria of autochthony. Further, legal discontinuity is only one criterion. Thus, autochthony may still be achievable even without the enactment of new constitutional arrangements by unauthorised means. Marshall's criteria are:

- (i) – “whether all processes for constitutional change are locally operated;
- (ii) - whether in the enactment [and arguably repeal] of constitutional provisions, legal continuity has been broken (or claims made that it has been broken);
- (iii) - whether with or without (i) or (ii), the people *or* possibly the bench, regard the constitution as authoritative because of acceptance of it.”<sup>66</sup>

P.A. Joseph and F.M. Brookfield have profitably applied these criteria to New Zealand,<sup>67</sup> Joseph concluding that “the New Zealand Constitution would be autochthonous according to the first and third of Marshall's criteria”.<sup>68</sup> Indeed, it seems paradoxical that Joseph is at once able to assert so

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<sup>66</sup> Marshall, above n 1 at 58-60.

<sup>67</sup> P.W. Hogg has applied Marshall's criteria to Canada: P. W. Hogg, *Constitutional Law of Canada* (3rd ed 1992).

<sup>68</sup> Joseph, *Constitutional and Administrative Law in New Zealand* above n 19 at 414.

forcefully that New Zealand has experienced no “contrived legal breach”,<sup>69</sup> but at the same time assert that autochthony was achieved by repudiation of the source of New Zealand authority.<sup>70</sup> The former assertion of course then leads Joseph to assess New Zealand as not autochthonous according to Marshall’s second (legal break) criterion. Perhaps, as Oliver has noted, Joseph’s 1993 approach is balanced and more befitting of a general textbook.<sup>71</sup>

Brookfield adds the temporal elements to Joseph’s claim,<sup>72</sup> but also recognises the break in legal continuity brought about by the Constitution Act 1986 (NZ), referred to in the second criterion. It also appears paradoxical that Brookfield can cite the ‘repudiation’ alluded to by Joseph (to allow Brookfield to satisfy Marshall’s second criterion), but not address Joseph’s claim that there has been no ‘revolutionary break’.<sup>73</sup> It is now considered whether similar claims might be made for the present constitutional system of Australia.

### **Australia’s position as measured against the criteria:**

***Criterion (i) “whether all processes for constitutional change are locally operated”.***

As Joseph has stated: “Whether all processes for constitutional change are locally operated... appears to be an indicium of autonomy rather than autochthony”.<sup>74</sup> Thus, (as argued earlier in this thesis) to equate the popular provisions in s 128 with the achievement of autochthony does not necessarily follow. However, even if this criterion *is* considered an indicium of autochthony, the present writer disputes the view that s 128 could be a measure of it. This is in view of s 128’s

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<sup>69</sup> *Ibid* at 413.

<sup>70</sup> *Ibid* at 416-417, and above ‘Foundations of the Constitution’ n 19 at 74 and see text accompanying n 19 above.

<sup>71</sup> Oliver, ‘Cutting the Imperial Link’ above n 7 at 390-391.

<sup>72</sup> Brookfield, above n 7 at 172. In respect of the first criterion, Brookfield cites 1947. In respect of the third, he cites “since the early 1970’s if not well before”, although not before noting “some theoretical difficulties with the concept of acceptance”.

<sup>73</sup> *Ibid.*

<sup>74</sup> Joseph, *Constitutional and Administrative Law in New Zealand* above n 19 at 412-413: “something more is required than a locally operating amendment process”.

inability to alter the Constitution Act. Since s 15(1) of the Australia Acts (admittedly in conjunction with other provisions) can be used to alter both the Constitution Act and the Constitution (with the appropriate popular support), s 15(1) is a better measure of municipal sovereignty, and therefore this criterion. On this view Australia has been autochthonous since 1986. However, by virtue of the state unanimity required in s 15(1) it would be a type of autochthony based upon the federal compact not any form of social contract giving rise to popular sovereignty. However, the problem with autochthony centering on the Australia Acts is that the Australia Act 1986 (UK), has an external rather than a local root, and further, the Australian re-enactment could be considered legally redundant anyway.

***Criterion (ii) “whether in the enactment of constitutional provisions, legal continuity has been broken (or claims made that it has been broken)”.***

Australia is not presently autochthonous as assessed against this criterion; legal continuity has not been broken. However, Marshall only requires the offspring to *claim* that continuity has been broken. It is not necessary to point to any specific unauthorised enactments. This criterion seems to accommodate the Canadian situation, where some make such a claim,<sup>75</sup> but paradoxically there are no unauthorised procedures. In Australia, unless the assertions of popular sovereignty can be seen to represent such a claim (which appears unlikely, given the current jurisprudential concern to emphasise continuity), more is required. However, this criterion could accommodate the repeal of the Constitution Act as outlined earlier in this chapter. A claim that continuity had been technically broken could be made, without the necessity for any unauthorised enactments. Such a process might allow Australians to “have their constitutional cake and eat it too”;<sup>76</sup> that is, autochthony; respect for the rule of law as represented by legal continuity by claiming only a tacit

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<sup>75</sup> Cf Oliver, ‘Cutting the Imperial Link’ above n 7.

<sup>76</sup> Oliver, ‘Cutting the Imperial Link’ above n 7 at 392.

breach; respect for federalism and respect for democracy. That said however, Australians seem as unwilling to claim legal breaks in continuity as they are unwilling to cause them.

***Criterion (iii) Acceptance by acquiescence: “whether the bench regards the Constitution as authoritative because of acceptance of it”.***

This criterion seems to encapsulate Hart’s notion of a change in the rule of recognition.<sup>77</sup> According to Hart, the rule of recognition “could change over time, in accordance with the courts’ and officials’ changing attitudes towards that which should be recognised as valid law in the legal system... but Hart provided little insight into how that transformation might take place”.<sup>78</sup> As noted by Joseph, each legal system must ask itself: “What is the courts’ and officials’ internal viewpoint?”<sup>79</sup> As such, the rule of recognition is not constituted by the practices and convictions of the judiciary alone. However, Hart only devotes one paragraph to the situation where “the unity of officials [and courts]... may partly breakdown”, noting: “It may be that, over certain constitutional issues... there is a division within the official world ultimately leading to a division [over the content of the rule of recognition] among the judiciary”.<sup>80</sup> All that could be done, according to Hart, “would be to describe the situation... and note it as a substandard abnormal case containing within it the threat that the legal system will dissolve”.<sup>81</sup>

Although Hart’s strong language was directed to the constitutional crisis that gripped South Africa in 1954,<sup>82</sup> the “persistent doctrinal confusion over the sources of legitimate constitutional

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<sup>77</sup> As noted earlier, Joseph has also pointed out that a new attitude of courts and officials also has a connection with Kelsen’s *grundnorm*, but it would seem that Marshall’s reasoning is more comfortably understood in Hartian terms.

<sup>78</sup> P. Oliver, ‘The 1982 Repatriation of the Constitution of Canada: Reflections on Continuity and Change’ (1994) 28 *La revue Juridique Themis* from web, 24/3/00,

<http://www.droit.umontreal.ca/pub/themis/94vol28n2-3/OLIVER.html>; at 15 from web.

<sup>79</sup> Joseph, *Constitutional and Administrative Law in New Zealand* above n 19 at 414.

<sup>80</sup> H.L.A. Hart, *The Concept of Law* (2nd ed 1994) at 122.

<sup>81</sup> *Ibid* at 123. See also J. Goldsworthy, *The Sovereignty of Parliament* (1999) at 241.

<sup>82</sup> See *Harris v Donges* [1952] 1 TLR 1245.

authority in Australia”<sup>83</sup> could be seen as a “partial failure of the normal condition of congruence”<sup>84</sup> and may endanger the stability of the system. Despite Hart’s assertions that a “local root” is established when the Westminster Parliament no longer has the ability to legislate for a former dominion,<sup>85</sup> it is not clear that a majority of Australians (nor even officials for that matter) view the original enactment of the Constitution in the Constitution Act as merely an “historical fact”.<sup>86</sup> Moreover, whilst it might be possible to discern a majority of High Court Justices that do view it as such, there has been little unanimity evident as to which concept of popular sovereignty (symbolic or theoretical) should be promoted to the apex of the Australian constitutional system.

***Criterion (iii) Acceptance by acquiescence: “Whether the people regard the Constitution as authoritative because of acceptance of it”.***

Many lawyers now promote that the Constitution ‘was’ law because of its original embodiment in a British enactment, but (because of British abdication in 1986) ‘is now’ law for some other reason. The reason most commonly given is the acceptance by the Australian people of the Constitution, and their preparedness to live peaceably under it. In this sense the British Parliament is no longer regarded as standing behind Australia’s constitutional institutions.<sup>87</sup> Professor Zines has said:

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<sup>83</sup> A. Fraser, ‘False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution’ (1994) 16 *Sydney Law Review* 213 at 215-216.

<sup>84</sup> Hart, above n 80 at 122.

<sup>85</sup> *Ibid* at 120. As such, it would seem that all officials and citizens would need to accept that the Imperial Parliament can no longer legislate for Australia.

<sup>86</sup> *Ibid*.

<sup>87</sup> Marshall, above n 1 at 58. It would appear the modern genesis of this notion can be traced to the horticultural comments made by Wheare about the Constitution being struck at Westminster but then transplanted to Australia, where it has since thrived: above n 6 at 108-109. At this point one might moot whether the repudiation of the British Parliament is a fourth criterion canvassed, but not enumerated by Marshall. If a separate criterion, it would seem by far the weakest, and devoid of any further claim, insufficient. However, if a substitution of a local ‘acceptance’ root accompanied the repudiation, the claim for autochthony would appear immediately stronger. As

The basic constitutional instruments *were* law because they were enacted by a superior law-maker. They are *now* law because they are accepted as fundamental legal rules of [the] system and the basic constitutive documents of [the] community.<sup>88</sup>

See also the *First Report of the Constitutional Commission* 1988:

As [the British] Parliament no longer has any authority in Australia, the legal basis of the Constitution no longer rests on any paramount rule of obedience to that institution. The legal theory that sustains the Constitution today is its acceptance by the Australian people as their framework of government.<sup>89</sup>

This ‘acceptance’ argument appears to be the second half of the argument utilised by Deane J in *Theophanous v Herald & Weekly Times Ltd.*,<sup>90</sup> which embraced both ‘adoption’ by referenda (to be discussed shortly) and current ‘acquiescence’ as the touchstones of popular sovereignty. It is noted that Professor Zines’s and the Commission’s view (as did Murphy J’s in *Bistradic v Rokov*<sup>91</sup>) have the attraction of recognising the original supremacy of the British Parliament. Geoff Lindell’s view has the further attraction of being presented as an *additional* (not necessarily *alternative*) way of explaining the binding nature of the Constitution.<sup>92</sup> Justice Deane’s view (in *Theophanous*), and Murphy J’s view in *Kirmani v Captain Cook Cruises Pty. Ltd. [No.1]*,<sup>93</sup> have none of these attractions. Indeed, the correctness of Justice Murphy’s view in *Kirmani* has been

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such the claim usually contains a repudiation (the Constitution ‘was’ law) and a substitution (the Constitution ‘is now’ law): see Zines and Lindell.

<sup>88</sup> L. Zines, *Constitutional Change in the Commonwealth* (1991) at 27. See also L. Zines, *The High Court and the Constitution* (1997) at 318.

<sup>89</sup> Volume 1 at 107. Whilst the legal basis of the Constitution no longer rests on “any paramount rule of obedience to the British Parliament”, this thesis argues it rests on its original enactment in a statute passed by that institution in the exercise of lawful sovereign authority.

<sup>90</sup> (1994) 182 CLR 104 at 171. In this respect Deane J seemed to follow Murphy J’s reasoning in *Kirmani v Captain Cook Cruises Pty. Ltd. [No. 1]* (1985) 159 CLR 351 more closely than his own. Murphy J had stated at 383: “The authority for the Australian Constitution then [1 January 1901] and now is its acceptance by the Australian people”. In *Theophanous*, Deane J seemed also to discard his view from *Breavington v Godleman* (1988) 169 CLR 41 at 123 which recognised “the past authority of the United Kingdom Parliament”.

<sup>91</sup> (1976) 135 CLR 552 at 566.

<sup>92</sup> G. Lindell, ‘Why is Australia’s Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence’ (1986) 16 *Federal Law Review* 29 at 37.

<sup>93</sup> (1985) 159 CLR 351 at 383.

questioned as being inherently and manifestly improbable.<sup>94</sup> Moreover, Justice Deane (in *Theophanous*) uses Lindell's argument as an *alternative*, which Lindell specifically cautioned against.<sup>95</sup> Even Marshall has noted, the word 'acceptance' is ambiguous.<sup>96</sup>

At present, the 'acceptance' or 'acquiescence' argument is to be given the short answer that at most it explains in political terms - not in legal terms - why the Constitution is binding.<sup>97</sup> For Australians to answer that the Constitution is law because it is law, or for an Australian court to answer that the Constitution is law because Australians accept it as law seem circular if practical but precarious answers. This is because its proponents can provide no empirical data to confirm such an assertion. In fact there is such data existing directly rebutting the theory: "just under one in five Australians have some idea of what the Constitution contains... [which] cannot amount to maintenance of the Constitution by the acquiescence of the people".<sup>98</sup> It would seem that to have any credence, the acceptance theory would need to at least show a "bare majority of Australians" adhere to it. Greg Craven could not discern any requisite degree of acceptance by the "population at large" in 1984, and even after the passage of the Australia Acts, the requisite degree seems as elusive as ever. In fact, if Australians in general were asked why the Constitution was binding,

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<sup>94</sup> Noted by G. Craven, *Secession* (1986) at 138.

<sup>95</sup> Lindell, above n 92 at 37.

<sup>96</sup> Marshall, above n 1 at 60. See also G. Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 (1) *Federal Law Review* 1 at 4 at f/n 30.

<sup>97</sup> At best the people may accept the Constitution because of their satisfaction with the legal order it creates, or at worst, because of their reluctance to rebel against a system they are not satisfied with. However, J. Daley, *The Bases for the Authority of the Australian Constitution* (1999) unpublished D. Phil thesis, Oxford at ch 6.3.1 doubts whether acquiescence can even amount to the moral legitimacy of the Constitution.

<sup>98</sup> G. Williams, 'The High Court and the People' in H. Selby (ed), *Tomorrow's Law* (1995) 271 at 286-289: "Ignorance cannot provide a foundation for the popular legitimacy of the Australian Constitution". See also a poll conducted by I. Saulwick in 1992 which found that 33 per cent of Australians did not even know that Australia has a written Constitution: referred to by S. Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 (1) *Federal Law Review* 133 at 146 at f/n 87.

some, if not many, might answer that the Constitution is law because it was enacted by the parliament of the United Kingdom. This would not be an incorrect answer.<sup>99</sup>

In contrast, the notion of acceptance by a contemporary society seems specially applicable to the U.S. Constitution, because the legal and political sources are fused together in ‘the people’. Although the ‘we the people’ of today played no part in its adoption, there is no other authoritative source to invoke but the “mundane adherence to the status quo”. Thus in both legal and political theory “the [U.S.] Constitution is authoritative because [Americans] believe and act as if it is”.<sup>100</sup> As Wheare has noted: “To explain why [Australians] accept [their constitution] would be a complicated matter”.<sup>101</sup> See the comments of the Constitutional Centenary Foundation:

It is often suggested now that the Constitution gets its legal force from the original and continuing agreement of the Australian people. Politically that may be so. Strictly speaking, however, the legal force of the Constitution comes from its origins and status as an Act of the once sovereign British Parliament.<sup>102</sup>

Such an argument might suffer the description of ‘sterile legalism’. However it is certainly no less sterile than arguing that a foreign Queen is “Head of State” (and should therefore be removed), when effectively an Australian Governor-General is. This was clearly demonstrated by the Queen’s non-interventionist role in the 1975 constitutional crisis.

Until such time as it can be demonstrated what Australians believe sustains their Constitution, it would seem that many jurists and judges are quite prepared to discern on behalf of all

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<sup>99</sup> Also noted by Wheare, above n 6 at 109.

<sup>100</sup> A. Ides, ‘Judicial Supremacy and the Law of The Constitution’, (1999) 47 *UCLA Law Review* 491 at 505.

<sup>101</sup> Wheare, above n 6 at 108.

<sup>102</sup> Constitutional Centenary Foundation, <http://www.centenary.org.au>.

Australians, a new legal basis for their Constitution. Along with much of the jurisprudence promoting popular sovereignty, only the consent of the people is missing.<sup>103</sup>

### ***Criterion (iii) Adoption by referenda***

Daley has suggested that the notion that popular sovereignty only began with the passage of the Australia Acts is incongruous: “If the crucial characteristic of popular will is the effective power to bring about legal change, then sovereignty must have been transferred much earlier than the passage of the Australia Acts”.<sup>104</sup> However, arguments that propound the Australian populace was sovereign sometime before 1986, can be questioned on at least four levels.

First, proponents who assert that the popular vote approving the draft Constitution was the legal authority of the Constitution, have to contend with arguments that the vote was hardly popular.<sup>105</sup> Daley has suggested that the electorate in many Colonies consisted of less than 25% of the population and that only 11.49% of the population of Australia at the time voted Yes.<sup>106</sup> This has been expanded upon by George Williams in the context of Deane J’s criteria for popular sovereignty of the Constitution in *Theophanous*.<sup>107</sup> Williams commented that, in respect of

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<sup>103</sup> Also noted by H. Wright, ‘Sovereignty of the People - The New Constitutional *Grundnorm*?’ (1998) 26 (1) *Federal Law Review* 165 at 194.

<sup>104</sup> Daley, above n 97 at ch 6.4.5.

<sup>105</sup> Most women (all colonies except South Australia and Western Australia) and all Aboriginal Australians were denied the right to vote: noted by Zines, *The High Court and the Constitution* above n 88 at 395-396. For a recent analysis of the categories of disqualification which plagued the franchise for the referenda, see A. Twomey, ‘The Federal Constitutional Right to Vote in Australia’ (2000) 28 (1) *Federal Law Review* 125 at 144. As Professor Finn (as he then was) noted: “The popularly elected Convention and the federation referenda were obviously important... [but] Quick and Garran were too much the lawyers to exaggerate [their] *legal effect*”: Finn, above n 47 at 2.

<sup>106</sup> Daley, above n 97 at ch 6.3.2. Lindell suggests that “the number of persons who actually voted was only 60% of the eligible voters”: above n 92 at 30. Williams suggests 52%: above n 88 at 286.

<sup>107</sup> (1994) 182 CLR 104 at 171.

approval by referenda, “in view of the exclusion of large sections of the community from voting... the Constitution cannot be said to be the people’s document”.<sup>108</sup>

Secondly, even though the Constitution was on one level approved by the Australian electors, they did so without legal effect. Note the comments of Sir John Latham:

The draft [constitution] had no legal effect or significance. It simply contained a proposal for the consideration of the people and of the legislature to which it was to be submitted. The *popular vote* approving the Constitution again had no legal effect. The Constitution obtained legal efficacy only by enactment as a Statute by the Parliament in Great Britain. (emphasis added)<sup>109</sup>

The referendums should only be seen as the political foundation or “mere antecedent historical circumstance[s]” as Craven calls them.<sup>110</sup> Although the people of the colonies through their legislatures agreed to the newly drafted document, it remained just that, a consensual document, until it was enacted through the Westminster Parliament. It was at that stage the Constitution became legal in nature and effect, deriving its legal force from the process of enactment. See the comments of Thomson: “The referenda... while being an essential political prerequisite... were as a matter of law irrelevant to the legislative sovereignty of the United Kingdom”.<sup>111</sup> Thus “the

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<sup>108</sup> Williams, above n 98 at 287.

<sup>109</sup> J. Latham, ‘Interpretation of the Constitution’ in R. Else-Mitchell (ed), *Essays on the Australian Constitution* (2nd ed 1961) 1 at 4. Indeed, in this sense Australia’s claim is much less than the referendum that approved the constitution of Eire in 1937, which did away with the oath of allegiance and claimed sovereignty over the six counties of the North. In that case, the approval of the people “constituted the enactment of the document”: Wheare, above n 6 at 94. Still further, Australia’s claim is less than that asserted in 1922 by the founders of the constitution of the Irish Free State, who claimed they were sitting as a constituent assembly, and that the Irish Constitution was not ‘passed’ but merely ‘registered’ by the United Kingdom Parliament: L. Kohn, *The Constitution of the Irish Free State* (1932) at 91. Contrast however *Moore v The Attorney General for the Irish Free State* [1935] AC 484 at 491 per Viscount Sankey LC: “The measure which it [the constituent assembly] passed [the Irish Constitution] was scheduled to an Act of the Imperial Parliament entitled the Irish Free State Constitution Act 1922”. As such, “the Constitution of the Irish Free State derived [its] validity from the Act of the Imperial Parliament, [not] solely from the operations of an Irish body”: *Ibid* at 496-497.

<sup>110</sup> Craven, above n 94 at 76.

<sup>111</sup> Thomson, above n 6 at 1201.

agreement of the people called the Constitution into existence and gave it substantial validity".<sup>112</sup>

However, it was only the Commonwealth of Australia Constitution Act 1900 (Imp) that gave this political agreement legal force. At any time prior, it had no legal force but was wholly political in nature and effect. To adapt the words of Corwin who was commenting on the American Constitution: 'As a political *document* the Australian Constitution came from its founders and the populace who voted for it, but as a *law* the Constitution comes from and derives all its force from enactment by the Imperial Parliament'.

Corwin said: "As a *document* the Constitution came from its framers... but as a *law* the Constitution comes from and derives all its force from the people of the United States of this day and hour".<sup>113</sup> Corwin's statement would accord with those who favour constitutional interpretation based on progressivism and as a result prepared to treat the Constitution as a 'living force'. Most notably those proponents of popular sovereignty who would wish to blur the political and the legal to state that the current Australian populace is now the fundamental basis of the Constitution.

Thirdly, "even if one supposes that the people did consent to the Constitution prior to Federation, this consent is irrelevant to obeying the Constitution today".<sup>114</sup> Fourthly, if the people of Australia were truly sovereign: Why did they (through their representatives) feel it necessary, in 1986, to go "cap in hand" to request the United Kingdom Parliament to "pass a statute concerning them at all?"<sup>115</sup> This action, far from recognising the popular acceptance of the Constitution,

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<sup>112</sup> Sir Maurice Byers QC as counsel for the plaintiff in *ACTV* (1992) 177 CLR 106 at 109.

<sup>113</sup> E. Corwin, *The Doctrine of Judicial Review*, (1963) at 82.

<sup>114</sup> Daley, above n 97 at ch 6.3.2.

<sup>115</sup> M. Kirby, Introduction (1996) 20 *Melbourne University Law Review* 949 at 950.

The Australia Act 1986 (UK) was passed pursuant to s 4 of the Statute of Westminster. No doubt out of an abundance of caution this method was chosen, but since 1986 more, not less, of Australia's constituent documents are to be found in the statute book of the United Kingdom. A point also noted by Hogg in relation to Canada; above n 67 at 54. Further, as Professor Zines has

clearly demonstrated an acceptance of the “legislative supremacy of the United Kingdom Parliament”.<sup>116</sup> This ‘cap in hand’ action is one of Justice Kirby’s recognised “chinks in the popular sovereignty theory’s armour”.<sup>117</sup> This is one of the [many] “historical and political flaws”<sup>118</sup> with the theory. It is difficult for protagonists of popular sovereignty occurring before 1986 to explain why a parliament which “had no business whatever enacting any law concerning Australia’s Constitution”<sup>119</sup> was politely summoned and the sovereign people were not.

So too, Australians had requested the United Kingdom Parliament insert saving clauses in both the Statute of Westminster and the Australia Act (UK) to ensure that the Commonwealth and States could not unilaterally disturb the balance between federal and state legislative powers.<sup>120</sup> In 1960, Wheare, commenting on these provisions in the Statute of Westminster, noted this was to have the desired effect of maintaining the supremacy of the Australian Constitution, but that that supremacy was based upon the status of the Constitution as an Act of the parliament of the United Kingdom.<sup>121</sup> Even after the Australia Acts in 1986 nothing has changed to alter the status of the Constitution Act as a United Kingdom statute applying by paramount force.

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noted: “If s 51(xxxviii) did not support the Australia Act 1986 (Cth), the British Act by nature of its paramount force would”: Zines, *The High Court and the Constitution* above n 88 at 305.

<sup>116</sup> Craven, above n 94 at 141.

<sup>117</sup> M. Kirby, ‘Deep Lying Rights – A Constitutional Conversation Continues’, The Robin Cooke Lecture 2004, 25 November 2004, from web, <http://www.hcourt.gov.au/speeches/kirbyj.html;2/12/04;4>

<sup>118</sup> *Ibid* at 3.

<sup>119</sup> *Ibid* at 4.

<sup>120</sup> See Dawson J in *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 452.

<sup>121</sup> Wheare, above n 6 at 61.

### ***Summary of Marshall's Criteria***

At first blush, it would appear each of Marshall's criteria are distinct<sup>122</sup> and if any one criterion is satisfied, autochthony is achieved. However, as Joseph has noted "autochthony is most likely to be successfully asserted when all the criteria are satisfied",<sup>123</sup> (as with New Zealand, but query Canada). Therefore, the better view would be that although Australia seems autochthonous by virtue of Marshall's criterion (i) (s 15(1) of the Australia Acts 1986) (if it is considered a criterion of autochthony and not autonomy) and possibly also by virtue of criterion (iii),<sup>124</sup> the matter is inconclusive and still awaiting determination.

## **PART C- AUTOCHTHONY BY ANY MEANS: THE LEGAL AND THE POLITICAL**

Thus it seems no matter what putative time is ascribed for the legal sovereignty of the Australian populace to commence, there are both historical and legal problems, as well as 'considerable theoretical difficulties'. This chapter does not gloss over such problems and difficulties but engages them. As this chapter has shown, strong arguments can be mounted against any additional (to s 128) legal role being found for the people, either in the adoption of the Constitution; stemming from the passage of the Australia Acts or even s 128 itself; or even the continued popular acceptance of the Constitution. In the face of such criticisms, many proponents of popular sovereignty see the need to conflate the legal and political sources of constitutional authority. To quote Andrew Fraser: "[A] clear majority of the High Court is prepared to assert the

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<sup>122</sup> "The criteria are not synonymous": Joseph, *Constitutional and Administrative Law in New Zealand* above n 19 at 412.

<sup>123</sup> *Ibid* at 413: Even "legal discontinuity is probably insufficient itself to establish a native legal root or local *grundnorm*". In this sense, the discussion earlier in this chapter regarding the use of a plebiscite to declare autochthony would satisfy criteria (ii) and (iii).

<sup>124</sup> It appears difficult to place a time on the achievement of autochthony under criterion (iii). However the ubiquitous judicial and juristic statements promoting popular sovereignty arising from the 'implied rights cases' seem to represent this awakening.

freedom to endow the conventional norms of modern political life with the full force of law".<sup>125</sup>

Further, "those who insist that the 'real' genesis of the Constitution lies in its acceptance by the Australian people have further eroded the already shaky boundary between law and politics".<sup>126</sup>

Professor Finn (as he then was) observed: "Dicey's two sovereignties appear to be coalescing as they did in the United States more than two centuries ago".<sup>127</sup> However even Marshall eschews the need for this and states:

It would not be a contradiction for an Australian to say that he [sic] believed the reason for the Australian constitution's [legal] validity to be its embodiment in a British Act of Parliament... at the same time as he [sic] insisted that he [politically] 'accepted' it because the rules it contained were enforced by Australians and approved of by his [sic] parliamentary representatives, who could alter them if they ceased to approve of them.<sup>128</sup>

A similar view appears to have been consistently put by Justice Dawson in his judgments in the 'implied rights cases'. To paraphrase the words of Marshall and Dawson J might reveal the following proposition: 'It is no contradiction for one to assert as a matter of *legal theory*, that the legal basis of the Constitution is its passage through the Imperial Parliament, while at the same time one recognises that, as an abstract proposition of *political theory*,<sup>129</sup> one actually accepts

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<sup>125</sup> Fraser, above n 83 at 223.

<sup>126</sup> *Ibid* at 222.

<sup>127</sup> Finn, above n 47 at 4. For example J. Kirk, 'Constitutional Interpretation and Evolutionary Originalism' (1999) 27 (3) *Federal Law Review* 323 at 341-342 states that it "is a matter of complex legal and moral theory" as to "why Australians accord the Constitution overriding effect, now that Britain's authority has been removed". However, he then fails to give one legal reason, only providing moral or political reasons. Further, George Williams has said that: "A wholehearted adoption of republicanism as an interpretative tool would, at least until it became part of the Australian legal tradition, involve breaking down [or blurring] the boundary between politics and law": G. Williams, *Human Rights under the Australian Constitution* (1999) at 143. Further, "Underlying republicanism... is the notion that law and politics are inextricably linked such that, at the extreme, the former might be regarded as a subset of the latter"; *Ibid*. And although he says the 'implied rights cases' are "far removed from the Court endorsing or accepting the place of republicanism within Australian constitutionalism", he agrees with B. F. Fitzgerald that "[s]trains of republican thought can be seen' in both *ACTV* and *Nationwide News*"; *Ibid* at 147-148.

