Legal Independence and Tests for Law

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Introduction

Revolutions and coups d'etat present the courts with the dilemma of choosing between the new regime and the old. The dilemma is heightened by the fact that, from the point of view of the old legal order which the judges are sworn to uphold, revolutions and coups are unlawful seizures of power and their adherents are criminals. Hence, it may seem to be a clear breach of duty for judges to recognise in any way the legislation and other acts of revolutionary and other usurpers. However, such a purist approach may have dire consequences. First, if the new regime seems prepared to respect the courts and to honour their decisions, the courts may be able to use their position to protect the constitutional and other rights of citizens under the old legal system.[1] Secondly, injustice and chaos will ensue if the courts do not recognise ordinary civil acts such as marriage and the making of contracts during the period of the rebel regime.[2] Thirdly, a complete refusal to recognise any of the acts of the usurpers may lead to a breakdown in order worse in its consequences than those of the revolution. The dramatic nature of coups, revolutions and of the problems that they pose for the courts has inspired a considerable jurisprudential literature.

By contrast, the growth of nations such as Australia from colony to

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1 This option may have been available to the courts after the Rhodesian Unilateral Declaration of Independence because the usurping government allowed the courts to rule on the constitutionality of some of its actions although, under its new Constitution, the courts had no power to adjudicate on their constitutionality; see *Madzimabuto v Lardner-Burke* [1968] 2 SA 284. It is clear that the rebel government in that case allowed the Rhodesian Supreme Court to determine the lawfulness of the government's actions according to its own view of the law.

2 For this reason, the courts of the United States recognised the lawfulness of ordinary private law transactions entered into by the residents of the Confederacy during the American Civil War; see, eg, *Horn v Lockhart* 17 Wall. 570; 21 Law ed. 657, *The United States v Home Insurance Co* 22 Wall. 99; 22 Law ed., 816, *Sprott v The United States* 20 Wall. 459; 22 Law ed. 371.

independent country has been peaceful and boring. Hence, it has inspired far less jurisprudential speculation. This article argues that we can learn much about law from an examination of the growth to independence of countries such as Australia. When Australia was a colony, its legal system was either a part of or subordinate to that of the United Kingdom. Now it is an independent country with a completely separate, independent legal system. Some legal theories, such as that of Hart and Wade, are only able to explain this transition in terms of a complete break in legal continuity. They argue that a newly independent country gains an independent legal system when its courts and officials abandon the old colonial rule of recognition, which makes the authority of the colonial legal system dependent on that of the imperial power, for a new one which separates the two legal systems.[3] Applied to Australia, their view leads to the conclusion that Australia only gained a separate legal system because of a break in legal continuity. This conclusion appears to do violence to the facts because the most striking feature of Australia's growth to independence is that it happened gradually without any obvious breaks.

This paper shall argue that Australia's gaining of an independent legal system may be explained without assuming any break in legal continuity or the adoption of a new basic test for law. The conclusion that a separate legal system can only be created in a former dependency by a revolutionary breach of legal continuity is based on two arguments. The first is that the United Kingdom Parliament cannot surrender its legislative powers over a dependency because it cannot bind its successors. The second is that the principle that the United Kingdom Parliament cannot bind its successors exists as a practice of the courts, which cannot be changed legally.

This paper will argue that both of these arguments are wrong but will focus on the second argument. The principle that the United Kingdom Parliament cannot bind its successors is one of a number of fundamental rules in the United Kingdom legal system which provide basic tests for identifying the law of that system. The tests operate largely by identifying who has the power to make laws and by defining the scope of their powers. So, the principle that the United Kingdom Parliament cannot bind its successors identifies that parliament as having law making powers, which it cannot limit or surrender. The Australian Constitution performs a similar role in that it identifies who has law making powers within the Australian legal system and defines the scope of those powers. Wade argued that, at least in the United Kingdom, these fundamental rules which provide the

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3 See H.L.A. Hart, *The Concept of Law* (2nd ed, Oxford: Clarendon Press, 1994) 120-22, and H.W.R. Wade, 'The Basis Of Legal Sovereignty', [1955] CLJ 163.

basic tests for law exist as matters of fact in the practice of the courts.[4] Hart generalised this theory, arguing that every legal system was based on fundamental tests for law, which he called rules of recognition. Like Wade's version of the principle of parliamentary sovereignty in the United Kingdom, these rules existed as matters of fact in the practice of the courts and other officials.[5]

According to Hart, all the legal standards of a legal system could be traced back to these fundamental tests.[6] This has a number of consequences. First, standards, which were used by lawyers and judges but which could not be traced back to one of the tests were not legal standards but moral or political standards. Second, there could be no legal means of changing fundamental tests for law unless they provided for their own change.[7] As, according to Hart, the fundamental tests for law were the highest legal standards of the system, there were by definition no other legal standards which stated how they could be changed or gave anyone the power to change them. If there had been such other legal standards, they would have provided the basic test for identifying the laws of the system.[8] Hence, where the basic tests do not provide for their own change, the only way in which they can be changed is by the courts abandoning them for different basic tests in what Wade describes as a revolutionary change.[9]

The paper rejects Hart's claims about the nature of these fundamental tests. Clearly, there are rules and other tests used by the courts to determine what counts as a law of a particular legal system. These criteria play a vital role in enabling the courts to identify legislation and analogous rules, such as the rules laid down by the courts in their development of the common law. However, I shall argue that these tests are not as different from ordinary legal standards as Hart and Wade claimed. In particular, the

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4 Wade, *ibid,* at 172

5 Hart, above n 3, chs. 5 and 6.

6 *Ibid,* ch. 5 especially 100-110

7 For example, the Australian Constitution, which may be described as the fundamental test for law in the Australian legal system, provides a mechanism for its own change in s 128.

8 Hart makes it clear that it makes no sense to say that the ultimate test is valid because that assumes a higher standard that we could use to determine the validity of the ultimate test. As by definition, there is no higher standard, the ultimate test is neither valid nor invalid; *The Concept of Law* 107-10. Similar reasoning leads to the conclusion that there are no legal standards apart from the ultimate test itself that stipulate how the ultimate test may be changed. If there were, those standards would provide us with a test for the validity of the ultimate test. The ultimate test would be valid if made or changed in accordance with the legal standards for changing it. Those rules of change would then be the ultimate test of validity in the system.

9 Wade, above n 3, at 190-6.

content of these tests is not a matter of fact determined by the practice of the courts. The claim that the basic tests exist as matters of fact in the practice of the courts entails that the only way to discover their content is by close observation of what the courts do rather than by legal analysis and argument. The paper rejects this position. It suggests that the South African and Australian cases on the impact which the *Statute of Westminster* and the *Australia Acts* had on their basic tests for law show that courts argue about the content of these basic tests in the same way as they argue about the content of other common law rules and principles. In other words, the content of these tests is a matter of law rather than a matter of fact and is determined by reference to other legal principles rather than by reference to the practice of the courts.

If the content of the basic tests for law is determined by reference to arguments of legal principle, we must reject Hart's claim that all law must be traceable back to one of these basic tests. If there are principles, which are used in arguments about the content of the basic tests, and if these principles are part of the law, it must be impossible to identify them as law by any of the basic tests. If the validity of these principles could be traced back to one of the basic tests, they could not be used in arguments about the content of the basic tests because we would not be able to identify them until we had defined the content of the basic tests. Nor are the principles themselves a basic test. Although they are used to argue about the content of the basic tests, these principles do not provide us with a test to determine the validity of the basic tests. If they did, they would be the basic tests themselves because we would be able to trace the validity of all laws through the basic tests back to them. Instead, lawyers and judges use them to generate arguments about the rationality and appropriateness of the basic tests just as they use them to develop arguments about the rationality and appropriateness of other legal standards. Thus as Dworkin has argued, they break down the difference between legal, moral and political standards.[10]

Third, the paper rejects the idea implicit in Hart's theory that if the basic tests do not provide for their own change, the only way that they can be changed is by a revolutionary change in the practice of the courts. Although the basic tests cannot be changed by legislation unless they provide for their own change, as legal principles, they are frequently reformulated in the same way that other principles of the common law are reformulated, by legal argument and analysis in the light of the requirements of other legal principles.

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[10] R. Dworkin *Taking Rights Seriously* (London: Duckworth, 1977) 43-4.

The *Australia Acts* and the legal independence of Australia

After the *Australia Acts,* no one doubts that Australia has a legal system, which is completely independent from that of the United Kingdom, and that the United Kingdom Parliament no longer has any residual powers with respect to Australia.[11] At the same time, some judges of the High Court have held that one of the results of the Acts has been to change the juridical basis of the Constitution so that it no longer binds because of its status as an Act of the paramount United Kingdom Parliament but because it represents the will of the sovereign Australian people.[12]

Perhaps because everyone agrees that the *Australia Acts* have achieved their purpose, there has been little detailed analysis of the way in which the change has been achieved. This is surprising in that before the *Australia Acts* were passed, there were doubts as to whether the Acts would be legally effective in achieving the intended results of severing the last ties linking Australia to the legal system of the United Kingdom. In particular, Detmold had concluded that '...both elements of the proposed constitutional settlement, the requested United Kingdom statute and the Commonwealth legislation under s 51(xxxviii), would in themselves be ineffective'.[13]

That the issue has not been discussed in depth may be the result of impatience with theory. As everyone, including Detmold,[14] agrees that the courts should treat the result as ending the last remaining ties with the

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11 See, eg, P.J. Hanks *Constitutional Law in Australia* (2nd ed, Sydney: Butterworths, 1996) 214 and L. Zines *The High Court and the Constitution* (4th ed, Sydney: Butterworths, 1997) 303-8. No doubts have been expressed in the literature as to the effectiveness of one or both versions of the Act in ending the power of the United Kingdom parliament to legislate for Australia. A few traditionalist friends have demurred, suggesting to me that the best way to remove all doubts about the constitutionality of a change to a republic would be to ask the United Kingdom parliament to pass request and consent legislation making the necessary changes to the Covering Clauses of the Constitution in conjunction with Australian legislation designed to achieve the same result, as was done with the *Australia Acts.* However, they have not argued in detail why such legislation is needed and how it would be effective.

12 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 138 per Mason CJ, *Nationwide News v Wills* (1992) 177 CLR 1, 72, per Deane and Toohey JJ, *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104, 180 per Deane J.

13 M.J. Detmold *The Australian Commonwealth: a fundamental analysis of its constitution* (Sydney: Law Book Co, 1985) 108.

14 *Ibid.*

United Kingdom legal system, there appears to be no need to consider the means by which the result was achieved.

The *Australia Acts* have completed the process by which Australia, as it has grown to independence, has developed its own legal system, separate from that of the United Kingdom. A superficial examination of this development suggests that Australia gained a separate legal system by a process of evolution in which the United Kingdom granted and Australia accepted increasing legal autonomy, culminating in the cooperative legislation of the *Australia Acts,* in which the United Kingdom and Australian parliaments combined to remove the last remaining links between the United Kingdom and Australian legal systems. On this view, there was a devolution and finally a surrender of legal authority by the United Kingdom over Australia accompanied by an acceptance of that authority by Australia without any break in legal continuity.

