WHY IS AUSTRALIA'S CONSTITUTION BINDING? – THE REASONS IN 1900 AND NOW, AND THE EFFECT OF INDEPENDENCE

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The enactment of legislation to sever the remaining constitutional links between the United Kingdom and Australia makes it desirable to address the question as to why Australia's Federal Constitution should be regarded as an instrument of higher law and thus legally binding. The answer which one gives to that question may be significantly different to the answer which a lawyer is likely to have given when the Commonwealth of Australia Constitution Act 1900 (UK)[1] was enacted.

A possible answer to the question was suggested by Sir Owen Dixon in a well known lecture delivered by him:

> The framers of our own federal Commonwealth Constitution (who were for the most part lawyers) found the American instrument of government an incomparable model. They could not escape from its fascination. Its contemplation damped the smouldering fires of their originality. 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 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. In the interpretations of our Constitution this distinction has many important consequences. We treat our organs of government simply as institutions established by law, and we interpret their powers simply as authorities belonging to them by law. American doctrine treats them as agents for the people who are the source of power and their powers as authorities committed to them by a principal. From this arises the theory that powers may not be delegated; that the agent selected by the principal to exercise a function of government may not transfer any part of his authority to some other person or body, a theory which finds no place in our system.[2]

The fact that it may now be necessary to search for a different explanation was suggested by a current member of the High Court, Sir William Deane, when he offered the following remarks in a recent case:

> Some statements in this judgment have contained the qualification "according to traditional legal theory". That is because the case was, in accordance with the approach long accepted in this Court, argued on the basis that the authority of the provisions of the Australian Constitution and the Statute of Westminster rests, as a matter of legal theory, wholly upon their enactment by the Imperial Parliament as distinct from resting upon a wider foundation which also

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[1] Referred to in this article as the "Constitution Act". Except where indicated otherwise references to "the Constitution" are to be taken as references to the Australian Federal Constitution embodied in cl 9 of the Constitution Act.

[2] Sir O Dixon, "The Law and the Constitution" (1935) 51 LQR 590, 597.

> encompasses the social compact and the international agreements which the Constitution and the Statute respectively embodied ... It may, however, 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".[3]

Although the question raised is of a legal character it is suggested that the answer given to it needs to conform as much as possible with historical, political and social reality. There is merit in ensuring that the answer can be readily understood by the community as a whole and not just by constitutional lawyers. At the same time some thought needs to be given to the question whether the adoption of a new explanation is likely to result in changes in the way the High Court will interpret the Constitution in the future.[4]

The Answer in 1900

An examination of the Constitution Act supplies an obvious starting point to the enquiry pursued in this article. The Constitution is itself part of an Act passed by the British Imperial Parliament by virtue of covering clause 9 of the same Act. Covering clause 5 makes clear that the Constitution was intended to "be binding on the courts, judges and people of every State and of every part of the Commonwealth". But the supremacy clause in question does not by itself indicate why it should be recognised as having that effect. Two features of the Constitution would have been important in explaining its character at the time of its enactment. First its *legal* status was derived from the fact that it was contained in an enactment of the British Imperial Parliament. Secondly, its *political* legitimacy or authority was based on the words contained in the preamble to that enactment which refer to the people of the Australian colonies having agreed to unite in a "Federal Commonwealth". Whatever the legal position, these words draw attention to the political reason for its enactment, the document having been in large measure approved by the people of Australia, even if the number of persons who actually voted was only 60% of the eligible voters.[5] The importance of the role played by the Australian people was to be further underlined by the ability given to them to amend the Constitution in accordance with proposals initiated by the Federal Parliament under s 128.

In order to understand why a lawyer would rely on its status as a British Imperial enactment as a means of explaining its legally binding character in 1900, it is necessary to examine the basic sources of law which operated from

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[3] *Kirmani* v *Captain Cook Cruises* (1985) 59 ALJR 265, 302-303 and contrast Dawson J in the same case: *ibid* 310. According to Murphy J also in the same case:

> The authority for the Australian Constitution then [1 January 1901] and now is its acceptance by the Australian people: *ibid* 276.

See also J A Thomson, "The Australian Constitution: statute, fundamental document or compact" (1985) 59 Law Institute Journal 1199.

[4] An issue canvassed in J A Thomson, *supra* n 3.

[5] L F Crisp, *Australian National Government* (3rd ed reprint 1975) 12. Voting was voluntary. See also Scott Bennett, *Federation* (1975) 19.

the moment the Australian colonies were settled to the date of the enactment of the Constitution Act. Those sources included:

1. So much English law (common law and statutory) as was applicable to the new situation and condition of the Australian colonies.
2. Statutes enacted by the British Parliament which were intended to apply to those colonies *ie* applying by "paramount force".

To these two sources was to be added a third, namely statutes enacted by local colonial parliaments exercising such powers of law-making as were given to them by the parent British Parliament. There is no need here to elaborate on the detailed grants of power which were made in the case of each Parliament or of the controversy surrounding the extent of the power of a Governor of a Penal Colony to make laws for the non-convict members of the community.[6]

The fact that the local legislatures enjoyed only such powers as were given to them did not mean that their grants of legislative authority would attract the operation of the maxim *delegatus, non potest delegare*. As is well known the Privy Council was later to emphasise that the traditional grant of the power to make laws for the peace, order and good government of a colony did not make the Colonial Parliaments delegates or mere agents of the British Imperial Parliament.[7]

At the same time those Parliaments were to be limited in two important ways. First, given the basic sources of law which operated on settlement they only enjoyed the grants of power given to them by the parent Parliament. Secondly, those grants of power were not taken as including the power to enact local legislation which was repugnant to any legislation enacted by the parent Parliament and which applied to the colonies by virtue of paramount force.

The enactment of the Colonial Laws Validity Act 1865 (UK) was not needed to create those limitations – they were already present before its enactment as a result of the sources of law referred to earlier. What s 2 of that Act was essentially designed to do was to delimit the scope of the limitation already referred to so as to confine it to repugnancy with British Acts which applied by paramount force (as distinct from those which applied by virtue of the reception of laws on settlement). This was needed because of the potentially wider views which could be taken of the limitation. For example, Boothby J of the South Australian Supreme Court acted on the view that local laws could not be "repugnant to the law of England".[8] In that sense it was correct to view the Colonial Laws Validity Act as a validating measure[9] even though later the same Act was to be viewed as a residual colonial limitation on the

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[6] See generally A C Castles, "The Reception and Status of English Law in Australia" (1963) 2 Adelaide Law Review 1 especially 2-5 and also W J V Windeyer, *Lectures on Legal History* (2nd ed, Revised 1957) 303-307.

[7] *R* v *Burah* (1873) 3 AC 889; *Hodge* v R eg (1883) 9 AC 117.

[8] A C Castles, *supra* n 6, 24. There had been doubts expressed by others as to the ability of local parliaments to alter or repeal English law which had been received upon settlement of the Australian Colonies. *Ibid* 22-23 and see generally 22-28.