<sup>128</sup> Marshall, above n 1 at 60.

<sup>129</sup> Also noted by Winterton, above n 96 at 4.

and obeys the Constitution because it is Australia's fundamental law'. As Justice Dawson asserted in oral argument in *Commonwealth v Mewett*:

It is and was a British statute and it is there. It may be that its force is spent now and that the existence of the *Commonwealth* is dependent upon the acceptance of the people, in the same sense as any government is ultimately dependent upon the acceptance of the people. (emphasis added)<sup>130</sup>

At this point however, note his Honour's carefully chosen words. His Honour states that the Commonwealth (not the Constitution) is dependent upon the acceptance of the people. His Honour's reference to peoples obeying their government, connotes that in ***political theory*** only, the force of the Constitution as a British statute is spent, because no one gives a second thought to it as (or even knows it is) part of a British statute. The force of the Constitution as a fundamental law for all Australians is now pre-eminent, and this depends upon acceptance. More explicitly in *ACTV* his Honour expresses the view that "as an abstract proposition of *political theory* the *Constitution* ultimately depends for its continuing validity upon the acceptance of the people."<sup>131</sup> (emphases added) Remember, the words of Dicey:

The arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. *But this is a political, not a legal fact.* The electors can in the long run always enforce their will. But the courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament.<sup>132</sup> (emphasis added)

In ***legal theory***, however, the Constitution is not dependent upon acceptance for its continuing validity. Being a statute, it depends on valid enactment. Thus, since the Constitution is the

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<sup>130</sup> (1997) 191 CLR 471. See transcript of oral argument 12/2/97 from web, 8/2/99, <http://www.austlii.edu.au/do/disp...996/S35/1.html>; 11.

<sup>131</sup> (1992) 177 CLR 106 at 181.

<sup>132</sup> A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, (1956: 9<sup>th</sup> edition) at 73.

fundamental law of the Commonwealth, the Commonwealth depends upon the acceptance of the people.<sup>133</sup>

This dichotomy has also been clearly recognised by W. Harrison Moore. In 1902 he discerned the legal basis of both the Constitution *and* the Commonwealth as tied to the Imperial Parliament: “The establishment of the Commonwealth... is an act of law performed under the authority of the acknowledged political superior”.<sup>134</sup> However, the original legal foundation of the Commonwealth is now spent, and it is the acceptance of the Australian people that now sustains the Commonwealth. However, the legal basis of the Constitution has not changed, it is still “first and foremost *a law* declared by the Imperial Parliament”.<sup>135</sup> In other words “the Constitution ‘is’ because it derives, with unbroken lineage, from an historically prior and superior authority”.<sup>136</sup> This view stresses the supremacy of the Constitution based upon its origin.<sup>137</sup> So too, in 1901 Quick and Garran noted that the powers enjoyed by the new Commonwealth “are *delegated by* and *derived from* the British Parliament, and they are to be held, enjoyed, and exercised by the people of the Commonwealth in the manner prescribed by the grant, subject - (1) to the supreme British Sovereignty (under the Crown), and (2) to the Constitution of the Commonwealth”.<sup>138</sup> (emphasis added)

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<sup>133</sup> However, in another sense, the Commonwealth depends upon both the legal and political validity of the Constitution. In Australia, these are not one and the same. In the United States they are: J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901 rep 1976) at 285.

<sup>134</sup> W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902, 2nd ed rep 1910) at 66. Of course, Australia has not been politically subordinate or inferior to the United Kingdom since possibly as early as the Treaty of Versailles in 1919, or as late as the adoption of the Statute of Westminster in 1942. This timeframe has also been recognised in respect of Canada’s evolution to statehood: see *Re Offshore Mineral Rights of B.C.* [1967] S.C.R. 792 at 816, although Canada adopted the Statute of Westminster in 1931.

<sup>135</sup> Harrison Moore, above n 134 at 66.

<sup>136</sup> Joseph, *Constitutional and Administrative Law in New Zealand* above n 19 at 397.

<sup>137</sup> Wheare, above n 6 at 68.

<sup>138</sup> Quick and Garran, above n 133 at 300. See also pages 285-286, 294-295 and 324-328.

Inherent in Justice Dawson's reasoning in the 'implied rights' cases, the legal and political are kept distinct. The present writer prefers this view because as his Honour notes, when one refers to popular sovereignty, one inevitably reverts to political concepts not legal concepts.<sup>139</sup> As long ago as *Engineers*, the legal and political were kept distinct and the High Court was to limit its sphere of influence to the former. The motive for obeying the Constitution (the moral justification) is to be found in the study of political obligation (the concept of 'authority' is probably more helpful than 'sovereignty'),<sup>140</sup> while the reason for believing the Constitution to be valid and binding is to be found in the study of legal theory supported by history. Those who promote the idea that there is "little point in distinguishing between the legal and political sources of the Constitution",<sup>141</sup> reduce the matter of constitutional validity to a study of 'Realpolitik' political philosophy.

It may be that the final occasion on which a sitting High Court Justice emphasised the source of the Australian Constitution as the Westminster Parliament was Justice Dawson's dissenting judgment in *ACTV*:

It is as well to bear in mind the nature of the instrument and the source from which it derives its authority. The Constitution is contained in an Act of the Imperial Parliament... Notwithstanding that this Act was preceded by the agreement of the people of [the colonies, except Western Australia] to 'unite in one indissoluble Federal Commonwealth', the legal foundation of the Constitution is the Act itself which was passed and came into force in accordance with antecedent law... It does not purport to obtain its force from any power residing in the people to constitute a government, nor does it involve any notion of the delegation of power by the people such as forms part of American constitutional doctrine. The words of the United States Constitution 'We the People of the United States... do ordain and establish this Constitution...' find no counterpart in the Australian Constitution; indeed, such words would entirely belie the manner of its foundation. *No doubt it may be said as an abstract proposition of political theory that the Constitution ultimately depends for its continuing validity upon the*

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<sup>139</sup> *Levy v State of Victoria* (1997) 189 CLR 579. See transcript of oral argument 6/8/96 from web, 12/9/99, <http://www.austlii.edu.au/do/disp...ipts/1995/M42/8.html>; 9.

<sup>140</sup> See Daley, above n 97.

<sup>141</sup> Winterton, above n 96 at 7. However, Daley, above n 97 at ch 6.2 has said: "The progression from moral norm to legal norm requires more careful argument". Goldsworthy has stated on more than one occasion that claims that "there is no important distinction between law and politics may be harmful"; J. Goldsworthy, 'Reply to Galligan' (1989) 18 (1) *Federal Law Review* 50 at 52.

*acceptance of the people, but that may be said of any form of government which is not arbitrary.* The legal foundation of the Australian Constitution is an exercise of sovereign power by the Imperial Parliament. The significance of this interpretation of the Constitution is that the Constitution is to be construed as a law passed pursuant to the legislative power to do so. (emphases added)<sup>142</sup>

Kainthaje, in an effort to “deconstruct Justice Dawson’s arguments” cites most of the foregoing passage and analyses it rhetorically by dissecting its “employment of figures of speech or tropes”.<sup>143</sup> It is said that when this is done “the ideals espoused by Dawson J can be questioned forcefully”.<sup>144</sup> However, as Kainthaje must admit “this is not to say the majority judgments [in ACTV] are free from rhetorical displacement”.<sup>145</sup> In the end the only reason why Kainthaje favours the majority judgments over that of Dawson J is that Kainthaje is generally receptive to the making of constitutional implications. However, this (as also noted by Kainthaje) “may well depend on one’s conception of democracy [that is, courts or parliaments as the best protectors]”.<sup>146</sup> It also depends on one’s reading of the historical record. A more faithful reading would clearly uncover that the Founders placed their faith in the institution of parliament not the courts to protect freedoms. Contrary to Kainthaje’s assertions, and as has been forcefully argued throughout this thesis, this choice *was* the Founders and not merely Dawson J’s.

Perhaps the most disturbing aspect of Kainthaje’s analysis is his assertion that “Dawson J transfers a quality to the Constitution which it no longer has - namely - *subordination* to the Imperial Parliament”.<sup>147</sup> (emphasis added) It is said this results from maintaining the view that “the legal foundation of the Australian Constitution is an exercise of sovereign power by the

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<sup>142</sup> ACTV (1992) 177 CLR 106 at 180-181.

<sup>143</sup> P. Kainthaje, ‘Strict Construction Meets Deconstruction: A Constructive Defence of Implied Rights’ (1996) 12 *Australian Journal of Law and Society* 1 at 34.

<sup>144</sup> *Ibid* at 35.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid* at 10.

<sup>147</sup> *Ibid* at 32.

Imperial Parliament".<sup>148</sup> However, as clearly demonstrated earlier in this thesis, such a view does not necessarily imply subordination. In fact many who adhere to the traditional view would be appalled by this interpretation and highlight again the difference between subordination and derivation. As Daley says: "Even if the authority of the Constitution is derived from the Imperial Parliament, that does not necessarily imply subordination".<sup>149</sup>

De Smith and Brazier make the point that it is politically expedient for revolutions (legitimate or otherwise) to invariably invoke the "vague concept" of popular sovereignty when usurping power, in an attempt to achieve legitimacy. In this way even the most illegitimate and undemocratic usurpation can avoid being so stigmatised. Or can it?<sup>150</sup> They continue:

It is one thing to say that *government* should rest on the consent of the governed; it is another thing to proclaim that a *constitution* has acquired the force of supreme law merely because it has obtained the approval of an irregularly convened Constituent Assembly or of a majority of the electorate or both. (emphases added)<sup>151</sup>

Thus, like Justice Dawson, they distinguish between government and constitution. The political fact of the requirement for the "consent of the governed" is separated from the legal basis of a constitution which affords it the "force of supreme law".

The "irregularly convened Constituent Assembly" De Smith and Brazier refer to includes both the U.S. Congress which, in 1776, ratified the U.S. Constitution and the illegally summoned Convention-Parliament consisting of "peers, former members of Parliament and other notables" which in 1689 offered the English Crown to William III and Mary II.<sup>152</sup> The electoral majority

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<sup>148</sup> Dawson J in *ACTV* (1992) 177 CLR 106 at 181.

<sup>149</sup> Daley, above n 97 at ch 5.6.1.

<sup>150</sup> De Smith and Brazier, above n 6 at 71.

<sup>151</sup> *Ibid.*

<sup>152</sup> Possibly also the actions of the House of Commons immediately before the execution of Charles I where it declared "the representatives of the people, the Commons, as the source of all

De Smith and Brazier refer to could easily apply to the referenda process by which the Australian colonies accepted the draft constitution. Thus, according to the authors these acts do not necessarily imbue a constitution with the necessary force of supreme law. However, they also note that to deny this legitimacy too rigidly will “land one in a morass of absurd and insoluble difficulties”.<sup>153</sup> These being, in part, the absurd claims that the Stuarts are still the rightful heirs to the English throne and the America States are still British colonies. Thus, there being no alternative historical and legal facts discernible, the English and United States positions must “beget their own legality”. However, in Australia any such imprecision can be avoided. One need only refer to history and the legal fact that the Australian Constitution was “duly enacted by the United Kingdom Parliament”.<sup>154</sup>

## CONCLUSION

This chapter concluded that the search for autochthony is firmly in the hands of Australians. To rely on our British parent is unsatisfying and equivocal. Similarly, to rely on the High Court is unsatisfying, disturbingly undemocratic and at present highly confusing.<sup>155</sup> The process should not be left to the judiciary alone to bring Australia’s constitutional and legal arrangements into line with practical realities, even if that is thought necessary. It should involve all the constituent components of the federation including of course the vital popular element.

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just power”: M. Kirby, ‘The Trial of King Charles I – Defining Moment for our Constitutional Liberties’ Speech to Anglo-Australian Lawyer’s Association, London – Great Hall, Grays Inn, 22 January 1999, from web, <http://www.hcourt.gov.au/charles88.htm>;6.

<sup>153</sup> De Smith and Brazier, above n 6 at 71.

<sup>154</sup> *Ibid* at 70.

<sup>155</sup> Winterton, above n 96 at 2 has intimated that “the outcome of constitutional litigation in the High Court [has become] highly unpredictable”. Witness also the jurisprudential difficulties encountered in the trilogy of references to the Canadian Supreme Court during 1980-1982. For a detailed assessment see Oliver, above n 78 at 9-11 from web.

Marshall's three criteria provide a guide for the attainment of autochthony. According to Marshall's first criterion (a local amending procedure), Australia may already be autochthonous on some level. Further, if one accepts the veracity of Marshall's second criterion (merely *claiming* a break in legal continuity), autochthony can be achieved without the necessity for a break in continuity. As such, if Australia was to repeal the Constitution Act, autochthony could be secured. However, in doing so Australians would need to *claim* that the effect was 'revolutionary'.<sup>156</sup> This would be despite resorting to an 'evolutionary' process that relied on a power which in ultimate terms was externally-derived. Finally, if Australia was to declare autochthony based upon a declaration of popular sovereignty, autochthony could be secured by means of a peaceful legal revolution.<sup>157</sup> Again 'the process is evolutionary but the effect revolutionary'. The people's withdrawal of allegiance to the current Monarch would violate the old order and institute a 'technical' break in continuity.

However, if Marshall's first criterion does not apply, and the second criterion is not invoked, the issues might be left to the High Court. If the traditional legal basis of the Constitution is then to be discarded, the present writer would argue that the federal compact should be seen to be the substitute, not popular sovereignty.

Further, if the issues are left to the High Court, autochthony could be achieved if the popular sovereignty thesis were 'sufficiently refined' (that is, clearly defined as to a theoretical or symbolic role, and unambiguous as to the true beneficiaries) and received the support of the majority as the legal basis of the Constitution. This would be because of the acceptance of the 'new attitude' probably according with Marshall's third criterion, and Hart's rule of recognition.

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<sup>156</sup> Joseph, *Constitutional and Administrative Law in New Zealand* above n 19 at 122.

<sup>157</sup> Wade, above n 49 at 191-197: a 'disguised revolution'.

The essential condition to determine whether constitutional arrangements have been annulled and a former regime dispensed with, is the efficacy of the change. As such, because of the largely inconclusive state of the authorities at present, it is impossible to predict with certainty whether or not the popular sovereignty revolution will succeed, and if so, in what form.<sup>158</sup> This then makes it difficult to further presuppose whether the legal basis of the Constitution has changed, which is the focus of the next chapter.

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<sup>158</sup> Adapted from the judgment of Lord Reid in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 725 quoting in part Sir Muhammed Munir CJ in *The State v Doso* [1958] 2 PSCR 180 at 185.

# **CHAPTER NINE**

## **A CHANGE IN THE LEGAL BASIS OF THE CONSTITUTION?**

### **INTRODUCTION**

This chapter discusses the legal basis of the Constitution and nature of the Constitution itself. As an aid to asserting an autochthonous constitution for Australia and formulating a fundamental and deep rights doctrine, many suggest that the legal basis of the Commonwealth Constitution has moved from the United Kingdom Parliament to the sovereignty of the Australian people. As a consequence, the nature of the Constitution is now said to be a social contract or at least a document that might be supportive of rights for the governed as its terms and conditions, and not an Imperial Statute. However, this chapter canvases the historical and jurisprudential criticisms of the philosophical phenomenon known as the social contract, to show that it has no place in Australia's current constitutional arrangements.

In Australia, the nature of the Constitution is a subject of fervent discussion. In fact, it is an inquiry that has occupied the High Court from its very inception and continues to do so today. In 1985, James Thomson suggested the nature of the Constitution was either an Imperial Statute, an autochthonous Constitution or a compact.<sup>1</sup> In 1998, Nicholas Aroney offered an expanded view:

The question of the fundamental nature of the Constitution has traditionally been answered in a number of ways. Most commonly it has been described as either an Imperial Statute, a fundamental law under which ordinary laws are made, a social contract to which the Australian people are a party, or a federal compact between the constituent states... The third and fourth kinds of answer to this question are often collapsed. It is often stressed that the Constitution is a compact between the people of the constituent states...However, two separate conceptions are at work here, and vie for dominance. One stresses the popular nature of the Constitution: the *people* as a whole,

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<sup>1</sup> J. Thomson, 'The Australian Constitution: Statute, Fundamental Document or Compact?' (1985) 59 *Law Institute Journal* 1199 at 1199.

voting as individuals, adopted the Constitution; therefore the Constitution should be understood as a *social contract* based on popular sovereignty. The other conception is that the moving forces were the people and the legislatures of the separate and formerly independent colonies, now states, which points to the fundamental nature of the Constitution as a *federal pact*.<sup>2</sup> (emphases added)

Aroney correctly resists the temptation to blur the distinction between the legal and political foundation of the Constitution and further correctly resists the tendency to collapse the distinction between social contract and federal compact (although he terms it federal pact). It is these distinctions that this chapter and chapter ten recognizes. I argue they ought to be revitalised and clearly maintained.

It seems reasonable to propose that constitutions could be broadly categorised in at least three ways. Each may legitimately be both the legal and political source of a particular constitution, or merely constitute the legal or political source:

*(i) An imposed constitution defining the powers of government*

- constitutions which aim at defining the government (or the relationship between governments in a federation) and its powers and which emanate from the will of a sovereign body; or

*(ii) A rights supportive social contract constitution*

- constitutions which consist of a declaration of rights, and of certain broad principles which are to be observed in governing the people;

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<sup>2</sup> N. Aroney, *Freedom of Speech in the Constitution* (1998) at 65 and 66.

(iii) *A federal compact*

- constitutions which consist of formal compacts between negotiating geographical and political entities.

Part A of this chapter will argue that in broad terms, category (i) constitutes the *legal* basis of the Australian Constitution. The nature of the Constitution will be identified as an imposed Act of the Imperial Parliament.<sup>3</sup> Part B will note that popular sovereignty is increasingly being promoted as the legal basis. It is further noted popular sovereignty is associated with a theory known as the social contract. It will be noted that as a result of this reasoning in the ‘implied rights cases’ Australia’s Constitution is sought to be transformed into a document supportive of rights similar to category (ii). This chapter will argue against this. Chapter ten will then promote that the correct *political* basis of the Constitution is a variant of social contract theory, known as ‘federal compact’; that is, category (iii).

## **PART A - IMPERIAL STATUTE: THE LEGAL BASIS**

The traditional view for over ninety years, whereby the High Court has “historically stressed the nature of the Constitution as an Act of the Imperial Parliament”<sup>4</sup> has been under severe scrutiny by the High Court. As Hutley noted in 1981 “Australia obtained the advantages of independence

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<sup>3</sup> In respect of the authority of the State Constitutions, there is a similar although less prevalent debate in existence. Blackshield has noted one view that such validity is still to be sought from an Act of the Imperial Parliament. “But another view is that their validity as State Constitutions must now be derived from the Commonwealth Constitution through the gateway of s 106”: A. Blackshied, ‘The Implied Freedom of Communication’ in Lindell, G. (ed.) *Future Directions in Aust Const Law* (1994) at 265-266.

<sup>4</sup> Aroney, above n 2 at 148.

without having to fight for it. But winning without having a fight carries the disadvantage of an ideological neutral legal system.”<sup>5</sup>

The Founders of the Australian Constitution explicitly rejected a bill of rights, so as this rejection does reflect an ideological position, perhaps Hutley’s view is a little too simplistic. However, it is clear that in the face of a retreating British hegemony, the proponents of popular sovereignty wish to imbue the Australian Constitution with a new form of ideology to search for an autochthonous Constitution. As such, the Imperial Statute approach is now seen as increasingly out of favour.

As a result, it might be said that some theorists are attempting to reinterpret the relationship between legality and popular legitimacy. Whereas higher regard has traditionally been shown for legality (the Imperial Statute view) than for popular legitimacy, this appears to be reversing.<sup>6</sup> However, is this necessary? The Australian Constitution was adopted by referendum in the 1890’s giving popular legitimacy, while it was given the force of law (legality) by engaging the Westminster Parliament. Thus unlike the position of the British North America Act 1867 (which was long on legality but short on popular legitimacy), a favourable blend of legality and legitimacy was achieved.

In former times the ‘statute view’ had been forcefully argued. In 1935 Sir Owen Dixon said:

The framers of our own federal Commonwealth Constitution found the American instrument of government an incomparable model... But, although they copied it in many respects with great fidelity, in one respect the Constitution of our Commonwealth was bound to depart altogether from its prototype. It is not a supreme law purporting to obtain its force from the direct expression of a people’s inherent authority to constitute a

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<sup>5</sup> F. Hutley, ‘The Legal Traditions of Australia as Contrasted with those of the United States’ (1981) 55 *Australian Law Journal* 63 at 65.

<sup>6</sup> Noted also in the Canadian context by P. Oliver, ‘Canada, Quebec, and Constitutional Amendment’ (1999) 49 *University of Toronto Law Journal* 519 at 588.

government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.<sup>7</sup>

In the last decade however, the 'statute view' of the Constitution has been the response of only a minority of jurists and judges considering such weighty matters. Often, even if this view is acknowledged, it is quickly dismissed. For example in 1997, Brennan CJ in *Kruger v The Commonwealth* said: "The Constitution, though in form and substance a statute of the Parliament of the United Kingdom, was a compact among the peoples of the federating colonies".<sup>8</sup> In 1992, the 'statute view' was forcefully argued by Dawson J, but his was the minority judgment in *Australian Capital Television Pty Ltd v The Commonwealth*. It might be that the following passage from this judgment will be the final occasion on which a sitting High Court Justice emphasises the nature of the Australian Constitution as an Imperial statute:

It is as well to bear in mind the nature of the instrument and the source from which it derives its authority. The Constitution is contained in an Act of the Imperial Parliament... Notwithstanding that this Act was preceded by the agreement of the people of [the colonies, except Western Australia] to 'unite in one indissoluble Federal Commonwealth', *the legal foundation of the Constitution is the Act itself which was passed and came into force in accordance with antecedent law...* It does not purport to obtain its force from any power residing in the people to constitute a government, nor does it involve any notion of the delegation of power by the people such as forms part of American constitutional doctrine. The words of the United States Constitution 'We the People of the United States... do ordain and establish this Constitution...' find no counterpart in the Australian Constitution; indeed, such words would entirely belie the manner of its foundation.<sup>9</sup> (emphasis added)

John Daley identifies three flawed claims as to why the Imperial Parliament is no longer the source of legal authority for the Australian Constitution:

First, the claim... that a body which lacks authority to legislate in the present cannot provide authority for legislation made in the past. Secondly, the claim... that some revolution has occurred to break at least partly with the authority of the past and

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<sup>7</sup> Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (1965) at 44. Also noted in G. Lindell, 'Why is Australia's Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29 quoting Sir O. Dixon, 'The law and the Constitution', (1935) 51 *Law Quarterly Review* at 597.

<sup>8</sup> (1997) 190 CLR 1 at 41-42.

<sup>9</sup> (1992) 177 CLR 106 at 180-181.

substitute a new legal regime unauthorised by its predecessor. Finally, the claim may be a moral one: that whereas previously obedience to the Imperial Parliament was a good reason for action, today only the Australian people can legitimately authorise a government.<sup>10</sup>

The short answers Daley gives to such claims are as follows:

- (i) it does not matter that “the Imperial Parliament lacks power to make new legislation for Australia”. It provides authority by derivation not subordination (The authority for one king is often the rule of succession laid down by his now deceased predecessor, who would manifestly lack the capacity to make new laws); and
- (ii) “No revolution has occurred”; and
- (iii) “the Imperial Parliament does not, and never did, provide sufficient moral reasons for obeying the Constitution”.<sup>11</sup>

The present writer *prima facie* agrees with each answer given by Daley, but wishes to take some issue with the second and third answers. In respect of (ii): as noted earlier in this thesis, Australia is indeed fortunate to have had the ability from within, and the co-operation from the United Kingdom to develop fully independent legal and constitutional arrangements which at the same time bear all the hallmarks of continuity. No revolution has occurred. However, the judicial rationalisation that the authority of the Constitution is now derived from the people could prove destabilising and inimical for such continuity. This would be the case if the inference is drawn by the High Court that rights can be discovered from a judicial reading of the popular will and not left to Parliament.

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<sup>10</sup> J. Daley, *The Bases for the Authority of the Australian Constitution* (1999) unpublished D. Phil thesis, Oxford at ch 5.2.2.

<sup>11</sup> *Ibid* at ch 5.6.2.

This thesis does not reject the observation that in empirical terms, a shift or change in the ‘rule of recognition’ or *grundnorm* or ‘ultimate principle’ may be occurring. In particular, Daley’s assessment that judicial statements promoting popular sovereignty are “at best... argument[s] about the Constitution’s moral [political?] authority, not its legal authority”<sup>12</sup> seems inaccurate. While these statements may in fact have this effect, it is not clear that the more fervent promoters of popular sovereignty were at all confining their comments to merely moral or political arguments. Many could not be more emphatic that they are conferring upon the Australian populace both political and legal sovereignty.<sup>13</sup>

In respect of (iii): On one view, the Imperial Parliament may at one time have provided moral reasons for obeying the Constitution. This was because at the time of enactment of the Constitution, the people of Australia were the subjects of a British and Imperial Crown. In fact, Daley has himself concluded that the best moral justification for obeying the Constitution is to “identify Australia’s legal system by reference to previous legally authoritative norms, in particular, the historical enactment of the Constitution by the Imperial Parliament”.<sup>14</sup>

In spite of the current pining for a local Australian root or autochthonous constitution, it is clear that passage of the Constitution through the Parliament at Westminster is the legal foundation of the Constitution. This is because Australia’s constitutional arrangements are still legally derived from, but not subordinate to, the United Kingdom Parliament. The argument is as follows:

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<sup>12</sup> *Ibid.*

<sup>13</sup> See Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138 and McHugh J in *Ridgway v The Queen* (1995) 184 CLR 19 at 91 and McHugh J in *McGinty v Western Australia*. (1996) 186 CLR 140 at 230. See M. Wait, ‘The Slumbering Sovereign: Sir Owen Dixon’s Common Law Constitution Revisited’ (2001) 29 *Federal Law Review*, 57 at 70 where Wait also assesses such developments as “hav[ing], without overstatement, been described as revolutionary” but contrasting the opinion of George Winterton.

<sup>14</sup> Daley, above n 10 at ch 1.5.

- The United Kingdom Parliament enacted the Constitution as (part of) one of its statutes; the Constitution Act.
- The Constitution was from its inception the fundamental law applicable to Australia and Australians (applying by the paramount status of the Constitution Act), binding throughout the Commonwealth (covering clause 5) and of superior force to all other laws in Australia (other than an Act of Westminster, now removed).
- This position did not change in 1986 (or at any other time for that matter) even though Australia has attained by evolution the status of a fully independent sovereign nation. That evolution is already complete under the existing Constitution. Hence, the Constitution is still binding on the executive, courts, judges and people.
- The Constitution Act has not ceased to hold its paramount status. It is clear existing Imperial Acts applicable to Australia in 1986, continue in force after 1986 until amended or repealed by valid Australian legislation.

Beyond this constitutional arrangement it is not necessary or appropriate to ascribe any additional legal/constitutional role (as distinct from a political or quasi-legal role) to the Australian people. Their express role is prescribed and entrenched by the terms of the Constitution. It is sufficient to note that the Australian people already have a legal role (conjointly with the Commonwealth Parliament and the Governor-General) under s 128. The people also have a fundamental and essential continuing legal (ss 7 and 24 of the Constitution) and political role, which they exercise by directly electing both Houses of the Commonwealth

Parliament at regular elections. Further, on one view, this political role was exercised on the adoption by referenda of the Constitution in the 1890's.

The present writer makes no apology for advocating this strict abstract view despite the view being at variance with a concrete description of the political character of the Australian constitutional order. There is no doubt that some would say one day the law would be obliged to catch up with the political and practical realities. However until this is achieved by a democratic process (legislative or by referenda), logic and certainty should be preserved. Further, maintenance of the strict legal view does not imply that "the Constitution was in some way a betrayal of Australian identity. The very opposite is true. The Constitution was, of course, an Australian creation".<sup>15</sup> It was drafted by leading Australians for Australians and through the referendum process empowers Australians to have a say in amending their supreme law.