This simple explanation of how Australia developed an independent legal system conflicts with the views of Wade and Detmold about the sovereignty of the United Kingdom Parliament. Wade argued that the United Kingdom Parliament lacks the authority to surrender power over a dependency. His view is based on the orthodox interpretation of the doctrine of parliamentary sovereignty according to which the United Kingdom Parliament cannot bind its successors or enact any legislation that a later parliament cannot repeal. According to this view, although the United Kingdom Parliament can confer power on legislatures such as those of Australia, it cannot surrender its power over Australia because a later parliament retains the power to repeal the legislation embodying the surrender and take back the power.[15]

The United Kingdom was able to grant Australia greater political autonomy by executive action and by changes in the policies governing the exercise of the prerogatives and other Crown powers in Australia. For example, the Imperial Conference in 1926 resolved that the Governor-General was to be 'the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain....He is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government' and that therefore he should cease to be the formal channel of communication between the government of Great Britain and that of Australia and the other Dominions.[16] The United Kingdom was also able to confer additional

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15 Wade, above n 3, at 172, 186-90.

16 Report of the Imperial Conference, 1926 (Summary of Proceedings, *Parliamentary Papers, Great Britain)* 1926, Cmd. 2768, 12-36, quoted in Dawson, *The Development of Dominion Status 1900-36* (London: Oxford University Press, 1937) 333-4.

powers on the Australian parliaments, for example by giving them the power to pass extra-territorial legislation.[17]

These actions were not enough to give Australia legal independence. To separate the Australian from the United Kingdom legal system, the United Kingdom Parliament had to lose its power to legislate for Australia. It attempted to surrender this power by legislation, the *Statute of Westminster* and the *Australia Act* (UK). If we accept the views of Wade and Detmold on parliamentary sovereignty, these attempts were ineffective in and of themselves because a later United Kingdom Parliament could have repealed these Acts and taken back its powers. In spite of these theoretical objections, it is clear that the United Kingdom Parliament no longer has the power to legislate for Australia and that if it attempted to do so, Australian courts should not and would not recognise its right to do so.

There has been no agreement as to how the United Kingdom Parliament lost its power. Critics of the theory that the United Kingdom Parliament cannot surrender power over a dependency have argued that events have shown it to be wrong because since 1930 the United Kingdom Parliament has succeeded in surrendering its power to legislate with respect to most former dependencies of the British Empire. They argue that the United Kingdom Parliament has always had the power to surrender its authority over dependencies and has exercised that power in legislation granting independence to former colonies. The supporters of the orthodox theory of parliamentary sovereignty disagree, arguing that the grants of independence by the United Kingdom Parliament were legally ineffective within the legal system of the United Kingdom and its Empire. However, they were the signal for the officials and people of the newly independent country to institute a legal revolution leading to the creation of a new legal system separate from that of the United Kingdom and in which the United Kingdom Parliament had no role.[18]

Even if we adopt the theory that the United Kingdom Parliament can surrender power over a former colony, it is not clear how it can be removed from the constitutional system of that colony other than by a legal revolution. Before independence, most colonial legislatures, including the Australian parliaments, derived their authority from a constitution that had the force of law because it was an Act of the Imperial Parliament, the ultimate authority in the Imperial legal system. After the United Kingdom Parliament has granted independence to and surrendered authority over a dependent territory, it can on this theory no longer legislate for that territory or revoke the surrender of power. However, it remains in the background as

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17 *Statute of Westminster* s 3, *Australia Act* (UK) s 2(1).

18 Wade and Detmold are supporters of this view, Wade, above n 3, at 172 and Detmold, above n 13, Ch 6 'Independence'.

the apparent source of the authority of the constitution of the newly independent state unless some other basis can be found for the authority of that constitution. As Marshall has pointed out, it appears difficult to do this without a complete break in legal continuity. For example, the government of the new country may decide to adopt a new constitution by some local process without reference to the Parliament of the United Kingdom. However, their authority to establish that process depends upon the existing constitution which derived its authority from United Kingdom legislation.[19]

The High Court of Australia has not been troubled by Marshall's point. Since the passage of the *Australia Act,* it has, on a number of occasions, suggested that the Constitution is legitimate because it is accepted by the sovereign people rather than because it is an Act of the United Kingdom Parliament.[20] Their view appears to be that not only did the United Kingdom Parliament lose its legislative power over Australia in the *Australia Act* but also dropped out of the Australian constitutional system completely. As a result, they see the Constitution's legitimacy as depending not on its status as United Kingdom legislation but as derived from the will of the people. It was easy for the Court to reach this conclusion because the Constitution was always based on two sources of legitimacy, one its status as legislation of the supreme Imperial legislature and the other its adoption by the Australian people in referenda. When one of these props was removed, the other remained as the sole basis of its legitimacy. It may have been more difficult for the Court to find such a basis for the Constitution's legitimacy if it had not been adopted after referenda or if the method of amendment did not involve the people so directly.

It is possible to explain the High Court's comments about the legitimacy of the Constitution after the *Australia Acts* as a revolutionary breach of legal continuity of the type which the orthodox theory requires to separate a legal system from that of the United Kingdom. Before considering whether this explanation ought to be accepted, it is necessary to consider the theoretical basis of the orthodox view that the United Kingdom Parliament cannot surrender legislative power over a dependency.

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19 G. Marshall *Constitutional Theory* (Oxford: Clarendon Press, 1971) 63.

20 *Australian Capital Television v Commonwealth,* above n 12, at 137-8 *Nationwide News v Wills,* above n 12, at 70, *Theophanous v Herald and Weekly Times,* above n 12, at 104, *McGinty v WA* (1996) 134 ALR 289, 343-4 per McHugh J. L. Zines above n 11, discusses the significance of the idea for constitutional interpretation at 393-7, and in 'The Sovereignty of the People' in M. Coper and G. Williams (eds), *Power, Parliament and the People* (Sydney: Federation Press, 1997) 91-107.

Can the United Kingdom Parliament surrender legislative power over Australia? Continuing Sovereignty and the Practice of the Courts

As we have seen, Wade based his argument that the United Kingdom Parliament could not grant independence to former dependencies by legislation upon the doctrine of the continuing sovereignty of the United Kingdom Parliament. According to this doctrine, a parliament is unable to limit the law making powers of later parliaments.[21] Wade argued that continuing sovereignty is, as a matter of fact, part of the ultimate test for law of the legal system of the United Kingdom and the former British Empire. Regardless of legislation like the *Statute of Westminster* and the *Australia Act*, that test bound the courts of British dependencies to continue to recognise the United Kingdom Parliament as the ultimate legislature in their legal system. The test could only be changed by revolution. Hence, a dependency could only become independent if its courts were prepared to make a revolutionary change in its basic test for law by refusing to recognise the paramountcy of the United Kingdom Parliament.[22] [23]

Wade's view is unnecessarily dogmatic. We should be suspicious of those who argue that for theoretical reasons practical measures cannot succeed in achieving their goal, in this case the goal of conferring independence on formerly dependent territories, unless they can give good reasons to support their conclusions. Wade offers no good reason why the powers of the United Kingdom Parliament should be limited so that it cannot surrender power over a dependency or why there should only be one way in which British dependencies can become independent. He claims that these are accidents of history and concedes that there is no logical reason why the United Kingdom Parliament should not be able to bind its

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21 The alternative view is that the United Kingdom parliament may, by a binding exercise of its unlimited powers, reduce the powers of future parliaments. Both views have their supporters. I have confined the discussion to the continuing sovereignty theory, because, if a parliament could bind its successors, it would have been able to surrender legislative power over Australia.

22 Wade, above n 3. Hart, above n 3, was of the same opinion, at 120-3.

23 The practice of the United Kingdom courts would not be relevant in determining whether the Dominion or colony had become independent because if the United Kingdom parliament legislates for any territory outside the United Kingdom, eg, China, those courts are bound to recognise the validity of that legislation. Unless, as happened in the case of Rhodesia, other United Kingdom authorities take measures to reestablish control over the colony or Dominion, the actions of the courts of the United Kingdom would not, on this view, affect the situation in the colony or Dominion.

successors or surrender its power over particular territory.[24] However, he does not explain why the living are bound by such accidents of history.

Wade's views are coloured by the theory that in every legal system there are basic tests or criteria, which exist as practices accepted by the courts and other officials and which are used to identify the laws of the system. That theory seems to offer some insights into situations like those under discussion. It appears to explain how, if the courts are willing to adopt new rules of recognition, illegal seizures of power may quickly generate new law. It also offers an explanation of how, in a country like Australia, where there is no clearly defined date of independence, independence may evolve gradually as courts and officials come to reject the old tests for law, which recognise laws of the imperial power as paramount, and adopt new ones which do not do so.[25]

The theory ought to be rejected because the explanations which it offers do not do justice to the facts. The theory is correct in pointing out that official attitudes to legal rules, even fundamental ones such as the rule that the United Kingdom Parliament cannot bind its successors, may change in response to political events such as growing political independence and that these changes in attitude can lead to changes in interpretation. However, it attaches too much importance to these attitudes in suggesting that major events, such as the creation of an independent legal system in a former dependency, are solely determined by them. The emphasis on the importance of the judges' attitudes is symptomatic of a more fundamental mistake, the mistake of assuming that the content of the basic tests used for identifying law in a particular legal system is a question of fact which can be discovered by observing the practice of the courts.

The error of assuming that the basic tests for law exist as facts in the practice of the courts may have arisen from an attempt to clarify the differences between these tests and normal legal rules. For there are fundamental differences which need elucidation. First, the basic tests for law cannot be identified in the same way as many other legal rules. Many laws, including all legislation and rules of the common law, originated in specific law making acts of judges, officials and other who are empowered

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24 *Ibid,* p 185, where Wade concedes that the arguments in favour of the view that parliament can bind its successors are not absurd. However, he rejects them on the basis that they are inconsistent with authority and with the general agreement of lawyers and judges.

25 Hence Detmold, who accepts both the doctrine of the continuing sovereignty of the United Kingdom parliament and the theory that that doctrine is a test for law constituted by the practice of the courts, places the legal independence of Australia at some date, difficult to determine, after the passage of the *Statute of Westminster Adoption Act,* 1942, but before 1979; see Detmold, above n 13, at 97-100.

to make law. The rules which confer lawmaking powers give us tests which we can use to identify these laws by identifying the law making acts of those empowered to make law. There are no such tests that we can use to identify the basic tests for law. If there were, they would be the basic tests and the tests that they identified would be subordinate tests. Secondly, we cannot describe the basic tests for law as valid or invalid because validity and invalidity are terms we use to express whether or not a purported rule of law complies with those tests.[26]

These differences may be traced to a more fundamental difference; unlike many other legal rules, the basic tests for law did not originate in the lawmaking act of an official or legislator empowered to make law. In saying this, it is necessary to avoid a possible confusion. Many basic tests for identifying the laws of a particular legal system, including the Australian Constitution, originated in legislation by a legislature that had law making powers in the jurisdiction in question. However, the fact that the Constitution originated as legislation did not and could not make it the ultimate test of validity for laws in the Australian legal system. It originated as legislation because at the time there was a higher legislature, the United Kingdom Parliament, which had law making powers for Australia. That parliament did not gain its powers over Australia from a higher legislator but from the ultimate tests for law that existed at the time.

