RE-ENACTING THE CONSTITUTION IN AN AUSTRALIAN ACT

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1 INTRODUCTION

The Australian Constitution was drafted by the 'founding fathers' at several Constitutional Conventions in the 1890s[1] and submitted to the people for approval. Following a Premiers' Conference at which some further changes were made, and submission of the document again to the people, a delegation was sent in 1900 to present the new document to the British Government. After the British Colonial Office had made some minor changes, the Parliament of Westminster passed the Commonwealth of Australia Constitution Act 1900 (UK) on 9 July 1900. The preamble and enacting clause of the Act read as follows . . .

> WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:
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> And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:
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> Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in the present Parliament assembled, and by the authority of the same, as follows:- . . . .

The Constitution is embodied in s 9 of the Act and it came into force on 1 January 1901 upon proclamation by Queen Victoria. Eighty-eight years later, the fact that our Constitution is contained in a British Act is not only anachronistic, but unsatisfactory in terms of legal and constitutional principle. While Australia is by no means unique in still having a British-enacted Constitution,[2] many other countries which were once in the same position have since enacted a new or re-enacted the same constitution themselves.[3] It is argued in this paper that the time is ripe for the Australian Constitution to be re-enacted, in identical terms for the sake of this discussion, in an Act of the Australian Parliament.

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1 See generally J A La Nauze, *The Making of the Australian Constitution* (1972).

2 Also having their current constitution enacted by the British Parliament are (the year in brackets indicates when the constitution came into force): Antigua (1981), Bahamas (1973), Barbados (1966), Botswana (1966), Dominica (1978), Jamaica (1962), Kiribati (1979), Malta (1964), Mauritius (1968), St. Christopher & Nevis (1983), St. Lucia (1979), Solomon Islands (1978), Fiji (1970, suspended 1987).

3 The year in brackets indicates the date when the relevant new constitution came into force: Ireland (1937), India (1950), Pakistan (formerly West Pakistan, 1956, not current constitution), Bangladesh (formerly East Pakistan, 1956, not current constitution), Ghana (1960, not current constitution), South Africa (1961, not current constitution), the United Republic of Cameroon (1961, not current constitution), the United Republic of Tanzania (1962, not current constitution), Singapore (1963), Malawi (1966), Uganda (1966, not current constitution), Kenya (1969), Gambia (1970), Sierra Leone (1971, not current constitution), Sri Lanka (formerly Ceylon, 1972, not current constitution), Swaziland (1978), Nigeria (1979, suspended 1984), Guyana (1980), and Lesotho (formerly Basutoland, 1983, suspended 1986). Also, Nauru (1968) and Papua New Guinea (1975), formerly under Australian trusteeships, have followed an analogous course.

Having our Constitution in an Act of the British Parliament is unsatisfactory for several reasons. The Constitution is our most fundamental legal, political and social document, yet in legal terms it does not come from the people of Australia. As Sir Owen Dixon wrote,[4] our Constitution is not a supreme law obtaining its force from the direct expression of a people's inherent authority to constitute a government, but a statute of the British Parliament enacted in the exercise of its legal sovereignty. The source of the authority of the Constitution has significant consequences for the way in which the powers of government are exercised and interpreted. For example, organs of government are treated simply as institutions established by law, and their powers are interpreted as belonging to them by law. In contrast, American doctrine treats them as agents for the people and consequently does not allow them to delegate their powers.[5]

From the point of view of our legal system there are problems associated with the fact that we have a Constitution enacted by Britain. It is incongruous that while we are developing a unique body of Australian law, our most basic law is a British Act and that the High Court must continually refer to it when determining the constitutional validity of our laws. Also, for symbolic reasons it is inappropriate today for Australia to rely on another legislature for the validity of our Constitution. The legal basis for the force of our Constitution should accord with the political reality that Australia is a mature, independent nation, in no way dependent on Britain.

For many of these reasons it has been argued that Australia needs to re-enact its Constitution so as to achieve constitutional 'autochthony'.[6] An autochthonous constitution is one which has the force of law through its own native authority and not because it was enacted or authorised by the Parliament of the United Kingdom. Autochthony means that the constitution is 'home grown' or sprung from the soil it inhabits[7] in a legal, and not only practical, sense. The issue of autochthony must be distinguished from that of autonomy, which relates to the actual power of the Parliament of the Commonwealth of Australia to pass laws and the power of the Parliament of the United Kingdom to legislate for Australia. With respect to autonomy, the Statute of Westminster 1931 (UK)[8] liberated the Australian Parliament from earlier restrictions on its powers and the Australia Act 1986 (UK) and the Australia Act 1986 (Cth) provide in s 1 that no future Act of the Parliament of the United Kingdom will extend or be deemed to extend to Australia. While the position with respect to autonomy is satisfactory,[9] the position with respect to autochthony is by no means as strong.

The traditional view is that Australia does not have an autochthonous constitution. While the document was almost entirely drafted by Australians, and there was popular approval of the draft document,[10] in legal terms this

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4 Sir Owen Dixon, "The Law and the Constitution" (1935) 51 LQR 590, 597. See also J A Thompson, "The Australian Constitution: statute, fundamental document or compact?" (1985) Law Institute Journal 1199 (Victoria).

5 Sir Owen Dixon, supra n 4.

6 *See generally K C Wheare, The Constitutional Structure of the Commonwealth* (1960) ch 4.