It does not necessarily follow that, because a constitution depends for its legal validity upon a process that does not involve popular vote, it should only be changed by a process which similarly eschews a popular mechanism. This is the attraction of the Australian Constitution. In spite of its non-popular legal basis, it embodies democratic legitimacy by its involvement of the people through s 128. (Arguments about the primacy of s 128 or s 15 of the Australia Act put to one side for the moment). Is not this system more in tune with democratic principles than a system such as the U.S. which merely pays lip service by making the people sovereign, but then denying them any role in constitutional amendment?<sup>16</sup> Australians do not have to pretend power

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<sup>15</sup> A. Atkinson, *The Muddle-Headed Republic* (1993).

<sup>16</sup> Noted in part by C. Gilbert, 'Section 15 of the Australia Acts: Constitutional Change by the Back Door' (1989) 5 *Queensland University of Technology Law Journal* 55 at 67. See also B. Harris, *A New Constitution for Australia* (2002) at 161. Suffice to say some States such as California have unusual Constitutional mechanisms such as 'Citizen Initiated Referenda' and the 'Recall' election which was most recently used in 2003 to elect Arnold Schwarzenegger as Governor.

comes from the people because they are already ascribed a popular and quasi-legal role of amendment under the Constitution.

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

Recent forays into converting Australia from a monarchy within the Commonwealth of Nations to a republic within the Commonwealth of Nations would not have changed the nature of the Constitution from being an Imperial statute. This was at least the case with the aborted effort in 1999 under the Australian Republican Movement's (A.R.M.) proposed model.<sup>17</sup> This is because the model discarded the Crown (by removing any reference to the Monarch) as a common unifying entity in the Federation without replacing it with 'The People' to fill the vacuum. This vacuum is symptomatic of the constitutional conundrum that appears to perplex jurists and judges. The A.R.M. model did not truly propose a form of government where all power (political and legal) emanates from the people, and the government holds such power as a trustee. As noted in the previous chapter, any future republican arrangements should unambiguously promote 'The People' for the sake of constitutional certainty and autochthony. Only in this way might "the current format of a national constitution contained in an Act of the Parliament of another country" be dispensed with, thus "enhanc[ing] its status as a 'foundational' document".<sup>18</sup>

The main difficulty with the A.R.M. model was that it did not propose to repeal the Constitution Act itself in *toto*, but only some of the covering clauses. As such, (and for the reasons noted in the previous chapter) there would still have been an argument that since the long and short title and other provisions remained, the Constitution's legal basis was still the United Kingdom

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<sup>17</sup> Constitution Alteration (Establishment of Republic) Bill 1999 (Cth).

<sup>18</sup> *An Australian Republic, The Options-The Report*, The Report of the Republican Advisory Committee (1993) Vol 1 at 122.

Parliament. Such less than decisive and ambiguous action would not have repudiated the source of Australia's legislative autonomy and denied a legislative gift was ever made. To many minds, it would have still been possible to invoke a logically prior parental legislative power. Needless to say autochthony would not have been achieved either. The argument for legal continuity under the 1999 A.R.M. model or any future model that does not repeal *in toto* the Constitution Act is as follows:

The 1998 Constitutional Convention had recommended that any provisions of the Constitution Act, which have no continuing force, should be repealed. This *might* have suggested the Constitution Act be repealed *in toto*. However, each state then passed uniform 'Request Acts' to request the Commonwealth to deal with the Constitution Act.<sup>19</sup> The Constitution (Requests) Bill 1999 (Qld) requested the Commonwealth not to repeal the long title, nor the short title (covering clause 1) of the Constitution Act, and arguably not the words of enactment. Only covering clauses 2 to 8 would have been repealed (clauses 5 and 6 were in fact to be incorporated into the new Constitution itself; ss. 126<sup>20</sup> and 127) and the existing preamble omitted. The Commonwealth Parliament had not legislated in response to these requests and moreover, the Commonwealth was apparently relaxed about the need to delete the existing preamble and most of the covering clauses. However, even in light of the more stringent requests from the States, the retention of the long and short titles meant that the Constitution Act would have remained in force, and further, still derived its legal authority from the sovereign will of the Imperial Crown-in-Parliament. Thus, the Act would remain in force until further amended or repealed in Australia.

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<sup>19</sup> See Constitution (Requests) Bill 1999 (Qld) and other uniform State request legislation.

<sup>20</sup> Section 126 would have ensured the Constitution would continue to be the fundamental law of Australia, binding throughout the Commonwealth, and of superior force to all other laws in Australia.

While it might be correct to say that in political terms, the amended Constitution under such a republic would derive its support from the Australian people; in constitutional terms there would be no break in constitutional continuity and no need to elevate the concept of popular sovereignty to an enforceable legal concept. It would be merely a further step in Australia's constitutional evolution as a nation in its own right, under its own Constitution as supreme law, but as amended to delete the monarchy and to insert an Australian Head of State and matters incidental thereto. In all other constitutional respects, the legal position would be as before, and constitutional continuity maintained.

It would therefore add nothing to the constitutional position of 'The People' under the A.R.M. model to imply some legal doctrine of the sovereignty of the people underlying the Constitution. Unless the new constitution contained a bill of rights, popular sovereignty would not add to the legal rights of the people, as is the position under the current Constitution. The people can only have those constitutional rights expressed in the Constitution or as necessarily implied therefrom. Whether or not popular sovereignty or an Imperial Statute are the basis for the supreme law, new constitutionally entrenched rights would have to be promulgated by constitutional amendment through the Parliament and referenda. So much is evident from the cases on the implied freedom of communication in political matters. This implied freedom is now clearly derived from the express terms of the Constitution, and not from some wider constitutional notion of popular sovereignty or the like. Implied constitutional rights can only exist in so far as they are necessarily derived from the text and structure of the Constitution. At least this is the burden of authority and the stand point of this thesis.

The concept of a republic is often seen in terms of a social contract with the sovereign people (owners) delegating the power to govern through the contract to their elected representatives

(beneficiaries) who are seen as trustees of this power.<sup>21</sup> Further, the sovereign people retain fundamental rights that the government cannot infringe, lest the people can legitimately and legally take any action necessary to protect them, such as revoking the contract. Whether the A.R.M. model embraced notions of social contract theory is doubtful, but unimportant. What is important is the recent suggestions by current and former High Court Justices that the current Constitution may embody such arrangements.

## **PART B - SOCIAL CONTRACT: NO BASIS OF THE CONSTITUTION AT ALL**

### **Contract theory in judicial discourse**

In 1993 Justice Toohey said:

Where the people of Australia, in adopting a constitution, conferred power... upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties – a presumption only rebuttable by express authorization in the constitutional document.<sup>22</sup>

On 22 August 1997 in the 1997 Deakin Law School Public Oration, Justice Kirby said:

If the Australian people are (as is suggested) now the ultimate foundation of the legitimacy of the Constitution, we must realise that this hypothesis has possible consequences. They may lie not only in the arguments that will be advanced about the fundamental ‘deep lying rights’ which the people have *reserved themselves*. They will also lie in the work of the courts... If the people are the ultimate source of all legal authority... does that not have consequences for the way courts reason?... If it is accepted that the people of Australia are the source of legitimacy of the Australian Constitution, does this mean that the people have *reserved to themselves* some rights which even the Constitution... cannot extinguish?... Are there people’s rights which the people have never surrendered to Parliament but *jealously reserve to themselves*?<sup>23</sup> (emphases added)

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<sup>21</sup> However, the concept of a republic is not one that *necessarily* involves the notion that the citizens have certain underlying rights beyond the terms of any Constitution. So too, the concept of a republic can be accommodated in different forms of government. The A.R.M. proposal retained a parliamentary executive in contrast to a U.S. style executive President.

<sup>22</sup> J. Toohey, ‘A Government of Laws, and Not of Men?’, (1993) 4 *Public Law Review*, 158 at 170.

<sup>23</sup> M. Kirby, ‘Deakin - Popular Sovereignty and the True Foundation of the Australian Constitution,’ 1997 Deakin Law School Public Oration, 22 August 1997, from web, <http://www.hcourt.au/deakin2.htm;5-7>.

Shortly before the Deakin oration Kirby J had to grapple with these very same questions in *Levy v Victoria*, (decision handed down 31 July 1997)<sup>24</sup> where the plaintiff in that case, *inter alia*, made an appeal to the rights of the sovereign people as a basis for a limitation on State legislative power. Justice Kirby noted:

With the passage of time since federation in Australia and changing notions of Australian nationhood, the perception that the Australian Constitution is binding because of its imperial provenance has given way (at least since the Australia Acts 1986) to an often expressed opinion that the people of Australia are the ultimate repository of sovereignty. *That view is not without conceptual and historical difficulties*. However, relying upon these opinions, the plaintiff submitted that no Australian Parliament, federal or State could deprive the ‘sovereign people’ of their fundamental democratic rights.<sup>25</sup> (emphasis added)

Like the other Justices in *Levy*, Justice Kirby decided the case on the basis of the Court’s previous rulings on the implied freedom of political communication derived from the text and structure of the Constitution.<sup>26</sup> However, Justice Kirby was the only Justice to discuss the notion of fundamental rights, also recounting the defendant’s objection to the plaintiff’s appeal to the sovereignty of the people as a limitation on legislative power:

[The defendants] pointed out that, under the Victorian Constitution (unlike its federal counterpart) any provision of the Constitution could be amended without direct involvement of the people. They argued that this fact made it impossible to apply to Victoria the suggested limitations said to be derived from popular sovereignty.<sup>27</sup>

These passages display the language of ‘social contract’ with their emphasis on the reservation of fundamental or inalienable liberties or rights that cannot be legislatively abrogated. This is the form of contract that has been broached in the ‘implied rights cases’. In the void left by the

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<sup>24</sup> (1997) 189 CLR 579.

<sup>25</sup> *Ibid* at 634.

<sup>26</sup> See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>27</sup> (1997) 189 CLR 579 at 643.

retreating British hegemony this type of contract has been suggested as being both the political and legal basis of the Australian Constitution.

As a result, there needs to be a consideration of some of the theory behind the philosophical fiction that is broadly termed the ‘social contract’, for much of its content is used awkwardly and loosely. The present writer, mindful of the social contract’s fictions and pitfalls only resorts to its intricacies because it is now on the table as a result of discussion by some High Court Justices, and has been the subject of some tentative argument before the High Court. The fact that the High Court’s discourse is somewhat muddled with vague, outdated notions from European political philosophy shows how tenuous the justification for the popular sovereignty-social contract-fundamental rights discourse is in Australian legal forms and functions.

#### ***‘Social Contract Proper’ and ‘Contract of Government’***

In 1936 Gough noted there are “two different kinds of contract: ‘Social Contract Proper’ and ‘Contract of Government’”.<sup>28</sup> The type of contract suggested by Justices Toohey and Kirby is the ‘social contract proper’<sup>29</sup> which supposes that a number of individuals, living in a ‘state of nature’, agreed together to form an organised society. It is this contract that often gives rise to the notion of fundamental or deep (natural) rights which are reserved by this group of individuals in their sovereign capacity.

The second form is the ‘contract of government’.<sup>30</sup> A well known example is the original contract between King and people. Gough gives King Charles I and King James II as examples of

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<sup>28</sup> J. Gough, *The Social Contract* (1936) at 2.

<sup>29</sup> Also known as *pacte d’association*, *pactum unionis* or *pactum societatis*.

<sup>30</sup> Also known as *pacte de gouvernement* or *pactum subjectionis*.

monarchs who are said to have broken such a contract, with their pretensions of ‘Divine Right’.<sup>31</sup>

So too in the eighteenth century the American colonies *considered* themselves no longer subordinate to the British Parliament, but in 1776 they *declared* themselves no longer loyal to King George III. Paul McHugh says that “The Treaty of Waitangi can be seen as an original contract of government between Maori tribes and the Crown of which the likes of Grotius, Locke and Rousseau could but talk in notional terms”.<sup>32</sup> Impeachment proceedings against U.S. Presidents can also be viewed as a revocation of the ‘contract of government’. In the Australian context, ‘contract of government’ theory might form the basis of a challenge to the Prince of Wales’ accession to the Australian Crown.

To date, Australians have declared themselves no longer subordinate to the British Parliament by virtue of the Australia Act. However, it remains to be seen whether they will declare themselves no longer loyal to Queen Elizabeth II or her heirs and successors. This might most likely occur on the accession of King George VII to the Australian Crown as King of Australia (Prince Charles has given an indication that he will likely take the name of George on his accession). As such, some Australian republicans have forewarned that because of some perceived less than virtuous behaviour on the part of the present Prince of Wales, there would be no difficulty in foreswearing allegiance to the Crown. Lord President Bradshaw of the High Court of Justice in pronouncing sentence over King Charles I in 1649 asserted that “monarchy, as in England understood, was a contract and a bargain between the King and his people and was reciprocal. If this bond be once broken, farewell sovereignty!”<sup>33</sup> The contemporary indictment against the Prince of Wales might read ‘promises exchanged between Queen Elizabeth II and my

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<sup>31</sup> Gough, above n 28 at 4.

<sup>32</sup> P. McHugh, *The Maori Magna Carta* (1991) at 38.

<sup>33</sup> M. Kirby, ‘The Trial of King Charles I – Defining Moment for our Constitutional Liberties’ Speech to Anglo-Australian Lawyer’s Association, London – Great Hall, Grays Inn, 22 January 1999, from web, <http://www.hcourt.gov.au/charles88.htm>;6.

parents/grandparents mean nothing to me today. However, out of respect for both I have accepted the rule of that sovereign, but I do not intend to enter into a contract with any of Her Majesty's heirs and successors'. In any event, if Australia does not become a republic before the Prince of Wales' accession, this will no doubt be an issue. Unless possibly the laws governing succession to the Crown are altered and Prince William is made the heir to Queen Elizabeth II.

Gough notes: "Generally [a contract of government] has nothing to do with the origin of society, but, presupposing a society is already formed, it purports to define the terms on which that society is to be governed".<sup>34</sup> A 'contract of government' might be negotiated with any contemporary Australian government. A possibility is to constitutionally entrench a bill of rights. Alternatively, a statutory bill of rights might be enacted. Such amendments to the terms of government might also encompass any other matters sought to be enforced upon government, such as a treaty with indigenous Australians (possibly similar to the *Treaty of Waitangi* in New Zealand). Such developments might be seen as analogous to the *Magna Carta*. For the *Magna Carta* did not set up the organs of government and define their powers, these were assumed by the document. The *Magna Carta* simply set out the terms of engagement in a feudal system between the King and his Barons.

The present writer argues that, in spite of the assertions by Justices Toohey and Kirby, a 'social contract proper' did not (and currently does not) exist between the people of Australia as a result of the federating process. As a result, a social contract is neither the political, nor more certainly, the legal basis of the Constitution. However, in chapter ten, the present writer asserts that the process of federation was a type (or offshoot) of social contract between the Australian colonies as the negotiating parties. As a result the subsequent Commonwealth Constitution gave

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<sup>34</sup> Gough, above n 28 at 2.

recognition to these entities as States in the newly formed Commonwealth. However, it must be remembered that this is only the political basis of the Constitution. This process is known as the ‘federal compact’ (or ‘constitutional compact’) to distinguish it from a ‘social contract’ or ‘social compact’ (both based on individuals as the negotiating parties) and even ‘federal contract’ which is legally imprecise.

### ***Historical criticism***

In 1936 when Gough set out to trace the history and development of the phenomenon called social contract he acknowledged the best years were behind it. Indeed not all liberals who were concerned about majoritarianism resorted to the vagaries of contract theory. The utilitarian J.S. Mill thought that “no good purpose was answered by inventing a contract in order to deduce social obligations from it”.<sup>35</sup> Gough noted that in 1936, “different arguments [were] needed from those which carried weight against despotism in the seventeenth and eighteenth centuries”.<sup>36</sup> For Gough and his contemporaries, the events then occurring in the Weimar Republic might have provided such arguments. However, if different arguments were required in 1936 from those in Stuart England in the seventeenth century or in the American colonies under George III in the eighteenth century, different arguments again are certainly needed in contemporary Australia in the twenty-first century.

It must be noted that this whole field of learning which has its origins in the classics, but refined by the individualist ideals of the Protestant Reformation and Enlightenment, is susceptible to, and has been subjected to, severe historical criticism of the highest calibre over many centuries. Social contract was a conceptual (not historical) tool to explain the principle that the people

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<sup>35</sup> J. S. Mill, *On Liberty* (Special Edition 1992) at 134.

<sup>36</sup> Gough, above n 28 at 1.

should consent to be governed not coerced into obedience. Social contract theory has been continuously and vehemently attacked on the basis that such covenants did not take place in historical fact. However, this argument has been less than effective against the likes of Thomas Hobbes<sup>37</sup> and John Locke<sup>38</sup> who apparently never meant such concepts as a ‘state of nature’ or the contract itself to be historically true, and “are not seriously distressed if such theory is historically improbable”.<sup>39</sup> To the question of “Where, as a matter of historical fact, is your social contract to be found?” Locke’s own answer, like all contractarians, is “mere evasion”.<sup>40</sup> Paul McHugh has said the contract’s “origin was so shrouded in the mist of time [so] as to make pinpointing it impossible as well as impracticable”.<sup>41</sup>

Much of the criticism also focuses on the legal connotations of the word ‘contract’ and notes that “a contract is a compact enforceable at law”.<sup>42</sup> What enforceable contract between the Australian people as individuals could possibly exist? In this regard it is too easy to confuse the ‘social contract proper’ with the ‘contract of government’, or the citizen-State relationship, which may lend itself to the notion of rights and obligations on both sides. Further, a legal contract presupposes the existence of a developed legal system, so it is “historically absurd to suppose that primitive men in the state of nature could make a contract”.<sup>43</sup> Moreover, “if man possesses rights, he must possess them against or in relation to somebody else; it is therefore meaningless to attribute rights to isolated individuals, and that in fact means rights necessarily involve society”.<sup>44</sup> In other words, rights can only evolve and be enforced in a society. To say that the

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<sup>37</sup> See Thomas Hobbes, *Leviathan* (1651).

<sup>38</sup> See John Locke, *Two Treatises of Government* (1688).

<sup>39</sup> Gough, above n 28 at 129. and

<sup>40</sup> C. K. Allen, *Law in the Making* (7<sup>th</sup> ed) (1964) at 15.

<sup>41</sup> McHugh, above n 32 at 34.

<sup>42</sup> Gough, above n 28 at 5 quoting Professor R.W. Lee, *The Social Compact*.

<sup>43</sup> *Ibid* at 4.

<sup>44</sup> *Ibid* at 228.

rights existed prior to the ‘social contract proper’, and that the contract was the basis of society is to deny that “unless society already existed there could be no rights to guarantee.”<sup>45</sup>

However, the present writer would submit the term ‘federal compact’ has the merits of not engulfing the discussion in such controversies. The agreement was between the colonies and was binding on them even if not enforceable at law. It is even of a higher character than a contract in that it cannot be rescinded by one colony alone. Further it is not historically absurd for a number of separate political entities to agree to unite. There was already a developed colonial legal system which accommodated that decision.

### **Contemporary arguments arising from contract theory**

Geoff Lindell’s seminal 1986 article might be seen as a genesis for much of the discourse relating to popular sovereignty and social contract. His view regarding a possible alternative/additional explanation of the bindingness of the Australian Constitution has been cited and relied on by some High Court Justices to stress the doctrines of popular sovereignty and social contract as the fundamental meaning of the Constitution. Most notably Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth* where his Honour states “The Australia Act 1986 (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people” then citing Lindell immediately in a footnote.<sup>46</sup> See also McHugh J in *Ridgway v The Queen*<sup>47</sup> and McHugh J in *McGinty v Western Australia*.<sup>48</sup> In his article, Lindell’s concern is whether his new (additional) explanation of the binding character of the Australian Constitution should encourage the High

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<sup>45</sup> *Ibid.*

<sup>46</sup> (1992) 177 CLR 106 at 138.

<sup>47</sup> (1995) 184 CLR 19 at 91 citing Mason CJ in *ACTV*.

<sup>48</sup> (1996) 186 CLR 140 at 230 citing Mason CJ in *ACTV*.

Court to treat the Constitution as a compact between the Commonwealth and the States. He believes that it should not, and:

would be surprised if the characterisation of the Constitution as a ‘compact’ will... be found to be a principal and independent ground of any decision of the High Court. The acceptance of the authority of the Australian people as the reason for explaining the legally binding and fundamental character of the Australian Constitution, does not, it is suggested, necessarily entail the consequence that the Constitution should now be seen as a compact between the Commonwealth and the States.<sup>49</sup>

This is a perplexing statement. Far from needing rebuttal, the propositions put forward do not in any event follow. The acceptance of the authority of the Australian people would facilitate the Constitution being seen not as a ‘compact’ between the Commonwealth and the States, but as a ‘contract’ between the people themselves or the people and the Commonwealth. Necessary for a finding that the Constitution is a compact between the States and the Commonwealth would be a totally divergent fundamental premise; that of the colonies as negotiating entities, not the people. Thus ‘compact theory’ usually has the colonies as the negotiating entities at federation, while ‘contract theory’ usually focuses on the people, although as noted, such terminology has frequently been used imprecisely, including reversing the definitions. Despite somewhat confusing logic, Lindell’s ultimate prediction would seem sound. The Constitution is more likely (in light of High Court jurisprudence focussing on individual rights) to be interpreted as a social contract, either between the people themselves (social contract proper) or between the Australian people and the central government (contract of government).

However, whether the Commonwealth can be considered a party to any fundamental contract of the Australian Commonwealth is a further complication. On one view, the Commonwealth should not be said to be a party to any such contract (or for that matter compact), as it was a totally non-existent entity. The Commonwealth was the beneficiary of federation, or the child of

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<sup>49</sup> Lindell, above n 7 at 47-48.

a marriage, to use a simple analogy. However, there are other expressed views which canvas the notion of the Commonwealth as a ‘negotiating entity’. Note the 1897 work of Robert Garran, where he discusses the notion of a “compact between the States and the Nation.”<sup>50</sup> In this sense the Commonwealth could be seen as an honest broker between the states.

In any event, it is contract theory, rather than compact theory, that finds a home in the language surrounding the ‘implied rights cases’. Moreover, contract theory allows greater protection of the individual by recourse to notions of Lockean reserved rights as raised by Justices Toohey and Kirby and argued by the plaintiffs in *Levy v Victoria*.<sup>51</sup> Suffice to say at this stage, that according to accepted legal theory, compact theory seems out of date as long ago as *Engineers*, where the ‘reserved State powers’ doctrine was discarded. Indeed Justice Brennan in *Nationwide News* said: “The notion that some powers are reserved to the States... find[s] no textual foothold in the Constitution”.<sup>52</sup> Equally though, one can argue that contract theory and the notion of some rights reserved to the people finds no textual foothold in the Constitution, and should be consigned to a similar fate as that of compact theory. However, like that often closely (but not necessarily: see Hobbes, Rousseau) associated doctrine, natural law, the social contract possesses seemingly “inextinguishable powers of survival.”<sup>53</sup> Paul McHugh says:

Although conceptually distinct, ‘natural rights’ theory became linked to social contract arguments...The social contract could have arisen without any preconception of natural right, just as natural right need not have entailed any social contract. Still, they went in tandem from the late seventeenth century in the works of Locke and the flurry of constitutionalism... which preceded and accompanied the American and French Revolutions”.<sup>54</sup>

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<sup>50</sup> R. Garran, *The Coming Commonwealth* (1897) at 26.

<sup>51</sup> *Levy v State of Victoria* (1997) 189 CLR 579.

<sup>52</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 43.

<sup>53</sup> M. Kirby, ‘The Struggle for Simplicity: Lord Cooke and Fundamental Rights,’ (1997) Speech Delivered to New Zealand Legal Research Foundation, 4-5 April 1997, from web, <http://www.hcourt.au/cooke.html>; 2 quoting Lord Cooke of Thorndon, ‘The Dream of an International Common Law’ in C. Saunders, *Courts of Final Jurisdiction* (1996) 138 at 139 quoting D. Lloyd, *The Idea of Law* (1977) at 86.

<sup>54</sup> McHugh, above n 32 at 378.

## Contemporary contractarians

Unanimity is not a strong feature of this new social contract jurisprudence. This discordance of opinion in the cases discussed means that reference to *obiter dicta* and extra-curtial writings is needed. Justice Toohey's views are probably the closest to a judicial acceptance of the social contract and its notion of a sovereign people reserving their fundamental liberties. His Honour has on more than one occasion, referred to the "free agreement of the people to unite" as the "conceptual basis of the Constitution".<sup>55</sup> However, as noted, this 'conceptual basis' is not confined to any political analysis, but elevated to the legal basis of the Constitution to replace the Imperial Parliament.

So too, Justice Kirby appears an increasingly strong advocate of social contract theory. Of the present court his Honour appears the most prepared to canvas notions of fundamental and deep lying rights that have never been ceded by the people, and which may even have been jealously reserved.<sup>56</sup> The present writer would also include Murphy and Deane JJ, as close adherents to such philosophy.<sup>57</sup> Further Justices such as Mason CJ, Brennan CJ and Gaudron J (when on the bench), and McHugh J are increasingly concerned to look for ways to protect individual rights. Certainly, Mason CJ, Brennan CJ and Gaudron, McHugh and Gummow JJ accept as a starting point that the people of Australia are the sovereigns. So too, it must be remembered that Chief Justice Gleeson's return to 'strict and complete legalism' is based on a complete acceptance of

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<sup>55</sup> With Deane J in *Leeth v The Commonwealth* (1992) 174 CLR 455 at 554. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 94.

<sup>56</sup> See Kirby, above n 23 and *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501 at 511. See also *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417.

<sup>57</sup> See the judgments of Murphy J in *Bisticic v Rokov* (1976) 135 CLR 552 at 566 and Deane J in *Kirmani v Captain Cook Cruises Pty Ltd [No. 1]* (1985) 159 CLR 351 at 441-2.

legal and political sovereignty residing in the people.<sup>58</sup> However, it must be admitted that neither McHugh, Gummow nor Gaudron JJ “have explicitly claimed that the popular will supplies the Constitution with either moral legitimacy or legal force”.<sup>59</sup>

### **A maelstrom of conceptual and theoretical difficulties**

The continuing relationship between the government and the people is a key aspect of much modern day social contract thought. It appears to have been astutely flagged by McDonald. He refers to a passage from the judgment of Deane and Toohey JJ in *Nationwide News*<sup>60</sup>: “The repositories of governmental power under the Constitution hold them as representatives of the people under a relationship, between representatives and represented, which is a *continuing* one”.<sup>61</sup> (emphasis added) For the relationship between the governed and the government to be assessed as a continuing one, the seventeenth century writings of John Locke rather than Thomas Hobbes must be consulted. As a result, Locke’s view that the people are sovereign and retain their natural rights prevails to facilitate limited government.

McDonald then moots that “absolute delegations of power to any one entity would not be consistent with *continuing* popular sovereignty”.<sup>62</sup> To be sure, absolute delegations of liberty to Hobbes’s sovereign is clearly inconsistent with continuing popular sovereignty. This is because, even if the people were initially sovereign in a state of nature, they surrendered all such power to

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<sup>58</sup> See Murray Gleeson, *Boyer Lectures 2000 – The Rule of Law and the Constitution* (2000). See also Murray Gleeson, ‘Judicial legitimacy’ (Paper presented at the Australian Bar Association Conference, New York, 2 July 2000).

<sup>59</sup> Daley, above n 10 at ch 6.1.

<sup>60</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 71-72.

<sup>61</sup> L. McDonald, ‘The Denizens of Democracy: The High Court and the “Free Speech” Cases’ (1994) 5 *Public Law Review* 160 at 178.

<sup>62</sup> *Ibid* at 183.

the new sovereign. Absolutism has replaced popular sovereignty.<sup>63</sup> McDonald summarises: “[I]t is necessarily inconsistent with [the ultimate sovereign power of the people] for any one branch of government to have sovereign power, that is if the people’s authority is to be a continuing reality rather than part of an abstracted Hobbesian theory”.<sup>64</sup> For if one branch of government, namely the executive or more recently, the legislature had sovereign power, the people’s authority would not be a continuing reality. In modern Westminster governments, there is no such thing as “the very definition of tyranny”<sup>65</sup> but the doctrine of parliamentary sovereignty has until recently made it difficult, if not impossible, for the people’s sovereignty to be assessed as continuing.

Locke would appear the philosopher of choice for many contemporary contractarians.<sup>66</sup> Rousseau and Hobbes’s repudiation of natural law and hence reserved rights is less favoured by contractarians of today. Moreover, Hobbes makes an argument for absolutism and eschews the rights of resistance.<sup>67</sup> Unlike Locke’s two-way conduit, for Hobbes, there only existed a one-way conduit. Through this conduit citizens surrendered all their liberty of action to the sovereign; “the sovereign was no party to Hobbes’s contract, but simply the recipient of powers conferred on him by a contract of all with all”.<sup>68</sup> Thus a contract of ‘all with all’ is a ‘social contract proper’ as it unites individuals. It is not a ‘contract of government’. Thus Hobbes’s sovereign, unlike

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<sup>63</sup> Although it must be noted that Hobbes’s theory would uphold any form of absolutism, not just monarchy but also military.