[9] *Union Steamship Co of New Zealand Ltd* v *Commonwealth* (1925) 36 CLR 130, 155-156 *per* Higgins J.

autonomy of the self governing legislatures as regards the ability of those legislatures to alter or repeal British Acts which applied by paramount force, *ie* those which applied to the British overseas possessions and colonies by express words or necessary implication.

In effect the limitation on the ability of the local parliaments to alter or repeal British legislation which applied by paramount force is more accurately understood as the result of local legislation being treated or seen as growing out of one of the two basic sources of law which operated at the time the Australian colonies were settled, namely, statutes passed by the British Parliament. That being so it was not to be assumed that the powers given to the local Australian legislatures were intended to:

(a) exceed the scope of the legislative powers granted to them under or by virtue of the empowering legislation; or

(b) alter or repeal other British legislation which was intended to apply to the Australian colonies either expressly or by necessary implication.

It is true that the operation of the Colonial Laws Validity Act was to be the subject of a disagreement between the British Law Officers and the Australian Delegates who went to London to handle the negotiations with the British Government regarding the enactment of the Constitution Act by the British Parliament. However the disagreement centred on the need for an express provision to put beyond any doubt the existence of the limitations on the legislative authority of the Commonwealth Parliament which were recognised in the Colonial Laws Validity Act.[10] In other words, the Australian Delegates were of the opinion that the operation of the latter Act to legislation enacted by the Commonwealth Parliament was clear without the need for an express provision to that effect – a view which was later to be upheld by the High Court.[11] The position was thus reached by 1900 that both the Commonwealth and the State Parliaments were unable to enact laws which:

(a) exceeded the powers granted to them under or by virtue of British legislation which provided for their establishment and existence; or were

(b) repugnant to any other British legislation which applied in Australia by paramount force.

In conclusion, as regards the explanation which would have been given in 1900, the Constitution was legally binding *because of the status accorded to British statutes as an original source of law in Australia and also because of the supremacy accorded to such statutes.* Local legislation was only

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[10] J Quick & R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 350-352.

[11] *Union Steamship Co of New Zealand Ltd* v *Commonwealth* (1925) 36 CLR 130. The contrary view of Murphy J first elaborated in *Bistricic* v *Rokov* (1976) 135 CLR 552, 565-567 did not find acceptance with other judges of the High Court: *eg* see *China Ocean Shipping Co* v *South Australia* (1979) 145 CLR 172, 181 *per* Barwick CJ, 194 *per* Gibbs J, 207-215 *per* Stephen J, 240 *per* Aickin J, and *contra* 236-239 *per* Murphy J.

recognised so far as it complied with British statutes which applied by paramount force including those which authorised or made provision for the enactment of legislation by the local parliaments. It will be noticed that this explanation does not treat as legally relevant the agreement of the Australian people to federate however important such a factor may have been in explaining the political reason for the adoption of the Constitution. This was in effect the approach which Sir Owen Dixon adopted in the remarks quoted at the outset in this article — an approach which, as he himself was concerned to emphasise, contrasted with that adopted in the United States where the supremacy of that country's constitution is normally attributed to "the people's inherent authority to constitute a government".[12]

"Independence", the Statute of Westminster and the Australia Acts

A number of important changes have taken place in relation to the constitutional and international status of the Australian nation since the enactment of the Constitution Act in 1900. Those changes include:

1. the development of Australia's independence in the eyes of the international community;
2. the inability of the British Parliament to legislate for Australia; and
3. the ability of both Commonwealth and State Parliaments to alter or repeal British statutes of any kind other than the Commonwealth Constitution and the Australia Acts (otherwise than in accordance with the procedure set out in s 128 of the Commonwealth Constitution, as regards the alteration of that Constitution, and also the procedures set out in the Australia Acts, as regards the alteration of those Acts).

The first of these developments was of course evolutionary in character and was largely the result of the operation of constitutional practices and conventions such as the well known Balfour Declaration. Formal legal declarations to symbolise the attainment of independence have in the main been absent except for such enactments as the Statute of Westminster. On the other hand, the Australia Acts can now be seen to evidence a more explicit declaration of that independence since they do not leave the remaining residual links between the United Kingdom and the Australian States to be terminated by the operation of constitutional conventions as regards, for example, the termination of British executive responsibility for the affairs of the Australian States.[13]

Given the largely non-formal nature of its development, the timing of Australia's independence has not been the subject of precise determination. Thus in *China Ocean Shipping Co* v *South Australia*, Barwick CJ said:

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[12] An authority effectively symbolised by the opening words of the US Constitution: We the People of the United States ... do ordain and establish this Constitution for the United States of America.

[13] Australia Act 1986 (Cth) s 10; Australia Act 1986 (UK) s 10.

> The historical movement of Australia to the status of a fully independent nation has been both gradual and, to a degree, imperceptible. In that movement, the *Statute of Westminster*, the validity of which the Solicitor-General's submission would deny, and its adoption by the Parliament (treated by the submission as futile and nugatory) played their very substantial part. Thus, though the precise day of the acquisition of national independence may not be identifiable, it certainly was not the date of the inauguration of the Commonwealth in 1901. The historical, political and legal reality is that from 1901 until some period of time subsequent to the passage and adoption of the Statute of Westminster, the Commonwealth was no more than a self-governing colony though latterly having dominion status.[14]

Whatever the doubts may be as to precisely when full independence was attained there can be no doubt that the development of that status was completed before once the Australia Acts took effect.[15]

The effect of the Statute of Westminster 1931 (UK)[16] was to remove the inability of the Federal Parliament to alter or repeal British statutes which applied by paramount power.[17] The removal of this limitation on its legislative authority was subject to a number of qualifications or exceptions. The first is that no power was given to alter or repeal the Constitution Act or the Constitution itself otherwise than in accordance with the referendum procedure contained in s 128 of the Commonwealth Constitution.[18] Secondly, no power was given to disturb the federal distribution of powers between the Commonwealth and the States, at least as regards to matters which fell within "the authority of the States".[19]

The Statute of Westminster did not, of course, put an end to the possibility of the United Kingdom Parliament legislating for Australia where such legislation was enacted at the request and consent of the Australian Federal Parliament and Government.[20] It was indeed the very exercise of that legislative authority which was relied on to support the legal validity of the British version of the Australia Act.[21] The legislation in question may indeed

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[14] (1979) 145 CLR 172, 183. See also Mason J in *New South Wales* v *Commonwealth* (the *Seas and Submerged Lands* case) (1975) 135 CLR 337, 469.

[15] According to the view of Murphy J the independent status was attained at the time of Federation but as indicated before this view has yet to gain the acceptance of other members of the High Court.

[16] Referred to in this article as the "Statute of Westminster". The latter enactment took effect in Australia from 3 September 1939 as a result of the Statute of Westminster Adoption Act 1942 (Cth).