Hart and Wade draw two controversial conclusions from the differences between the basic tests for law and other legal standards. First, they assume that as there is no test for identifying the basic tests for law, there is no way of discovering the tests but to observe the courts to see what tests they actually use.[27] Secondly, and more importantly for the present argument, Hart and Wade assume that, unless the basic test for law specifically provides for its own change, there is no legal way in which it can be changed or legal criteria for determining whether it has changed in the light of changed political realities. Both concede that the test for law may allow radical changes to itself without a break in legal continuity. For example, a test for law may allow an imperial legislature to surrender power over a dependent territory. If the imperial legislature exercises that power, it will lead to radical changes in the tests for law of the former imperial power and the dependency, which will separate. However, such a change in the ultimate tests for law can only occur lawfully if the test for law allows for it by conferring on the legislature or some other institution the specific power to make the change.[28] If the ultimate test for law does not allow the imperial legislature to exercise such a power, the only way that it can lose its power

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26 Hart, above n 3, at 100-110.

27 *Ibid.*

28 Hart, *ibid* at 148-50; Wade, above n 3, at 184-6.

over a dependency is by a revolutionary change in the test for law itself.[29]

The second assumption is difficult to justify. We can accept that as the test for law did not originate in legislation and, as it defines the powers of the legislature and other law makers in the system, it cannot be changed by legislation or by some analogous law making act unless it specifically authorises such change. This is only another way of saying that a legislature cannot confer its law making powers on itself. However, it does not follow that there can be no legal way of changing a test for law which does not provide for its own change. To reach that conclusion, we have to make the further assumption that the only way to change the law is by legislation or other analogous law making acts. This is a controversial assumption that is considered in detail below.

The conclusion that there is no legal way of changing a test for law which does not provide for its own change has certain consequences. First, it entails that there is no law to guide judges faced with difficult decisions about the reformulation of the basic tests in the light of major political changes, such as decisions about the powers of the United Kingdom Parliament over newly independent countries. Hence, Hart contents himself with describing the transition from colony to independent country. At the beginning of the transition, there was usually a colony with a local legislature exercising powers conferred on it by the United Kingdom Parliament. The colony was clearly part of a greater legal system in that its basic test for law recognised the supremacy of the United Kingdom Parliament. By the end of the process, the colony had become an independent country with a basic test for law that no longer recognised the ultimate authority of the parliament of another country.[30] It is clear from this account that at some time during the process, the judges of the newly independent country must have rejected the old tests for law which recognise the supremacy of the imperial legislature for new ones which do not. However, Hart gives no guidance as to if and when the judges ought to change their allegiance.

Wade adopts a similar approach, concluding that '...if the courts of the newly made independent country have thrown off their allegiance, it is futile to talk of continuing legal sovereignty',[31] but offers no advice as to when judges are legally entitled to throw off their allegiance. In fact, as we have seen, he describes such acts as revolution to emphasise that they can never be justified in terms of the old legal order. However, he does not address the conundrum that his views pose for judges. Changing the tests for law in recognition of new political realities is not only unjustifiable

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29 Wade, *ibid,* at 188-97.

30 *Ibid,* at 120-21.

31 *Ibid,* at 196.

under the old legal order but is in breach of that order. In other words, it is unlawful. This may pose a difficult dilemma for the conscientious judge who was appointed under the old legal order and who is under a duty to uphold that order. Both the Imperial power and the colony may have agreed that the colony should receive independence and that intention may have been expressed in an Act of the imperial legislature purporting to grant independence. However, if that Act is ineffective according to the basic tests for law of the old legal order, should judges who owe allegiance to that legal order give effect to it in breach of the law which they are sworn to uphold?

The judges who recognised the independence of the Dominions after the *Statute of Westminster* did not see themselves as revolutionaries rejecting the basic tests for law of one legal system and fashioning new tests for a new legal system. Instead, they acted as they normally did, as if there were legal answers to the questions that the cases raised.[32] To fit these cases into the theory, Wade and Hart both argue that the apparent normality of the decisions is a cloak for revolutionary change, in which the courts fashion new tests for law for new legal systems.[33]

The theory is forced to distort the cases in this way because it is committed to the view that the basic tests for law cannot be changed except by a revolution in which the old legal order is replaced by a new one. That commitment flows from treating the basic tests for law as facts constituted by the practice of the courts and officials, thus distinguishing sharply between the content of those tests and the justification for them.[34] Hence, whatever the justification for the continuing sovereignty theory may be, according to Wade, it exists not because it is justified but because it has, as a matter of historical fact, been embodied in the practice of the courts.[35]

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32 This is particularly true of the South African decision of *Harris v Minister for the Interior* 1952 (2) SA 428; [1952] 1 TLR 1245 and of the cases in which the Australian High Court recognised Australian legal independence such as *China Ocean Shipping Co v SA* (1979) 145 CLR 172 and *Southern Centre of Theosophy v SA* (1979) 145 CLR 246, in which the courts would have been surprised to learn that they were engaged in revolutionary activity. Detmold, above n 13, explains the Australian decisions by arguing that the revolution had occurred some years before the cases were decided, at 98-100. However, then the revolutionary change, which brought independence, is reduced to a mere change of attitude by the courts and the people.

33 Wade, above n 3, at 190-4 and Hart, above n 3, at 114-20 and in particular 144-50.

34 Hart, *ibid,* is very clear on this point, insisting that the rule of recognition exists as a matter of fact and that its scope is determined by the practice of courts and officials not by the justification for the rule, at 100-109.

35 Wade, above n 3, at 184-9.

Therefore, it is not possible for the judges to refine the scope of the tests by reference to their point if it becomes impossible to justify their application to a particular case. Instead, all they can do is to reject the tests and the duties which they impose and replace them with new ones in what Wade describes as a 'revolution'. Until such a revolution occurs, the legal system does not change regardless of the general political situation or the intentions of other players in the system.[36]

By describing the situation as a 'revolution', Wade is suggesting that it is in some ways analogous to that in genuine revolutions or coups when the legitimate government has been overthrown by usurpers who have seized power.[37] In revolutions and coups, where a new regime has ousted the legitimate government and seems firmly ensconced in power, the judges, if allowed to continue in office, are faced with a difficult decision. If they recognise the decisions of the revolutionary government, they risk conferring legitimacy on it and thus helping it to remain in power. They may also have little option but to acquiesce in enforcing decisions of the new regime which take away individual rights which were protected under the old regime. On the other hand, if they do not recognise the decisions of the new regime, they may, if the legitimate government appears to have little chance of regaining power, make themselves into martyrs for no good reason or encourage a breakdown in civil order which may be worse than the evils of the new government which they were trying to avoid. In these cases, courts have often accepted the decrees of the new regime as law, at least to the extent that they do not arbitrarily take away rights conferred under the old regime and are not in breach of constitutional restraints on the powers of the government.[38]

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36 However, Wade, *ibid,* is unable to deny that usually the judges take their cues from the general political situation; eg, after the execution of Charles I, the courts recognised the legislation of Cromwell's parliaments until the restoration of Charles II. However, they were not under a legal duty to do this, at 188-9.

37 For example, Wade, *ibid,* argues that the developments in South Africa, which would indubitably have led the courts in that country by the mid-fifties, if not before, to the view that the United Kingdom parliament lacked the power to repeal the *Statute of Westminster* were a revolution similar to forcible seizures of power in countries such as Uganda and Pakistan, at 190-93.

38 Courts in legal systems inspired by the common law, like courts in other systems, have often had to face such problems. Wade discusses cases arising from the Civil War and Commonwealth in England, *ibid,* at 188-9. More recent examples are provided by the cases giving limited legal recognition to the acts of rebel, Confederate authorities during the American Civil War such as *Texas v White* (1868) 7 Wallace 700, *Hanauer v Woodruff* (1872) 15 Wallace 439, and *Horn v Lockhart* (1873) 17 Wallace 570 and cases

Courts faced with deciding whether or not to recognise the decrees of a government which has seized power illegally may have some discretion to determine the conditions on which they will recognise those decrees. In doing so they may have to take into account a number of political considerations such as the need to ensure that there is not a complete breakdown in public order, that as far as possible, private rights including property rights and those arising from marriages and other arrangements are honoured, and that the constitutional rights of individuals are protected. Their decisions may create new criteria for recognising the decisions of the new regime as valid laws. Wade argues that the courts in the Dominions faced a similar situation when the Dominions became independent and they had to fashion new criteria for identifying the law. To illustrate this thesis, he analysed the South African position in some detail.

Wade's Analysis of how the Dominions Gained Legal Independence from the United Kingdom; the South African Case

As noted above, Wade draws an analogy between revolutionary situations where the criteria of legality are fluid or nonexistent and have to be created by the courts and the situation in countries such as Canada and Australia when they gained their legal independence from the United Kingdom. Wade suggests that judges in newly independent countries had similar freedom to determine the ultimate criteria for determining legality within their legal systems when they became independent. The example that he uses is South Africa. In 1931, when the *Statute of Westminster* was passed, South Africa, like Australia, had a written constitution embodied in a United Kingdom Act, the *South Africa Act.* That Act gave the South African Parliament power to amend all of its provisions as long as it complied with the procedures laid down in the Act. After the *Statute of Westminster* gave the South African Parliament power to amend or repeal Imperial legislation applying in South Africa, debate arose as to whether the parliament was still bound by the provisions of the *South Africa Act* or whether it could use its new powers to repeal them. At first, the Supreme Court of South Africa held that the *Statute of Westminster* had converted the South African Parliament into a sovereign legislature which, as it was free to amend or repeal Imperial legislation, was no longer bound by the fetters imposed by the *South Africa Act.*[39] However, in *Harris v Minister of the Interior,*[40] the

following unlawful seizures of power in the Commonwealth such as *Uganda v Comr of Prisons, Ex p Matovu* [1966] EA 514, *The State v Dosso* [1958] 2 PSCR 180 and *Madzimbuto v Lardner-Burke* [1969] 1 AC 1.

39 *Ndlwana v Hofmeyr N O* 1937 AD 229.

40 [1952] (2) AD 428.

Supreme Court reversed this decision, holding that although the South African Parliament was no longer bound by Imperial legislation, it remained subject to the limits imposed by the *South Africa Act*. Wade argues that neither decision could be described as 'right' or 'wrong' but as illustrating the choices open to the courts in a revolutionary situation in which it had to redefine the criteria of validity for the system.[41]

If Wade's analysis of the South African situation is correct, it is equally applicable to Australia. If that is the case, the *Statute of Westminster* and the United Kingdom version of the *Australia Act* were not enough in themselves to give Australia complete legal independence. Under the basic tests for law existing at the time, these Acts could always have been repealed by the United Kingdom Parliament because it could not surrender its power to legislate for Australia. Instead, legal independence only came when the Australian Courts changed the ultimate tests for law that they used in determining the laws of Australia. More surprisingly, when they changed the tests, the Australian courts were free to develop new ultimate criteria of validity to replace the old ones that they had rejected. In doing so they were free to hold that the Commonwealth Parliament was no longer bound by the limits on its power imposed by the Constitution as that was part of the old test for law. As United Kingdom legislation, the Constitution was only binding on the Commonwealth Parliament while United Kingdom legislation was recognised by the ultimate test for law as the supreme law of Australia. Of course, on this analysis, the Courts were not bound to hold that the powers of the Commonwealth Parliament were no longer subject to constitutional restraints. As the courts were free to construct a new criterion of validity, they were free to incorporate existing constitutional constraints into that criterion. Wade would no doubt have pointed to recent decisions in which the High Court has argued that the Constitution is now binding as an expression of popular sovereignty rather than as paramount legislation of the United Kingdom Parliament as evidence that the courts have done just that.[42]

To sum up, according to Wade, as the Australian legal system was once dependent on that of the United Kingdom and is now independent, there must have been at some point a legal revolution in which the Australian courts abandoned one ultimate criterion of legal validity which recognised the supremacy of the United Kingdom Parliament for another which did not. When this occurred, the Australian courts would have had, whether or not they were aware of it, complete freedom to change Australia's constitutional practices. Paradoxically, given their lack of awareness of the freedom that they had, they created that freedom by their own behaviour in changing the ultimate criteria for determining the law in

41 [1955] CLJ 190-92.