<sup>64</sup> McDonald, above n 61 at 177.

<sup>65</sup> McDonald, *Ibid* citing James Madison in J.E. Cooke (ed.) *The Federalist* (1961) at 324.

<sup>66</sup> In the *BLF* case in 1986 Kirby P (as he then was) referred to John Locke’s *Second Treatise on Government*.

<sup>67</sup> See also the comments of Geoffrey Palmer in *New Zealand’s Constitution in Crisis*: “New Zealanders are particular inheritors of the Hobbesian tradition. It is time to break the New Zealand Hobbesian tradition and its models of absolutist government”: at pp 42-44.

<sup>68</sup> Gough, above n 28 at 103. As such, Hobbes “agreed that society had its origin in contract, but minimized its significance by finding it born of fear rather than a rational, voluntary giving-up”: P. McHugh, above n 32 at 37.

Locke's, was not amenable to having any obligations or duties (reciprocal or other kind) enforced against him. Only when the sovereign endangers his subject's lives or personal safety, does Hobbes admit that the duty to obey ceases.<sup>69</sup>

### ***Mason CJ: Government as a Trustee?***

Andrew Fraser has said that Mason CJ's discussion of representative government in *Australian Capital Television Pty Ltd v Commonwealth* can be viewed as an exposition of a "constitutional constructive trust" existing on behalf of the Australian people.<sup>70</sup> His Honour uses the concept of representative government to emphasise that representatives are "accountable to the people for what they do, and have a responsibility to take account of the views of the people on whose behalf they act".<sup>71</sup> So too Professor Finn (as he then was) has flagged the notion that power is derived from a sovereign people occupying the position of a trustor, which is used to create a trustee government on its own behalf. Thus the relationship between government and governed is fiduciary.<sup>72</sup>

Traditionally however, the concept of trust has been no part of English or Australian constitutional law.<sup>73</sup> Dicey said: "Parliament is [not] in any legal sense a trustee for the electors. Of such a feigned trust the courts know nothing".<sup>74</sup> The concept of trust can be traced back (through Austin) to Locke. Locke's fiduciary relationship had the benefit of imposing duties on the government, and leaving rights on the side of the people. It overcame Locke's perceived

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<sup>69</sup> Gough, above n 28 at 106.

<sup>70</sup> A. Fraser, 'False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 213 at 216.

<sup>71</sup> *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138.

<sup>72</sup> P. Finn, 'A Sovereign People, A Public Trust', in Finn P. (ed.) *Essays on Law and Government Vol 1* (1995).

<sup>73</sup> See A. Dicey, *Introduction to the Study of The Constitution* (1956; 9th ed) at 75.

<sup>74</sup> *Ibid* at 75: noted by J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901 rep 1976) at 327.

pitfall in Hobbes's absolutism. To Locke, both rights and duties must be reciprocal through the two-way conduit. For Locke, "while society originates in a social contract ['social contract proper']... Locke never said that there was a contract [of government] between King and people". The people "make the government trustees on their behalf".<sup>75</sup> Thus, as Gough opines: "In this respect Locke appears to have been widely misunderstood".<sup>76</sup> It was the Whig political writers of the 'Glorious Revolution' who promoted the notion of a 'contract of government' in the form of the Original Contract between King and people. However, they were to adopt Locke's views as a philosophical foundation for a justification of the 'Glorious Revolution'. In this way Locke's writings have been imbued with a contractual relation between King and people, which was simply never present. See the comments of G.S. Wood: "T[he] imagined contract between... the King and the people was not Locke's contract, (which was a contract among the people to form a society), but the Whig contract that ran through much eighteenth-century English thinking".<sup>77</sup>

### ***Mason CJ: Government as a delegate?***

Andrew Fraser has also said that Mason CJ's judgment in *ACTV* suggests "that elected officials are merely servants of the sovereign people".<sup>78</sup> This is reminiscent of the language of delegation that can be traced back to Rousseau's (and Milton's) notion that the sovereign people "made the government not a trustee but a mere delegate of the sovereign general will".<sup>79</sup>

However, to this suggestion, *Dignan's Case*<sup>80</sup> would be an immediate answer, for "the [delegation] doctrine never gained widespread acceptance in England".<sup>81</sup> As noted by Brennan J

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<sup>75</sup> Gough, above n 28 at 127.

<sup>76</sup> *Ibid.*

<sup>77</sup> G. Wood, 'The Origins of Vested Rights in the Early Republic' (1999) 85 *Virginia Law Review* 1421 at 1428.

<sup>78</sup> Fraser, above n 70 at 216.

<sup>79</sup> Gough, above n 28 at 135.

in *Kirmani*, (while commenting on the effect of the Statute of Westminster): “The Dominion Parliaments were neither delegates of the Imperial Parliament’s power nor agencies of a British government”.<sup>82</sup> Similarly, the notion has no application to the Australian Constitution because the powers of government are not considered to be derived from the people of the Commonwealth. Thus, Australian Parliaments have, “within their spheres of jurisdiction and competence, the same plenitude of power that the Imperial Parliament possessed or could bestow”.<sup>83</sup> It was only the American Constitution, founded on the sovereignty of the people of the union, that was to adopt the maxims *Delegata potestas non potest delegari*, *Delegatus non potest delegare* (a delegate has no power to delegate).

Thus Andrew Fraser attributes both the totally separate notions of ‘trust’ and ‘delegation’ to the one judgment of Mason CJ. Still others would attribute the notion of social contract. For example, Aroney has suggested that in the ‘implied rights cases’ “the majority emphasised the view that the Constitution is essentially a contract entered into by a free and sovereign people...”<sup>84</sup> This confusion is indicative of the fact that the High Court’s own discourse is somewhat muddled and vague. The use of outdated notions from European political philosophy shows how tenuous the justification for the popular sovereignty/ social contract/ fundamental rights discourse is in Australian legal forms and functions. The High Court should not resort to vague, outmoded fictions to rationalize their intervention in breach of the separation of powers and the sovereignty of parliament.

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<sup>80</sup> *Victorian Stevedoring Co v Dignan* (1931) 46 CLR 73 at 95 per Dixon J. Also noted by G. Marshall, *Constitutional Theory* (1971) at 116.

<sup>81</sup> Gough, above n 28 at 96.

<sup>82</sup> *Kirmani v Captain Cook Cruises Pty Ltd [No. 1]* (1985) 159 CLR 351 at 410.

<sup>83</sup> *Victorian Stevedoring Co v Dignan* (1931) 46 CLR 73 at 95 per Dixon J.

<sup>84</sup> Aroney, above n 2 at 22, elsewhere citing *Nationwide News* at 70 per Deane and Toohey JJ; *ACTV* at 210-211 per Gaudron J, 228 per McHugh J and 136 per Mason CJ in a footnote.

## A maelstrom of conceptual and historical difficulties

Most proponents of fundamental rights accept that the legal sovereignty of the Australian populace only resulted from some form of post-federation act, most notably the passage of the Australia Acts. However, for the people of Australia to have reserved their fundamental rights, they must have been legally sovereign at federation, because a ‘social contract proper’ needed to be on foot at this time to effect the surrender of some rights but not others. Only a populace aware of, and armed with its legally sovereign powers could have willingly entered into such a contract. To ascribe to this view is to descend into the maelstrom of “conceptual and historical difficulties” and to ignore the “theory and practicality which the inescapable facts of history present”.<sup>85</sup>

At federation, the Australian populace was not aware of its legal sovereignty and was content to exercise its political sovereignty. Its legal sovereignty had not been violently shaken from its slumber by a revolutionary war, and a ‘We the People...’ Constitution was not the result of the direct voice of the people. Sir John Latham has said: “The method by which the American Constitution was adopted lent some weight to the idea of the Constitution as a contract. But there is no basis for such a view in the case of the Australian Constitution”.<sup>86</sup> Moreover, Hutley has noted “Australia does not have to pretend that power comes from the people. The polity has an historical legitimacy that America does not have”.<sup>87</sup> This was also true of the Dominion of Canada where the framers of the Constitution Act 1867 (formerly the British North America Act

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<sup>85</sup> Kirby J in *Levy v State of Victoria* (1997) 189 CLR 579 at 634 and Kirby, above n 23 at 5.

<sup>86</sup> Sir John Latham, ‘Interpretation of the Constitution’ in R. Else-Mitchell (ed.) *Essays on the Australian Constitution* (1961) at 5.

<sup>87</sup> Hutley, above n 5 at 64.

1867), believed that having the Canadian Constitution provided by the Imperial Parliament endowed the Constitution with a superiority to that of the American Model.<sup>88</sup>

Smallbone has asserted that: “[T]he [Australian] people [at federation] could not have contemplated limitations on legislative power pursuant to an implied Bill of Rights since such a concept would have been quite alien to them”.<sup>89</sup> Indeed, a majority of the Founders thought that to entrench freedoms in a Constitution, “misconceived the way freedoms were secured”.<sup>90</sup> Further, “to see the Constitution as a social contract was to misconceive the nature of society and therefore the best means for securing freedom and progress. Society was not an artificial entity that was constituted by agreement or contract, and therefore entrenching rights in a Constitution did not guarantee them”.<sup>91</sup> However, it would seem the majority of Founders also rejected a bill of rights because the political climate dictated that levers were required to discriminate against indigenous Australians and immigrants such as the Chinese.

Hence, the process of federation, did not see the Commonwealth constituted by a contractual agreement of individuals for the protection of fundamental rights. As such it was inappropriate to limit Parliament by using such measures. Federation was a compact between the colonies and the residents thereof which ennobled the position of Parliaments, whether those being supreme in Australia or the sovereign Imperial Parliament. As a result “liberty was founded on black letter law”.<sup>92</sup> Implicit in this view (progressive parliamentarianism) was a notion of a growing and

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<sup>88</sup> Noted by Oliver, above n 6 at 527.

<sup>89</sup> D. Smallbone, ‘Recent Suggestions of an Implied “Bill of Rights” in the Constitution, Considered as a Part of a General Trend in Constitutional Interpretation’ (1993) 21 *Federal Law Review* 254 at 256.

<sup>90</sup> H. Patapan, ‘The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia’, (1997) 25 (2) *Federal Law Review* 211 at 215.

<sup>91</sup> *Ibid.*

<sup>92</sup> Hutley, above n 5 at 66.

changing community that was not formed by an abstract citizenship of the Commonwealth based on contractual rights. As Patapan has said:

The view of the Constitution as a type of social contract draws upon different political and theoretical traditions with major consequences for the character of the regime. If the Constitution derives authority and legitimacy from the will of the people then it represents a radical constitutive formulation of the people's coming together... It may well be that as an expression of Lockean liberal constitutionalism the Constitution secures natural rights, limited government, citizenship and representative government. However, the sovereignty of the people also opens up a world of fundamentally different political visions, from Hobbes' sovereign to Rousseau's general will, from communitarianism to republicanism. In these outer reaches the judicial task of interpreting and applying the law, of choosing the character of the political regime, becomes a delicate task more suited for the skills, abilities and discretion of a political philosopher and statesman.<sup>93</sup>

Even if the people of Australia are now legally sovereign, social contract theory is a discredited doctrine because of Australia's federal Constitution being the result of a federal compact. Further, even if it is accepted that the people of Australia are now legally sovereign, because of some post-federation act, this does not allow them to now travel back in time and reserve their fundamental rights.

To highlight the incongruity of the social contract argument one only needs to note how it is either discarded or embraced depending on the whim of the commentator. Donaghue argued that “it is permissible to draw implications from the Constitution which are *not* consistent with the intentions of the framers” (emphasis added), as this would be consistent with the emerging

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<sup>93</sup> H. Patapan, ‘Competing Visions of Liberalism: Theoretical Underpinning’s of the Bill of Rights Debate in Australia’ (1997) 21 *Melbourne University Law Review* 497 at 501 and H. Patapan, ‘Politics of Interpretation’ (2000) 22 *Sydney Law Review* 247 at 271. See also H. Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (2000) at 31. See also A. Lynch, ‘Comment and Book Review. The High Court – Legitimacy and Change: Review Essay: Haig Patapan, Judging Democracy – The New Politics of The High Court of Australia’, (2001) 29 (2) *Federal Law Review*, 295 at 304.

popular sovereignty doctrine.<sup>94</sup> In doing so he rejected the notion of a contract on foot between the Australian people and the founders, which would be the basis for interpreting the Constitution in accordance with the wishes of the founders.<sup>95</sup> He explains that this is because of the fact that only a small minority of the Australian population voted in the referenda which resulted in the acceptance of the Australian Constitution.<sup>96</sup>

However, if a sufficiently wide franchise and significant voter turnout be the true criteria for the validity of a contract, how does this auger for the view in both the judiciary and academia that the legitimacy of the Constitution lies in the original adoption and subsequent acquiescence of its provisions by the people?<sup>97</sup> Surely if a contract to secure the intentions of the founders can be struck down (as outlined by Donaghue above), then a contract to preserve any fundamental reserved rights of the Australian populace (as mooted by Toohey and Kirby JJ) must also be struck down on the same basis. As usual the only way that such contracts can be interpreted is by the subjective intuition of the particular interpreter. Contractarians are forced to assert that their assessment of the parties to, and the nature and terms of, the contract, is superior and more supported than any other. This is familiarly known as the nub of the objections to all higher laws which are said to lie outside positive laws.

Witness also the failure of the historic claim that the Imperial Parliament lacked legitimacy to amend the draft Constitution. Historian Helen Irving has said:

The question whether the passage of the Constitution as an Act of the British Parliament shifted the legal foundation from the people to the parliament may be tested by the resolve shown by the Australian delegates who went to London in early 1900 to help the

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<sup>94</sup> S. Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 (1) *Federal Law Review* 133 at 171.

<sup>95</sup> *Ibid* at 143.

<sup>96</sup> *Ibid* at 144.

<sup>97</sup> See Murphy J in *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351, Deane J in *Theophanous* (1994) 182 CLR 104 and Lindell and Toohey specifically.

Constitution in its passage. They went determined to protect the Constitution as it stood, unchanged, regardless of what the British thought.<sup>98</sup>

With respect, this is a ‘legal imprecision’. <sup>99</sup> The test of whether the legal source of the Constitution is the British Parliament is simply enactment. The Australians had ample opportunity to repudiate the existing legal order and proclaim the Constitution in the name of the Australian people. However for various reasons, some stemming from genuine affection for all things British, autochthony was not a viable option. The better view is that “those involved in Australian federation... were prepared to pay a real price for [Imperial] legitimacy”. That is, Colonial Office interference in the form of s 74 of the Constitution, which provided for the “continuing supervision of the Privy Council over Australian Courts”.<sup>100</sup> This should be seen as a paying a “real price” and not merely tolerating British “tinkering”.<sup>101</sup> As four of the five Australian delegates themselves insisted, any alteration of the draft bill would “vitiate the agreement to united”.<sup>102</sup>

## CONCLUSION

The question of the character or nature of the Australian Constitution is now on the table as a result of the expressed views of a number of former and current High Court Justices. This chapter expressed the view that the Constitution is essentially an Imperial Statute, albeit of a very special category. Further the legal basis is to be found in the Constitution Act applying in Australia by paramount force, after enactment by the Imperial Parliament.

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<sup>98</sup> H. Irving, *To Constitute a Nation*, (1998) at 205.

<sup>99</sup> Book Review by D. Cass, (1998) 26 (2) *Federal Law Review* 409 at 412.

<sup>100</sup> Daley, above n 10 at ch 2.4.3.

<sup>101</sup> cf Irving, above n 98 at 203.

<sup>102</sup> Daley, above n 10 at ch 6.1.

Any form of social contract (however discerned or implied, based on popular sovereignty or otherwise) is no basis whatsoever of the constitutional arrangements of Australia, and should therefore be discarded. As noted earlier the social contract was a conceptual and philosophical (not historical) tool to explain the principle that the people should consent to be governed not coerced into obedience. However, it is not clear that recent Australian judicial and academic adherents of contract theory, are confining themselves to a discussion of philosophical principles or even a theory of political obligation. Many ignore the historical difficulties. Moreover, as mentioned throughout this thesis, many seek to combine the legal and the political. As a result, the ‘social contract proper’ along with popular sovereignty are unjustifiably seen as the legal basis of the Constitution.

In 1936 Gough said:

The social contract has long been discarded as an explanation of the allegiance of individual subjects to their government, but where the component units of a federation are not individuals but communities with separate governments, which may have been in existence before the union was made, *there is no question of pre-social and therefore unhistorical natural rights.*<sup>103</sup> (emphasis added)

As will be shown in chapter ten, this statement is extremely applicable in Australia. The colonies were pre-existing entities which formed a federal compact for the benefit of their residents. The residents as individuals were already organised into colonial polities, and an additional federal polity was merely being super-imposed. Whether ‘a state of nature’ existed at the time of federation which would allow a social contract proper between the Australian people living in the colonies to be formed is debateable but doubtful. More importantly, as history has shown, no social contract was wanted. If the people of Australia were of a mind to, Locke would have defended their right to sever their connection with the Parliament at Westminster and the British

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<sup>103</sup> Gough, above n 28 at 222.

Crown and ordain and establish a new Commonwealth *in vacuis locis*.<sup>104</sup> This was just what the American colonists had done, and the English parliament had no jurisdiction over them. Further La Nauze has suggested that unlike the American colonies, the Australian colonies “would have met with no resistance other than argument”.<sup>105</sup>

However, Australians were of no mind to sever the possibility of beneficial Westminster legislative intervention, or a system of government which protected rights through the parliamentary process and not by means of a bill of rights or fundamental rights. In the end it was the colonies themselves supported by their residents who were British subjects, that established a new Commonwealth, but it was left to Imperial legislation to provide legal validity. Crispin Hull has recently said: “Federation was to create a nation and the act of federation- would as a practical, political matter- have to be approved by the people of each of the colonies. But as a legal and constitutional matter, the federation could be achieved only through the passage of legislation through the British (or Imperial) Parliament”.<sup>106</sup> As noted by Daley, this historical analysis is an effective answer to Galligan’s assertion for popular sovereignty based on “raw political power”: “Galligan simply assumed that the hypothetical ability to declare independence unilaterally is significant, whilst the actual form of the Constitution is not”.<sup>107</sup> Moreover, as Lynch notes: “It is quite clear that a simplistic portrayal of the federation process as an exercise in popular sovereignty involves a degree of historical revisionism”.<sup>108</sup>

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<sup>104</sup> *Ibid* at 210.

<sup>105</sup> J. La Nauze, *The Making of the Australian Constitution*, (1972) at 254.

<sup>106</sup> C. Hull, *The High Court of Australia* (2003) at 2.

<sup>107</sup> Daley, above n 10 at ch 6.1.

<sup>108</sup> See also A. Lynch, ‘Comment and Book Review. The High Court – Legitimacy and Change: Review Essay: Haig Patapan, Judging Democracy – The New Politics of the High Court of Australia’ (2001) 29 (2) *Federal Law Review* 295 at 304.

It was clear enough to Gough in 1936, that “as an *historical* theory, the contract has long been discredited, and its more recent adherents have wisely confined themselves to the claim that a contract is [only a] philosophical basis of the state”.<sup>109</sup> (emphasis added) However, it must be remembered that Gough was only referring to his original description of the ‘social contract proper’ to explain the origins of society, relying on its notion of primitive men in a state of nature forming a contract at some putative dawn. It is submitted that such a harsh analysis cannot befall the ‘federal compact’ theory. This theory, to be discussed in chapter ten, has the benefit of being plausible as both a philosophical *and* politico-historical basis of the Commonwealth and the Constitution.

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<sup>109</sup> Gough, above n 28 at 224.

## **CHAPTER TEN**

### **THE POLITICAL BASIS OF THE CONSTITUTION: A FEDERAL COMPACT**

#### **INTRODUCTION**

What produced a legal result for the Australian Constitution was enactment by the Imperial Parliament. As noted earlier, there is no national indignity in acknowledging legal continuity or even derivation from an Imperial predecessor. However, this chapter argues that *if* it is ultimately considered unsatisfactory and symbolically inappropriate, for the legal source of the Australian Constitution to be derived from an external source (in an autochthonous not autonomous sense), and should therefore be discarded, a federal compact is a more historically correct interpretation of federation. Part A of this chapter argues that the political and historical process that brought the draft Constitution into being was a federal compact between the colonies, not a social contract. This conclusion is reached by a comparative analysis of the Australian and United States constitutions and their preambles.

The claim that a federal compact between the colonies is the most historically accurate assessment of the Australian Federation derives support primarily from the following:

- the historical record of the colonial unanimity which was the formative basis of the Federation (and the subsequent legacy for the requirement of state unanimity under s 51(xxxviii) of the Constitution and s 15 of the Australia Act);
- the Australian Constitution's adoption of a theory of legislative sovereignty, instead of a United States theory of delegated power emanating from a sovereign people;<sup>1</sup>

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<sup>1</sup> See *Victorian Stevedoring Co v Dignan* (1931) 46 CLR 73 at 95 per Dixon J.

- the overwhelmingly federal aspects of the Constitution in contrast with the national character of the United States Constitution;<sup>2</sup>
- a comparison of the preamble with the United States Constitution's preamble.

Part B notes that although federal compact theory has been considered out of date for many years,<sup>3</sup> the process adopted to enact the Australia Act 1986 (Cth), and the 1999 attempt to reconstitute the Australian Commonwealth as a republic have reinvigorated the theory. Part C notes that any further attempts to secure a republic for Australia will involve not only removing the Crown, but the Imperial Parliament that currently stands behind the Constitution. In any such process attention should be paid to federal compact theory to ensure that legal challenges by potentially disaffected States (or at least politically damaging squabbles) do not ensue.

## PART A- A COMPARISON WITH UNITED STATES STRUCTURES

### *Colonial unanimity*

As a document the Australian Constitution came from its founders acting on the authority of the colonial entities and endorsed by the people, but as a law the Constitution comes from and derives all its force from the Imperial Parliament. Thus, the outcome of the exercise of the peoples' political sovereignty was the endorsement of the agreement between the colonies to federate. Finlay has said: "When the Commonwealth came into existence in 1901, it did so, in a formal sense, as a result of an Imperial Statute... It must be remembered, however, that this event was itself a consequence of a compact between the federating colonies".<sup>4</sup> On this view the colonies, soon to become States, were the real negotiating entities. Thus "the colonies in Australia

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<sup>2</sup> "The Constitution is on its face federal...": G. Sawer, *Australian Federalism in the Courts*, (1967) at 121.

<sup>3</sup> Since at least *Amalgamated Society of Engineers v Adelaide Steamship* (1920) 28 CLR 129.

<sup>4</sup> H. Finlay, 'In Search of the Unstated Premise: An Essay in Constitutional Interpretation' (1982) 56 *Australian Law Journal* at 471.

preceded and produced the Commonwealth".<sup>5</sup> Contrast the technical view of Sir Anthony Mason in 1986: "The states have been described from time to time as parties to the federal compact, but this means no more than they are constituent elements in the federation that the Constitution brought into existence".<sup>6</sup>

The present writer must admit some force in the argument that although the colonies in Australia had long existed, (and been self-governing since the 1850's) they were not in one sense truly sovereign or autochthonous entities. For it must be accepted that, although the colonies had been granted a degree of autonomy by the doctrine of responsible government, and in 1901 became States in the new Commonwealth, "they were not before then sovereign bodies in any strict sense".<sup>7</sup> In contrast, the American colonies had in 1776 severed all ties with the United Kingdom Parliament and King before federating. See also the comments of the Queensland Constitutional Review Commission in 2000:

In the 1890's a deliberate decision was taken to avoid the unificationist risks then perceived to be inherent in the Canadian model of federalism. The end of the Imperial link in 1986 may have the capacity to reopen that question, but it cannot undo the historical fact that whereas truly independent States joined in the American Union, Australian States entered the Commonwealth as dependent colonies.<sup>8</sup>

Although note that in 1890 Sir Samuel Griffith was to express the view that "the Australian colonies had been accustomed for so long to self-government that they had become practically almost sovereign states, a great deal more than sovereign states, though not in name, than the

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<sup>5</sup> B. Knox, 'Colonies to Commonwealth: The Evolutionary Crown' from web, 11/1/99, [http://www.norepublic.com.au/Pages/Essay\\_Knox\\_No\\_Case\\_Paper.htm](http://www.norepublic.com.au/Pages/Essay_Knox_No_Case_Paper.htm);1.

<sup>6</sup> A. Mason, 'The Role of a Constitutional Court in a Federation' (1986) 16 *Federal Law Review*, 1 at 25.

<sup>7</sup> *Victoria v Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353 at 396 per Windeyer J.

<sup>8</sup> Queensland Constitutional Review Commission, *Report*, 2000 from web, <http://www.constitution.qld.gov.au/ref.htm> at 25.

separate states of America".<sup>9</sup> Perhaps Sir Samuel's rather gracious comments need to be understood in the time that they were expressed; during the mammoth task of encouraging far-flung and disparate colonies to form a federation perhaps as great as the American.

In any event, the constraints on the powers of the new Australian Commonwealth were primarily formulated to protect the States rather than individual rights.<sup>10</sup> Even to this day Australians "have a dual allegiance that reveals an intuitive grasp of the principles of federalism and a commitment to them".<sup>11</sup> This fidelity to the federal principle usually manifests itself as a strong commitment against centralism, but can even do so at the expense of fundamental rights. An example of the latter can be found in the strong defeat of the 1988 referendum proposals. As Galligan has noted: "One proposal was to extend the few existing entrenched rights [in the Commonwealth Constitution] by making them binding on the States... [This] would have extended rights protection but at the expense of the States".<sup>12</sup> See also the comments of P. King:

What is distinctive about federations is not the fact that 'the people' are viewed as sovereign, but that the expression of this sovereignty is tied to the existence and entrenchment of regional, territorial entities. In federations, 'the people' are taken as a single in one sense, but as a plurality of entities in another.<sup>13</sup>

### ***Inhabitants of the colonies not citizens of the Commonwealth***

As noted earlier in this thesis, there has been a recent emergence in Australian jurisprudence of notions akin to 'American Realism' amongst the judiciary and commentators. We have seen this

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<sup>9</sup> *Official Record of the Debates of the Australasian Federation Conference*, Melbourne, 10 February 1890 at 10.

<sup>10</sup> J. Goldsworthy, 'The Constitutional Protection of Rights in Australia' in G. Craven (ed.) *Australian Federation Towards the Second Century* (1992) at 154.

<sup>11</sup> Western Australian Constitutional Committee, *The Report of the Western Australian Constitutional Committee*, (1995) at 84.

<sup>12</sup> B. Galligan, 'Parliamentary Responsible Government and the Protection of Rights' (1993) 4 (2) *Public Law Review* at 110.

<sup>13</sup> P. King, 'Federation and Representation' in M. Burgess and A. Gagnon (eds) *Comparative Federalism and Federations* (1993) at 96 as noted by B. Harris, *A New Constitution for Australia* (2002) at 130.

manifest itself in the High Court in the progressive ‘living force’ form of constitutional interpretation. In conjunction some also moot a theory of popular sovereignty based on social contract which sees the people as the negotiating parties at federation, acting as a national collective entity.<sup>14</sup> This is said to rest on the United States experience.

However, U.S. theory does not represent the historical reality of the Australian federation. This is highlighted well by the opposing arguments put before the High Court in 1904 in *Deakin v Webb*<sup>15</sup> by lawyers who were members the Federation Convention Debates. In opposing Higgins KC, Isaacs KC submitted “the United States Constitution is a grant by the people...”. On the other hand the Australian Constitution is “...a grant and distribution of powers by the Imperial Parliament”.<sup>16</sup> So too Harris says: “I would... argue... that the Constitution is something ‘out there’, which distributes powers between governments, rather than something that is ‘of the people’, and which distributes power between them and the governments.”<sup>17</sup> However, these views do not dissuade proponents of popular sovereignty and social contract theories from “viewing the Constitution as a genesis of rights as opposed to a mere division of governmental powers”.<sup>18</sup>

The people of the Australian colonies nowhere declared as a national collective entity that they ‘ordain and establish’ the Commonwealth Constitution. Thus the Australian Constitution was a federal compact, freely, voluntarily and solemnly entered into by the colonies, soon to be States,

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<sup>14</sup> *Re Duncan* (1983) 57 ALJR 649 at 671 per Deane J and *Leeth v The Commonwealth* (1992) 174 CLR 455 per Deane and Toohey JJ. M. Kirby, ‘Andrew Inglis Clark and the High Court of Australia’ in R. Ely (ed.) *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 378 at 385 and 388.