7 *The Shorter Oxford English Dictionary on Historical Principles (1978) 135.*

8 Adopted retrospectively as from 1939 by the Statute of Westminster Adoption Act 1942 (Cth).

9 Although query whether it extends to the power to enact the Constitution it self.

10 See J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 225 for final figures. Note that not all of the electorate turned out to vote.

is irrelevant as the binding legal force of the Constitution is wholly dependent on its being enacted by the Parliament of Westminster.[11] It is the United Kingdom Parliament, not the People of Australia, which holds sovereignty or legal supremacy. The Constitution is only 'home grown' in a practical, not legal, sense. The ability of the British Colonial Office to make the late changes[12] to the Constitution supports the view that the Australian involvement was legally irrelevant.

An alternative view is that Australia already has an autochthonous constitution as the binding legal force of the Constitution no longer derives from its enactment by the British Parliament, but now rests upon its acceptance by the Australian People. In *Kirmani v Captain Cook Cruises Pty Ltd,*[13] Murphy J suggested that autonomy and autochthony occurred as early as 1901:

> On the inauguration of the Commonwealth on 1 January 1901, British hegemony over the Australian colonies ended and the Commonwealth of Australia emerged as an independent sovereign nation in the community of nations. From then, the British Parliament had no legislative authority over Australia. The authority for the Australian Constitution then and now is its acceptance by the Australian people.[14]

Others have suggested that autochthony has been achieved over a period of time during which the Australian people have accepted it as supreme law.[15] Wheare explained this thesis by an appropriate metaphor:

> If the constitution obtained its life in the seed bed at Westminster, and was transplanted to Australia, it has struck root in the Australian soil, and owes its life now to Australia and not to Britain.[16]

The virtue of such a theory is that the legal explanation for the authority of the Constitution conforms with the political reality.[17] However, it is not clear that the element of popular acceptance is sufficiently made out to sustain such a theory. While some Australians may believe that the Constitution has the force of law independently of the British Act, many others would not. Were the matter to be tested in the High Court, one would not have confidence as to the outcome. At best it can be said that we are in a state of flux.[18] It is suggested that the traditional view is still correct today, and therefore the desire to attain constitutional autochthony is another reason for re-enacting the Constitution.

Acceptance of the traditional view, that we do not have an autochthonous constitution, does not necessarily mean that the British Parliament can repeal or amend the Constitution Act. Section 1 of the Australia Act 1986 (UK) provides that:

> No Act of the Parliament of the United Kingdom passed after the commencement

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[11] See Sir Owen Dixon, *supra* n 4 597; J A Thompson, *supra* n 4, 1201.

[12] See J A La Nauze, *supra* n 1, ch 16. Note that the relevant s 74 of the Constitution regarding appeals to the Privy Council has now been effectively removed by s 11 of the Australia Act 1986 (UK) and The Australia Act 1986 (Cth).

[13] (1985) 59 ALJR 265.

[14] *Ibid* 276.

[15] G J Lindell, "Why is Australia's Constitution binding? The reasons in 1900 and Now, and the Effect of Independence" (1986) 16 F L Rev 29; see also the *First Report of the Constitutional Commission*, (1988), 107, 151.

[16] K C Wheare, *supra* n 6, 108.

[17] G J Lindell, *supra* n 15, 37.

[18] G J Craven, *Secession: The Ultimate States Right* (1986) 139.

> of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

This suggests that the British Parliament no longer has the power to repeal or amend the Constitution Act. However, the doctrine of British Parliamentary sovereignty,[19] by which the British Parliament cannot fetter itself, might theoretically deprive the section of having this effect. The British Parliament retains the power to repeal this section and then to repeal or amend the Constitution Act. The British Parliament need not repeal the Australia Act 1986 (UK) provision expressly; a repeal or amendment of the Constitution Act would have effect as a repeal *pro tanto* of s 1 of the Australia Act 1986 (UK).

While this seems to be correct in strict legal theory, an argument can be advanced to safeguard the effect of s 1 of the Australia Act 1986 (UK). If the United Kingdom Parliament repealed or amended the Constitution Act, it is likely that our High Court would not recognise such legislation as having legal effect in Australia, regardless of whether such legislation may be valid in the British courts. This is the same argument as was previously expressed in relation to s 4 of the Statute of Westminster.[20] The argument is bolstered by the inclusion of the words "or be deemed to extend" in the formula used in s 1. Section 1 of the Australia Act 1986 (Cth) is identical in wording. This Act is based on the head of power contained in s 51(38) of the Constitution, which is discussed below. While the enactment of s 1 is literally within this head of power, it seems doubtful that the Commonwealth can limit the power of the British Parliament by using a power contained within a British Act.

Assuming that s 1 of the Australia Act 1986 (UK) is effective in Australia, and we are not in danger of the British Parliament tinkering with or abolishing our Constitution via the Constitution Act, it has been shown that there are still many other problems associated with the fact that the Australian Constitution is contained in a British Act.