42 See n 20 above for the relevant decisions.

Australia.

It may seem possible to avoid these counter intuitive results by distinguishing the Australian position from that in South Africa. Australia, unlike South Africa, ensured that it could not be argued that the *Statute of Westminster* freed the Commonwealth Parliament from constitutional limits on its powers by having s 8, which states that nothing in the Statute confers power on the Commonwealth to repeal or amend the Constitution, inserted.

The distinction cannot be accepted because the *Statute of Westminster* has the same status in Australia as the Constitution in that both originated as statutes of the United Kingdom Parliament. If there has been a change in the ultimate tests for law in Australia so that laws of the United Kingdom Parliament no longer bind the Commonwealth Parliament, it is no longer bound by s 8 of the *Statute of Westminster* or by the Constitution. Any freedom, which the courts had to remove the one from the ultimate criteria of validity, extended to the other.

The suggestion that at independence, the judges in Australia became free to ignore the Constitution and the restraints, which it imposed on their power and on the power of the other branches of government, seems bizarre. However, it flows from Wade's position that, first, independence comes when the ultimate tests for recognising the law change and that, secondly, whether this change has occurred is not a question of law but a question of fact to be determined by observing the practice of the courts. As according to Wade, the courts can only make this change by ignoring the constraints on their powers imposed by the old criteria for identifying the law, the change is necessarily revolutionary leaving the courts free from any legal constraints. Therefore, they are free to determine how great the change will be.

Detmold

Although he agrees on many points with Hart and Wade, Detmold attempts to avoid the conclusion that a new, independent legal system can only be created by a legal revolution by arguing that whether there has been a change in the ultimate criteria for identifying law is a legal issue of a special sort. He argues that the question of whether a new legal order with new ultimate tests for identifying the law has come into existence is a legal issue to be determined by principles of the common law.[43] The fact that it is a common law issue entails that as long as the judges apply the correct legal principles in deciding to recognise a new ultimate test for law, they do not breach their duty to uphold the law. Also, as the issue is a common law issue, it cannot be settled by legislation, even legislation of all the

43 *Ibid,* ch 6.

parliaments concerned.[44] Accordingly, both the United Kingdom and Commonwealth versions of the *Australia Act* were unable to end the United Kingdom Parliament's power to legislate for Australia.[45] However, in Detmold's view, the courts had a clear legal responsibility to treat them as evidencing for the purposes of the common law the passing away of that power.[46]

Although Detmold differs from both Hart and Wade in that he sees the issue of whether an old ultimate test has given way to a new one as a legal issue, his views are similar to theirs in that he sees the answer to that question as depending on matters of fact. The facts which he sees as crucial differ from those that Wade relied on. Whereas Wade argued that the ultimate test for law was constituted by the practice of the courts,[47] Detmold argues that it consists in the constitutional attitudes of the people.[48]

Making the issue depend on the attitudes of the people rather than the practice of the courts is fundamental to Detmold's argument that the issue is a legal one the answer to which depends upon issues of fact. This conclusion would have made no sense if the basic tests for identifying law were constituted by the practice of the courts. It would be pointless for the courts to refer to their own practice in any case in which the issue was whether they are legally bound to recognise a new basic rule because their past practice can only tell them what the rule has been, not whether they should change it.

It also allows Detmold to criticise the generally accepted position before the *Australia Acts* under which the Commonwealth was seen as legally independent from the control of the United Kingdom Parliament but the States were not.[49] As Detmold points out, this position was illogical in that the independence of the Commonwealth presupposed the independence of the States because the Commonwealth was built on the foundation of the

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44 *Ibid,* 96-7. It is not clear why this should be so given parliament's power to change the common law.

45 *Ibid,* 108.

46 Detmold, above n 13, at 108.

47 Wade, above n 3, at 197.

48 Detmold, above n 13, ch 6. It is not clear that Detmold views this as the only common law criterion because it is of limited importance in another situation where judges may have to decide according to common law principles whether there has been a change in the ultimate test, the situation in which the constitutional government has been overthrown in a revolution. In this situation, whether there is a continuing contest for power between the old and the new regimes may be more important than the attitudes of the people to the new regime, *ibid,* at 93-5.

49 The *Statute of Westminster* left the States legally subordinate to the United Kingdom while freeing the Commonwealth from the last remaining Imperial constraints on its powers.

States. Besides, if the independence of the Commonwealth depended on the constitutional attitudes of the Australian people, they could not be expected to have constitutional attitudes sophisticated enough to contemplate a constitutional system in which the United Kingdom Parliament occupied the anomalous position of paramount imperial legislature with respect to the States but not the Commonwealth.[50]

Although Detmold's argument that the constitutional attitudes of the people determine whether there has been a change in the basic tests for law enables him to treat the issue as a legal issue and thus explain the responsibility of the judges in legal terms, it suffers from other weaknesses. In particular, it is not clear how the constitutional attitudes of the people are to be determined. There is nothing in Detmold's account that suggests that it is an issue on which the court should take evidence from sociologists or opinion pollsters. Rather, he sees the court as determining the constitutional attitudes of the people by a mixture of common sense, inference from well-known facts and guesswork.[51] This is not a solid basis on which to decide such fundamental issues because judges can manipulate such evidence to reach whatever conclusion they believe is desirable. Also, he makes it clear that the people's constitutional attitudes, if they have any, are unlikely to be complex,[52] but does not explain how their uncomplicated attitudes can be the basis of a complex constitutional system.

Hart originally adopted a similar position to Detmold's, arguing that the existence of the rule of recognition depended upon its acceptance by the population at large as a standard for identifying legal rules.[53] However, after criticism from Hughes that: 'A concern with the basic norm is probably a characteristic only of high officials and jurists. Modern jurisprudence has erected out of this preoccupation of a tiny fraction of the population a general explanation of participation in a system of order which defies ordinary experience,' Hart conceded that his earlier views were an over-simplification[54] and that normally only judges, lawyers and other officials involved in the workings of the legal system have any conception of the system's ultimate tests for law.[55] Detmold cannot make this concession

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50 *Ibid,* 100-104

51 For example, Detmold, above n 13, suggests that the fact that by 1979 most Australians were two or three generations removed from the time in the 1920s when the United Kingdom still claimed the power to intervene in Australia's affairs strongly supports the view that by then Australia, or at least the Commonwealth, was independent of the legislative power of the United Kingdom parliament, at 99-100.

52 *Ibid,* at 103.

53 H.L.A. Hart, 'Legal and Moral Obligation' in A.I. Melden (ed), *Essays in Moral Philosophy* (Seattle: University of Washington Press, 1958).

54 Hart, above n 3, at 295-6, notes to Chapter 6

55 *Ibid,* 113-4

because if he does, he must also concede as does Wade, for reasons given above, that the question of whether the ultimate tests for law have changed is not a question of law.

Detmold attempts to finesse these problems by defining the issue so as to make it appear to be one that could be resolved by appealing to general community attitudes. He argues that the issue to be determined by looking to the constitutional attitudes of the people is the 'political legitimacy' of the system,[56] a concept the content of which may be sufficiently vague and general to be determined in this way. However, it is clear from his definition of 'legitimacy' as 'a relationship between the ultimate power in a legal order and people'[57] and the examples which he gives that whether or not the people see the constitution or an ultimate legislature as having political legitimacy determines whether that constitution or legislature retains its status as part of the ultimate test for law of the system.[58]

Detmold's views cannot be accepted because of their unreality. Ordinary people do not have sufficiently complex attitudes towards the legal system to enable those attitudes to be used to determine whether or not the rules of recognition have changed to give a country a separate legal system.

A new look at ultimate tests for law

It may seem that we can resolve the problems which flow from the different views of Hart and Wade on the one hand and of Detmold on the other by abandoning the theory of the continuing sovereignty of the United Kingdom Parliament and conceding that it has the power to surrender its authority over dependent territories. This interpretation is more politically defensible in that it places the power to grant and receive legal independence in the hands of the governments, parliaments and people of the imperial power and the dependency. On the other hand, the theory of the continuing

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56 *Ibid,* 88-9.

57 *Ibid.*

58 For Detmold, above n 13, Australia reached the second stage of independence when the United Kingdom Government and Parliament ceased to have ultimate legal power over it, at 89. That occurred when the people's constitutional attitudes changed so that they no longer recognised the power of the United Kingdom parliament to legislate for Australia, *ibid,* 98-100. Detmold makes it clear that the issue was not only one of political legitimacy but legal power; the United Kingdom parliament lost the legal power to legislate for Australia once Australian people, courts and officials ceased to recognise that they had a duty to obey the laws of that parliament, *id.*

sovereignty of parliament takes the power to grant independence from the hands of parliament and the people and gives it to the judges. If the United Kingdom Parliament cannot surrender sovereignty over a dependency, the only way in which Australia and the other dominions could have become independent was by means of a legal revolution initiated by the judges. That view may appeal to some lawyers but politically is indefensible. It could have created a constitutional crisis if Australian courts had refused to initiate the revolution by declaring either the *Statute of Westminster* or the *Australia Act* ineffective in ending the power of the United Kingdom Parliament to legislate for Australia.

However, if the rules about the sovereignty of parliament are ultimate tests for identifying law and if these tests consist of the practices of the courts or the constitutional attitudes of the people, the fact that one interpretation of the tests is more rational or politically defensible than another will not be relevant in determining their content. That content will be determined by facts about the scope of the practice not by arguments about its rationality. Once the evidence is clear, there is no room for further argument. Rationality can only play a part in determining the content of basic tests for law if we abandon the idea that they consist of practices or social attitudes. Of course, in cases where there is no settled test for law, courts will have to consider arguments about the practices that they should adopt for the future. Those arguments ought to be rational arguments because it is undesirable for the courts to behave irrationally. However, they are not legal arguments about what the current content of the tests for law is, but are non-legal arguments about what its content ought to be for the future.[59]

The view that there is no room for legal argument about the content of the ultimate test once the facts about the practices of the courts or the attitudes of the people are known can only be supported if we adopt a narrow theory of legal reasoning. Legal reasoning is reasoning using legal standards to determine what the law requires as distinct from reasoning using non-legal standards to supplement or evaluate the law. If legal

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[59] Hart, above n 3, argues that there will be cases in which the ultimate tests for identifying law are not clear. They can only be unclear because in these cases, the courts do not have a settled practice. The legal system can handle such cases as long as the tests are clear in most cases. All the courts can do in cases where the ultimate tests are unclear is to decide what their practice will be in future. In making that decision, they may be guided by arguments about what the practice ought to be. However, these arguments are not legal arguments. Hart concludes that in such cases, the courts gain the authority to decide questions about the ultimate tests for law after the event if and when the legal and political community accepts their proposed solution. Hart's discussion of uncertainty in the ultimate tests for law may be found at 147-54.

reasoning consists only of the use of tests to determine whether a purported rule of the system is valid and to determine the content of that rule, it follows that there is no possibility of legal reasoning about the content of the ultimate test. Ultimate tests will be outside the scope of legal reasoning because we have no legal test for identifying them or determining whether they are valid[60] and we have no canonical formulation of their content that we can interpret in the normal way.