<sup>15</sup> (1904) 1 CLR 585.

<sup>16</sup> J. Daley, *The Bases for the Authority of the Australian Constitution* (1999) unpublished D. Phil thesis, Oxford at ch 6.1.

<sup>17</sup> Harris, above n 13 at 131-132

<sup>18</sup> P. Loftus, ‘Proportionality, Australian Constitutionalism and Governmental Theory- Changing the Grundnorm’ (1999) (3) *Southern Cross University Law Review* 30 at 42.

and ratified by the people thereof respectively. See the 1920 judgment of Knox CJ, Isaacs, Rich and Starke JJ in *Engineers*: “The [Commonwealth of Australia Constitution] Act recited the agreement of the peoples of the various colonies, as they then were, ‘to unite...’”<sup>19</sup> As noted by Finn, this view aggravates the “fissure which was to divorce the legal and political identities of the Australian people”. This was of course, and still is, facilitated by considering the people who voted to accept federation as British subjects and “inhabitants of their respective colonies” and not collective “citizens of the Commonwealth”.<sup>20</sup> Thomson has noted that “if the compact [contract] was constituted by the people in Australia collectively it... endorses popular sovereignty as the juristic base of the Constitution”.<sup>21</sup> Aroney views these two separate conceptions (inhabitants v citizens) as still “vying for dominance”<sup>22</sup> in Australian jurisprudence.

### ***Federal v National***

To say that the Australia Constitution is based on a federal compact however, does not deny that it does contain some concerns of a national character; for example the s. 24 (House of Representatives), and s. 122 (Government of Territories) which has been described as “non-federal in character”.<sup>23</sup> However, the founders of the Australian Constitution did reject possibly the most ‘nationalising single element’ in a Presidency. Moreover, there appear at least as many, if not more, federal than national features (besides its method of ratification) such as: the Senate; the enumeration of legislative powers and the amending process under s 128.

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<sup>19</sup> *Amalgamated Society of Engineers v Adelaide Steamship* (1920) 28 CLR 129 at 152.

<sup>20</sup> P. Finn, ‘A Sovereign People, A Public Trust’, in P. Finn (ed.) *Essays on Law and Government Vol 1* (1995) at 3.

<sup>21</sup> J. Thomson, ‘The Australian Constitution: Statute, Fundamental Document or Compact?’ (1985) 59 *Law Institute Journal* 1199 at 1201.

<sup>22</sup> N. Aroney, *Freedom of Speech in the Constitution* (1998) at 66.

<sup>23</sup> Barwick CJ in *Spratt v Hermes* (1965) 114 CLR 226 at 242; noted by Toohey J in *Kruger* (1997) 190 CLR 1 at 79. See also Harris, above n 13 at 129.

However, if as Madison pointed out in 1787 in relation to the U.S. amending process: “In rendering the concurrence of less than the whole number of States sufficient, it loses the *federal*, and partakes of the *national* character”,<sup>24</sup> what is the real nature of s 128: could it be considered national? It is submitted that it is federal and not national. This is because one must remember that at the time Madison was writing, there was seen no distinction between federalism and confederalism, and the only choice was between confederal and national.<sup>25</sup> See also Claus: “[I]n the debates surrounding adoption of the new American constitution, the terms ‘federal’ and ‘confederal’ were used interchangeably”.<sup>26</sup> Thus it is clear that both the United States and Australian amending processes are neither national, nor confederal, but federal.

However, even though the Australian Constitution itself has more federal features than national features, the Constitution has operated during a century of political and judicial change, which has altered the balance. The altering of the federal balance to increasingly favour the national government has been a consequence of political manoeuvring between the federal and State governments; for example in the field of taxation during war-time. But is also the work of a post-*Engineers* High Court in its interpretation of the Constitution. This continues (with but rare exception, see the *Incorporation Case*)<sup>27</sup> to this day. Greg Craven has suggested that:

The most likely scenario is one where the States continue to slide, none too gracefully and with occasional rallies, into a position of increasing subservience... [and] the High Court will continue to interpret the enumerated powers of the Commonwealth broadly and, if anything, more broadly than before.<sup>28</sup>

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<sup>24</sup> *The Federalist*, Paper No. 39 232 at 237.

<sup>25</sup> M. Diamond, ‘Commentaries on *The Federalist*’ (1977) 86 *The Yale Law Journal* 1273 at 1274.

<sup>26</sup> L. Claus, ‘Federalism and the Judges: How the Americans Made us What We Are’ (2000) 74 *Australian Law Journal* 107 at 110.

<sup>27</sup> *New South Wales v Commonwealth (Incorporations Case)* (1990) 169 CLR 482.

<sup>28</sup> G. Craven, ‘The States-Decline, Fall or What?’ in G. Craven (ed.) *Australian Federation: Towards the Second Century* (1992) 49 at 68-69.

Although a reserved states rights doctrine was pursued by the Justices of the High Court with a living memory of the drafting and ratification of the Australian Constitution,<sup>29</sup> this was quickly discarded by the *Engineers case* in 1920. For “by 1920, courts in both [Australia and the United States] had engaged in highly visible disputes with governments based upon restrictive definitions of power”.<sup>30</sup> The reserved states rights doctrine lingered, probably because of influences such as the compact theory, but in the end it could not be sustained. As noted by Aroney, *Engineers* was to usher in a view that “the implication of *any* doctrine [not just reserved states rights], is significantly reduced when we stress the nature of the Constitution as an Act of Parliament”.<sup>31</sup> (emphasis added) This is why extra-curial statements which stress the implication of representative government deriving from popular sovereignty are considered such a departure from *Engineers*. Moreover, there is the ‘implied rights’ fusion of the legal and political, which were kept clearly distinct in *Engineers*.

However, as noted throughout this thesis, there are some Justices who now say that the people of Australia collectively are sovereign and that this requires a “dialogue between the people and the court”<sup>32</sup> to facilitate a possible veto of legislation. In answer, it might suffice to say that all the powers of government, (and even more certainly the judiciary), are derived from an overwhelmingly federal Constitution (under the aegis of the crown) and not from the people collectively as citizens of the Commonwealth.

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<sup>29</sup> *D'Emden v Pedder* (1904) 1 CLR 91, most particularly Griffith CJ and Barton and O'Connor JJ but cf Isaacs J.

<sup>30</sup> W. Rich, ‘Constitutional Law in the United States and Australia: Finding Common Ground’ from Web, 29/12/98, <http://washburnlaw.edu/wlj/35-1/articles/richtxt.htm>; 3.

<sup>31</sup> Aroney, above n 22 at 110.

<sup>32</sup> L. McDonald, ‘The Denizens of Democracy: The High Court and the “Free Speech” Cases’ (1994) 5 *Public Law Review* 160 at 191.

At times the distinction between constitution-making, constitution-altering and law-making powers appear to be conflated. The present writer argues that it is most beneficial to clearly keep each separate:

### **Constitution-making**

Australian constitution-making should be seen as purely confederal (or compactual) and emanates from the *unanimous* agreement of the colonial entities. Further, the constitution-making process, of course, had the Imperial Parliament over-layed over the whole process. Like the Canadians, Australians would hold that their Constitution bequeathed from the Imperial Parliament was of a higher and purer form than the American's revolutionary text.

Moreover, in emanating from the sovereign authority of the Imperial Parliament (the legal basis of the Constitution), the Australian Constitution avoided many of the 'metaphysical' theories of sovereignty developed in the United States. For example many would try to vest sovereignty in *either* the whole people or the peoples of the several states. Still others such as Bryce would argue for a 'compound republic' and a sovereign within the jurisdiction of another sovereign.<sup>33</sup> Unlike the United States, the Australian constitutional principle of constitution-making is not national, and therefore does not support the proposition of a collective 'We the People...' constitution.

### **Constitution-altering**

Australian Constitution-altering is more federal than national and is exercised by s 128 of the Constitution. Indeed, any suggestion of a national popular role in s 128 is heavily circumscribed by the federal aspects. Not just a majority of Australians is needed to alter the Constitution, but a majority of voters in a majority of States. Although in altering the Constitution Act, any reliance

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<sup>33</sup> See N. Aroney, 'Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901' (2002) 30 (2) *Federal Law Review*, 265 at 272.

on s 15 of the Australia Act and s 51(xxxviii) of the Constitution, also imbues notions of the confederal, because of the requirement of state unanimity evident in both those provisions.

### **Law-making**

Australian law-making should be seen as partly federal (s 7 of the Constitution: the election of the Senate) and partly national: s 24 of the Constitution (the election of the House of Representatives). This taxonomy accords with the view of Thomas Just, a framer of the American Constitution, (relying on Madison) that a “federation should be ‘federal’ as to its foundation (an agreement of the constituent states), and ‘partly federal, partly national’ as to its representative institutions”.<sup>34</sup>

### **Preambles**

At this point, many would point to the wording of the Australian Constitution’s preamble and the agreement of the people of the colonies (as distinct from the colonies themselves) to unite as a historical source. See the comments of Deane and Toohey JJ in *Leeth*: “The States themselves are, of course, artificial entities. The parties to the compact which is the Constitution were the people of the federating colonies”.<sup>35</sup> Whilst the present writer acknowledges that this has some force, it is still maintained that the politico-historical process that brought the draft Constitution into being was a federal compact between the colonial entities themselves, not a contract to which the people were a party. At best, the glib reference to the people (in contrast to an unequivocal ‘We the people...’ statement) highlights that the Constitution was ratified by the people of the colonies, but that the colonies themselves (soon to be States) had freely, voluntarily and solemnly entered into a federal compact.

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<sup>34</sup> *Ibid* at 293. In respect of s. 7, “each State is entitled to equal representation in the Senate irrespective of population”: Harris, above n 13 at 131.

<sup>35</sup> *Leeth v The Commonwealth* (1992) 174 CLR 455 at 484.

As to legal force of preambles, see specifically the judgment of Deane and Toohey JJ in *Leeth*, where their Honours purported to derive an implied constitutional right of equality from the provisions in the Preamble that the people of the Australian colonies had agreed to unite in a federal Commonwealth. Winterton has said, “This judicial creativity suggests that concerns [about judicial activism] are not fanciful”.<sup>36</sup> See also the comments of Sir Anthony Mason, “we do not know what would come of it [preamble] in the hands of judges”.<sup>37</sup>

The position of the Australian Constitution can be clearly contrasted with the U.S. Constitution in respect of the sentiments evident in each preamble. The basis of the U.S. version can be seen to be much more national. That preamble declares not that the people of one state compact with the people of another, nor that the states compact with each other, but that *the people of the United States* ordain and establish the Constitution. Of course *the people of the United States* could not in reality exist prior to the Constitution being promulgated to bring the United States into being. However, in one sense one is reminded of a social contract coming into being, with the people contracting with each other.

### ***The United States Preamble***

Joseph Story was an influential U.S. writer of the 1840’s and later judge who forcefully argued that the U.S. Constitution was not a compact between the governments of the several states, nor even by the people of the several states, but more a government of individuals, relying on popular sovereignty and therefore national.<sup>38</sup> “We shall treat it, not as a mere compact, or league, or

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<sup>36</sup> G. Winterton, ‘The 1998 Convention: A Reprise of 1898’. 11/12/99, from web, <http://www.law.unsw...au.html>:7. Contrast with Williams’ statement that “judges only resort to preambles extremely sparingly and could not derive rights or other meanings from the preamble”: ‘Referendum 1999’ pamphlet at 35.

<sup>37</sup> Mason, above n 6 at 25.

<sup>38</sup> In his *Commentaries on the Constitution of the United States*, and the later condensed version *A Familiar Exposition of the Constitution of the United States* (1992 Special Edition). See also J. Gough, *The Social Contract* (1936) at 218.

confederacy...; but, (as it purports on its face to be), as a Constitution of Government, framed and adopted by the people of the United States".<sup>39</sup>

During the American Civil War in the 1860's Story's view became critical for the security and survival of the Union. Story promoted his view against those (such as J.C. Calhoun) who in the desperate times of the Civil War, would urge State's rights against the Federal Government. Calhoun argued that since each State retained its sovereignty, freedom and independence (the theory of 'State sovereignty'), and that since the federation was a political compact (the 'compact theory of federation'), the South need not submit to will of the North. The 'State Sovereignty' theory of course formed the basis of the argument for the southern States to secede from the Union in 1860.

In the end, the view that no U.S. State could secede was of course only accepted after the Federal victory in the Civil War, which was an horrific example of competing political theories being played out on the battlefield. Craven has noted that authors of the calibre of Bryce, Dicey and Garran would agree that this terrible scenario was "at least partly due to the failure of those who wrote the American Constitution to deal adequately with the topic of secession".<sup>40</sup> Even after the war, no amendment to the U.S. Constitution to expressly forbid secession was adopted. For to do so, would be to acknowledge that the position before the war was at least arguable. However, as an acknowledgment of the untenable nature of their argument, many southern States then deleted any reference to contract or compact theory from their own state Constitutions. Moreover, their

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<sup>39</sup> J. Story, *A Familiar Exposition of the Constitution of the United States* (1992 Special Edition) at 36.

<sup>40</sup> That is "the right of secession was not expressly negatived in the American Constitution": G. Craven, *Secession, The Ultimate States Right* (1986) at 18 and 20.

Constitutions “were amended by the introduction of provisions expressly repudiating the right of secession”.<sup>41</sup>

During the civil war John Calhoun would unsuccessfully argue the exact converse of Story. Calhoun argued: “It is federal, because it is the government of States united in a political union [compact], in contradistinction to a government of individuals socially united; that is, by what is usually called, a social contract”.<sup>42</sup> Unsuccessful as Calhoun was in his own time his thoughts “have been an important source of our contemporary understanding of federalism.”<sup>43</sup> In doing so, Calhoun not only challenged Story and like, but that founding text *The Federalist* itself. “In particular, Calhoun argued that its view of American government as compoundedly federal *and national* was a ‘deep and radical error’”.<sup>44</sup> (emphasis added) However, Calhoun did find direct support for his view in *The Federalist* Paper No. 39 where James Madison noted that the U.S. Constitution is to be founded on the assent and ratification of “the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong”.<sup>45</sup> Thus Calhoun would further argue “We, the people of the United States, - means- We, the people of the several States of the Union”.<sup>46</sup>

One of Calhoun’s more powerful arguments centred on the Tenth Amendment which reserved powers not delegated to the United States ‘to the States respectively, *or* to the people’. The question was, which people? The people regarded in the aggregate, as a nation, or the people of

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<sup>41</sup> J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901 rep 1976) at 293.

<sup>42</sup> J. Calhoun, *A Disquisition on Government and a Discourse on the Constitution and Government of the United States* (1993 Special Edition) at 113.

<sup>43</sup> Diamond, above n 25 at 1276.

<sup>44</sup> Noted by Diamond, *Ibid* at 1275.

<sup>45</sup> Madison, above n 24 at 236 noted by Calhoun, above n 42 at 236. See also Aroney, above n 33 at 278: “Madison could conclude that the [United States] Constitution rested on a ‘federal’, rather than a ‘national’ basis, precisely because the act of ratification was by ‘the people as forming so many independent States’, rather than the people ‘as forming one aggregate nation’”.

<sup>46</sup> Calhoun, above n 42 at 128.

the several states? The dual reservation in the Tenth Amendment was, according to Calhoun, “to the several States and people [of the several States] in their separate character, and not the whole, as forming one people or nation”.<sup>47</sup> He further drew on the fact that the Tenth Amendment was a more or less direct successor of the second provision of the Articles of Confederation of 1781, and that provision said a great deal about the States but nothing about the people. It stated:

Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation, expressly delegated to the United States in Congress assembled.

Naturally enough, in the formation of the ‘more perfect union’, the people had to be recognised, but the belated recognition in the Tenth Amendment, if it meant anything at all, meant the people of the States not the union. In the end, however, Calhoun bemoaned that his reasoning had “not been sufficient to prevent the opposite opinion [ie Story’s] from being entertained”, and would eventually concede that “this last seems to have become the prevailing one”.<sup>48</sup> It would follow therefore, that since the U.S. Constitution was not a compact between the States, no State could secede without the consent of all.<sup>49</sup>

U.S. Tenth Amendment law, while not sufficient to support claims for secession has proved fruitful for the development of the concept of ‘State sovereign immunity’. This doctrine was commenced by Marshall CJ in *M’Culloch v Maryland*<sup>50</sup> and recently asserted by the U.S. Supreme Court in *Alden v Maine*<sup>51</sup> where a 5-4 majority held that the Tenth Amendment had constitutionalised the States’ sovereign immunity; based on a natural (not common) law reading which would not yield to “congressional abrogation”. Australia has also developed (albeit warily,

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<sup>47</sup> *Ibid* at 144.

<sup>48</sup> *Ibid* at 118.

<sup>49</sup> Note that earlier dissentents to this view were of such calibre as Thomas Jefferson.

<sup>50</sup> 4 Wheat (17 US) 316 (1819).

<sup>51</sup> 119 S. Ct. 2249 (1999).

for example *Engineers*) Marshall CJ's idea of spheres-of-sovereignty into the arguably common (not natural) law notion of inter-governmental immunity.<sup>52</sup>

Thus as Calhoun was to eventually concede, the prevailing view<sup>53</sup> had as powerful arguments that 'We, the people' meant the people in their individual character, as forming a single community, (who ordained and established the Constitution) and not people as forming States, and further that this could be supported by the omission to enumerate the States by name, after the word 'people'.<sup>54</sup> Try as he might, Calhoun could not explain away this "striking omission".<sup>55</sup>

### ***The Australian Preamble***

Similarly, it might be thought that interpreters of, and commentators on, the Australian Constitution might find it impossible to explain away the *striking inclusion* of the Australian colonies, soon to be States, by name after the word 'people' in the preamble (except Western Australia) and covering clause 3 (including Western Australia).<sup>56</sup> As historian Bruce Knox has rightly pointed out: "How odd therefore that so few observers have taken notice of the preamble... 'The *people of New South Wales* ...[and the rest]', it did not refer to 'the *Australian people living in New South Wales, etc*'".<sup>57</sup> The Constitution was never ratified by the people of Australia as a whole; it was ratified individually by the people of each colony. As J. Wright has correctly said:

By the Australian preamble, however, the people were declared to have acted as members of the several colonies 'agreeing to unite', and thus the Australian Commonwealth was

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<sup>52</sup> For a recognition of the impact of the American doctrine on Australian development see Claus, above n 26 at 107-115.

<sup>53</sup> Noted by R. Garran, *The Coming Commonwealth* (1897) at 26 as the 'constitution theory of federation'; see also Craven, above n 28 at 66. Others to promote the prevailing view were such as James Wilson, John Marshall and Daniel Webster.

<sup>54</sup> Calhoun, above n 42 at 32.

<sup>55</sup> *Ibid*

<sup>56</sup> Noted also by Thomson, above n 21 at f/n 38 1203; quoting W. Harrison-Moore, *Constitution of the Commonwealth of Australia* (1910) at 67-68.

<sup>57</sup> Knox, above n 5 at 3.

principally a confederacy of existing communities ‘founded on the assumed continuance of those communities in the distribution of powers between the Commonwealth and the States, in the organization of the Commonwealth Government, and in the machinery for the alteration of the Constitution’. <sup>58</sup>

However, it must also be admitted that a provision in the Australian Constitution’s preamble such as ‘Whereas the *colonies* of New South Wales ... (and the rest)’ might have endowed the preamble with an even stronger argument for the Constitution being viewed as a federal compact.

Despite the historical evidence some High Court Justices persist with promoting popular sovereignty arising from the Australian preamble. See the comments of Deane and Toohey JJ in *Leeth*: “The States themselves are, of course, artificial entities. The parties to the compact which is the Constitution were the people of the federating colonies”. <sup>59</sup> In light of their Honour’s other statements on this whole subject, this passage is troubling. If the people of the colonies were the parties to the compact, and they are now the legal basis of the Constitution, should it not follow that in those people as separate and distinct communities, sovereignty should reside? However, their Honours would seem not to accept this, and see sovereignty (as with all other proponents of popular sovereignty) as residing in the people, taken in the aggregate, as forming the Commonwealth of Australia. This is in spite of recognising in *Leeth* that “it is the people who, in a basic sense, now constitute the individual States, just as, in the aggregate and with the people of the Territories, they constitute the Commonwealth.” <sup>60</sup>

Their Honours comments in *Nationwide News*: “In implementing the doctrine of representative government, the Constitution reserves to the *people of the Commonwealth* the ultimate power of

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<sup>58</sup> J. Wright, ‘The Nature of the Australian Constitution: The Limitations of the Institutional and Revisionist Approaches’ (2000) 28 *Federal Law Review* 345 at 351.

<sup>59</sup> *Leeth v The Commonwealth* (1992) 174 CLR 455 at 484.

<sup>60</sup> *Ibid.*

governmental control” perpetuates this perspective.<sup>61</sup> (emphasis added) This is the inconsistency to be discovered in referring to such an unsatisfying notion as popular sovereignty. Aroney has also noted the same difficulty with Mason CJ’s view in *ACTV*: “to regard the Australian people as a whole as the constitutive authority behind the Constitution ignores the federal nature of the Constitution, which is strikingly entrenched even in its democratic sections (7, 24 and 128)”.<sup>62</sup>

Deane and Toohey JJ’s argument could be construed to be based on the following elements:

1. The States are artificial entities, hence
2. the people of the colonies were the parties to the compact; however
3. the conglomerate people as ‘citizens of the Commonwealth’ are now the sovereigns,
4. hence the people are the legal basis of the Constitution.

Step 3 is doubtful as to see the conglomerate people of Australia at the time of Federation as sovereign, is to confront the reality that this would be a mere mass of individuals, without any organic arrangements to express their sovereign will, or carry it into effect. Only as ‘inhabitants of their respective colonies’ could they constitute organised political communities. Even if step 3 is conceded, step 4 does not follow as the legal basis of the Australian Constitution is enactment by the Imperial Parliament.

The preferred view would be:

1. the colonies as separate and distinct communities, and as independent political entities, were the parties to the federal compact;

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<sup>61</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 71.

<sup>62</sup> *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138.

2. the compact was then ratified by the people thereof respectively;
3. thus the federal compact of the colonies forms the political basis of the Constitution;
4. thus neither the inhabitants of the States nor the citizens of the Commonwealth are now the sovereigns,
5. The legal basis was provided by enactment through the Imperial Parliament: its inauguration was an act of law performed under the authority of an acknowledged political superior.

For Deane and Toohey JJ, “the conceptual basis [of the Constitution] was the free agreement of ‘the people’ of the federating colonies.”<sup>63</sup> It seems clear that this ‘conceptual [political] basis’ then takes on the status of the legal basis to imply the doctrine of legal equality. The present writer would disagree in the entirety: the conceptual basis of the Constitution is the agreement of the colonies to federate, and that this amounts at most to a political basis. There is a further political factor, that of the acceptance of federation at referendum, (by the people of the several colonies, and not by them as individuals composing one entire nation), but to elevate this to anything more is artificial. On the present writer’s analysis it is therefore not surprising that the Constitution embodied a general principle which protected the States and their instrumentalities from being singled out by Commonwealth laws for discriminatory treatment, but provided no similar protection of the people who constitute the Commonwealth and the States.<sup>64</sup>

The Constitution and the Commonwealth resulted neither from the act of a majority of people in Australia, nor from a majority of the colonies; but from the unanimous assent of the colonies. (Western Australia was to be admitted to the Federation at the eleventh hour, after enactment of

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<sup>63</sup> *Leeth v The Commonwealth* (1992) 174 CLR 455 at 486 and reiterated by Toohey J in *Kruger v The Commonwealth* (1997) 190 CLR 1 at 94.

<sup>64</sup> The converse of this was argued by Deane and Toohey JJ in *Leeth* at 484.

the Constitution but before proclamation). Thus the Australian Constitution would embody three great divisions:

- the primary division being federal, that is, on the basis of distinct, independent States
- the division between constitution-making, constitution-altering and law-making, and lastly
- a less than perfect division of powers between the departments of government.
- A fourth division accepted in the U.S., that as between delegated and reserved powers was rejected.

## PART B - A REVIVAL OF FEDERAL COMPACT THEORY

The Australian federation is an ‘imposed’ federation created by the sovereign power of the Imperial Parliament, and not a ‘voluntary’ federation agreed to by sovereign States or a sovereign people. The legal stamp of authority of the Imperial Parliament was to be decisive. Federal compact theory and social contract theory were both at once rendered **legally** inapplicable. Thus neither the people of Australia, nor the people of the several States, nor the States as entities could view themselves as the legal basis of the Constitution and possibly destabilise the fledgling federation so insecure in its antipodean retreat. On this view, there was and is, no basis for arguing that the Constitution is not supreme law.<sup>65</sup>

Craven notes that “whatever degree of validity [the federal compact theory] may hold as regards the United States, [it] will be inapplicable to a federation... which has been legally effected... by

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<sup>65</sup> However, Garran disputed this by promoting three tiers of sovereignty in which the Constitution is ‘superior’ but not ‘supreme’: “first and lowest [is] the limited and co-ordinate sovereignties of the national and state governments respectively; above these [is] the superior sovereignty of the Constitution; and above all the supreme sovereignty of the amending power [s 128]”: Garran, above n 53 at 26.

the expression of a superior sovereign will”.<sup>66</sup> As such a distinction between the ‘voluntary’ American federation and the ‘imposed’ Australian federation must be drawn. Crucial is the element of choice “which is the legal rather than the historical [political] root of a given federation”.<sup>67</sup> In the Australian context, this element of choice was demonstrated by the referendums in each colony to ratify the draft constitution. It was then voluntarily submitted to the Imperial Parliament, but from that point on, the element of choice was absent. The draft ratified by the colonists was altered by the British and then included in a statute applying as a supreme law and imposed on all parts of the new federation by paramount force. In contrast, Bede Harris has noted in the American context:

One can deduce that a key element of American federalism was that it was the product of a ‘bottom up’ view of the direction in which constitutional authority flowed: Constitutions were made by a process of agreement between the people or their representatives, rather than being imposed from above.<sup>68</sup>

Craven is successful in his efforts to demonstrate that the compact theory of federation has no legal “validity in connection with the Australian federation”.<sup>69</sup> He does this by faithfully maintaining the distinction between history and law. Such a distinction (with a further element bound up with the historical, the political) has been consistently argued throughout this thesis. Craven is correct in stating that: “The [U.S.] federation was voluntary, both as a matter of history, and as a matter of law”.<sup>70</sup> By contrast it is readily apparent that the Australian federation is voluntary as matter of political history, but imposed as a matter of law. Craven is therefore emphatic (and correct in the opinion of the present writer) in asserting that the agreement of the

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<sup>66</sup> Craven, above n 28 at 69.

<sup>67</sup> *Ibid* at 68-69.

<sup>68</sup> Harris, above n 13 at 126.

<sup>69</sup> Craven, above n 28 at 78.

<sup>70</sup> *Ibid* at 75.

people of the colonies, or the colonies themselves “did not form the legal basis of the application of the Constitution Act”.<sup>71</sup>

Turning to the authorities, Craven notes that those older cases referring to the Constitution as a federal compact<sup>72</sup> “may be best described as loose (some would say misleading, if not dangerous) judicial rhetoric, rather than considered pronouncements upon the nature of the Australian Federation”.<sup>73</sup> The present writer would agree that they might be considered loose statements “referring to the historical, rather than to the legal genesis of the Constitution Act”.<sup>74</sup> However, what should be made of those judicial statements in the ‘implied rights cases’ referring to the Constitution as a social contract based upon popular sovereignty? In view of the fact that it has been demonstrated that first, the legal basis of the Constitution is its enactment by a supreme legislative body which possessed sovereignty over the Australian colonies, and secondly, the political basis of the Constitution is a federal compact, these statements could rightly be considered ‘misleading, if not dangerous judicial rhetoric’.

Thus since “the Australian Constitution was legally authoritative... by virtue of [Imperial] enactment”,<sup>75</sup> the federal compact theory of federation is not an aspect of Australian constitutional law, but a mere aspect of Australian political history. In contrast, the social contract theory of a sovereign Australian people is no part of Australian constitutional law, nor any part of Australian political history.

However, do these propositions need fresh analysis in light of the Australia Acts and the 1999 republican attempt? With the termination of the power of the British Parliament to legislate for

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<sup>71</sup> *Ibid.*

<sup>72</sup> Mostly occurring before *Engineers* when the reserved States’ rights doctrine was discarded.

<sup>73</sup> Craven, above n 28 at 78.

<sup>74</sup> *Ibid.*

<sup>75</sup> Thomson, above n 21 at 1201.