There are six methods to be considered by which the Constitution Act might be repealed and the Constitution re-enacted in an Act of the Australian Parliament. These are: an Act of the Australian Parliament authorised by a British enabling Act; a unilateral Act of the Australian Parliament; an Act passed pursuant to s 51(38) of the Constitution; by using s 128 of the Constitution; the repeal of s 8 of the Statute of Westminster; and a 'peaceful legal revolution'. For the sake of this discussion it is assumed that the Constitution itself would be re-enacted in identical terms and that the preamble and eight sections (known as covering clauses) of the Constitution Act would be reproduced in substantially the same form. The enacting clause of the Constitution Act[21] would, of course, have to be changed and it may be necessary to make other minor consequential alterations. But this discussion will not consider the many complex issues relating to changing the terms of the

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[19] S A de Smith, (H Street and R Brazier (eds) *Constitutional and Administrative Law* (1986) ch 4.

[20] C Howard, *Australian Federal Constitutional Law* (3rd ed 1985) 584.

[21] *Supra* text at nn 1-2.

Constitution or amending substantially the preamble and covering clauses of the Constitution Act.[22]

2 BRITISH ENABLING ACT

The first method by which Australia might be able to re-enact the Constitution is by Britain repealing the present Constitution Act and passing an Act enabling the Australian Parliament to enact a constitution. A model for this method is provided by the 1950 Constitution of India,[23] which is still in force today, albeit in a substantially amended form. The British influence in India began around 1600 and Britain enacted the first Constitution for the colony of India in 1853, the second in 1915, and the third in 1935. Over the period between 1915 and 1945 the Indian independence movement gained momentum and after the Second World War the Mountbatten Plan was devised. The Plan partitioned the colony of India into two states and granted them independence. This was effected by the Indian Independence Act 1947 (UK) by which the new Dominions of India and Pakistan (consisting of West Pakistan, now Pakistan, and East Pakistan, now Bangladesh) came into existence on 15 August 1947. The Indian Independence Act provided:

> s 8(1) In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall, for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion . . .
>
> s 6(1) The Legislature of each of the new Dominions shall have full power to make laws for that Dominion . . .
>
> (3) The Governor-General of each of the new Dominions shall have full power to assent in His Majesty's name to any law of the Legislature of that Dominion. . . .

Subsequently, an indirectly elected Constituent Assembly drafted and promulgated the Indian Constitution, which came into operation on 26 January 1950. The Constitution did not receive the Royal Assent. The Constitution provided for a federal republic of fifteen states, with a strong central government. Central executive power was vested in the President and legislative power was vested in a bicameral Parliament. There are two views about the validity of the Constitution consequent upon the fact that the Constitution did not receive the Royal Assent.[24] The second view will be discussed later. According to the first, the Royal Assent was not required for the Constitution by the Indian Independence Act. Therefore, the Constitution of India provides a model for the enactment of a new constitution by the indigenous parliament under the authorisation of a British Act. By this method the force of the new constitution derives from the British Act and legal continuity is preserved.

Is this first method possible for Australia today? If the reasoning above

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[22] See generally the *First Report of the Constitutional Commission*, (1988), 96-111, 145-187. The changes to the preamble, enacting clause and covering clauses recommended by the Commission are mentioned *infra* text at nn 42-45.

[23] See generally K C Wheare, supra n 6, 94-103; A P Blaustein, H Hecker and S N Jain, "India", in A P Blaustein and G H Flanz (eds), *Constitutions of the Countries of the World* (June 1986) Vol VII; A Gledhill, *The Republic of India: Development of its Laws and Constitution* (2nd ed 1964); V D Kulshreshtha, *Landmarks in Indian Legal History and Constitutional Law* (4th ed 1977); M V Pylee, *India's Constitution* (3rd ed 1979).

[24] K C Wheare, *supra* n 6, 95 ff.

is correct, then s 1 of the Australia Act 1986 (UK) has had the effect that Britain can no longer legislate for Australia. Therefore, this method is no longer available.

3 UNILATERAL ACT OF THE AUSTRALIAN PARLIAMENT

Could the Australian Parliament unilaterally repeal the Constitution Act and re-enact the Constitution in an Act of the Australian Parliament? This was the course adopted by South Africa in enacting the Constitution of 1961[25] (which has since been superseded by the Constitution of 1983).

The predecessor to the 1961 Constitution was the Constitution of the Union of South Africa which was enacted by Britain in the South Africa Act 1909 (UK) and came into operation in 1910. The Union of South Africa was brought into existence by this Act and was comprised of four former British colonies. Its Constitution was drafted by the South African 'founding fathers' and had been accepted by the legislatures of three of the colonies and by the electors of the fourth in a plebiscite. The British Parliament enacted this Constitution in virtually unchanged form. The 1910 Constitution provided that it could be amended, subject to certain exceptions which will be discussed below, by an ordinary Act of the Parliament of the Union of South Africa.[26] The legal background to the 1961 Constitution was the passing of the Statute of Westminster 1931 (UK) and the Status of the Union Act 1934 (South Africa) which had the combined effect of ending the ability of the British Parliament to pass laws for South Africa.[27] The Status of the Union Act had incorporated the relevant portions of the Statute of Westminster into the law of South Africa (a parallel to the Statute of Westminster Adoption Act 1942 (Cth)) and had also provided in s 2:

> The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union.

The political background to the 1961 Constitution was the application of the policy of apartheid by the National Party since 1948 and its desire to realise its vision of a Republic of South Africa.