[17] Section 2.

[18] Section 8.

[19] Sub-section 9(1).

[20] Section 4. The view has been taken that it was sufficient if the relevant British Act "expressly *declared* that the Dominion has requested, and consented to, the enactment thereof" (italics added): *Manuel* v *Attorney-General* [1982] 3 WLR 821.

[21] Australia Act 1986 (UK). The preamble of that Act recites that the Act was passed at the request and with the consent of the Parliament and Government of the Commonwealth of Australia as well as with the concurrence of the States of Australia. The request of the Commonwealth Parliament and Government was declared in the Australia (Request and Consent) Act 1985 (Cth), and that of the States in the Australia Acts (Request) Act 1985 passed by the Parliament of each State: see NSW Act No 109/1985, QLD No 69/1985, SA No 95/1985, TAS No 99/1985, VIC No 10203/1985, and WA No 65/1985. The Commonwealth Parliament passed a substantially identical version of the Australia Act in pursuance of s 51(xxxviii), at the request of the Parliaments of all the Australian States: see Australia Act 1986 (Cth) and the State Acts referred to above.

have gone to the lengths of actually amending ss 51(xxxviii) and 128 of the Constitution as regards the use of either of those provisions to alter or repeal the provisions of the Australia Act.[22] Be that as it may, the possibility of the United Kingdom Parliament legislating for Australia after the Australia Acts came into force was terminated as a result of the provisions of those Acts which put an end to the procedure provided for in the Statute of Westminster.[23]

The limitations on the legislative autonomy of the States were not to be removed until the Australia Acts came into operation. The relevant provisions which removed those limitations followed in some respects the model used in the Statute of Westminster to remove the same limitations which previously operated in relation to the authority of the Commonwealth Parliament. Laws passed by the State Parliaments after the commencement of the Australia Acts are:

(a) not subject to the operation of the Colonial Laws Validity Act; and

(b) capable of altering or repealing British Acts of Parliament.[24]

As was the case with the Commonwealth Parliament some provision was made to deal with the problem of extra-territoriality.[25]

Care was, however, taken to ensure that State Parliaments were not given power to legislate otherwise than in accordance with and subject to:

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[22] Australia Act 1986 (UK) s 15. The latter provisions envisage that any Act of the Parliament of the Commonwealth, passed for this purpose, can only be passed at the request or with the concurrence of the Parliaments of *all* States: see s 15(1). This was not intended to limit or prevent the use of s 128 of the Constitution to confer upon the *Federal Parliament* the power to amend or repeal the provisions of the Australia Act: see sub-ss 15(1) and 15(3). By implication it may be argued that this precludes the use of s 51(xxxviii) or s 128 in any other way. This may have interesting implications for a State Parliament which approaches the Commonwealth Parliament for assistance in removing a "manner and form" limitation contained in the constitution of that State. It is doubtful whether s 15 of the Australia Act 1986 (Cth) could be construed as limiting the future exercise of either s 51(xxxviii) or s 128 in the way adverted to above. That Act is, primarily at least, based on s 51(xxxviii) which, like all other powers contained in s 51 is prefaced by the words "subject to this Constitution". The Act could not therefore alter the terms of s 128 without itself having been passed in accordance with the procedure set out in s 128.

Support for the view that s 51(xxxviii) cannot be used to amend the Constitution can be found in R Graycar and K McCullock, "Gilbertson v South Australia – The Case for s 51(xxxviii)?" (1977) 6 Adelaide Law Review 136, 141; Sir A Bennett QC "Can the Constitution be Amended Without a Referendum" (1982) 56 ALJ 358; K Booker, "Section 51(38) of the Constitution" (1981) 4 UNSWLJ 91, 96, 110 n 34; G Winterton, "Comment on Section 51(38) of the Constitution and Amendment of the Covering Clauses" (1982) 5 UNSWLJ 327, 330 n 7. The contrary view was suggested in C Howard, "Constitutional Amendment: Lessons from Past Experiences" (1973) 45 Australian Quarterly 35, 40-41.

[23] Australia Act 1986 (Cth) s 12; Australia Act 1986 (UK) s 12. In addition s 1 of both Acts provides:

> No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

[24] Australia Act 1986 (Cth) s 3; Australia Act 1986 (UK) s 3. The inability of a State Parliament to ignore "manner and form" limitations provided for in s 5 of the Colonial Laws Validity Act 1865 (UK) is reproduced in s 6 of the British and Australian versions of the Australia Act.

[25] Australia Act 1986 (Cth) s 2 Australia Act 1986 (UK, s 2).

(a) the Constitution and the Constitution Act;

(b) the Statute of Westminster as amended by the Australia Acts;

(c) the Australia Acts; and

(d) any "manner and form" limitations contained in the Constitutions of the States.[26]

Thus the removal of the inability of State Parliaments to pass laws that are repugnant to British Acts which applied by paramount force does not extend to the ability of the same parliaments to make laws that are inconsistent with *certain* or *particular* British enactments, namely, the Constitution and the Australia Acts. Thus, so far as the Constitution is concerned, the position which existed before the enactment of the Australia Acts in 1986 remains undisturbed.

The fact that the British Parliament has vacated the authority to legislate for Australia without having freed the Federal and State Parliaments from certain limitations which restrict their authority to legislate inconsistently with the Constitution and also the Australia Acts should not be taken as being inconsistent with the attainment of Australian independence and sovereignty. The absence of any inconsistency in that regard is amply illustrated by the well known and famous case of *Harris* v *Minister of the Interior*[27] where the Appellate Division of the South African Supreme Court upheld the continued inability of the South African Parliament to pass certain legislation dealing with the disenfranchisement of coloured voters unless the legislature in question was constituted in a special way. Centlivres CJ said in that case:

> A State can be unquestionably sovereign although it has no legislature which is completely sovereign. As Bryce points out in his *Studies in History and Jurisprudence* (1901 ed, Vol II, p 53) legal sovereignty may be divided between two authorities. In the case of the Union, legal sovereignty is or may be divided between Parliament as ordinarily constituted and Parliament as constituted under sec. 63 and the proviso to sec. 152. Such a division of legislative powers is no derogation from the sovereignty of the Union and the mere fact that that division was enacted in a British Statute (viz., the South Africa Act) which is still in force in the Union cannot affect the question in issue.[28]

His Honour also observed later in his judgment:

> ... it would be surprising to a constitutional lawyer to be told that that great and powerful country, the United States of America, is not a sovereign independent country simply because its Congress cannot pass any legislation which it pleases.[29]

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[26] *Ibid* ss 5, 6. The view has been taken that s 106 of the Constitution provides a further legal reason why the States are bound to comply with a "manner and form" limitation: *Western Australia* v *Wilsmore* [1981] WAR 179.

[27] [1952] (2) SA 428. See also *Bribery Commissioner* v *Ranasinghe* [1965] AC 172.

[28] *Ibid* 464.