The differences between tests for identifying law and other legal standards do not appear to be so fundamental if we adopt a broader view of legal reasoning to include reasoning in which arguments, which cannot be identified by the tests for law, are used to help determine the scope of legal standards. If legal reasoning includes arguments that cannot be identified by the tests for law, those arguments can be used to reason about the tests themselves. A legal system which is consistent with this model of legal reasoning may include tests for law which identify the authorities with the power to lay down legal rules and a set of principles which are not identifiable by the tests and which are used to help limit or elaborate the rules in cases where the rules lead to unjust results or are not clear.[61] As the principles do not owe their status as law to the tests for law, there is no reason why they should not be used in arguments about the content of the tests themselves in cases where the content of the tests is in dispute.

The claim that legal reasoning is limited to reasoning about the use of fundamental tests for law to identify legal standards is committed to the view that the law can only be changed lawfully if there is a legislator or analogous official who has the legal power to make the change. As we have seen, this view is one of the assumptions which underlies the views of Hart and Wade that the ultimate test for law can only be changed legally to the extent that it specifically authorises such change. Limits on what could count as a fundamental test for law commit the narrow view to this theory of the limits of lawful legal change. Tests for law must of necessity identify laws by identifying the way in which they were made and in particular indicating whether the person who purported to make them was legally empowered to do so. Tests for law are designed to guide courts, officials

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60 Hart, *ibid,* makes this point in his discussion of validity. A judgment that a law is valid requires that there is a higher standard, which can be used to evaluate the law's validity. Therefore, it makes no sense to ask whether the ultimate test is valid because there are no higher standards which can be used to evaluate it, at 100-10.

61 This is a very crude sketch of the way in which Dworkin claims that legal systems such as that of the United States, the United Kingdom and Australia work; see R.M. Dworkin, *Taking Rights Seriously* (1st ed, London: Duckworth, 1977) and R.M. Dworkin, *Law's Empire* (London: Fontana Paperbacks, 1986).

and citizens by helping them to identify the law. Tests cannot serve this function if they attempt to identify legal standards solely by reference to their content. For example, a test that laid down that 'whatever is just is the law' would provide no guidance to judges, officials and citizens as to the content of the law because of the indeterminate but all-encompassing nature of justice. It is indeterminate in that there may be many cases in which it does not provide clear guidance because more than one answer is equally just, but all embracing because there is hardly a social situation in which it is completely irrelevant. Hence, tests for law always identify laws at least in part by reference to their source, that is by reference to the way in which they were made.

This is not to deny that tests for law may refer to matters of substance as well as form. It is arguable that they may not only identify the ways in which legal rules may be made and the institutions which have the power to make them, but also require us to consider whether the content of these rules is consistent with the substantive requirements of moral or political ideals.[62] Although substantive moral or political ideals may be part of a test for law, they cannot be the whole of it without destroying its utility as a guide to officials and citizens. Also, substantive moral and political ideals enter into tests for law as constraints on law-making powers, invalidating exercises of those powers that are inconsistent with their content. Many bills of rights operate in this way as constraints on the law making powers of legislatures and other law makers.[63]

It is clear that the claim that there are ultimate tests for law which are outside the scope of legal reasoning stands or falls with the narrow view of legal reasoning. Therefore, both may be accepted if it can be shown that either is correct.

It is difficult to support the narrow view of legal reasoning independently of the thesis that there is an ultimate test for law which differs in kind from other legal rules. Evidence of the way in which judges

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62 Dworkin has argued that including moral and other standards, which require that the content of laws be evaluated, in tests for identifying laws of the sort proposed by Hart would transform their nature and role; M. Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984) 247-50 and Dworkin, *Law's Empire, ibid,* 124-30. It is not necessary to consider these claims in this paper.

63 Substantive moral requirements may also play another role in the basic law of a legal system. They may impose affirmative duties on a government to provide certain basic rights to its citizens. However, from the point of view of the narrow theory of legal reasoning, these moral requirements do not operate as rules of recognition enabling us to identify the law but rather impose a duty on the government to make new law with a certain moral content.

decide cases supports the broad view of legal reasoning because, as supporters of the narrow view concede, judges regularly use standards that are not identifiable by tests for law.[64] For example, Hart stresses the importance of tests for validity and arguments about the meaning of words in his picture of legal reasoning.[65] However, he emphasises that these types of arguments are not sufficient to enable the judge to decide every case because once the rule is discovered and found to be valid, it may not cover the case in question or its terms may be too vague to determine the answer. In these cases, judges have to use arguments and standards that cannot be identified as law by tests for law. Hart argues that these standards and arguments are not law and that therefore they do not bind the judges who have a discretion to choose which they will use.[66]

It is difficult to accept this description of the way in which judges use standards which are not identifiable by tests for law. Not only do judges use these standards, but they do not normally distinguish them from legal arguments proper or make it clear that they are not legal arguments. Instead, the practice of judges suggests that they see the standards which they use as legal standards which are binding on them whether or not they can be identified by an ultimate test for law.

The fact that judges act as if they were legally bound by arguments which cannot be identified by an ultimate test, suggests that legal argument consists of more than argument about the validity and content of standards which can be identified by ultimate tests.[67] It includes arguments about justice and the purpose and point of rules as well as arguments about validity and about the meaning of words. If we accept this broad view of legal reasoning, we must reconsider the nature of tests for law. If arguments about the point and justice of legal rules play a role in defining their content, there is no reason why we cannot use arguments about the point and justice of the ultimate tests for law to help determine their content.

Community acceptance and the practice of the courts play an important role in determining what the ultimate tests for law are and help explain why the tests differ greatly from legal system to legal system. For

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64 See, eg, Hart, above n 3, Ch 7, 'Formalism and Rule Scepticism'. Claims that Positivists are committed to the view that judges should never apply standards other than those identified by a test for law has provoked outraged responses from some Positivists; see Morison, 'Some Myth about Positivism' (1959) 68 *Yale LJ* 212.

65 Hart, *ibid,* stresses the importance of validity in Chapter 6, 'The Foundations of a Legal System' and the importance of defining general terms in Chapter 7 'Formalism and Rule-Scepticism'.

66 *Ibid,* 'Formalism and Rule Scepticism' at 124-36.

67 Dworkin has made a similar point with respect to principles in 'The Model of Rules I', *Taking Rights Seriously,* above n 61, esp. at 36.

example, they help explain why the tests in Australia, which is a federation with a rigid, written constitution, clearly differ from the tests used in the United Kingdom, where parliament is supreme and the constitution is unwritten. However, the content of ultimate tests for law is not determined solely by community acceptance and the practice of the courts as Hart and Wade claim. Courts and lawyers argue about the content of these tests in the same way as they do about other legal standards, using arguments about justice and about the point of the standards to try to determine their content in particular cases. This is clearly the case in countries such as the United States of America and Australia where the tests for identifying other rules of law are set out in written constitutions which are subject to detailed interpretation by the courts.

Although tests for law are important, they do not play the fundamental role in the legal system which Hart envisaged. Hart argued that in every developed legal system there were tests for law that could be used to identify all of the law of the system.[68] If, as this paper argues, the content of the tests for law can be the subject of legal argument, then the tests for law cannot be used to identify all of the law of a legal system. For reasons given above, the standards that are used in argument about the scope of the tests for law are not identifiable by those tests.

Another look at the independence cases

Once we reject the thesis that the ultimate tests for law stand outside the legal system and accept that they are open to interpretation and argument, like other legal standards, we are able to find more plausible explanations for the South African and Australian cases than that suggested by Wade.

South Africa

Wade explained the South African cases as ones in which the courts created a new, independent South African legal system in a legal revolution in which they fashioned new ultimate tests for law.[69] The South African cases are better understood as based on ambiguities in the *Statute of Westminster* than on any freedom which the courts were vested with as a result of a 'revolutionary change' requiring them to fashion new ultimate criteria of legal validity. By laying down that Dominion legislation was to prevail over inconsistent United Kingdom legislation applying to the Dominions, not vice versa, the *Statute of Westminster* raised questions about whether the Dominion parliaments remained bound by limits on their powers imposed by their Constitutions which were in the form of United Kingdom legislation. Section 2 of the Statute is broad enough in its terms to be interpreted as granting an unlimited grant of legislative power to

68 *Ibid,* at 100-110.

69 *Ibid,* at 51-53.

Dominion parliaments whose powers were limited by such constitutions.

There were good reasons for avoiding such an interpretation. The Constitutions of some of the Dominions, including that of Australia, were drafted in the Dominions themselves as the result of an exhaustive political process. Some, including that of Australia, established federal systems in which the constitutional limits on the powers of the federal legislature were one of the major guarantees of the autonomy of the regional governments. It is unlikely that the drafters of the *Statute of Westminster* intended to sweep away the results of these local political processes in one fell swoop, especially as section 2 does not specifically grant legislative power but determines which legislation, Dominion or United Kingdom, prevails in cases of conflict. Therefore, there was an overwhelming argument that the maxim *generalia specialibus non derogant* should apply to the question of whether the Statute had given the parliaments of Dominions such as Australia the power to ignore constitutional limits on their legislative powers. The drafters of the Statute were sufficiently concerned about these problems to add ss 7 and 8 to the Statute, making it clear that the Statute did not enable the Commonwealth and the Canadian legislatures to ignore the constitutional limits on their powers.