In 1961 the National Party Government attained the approval of a majority of the White electorate voting in a plebiscite for a Republic, and then secured the passage of the Republic of South Africa Constitution Act 1961 (South Africa). This Act repealed virtually all of the South Africa Act 1909 (UK) and enacted a new Constitution. It was enacted by the Parliament of the Union of South Africa by passage through (by a simple majority) both Houses and received the Royal Assent from the Governor-General. The Preamble and enacting clause read:

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[25] See generally E Kahn, "The New Constitution" (1961) 78 SALJ 244; E Kahn and H Rudolph, "South Africa", in A P Blaustein and G H Flanz (eds), *Constitutions of the Countries of the World* (1986) Vol XIV.

[26] Section 152.

[27] *Harris v Minister of the Interior* [1952] 2 SALR 428, 467-468 per Centlivres CJ. To an extent the role of the Court, in addition to the legislature, can be seen as important in the success of this device.

> We, who are here in Parliament assembled, DECLARE that whereas we . . .
>
> ARE CHARGED WITH THE TASK of founding the Republic of South Africa and giving it a constitution best suited to the traditions and history of our land:
>
> BE IT THEREFORE ENACTED by the Queens's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows:-. . . .

The Constitution came into operation on 31 May 1961. The 1961 Constitution had the effect of creating a Republic, but otherwise there was only a minimal change in the constitutional structure.

Subject to the qualification discussed below, the 1961 Constitution of South Africa was enacted while preserving legal continuity.[28] The Parliament of the Union of South Africa had the power to repeal the South Africa Act 1909 (UK) and to enact a new Constitution for South Africa as it enjoyed constitutional sovereignty by virtue of the South Africa Act, the Statute of Westminster and the Status of Union Act.

There is a qualification, however, to the legality of the method adopted by South Africa to replace its Constitution. A complication arose in relation to the two entrenched sections of the 1910 Constitution. While the normal amendment procedure was by ordinary Act of the Union Parliament, two sections, s 137 protecting the equality of the official languages and s 152 relating to amendment of the Constitution, required the approval of a two-thirds majority of the total number of members of both Houses sitting together in a joint-sitting for their amendment. These two sections were repealed by the Constitution Act of 1961 by a simple majority. They were re-enacted, also by a simple majority, in a very similar form in ss 108 and 118 respectively of the 1961 Constitution, which were similarly entrenched as requiring a two-thirds majority. It is arguable that the entrenched sections of the 1910 Constitution were not properly repealed and therefore continued to have force.[29] Also, doubts were raised whether the entrenchment of the sections in the 1961 Constitution was valid.[30]

It seems that it is not open to the Australian Parliament to follow the South African example and unilaterally repeal the Constitution Act and re-enact the Constitution. The Commonwealth Parliament is not sovereign in the same sense as is the British Parliament and was the Union of South Africa Parliament. The Australian Parliament does not have unlimited legislative power on any subject. As a consequence of federation, the powers of the Parliament are limited by the Constitution and no head of power enables the Commonwealth alone to repeal the Constitution Act and to re-enact the Constitution. Furthermore, even if the Commonwealth did have a head of power to rely on, its parliamentary competence is limited by s 8 of the Statute of Westminster which prevents the Commonwealth passing a law to repeal the Constitution Act. This section is best discussed later. The Union of South Africa Parliament was under no such disability.

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[28] E Kahn, *supra* n 25, 257.

[29] *Ibid* 274.

[30] E Kahn and H Rudolph, *supra* n 25, 13. See *infra* text at nn 79-80, regarding the ability of Australia to create binding manner and form requirements in a re-enacted Constitution.

4 SECTION 51(38) OF THE CONSTITUTION

A third method might be to use the power contained in the obscure s 51(38) of the Constitution[31] to repeal the Constitution Act and re-enact the Constitution in an Australian statute. The section provides:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-
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> (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

In effect, s 51(38) enables the Commonwealth Parliament, if the States agree, to 'stand in the shoes' of the United Kingdom Parliament of 1901. The section is most unusual and it is believed that it has no parallel in other constitutions. The power seems to have been intended as a 'catch-all' provision to cover any other powers of the Federal Council not expressly conferred on the Commonwealth.[32] It lay dormant until recently when it was discovered that it has potentially a very powerful operation. Howard has suggested that this section could be used to repeal the Constitution Act and to re-enact it in an Australian statute.[33] Taking a literal construction of this head of power, it seems to work. The repeal of the Constitution Act and re-enactment of the Constitution were things that only the United Kingdom Parliament could do in 1901; therefore, the Commonwealth and States in conjunction are empowered to do this now. Whether Britain regularised its own position by repealing the Constitution Act would be immaterial for Australia.

The main argument against the use of s 51(38) to repeal the Constitution Act is the doctrine of repugnancy. The Commonwealth of Australia Constitution Act 1900 (UK) is an Act of 'paramount force', a British Act extending to a colony. The doctrine of repugnancy was expressed in s 2 of the Colonial Laws Validity Act 1865 (UK) as follows:

> Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony . . . shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

It was accepted that the Commonwealth was bound by the doctrine of repugnancy after federation.[34] Therefore, prior to 1939, if the Commonwealth had passed an Act to repeal the Constitution Act pursuant to s 51(38), it would have been void for repugnancy. There is an argument than an Act passed in accordance with s 51(38) would not have been repugnant to the Constitution Act, but *consistent* with it, as s 51(38) is contained in the Constitution Act.[35] However, this reasoning is not convincing as an Act to repeal the Constitution Act must necessarily be repugnant to it. In 1939,

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[31] See generally C Howard, "Constitutional Amendment: Lessons from Past Experience" (1973) 45 Australian Quarterly 45; A Bennett, "Can the Constitution be Amended Without Referendum?" (1982) 56 ALJ 358; R D Lumb, "Section 51, pl. (xxxviii) of the Commonwealth Constitution" (1981) 55 ALJ 328.