[29] *Ibid* 468. The basic obstacle which prevented the South African Parliament from disenfranchising the black and coloured voters in the Cape Colony was finally removed by legislation which was upheld in *Collins* v *Minister for the Interior* [1957] (1) SA 552 (Appellate Division).

The Answer in 1986

The question can now be addressed as to whether the changes that have occurred to the constitutional status of Australia since 1900 affect the explanation which should be given for the legally binding and fundamental character of the Australian Constitution. The attainment of complete constitutional independence need not affect the nature of that explanation according to what may be termed an historical approach to the problem. This approach would stress the essential continuity in the chain of legislative authority. The Federal and State legislatures were entrusted with certain grants of legislative powers which were not enlarged as a result of developments since 1900 except as regards the ability to override the enactments of the British Parliament, other than, *inter alia*, the Constitution.[30] The fundamental nature of the Constitution can then be explained in 1986 by reference to the fact that *nothing has happened to change the pre-existing inability of the Parliaments of the Commonwealth and the States to legislate inconsistently with the Constitution* whatever changes may have occurred in relation to the ability of those Parliaments to enact legislation which is inconsistent with *other* British Acts of Parliament.

In the view of the writer, the historical explanation is constitutionally and legally sound. However its necessary reliance on Australia's colonial past may, understandably, lead to a search for an additional, although not necessarily alternative, way of explaining the reason for the legally binding and fundamental character of the Constitution. In short that explanation can be found in the words of the preamble to the Constitution Act referred to earlier, namely, the agreement of the people to federate, supported by the role given to them in approving proposals for constitutional alteration under s 128 of the Constitution, as well as their acquiescence in the continued operation of the Constitution as a fundamental law. According to this approach the Constitution now enjoys its character as a higher law because of the will and authority of the people. Such an explanation more closely conforms to the present social and political reality and has the advantage of ensuring that the legal explanation for the binding character of the Constitution coincides with popular understanding.

The fact that the explanation advanced above differs from that which would have been given in 1900 is not inconsistent with the principles of liberal and progressive interpretation which the High Court has long accepted and followed in its interpretation of the Constitution. Thus the Court has emphasised that it is only concerned with the *essential* meaning which words used in the Constitution had in 1900 rather than their *denotation* at that

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[30] As well as the power to make laws which operate extra-territorially, which need not be fully discussed here. The re-definition of the legislative power granted to the State Parliament under sub-s 2(2) of both the Australian and British version of the Australia Act may still require that such laws have a connection with the State of the enacting legislature even though the State Parliaments are given all legislative powers that the Parliament of the United Kingdom might have exercised at the commencement of those Acts. This is because the powers of the United Kingdom Parliament referred to are those "for the peace, order and good government of [that] State". A similar qualification appears in the provisions of sub-s 2(1).

date.[31] This approach may also explain the "expansion" of the grant of executive power contained in s 61 of the Constitution to encompass powers which would not have been thought to be capable of being exercised by the Governor-General under the same section because of their connection with the conduct by the British Government of Imperial affairs when the Commonwealth was established. According to this view the concept of "executive power of the Commonwealth" in s 61 was capable of changing in denotation with the development of Australian Dominion status.[32] The latter analogy is particularly relevant here since, if it is sound, it illustrates how the Constitution can be treated as embodying at its inception the *potential* to operate in a *different* way once the status of independence is attained.

It has been suggested that a further possible instance of the Court's dynamic approach to constitutional interpretation can be found in the developments which culminated in the *Engineers'* case.[33] It may be recalled that in the *Pay-roll Tax* case Sir Victor Windeyer had occasion to indicate that he had never thought it right to regard the discarding of the doctrine of the implied immunity of the States and other results of the *Engineers'* case as the correction of antecedent errors or as the uprooting of heresy. His Honour observed:

> ... in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs.[34]

His Honour continued by remarking:

> As I see it the *Engineers' Case* ... looked at as an event in legal and constitutional history, was a consequence of developments that had occurred outside the law courts as well as a cause of further developments there. That is not surprising for the Constitution is not an ordinary statute: it is a fundamental law. In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so.[35]

The need for the Court to adopt a dynamic approach was also stressed by Sir Isaac Isaacs when he emphasised the flexibility of the common law relating to the Crown and its ability to adapt its principles to the changing circumstances of the life of the community.

> It is the duty of the judiciary to recognise the development of the Nation and

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[31] See *eg Attorney-General for N.S.W.* v *Brewery Employees' Union of N.S.W.* (1908) 6 CLR 469, 508; *R* v *President of the Commonwealth Conciliation and Arbitration Commission; ex parte Association of Professional Engineers of Australia* (1959) 107 CLR 208, 267 *cf R* v *Federal Court of Australia; ex parte W.A. Football League* (1979) 143 CLR 190, 233-234.

[32] L Zines (ed) *Commentaries on the Australian Constitution* (1977) 34, 56-58 and generally Chapter 1.

[33] *Amalgamated Society of Engineers* v *The Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[34] *Victoria* v *Commonwealth* (1971) 122 CLR 353, 396.

[35] *Ibid* 396-397.

> to apply established principles to the new positions which the Nation in its progress from time to time assumes ...[36]

In this instance the concern is of course with the Constitution generally and "the development of the Nation" has assumed a more explicit and formal character given the express provisions of the Statute of Westminster and the Australia Acts, especially those provisions which purport to terminate the power of the United Kingdom to legislate for Australia.

What is, however, 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 the *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, or that there are important matters, such as the power to alter the Constitutions of the States, which lie beyond the scope of s 128.

No attempt is made here to deal fully or exhaustively with the possible limitations on the reach of s 128.[37] Without engaging in such an analysis and leaving aside the problems created by the penultimate paragraph of s 128 the writer inclines to the view that these limitations will either prove to be non-existent or of minor importance.[38] Given the very considerable role accorded to the democratic processes in securing any alteration to the Constitution, and also the difficulty of complying with the requirements laid down in s 128, one may safely assume that the High Court may not feel inclined to recognise any limitations without there being very strong and compelling reasons for recognising their existence. So far as the ability to alter State Constitutions is concerned, at least before the enactment of the Australia Acts, it needs to be recalled that although s 128 is directed to "the alteration of the Commonwealth Constitution",[39] s 106 already makes extensive reference to the continued operation of the State Constitutions (including their alteration). This has led a State court to rely on that section

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[36] L Zines, *supra* n 32, 24 where the passage quoted in the text was set out. The passage was taken from His Honour's judgment in *Commonwealth* v *The Colonial Combing Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 438. Also of relevance are the observations of Isaacs J in *Commonwealth* v *Kreglinger and Fernau Ltd* (1926) 37 CLR 393, 413:

> Constitutions made, not for a single occasion, but for the continued life and progress of the community, may and indeed must be affected in their general meaning and effect by what Lord Watson ... calls 'the silent operation of constitutional principles ...'