Australia, has there been a fundamental change in the nature of the Australian federation? Because Australians still accept the Constitution Act as authoritative and binding, could the Australian federation be now more accurately described as a voluntary rather than imposed federation? This is doubtful. However it would appear many who promote popular sovereignty would disagree. Some promote that the Constitution is legally a social contract based on popular sovereignty, because the Australian people accept and acquiesce to it. This is problematic. The present writer would argue against abandonment of the notion that the Australian federation was imposed. To slightly expand upon the words of Winedyer J in *Worthing v Rowell and Muston Pty Ltd*:<sup>76</sup> ‘The Australian Constitution, [in contrast to the United States] gets its juristic force not as a compact [*nor social contract*], but from a statute of the Imperial Parliament’. The fact that the abandonment of this view has occurred throughout the ‘implied rights cases’ has left the juristic basis of the Constitution clouded in confusion. Still, if the present writer could be persuaded to accept a voluntary federation theory, it would be the one with an historical pedigree, it would be one based on a federal compact and not a social contract. The United States is a voluntary federation based on a social contract. Australia is an imposed federation brought into being by an Imperial statute. If the Imperial statute is removed, the Australian federation should be seen as voluntary federation based on a federal compact.

In 1997 Professor Zines said “It has for many years been regarded as heresy to refer to the Constitution as a compact.”<sup>77</sup> This view is however, unnecessarily restrictive in light of the Australia Acts and the ‘implied rights cases’. Indeed, the federal compact reality has a much stronger historical pedigree than the social contract ideal.

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<sup>76</sup> (1970) 123 CLR 89 at 125.

<sup>77</sup> L. Zines, *The High Court and the Constitution* (4th ed 1997) at 308.

In 1985, just prior to the passage of the Australia Acts, Thomson noted:

Historically, the Australian Constitution was not formally approved by the people acting as a [nationalistic] collective entity. Rather it was endorsed by enfranchised citizens voting as members of individual and distinct colonies... On the basis of this constitutional and political history, support can be garnered for the view that the Australian Constitution is a compact... between constituent States.<sup>78</sup>

A similar view has recently been espoused by Aroney:

[M]ost accounts of the search for the basic rule [of the Australian legal system] have been skewed by an (unhistorical) camber in favour of regarding the Australian people as an undifferentiated (and rather undefined) whole, without regard to the States into which they are organised and, more importantly, without regard to the federative compact which, from an *autochthonous* and *legal* point of view, brought the federation into being.<sup>79</sup> (emphases added)

However, one problem arising from Aroney's view is that for the federal compact to create an autochthonous Commonwealth, the colonies would need to have been considered autochthonous. This might be difficult in light of the countervailing necessity to refer to Imperial legislation in their creation. However, Aroney has also said: "The Imperial Parliament abdicated its legislative capacity concerning Australia, and the unanimous action of the States took its place... as the ultimate source of authority in the Australian federation",<sup>80</sup> not popular sovereignty. This concept of state unanimity is of course a natural outgrowth of the colonial unanimity evident at the time of federation. Federal compact theory can rely on either colonial unanimity or state unanimity.

Federal compact theory views the people who voted to accept federation as British subjects and the inhabitants of their respective colonies. They were not citizens of the Commonwealth or a

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<sup>78</sup> Thomson, above n 21 at 1201. He then correctly goes on to clearly distinguish between this political aspect and the legal force given by the Imperial Parliament. See also N. Greenwood, *For the Sovereignty of the People*, (1999) at 366-367.

<sup>79</sup> Aroney, above n 33 at 288.

<sup>80</sup> *Ibid* at 290-291.

national entity.<sup>81</sup> As British subjects they voted through the mechanism of colonial governments which were themselves created by the Imperial Parliament. The purpose of the compact was to create a politico-legal form for the Federation and the ongoing process of governance for that Federation. For, as noted by Brennan CJ in *Kruger v The Commonwealth* in 1997: “the leading object of the Constitution was the creation of the Federation”.<sup>82</sup>

In his book *A New Constitution for Australia*, Bede Harris undertakes a comparison between the American federation and the Australian federation. He states:

The [Australian] Founders task was to draft not a charter regulating the relationship between the citizen and the various governments in Australia, but rather what was really a compact or treaty between the separate Australian colonies delineating the terms upon which they would agree to federate. Our Constitution thus bears more of the features of an inter-governmental agreement than a set of principles regulating the relationship between the individual and the State.<sup>83</sup>

Whilst Harris states “I do not mean to suggest that a federal Constitution will be wholly of one character or the other”, he concludes that the United States Constitution “places its major emphasis on the Constitution as a *compact* between the States...” and the Australian Constitution “gives the dominant impression of being a *treaty* between the States”.<sup>84</sup> (emphases added) It is uncertain what, if anything, turns on the different terminology used, namely ‘compact’ and ‘treaty’. It would seem they are synonymous for he also states, there is “evidence for the view that it is the States, rather than their individual citizens, who are parties to the Australian federal compact”.<sup>85</sup> The main distinction sought to be made though (with which the present writer agrees) is that whether the Australian Constitution be politically termed a compact or treaty, it is

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<sup>81</sup> Finn, above n 20 at 3 at f/n 15.

<sup>82</sup> (1997) 190 CLR 1 at 42.

<sup>83</sup> Harris, above n 13 at 4.

<sup>84</sup> *Ibid* at 129-132.

<sup>85</sup> *Ibid* at 131.

most certainly not “a document designed to secure the rights of individual citizens *vis-à-vis* governments of whatever level”.<sup>86</sup>

While Craven could assert in 1984 that “the compact theory of federation has absolutely no application [to Australia]”,<sup>87</sup> it would now surely be just as legitimate for proponents of that political theory to promote it as the juristic basis of the Constitution (especially in view of its historical merits) against any other competing political theories claiming to be the same. After all, it must be remembered how the legal links were severed with the United Kingdom in 1986. The Australia Acts took place within a federal not popular framework. There were no referendums held, either to approve severing the links or to relocate Imperial sovereignty in popular acceptance.

The process was facilitated by the ‘request and consent’ procedures involving all the State legislatures, the Commonwealth Parliament and the British Parliament. Again, just as with the federating process itself, the negotiating entities were the States (this time with the necessary input from the Commonwealth) and not the people of Australia. The Queensland Constitutional Review Committee has noted that this process provided “a solution to the problem [RTE] Latham had raised sixty years earlier”.<sup>88</sup> The problem being that “if the Imperial Parliament ceased to be looked to as the original source of law, there would have to be a novation of the federal compact, a new fundamental agreement between the Commonwealth and States”.<sup>89</sup> However, the present writer would disagree with the QCRC’s assessment of Latham’s concern. The process that led to the enactment of the Australia Acts, and their subsequent enactment dealt with the concept of

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<sup>86</sup> *Ibid.*

<sup>87</sup> Craven, above n 40 at 76-77.

<sup>88</sup> Queensland Constitutional Review Commission, *Issues Paper*, 1/5/94, from web, <http://www.constitution.qld.gov.au/ref.htm>; 218.

<sup>89</sup> R.T.E. Latham, ‘The Law and the Commonwealth’ in W. Hancock, *Survey of British Commonwealth Affairs*, (1937) at 527.

autonomy; that is, the British Parliament was to no longer have any legislative power over Australia. However, the concept Latham was concerned to address was that of autochthony; that is, the severing of Australian law from the Imperial root. Should autochthony be desired, Latham is right in suggesting that “a novation of the federal compact” would be required. To no longer view the source of the Commonwealth Constitution as the Imperial Parliament “would provide no measure within Australia of the mutual status of the parties to Federation”. <sup>90</sup> Similarly, it could be argued that to remove the monarchy might require a new fundamental agreement between the Commonwealth, a majority of voters in Australia, all the State parliaments, and a majority of voters in **every** state.

## **PART C- SECESSION, REPUBLICAN IDEALS AND STATE UNANIMITY: A CRITIQUE**

### *Secession*

As the Australian colonies were to be considered as parties to a compact of federation, the founders of the Australian Constitution were acutely aware of possible consequences for the federation in light of emphasising such a compact too robustly. Foremost, the grim reminder of the American Civil War had served as a timely warning against the notions of reciprocal duties and rights of rescission, and the rights of the States against the federal government generally. <sup>91</sup> Thus for the new Australian federal entities called States, reserved rights of nullification (of federal power) and secession (from federal power) were not to be granted. Craven has noted: “taking as they did the great American federation for their guide, [the Australian] delegates were well aware of the problem of secession, and the dangers which it posed”. <sup>92</sup> In fact “no

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<sup>90</sup> *Ibid.*

<sup>91</sup> See *Official Record of the Debates of the Australasian Federation Conference (Convention Debates)*, Adelaide 1897, 296. Noted also by Craven, above n 40 at 18. See also Gough, above n 38 at 213 and H. Irving, *To Constitute a Nation*, (1998) at 198.

<sup>92</sup> Craven, above n 40 at 8.

convention delegate advocated a right of secession".<sup>93</sup> So too, the people of the new Australian federation would in 1901 have no reserved 'deep' or 'fundamental' rights. Nor would they have rights of rescission of any original contract between people and government. As a result of these concerns about the 'doctrine of reservation' generally (states and people), the Australian founders adopted the following three safeguards:

First, the Australian Constitution was to contain no equivalent provision to the U.S. Tenth Amendment (which reserved powers not delegated to the United States 'to the States respectively, or to the people').

Secondly, not wishing to form a 'national' government (which is too complete a union) nor a mere 'confederation' (which is a less than perfect union), the founders inserted the words 'indissoluble Federal Commonwealth' into the Australian Constitution's preamble. In the words of Dicey: "Federalism is the natural condition of states which desire union and do not desire unity".<sup>94</sup> To desire unity would be to desire a national government, (as was mooted by the Dibbs Unification Scheme in 1894).<sup>95</sup> The U.S. founders had achieved much the same by forming what they called a 'perfect union'. Had the U.S. nationalists wholly succeeded, too complete a union would have been formed. Had the U.S. Constitution not been successful the country would have remained a less than perfect union under the Articles of Confederation.<sup>96</sup> The reference to 'indissoluble' in the Australian Constitution was meant to prevent unilateral secession, after all, it was clearly not the intentions of the Australian founders (nor American for that matter) to "place the dissolution of the [federal] government in the hands of a single State".<sup>97</sup> However, whereas the Americans had neglected to deal with the issue decisively and paid the price of the civil war,

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<sup>93</sup> *Ibid* at 21.

<sup>94</sup> A. Dicey, *Introduction to the Study of the Law of the Constitution* (1931, Eighth ed), 1xxv.

<sup>95</sup> Noted by Quick and Garran, above n 41 at 155.

<sup>96</sup> Diamond, above n 25 at 1280.

<sup>97</sup> Gough, above n 38 at 217.

the Australians had at least come up with a response to the problem. However, Craven notes that the Australian preamble response does not go as far as the founders might have. Options to provide for an express prohibition of secession and/or an express power for the Commonwealth to coerce a rebellious State were not adopted.<sup>98</sup>

Thirdly, and most importantly, it was ensured that the compact between the states would not have any basis in law for rescission. This was to repress the promotion of arguments which could replicate the divisive and disastrous scenario played out in America which led to civil war. This was done by having an authority higher than the colonial participants, the Imperial Parliament, enact the Constitution. This is acknowledged by W. Harrison Moore in his seminal book *The Constitution of The Commonwealth of Australia* published in 1910, where he clearly recognised the distinction between the legal and politico-historical foundations of the Constitution: “the formal source of the Constitution being acknowledged [a law declared by the Imperial Parliament], its historical sources may be recognised without any fear of impairing the stability of the union”.<sup>99</sup> Thus the accepted Imperial legal basis of the Constitution made it possible for many to safely speculate on the nature of, and parties to, the agreement behind it. In other words the federal compact was not in danger of being revoked by any party to it, because of the Imperial Parliament standing behind it.

Witness Western Australia’s unsuccessful attempt in 1935 to petition the British Government to allow it to secede from the Commonwealth of Australia. This petitioning of the British Government confirmed, in constitutional terms, the lack of authority of ‘the people’. The referendum in Western Australia in favour of secession was passed by a majority of almost 2:1. But the Western Australian government did not begin to operate as an independent country, it

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<sup>98</sup> Craven, above n 40 at 21.

<sup>99</sup> Harrison-Moore, above n 56 at 66-67.

petitioned the British Government for amendment of the Constitution Act. Amendment under existing procedures was considered crucial to legal validity, unlike the will of the Western Australian people.<sup>100</sup> In contrast, the Americans having no Imperial authority standing behind their compact, resorted to the notion of the consent of ‘The People of the United States’, which in effect transformed their federal compact into a national constitution.

Craven has noted approaches one and two by the Australian founders (no Tenth Amendment equivalent and the word ‘indissoluble’) constituted the weakest stances against secession.<sup>101</sup> Approach number two which relied on the word ‘indissoluble’, seemed to be a compromise between the strongest and weakest stances against secession. If, during the Adelaide Convention Debates, Isaac Isaacs had had his way, this approach would not have even been necessary because of the fact that the Constitution would be contained in an Imperial Act. Unfortunately Isaacs did not expand on how this very act would render the question of secession irrelevant, suffice to interject in the speeches of fervent supporters of express prohibitions against secession: “There cannot [be any secession] if it [the Constitution] is an Act of the Imperial Parliament”.<sup>102</sup>

However, there is no doubt that a determined Australian State with sufficient popular support and political will and prepared to use any means necessary, could not be prevented (without military or possibly economic force) from unilaterally seceding from the Commonwealth, but such an act would be extra-legal. This in turn would require recourse to the doctrines of ‘legitimacy’, ‘necessity’ or ‘the effectiveness principle’ and the ‘recognition of revolutionary regimes’.

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<sup>100</sup> Daley, above n 16 at ch 6.1.

<sup>101</sup> Craven, above n 40 at 26.

<sup>102</sup> *Convention Debates*, Adelaide 1897 at 128.

However, as such doctrines are descriptive not prescriptive, they would not provide any constitutional or legal basis for secession.<sup>103</sup>

Writing in 1984, Craven was able to dismiss the possibility of secession as “unthinkable”.<sup>104</sup> So too in the present, the proposition remains “virtually unthinkable”, but as noted by Craven such a “proposition carries its own limitations”.<sup>105</sup> The ‘infinity of possibility’ means that any political scenario cannot be ruled out. Who knows what form of republican government may be mooted by the Commonwealth Government, and accepted under section 128 in the future? Such a form may be totally unpalatable to one or two Australian States, thereby prompting an aggrieved State to attempt to secede and adopt their own form of republican government, or even attempt to retain links to the British monarchy.

### ***To a republic: in the absence of proper federal considerations?***

Central to the republican question is whether the methods adopted by the Commonwealth in 1999 to change the Commonwealth, but not the States, to a republic were constitutionally valid, and just as important politically responsible. The model of any future proposed republic will no doubt be different from the A.R.M. model, but it is likely the methods promoted to achieve republican change would not. In his book *Democracy, Choosing Australia's Republic*, the late Richard McGarvie notes that Greg Craven had examined such difficulties as far back as 1992. The failed 1999 referendum is now something that merely happened last century, but the arguments for and against the validity of change noted by Craven are still unresolved.

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<sup>103</sup> See *Reference re Secession of Quebec* (1998) 161 DLR (4<sup>th</sup>) 385.

<sup>104</sup> Craven, above n 40 at 10.

<sup>105</sup> *Ibid.*

McGarvie is clear that the best “way of resolving the republic issue is by treating it as an issue for the whole federation. That involves treating the Commonwealth and States as full partners”.<sup>106</sup> He agrees with a 1996 recommendation from the South Australian Constitutional Advisory Council that “any proposal put to the people to make the Commonwealth republican should include provisions to make all the states republican as well so that all would change together”.<sup>107</sup> He then outlines a process which “ensures that the changes would be constitutionally valid beyond any credible argument”.<sup>108</sup> Such changes would require a majority of voters overall and a majority of voters in **every** state and also the request or concurrence of every state Parliament.<sup>109</sup> This unanimous parliamentary and/or popular process is often referred to as the doctrine of ‘state unanimity’.

The present writer agrees with such recommendations. This decisive and unanimous action by all component parts of the federation: the Commonwealth; the States; the people of the Commonwealth and people of the states, would put to rest the republic question with considerable benefits. Democracy would be expressed in a fuller form and the integrity of federal unity would

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<sup>106</sup> R. McGarvie, *Democracy, Choosing Australia's Republic* (1999) at 247-248.

<sup>107</sup> *Ibid* at 251-252. It is noted that not all state constitutions require the use of the referendum process for their alteration. In respect of removing the monarch, it would seem that Queensland, Western Australia, South Australia and possibly New South Wales do however have to resort to it. However, on such an important issue, state politicians would be wise to ensure that any parliamentary process flowed directly from a popular process.

<sup>108</sup> *Ibid* at 256.

<sup>109</sup> *Ibid*. In preparation for the 1999 referendum on whether the Commonwealth should become a republic, each State introduced in substantially the same terms, a Constitution (Requests) Act. A further series of ‘request Acts’, the Australia Acts (Request) Acts, were introduced to facilitate **any future** move to State republics. Pursuant to the Australia Acts (Request) Act (Qld), the Commonwealth Parliament was requested to insert additional sub-sections (6) and (7) into s. 7 of the Australia Act. This would allow ‘the parliament of a State to make a law providing that the preceding subsections [stipulating, *inter alia*, that ‘Her Majesty’s representative in each State shall be the Governor’] do not apply to the State’. As a result of the 1999 referendum defeat, neither series of ‘request Acts’ were acted upon.

be upheld. Further, such a procedure would remain faithful to the political process that brought the Australian federation into existence; the federal compact based upon colonial/state unanimity.

Be that as it may, the present writer can not however support the ‘state unanimity’ doctrine as a *legal* obstacle to the creation of a republic, even one mooted to be created by the methods adopted in 1999. This is because the doctrine principally relies on the political foundation of the Constitution (the federal compact) and not the legal foundation. That said however, there are high political principles involved. The present writer recognises the doctrine as a very powerful political argument with significant intellectual support, and which is ‘sufficiently plausible’ and historically credible to argue without any trepidation against competing political theories. Given that the traditional legal basis of the Constitution (an Imperial Statute) is being judicially discarded, and if at some point the federal compact is elevated to the legal basis of the Constitution, this doctrine would of course assume legal importance.

In any event, the best method to achieve a republic for Australia is that suggested by the Western Australian Constitutional Committee and endorsed by McGarvie: “a change to a republic.. [is] one of such symbolic importance that... *whatever the legal position*, it should not proceed without majority approval in all the states”.<sup>110</sup> (emphasis added) Anything less will be at best equivocal and might leave the door open to possible High Court challenges, or worse, create instability in the Federation.

Professor Atkinson has said, “The Crown is part of the compact of federation”.<sup>111</sup> As a result Bruce Knox argues that “as the primary purpose of the Constitution in 1901 was to implement the desire of the Colonies to form ‘a federal Commonwealth under the Crown’, the arrangement

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<sup>110</sup> McGarvie, above n 106 at 250 citing the Western Australian Constitutional Committee, *The Report of the Western Australian Constitutional Committee*, above n 11 at 68-69.

<sup>111</sup> A. Atkinson, *The Muddle-Headed Republic* (1993) at 66.

ought to be re-negotiated if one of these components is to be eliminated”.<sup>112</sup> Further, “at the very least, any proposed new Constitution [should be] submitted for the approval of *all* the original parties to the compact [the people of the colonies]; and this is a requirement upon which the States ought to insist”.<sup>113</sup> (emphasis added) The Crown was a gift from all the colonies/states to the Commonwealth under the Constitution. On one view, any move to a Commonwealth republic without the approval of a majority of voters in every state is tantamount to the beneficiary discarding the gift without the correct recourse to all the original benefactors.

The doctrine of colonial/state unanimity (either parliamentary or popular) is not foreign to the Constitutional arrangements of Australia. In fact it has been apparent many times. As noted, the proposal to federate was supported by majorities in each colony. Since federation, seven of the eight proposals to alter the Commonwealth Constitution, which have been passed in referendums, were passed by majorities in each state.<sup>114</sup> The passage of the Australia Act (Cth) was facilitated by the request and consent of each of the state Parliaments. Section 15 of the Australia Act also embodies a procedure for the request and consent of all state Parliaments. Further, whilst section 128 does not generally embody state unanimity in providing for constitutional change, the penultimate paragraph of section 128 in fact expressly allows a state to veto constitutional change under certain circumstances. The paragraph gives three express categories that require the consent of a ‘majority of the electors voting in that State’, but also a more troubling fourth category, over which “there are differences of view”.<sup>115</sup> However, the fourth category seems to specifically refer

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<sup>112</sup> Knox, above n 5 at 3-4.

<sup>113</sup> *Ibid.*

<sup>114</sup> McGarvie, above n 106 at 257.

<sup>115</sup> J. Thomson, ‘Altering the Constitution: Some Aspects of Section 128’, (1983) 13 *Federal Law Review*, 323 at 340. The four categories are as follows: (1) alterations diminishing the proportionate representation of any State in either House of Parliament; (2) alterations diminishing the minimum number of representatives of a State in the House of Representatives; (3) alterations of the boundaries of the State; and (4) alterations in any manner affecting the provisions of the Constitution in relation thereto.

back to the previous three (because of its reference to ‘in relation thereto’). As such it would seem difficult to read into it any reference to the removal of the Crown requiring such approval.<sup>116</sup>

The critical issue in any move to a republic is whether the national referendum question includes the conversion of all the states to republics, at the same time as the Commonwealth, or not. The present writer argues strongly that it should. The health of the federation should be of paramount consideration, and the tenuous position of any dissentient states must be considered. As such, the present writer agrees that arguments for simultaneous change are compelling. Simultaneous change based on unanimity also has the added benefit of ensuring that the change would be constitutionally valid beyond any credible argument. Only divisiveness and instability will result from any other procedure.

McGarvie argues that if the question is inclusive of all the components of the federation, (ie the seven Crowns in Australia), and majority approval is not obtained in all the states, “nothing further will happen and the Commonwealth and states would remain monarchies as they are now”.<sup>117</sup> This seems to be a *strict* application of the unanimity doctrine which would in practice give one state the (in many quarters, the undesirable) power of veto over such a change.<sup>118</sup> While,

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<sup>116</sup> A unanimity doctrine also finds support in discussions on what procedure needs to be followed to amend s 128; assuming it can be amended. One argument is that “an amendment to any portion of s 128 comes within the penultimate paragraph of s 128 and therefore requires the consent of a majority of voters in all States”: *Ibid.* Anne Twomey has suggested: “[T]he better view of the penultimate paragraph of s 128 of the Constitution would not require majorities in every State to approve a referendum to become a republic, as long as the referendum did not affect the representation of the States in the federal parliament or the boundaries of the States, or perhaps the penultimate paragraph of s 128 itself”: A. Twomey, ‘State Constitutions in an Australian Republic’, (1997) 23 *Monash University Law Review*, 312 at 322.

<sup>117</sup> McGarvie, above 106 at 256. Although there is only one monarchy there is one Crown *in right* of the Commonwealth and six Crowns *in right* of the states.

<sup>118</sup> At the 1999 referendum Queensland was “easily the biggest ‘no’ vote State at 62.58 per cent”; *The Australian* 8/11/99 at 6. However one point must be made clear from the outset. The veto would not lie with state politicians as it would be incredulous for any state Parliament or Government to withhold support once the majority of its citizens had voted in favour of a change

the present writer would submit that legally such a power of veto does not exist, the scheme is meritorious and would avoid possible damage to the Australian federation. Thus the question should without doubt be inclusive, and should unanimity not be forthcoming, Australians should be mature enough to recognise that for the benefit of the whole federation, no component should proceed to republican change at that time.

If however, some still wish to proceed on the basis of the majorities set out in section 128, dissenting states should be given time to reconsider the question and possibly save face at the same time. Such states should also not be forced to operate within any strict timeframe established by the Commonwealth. If for example, at a national referendum on the question of whether the whole federation should become republican, only Queensland fails to secure the requisite majority, a State referendum could subsequently be held to see if Queenslanders would change their mind in light of overwhelming support for a republic. There is a chance that Queenslanders (or any citizens for that matter) in this position would review their decision in light of the best interests of the federation and vote to move to a republic.<sup>119</sup> This process would give every opportunity for wayward members to rejoin the flock, much the same as the reluctant Western Australians joined the federation at the eleventh hour. *Prima facie*, it might seem to make little difference how or why a state converts to a republic, that is, under an inclusive or non-inclusive question. However, it is submitted a state converting under the ‘inclusive question’ would have both its autonomy and importance within the federation recognized at the same time. The question is not only inclusive, but so is the process.

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to a republic. However, it is possible that the citizens of one or two states may dissent from such change.

<sup>119</sup> A point also noted by the Western Australian Constitutional Committee, *The Report of the Western Australian Constitutional Committee*, above n 11 at 84-85.

The present writer submits a ‘non-inclusive’ question has none of the above attractions. Firstly, it does not allow Australians to assess whether they would be prepared to convert their states as well as their Commonwealth. A ‘non-inclusive’ question merely adopts the flawed process of converting the Commonwealth to a republic first and then allowing the states to fend for themselves in a completely new constitutional and political landscape. To say, as many did during the 1999 republican debate, that this process is respectful of state autonomy, is to misconceive the confusion and harm that would attend in not having the opportunity of the states to convert at the same time as the Commonwealth. For example, after a successful proposal to convert the Commonwealth, the timing of any subsequent state referendums (or parliamentary action) might not be co-ordinated, and a piece-meal and confused approach is likely to ensue. Further, if subsequently some states (after parliamentary or referendum procedures), do intend to become republics, what would be the position of states that had not yet decided, and may have even dissented on the question of converting the Commonwealth?

Further, arguments that dissenting states could remain monarchies within a federal republic should be dismissed as completely destabilising to the federation, absurd and not feasible. One only has to consider the crisis in 2003 when the then Governor-General Dr Peter Hollingsworth stood aside while under investigation for his handling of child sexual abuse complaints within the Anglican church, and Sir Guy Green from Tasmania was seconded as Commonwealth Administrator. At the time Sir Guy was the longest serving State Governor. What would be the position if such a crisis occurred in a mixed monarchic-republican federation? The Constitutional Alteration (Establishment of Republic) Bill 1999 (Cth) provided that if the President of the Commonwealth of Australia had to stand aside, the longest serving State Governor would act in the position. However, if the longest serving Governor were from a monarchical state, we would have the anomalous situation where the Governor of State, which was a monarchy, would be

acting as a President of a republic. One wonders what further crises would be created from this very situation alone?

In all reality, dissenting states would have no real option to remain a monarchy in a republican Australia. As a result, the effect upon the health of the federation because of one or two unhappy states is not to be underestimated. The prospects of parallels with Quebec are frightening. Richard McGarvie has consistently argued there is no doubt, that in practice, a dissenting state (or states) would be forced to change to a republic through sheer humiliation and ridicule. This appears to be why he maintains that any dissent from any quarters should maintain the monarchical status quo. However, the present writer would distinguish the position of dissenting states under an ‘inclusive’ or a ‘non-inclusive’ question. Under the former, any dissenting states were included in the process from the outset as this accords with their status as full partners with the Commonwealth in the federation. Because of such inclusiveness, should any states find themselves facing embarrassment in light of majorities in four or five states and overall, it is more likely they would reconsider their position and move to a republic. However, a ‘non-inclusive’ question treats the states as minor and subordinate and merely expects them to follow the Commonwealth. Further, dissent on such a question might see the states fragment into different courses of action, with dissenting states being ridiculed into changing to republics. Consequently, to *force* a republican form of government upon dissenting states would be “politically delinquent” and “morally repugnant”.<sup>120</sup>

It must be said at this point that the doctrine of ‘state unanimity’ is often associated with the notion of a confederation. Indeed, during the framing of the United States Constitution, it was noted that the United States had passed from notions of confederacy embodied in the Articles of

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<sup>120</sup> G. Kennett, ‘The Crown and the States’ (paper to The Samuel Griffith Society Conference, Melbourne, 30 July- 1 August 1993), from web: <http://www.exhibit.com.au/-griffith>; 2.