[32] See J Quick and R Garran, *supra* n 10, 650-651; R D Lumb, *The Constitution of the Commonwealth of Australia Annotated* (4th ed 1986) 196.

[33] C Howard, "Constitutional Amendment: Lessons from Past Experience" (1973) 45 Australian Quarterly 45.

[34] J Quick and R Garran, supra n 10, 347-352, 650-651; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 209-210 *per* Stephen J.

[35] G J Craven, *supra* n 18, 183.

the Statute of Westminster 1931 (UK) had effect in Australia[36] and liberated the Commonwealth, a Dominion within the meaning of the Act, from the doctrine of repugnancy by providing in s 2 that:

> (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
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> (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing of future Act of the Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the poweers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

However, the Statute of Westminster also included a saving provision. Section 8 provides:

> Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia . . . otherwise than in accordance with the law existing before the commencement of this Act.

If a broad and, it is submitted, correct construction of s 8 is taken, it means that the Commonwealth Parliament cannot repeal the Constitution Act in accordance with s 51(38) of the Constitution. Prior to 1939 the Commonwealth could not use s 51(38) because of the doctrine of repugnancy; s 8 preserves this status quo. Campbell has advocated a narrower construction of s 8, by which it only preserved the normal manner for constitutional amendment, namely s 128 of the Constitution.[37] On this basis, s 51(38) could now be used to repeal the Constitution Act and there would not be a problem of repugnancy. However, the inclusion of the words "Constitution Act" suggests that s 8 of the Statute of Westminster has a broader meaning and the natural words of s 8 favour the broader construction. Section 8 of the Statute of Westminster says that the Constitution Act can only be altered "in accordance with the law existing before the commencement of this Act". The law existing prior to the commencement of the Statute of Westminster included the Colonial Laws Validity Act. It is submitted that section 8 preserves the doctrine of repugnancy for the Constitution Act and therefore s 51(38) cannot be used to repeal the Constitution Act.

Apart from the problem posed by s 8 of the Statute of Westminster, some other comments can be made about the validity of using s 51(38) to repeal the Constitution Act. In favour of it being used in this way are the arguments that the Constitution should be given a liberal, developmental interpretation and that the requirement of the agreement of all the States provides a sufficient safeguard. Two arguments against the use of s 51(38) which have been raised in the context of using it to amend the Constitution itself are not applicable to the repeal of the Constitution Act. One has been that amendment of the Constitution was not something that 'only' the British Parliament could

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[36] Statute of Westminster Adoption Act 1942 (Cth).

[37] E Campbell, "An Australian-made Constitution for the Commonwealth of Australia" in *Report of Standing Committee D to the Executive Committee of the Australian Constitutional Convention* (1974), 95, 100; see also the *First Report of the Constitutional Commission*, (1988), 185.

do in 1901, as the Constitution could also be amended by referenda pursuant to s 128. While this argument is correct in relation to using s 51(38) to amend the Constitution itself, it does not apply to the repeal of the Constitution Act, as this is not something which could have been done by the s 128 method.[38] The second argument against the use of s 51(38) has been that the proviso "subject to this Constitution" makes s 51(38) subordinate to s 128, which latter provision therefore provides the only means of amendment. While this objection is valid in relation to using s 51(38) to amend the Constitution itself, it does not apply to repeal of the Constitution Act.

5 SECTION 128 OF THE CONSTITUTION

A fourth method by which Australia might be able to repeal the Constitution Act and re-enact the Constitution in an Act of the Australian Parliament is by using the amendment procedure laid down in s 128 of the Constitution.[39] Section 128 provides that the Constitution may be amended by a referendum passed by a majority of voters in a majority of States. It has been suggested that this procedure could be used to amend the preamble, enacting clause and covering clauses of the Constitution Act as well as the sections of the Constitution itself.[40] If this is correct then s 128 may be able to be used to repeal the Constitution Act and re-enact the Constitution in an Australian statute. This argument would seem to be easily rebutted by noting that s 128 is a power to amend "this Constitution" not "this Constitution Act" and therefore cannot be used to amend or repeal the preamble, enacting clause or covering clauses.[41] However, the Constitutional Commission, in its First Report of April 1988,[42] was of the opinion that the words "this Constitution" should be read very broadly and that the power could be used in this way.

The terms of reference of the Commission required it, among other things, to report on the revision of the Constitution to reflect adequately Australia's status as an independent nation. The Commission considered whether the preamble, enacting clause and covering clauses should be amended or repealed. In brief, it recommended that the preamble not be altered, that the enacting clause be omitted, that in covering clause 2 the words "the United Kingdom" be replaced with the word "Australia", that in covering clause 5 the words after "laws of any State" be omitted, and that covering clauses 7 and 8 be repealed. The Commission was of the view that s 128 of the Constitution could safely and properly be used to effect the changes it recommended.[43] It said that an amendment to or repeal of the entrenched provisions which relate to the organisation and powers of government in a country is, in its ordinary meaning, concerned with "the Constitution".[44] The Commission also said that s 128 has to be interpreted in the light of the passage of the Australia

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[38] *Infra* text at nn 39-53.