The South African Constitution was not protected by a similar provision. In *Ndlwana v Hofmeyr*[70] the South African Supreme Court held that since the *Statute of Westminster* had converted the South African legislature into a sovereign independent legislature, the validity of its legislation could not be challenged in a court of law. Hence, it was free to determine its own procedures and was not bound to comply with special procedures contained in the *South Africa Act.* In other words, the court took the view that the Statute, in freeing the South African Parliament from the constraints of Imperial law, necessarily freed it from the constraints imposed by the Constitution of South Africa, itself an Imperial law. The decision was not based on a rigorous analysis of the Statute or of the reasons why the Constitution might bind the parliament other than its status as Imperial law. Instead, the court took as its model of a sovereign legislature that of the United Kingdom, assuming that the legislature of an independent country had to have the unlimited legislative powers of the United Kingdom Parliament. It seems to have been led by Austinian notions of sovereignty, under which all sovereigns have two aspects, freedom from control by any person within the legal system over which it is sovereign and freedom from control by any external power, to conclude that the grant of independence in the *Statute of Westminster* had the effect of removing constitutional limitations on the powers of the legislature.[71]

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70 1937 AD 229

71 *Ibid,* 237-8

Harris v Minister for the Interior[72] was similarly concerned with the interpretation of the *Statute of Westminster*. The first point it made was that although the *South Africa Act* was an Imperial Act, it gave the South African Parliament complete power to amend or repeal all of its provisions as long as that parliament complied with its procedural requirements.[73] Therefore, the *South Africa Act* was an exception to s 2 of the *Colonial Laws Validity Act* in that, although it was Imperial law, it was not paramount over inconsistent South African law. Accordingly, s 2(1) of the *Statute of Westminster,* which repealed the *Colonial Laws Validity Act,* did not have any effect on the ability of the South African Parliament to alter the *South Africa Act.* Similarly, s 2(2) of the Statute did not alter the position. The object of s 2 was to give the South African Parliament a power that it did not possess before the *Statute of Westminster* was passed. As the South African Parliament already had power to amend the *South Africa Act* as long as it complied with its procedural provisions, the *South Africa Act* could stand consistently with s 2 of the Statute, especially as there is nothing to indicate that the Statute intended to make radical changes to the internal constitutional structure of South Africa or to destroy guarantees of voting rights granted by the *South Africa Act.* Besides, s 2 of the Statute conferred power on the parliaments of the Dominions, that is on their existing parliaments, many of which had powers limited by the constitutions which established them, not on new parliaments possessing unlimited legislative power created by the Statute itself.[74]

The Court also rejected the view adopted in *Ndlwana v Hofmeyr* that a nation could not be completely sovereign unless it had a sovereign parliament modelled on that of the United Kingdom because the argument entailed that the *Statute of Westminster* could only be a grant of sovereignty to the Dominions if it abolished all the limitations on the powers of their parliaments contained in their constitutions. As none of the Dominions had requested such radical changes to their constitutions it would have been somewhat bizarre if, at the moment of granting independence, the United Kingdom had interfered in the internal affairs of the Dominions in such a comprehensive way.[75] Besides, if correct, the argument entails that the United States is not an independent state because it does not have a legislature with unlimited legislative powers.[76]

This analysis of the two cases suggests that on their face they were concerned with the interpretation of the *Statute of Westminster,* not with fashioning a new ultimate criterion of legal validity for South Africa.

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72 1952 (2) SA 428

73 *Ibid,* 462-3.

74 *Ibid.*

75 *Ibid,* 463-4.

76 *Ibid,* 468.

Although both cases accepted that after the *Statute of Westminster,* South Africa had become a completely independent country politically and legally, they did not see this as the result of a revolution which made it necessary for the courts to fashion a new criterion of validity as suggested by Wade. Instead, both cases were in agreement that the United Kingdom Parliament could, and in the *Statute of Westminster* had surrendered the power to legislate for South Africa.[77]

A supporter of Wade might reply that the South African decisions changed the ultimate criteria of validity in a radical way because they based their reasoning on the claim that the United Kingdom Parliament could surrender its powers over former dependencies so as to bind its successors. This according to Wade, was a radical change because all the earlier authorities made it clear that parliament could not bind its successors in this way.[78] However, the argument can only be accepted if Wade is right in asserting that according to the ultimate criteria of validity of the United Kingdom legal system, the United Kingdom Parliament could not bind its successors by surrendering power over a dependent territory. If under the ultimate criteria of validity that parliament could surrender its powers, then the South African cases introduced no radical change. Even on Wade's own account, this is a controversial issue because he cites a number of commentators, from Dicey on, who were of the opinion that the United Kingdom Parliament could surrender power over a dependent territory.[79]

Wade's conclusion that the South African cases marked a revolutionary break in the legal system of South Africa, giving the South African courts freedom to fashion a new criterion of legal validity for South Africa, depends not on an analysis of the reasoning in those cases but on a claim that there is no other compelling explanation of what happened. According to Wade, the cases, by recognising that South Africa had an independent legal system, must have fashioned new criteria for determining the law in South Africa because the old criteria did not provide a lawful way for South Africa to become independent. However, to prove his case, he had to show that the ultimate criteria of validity in the United Kingdom legal system did not allow the United Kingdom Parliament to surrender its powers over dependencies and that there was no lawful way of changing those criteria. That he failed to do because the ultimate criteria for law in the United Kingdom are not as clear as he claimed and he did not consider the possibility that these criteria, like other legal standards, are subject to frequent reformulation.

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77 In *Ndlwana* this was expressed in the pithy aphorism that 'Freedom once conferred cannot be revoked'; 1937 AD 229 at 237. The court in *Harris* agreed; 1952(2) SA 428, 467-8.

78 Wade, above n 3, at 186-92.

79 *Ibid,* 177-82.

Australia

The Australian cases may appear to give more support to Wade's views. The High Court of Australia has held that the growth of Australian independence has had a number of effects on the Australian Constitution. First, it has led to an accretion of some additional jurisdiction and legislative powers to the Commonwealth.[80] Secondly, the Court recognises that the United Kingdom is now a foreign power for constitutional purposes, although it did not have that status at federation.[81] Thirdly, some members of the Court have argued that the Constitution's legitimacy depends not upon its status as legislation of the United Kingdom Parliament but on the sovereignty of the people.[82] In doing so, they have accepted that the United Kingdom Parliament can and has surrendered its legislative power over Australia in the *Statute of Westminster* and the *Australia Act* (UK) without freeing the Commonwealth Parliament and Government from the constraints imposed on their powers by the Constitution.

The third group of cases are the most important for the purposes of this article because they indicate that there has been a change in the basic tests for recognising law in the Australian system, such that the United Kingdom Parliament has completely dropped out of that system. A supporter of Wade's views would explain this change as the result of a legal revolution in which the courts have abandoned the old test for law in which the United Kingdom Parliament had fundamental law making powers, for a new one in which it has no law making role. The cases may appear to support this interpretation because they suggest that basing the legitimacy of the Constitution on popular sovereignty rather than the paramount powers of the United Kingdom Parliament has implications for its interpretation which are not directly referrable to the words of the Constitution, the *Statute of Westminster* or the *Australia Acts*.

To the extent that the Australian cases claim that the source of the Constitution's legitimacy has implications for its interpretation, they differ from the South African cases. The South African cases were concerned with the interpretation of the specific words of the *Statute of Westminster* rather than the implications that might flow from changes in the basic tests for

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80 See, eg, the *Seas and Submerged Lands* Case, (1975) 135 CLR 337, *Victoria v Commonwealth* (AAP Case) (1975) 134 CLR 338, and *Davis v Commonwealth* (1988) 166 CLR 79.

81 *Sue v Hill* (1999) 163 ALR 648, [1999] HCA 30, as yet unreported. The Court split on this issue in the earlier case of *Kirmani v Captain Cook Cruises* (1985) 159 CLR 351.

82 *Australian Capital Television v Commonwealth; Nationwide News v Wills; Theophanous v Herald and Weekly Times,* above n 12; *McGinty v WA* (1995-6) 186 CLR 199-201, 230 and 274-5 per Toohey J, McHugh and Gummow JJ.

law. It is always easier to argue that the courts are exercising a discretion or making law when they base their decisions on implications to be drawn from legislation rather than on its express words, especially when those implications depend in part on a rethinking of the nature of the legislation and the way in which it ought to be interpreted. However, the High Court's drawing out of implications from the change does not entail that it was carrying out a legal revolution when it announced that the Constitution derived its legitimacy from the sovereignty of the people rather than from the United Kingdom Parliament. Nor does it entail that at that point the Court was no longer bound by the Constitution but was legally free to abandon, alter or adopt it as the basis of a new rule of recognition as it saw fit.

None of the implications that the Court drew ultimately depend on the Court's recognition of the change in the legal sovereign but could have been made even if the Court had continued to recognise the United Kingdom Parliament as the ultimate source of the Constitution's legitimacy. Some of the judges have implied that as the people are sovereign, parliament and the government are accountable to the people for the way in which they exercise their powers. The clearest expression of this view is that of Mason CJ in *ACTV v Commonwealth,* where he said:

> The very concept of responsible government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives. In the case of the Australian Constitution, one obstacle to the acceptance of that view is that the Constitution owes its legal force to its character as a Statute of the Imperial Parliament enacted in the exercise of its legal sovereignty; the Constitution was not a supreme law proceeding from the people's authority to create a government. And, most recently, the *Australia Act* 1986 (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognised that the ultimate sovereignty resided in the Australian people. And in the exercise of those powers the representatives of necessity 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.[83]

Mason CJ concluded that the Constitution contained an implied

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83 *Australian Capital Television v Commonwealth, ibid,* at 137-8. See also, *Nationwide News v Wills, ibid,* at 72, *Theophanous v Herald and Weekly Times, ibid,* at 180, *McGinty v WA, ibid.*

guarantee of freedom of political speech that was necessary to enable the people to maintain control over the government through the ballot box.

The claim that the Australian people rather than the United Kingdom Parliament had become the basic source of the Constitution's legitimacy plays a limited role in Mason CJ's argument. He implies a constitutional guarantee of free speech from the Constitution's establishing representative, responsible government that signifies 'government by the people through their representatives', or in legal terms 'that the sovereign power which resides in the people is exercised on their behalf by their representatives'. In his opinion, the fact that the Constitution had, until the *Australia Acts,* owed its legal force to its character as an Act of the Imperial Parliament had been an obstacle to the legal recognition of the sovereignty of the people implicit in representative, responsible government.

On this view, recognition that the ultimate source of the Constitution's legitimacy was the people, not the United Kingdom Parliament, did not create a new system of government by the people or new systems of government accountability but removed an obstacle in the way of recognising what had always been there. That obstacle was the doctrine of the ultimate legal sovereignty of the United Kingdom Parliament in Australia.

Mason CJ did not explain why the recognition of the ultimate legal sovereignty of the United Kingdom Parliament over Australia had been an obstacle to recognition of the theory of governmental accountability to the people that he claimed was implicit in the Constitution. After all, the traditional view of the Constitution is that it embodies the political will of the people of Australia, although in 1900 it could only be translated into law by an Act of the Imperial Parliament. If the Constitution embodies the political will of the people of Australia, they would appear to be the political sovereign. If that is the case, the fact that the Constitution is a statute of the United Kingdom Parliament is not an obstacle to recognising that the Constitution makes the government accountable to the people. Hence we may be able to dismiss Mason CJ's reference to a change in the ultimate legal basis of the Constitution as a rhetorical flourish unnecessary to his argument. The similar arguments of Brennan and Gaudron JJ in *Nationwide News v Wills* and *Australian Capital Television v Commonwealth* respectively do not refer to the change in the ultimate source of the legitimacy of the Constitution. Instead, they are based on the thesis that the system of representative democracy and responsible government that the Constitution establishes makes the government accountable to the people and requires a limited guarantee of free speech to protect that accountability.[84] Similarly, in the later case of *Lange v ABC,* the

[84] *Australian Capital Television v Commonwealth, ibid,* at 48-53 and 106, 208-

Court unanimously upheld the implied guarantee of free speech but based it on the Constitution's embodying a system of representative responsible government rather than on the ultimate sovereignty of the Australian people.[85]

Why then did Mason CJ make the point that, in the past, recognition that the United Kingdom Parliament was the ultimate legal source of the legitimacy of the Australian Constitution had been an obstacle to recognising that the government was accountable to the people as the ultimate source of its powers? The answer may lie in the fact that Mason CJ and the majority were proposing that the Constitution gave the courts a role in enforcing government accountability. In earlier cases, especially the *Engineers* Case[86] the High Court had used the idea that the Constitution was a statute of the United Kingdom Parliament to argue that Australian governments and parliaments, like those of the United Kingdom, were accountable politically, but not legally to the people.[87] Mason CJ was attacking that view. He may therefore have decided that it was necessary to attack the theory of the Constitution on which it was based.[88]

If that were the case, his argument is part of a debate about the true nature of the Constitution and the way in which it ought to be interpreted which has continued since federation. In that debate, judges have pointed to the Constitution's origins as a statute of the United Kingdom Parliament or to its acceptance by the people in referenda to justify different approaches to its interpretation and to the role of the High Court in preventing the misuse of Commonwealth power. In general, judges who point to the Constitution's origins as a statute have adopted a literalistic approach to its interpretation, stressing the importance of the words used. As a result, they have been reluctant to imply limits into the specific powers that the

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14 respectively. Deane and Toohey JJ take a middle position, arguing that the implied freedom is necessary to give substance to the basis of representative and responsible government, the idea that all the powers of government belong to and are derived from the people; *Nationwide News v Wills, ibid,* at 70-2.