Confederation, to notions of ‘a more perfect union’. It followed therefore that there was to be no requirement for unanimity in any constitutional amendment procedure.<sup>121</sup> So too, section 128 of the Australian Constitution (apart from the penultimate paragraph) does not require unanimity for constitutional change. As a result many would assert that “each State, having voted to enter the federation in 1900, should accept the rules for altering the Constitution [including republican change] contained in section 128”.<sup>122</sup> However, to the above assertions there are two objections. First, no direct comparison with the United States should be entertained, for as noted earlier, there are crucial differences between the two countries constitutional foundations. Secondly, the importance of the republic question to all components of the federation has given the notion of unanimity a new credence. The removal of the Crown should not be seen as merely an “unexceptional” change to the Constitution but a “fundamental” change.<sup>123</sup>

Not unexpectedly, Canadians also have considered these fundamental questions. In that federation, federal compact theory at one time “dictated unanimous provincial consent for constitutional amendment, [and]... remained as the keystone of Quebec’s position on amendment until at least 1950”.<sup>124</sup> The fact that in Canada “historical opinion is now firmly against the [federal] compact theory”<sup>125</sup> must be understood in terms of the Canadian dual constitutional amendment process, whereby amendments are categorised according to a formula; known

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<sup>121</sup> Diamond, above n 25 at 1275. To borrow John Calhoun’s ‘shrewd label’, state unanimity might be called a ‘concurrent majority’. However, Diamond pointed out that “the concurrent majority is in fact a system of *unanimous concurrence*”, and of a more confederal nature than federal.

<sup>122</sup> Western Australian Constitutional Committee, *The Report of the Western Australian Constitutional Committee*, above n 11 at 67.

<sup>123</sup> *Ibid* at 68.

<sup>124</sup> P. Oliver, ‘Canada, Quebec and Constitutional Amendment’, (1999) 49 *University of Toronto Law Journal* 510 at 532. It should be noted that the Canada Constitution Act 1982 (more commonly referred to simply as the Constitution Act 1982) is contained in schedule B to the Canada Act 1982 (UK). The Canada Act 1982 (UK) was an Act of United Kingdom Parliament which relinquished the power of that parliament to affect any Canadian laws, including the Constitution.

<sup>125</sup> *Ibid*.

originally as the ‘Fulton-Favreau formula’. In short, amendments require either majority or unanimous support from the provinces depending on the gravity of the amendment. For example, to amend the constitution to alter the ‘powers of the Senate and the method of selecting Senators’ is declared a ‘qualified proceeding’, <sup>126</sup> and only requires a resolution of two-thirds of the provinces (along with a resolution from the Federal Parliament). <sup>127</sup> However, any amendment to ‘the office of the Queen, the Governor General or the Lieutenant Governor of a province’ is declared a ‘highly qualified proceeding’, <sup>128</sup> and must receive (along with a resolution from the Federal Parliament), a similar resolution from *all* ‘the legislative assemblies of each province’. <sup>129</sup> Thus it seems that, although Quebec (relying on the compact theory) could not sustain a right of veto on constitutional amendment by the general procedure in ‘qualified proceedings’, it must be acknowledged that the theory may have played some part in the more rigorous unanimity procedure for amendment in ‘highly qualified proceedings’. The argument being based on the notion that the federative pact “does not belong to the majority of the provinces, even less to the federal government, to change it. ... [A]ny modification [without unanimous consent] ... constitutes an assault on the respect due to contracts”. <sup>130</sup> In fact Oliver noted that “by defining in broad terms the class of amendments requiring unanimity, the new formula, according to one distinguished commentator, ‘accepted in fact, if not in form, the compact theory... which the

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<sup>126</sup> S 42(1)(b) Canada Constitution Act (1982).

<sup>127</sup> S 38 Canada Constitution Act (1982).

<sup>128</sup> S 41(a) Canada Constitution Act (1982). Bede Harris also suggests different categories of constitutional amendment in his proposed new constitution. “Constitutional amendment not affecting the balance between the States and the Commonwealth or the position of any particular State, would only require two-thirds majority of voters nation-wide; constitutional amendment affecting the balance of power between the States and the Commonwealth would require two-thirds majority of voters nation-wide *and* a majority of voters in a majority of States; constitutional amendment affecting the rights or boundaries of a particular State or States would require two-thirds majority of voters nation-wide *and* a majority of voters in a majority of States *and* a majority of voters in the specific State(s) affected”: (emphases added) Harris, above n 13 at 163.

<sup>129</sup> S 41 Canada Constitution Act (1982).

<sup>130</sup> Quoted in C. Black *Duplessis*, noted by Oliver, above n 124 at 532.

Dominion had so often scouted in the past”.<sup>131</sup> Thus as a matter of apparent compromise the compact theory did influence the formulation of Canada’s domestic amendment procedure. In matters of high constitutional importance, such as the removal of the Crown, the Constitution requires the unanimous consent of all provinces. (This appears to be an example of a political doctrine influencing a legal rule). So by analogy (whereby in both federations [Australia and Canada], their whole tradition is a royal and parliamentary one)<sup>132</sup> the unanimous consent of all the Australian States is required to remove the Crown in Australia. Further, as noted earlier, a majority of voters in each state would be an additional political (and possibly legal) safeguard.

## CONCLUSION

Most might have thought that much of the foregoing discussion would only draw interest from very keen surveyors of political philosophy and legal history. However, the ‘implied rights cases’ and the 1999 attempt to reconstitute Australia as a republic only at the Commonwealth level (both of which proceeded without adequate respect for the States’ integral position in the federal compact), have rejuvenated such concerns and thrust them into mainstream constitutional law. In respect of the ‘implied rights cases’, would all the States (especially those without the referendum mechanism) really accept the following proposition: “as a matter of *legal principle* the ultimate sovereignty in this country, federal *and State*, rests on the people of this country”? <sup>133</sup> (emphases added)

Thus, any continued judicial alteration of the Constitution (ie. the continued promotion of popular sovereignty) which might be detrimental to the States’ interests (or even some) could be

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<sup>131</sup> R. MacGregor-Dawson noted by Oliver, above n 124 at 536.

<sup>132</sup> F. Scott, *Essays on the Constitution*, (1977) at 249. See also the comments of Aroney: “Canada’s importance [to the framers of the Australian Constitution]...was that it showed the Australians how a federal system could be adapted to an Imperial, monarchical and parliamentary system”: Aroney, above n 33 at 271.

<sup>133</sup> *Levy v The State of Victoria* (1997) 189 CLR 579 at 582.

extremely divisive and could see rigorous political and legal challenges ensue. Further, proceeding to a republic (or even judicially imbuing a republican ideology in the Commonwealth Constitution), at the expense of federal compact considerations, where the position of the States is seriously undervalued, might force the States to decide whether the compact made by them at federation had been violated and therefore required their intervention.

Many Australians still cherish their ‘dual allegiance’ and while understanding republicanism and individual rights are important issues, perceive federal issues as more important.<sup>134</sup> As argued strenuously throughout this thesis, to judicially convert the Commonwealth Constitution to a national republican ‘rights oriented’ document in the absence of proper federal considerations, is to misconceive the notions of parliamentary supremacy, judicial deference and the will of the people. Similarly, to legislatively convert Australia to a republic at the Commonwealth level only (albeit with popular approval), and leave the States to then consider their own position, is to misrepresent the notion of state autonomy.

This chapter and the preceding chapter have argued for the legal and political sources of constitutional authority to be clearly maintained. To say there is no such distinction may be harmful for discerning and upholding the rule of law. As such, this thesis has sought to avoid criticism that many of the concepts espoused are merely a rigid recitation of orthodoxy for its own sake. It has been shown there are useful pragmatic reasons in both legal and constitutional principle and practice, for maintaining the normative dichotomy between the legal and the political. Law and politics ought not to be conflated.

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<sup>134</sup> Noted by the Western Australian Constitutional Committee, *The Report of the Western Australian Constitutional Committee*, (1995) above n 11 at 65 and 84. Witness the defeat of a referendum proposal in 1988 whereby the Australian populace rejected a proposal to add to the federal Constitution a new provision requiring the States to provide just compensation for compulsory acquisition.

Constitutionally authorised processes ought not to be muddied by judicial and executive actions lest the separation of powers become blurred. Such a confusion of roles under the separation of powers could either precipitate a constitutional crisis or make reliance on the rule of law in a crisis difficult. The Constitution is clear about the division of powers and the separation of powers. The form of the Constitution is designed to function to sustain this. Changes in function without changes in form will make the Constitution dysfunctional.

## **CHAPTER ELEVEN**

### **CONCLUSION**

Why is it that after more than 200 years of white settlement, and after a century of federation, there is still no consensual opinion amongst judges and academic analysis as to the most basic legal tenets of our constitutional system? Of all sections of Australian society one would assume these groups would have the greatest clarity of understanding. Instead we have only broad agreement on the crudest aspects of the constitutional architecture.

Perhaps this is partly because Australia stands midway between the two great common law systems. We have the benefit of seeking guidance from both, but the twin spectres of inconsistency and confusion are ever present. The Australian Constitution can be viewed as reflecting a struggle, which is still ongoing, between British elements (predominantly parliamentary supremacy) and United States elements (predominantly judicial review) captured in its text.<sup>1</sup> However, this conflict is not unique to the Australian federation. Commenting on the Canadian Constitution Professor Scott has said: “The British North America Act contains two basic notions which are somewhat contradictory. One is the principle, inherited from the United Kingdom, of the sovereignty of Parliament; the other is the acceptance of specific limitations on this sovereignty”.<sup>2</sup>

This struggle stems from underlying constitutional and institutional conflicts in the constitutional arrangements of Australia and manifests itself in judicial and academic disagreement on the

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<sup>1</sup> M. Kirby, ‘Deakin - Popular Sovereignty and the True Foundation of the Australian Constitution,’ 1997 Deakin Law School Public Oration, 22 August 1997, from web, <http://www.hcourt.au/deakin2.htm>; 2. There is also the struggle between a federal and national view of the Commonwealth.

<sup>2</sup> F. Scott, *Essays on the Constitution* (1977) at 212. Indeed, the constitutional situation in Canada is no better (probably worse, save a Charter of Rights).

nature and source of the Australian Constitution, and the legal constraints the Constitution imposes. The High Court has had to grapple with these conflicts for over a century, but since the ‘implied rights cases’ these conflicts now more than ever, seem in sharper focus.

Australia sits at a crossroads. Australians have debated a republican form of government and many are apparently desirous of a new constitution to effect such change. Thus we are, in constitutional terms, in a potentially revolutionary situation, where the ultimate aim is the sovereignty of the Australian people, but we are not there yet. Where for the moment does sovereignty lie?

Any question about the whereabouts or identity of Australia’s internal sovereign seemed to have slumbered until given impetus by the High Court in the ‘implied rights cases’. Whilst most of the previous jurisprudence on the nature of the Constitution had sought to uphold the tradition of a Westminster (legal and historical) root, the ‘implied rights cases’ seemed to desperately search for a local Australian legal root. Here the premise of popular sovereignty was used as a springboard to the discovery of implied constitutional rights. Such a monumental change in accepted legal theory deserves a full analysis. After all, the location of the legal sovereign is a fundamental question for every lawyer. However the question is not without difficulties.

It was with these concerns in mind that this research has not glossed over theoretical and historical difficulties and philosophical problems. As such, it makes no apologies for “irritating colleagues who just want to get on with life, accepting its presuppositions and obeying its rules”.<sup>3</sup> After all, it must be admitted that theoretical assumptions are often subliminally buried in what judges, lawyers and possibly even what citizens do, so the academic exercise of deciphering what

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<sup>3</sup> M. Kirby, ‘Introduction’, (1996) 20 *Melbourne University Law Review*, at 949.

they are is important.<sup>4</sup> Moreover, by viewing law through a historical and philosophical frame one can identify the parameters of truly original developments.<sup>5</sup>

Lord Lloyd has noted: “It is said that lawyers are not disposed to look behind the immediate constitutional framework to the ultimate sources of legal authority”.<sup>6</sup> This is because lawyers favour text, continuity and prescription, and are therefore ill prepared to dig down to the ‘constitutional bedrock’. Judges and jurists are also trained to see continuity in the development of constitutional law. However, after the ‘implied rights cases’, lawyers from the halls of universities to the benches of courtrooms were given the impetus to not only dig down to the bedrock, but excavate it.<sup>7</sup>

This thesis was concerned with the judicial and academic ambivalence and confusion surrounding the nature and source of the Constitution and the legal constraints that it imposes. Whilst since the passage of the Australia Acts, there has been a move away from the inherently British concept of parliamentary sovereignty in Australian constitutional thought, it does not necessarily follow that this should be reflected in any greater role for the High Court in the area of individual rights. However, the ‘implied rights cases’, and much academic commentary surrounding those cases exactly represent this search for a new ‘American style’ judicial legitimacy and greater role for the High Court in the area of individual rights.

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<sup>4</sup> The importance of academic contribution is recognised by Samford and Preston in their introduction to *Interpreting Constitutions: Theories, Principles and Institutions* (1996) at 11, and also by P. Joseph and G. Walker, ‘A Theory of Constitutional Change’ (1987) *Oxford Journal Legal Studies* 155 at 172.

<sup>5</sup> As Oliver has noted: To some of these intractable legal problems, elucidation may be brought by a better knowledge of history, theory and politics: P. Oliver, ‘Canada, Quebec and Constitutional Amendment’, (1999) 49 *University of Toronto Law Journal*, 510 at 519.

<sup>6</sup> D. Lloyd, *The Idea of Law* (1987) at 173.

<sup>7</sup> But note Wade’s warning: “The closer judges come to constitutional bedrock the more prone to disorientation they seem to be”, even with a written constitution on hand: H.W. R. Wade, and C. Forsyth, *Administrative Law* (1994: 7<sup>th</sup> edition) at vi.

This thesis argued against the legitimacy and necessity of the High Court establishing an ‘extra-constitutional’ individual rights doctrine to limit parliamentary supremacy. Notwithstanding the waning influence in contemporary constitutional thinking of the theory of the sovereignty of parliament, it was argued parliamentary supremacy remains a major and important principle of Australian constitutional law. Moreover, 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 in most cases be left to the elected parliaments, with the courts incrementally developing rights at common law.

The Founders of the Constitution instituted those broad traditions when they envisaged the institutional design and normative scheme of the Constitution. Such traditions were based on positivist and utilitarian notions and included the embracing of the doctrine of parliamentary supremacy and the specific rejection of a bill of rights. For the judiciary to now show infidelity to the institutional design of the Founders would mean that the checks, balances and principles envisaged by the Founders are subverted, potentially leading to a dysfunctional constitutional order. 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.

It was noted however, that the High Court is acutely aware of Australia’s current international position with respect to what is perceived to be an impoverished individual rights doctrine. Whilst acknowledging Australia’s anomalous position, my argument is that it is not for the High Court to remedy the lack of a charter or bill of rights. The Parliaments of Australia are the constitutionally authorised source of a solution to the bill of rights deficit.<sup>8</sup>

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<sup>8</sup> See the Human Rights Act 2004 (A.C.T.).

A summary of the sources of rights canvassed by the thesis is as follows:

***The Constitution as a protector of rights:***

It was argued the Constitution's protection of rights is essentially limited to two spheres:

(i) ***express constitutional rights*** First, the few 'internally scattered' express provisions.

(ii) ***implied constitutional rights***

Secondly, the only rights not expressed in the Constitution are those necessarily implied in the text and structure. However, such implications have to date, not been securely grounded in considerations of text and structure. Kathleen Foley has recently stated that cases such as *Sue v Hill*<sup>9</sup> and *Pfeiffer v Stevens*<sup>10</sup> are examples of the Court's departure from *Lange's*<sup>11</sup> textual approach.<sup>12</sup> In *Lange*, any successful challenge to the existence of the implied freedom of political communication was dispelled by the High Court. However, possibly because of subsequent changes in the composition of the bench, implied rights jurisprudence has since faltered.

There is no doubt that the High Court's first forays into implied rights jurisprudence in the early 1990's produced a whirlwind of criticism, the likes of which many had not seen before. Needless to say much of this criticism was 'under-reasoned' and political rather than jurisprudential. Any legitimate criticism of such an important development of constitutional law and the role of the High Court must be reasoned clearly and above all informed.<sup>13</sup> As such, it was argued the High

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<sup>9</sup> (1999) 199 CLR 462.

<sup>10</sup> (2001) 185 ALR 183.

<sup>11</sup> (1997) 189 CLR 520 at 567.

<sup>12</sup> K. Foley, 'The Australian Constitution's influence on the Common Law' (2003) 31 (1) *Federal Law Review*, 131 at 153.

<sup>13</sup> See M. Kirby, 'Shocking level of civics ignorance', *The Sydney Morning Herald*, 16 August 1997 at 5. Further, some would assert that any criticism must clearly distinguish between a

Court's process of implication as evident in *Lange* could be reinvigorated, but only along strict philosophical guidelines derived from fidelity to the core principles of the Constitution's function:

- First, the Court's understanding of implied rights should, for the purposes of implied rights jurisprudence, be based upon a utilitarian understanding.
- Secondly, the Court's enunciation of implied rights to date, should be seen to be in essence utilitarian and not based on natural law, even if some members of the Court and some commentators do not view it this way.
- Thirdly, and as a direct corollary of the previous points, the concept of popular sovereignty as the legal source of the Constitution must be discarded as completely irrelevant and misleading. For if popular sovereignty is resorted to, there is a danger the Court will fall into discerning rights and principles from over-arching notions which form no part of the Constitution. As Kathleen Foley has recently cautioned: "An issue of concern is that drawing conclusions from broader concepts underlying the Constitution is a process that affords courts a considerable degree of latitude. This increases the scope for the development of constitutional law to be influenced by judges' subjective values".<sup>14</sup>

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judicial method that interprets the Constitution and one that develops the common law. For as Brennan J (as he then was) pointed out in *Theophanous* only in the development of the common law is there room for judicial policy to affect judicial reasoning: (1994) 182 CLR 104 at 142. It follows that only in this instance (and not in Constitutional interpretation) is there room for "criticism about the wisdom - as distinct from the correctness - of a judicial development in the law": G. Brennan, 'The state of the Judicature', Speech delivered at the opening of the 30<sup>th</sup> Australian Legal Convention, Melbourne, 19 September 1997, from web <http://www.hcourt.gov.au/judicat.htm;11>.

<sup>14</sup> Foley, above n 12 at 153.

### ***International law as a protector of rights:***

It is conceded there is a growing influence of international law upon Australia's constitutional arrangements. There is the appeal to United Nations Human Rights Committee. There is also the protection of domestic legislation enacted pursuant to the external affairs power of ratified international instruments concerning rights. There is also the incremental development of the common law in line with international norms. More tenuous though is judicial use of international instruments to protect rights in the resolution of ambiguities in legislation or heads of constitutional power. Justice Kirby stated in *Newcrest Mining*: Where the Constitution is *ambiguous*, the plenary heads of power are to be construed narrowly where the commands would potentially curtail fundamental rights<sup>15</sup> (emphasis added). An extension of Justice Kirby's view promoted by Justice Toohey was noted but discarded as doubtful under Australia's current constitutional arrangements: Where the Constitution is *unambiguous*, the plenary heads of power are to be construed narrowly where the commands would potentially curtail fundamental common law rights.<sup>16</sup>

### ***Popular sovereignty as a protector of rights:***

The thesis has noted some High Court justices and some academic commentators have used popular sovereignty as a theoretical underpinning of the Australian constitutional system for the protection of extra-constitutional rights. Popular sovereignty asserts that the will of the people is a fundamental norm and legislation can be invalidated if inconsistent with that norm, whether or not the legislation breached any textual rule of the Constitution. Daley has noted "They may have seen popular sovereignty as a tool sufficiently ambiguous that judges would be able to define the will of the people".<sup>17</sup> The embracing of popular sovereignty has primarily been manifested in

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<sup>15</sup> (1997) 147 ALR 42 at 147 and 150.

<sup>16</sup> J. Toohey, 'A Government of Laws, and Not of Men?', (1993) *Public Law Review* at 170.

<sup>17</sup> J. Daley, *The Bases for the Authority of the Australian Constitution* (1999) unpublished D. Phil thesis, Oxford (copy on file with author) at ch 5.6.2.

three interrelated areas to be summarised shortly: the common law; natural law and the social contract.

***The common law as a protector of ‘fundamental’ rights:***

The thesis acknowledged there is the accepted role of the common law in clarifying legislative provisions by requiring clear and unambiguous statutory language if common law rights are to be displaced.<sup>18</sup> It is conceded that if a statute is ambiguous, the common law is a vibrant and rich source of rights which can be invoked through restrictive interpretation of the statute. However, it is also equally clear that if the statute is unambiguous, the common law has a serious limitation in that it falls away in the face of the inconsistent legislation.

However, are there common law rights which can limit parliament’s legislative power? We were not concerned about traditional common law rights which can always be abrogated by legislation if the parliament makes its intention unambiguously clear. What some judges such as Sir Robin Cooke and Toohey and Kirby JJ have suggested exist, are some common law rights that are so fundamental that Parliament cannot override them. These judges began to assert that judges might be justified in distilling fundamental rights because judicial review would be as good a reflection of the will of a majority of citizens as the decision of the legislature. The High Court itself has specifically left the question open in *Union Steamship Co of Australia Pty Ltd v King*:

Whether the exercise of that legislative power [Parliament of New South Wales and arguably the Commonwealth] is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law, a view which Lord Reid firmly rejected in *British Railways Board v Pickin*, is another question which we need not explore.<sup>19</sup>

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<sup>18</sup> G. Winterton, ‘Constitutionally Entrenched Common Law Rights’ in C. Samford and K. Preston (eds) *Interpreting Constitutions* (1996), at 122.

<sup>19</sup> (1988) 166 CLR 1 at 10, citing the New Zealand stream of authority per Sir Robin Cooke.

To this whole notion, Bede Harris gives the short answer:

The adoption of such a rule [the question left open in *Union Steamship*] would no doubt, be seen as a constitutional revolution and a usurpation by the courts of the policy making role of the legislature. Furthermore, the creation of a ‘judge made’ Bill of Rights would be extremely difficult, as the judiciary would have to determine what rights were ‘fundamental’ and how far legislation could limit them before the latter was declared invalid.<sup>20</sup>

See also the answer given by President Kirby (as he then was) in the *BLF case* (although his Honour may have resiled from this position now):

Substituting judicial opinion about entrenched rights for the lawful powers of Parliament, unless anchored in a Bill of Rights duly enacted, inevitably runs into the difficulties of *defining* what those ‘common law rights’ are and of *explaining* how they are so basic that they cannot be disturbed.<sup>21</sup> (emphases added)

See also his Honour’s comments in *Durham Holdings*: “Protection against extreme departures of fundamental rights... does not arise from a belated attempt to assert for the common law (and the judges who expound and apply it) a role superior to legislation which judicial authority, legal history and political realities deny”.<sup>22</sup> And further:

[T]he commonly expressed view about the common law in Australia envisages a ‘more modest’ role, at least where a legislature has made law within the ambit of its constitutional powers. This is because, in Australia, the common law operates within an orbit of written constitutional laws and political realities.<sup>23</sup>

After all, parliamentary sovereignty is itself judicially considered one of the most basic and fundamental common law doctrines. Further, common law rights are seldom declaratory, but are merely the balance remaining after prohibited conduct has been dealt with.

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<sup>20</sup> B. Harris, *Essential Constitutional Law* (2000) at 94.

<sup>21</sup> (1986) 7 NSWLR 372 at 406.

<sup>22</sup> (2001) 75 ALJR 501 at 515-516.

<sup>23</sup> *Ibid* at 514.

The thesis also argued that reference to Sir Owen Dixon's claim that 'the common law is the ultimate constitutional foundation' and the common law in general does not support a fundamental law doctrine. This is again because of the confusion surrounding an appeal to such theories. Such confusion makes it constitutionally unsafe to do so. My argument is that although the common law is a robust area for the protection of some rights, it must fall away in the face of unambiguous legislation. An overly strident assertion that it does not fall away displays infidelity to the institutional design of the Founders and means that the checks, balances and principles the Founders envisaged are subverted.

***Natural law as a protector of 'deep' rights:***

Professor Winterton quotes J. Ely that the "advantage of natural law is that you can invoke it to support anything you want, while its disadvantage is that everybody understands that".<sup>24</sup> It was noted that many have appealed to natural law or at least a principle higher than parliamentary supremacy as a possible source of deep rights. Lord Cooke from New Zealand has been a chief proponent of such a view and more recently Justice Kirby has flagged the issue. It was noted that to promote such fundamental law, Lord Coke's seventeenth century doctrines in *Dr Bonham's* case are usually exhumed, or on rarer occasions the writings of Blackstone.

The thesis noted there has been little unanimity in this discussion as to where (natural law or common law) the rights might actually be distilled from. However, the thesis provided reasons why such outdated notions cannot be safely relied upon. First, the ancient sources themselves do not go as far as contemporary petitioners would like. As Gough noted: "When [Coke] spoke of adjudging an Act to be void, he did not mean that the court could declare it to have been beyond the power of parliament to enact, but that the court would *construe* it strictly, if this were

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<sup>24</sup> Winterton, above n 18 at 133 at f/n 92.

necessary in order to bring it into conformity with these recognised principles.<sup>25</sup> Secondly, both Coke and Blackstone rebuked their own earlier theories later in life. Thirdly, it would simply be rash to assume that seventeenth-century politics necessarily conveyed the modern implications of judicial review. Fourthly, it must be remembered that in Coke's time, the relationship between parliament and the courts was fundamentally different from what it was to become after the 'Glorious Revolution'. In the time of Coke, Parliament was considered the High Court of Parliament, and not the sovereign body that it subsequently developed into during the eighteenth and nineteenth centuries.

Finally, the source and nature of the particular right (and this also applies to fundamental common law rights) can only be resolved by the subjective intuition of the particular judge. Judges are forced to assert that their assessment of the source of the rights (and the rights themselves), is superior and more supported than any other. This is familiarly known as the nub of the objections to all higher laws which are said to lie outside positive laws.

#### ***The social contract as a protector of 'reserved' rights:***

It was noted Justices Kirby and Toohey have often touched upon the issue that "if it is accepted that the people of Australia are the source of legitimacy of the Australian Constitution, does this mean that the people have reserved to themselves some rights [not ceded by the people] which even the Constitution... cannot extinguish?"<sup>26</sup> This is undoubtedly the language of contract theory. Indeed Justice Kirby has acknowledged that he no longer has "an unquestioning faith in the parliamentary system".<sup>27</sup>

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<sup>25</sup> J. Gough, *Fundamental Law in English Constitutional History*, (1955) at 34.

<sup>26</sup> Kirby, above n 1 at 5.

<sup>27</sup> M. Kirby, 'Looking to the Courts to Fight Political Paralysis', (1994) 19 *Issues for the Nineties*, 4 at 5.

Following is a summary of arguments usually put forward for social contract rights:

(a) On one view these rights would have needed to have been reserved by the Australian populace at the time of formation of the supreme document in the Australian Commonwealth; the Constitution. Reservation has occurred, and it is the role of the judiciary to interpret the Constitution in light of these reserved rights; or

(b) As above, the rights were required to have been reserved, but reservation has not taken place. However, the judiciary can still recognise such rights by recourse to other sources of law, ie. recognition by the common law or natural law as a fundamental or deep right.

The better view is that the rights were required to have been reserved, but reservation has not taken place, so the judiciary cannot legitimately interpret the Constitution in light of such rights.

The pre-federation Australian populace was mostly oblivious to the rights debate and did not:

- a) reserve their fundamental rights by means of a social contract; nor
- b) reserve their fundamental rights by adopting a provision similar to the United States Ninth Amendment;
- c) reserve any powers not delegated to the Commonwealth to themselves by adopting a provision similar to the United States Tenth Amendment;
- d) protect their fundamental rights in a constitutionally entrenched Bill of Rights;
- e) protect their fundamental rights in a legislative Bill of Rights;
- f) protect their fundamental rights in any State Constitution;
- g) protect their fundamental rights in a State legislative Bill of Rights.

Thus, it has been a burden of this thesis to provide argument against the notion of any reserved rights for the Australian populace. Propositions (b) through to (g) are self evident. In respect of (a) no 'social contract' existed at the time of Federation to reserve any such rights.

Justice Kirby grappled with such issues in *Levy v Victoria*,<sup>28</sup> (a case dealing with State legislative power) but at the time it was thought to decide the case on the basis of the Court's previous rulings on the implied freedom of political communication derived from the text and structure of the Constitution. However, it was also noted that if the defendant's argument in *Levy* is logically concluded, and as Justice Kirby has flagged, a defence against reserved rights might be found lacking in respect of that 'pale shadow of a parliament', the Commonwealth Parliament.

It was argued in this thesis that social contract theory is emphatically unhistorical and has no place in Australia's constitutional arrangements. However, as Wright has astutely noted: "Even though the popular sovereignty arguments were unsuccessful in *Levy*, it may be premature to suggest that this failure is indicative of a lack of resonance of popular sovereignty in the High Court. [T]he test of the strength of popular sovereignty is yet to come..."<sup>29</sup>

#### ***Judicial activism as a protector of rights:***

It was consistently argued throughout the thesis that the judicial role is limited to interpreting the Constitution consistent with the broad conventions of judicial deference to Parliament and the expressed will of the electors through their elected representatives. It would therefore be a false application of such principles for the courts to arrogate to themselves the enunciation of rights going beyond those which are essential for the proper interpretation of the text and structure of the Constitution.