[39] See generally E Campbell, *supra* n 37; J A Thomson, "Altering the Constitution: Some Aspects of Section 128" (1983) 13 F L Rev 323.

[40] G Winterton, *Monarchy to Republic: Australian republican government* (1986) 124-125; R D Lumb, "Fundamental Law and the Process of Constitutional Change in Australia" (1978) 9 F L Rev 148; *First Report of the Constitutional Commission*, (1988).

[41] See G J Craven, *supra* n 18, 160-170; H P Lee, "The Australia Act 1986 — Some Legal Conundrums" (1988) 14 Mon U L Rev 298, 312.

[42] *First Report of the Constitutional Commission*, (1988).

[43] *Ibid* 181-187.

[44] *Ibid* 186.

Acts, which have terminated the power of the United Kingdom to amend or repeal the Constitution Act.[45] Unless s 128 can be used to alter the Constitution Act, the Commission said, the provisions of that Act would now be immutable.

It is submitted, with respect, that the power conferred by s 128 does not extend to alterations to the Constitution Act. First, there is the clear literal limitation mentioned above. Secondly, it is not clear that the provisions of the Constitution Act are immutable unless s 128 can be used to alter them, and an alternative method of alteration of the Act is discussed in the next section of this article. Another problem is posed by s 8 of the Statute of Westminster: a Commonwealth Act to repeal the Constitution Act passed pursuant to s 128 would be void for repugnancy. The issue of the effect of s 8 of the Statute of Westminster was discussed above in relation to s 51(38) of the Constitution. The Constitutional Commission adopted[46] a similar view to that of Campbell,[47] that s 8 does no more than preserve the existing methods of changing the Constitution and the Constitution Act, and does not preserve the previous status quo of the doctrine of repugnancy in relation to these documents. For the reasons canvassed above, it is submitted that s 8 preserves the effect of the Colonial Laws Validity Act for the Constitution and Constitution Act.[48] The Constitutional Commission went further and said:

> Whatever may have been the position before 1986, section 1 of the *Australia Acts* has, in our view, the effect of doing away with the concept of the Constitution having an inferior status to any other law. It is anachronistic to base the fundamental nature of the Constitution on the *Colonial Laws Validity Act 1865* (Imp).

While this argument may be practically convenient and symbolically attractive, it is not clear that the Australia Acts have altered the source of the authority of our Constitution.[49] Indeed, the United Kingdom version of the Australia Acts, which arguably was necessary for the validity of the scheme, or at least the validity of some sections of the Acts,[50] relies on the paramountcy of United Kingdom legislation for its effectiveness. Even if the Australia Acts have effectively terminated the power of the United Kingdom to legislate for Australia in the future, it does not necessarily follow that the laws of the United Kingdom such as s 8 of the Statute of Westminster cease to hold their paramount status. A further argument against using s 128 to repeal the Constitution Act is that s 128 presupposes the continued existence of s 9 of the Constitution Act.[51] The Constitutional Commission did not have to consider this issue as its discussion was confined to amendment and repeal of certain specific clauses rather than repeal of the entire Act.

A different and ingenious suggestion was put forward by Campbell.[52] She suggested that a referendum might be held under s 128 to alter the Constitution to give the Commonwealth Parliament a new head of power to repeal the

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45 *Supra* text at nn 41-42.
46 *Supra* n 42, 185.
47 *Supra* text at n 37.
48 *Supra* text at nn 37-38.
49 See pp 135-136 above.
50 *Eg* s 1, *Supra* text at nn 18-19; eg s 15, in respect of which see L Zines, *The High Court and the Constitution* (2nd ed 1987) 271-273.
51 See E Campbell, *supra* n 37, 98.
52 *Ibid* 97. See also H P Lee, *supra* n 41, 314.

Constitution Act and re-enact an identical Constitution.[53] The Commonwealth could then do this by an ordinary Act of Parliament. The problem with this suggestion is again s 8 of the Statute of Westminster: the Commonwealth Act would be void for repugnancy.

6 REPEAL OF SECTION 8 OF THE STATUTE OF WESTMINSTER

It has been argued above that the broader interpretation of s 8 of the Statute of Westminster is correct, and that therefore it has the effect of preserving the doctrine of repugnancy for the Constitution Act. A fifth method by which Australia might be able to repeal the Constitution Act and re-enact the Constitution is then by repeal of s 8 and re-enactment of the Constitution in an Australian statute by one of the two preceding methods. It has been suggested[54] that the logical result of the High Court's reasoning in *Kirmani v Captain Cook Cruises Pty Ltd*[55] is that s 2(2) of the Statute of Westminster gives the Commonwealth a new head of power which would include the power to repeal s 8. This unlikely[56] possibility was put to rest by the recent Australia Act 1986 (UK) which provides in s 15(1):

> This Act or the Statute of Westminster 1931, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States. . . .