85 (1997) 189 CLR 520.

86 *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129.

87 The majority in *Engineers* stressed that in interpreting the Constitution according to British principles of interpretation, presumably imported by the Constitution's status as a British Act, the Court had no right to limit the scope of a granted power to prevent its abuse. Rather, the people has the power and the responsibility to prevent the abuse of granted powers by political means, ie through elections; *ibid,* at 151-2.

88 Mason CJ, along with many of the other judges in the free speech cases, rejected the commonly held belief that the *Engineers* Case ruled out constitutional implications.

Constitution grants the Commonwealth, either to protect individual rights or to protect the States. On the other hand, judges who have emphasised that the Constitution is the compact of the people have adopted a more activist approach, relying on implications derived from their perceptions of the basic principles of the Constitution to limit the powers of the Commonwealth in order to protect the rights of the States and, more recently, the people.

For example, in the early implied immunities cases, the majority of Griffith CJ, Barton and O'Connor JJ relied on the Constitution's status as the compact of the Australian people as well as a statute of the United Kingdom Parliament to justify the federalist implications which it was drawing.[89] The *Engineers* Case[90] rejected both the early court's readiness to draw implications and the immunities it adopted on the grounds that the Constitution was a British statute and was to be interpreted as such.[91] The debate did not end with the *Engineers* Case. Later judges, such as Dixon CJ, who revived a limited immunities doctrine, stressed repeatedly that it was impossible to interpret the Constitution without drawing some implications, thus rejecting the approach as well as the conclusion in the *Engineers* Case.[92] On the other hand, judgments which adopted a broad approach to the interpretation of Commonwealth powers, such as the majority judgments in the *First Uniform Tax* Case and the *Dams* Case, relied on the *Engineers* argument that it was for the electorate, not the courts, to control the way in which the Commonwealth used its powers.[93]

These cases raised issues about whether the powers of the

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89 *Federated and Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (*Railway Servants* Case) (1906) 4CLR 488, 534 per Griffith CJ, Barton and O'Connor JJ; *Baxter v Commissioners of Taxation, New South Wales* (1907) 4 CLR 1087, 1104-1115 per Griffith CJ, Barton and O'Connor JJ. But note the interesting rejection of this approach in *Deakin v Webb* (1904) 1 CLR 585, 605-6, where the Court (Griffith CJ, Barton and O'Connor JJ) argued that the implications were inherent in the choice of a constitutional model similar to that of the United States rather than Canada and that it made no difference to the Constitution's interpretation whether it was regarded as a statute or a compact of the people.

90 See above n 86.

91 *Ibid,* 142-154.

92 See, eg, *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681-2, *Australian National Airways v Commonwealth* 1945) 71 CLR 29, 85 and *Lamshed v Lake* (1958) 99 CLR 132, at 144.

93 *South Australia v Commonwealth* (*First uniform Tax* Case) (1942) 65 CLR 373 at 429 per Latham CJ and *Commonwealth v Tasmania* (*Dams* Case) (1983) 158 CLR 1 at 126-9, 168-70, 220-22 and 254-6 per Mason, Murphy, Brennan and Deane JJ

Commonwealth were limited by implication to protect the constitutional position of the States. Debate about the nature of the Constitution has continued in the implied rights cases. Mason CJ's comments, quoted above, that the view that the Constitution owes its legal force to its character as a statute of the United Kingdom Parliament was an obstacle to recognising that elected representatives are ultimately accountable to the people, was part of a discussion of the extent to which the Court was entitled to imply guarantees of fundamental rights into the Constitution. He concluded that, although the drafters of the Constitution did not adopt a Bill of Rights because they were of the opinion that a political process based on representative government was the best guarantee of fundamental rights, a guarantee of free political speech was necessarily implied in the Constitution because it was essential to representative democracy.[94]

The unanimous decision in *Lange v ABC*[95] defined the scope of the implied guarantee of free speech but not before considerable debate about the scope of the implication and the way in which that scope was to be determined. These debates raised issues about the nature of the Constitution, the scope of any implications that could be drawn from it and the role of the Court as its interpreter. At one end of the spectrum, Deane and Toohey JJ in particular argued that the Constitution embodied certain fundamental principles of government including representative democracy, responsible government, the separation of powers and federalism. These principles were not expressly stated but were to be implied from the nature of the Constitution and from any express provisions that were based on them:

> That approach [the approach of the framers to the drafting of the Constitution] was to incorporate underlying doctrines or principles by implication from the nature of the Federation and from any particular express provisions which reflect or implement those doctrines or principles. In the context of that approach, specific provisions of the Constitution which reflect or implement some underlying doctrine or principle are properly to be seen as a manifestation of it and not as a basis for denying its existence by invoking the inappropriate rule of expressio unius.[96]

They gave two examples. First, they argued that the specific protection that the Constitution gives to the constitutions and powers of the States in ss 106 and 107 exemplifies rather than rules out the more general principle that the Constitution guarantees the continuing existence and political viability of

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94 *Australian Capital Television v Commonwealth,* above n 12 at 135-141.

95 See above n 85.

96 *Leeth v Commonwealth* (1992) 174 CLR 455, at 484-5.

the States. Similarly, they argued that the Constitution contains no detailed statement of the content or implications of the doctrine of the separation of the judicial power from executive and legislative power, but adopts it by vesting the judicial power of the Commonwealth in the High Court and other federal courts.[97]

At the other end of the spectrum, Dawson and McHugh JJ have argued that it is wrong to interpret the specific provisions of the Constitution in the light of general principles of federalism or representative government. They have pointed out that there are many possible systems of federalism and representative government. The only way to discover the nature of the federal system and system of representative government which the Constitution has adopted is by an examination of its specific provisions. It is permissible to draw implications from these provisions where necessary to make them effective, but it is not permissible to interpret them in the light of a general theory of federalism or representative government imposed on the Constitution from extrinsic sources or speculations about the intentions of the framers.[98] Dawson J in particular has pointed out that the effect of interpreting constitutional provisions in the light of such general theories is to take power to determine many issues about the nature of federalism and representative government from parliament and to vest it in the courts.[99]

To support their arguments about how the Constitution ought to be interpreted, Dawson and McHugh JJ both relied on the Constitution's status as an Act of the United Kingdom Parliament. Dawson J's opinion was that, regardless of the *Australia Acts,* the legal foundation of the Australian Constitution was an exercise of sovereign power by the Imperial Parliament. Hence, the Constitution was to be interpreted as an Act of Parliament according to its terms rather than in the light of extrinsic circumstances.[100] He did concede that as an 'abstract proposition of political theory', the Constitution may depend for its continuing validity upon the

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97 *Ibid.* See also their joint judgment in *Nationwide News v Wills,* above n 12 at 69-77, and the judgments of Deane J in *Theophanous v Herald &Weekly Times* above n 12 at 168-74 and the judgment of Toohey J in *McGinty v Western Australia,* above n 82 at 198-205.

98 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 180-86, per Dawson J, *Theophanous v Herald & Weekly Times* (1993-4) 182 CLR 104, 189-94 and 195-201 per Dawson and McHugh JJ and *McGinty v Western Australia* (1996) 186 CLR 140, 180-85 and 230-35 per Dawson and McHugh JJ

99 *Australian Capital Television v Commonwealth,* above n 12 at 180-86, *Theophanous v Herald & Weekly Times,* above n 12 at 189-94, and *McGinty v Western Australia,* above n 82 at 180-85.

100 *Australian Capital Television v Commonwealth, ibid,* at 181-2

acceptance of the people,[101] but it is clear that in his opinion, that was not relevant to the way in which the Court ought to interpret it.

McHugh J formed a similar opinion as to how the Constitution was to be interpreted, although his reasoning was different. He was of the opinion that the political and legal sovereignty of Australia now resides in the Australian people. However, he argued that this does not effect the way in which the Constitution ought to be interpreted. As the people have chosen to be governed in accordance with a Constitution enacted in a statute of the United Kingdom Parliament, they have by implication chosen to have that Constitution interpreted by the ordinary rules of statutory interpretation. As the ordinary rules of statutory interpretation require that the text be the starting point for any interpretation, it is impermissible to draw implications from doctrines that are said to underlie the Constitution. He concluded that it is only permissible to interpret the Constitution in the light of a political theory, such as federalism or representative democracy, if that theory is necessarily implied by the text or the structure of the Constitution. Hence, he concluded that the reasoning of the majority in *Theophanous v Herald & Weekly Times*[102] and *Stephens v West Australian Newspapers*[103] was wrong because it treated the 'implication' of representative democracy as a distinct constitutional provision which had to be interpreted separately from the text to determine the scope of any implied right of freedom of communication.[104]

It is beyond the scope of this article to consider the extent to which the High Court is justified in relying on broad political theories in interpreting the Constitution, or even to consider whether judges such as Mason CJ, Dawson and McHugh JJ are right in assuming that the nature of the Constitution as a statute of the United Kingdom Parliament is relevant to its interpretation. However, it is clear that the claim that the Constitution's validity now depends upon its acceptance by the sovereign people rather than its status as an Act of the United Kingdom Parliament does not mark the abandonment of an old ultimate test for law for a new one, but is merely a stage in a debate which has been continuing since federation about the nature and the correct approach to interpretation of the Constitution. Therefore, the Australian cases do not give any support to Wade's contention that the only way in which a country such as Australia can gain a separate legal system is by a revolution in the practice of the courts, in which they abandon an old fundamental test for law for a new one in which the legal system of the former Imperial power has no role. Instead, they suggest that the exact scope of the tests for law contained in the

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101 *Ibid,* at 181.

102 See above n 12.

103 (1994) 182 CLR 211.

104 *McGinty v Western Australia,* above n 82 at 230-35.

Constitution has always been the subject of continuing argument. It would be arbitrary to select one of these arguments as more important than the others and give it the status of a revolution. On the other hand, it would be ludicrous to suggest that each reformulation of the tests as a result of these arguments was a revolution in which the courts rejected an old fundamental test for a new one.