[37] See J A Thomson, "Altering the Constitution: Some Aspects of Section 128" (1983) 13 FLRev 323 where extensive reference is made to the writing on the subject.

[38] This may be the case in relation to much of what is contained in the covering clauses in the Constitution Act, especially if most of the provisions are seen as transitional in character and as only necessary to bring the Constitution into existence so that it can operate *according to its tenor.* Its tenor includes of course the wide powers of alteration contained in s 128. Support for this view may be found in R Lumb, "Fundamental Law and the Processes of Constitutional Change in Australia" (1978) 9 FLRev 148, 158-163.

[39] The opening words of the section read: "This Constitution shall not be altered except in the following manner ...".

of the Constitution as a further reason for requiring State Parliaments to comply with any requirements governing the alteration of their constitutions contained in those constitutions.[40] It has even been suggested by some judges that because of s 106, State Constitutions are either part of, or derive their existence by virtue of the Commonwealth Constitution.[41] It is also worth noting that s 128 provides for the "alteration" of the Constitution and not its "amendment". The latter word may prove to be narrower in scope than the former.[42]

The effect of the enactment of the Australia Act by the United Kingdom Parliament appears at first sight to strengthen the impression that s 128 can be used to amend the constitutions of the Australian States. The provisions of s 15(3) of the former Act would have been unnecessary to preserve the availability of s 128 of the Constitution notwithstanding the procedure provided by s 15(1) of the Australia Act if s 128 was not available in the first place. In another sense, however, it may be that s 15 of the Australia Act passed by the United Kingdom Parliament will have the effect, already adverted to in passing,[43] of restricting the *kind* of alteration which can now be made pursuant to s 128 for the purpose of dealing with those State constitutional matters which are touched upon in the Australia Acts. Failing the use of s 128 in the particular way envisaged by s 15(3) of the Australia Act, legislation varying the provisions of the Australia Act may need to be enacted by the Commonwealth Parliament with the concurrence of *all* State Parliaments.

Of even greater significance is the more remote possibility suggested by the literal wording of s 15(1) of the British version of the Australia Act, namely, that of amending s 8 of the Statute of Westminster in such a way as to create a new method of amending the Commonwealth Constitution. One example might be to confer upon the Commonwealth Parliament the power to amend certain provisions of the Constitution without the need to secure the approval of the people voting at a referendum. If this possibility was sound it would mean that the Australian Parliaments could create a new method of altering the Constitution without complying with s 128 or obtaining the approval of the electors under that section. The far ranging consequences of this view being accepted, at least at the present time, may suggest that

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[40] *Western Australia* v *Wilsmore* [1981] WAR 179.

[41] Barwick CJ in *New South Wales* v *Commonwealth* (the *Seas and Submerged Lands* case) (1975) 135 CLR 337, 372, and *China Ocean Shipping Co* v *South Australia* (1979) 145 CLR 172, 182; Murphy J in *Commonwealth* v *Queensland* (1975) 134 CLR 298, 336-337 and *Bistricic* v *Rokov* (1976) 135 CLR 552, 566. See also J Quick and R Garran *supra* n 10, 930. *Contra* *Western Australia* v *Wilsmore* [1981] WAR 179.

[42] A P Canaway, "The Safety Valve of the Constitution" (1938) 12 ALJ 108 and note the following remarks made by the Privy Council in *Attorney-General for the Commonwealth* v *Colonial Sugar Refining* (the *Royal Commissions* case) (1913) 17 CLR 644, 656, which were adverted to by the same author:

> No doubt the Act of 1900 contains large powers of moulding the Constitution. Those who framed it intended to give Australia the largest capacity of dealing with her own affairs without coming to the mother Parliament.

[43] Supra n 22.

a court would strain against accepting such a view,[44] possibly by exploiting the need to show that the relevant legislation "amends" or "repeals" the Statute of Westminster[45] and also emphasising that the power to amend or repeal contained in s 15(1) is directed towards the alteration of the Statute of Westminster and the Australia Acts – the Constitution not being referred to in this regard, at least in explicit terms. This approach *assumes*, at least for the purposes of argument, that the United Kingdom Parliament retained the power to alter the Australian Constitution when it enacted the Australia Act but did not as a matter of *construction* purport to exercise that power.

Of course there may perhaps be some who will wish to question the correctness of that assumption. Hitherto there has been support for the view that the United Kingdom Parliament did not have the power to alter the Australian Constitution whether or not, presumably, the alteration was made with the request and consent of the Commonwealth Parliament in accordance with s 4 of the Statute of Westminster.[46] So far as that view rests on s 128 itself as a manner and form limitation, binding on the United Kingdom Parliament from the moment the Constitution began to operate, it would seem to conflict with the orthodox view of British Parliamentary sovereignty. If, on the other hand, the view is drawn from the development of Australia's independent status since 1900 it would seem to be based on an *implied* cessation of British legislative authority, given the absence of any express provisions in the Statute of Westminster which purport to operate as a cessation of such legislative authority, and the recognition in s 4 of the same enactment of the possibility of the United Kingdom Parliament legislating for Australia with the request and consent of the Commonwealth Parliament

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[44] Perhaps it stands a greater chance of acceptance at a time far removed from the present, although it does need to be recalled that the Constitutions of the United States, and now Canada, provide for a method of constitutional alteration under which the approval of central and regional legislatures suffices without also having to obtain the approval of the people at a referendum: United States Constitution art 5, Canada Act 1982 (UK) ss 38-49, respectively. It would remain however a surprising effect of the arrangements which were primarily designed to end the residual colonial links between the Australian States and the United Kingdom and one which was clearly not highlighted at the time those links were terminated. The writer has not found it necessary to reach a concluded view on whether the possibility discussed in the text will prove to be legally sound.

[45] Brennan J had occasion to deal with the difficulties involved in determining whether the relevant legislation merely "amends" or "repeals" other legislation in the context of dealing with the power to legislate conferred by s 2(2) of the Statute of Westminster in *Kirmani* v *Captain Cook Cruises* (1985) 59 ALJR 265, 291-292.

[46] Sir M Byers QC in "Conventions Associated with the Commonwealth Constitution" (letter to the Editor) (1982) 56 ALJ 316, 318, and in *Current Constitutional Problems in Australia* (Centre for Research on Federal Financial Relations, 1982), 55; R D Lumb, "Fundamental Law and the Processes of Constitutional Change in Australia" (1978) 9 FLRev 148, 154-158. Compare the *obiter dictum* in *R* v *Minister for Justice and Attorney-General; ex parte Skyring* (Supreme Court of Queensland, 17 February 1986, unreported decision of Connolly J):

> It resembles the situation which arose in the 1970s when a Government of the Commonwealth toyed with the notion of obtaining amendments of the Constitution of the Commonwealth by overriding Imperial legislation. Despite the reservations expressed by Professor Lumb ... in point of legal theory, such legislation may well have been effectual, if Her Majesty's Government in the United Kingdom could have been persuaded to introduce it and if the Imperial Parliament had agreed to enact it, although, in political terms, it would have been seen as a fundamental breach of faith with the Australian people. (*ibid* 5-6)

and Government. The basis for accepting the implied loss of legislative authority is significantly weakened by at least two factors:

1. It is not necessarily inconsistent with the sovereignty or independence of a country for that country to *allow* the legislature of another country to legislate for the affairs of the former country – particularly where, as was the case here, the relevant legislation was passed at the request and with the concurrence of *all* Australian Parliaments.[47]
2. The Australia Acts were passed at a time when the process of full independence was *incomplete* given the continued operation of the colonial limitations on the legislative authority of the Australian State Parliaments – hence the need for the enactment of the Australia Acts.