Using this mechanism, s 8 of the Statute of Westminster can now be repealed.[57] This would mean that the doctrine of repugnancy no longer applied to the Constitution Act and the Commonwealth could repeal the Constitution Act by either of the two preceding methods.[58] Thus, the Australia Acts have provided a new, perhaps unexpected, route to repealing the Constitution Act. The far-ranging consequences of s 15 of the Australia Acts might be justified by noting the safeguard provided by the requirement of the agreement of all the States. A new constitution could then be enacted by the Commonwealth Parliament on the basis of one of the two preceding methods and legal continuity would be maintained. It is queried whether the identical s 15(1) of the Australia Act 1986 (Cth) is equally effective: the head of power on which this Act is based is s 51(38) of the Constitution; s 51(38) is subject to the doctrine of repugnancy because of s 8 of the Statute of Westminster; and s 51(38) cannot be used indirectly to repeal the repugnancy provision which limits it.

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[53] The argument was not confined to the re-enactment of an identical Constitution.

[54] G J Craven, "The Kirmani Case — Could the Commonwealth Parliament amend the Constitution without a referendum?" (1986) 11 Syd L Rev 64.

[55] (1985) 59 ALJR 265.

[56] G J Craven, *supra* n 54, 72.

[57] This suggestion has been put forward by a number of academics at the University of Melbourne and by G Winterton, "An Australian Republic" (1986) 16 Melb U L Rev 467.

[58] A possible alternative would be for the Commonwealth to re-enact the Constitution on the basis of s 2(2) of the Statute of Westminster.

7 'PEACEFUL LEGAL REVOLUTION'

Finally, a sixth method by which the Constitution might be re-enacted by the Australian Parliament, or indeed by any indigenous body, including a Constituent Assembly or the Australian people as a whole, is by what might be called a 'peaceful legal revolution'. This occurs when a new constitution is brought into existence by peaceful means, in circumstances which are not legal according to the preceding constitutional order, and the new constitution is effective in establishing a new constitutional order. There is thus a revolution in the legal order. This argument is based on an analogy with a successful violent revolution and assumes that a successful violent revolution can ultimately be effective in establishing a new constitutional order. The clearest example is the Constitution of the United States of America of 1788, which was clearly invalid according to British law, but is unquestionably constitutionally authoritative.[59] It is suggested that it is possible to achieve the same result as a successful violent revolution, namely, the establishment of a new constitutional order, without the spilling of blood. The Constitutions of Ireland of 1937 and India of 1950 provide useful case studies to support this theory.

The background to the Irish Constitution of 1937 is as follows. Ireland had become part of the United Kingdom in 1800 and during the ensuing century the independence movement had grown. Partition of the whole of Ireland and independence for southern Ireland were to be attained by the Home Rule Act 1914 (UK). The effect of this Act was delayed, however, because of the war. Finally, the independence movement unilaterally convened the Dail Eireann (Assembly of Ireland) which on 21 January 1919 proclaimed the Irish Free State and promulgated a constitution. Certainly the new Constitution was not legal according to the laws of Britain. The question of whether it was nevertheless constitutionally authoritative did not need to be decided because of the events of subsequent years.

In 1920 Britain partitioned Ireland[60] and in 1922 the Dail Eireann agreed to the Anglo-Irish Treaty. The Treaty was passed into law by both Britain and the Dail.[61] The Treaty provided that the Dail Eireann was to act as a Constituent Assembly and draft a new constitution. The Dail drafted a new constitution and then, outside of the terms of the Treaty, enacted it in the Irish Free State (Saorstat Eireann) Act 1922 on 25 October 1922.

> The preamble and enacting clause read as follows:
>
> Dail Eireann sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the People and in confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of The Irish Free State (otherwise called Saorstat Eireann) and in the exercise of undoubted right, decrees and enacts as follows:. . . .

Meanwhile, the view of the British Parliament was that it alone had the power to enact a Constitution for the Irish Free State. It therefore passed the Irish Free State Constitution Act 1922 (UK) which came into operation on 6 December 1922. The Constitution drafted by the Constituent Assembly was enacted in a schedule to the Act. Consequently there has always been

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[59] SA de Smith, *supra* n 19, 77.
[60] Government of Ireland Act 1920 (UK).
[61] Irish Free State (Agreement) Act 1922 (UK).

dispute as to the real legal basis of the Irish Constitution of 1922.[62] In *The State (Ryan) v Lennon*[63] the Supreme Court of the Irish Free State seemed to take the view that the legal basis for the authority of the Constitution was its enactment by the Dail Eireann sitting as a Constituent Assembly. However, the Privy Council in *Moore v The Attorney-General for the Irish Free State*[64] took the view that the Constituent Assembly had no power to enact the Constitution and that the Irish Constitution of 1922 derived its validity from the Act of the British Parliament.

After continued dissatisfaction with the Anglo-Irish Treaty, the 1922 Constitution, and its method of enactment, in 1937 a new Constitution was drafted, but deliberately not enacted by the Dail. Rather, it was put to the people to be voted on, and came into operation on 29 December 1937 when passed by a majority of voters. The preamble and enacting clause read:

> In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Eire. . . Do hereby adopt, enact, and give to ourselves, this Constitution.