Are tests for law controversial?

I have argued that neither the Australian or the South African cases support Wade's contention that a revolutionary change in the fundamental test for law is necessary to create an independent legal system in a territory which has been a dependent part of an imperial legal system. Wade supported his position by two arguments. First, he argued that the United Kingdom Parliament did not have the power to surrender its jurisdiction over a dependent territory in a way that would bind its successors. Second, he argued that whatever the powers of the United Kingdom Parliament were in such situations, its powers were defined as a matter of fact by the tests for law which the courts use in practice. On this view, the United Kingdom Parliament could not surrender its powers over a dependency unless and until the courts of the dependency recognised an ultimate test for law that allowed it to surrender its powers. If their original test for law did not concede such a power to the United Kingdom Parliament, as the test was constituted by the practice of the courts, there was no way in which it could be changed legally. Instead, the only way in which the Courts could change it was by a revolutionary break, in which they abandoned the old test for a new one.

That Wade's contention is not supported either by the South African or the Australian cases, suggest that one or both of his arguments is wrong. With the benefit of hindsight, it is easy to argue that Wade's first argument, the argument that the United Kingdom Parliament could not surrender its powers over a dependency, is wrong. After all, the United Kingdom Parliament has successfully surrendered its powers over most of its former dependencies and it is recognised both in the former dependencies and in the United Kingdom that the United Kingdom Parliament no longer has power over those dependencies. The ease with which the United Kingdom Parliament has surrendered its power suggests that there never was a constitutional barrier to its so doing.

Wade's second argument, the argument that the powers of the United Kingdom Parliament are defined as a matter of fact by the practice of the courts, can be used to strengthen the claim that his first argument was wrong. If Wade's second argument is correct, it is not necessary to prove that the United Kingdom Parliament could legally surrender power over

dependencies to show that the first argument is wrong. All we need to do is to show that the issue is controversial. Wade's second argument claimed that the rule that the United Kingdom Parliament could not bind its successors existed as a matter of fact in the practice of the courts in recognising the most recent Act of Parliament as binding, regardless of attempts of earlier parliaments to limit parliament's powers.[105] For the claim to be correct, the courts must have an approach that is consistent enough to be able to be described as a practice. If the matter is controversial, one in which there are no decisive precedents so that reasonable lawyers and judges disagree about the answer, the courts are unlikely to have a consistent practice.[106] If there is no such practice, it follows that there is no revolutionary change whatever position the judges adopt because, whichever decision they reach, they cannot be said to have rejected the existing practice.

However, if we concede that the content of the ultimate test for law may be a matter of controversy, we undermine Wade's second argument, the argument that the ultimate test for law exists in the practice of the courts. As noted above, the fact that the content of the test is controversial indicates that the courts are unlikely to have an approach that is consistent enough to qualify as a practice. Yet the Australian cases in particular suggest that in Australia there has been a long history of fundamental and unresolved argument about the nature of the Constitution and the correct approach to its interpretation. Similarly, in the United Kingdom there has been a long and unresolved debate about the ability of the United Kingdom Parliament to bind its successors. If there are no clear answers to such fundamental questions about the content of the ultimate criterion of legal validity, it casts doubt on the existence of such a criterion, at least as an agreed practice rather than a controversial set of criteria.

It may be possible to explain the disagreements in the United Kingdom about the scope of the principle that Parliament cannot bind its successors as an example of Hart's point that the rule of recognition may be unclear in some cases. As Hart argues, some lack of clarity in the practices by which the judges identify law may be expected and does not affect the operations of the legal system as long as there is agreement on what the practice requires in the majority of cases.[107] However, the Australian cases are less easily explained in this way because the disagreements about how

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105 Wade, above n 3 at 186-90.

106 Dworkin made this criticism of the claim by Hart, above n 3 at 122-3 and 147-54, that parts of the rule of recognition could be unclear, arguing that a rule constituted by the practice of courts and officials, such as the rule of recognition, could not be unclear because if it were, there was no practice and hence no rule; *Taking Rights Seriously* above n 61 at 61-3.

107 Hart, above n 3 at 147-54.

the fundamental tests for law in the Constitution are to be interpreted are more wide ranging and fundamental, leading to dissenting judgments in many, if not most Constitutional cases. In fact, the Australian legal system does not appear to be based on any fundamental consensus or practice in the courts about the scope and content of the ultimate tests for law, but operates in spite of wide spread disagreements about these tests. Therefore, the Australian experience supports the view that the ultimate tests for law may take the form of a controversial set of criteria, the content of which is the subject of continual unresolved arguments, rather than a settled practice of the courts.

A supporter of the theory that there are in every legal system fundamental tests for law constituted by the practice of the courts might object that the difference between the Australian legal system and that of the United Kingdom is one of degree rather than of kind. Although disagreements about the scope and interpretation of the fundamental tests for law may be more widespread in Australia than in the United Kingdom, they do not stop us from identifying the law in the majority of cases. Hence the tests are sufficiently certain to enable us to know what the law is most of the time.

Even if we concede this point, the Australian cases illustrate a fundamental weakness of the theory that fundamental tests for law are constituted by the practice of the courts. As argued above, that theory rules out the possibility of legal argument about the scope of ultimate tests for law. If we equate the ultimate tests for law in Australia with the Constitution, it entails that none of the arguments considered above about the scope and interpretation of the Constitution can be legal arguments. Instead, they must be classified as non-legal arguments about what the scope of the ultimate tests for law ought to be. The better view is that there are legal principles that can be used to determine the scope of the rule of recognition. The rules of recognition cannot be used to identify these principles for reasons given above. Evidence for their status as law is found in the fact that they are commonly used by lawyers and judges to justify decisions in hard cases and that there are good reasons for using them in this way rather than in our ability to identify them as law by the use of a test.

Continuing sovereignty as a legal principle not a practice of the courts

Seeing the rule of recognition as a legal principle the content of which is to be determined by appealing to other relevant legal principles enables us to develop sensible legal answers to questions about the origins of the separate legal systems of countries such as Australia and South Africa. It also offers

a compelling explanation of how the content of fundamental tests for law may be controversial. The problems with Wade's version of continuing sovereignty can be avoided if continuing sovereignty is seen as a legal principle providing a justifiable basis for a parliamentary democracy rather than as a practice of the courts which exists as a brute historical fact. If it is a legal principle, its exact content will lie to be determined by argument, including arguments based on other legal principles. The answer it provides may depend upon the situation, so that the requirements of the principle may differ if the United Kingdom Parliament is attempting to surrender power over a dependency in order to give that dependency independence rather than attempting to entrench a particular political platform in the United Kingdom.

Some supporters of continuing sovereignty have argued that it embodies an important principle of inter-generational equity, the principle that later generations should not have their parliament's power to make fundamental social and political changes limited by its predecessors.[108] In my opinion, this interpretation is correct. It explains why a parliament should not be able to bind its successors either by making legislation unalterable or by imposing special procedures for its amendment or repeal. The principle is not an absolute principle. If it were, entrenched constitutions would never be justifiable. It does not justify extending the principle of continuing sovereignty to prevent the United Kingdom Parliament from surrendering its powers over a colony or dependency. Surrendering legislative power over a territory does not offend the principle of inter-generational equity as long as the people of the territory are given full legislative powers over all aspects of their own political and social system.[109] Rather, it advances that principle because it frees the people of that territory from a dependent status and gives them full control of their own future. Therefore, properly understood, the principle of the continuing sovereignty of the United Kingdom Parliament allowed that parliament to surrender its legislative power over former dependencies. Hence, the United Kingdom Parliament was able to grant Australia full independence and a completely separate legal order by means of the *Statute of Westminster* and *Australia Act* (UK).[110] No legal revolution or break in legal continuity was required for the grant to be effective.

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108 This justification for continuing sovereignty was adopted in *McCawley v R* (1920) 28 CLR 106 at 114-5; see also Detmold, above n 13 at 207-8.

109 The principle would be offended if the Imperial parliament purported to surrender all power over a dependency but did not give full legislative powers to the people of the dependency to determine their own future. Such a policy would be doubly odious if the limits on the powers of the former dependency were designed to prevent it from touching the interests of the former imperial power.

110 See above n 17.

Conclusion

This paper has argued that the doctrine of the continuing sovereignty of the United Kingdom Parliament did not present a legal barrier to that parliament's granting legal independence to countries such as Australia. Properly understood, the doctrine is designed to establish important principles such as those of parliamentary democracy and inter-generational equity. These principles require that one parliament should not be able to impose its policies on future parliaments in a way which prevents change. However, they are not inconsistent with a parliament's surrendering its powers over a dependent territory because such a surrender of power may advance the principles of democracy and inter-generational equity.

In adopting this view of the doctrine of continuing sovereignty, the paper rejects the theory adopted by Hart and Wade, that the doctrine is constituted by the practice of the courts and therefore is immune to legal change. That view led Wade to his well-known conclusion that dependencies of the United Kingdom could only become independent as the result of a legal revolution in which the courts of the former dependency rejected the old test for law under which the United Kingdom Parliament was the paramount legislature for the dependency, for a new one in which that parliament played no role. The paper rejects Wade's view because it does not accord with the facts. It is clear that the parties to grants of legal independence such as the *Statute of Westminster* and the *Australia Acts* believed that they were effective. It is also clear that the courts have treated them as effective. There is no evidence in the decisions of the courts of the legal revolution that Wade argued had to occur for former dependencies to gain their legal independence. Instead, an analysis of the cases in South Africa and Australia shows that the courts assumed that there were legal answers to the issues relating to independence that they were asked to decide.

It may appear possible to explain the cases on the basis that they reject the doctrine of the continuing sovereignty of parliament for a doctrine that allows a parliament to bind its successors thus allowing it to surrender power over a dependency. However, the paper argued that the cases cannot be explained solely as rejecting that interpretation of the doctrine of parliamentary sovereignty which would prevent parliament surrendering its powers over a dependency. Instead, the analysis of the cases leads to a more radical conclusion. Their mode of reasoning suggests that although legal systems do have tests which are used to identify many of the laws of the system, the tests are not constituted by the practices of the courts and other officials as suggested by Hart and Wade. The Hart-Wade view puts the content of the tests outside the scope of legal argument. On this view, any argument about the content of the ultimate tests could only be non-legal

argument about whether the tests should be changed by an extra-legal, revolutionary, exercise of power. The cases do not approach the tests in this way, but as legal principles, the content of which is the subject of constant argument and reformulation in the light of other relevant principles. The paper suggests that the cases show that the arguments about the content of the tests are legal arguments, not extra-legal arguments.

The claim that tests for law are subject to frequent reformulation as the result of legal arguments requires a rethinking of the place of such tests in the legal system. Hart argued that such tests are the ultimate rules of the legal system which provide us with a test for identifying all other law. As a result, they were not subject to legal argument and change, because there were no legal standards by which they could be evaluated. The paper rejects this view, arguing that the standards that are used in arguments about the content of the tests for law are not identifiable by those tests.

The paper concludes that, although these principles are not identifiable as law by the tests for law, there are other good reasons for treating them as law. If they are law, it undermines Hart's thesis that all law can be traced back to a basic test and lends support to theories such as that of Dworkin which claim that standards which cannot be identified by such tests may still be law.