At this point it needs to be emphasised that the possible effect of s 15 of the Australia Act canvassed above is presumably confined to the British version of that Act. It would be difficult to attribute the same effect to the version of the Act passed by the Commonwealth Parliament since that legislation was itself enacted primarily as an exercise of s 51(xxxviii) of the Constitution. Legislation enacted under that section would seem to be incapable of providing for the alteration of s 128 or the means by which that section could be altered without itself complying with the procedure prescribed by s 128. As indicated before[48], all the powers in s 51 are prefaced by the words "subject to this Constitution", which of course includes s 128 – the only method provided *in the Constitution* for its alteration.

The purpose of the foregoing discussion has been to draw attention to the potential and possible effect of s 15 of the British version of the Australia Act which would, if sound, detract from the force of the argument that the Constitution should be seen as deriving its legally binding and fundamental character from the will and authority of the Australian people. It is of course possible to dismiss these potential effects as being of only theoretical significance given the difficulty of securing the agreement of *all the Australian Parliaments* at any given time. The fact remains however that that agreement was forthcoming to facilitate the enactment of the Australia Acts although admittedly the reason for such an agreement being reached on that occasion can be seen as exceptional.

If the assumption is accepted as correct it is suggested that the agreement and the will of the people could still account, although not with the same force, for the reason why both the Commonwealth and State Parliaments would continue to be bound by the limitations created by the Constitution. The main difference, however, would be in the fact that the limitations agreed to by the people would continue to operate *only* and *until* steps were taken by *all* Australian Parliaments for the removal of those limitations. The limitations would be no less legally binding until those steps were taken. Even

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[47] A similar view was taken in relation to the analogous question concerning the continuation of Privy Council appeals in countries which became independent from the United Kingdom: see *Southern Centre of Theosophy Inc* v *South Australia* (1979) 145 CLR 246, 253, 258-259 where Gibbs J referred to *Ibralebbe* v *R* [1964] AC 900. The other judges in the former case agreed with Gibbs J except for Murphy J who dissented.

[48] Supra n 22.

the original agreement of the people to federate was made on the understanding that an alternative method of altering the Constitution existed apart from the referendum procedure in s 128 of that document, namely, the exercise of the United Kingdom Parliament's legislative authority. The Australia Act passed by the United Kingdom Parliament would then have had the effect of substituting, in a sense, all the Parliaments of Australia for that of the United Kingdom, if the correctness of the assumption referred to above is accepted.

It is not without significance to mention that the view is accepted in the United States that the federal Constitution of that country derives its fundamental character from the will of the people even though that Constitution can be altered if two-thirds of both Houses of Congress initiate an amendment and it is ratified by the legislatures of three-quarters of all the States – without having to seek the approval of the people. In fact the alternative method of having amendments initiated by conventions convened by Congress on the application of two-thirds of the State legislatures has apparently never been used since the United States Constitution was adopted;[49] while that of having proposed amendments ratified by conventions convened in three-quarters of the States, has been used only once.[50]

The main significance, then, of s 15 of the British version of the Australia Act, taken at its highest, would be that it may have *weakened* the strength of the *entrenchment* of the limitations which flow from the Constitution, but the limitations will continue to operate until and unless a new method of altering the Constitution is devised pursuant to the exercise of the power contained in s 15(1) of the same version of the Australia Act. According to this view the reason for the binding nature of those limitations can still be explained in terms of the authority and will of the Australian people.

Consequences for Future Constitutional Interpretation

It has been suggested that the change in the explanation for the fundamental nature of Australia's Constitution may have important implications for the judicial interpretation of that document.[51] In particular it might require a change in approach in relation to:

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[49] W Edel, *A Constitutional Convention* (1981) (viii).

[50] *Ibid* 1.

[51] J A Thomson, "The Australian Constitution: statute, fundamental document or compact" (1985) 59 *Law Institute Journal* 1199. See also *University of Wollongong* v *Metwally* (1985) 59 ALJR 48, 59 where Deane J considered that "the Australian Federation was and is a union of people" and that this should affect the construction of constitutional provisions so that they may be viewed as "ultimately concerned with the governance and protection of the people from whom the artificial entities called the Commonwealth and States derive their authority". This led him to treat s 109 "as protecting the individual from injustice". This approach, however, is likely to conflict with that advocated by the present writer below at p 44. See also the reference to the Privy Council cases mentioned below at p 46 and also the reference to the Parliament being "sovereign" and its "legislative powers being "plenary" by Mason J (dissenting) in the *Metwally* case *ibid* 54. The latter case is convincingly criticised in Ch 15 of the forthcoming second edition of L Zines, *The High Court and the Constitution* (1981).

(i) the continued adherence to the "settled rules of construction"[52] which apply to any enactment of the British Parliament;

(ii) the delegation of legislative powers;[53] and whether

(iii) the Constitution should be regarded as a "compact" between the former Australian Colonies.

In the view of the writer such a change in approach is unlikely to be required.

The influence of history and the historical explanation for the fundamental nature of the Constitution cannot be ignored to the extent that the original agreement of the Australian people to its adoption was for its adoption *in the form in which it emerged*, namely, as a *British statute*; and thus to be interpreted in the way in which such instruments were interpreted at that time. Nothing has happened since its enactment to indicate that the continued agreement of the people to treat the Constitution as a higher law has changed that aspect of its operation. The changes brought about by independence should only go so far, it is suggested, as to support the elimination of gaps in legislative and other constitutional authority which would otherwise be left vacant as a result of the cessation of United Kingdom sovereignty over Australian affairs. In other words to ensure that either the Commonwealth Parliament or the State Parliaments, or both acting together, can exercise the powers previously exercised by the United Kingdom Parliament. Any attempt to treat independence as supporting implied changes of any other kind opens the way to the dangers usually associated with subjective processes and values fostered by the use of implications in legal reasoning.

It seems to the writer at any rate, unrealistic to assume that either the fact of independence or the different explanation which should now be adopted to explain the fundamental character of the Constitution should have the effect of changing basic principles of interpretation or constitutional doctrines, without there having been a more explicit indication that this is what was intended by the Australian people or their representatives.