The thesis also discussed the philosophical foundations and historical context of the Australian Constitution, and the role of the High Court and Parliament. It argued a contemporary philosophical foundation based on natural law mooted in the 'implied rights cases' is not only

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<sup>28</sup> (1997) 189 CLR 579.

<sup>29</sup> H. Wright, 'Sovereignty of the People - The New Constitutional *Grundnorm*?' (1998) 26 (1) *Federal Law Review* 165 at 176.

inconsistent with the nature of the rights the Court is enunciating, (residual not absolute), but would impose a particular restrictive political philosophy (based on the individual) on the Australian polity which is diametrically opposed to the polity's fundamental political philosophy that is based on utilitarian principles tempered by federalism.<sup>30</sup> As a matter of historical fact: "What is beyond all question, is that the founders opted for Parliament"<sup>31</sup> and the doctrine of parliamentary supremacy rather than the High Court to translate these utilitarian principles and any associated rights into law. Smallbone has said: "It would be unfortunate if [judicial activism] were to be the subject of a continuing fluctuation of judicial opinion, changing with the composition of the bench".<sup>32</sup>

***Parliamentary supremacy as a protector of rights:***

This thesis has argued that parliamentary supremacy remains a major principle of the Australian constitutional system, although not necessarily an irreducible principle. Under this system the protection of rights is left to Parliament, and the people may use political restraint if thought necessary.

At this point the argument inevitably descends to the question of whose vigilance is best equipped to protect liberty: parliaments or courts? As noted earlier, either may, and have, facilitated injustice. Both are fallible. However, "in practice, the chain of legal authority, and the availability of legal methods of overruling egregiously unjust decisions, must at some point come to an end. Otherwise there is a vicious circle, or infinite regress, of authority to overrule such decisions".<sup>33</sup>

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<sup>30</sup> J. Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 (1) *Federal Law Review* 37 at 65.

<sup>31</sup> G. Craven, 'The High Court and the Founders; an Unfaithful Servant', Papers on Parliament No. 30, The Constitution Makers, Dept of Senate (1997) at 75.

<sup>32</sup> D. Smallbone, 'Recent Suggestions of an Implied "Bill of Rights" in the Constitution, Considered as a Part of a General Trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254 at 268.

<sup>33</sup> Goldsworthy, above n 11 at 262.

At the end of the day the people must ultimately put their trust in what they consider the most appropriate authority to determine these issues, and for the reasons outlined throughout this thesis, in the parliamentary democracy called Australia, Parliament as it was conceived in the Founders' Federation Conventions, is that authority. By the democratic use of our parliaments rights can be specifically protected. It was noted both Commonwealth and State parliaments have enacted a myriad of specific legislation directed at particular rights; particularly anti-discriminatory legislation. There is also rights-enhancing models for good legislation and good-policy making, such as the Legislative Standards Act 1992 (Qld)<sup>34</sup> and the Commonwealth Scrutiny of Bills Committee.

The current Australian populace, and after a century of federation, has the chance to make up for missed opportunities, (if that is felt necessary). The Australian populace can exercise its 'political' will (sovereignty) and agitate for a plebiscite and/or referendum (at the level of Commonwealth, State or both) to be called on a bill of rights. The populace could then make a clear democratic decision and protect any rights (fundamental or otherwise) it wishes to, by instructing its representative assembly to enact either a constitutionally entrenched bill of rights in the existing Constitution or a statutory bill of rights. If it was felt that a new constitution was desired because the current constitutional arrangements were unsatisfactory, issues such as autochthony, breaks in legal continuity and authorised and unauthorised means would need to be considered.

'The price of liberty is eternal vigilance' by the people, not the judiciary. This was confirmed in the *Engineers* case in the judgment of Knox CJ, Isaacs, Rich and Starke JJ: "the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against

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<sup>34</sup> B. Horrigan, 'Paradigm Shifts in Interpretation: Reframing Legal and Constitutional Reasoning', in C. Samford and K. Preston (eds) *Interpreting Constitutions*, (1996) 31 at 79-80.

by the constituencies and not by the Courts".<sup>35</sup> As Geoffrey Sawer has also noted: "In the absence of a constitutional guarantee, the political groupings of the country will be more on the alert to resist infringement through popular demonstration and parliamentary action, and this is a stronger protection than enforcement of legal guarantees in the courts".<sup>36</sup> Thus, if the ultimate sovereignty of the people means anything it means that only the people have the ability to enforce the duty owed to their interests by Parliaments<sup>37</sup> which they have elected to represent them. These concepts align with Dicey's two 'actual' limitations on the sovereign power of Parliament. For Dicey, one limitation is the external possibility of popular resistance (political sovereignty), and the other is the internal moral obligation on the consciences of members of Parliament, in whom legal sovereignty is vested.

### ***The 'implied rights cases'***

In the introduction to this thesis, it was argued that under the Mason Court, six major interrelated principles arose in the 'implied rights cases'. It was suggested that these concepts were fundamental to the discourse and were said to assist courts in discerning or protecting the fundamental rights of the Australian populace.

The six interrelated concepts were:

#### ***1. Philosophical foundations and constitutional interpretation***

Numerous Justices, such as Kirby and Deane JJ began looking back to the writings of Founders such as Inglis Clark to discern an alternative understanding of what philosophical foundations underpinned the Constitution and how the Constitution should be interpreted. A bottom up philosophical foundation based on natural law concerns about the primacy of the

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<sup>35</sup> (1920) 28 CLR 129 at 151.

<sup>36</sup> G. Sawer, *The Australian Constitution* (1988) at 139.

<sup>37</sup> J. Goldsworthy, *The Sovereignty of Parliament* (1999) at 173.

individual as espoused by Clark, rather than a top down foundation based on utilitarian and expansive principles has gained substantial acceptance. This change in understanding also dovetailed with Clark's "living force" formula of constitutional interpretation and doctrine of popular sovereignty.

## ***2. Popular Sovereignty***

As a corollary of this change in understanding, numerous Justices and commentators began pointing to the fact that an un-stated premise of the Australia Acts 1986 is that, since s 128 of the Constitution is now the only method of altering the Constitution, and that since its provisions are primarily popular, the people of Australia are now the local legal source of all constitutional authority, including their own fundamental rights. As such, a theory of popular sovereignty was promulgated.

## ***3. Fundamental Rights***

As a corollary of the promotion of popular sovereignty, some judges have in *obiter* and extracurially suggested that some rights are so fundamental that they exist outside the constitution or are implied *into* the constitution that parliament cannot override them. As such, a theory of fundamental law was promulgated.

## ***4. Autochthony***

Since at least 1986, Australia has had an autochthonous or locally home-grown constitution. This is because "as a fully autonomous independent nation, we must explain our constitutional arrangements [including the rights of the Australian populace] wholly in home-grown terms", <sup>38</sup> and not in terms of the doctrine of British parliamentary sovereignty,

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<sup>38</sup> A.R. Blackshield, 'The Implied Freedom of Communication' in G. Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 232 at 242.

because that parliament can no longer legislate for Australia, including amending the Constitution.

### **5. Social Contract**

As a corollary of the autochthony argument, the traditional view (which espoused the United Kingdom Parliament as the legal source of the Constitution) was discarded. Moreover, it was mooted that the nature of the Constitution had changed. If the United Kingdom Parliament is no longer the legal source of constitutional authority, the Constitution should no longer be viewed as an Imperial Statute but a social contract or some other form of document that promotes rights.

### **6. Legal and Political Sovereignty**

Many sponsors of popular sovereignty and individual rights doctrines saw the need to conflate the legal and political sources of constitutional authority. As a result Professor Finn (as he then was) has noted: “Dicey’s two sovereignties appear to be coalescing as they did in the United States more than two centuries ago”.<sup>39</sup> There has also been a tendency to “conflate the idea of sovereignty at International Law and sovereignty under the municipal constitutional system”.<sup>40</sup>

This thesis has strongly argued against these principles. The thesis deconstructed the elements of the new discourse reflected in these principles 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 as reflected in the design of the Australian constitutional system. It was

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<sup>39</sup> P. Finn, ‘A Sovereign People, A Public Trust’, in P. Finn (ed.) *Essays on Law and Government Vol 1* (1995) at 4.

<sup>40</sup> N. Aroney, ‘A Public Choice? Federalism and the Prospects of a Republican Preamble’ (1999) 20 *University of Queensland Law Journal* 262 at 278 at f/n 123.

noted that these six principles have dubious foundations in law and history and to follow them might have unforeseen and dangerous consequences. Evidence was provided against all six principles to reveal them as incorrect in legal reasoning and/or historical fact.

In short:

**1. *Philosophical foundations and constitutional interpretation*** (Chapters 2 and 3)

In the process of constitutional interpretation the High Court should show fidelity to the accepted institutional design and normative scheme as devised by the majority of the Founders.

**2. *Popular Sovereignty*** (Chapter 4)

Parliamentary supremacy remains a major principle of Australian constitutional law and hence popular sovereignty has only a limited (and possibly confusing and dangerous) role in Australia's current constitutional arrangements.

**3. *Fundamental Rights*** (Chapters 5 and 6)

The promulgation and enforcement of rights chosen by the judiciary, against a democratically elected parliament, should be seen as a “massive transfer [appropriation] of political power from parliaments to judges”<sup>41</sup> and more disturbingly be seen as extra-constitutional, and a dangerous course indeed.

**4. *Autochthony*** (Chapters 7 and 8)

The Constitution was not autochthonous in 1901 and is still presently (even in spite of the Australia Acts in 1986) not formally autochthonous.

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<sup>41</sup> Goldsworthy, above n 37 at 3.

### **5. Social Contract (Chapters 9 and 10)**

No matter what the position of the *political* source/basis of the Constitution, popular sovereignty is not the *legal* source/basis of the Constitution. A change in the traditional legal source/basis of the Constitution from the United Kingdom Parliament has therefore not occurred. As such, the Constitution should still be viewed as an Imperial Statute and not a social contract or some other form of document promoting rights.

### **6. Legal and Political Sovereignty (Chapters 9 and 10)**

This thesis argued for the distinction between the legal and political sources of constitutional authority to be carefully and clearly maintained. Not merely for conceptual tidiness but for pragmatic reasons relating to the integrity of the constitutional order under the separation of powers and the rule of law.

My arguments were:

#### **1. The Founders envisaged a philosophical foundation based utilitarianism not natural law**

The thesis argued that in the 1890's Andrew Inglis Clark's views on some important issues did not prevail. His views about republicanism, American-style separation of powers, a bill of rights, progressive constitutional interpretation and American jurisprudence in general, were all rejected by the other Founders who favoured the Westminster tradition. The fact that Clark's opinions can be shown to be at odds with the majority of the founders on many issues, especially the protection of rights and constitutional interpretation calls into question 'progressive' constitutional interpretation and the practice of judges such as Deane and Kirby JJ relying on minority views.

## ***2. Popular sovereignty has only a limited role in the Constitution and constitutional interpretation***

This thesis was concerned with analysing the promotion of popular sovereignty into Australia's constitutional arrangements, because, it was argued, this represents a fundamental change in the High Court's paradigm of constitutional interpretation. The thesis analysed how and why the move came about, and the consequences (intended or otherwise) of promoting popular sovereignty into Australia's fundamental constitutional and legal fabric. This analysis was assisted by a close study of the High Court's exegesis in the 'implied rights cases', as well as extra-curtial writings.

In respect of popular sovereignty it was noted that, no matter what level popular sovereignty was promoted to in Kelsen's hierarchy, it became a conflicting norm, thus imperilling the efficacy of legal system itself. In terms of Salmon's theory, it was noted the disturbing and destabilising consequence of elevating popular sovereignty to an ultimate principle in the Australian legal system, would be that it would have no legitimate historical source, no legitimate legal source, in fact no source at all.

Further, it was noted that much confusion has accompanied the promotion of popular sovereignty into Australia's constitutional arrangements, and it was identified that at least two aspects of the concept of sovereignty, external and internal, appear to be coalescing. It was also noted that the debate regarding internal sovereignty may have been confused by blurring and rolling into one differing constituent elements such as: 'the body empowered to amend the Constitution', and 'the source from which the written constitution derives its authority'.

The thesis also forcefully argued the potential cannot be denied for 'text and structure' implied rights jurisprudence to go beyond or transcend, at some point, its textual and utilitarian

foundations unless the extra-constitutional principle of popular sovereignty is completely discarded. To be sure, although many commentators suggest that the recognition of popular sovereignty “neither requires nor justifies a radical change in constitutional interpretation”,<sup>42</sup> this thesis diverged. It was a primary argument of this thesis that should the notion of popular sovereignty not be exorcised from such constitutional interpretation, the danger exists that a different judicial method will be greatly facilitated or may inorexibly follow. As an example of this, the research cited the irreconcilable *volte face* in McHugh J’s reasoning from *McGinty v Western Australia*<sup>43</sup> to *Commonwealth v Mewett*.<sup>44</sup>

Also discussed was the use of legal history in constitutional interpretation. It is noted that the use of legal history (especially the Convention Debates) by courts should generally be welcomed, provided such courts focus their efforts on thorough and faithful historical analyses. As such, the thesis suggested that a theory of constitutional interpretation with a historical commitment is to be generally preferred, and theories such as progressivism that do not rely on such a commitment, are to be, in the main, discarded.

### ***3. Australia does not have a fundamental law/rights doctrine***

In respect of any fundamental law doctrine existing in Australia, it was argued one does not exist. The primary argument being that, “If the courts asserted a jurisdiction to review the manner of legislative power, there would be no logical limit to the grounds on which legislation might be brought down”.<sup>45</sup> And because there is no logical limit to the ambit of fundamental rights, they undermine the rule of law. Indeed, it would be a breach of the doctrines of judicial deference and the separation of powers for the High Court to arrogate to itself a jurisdiction to enunciate rights

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<sup>42</sup> Wright, above n 29 at 194.

<sup>43</sup> (1996) 186 CLR 140.

<sup>44</sup> (1997) 191 CLR 471.

<sup>45</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 44, per Brennan J.

going beyond those which are essential for the proper interpretation of the text and structure of the Constitution.

The Gordian knot in the notion of fundamental rights and hence popular sovereignty is how the judiciary is to determine what the people have said in respect of their rights. There is no means authorised in the Constitution to empower the judiciary to champion the *vox populi*. And further “The danger in resort, however indirectly, to popular sovereignty as a constitutional foundation is that there is no necessity binding the *vox populi* to support for human rights”.<sup>46</sup> Goldsworthy notes that by repudiating the doctrine of parliamentary supremacy, the judges “would be claiming th[e] ultimate [decision making] authority for themselves”.<sup>47</sup> Judicial veto of legislation should be seen as a large step from judicial review, and rightly be considered a deliberate usurpation. Moreover, the argument that the people did not intend to confer upon a legislature a power to infringe their fundamental rights, is based upon an unknown and unexpressed will. As Daley has said: “Because the will of the people is inevitably inchoate, popular sovereignty was a potent tool providing ostensible justification for actions by any political institution, such as the High Court, able to purport to be able to articulate that will”.<sup>48</sup>

Smallbone further suggests:

To control the interpretation of the Constitution by reference to a non-parliamentary institution or concept, to the limitation of the written text, is to go beyond all accepted criteria of exegesis and is to elevate that concept or institution to a position of conceptual superiority, if not indirect supremacy, over Parliament.<sup>49</sup>

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<sup>46</sup> *Ibid.*

<sup>47</sup> Goldsworthy, above n 37 at 3.

<sup>48</sup> Daley, above n 17 at ch 9.2.

<sup>49</sup> Smallbone, above n 32 at 257.

#### **4. Australia does not formally have an autochthonous constitution**

In respect of autochthony, the thesis concluded that Marshall's criteria for autochthony were very helpful and useful. However, although Australia's Constitution seems autochthonous by virtue of Marshall's criterion (i) *a locally operated constitutional change*, and possibly also by virtue of criterion (iii) *Whether the bench regards the Constitution as authoritative because of acceptance*, the better view is that it is not autochthonous and the matter is still awaiting determination. As such, the thesis distinguished between different approaches to the cessation of the authority of the United Kingdom Parliament and concluded that any such action to date by that parliament is equivocal, and as a result, the search for autochthony is in the hands of Australians. In any event, to rely on our British parent is unsatisfying and equivocal. Similarly, to rely on the High Court is unsatisfying, disturbingly undemocratic and at present highly confusing.

The thesis also noted that although there are different approaches to the acquisition of autochthony, an approach relying on democratic and peaceful means is to be preferred. As such, two such possible approaches were canvassed: (i) the repeal of the Constitution Act or (ii) a declaration of popular sovereignty. Either of these approaches might have consequences for the rule of law, and therefore these must also be considered. The thesis also discussed opposing juristic approaches as to why the Australian Constitution is binding. It noted that whereas legal and political sources were once thought to be best kept distinct, this appears under threat.

#### **5. The Constitution should still be viewed as an Imperial Statute and not a social contract**

In respect of the legal basis of the Constitution, it was argued it is the United Kingdom Parliament. It was noted that it is clear from the terms of the covering clauses of the Constitution Act, the Westminster Acts, and the Australia Acts that both Australia and Britain intended that the Constitution Act would remain legally binding in Australia until validly repealed by Australian legislation. The political and historical process that brought the draft Constitution into

existence was a federal compact. The thesis consistently argued that there is no national indignity in acknowledging legal continuity or even derivation from a former legal system. The fact that Australian institutions derive their authority from the Imperial Parliament does not, even as a matter of ‘traditional legal theory’, imply that they continue to be subordinate to the Imperial Parliament. As Daley notes: “The source of authority can be historic – it need not have an ongoing life of its own”.<sup>50</sup> However as Justice McHugh noted in *McGinty*:

The Constitution is contained in a statute of the United Kingdom Parliament. In the late twentieth century, it may not be palatable to many persons to think that the powers, authorities, immunities and obligations of the federal and State parliaments of Australia derive their legal authority from a statute enacted by the Imperial Parliament, but the enactment of that statute containing the terms of the Constitution is the instrument by which the people have consented to be governed.<sup>51</sup>

This thesis argued that *if* it is ultimately considered unsatisfactory and symbolically inappropriate, for the legal source of the Australian Constitution to be derived from an external source, and should therefore be discarded, a federal compact between the predecessors of the States, the colonies, is a more historically correct interpretation of federation than popular sovereignty based on a social contract. This conclusion was reached by

- a close historical analysis of the colonial unanimity which was the formative basis of the federation and the subsequent requirements for state unanimity under s 51(xxxviii) of the Constitution and s 15 of the Australia Acts;
- the Constitution’s adoption of legislative sovereignty instead of a theory of delegated power;
- the overwhelmingly federal aspects of the Constitution in contrast with the national character of the United States Constitution;

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<sup>50</sup> Daley, above n 17 at ch 9.2.3.

<sup>51</sup> (1996) 186 CLR 140 at 230.

- a comparison of the preamble with the United States Constitution's preamble.

***6. The distinction between legal and political sources of constitutional authority should be clearly maintained***

Throughout this thesis the present writer strenuously argues against those who promote there is little point in distinguishing between the legal and political sources of constitutional authority, and legal and political norms in general. For as recently demonstrated by increasing numbers of Australia's near Pacific and Asian neighbours, the rule of law is a precious but too often fragile construct. Australia is indeed fortunate to have seen a greater amount of this (arguably) most important of constitutional values during its century of evolution from former dominion to sovereign state.

However, to now say there is no such distinction between legal and political sources of constitutional authority may be harmful for discerning and upholding the rule of law should Australia ever find itself in an anarchical or revolutionary situation, or even more certainly a situation where Australia's monarchical constitutional arrangements were formally sought to be replaced with republican arrangements. As such, this thesis has sought to avoid criticism that many of the concepts espoused are merely a rigid recitation of orthodoxy for its own sake. It was shown there are useful pragmatic reasons in both legal and constitutional principle and practice for maintaining the normative dichotomy between the legal and the political. The differing views canvassed in this thesis about the legal constraints the Constitution imposes, illustrates how jurisprudential theory is not merely an abstract corner of philosophy, but a field with important insights for practical law.

Following is a summary of the six interrelated concepts:

<b>TABLE 7</b> <b>SUMMARY OF THE SIX PRINCIPLES NOTED IN THE ‘IMPLIED RIGHTS CASES’</b>	
<b>Principle identified</b>	<b>Principle rebutted</b>
<p><i>1. Philosophical foundations and constitutional interpretation:</i></p> <ul style="list-style-type: none"> <li>• The Constitution should be understood in terms of natural law doctrines.</li> <li>• ‘Progressive’ constitutional interpretation should be adopted.</li> </ul>	<ul style="list-style-type: none"> <li>• The Constitution should be understood in terms of positivist and utilitarian doctrines as envisaged by the Founders. The Founders (excluding Andrew Inglis Clark) favoured parliaments not courts for the protection of rights.</li> <li>• The High Court should show fidelity to the accepted institutional design and normative scheme as devised by the Founders. ‘Progressive’ constitutional interpretation should therefore be discarded and theories that embrace historical conceptions should be adopted.</li> </ul>
<p><i>2. Popular Sovereignty</i></p> <ul style="list-style-type: none"> <li>• As an un-stated premise of the Australia Acts and because of s 128 of the Constitution, the legal basis of the Constitution is based on popular sovereignty.</li> </ul>	<ul style="list-style-type: none"> <li>• Parliamentary supremacy is a major principle of Australian Constitutional law.</li> <li>• Popular sovereignty has a limited and possible dangerous and destabilising role in Australia’s current constitutional arrangements.</li> </ul>

<p>3. <i>Fundamental rights/law</i></p> <ul style="list-style-type: none"> <li>Some judges in <i>obiter</i> and extrajudicially suggest that some fundamental or deep rights exist outside the Constitution to limit parliamentary supremacy because of higher law theories.</li> </ul>	<ul style="list-style-type: none"> <li>There are no higher law theories standing outside or anterior to the Constitution (whether in international law, natural law or common law) which act as a limit to parliamentary supremacy. Such doctrines have been discredited in legal theory and historical fact and if adopted would amount to a massive appropriation of political power by judges.</li> </ul>
<p>4. <i>Autochthony</i></p> <ul style="list-style-type: none"> <li>Since at least 1986 Australia's constitution is autochthonous</li> </ul>	<ul style="list-style-type: none"> <li>Australia's constitution is not formally autochthonous and any efforts by the Imperial Parliament in this regard are equivocal and indefinite, because of an unsettled view of the 'continuing' sovereignty of that parliament.</li> <li>The search for autochthony (if that is desired) is in the hands of Australians.</li> </ul>
<p>5. <i>Social Contract</i></p> <ul style="list-style-type: none"> <li>The legal source of the Constitution is no longer the Imperial Parliament but a social contract based upon popular sovereignty.</li> </ul>	<ul style="list-style-type: none"> <li>Social contract theory is no part of the Australian constitutional landscape. A change in the traditional legal source/basis of the Constitution from the United Kingdom has not occurred.</li> <li>Should the legal source of the Imperial Parliament ever be discarded, the federal compact is a satisfying replacement in terms of Australia's</li> </ul>

	constitutional history and design.
<p>6. <i>Legal and Political Sovereignty</i></p> <ul style="list-style-type: none"> <li>Both the legal and political sources of Australian constitutional authority are fused in the Australian people</li> </ul>	<ul style="list-style-type: none"> <li>The distinction between the legal and political sources of constitutional authority (and legal and political concepts generally) should be clearly maintained for pragmatic reasons relating to the integrity of the constitutional order.</li> </ul>

In late 2004 the Australian electorate returned the Howard Government with an increased majority in the House of Representatives and – from July 1 2005 – majority control of the Senate. It might be that this latest Howard term will be a true test of patience for those who don't seem to be troubled by the doctrine of judicial deference to Parliament and wish to promote popular sovereignty and fundamental深深 rights. Already Justice Kirby has nailed his colours to the mast and taken up arms. In his November 2004 speech celebrating Sir Robin Cooke's 'deep rights' doctrine he suggested:

Where governments enjoy large majorities in a unicameral parliament, or effective majorities in both houses of a bicameral parliament, the role of the courts in protecting minority rights becomes more important. It is a power to be exercised lawfully, wisely and for the purpose of protecting the true sovereign – all of the people of the polity concerned.<sup>52</sup>

This reasoning reflects a clear shift in the role of one of the key components of the federation. A political role for the High Court could have a destabilising effect on Australia's constitutional

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<sup>52</sup> M. Kirby, 'Deep Lying Rights – A Constitutional Conversation Continues', The Robin Cooke Lecture 2004, 25 November 2004, from web, <http://www.hcourt.gov.au/speeches/kirbyj.html;2/12/04/12>.

arrangements. Is Justice Kirby's suggestion purely apolitical? Not surprisingly the retort to such a suggestion is predictable:

Since when did the role of the High Court change in any way according to the size of the majority of the government of the day or the fact that it controlled the Senate?... Paradoxically Kirby J is implying the greater the strength of the government mandate after a democratic election, the greater the Court's vigilance should be. This goes beyond judicial activism, pursuit of a bill of rights, the separation of powers and judicial differences over the deep-lying rights of the Constitution. Kirby J's argument implies that a government with control of the Senate should face a more rigorous High Court. Who's respecting the sovereignty of the people now? <sup>53</sup>

Justice Heydon also warns "The more courts freely change the law, the more the public will come to view their function as political; the more they would rightly be open to vigorous and direct public attack on political grounds..." <sup>54</sup>

At the end of the day, many, including Zines, Finn and Wright would support the premise that many of the issues raised in this thesis are so vital to Australia's legal and constitutional arrangements that they should not be 'cast in their present crude form to our judiciary' <sup>55</sup> but require a 'clear democratic decision' and the 'consent of the people'. As Dias has noted: "Should any conflict now arise between Parliament and the courts... the acceptance of some definitive rule will ultimately have to come from the people themselves in connection with a specific issue... whose decision will largely be governed by the political *milieu* in which the reference to them is made". <sup>56</sup> In the meantime "constitutionalism and the rule of law are not advanced by sacrificing

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<sup>53</sup> 'Courting an opponent to popular government' *The Australian*, 26 November 2004, from web, <http://www.theaustralian.news.com.au>, 26/11/04.

<sup>54</sup> D. Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) Jan-Feb 2003 *Quadrant* at 22.

<sup>55</sup> Finn, above n 39 at 21.

<sup>56</sup> R. Dias, *Jurisprudence* (3<sup>rd</sup> ed, 1970) at 117 and 125.

means to ends, no matter how noble those ends may appear to be".<sup>57</sup> Patapan has said that the Mason Court

sacrificed the security that legalism previously provided. In the need for legitimacy the High Court increasingly resorted to 'community values' as a basis for its guardianship of the Constitution... The significance of community values as an interpretative tool has been heightened by the shift towards recognition of popular sovereignty underlying Australian constitutionalism.<sup>58</sup>

In 1999 the Australian Republican Movement's model for a parliamentary appointed President for the Commonwealth of Australia, was consigned to Australia's political and constitutional deep freeze. However, if the ALP wins the next federal election, (or Peter Costello assumes the leadership of the coalition), the timing of any subsequent referendum on a direct electionist model, might not be remote.<sup>59</sup> Proceeding to a republic where the position of the States is seriously undervalued, might force the States to decide whether the compact made by them at federation had been violated and therefore required their intervention. On the verge of such momentous constitutional reform, Australians would do well to note Sir Owen Dixon's candid observation that: "The fundamental conceptions, which a legal system embodies or expresses, are seldom grasped or understood in their entirety at the time when their actual influence is greatest".<sup>60</sup>

It is *now* that these 'fundamental conceptions' (as noted in the table above) must be grasped and understood as being clear, crystal clear. To mistakenly confuse and/or deliberately disguise

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<sup>57</sup> Winterton, above n 18 at 145.

<sup>58</sup> A. Lynch, 'Comment and Book Review. The High Court – Legitimacy and Change: Review Essay: Haig Patapan, Judging Democracy – The New Politics of The High Court of Australia', (2000) 29 (2) *Federal Law Review*, 295 at 303.

<sup>59</sup> On 21 January 2005, Queensland Premier Peter Beattie called for debate on a future Australian republic to be placed back on the Federal Labor Party's agenda: *The Australian*, 21 January 2005. Prince Charles is also visiting Australia in February-March 2005 which will no doubt reinvigorate the republican debate.

<sup>60</sup> Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses*, (1965) at 38.

Australia's fundamental constitutional concepts would be of great misfortune to a nation attempting to reinvent its governmental foundations and clothe itself in a new national identity. Moreover, it was argued the shift in the role of the High Court to a more political one, could have a destabilising effect on the High Court itself, and no less the federation. For when Australia moves to a republic or 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 clearly rule on which law we should obey.

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