There is, furthermore, reason to doubt whether the significance of the Constitution as a British statute has not been overstressed in regard to both the application of the British principles of statutory interpretation or the ability of the Commonwealth Parliament to delegate legislative power as compared with that of the United States Congress.

So far as the former is concerned the High Court has had occasion to emphasise the approach to constitutional interpretation which was aptly summarised by Higgins J:

> although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting, to remember that it is a Constitution, a mechanism under

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[52] *Amalgamated Society of Engineers* v *The Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 148.

[53] A matter specifically adverted to by Sir Owen Dixon in the remarks quoted at the outset of this article: above p 28.

> which laws are to be made, and not a mere Act which declares what the law is to be.[54]

In *R* v *Coldham; ex parte Australian Social Welfare Union*[55] the High Court in a unanimous judgment gave its approval to the following equally well known remarks of O'Connor J in *Jumbunna Coal Mine NL* v *Victorian Coal Miners' Association*:

> ... it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve. For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.[56]

This may well have had the same effect as, or have obviated the necessity for, treating the Constitution as a *sui generis* instrument "calling for principles of interpretation of its own".[57] It may also go far towards explaining the true reason for the emphasis placed on the literal and expansive approach to the grants of Commonwealth legislative power (including the rejection of the "reserved powers" doctrine) since the decision of the High Court in the *Engineers'* case.[58] The limited significance of some presumptions which characterise the interpretation of ordinary statutory provisions is illustrated by the rejection of arguments based on the maxim *expressio unius exclusio alterius* to support the discredited reserved power doctrine and also to support attempts to restrict the scope of one power, such as for example, the marriage power in s 51(xxi), by reference to another power such as the divorce and matrimonial causes power in s 51(xxii) of the Constitution. In regard to the latter instance Jacobs J had occasion to remark, "it is a fragile argument when the subject is the extent of constitutional power ...".[59] The *modified* application of the English rules of statutory interpretation is further illustrated by the use that can be made of the Draft Constitution Bills discussed during

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[54] *Attorney-General for New South Wales* v *Brewery Employees' Union* (1908) 6 CLR 469, 611.

[55] (1983) 153 CLR 297, 314.

[56] (1908) 6 CLR 309, 367-368. See also *R* v *Public Vehicles Appeal Tribunal (Tasmania); ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225.

[57] Compare *Minister for Home Affairs* v *Fisher* [1980] AC 319, 329. See also J A Thomson *supra* n 3.

[58] *Supra* n 52. See *Commonwealth* v *Tasmania* (the *Dam* case) (1983) 57 ALJR 450, 487 *per* Mason J.

[59] *Russell* v *Russell; Farrelly* v *Farrelly* (1976) 134 CLR 495, 550. See also *ibid* 539 *per* Mason J. The latter case was affirmed despite an attempt to reopen its correctness in *R* v *Lambert; ex parte Plummer* (1980) 146 CLR 447. Generally a head of power will not be given a restricted meaning merely because of the existence of another power but this does not mean that there may not be some cases where this will occur *eg* the presence of the requirement relating to "just terms" in the acquisition power (s 51(xxxi)) has been interpreted as excluding the acquisition of property under other heads of power in s 51 otherwise than in accordance with that requirement: L Zines, *The High Court and the Constitution* (1981) 21.

the Constitutional Convention Debates in the 1890s — a facility not permitted in the case of ordinary statutory enactments.[60]

Similarly in the case of the delegation of legislative powers, however much the theory is stressed in America that the Constitution there derives its force from the direct expression of a people's inherent authority to constitute a government, this has not prevented, it seems, a substantial degree of delegation largely in the interests of practicality. This is so despite a closer adherence to the different doctrine of the separation of powers in that country.[61]

It is true that Dixon J remarked in *Victorian Stevedoring Co Pty Ltd* v *Dignan* that:

> In support of the rule that Congress cannot invest another organ of government with legislative power, a second doctrine is relied upon in America, but it has no application to the Australian Constitution. Because the powers of government are considered to be derived from the authority of the people of the Union, no agency to whom the people have confided a power may delegate its exercise.[62]

His Honour also pointed out, however, that "no similar doctrine . . . existed in respect of British Colonial Legislatures" and referred to his well known Privy Council cases where their Lordships had "felt it necessary to emphasise the plenitude and supremacy of the powers with which the Legislatures of the Dominions of the Crown were invested".[63] In that connection His Honour quoted with approval the following remarks of Willes J in delivering the judgment of the Exchequer Chamber in *Phillips* v *Eyre*:

> A confirmed act of the local legislature . . . whether in a settled or a conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament.[64]

The effect of the developments which culminated in the enactment of the Statute of Westminster and the Australia Acts have been to render the latter qualifications superfluous. It seems difficult to understand why those developments and enactments should now have had the effect of *contracting* the legislative powers of the Australian legislatures once they were freed of the colonial limitations which previously fettered their authority. It is suggested here that the influence of "history and [the] usages of British legislation", to use the words of Dixon J in *Dignan's* case,[65] are likely to prove more enduring, not only as regards the problem of delegation but also for other matters which involve constitutional interpretation.

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[60] *Tasmania* v *Commonwealth* (1904) 1 CLR 329, 333; *Municipal Council of Sydney* v *Commonwealth* (1904) 1 CLR 208, 213-214. *Seamen's Union of Australia* v *Utah Development Co* (1978) 144 CLR 120, 142-144 *per* Stephen J, and see now as to the reference which can be made to the Debates themselves as a means of ascertaining the *purpose* of provisions in the Constitution: *Re Pearson; ex parte Sipka* (1983) 57 ALJR 225, 227.

[61] G Winterton, *Parliament, The Executive and the Governor-General* (1983) generally 85-92 and also the American authorities referred to in Notes 398, 403, and 437.

[62] (1931) 46 CLR 73, 94.

[63] *Ibid* 95. Those cases were *R* v *Burah* (1878) 3 AC 889, *Hodge* v *The Queen* (1883) 9 AC 117 and *Powell* v *Appollo Candle Co* (1885) 10 AC 282.

[64] (1870) LR 6 QB 1, 20.

[65] (1931) 46 CLR 73, 101-102.

Finally, there remains the question whether the new explanation for the fundamental nature of the Constitution should encourage the High Court to treat that document as a compact.

It is true that the Constitution has on occasion been referred to as a "compact". In the *Royal Commission's* case Viscount Haldane LC, when delivering the judgment of the Privy Council, said:

> Their Lordships are called on to interpret the legislative compact made between the Commonwealth and the States, and they have to determine on the language of the Statute what rights of legislation the federating Colonies declared to be reserved for themselves.[66]

It is also true that the rejection of that characterisation may also assist, even if only in terms of emphasis, the adoption of interpretations which favour the scope of Commonwealth legislative power. Thus in the *Payroll Tax* case Barwick CJ said in the course of denying any implied State immunity from the payment of Commonwealth taxation:

> I have observed elsewhere that the Constitution does not represent a treaty or union between sovereign and independent States. It was the result of the will and desire of the people of all the colonies expressed both through their representative institutions and directly through referenda to be united in one Commonwealth with an agreed distribution of governmental power. The whole "agreement" or as it is sometimes called "the compact" of the people of the colonies was to be and was expressed in an Act of the Imperial Parliament not in any sense as a treaty or an agreement of union, or as a confederation of States but as a statutory Constitution under the Crown.[67]

His Honour also said:

> Whatever the antecedent history of the passing by the Imperial Parliament of the Constitution . . . it and it alone expresses the will of the Imperial Parliament which alone had legislative power to alter the colonial status.[68]

His Honour concluded:

> There is no room, in my opinion, for an implication of a kind which might be appropriate in the construction of a treaty of union between States, some unexpressed contractual term of a fundamental nature.[69]

The writer would be surprised if the characterisation of the Constitution as a "compact" will, on close examination, 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

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[66] *Attorney-General for the Commonwealth* v *Colonial Sugar Refining* (1913) 17 CLR 644, 656. See also the authorities referred to in J A Thomson *supra* n 3, 1202 n 32, and A Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed 1976) 10 n 11.

[67] *Victoria* v *Commonwealth* (1971) 122 CLR 353, 370. His Honour's rejection of implications derived from the federal nature of the Constitution as a basis for the immunities enjoyed by the States was not accepted by a majority of the Court in that case (Menzies, Gibbs, Windeyer and Walsh JJ). The approach of the majority seems to have been accepted in the more recent case of *Queensland Electricity Commission* v *Commonwealth* (1985) 59 ALJR 699, 704 *per* Gibbs CJ; 708 *per* Mason J; 711, 713 *per* Wilson J; 721-722 *per* Deane J; 728 *per* Dawson J; *cf* 715-717 *per* Brennan J.

[68] *Victoria* v *Commonwealth* (1971) 122 CLR 353, 371.

[69] *Ibid* 372.

for explaining the legally binding and fundamental character of the 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. Recently, Deane J emphasised the distinction between the agreement of the people and the agreement of the Australian Colonies:

> The Constitution of Australia was established not pursuant to any compact between the Australian Colonies but, as the preamble of the Constitution emphatically declares, pursuant to the agreement of "the people" of those Colonies.[70]

In terms of history it is of course true that the Australian Colonial Parliaments played an extremely significant role in the attainment of Federation such as, for example, by passing the necessary enabling Acts which made possible the holding of the Second National Australasian Convention.[71] Those Parliaments also adopted addresses requesting the enactment of the Constitution by the British Parliament. Also, as is well known, the Premiers' Conference held in Melbourne in January 1899 (in which all the Australian Colonies participated) agreed to several changes being made to the Constitution Bill in order to ensure that it received the approval of the minimum number of voters when it was put to the electors at the referendum which took place in the same year.[72] At the same time, however, it also needs to be recalled that:

1. the Constitution was to a large extent the product of the members of the same Constitutional Convention who were, in the main, and unlike their predecessors at the first of those conventions, elected by the people;[73]
2. the Constitution was to a large extent, as already indicated, approved by the people in the former Australian Colonies; and

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[70] *Re Duncan; ex parte Australian Iron and Steel Pty Ltd* (1983) 57 ALJR 649, 671 and *cf* *Victoria* v *Commonwealth* (1971) 122 CLR 353, 395-396 *per* Windeyer J who said:

> As an agreement of peoples, British subjects in British Colonies, and the enactment thereafter by the sovereign legislature of the British Empire of a law to give effect to their wishes, the Australian federation can be described as springing from an agreement or compact. But agreement became merged in law. The word "compact" is still appropriate but strictly only if used in a different sense not as meaning a pact between independent parties, but as describing a compaction, a putting of separate things firmly together by force of law. The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia.

In *Amalgamated Society of Engineers* v *The Adelaide Steamship Co Ltd* (1920) 28 CLR 129 the majority remarked in passing that the Constitution was "the political compact of the whole of the people of Australia, enacted into binding law by the Imperial Parliament".

[71] See *eg* Australasian Federation Enabling Act 1896 (Vic). See also the remarks of Deane J in the case referred to above in n51.

[72] R D Lumb & K W Ryan, *The Constitution of the Commonwealth of Australia Annotated* (3rd ed 1981) 31.

[73] As was envisaged in the famous plan proposed by Dr J Quick at the Corowa Conference held in 1893, *ibid* 30 and R Garran, *Prosper the Commonwealth* (1958) 102-105.

3. the approval must have been given in the knowledge that the Constitution would, at least at the time of its enactment, derive its legal force from its status as a British statute.

There is, moreover, nothing inherent in the attainment of Australian independence which points to an intention on the part of the Australian people to treat the Constitution as a compact between the Commonwealth and the States, whatever legal consequences may flow from this view of the Constitution. Whether this judgment will need to be revised as a result of the *possible* use which may be made of the power of *all* the Australian Parliaments to create a new method of altering the Constitution otherwise than in accordance with s 128, remains to be seen.[74] Should that possibility ever be realised it will provide a stronger foundation for arguing that the Constitution should be seen as a compact between the Commonwealth and the States — but only because it is capable of being altered in the manner prescribed by the Parliaments of the Commonwealth and the States acting together and not because it was brought into being in that fashion.

Conclusions

The points made in this article can be conveniently summarised in the form of the following propositions. *First*, the fundamental or legally binding character of the Constitution, when first enacted as part of a British statute, could be explained by reference to the status accorded to those statutes as an original source of law in Australia and also because of the supremacy accorded to such statutes. *Secondly*, nothing happened or has happened to change the status of that *particular statute, ie* to change the pre-existing inability of the Parliaments of the Commonwealth and the States to legislate inconsistently with the Constitution, whatever changes may have occurred in relation to the ability of those Parliaments to enact legislation which is inconsistent with *other* British Acts of Parliament. This approach to the problem was referred to as the "historical explanation" for the status of the Constitution as a higher law. *Thirdly*, the developments which culminated in the enactments of the Statute of Westminster and the Australia Acts and which have enabled Australia to attain the status of an independent nation (from both a domestic and international point of view) make it appropriate to *supplement* the historical explanation. This can be done by recognising that the status of the Constitution as a fundamental law is now derived from the authority of the Australian people. *Fourthly*, the latter explanation may be weakened but not destroyed by the possible effect of the provisions contained in s 15 of the Australia Act as passed by the United Kingdom Parliament. *Fifthly*, the reliance placed on the authority of the people of Australia need not involve any major changes to the judicial interpretation of the Constitution. That reliance would, however, have the advantage of adopting an explanation which does conform as much as possible with the present political and social reality, as well as having the merit of being readily understood by persons who are not versed in the niceties of constitutional law.

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[74] Pursuant to sub-s 15(1) of the Australia Act 1986 (UK) discussed above pp 40-43.