The Constitution provided for a popularly elected President (Uachtaran) to replace the role played by the Governor-General. Real power was vested in the Prime Minister (Taoiseach) who had the obligation of forming the government. A bicameral Parliament was created. The purpose of putting the Constitution to a vote of the people, and having the people as a whole enact the Constitution, was to avoid any legal relationship with Britain. If the Dail had enacted the Constitution, and if it owed its authority to Britain, the source of the power to enact the Constitution may still have been traceable back to Westminster. By the method adopted, there was a break in legal continuity as the 1937 Constitution was not authorised by the preceding constitutional order. Nevertheless, the 1937 Constitution is generally considered to be constitutionally authoritative.[65]

The Indian Constitution of 1950 has already been discussed above. It was anticipated that there is a second interpretation of the validity of this Constitution which relates to the fact that the Constitution did not receive the Royal Assent. This is that the Indian Independence Act 1947 (UK), which authorised the Constituent Assembly to draft the Constitution, did require that the Royal Assent be received for the Constitution. While the question has not been raised in the Indian courts, a decision of the Federal Court of Pakistan[66] is persuasive authority for the view that the Governor-General's assent was required for the Constitution.[67] As it was not received, the promulgation of the Constitution by the Constituent Assembly was not in accordance with the preceding constitutional order and there was a break in legal continuity. If the Constitution of 1950 did not derive its validity from the British Act, the argument is that the source of its authority is the

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[62] See K C Wheare, *supra* n 6, 90ff.

[63] [1935] IR 170.

[64] [1935] AC 484, 497.

[65] The British government accepted the 1937 Constitution without protest in a statement on 24 December 1937, see V T H Delaney, "The Constitution of Ireland: Its Origins and Development" (1957-58) 12 Univ Toronto L Jo 1, 7.

[66] *Federation of Pakistan v Tamizuddin Khan* PLR 1956 WP 306; see K C Wheare *supra* n 6, 101ff.

[67] K C Wheare, *supra* n 6, 101ff.

sovereignty of the people. The preamble and enacting clause of the Constitution support this view:

> WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN, DEMOCRATIC[68] REPUBLIC . . .
>
> IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

This Constitution was, at least nominally, enacted by the People through the Constituent Assembly. But there is an issue whether the indirectly elected Constituent Assembly was really representative of the People.[69] The Constitution was not submitted to the people through a referendum. It has been argued that the popular will was shown to have been in support of the Constitution by the results of the First General Elections of 1951-1952.[70] In that election the Opposition, which had declared that it would scrap the Constitution, was resoundingly defeated. Despite the lack of direct popular approval, the 1950 Constitution is constitutionally authoritative.

The Constitutions of Ireland of 1937 and of India of 1950 (if the second interpretation is accepted) provide strong models for a peaceful legal revolution. They suggest that a new constitution, which is not legal according to the preceding constitutional order, can be brought into existence by peaceful means, and be effective in establishing a new constitutional order. The paradox is that a peaceful legal revolution necessarily involves an action which is not legal, in the narrow sense of not according to the previous constitutional order, but it is capable of establishing a new constitutional order which is constitutionally authoritative, or which has the force of law, using 'law' in a broad sense.

But why does the peaceful revolution work? On what basis does the new constitution have constitutional authority or the force of law? Two reasons have usually been advanced. One reason is that the new constitution is based on the will of the people, and the people have inalienable ultimate sovereignty.[71] This reason has been given for the binding force of the Constitution of the United States, the preamble of which reads:

> WE THE PEOPLE of the United States . . . do ordain and establish this Constitution for the United States of America.

The Irish Constitution of 1937 was enacted by the people and clearly supports this reasoning. The Indian Constitution of 1950 at least invokes the name of the people, although it has been noted that it did not receive the approval of the majority of the voters, and the Constituent Assembly may not have been representative. The second reason why peaceful legal revolutions are successful is their acceptance over a period of time as establishing a new constitutional order. In the analogous situation of a successful violent revolution, no one would question today that all the laws enacted by successive governments of the United States are valid, nor would they suggest that a Stuart is still the rightful King of England.[72] As de Smith says, a "successful

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[68] This has since been amended to read "SOVEREIGN SOCIALIST SECULAR DEMOCRATIC".

[69] M V Pylee, *supra* n 23, 52-53.

[70] *Ibid* 53.

[71] S A de Smith, *supra* n 19, 77.

[72] *Ibid* 77-79.

revolution sooner or later begets its own legality."[73] While this reasoning is not terribly satisfying in terms of legal theory, it is at least realistic. The problem with this reasoning is that it does not enable one to decide at the time of a purported peaceful legal revolution whether it is successful. It is suggested that a third reason can be advanced for why the peaceful legal revolutions in Ireland in 1937 and India in 1950 worked. Where a state has a constitution which has been imposed by a foreign legislature the state has the constitutional authority to enact an autochthonous constitution when this is the purpose of the constitutional change. The basis for this power is the status of a constitution as fundamental law. Because a constitution is so intimately connected with the social, political, cultural and historical life of a state, a constitutional change designed to achieve autochthony has inherent validity. It is suggested that the new constitution will immediately have the force of law where constitutional autochthony is the purpose of constitutional change, and this is combined with an expression of popular sovereignty.

This leaves the vexed question of what judges should do in the situation of a peaceful legal revolution, which would be a potential problem for Australia following this method. Judges taking office under the old constitutional order will be constrained to hold the peaceful legal revolution illegal.[74] A solution provided by the constitutional change in Ireland in 1937 is to have the judges reappointed to office under the new constitution and have it a term of accepting office that they swear an oath of allegiance to the new constitution.[75] Whether judges will agree to such reappointment is very much a practical and political question.

It is suggested on the basis of the above reasoning that Australia could re-enact the Constitution by means of a peaceful legal revolution. The following scenario might be followed: the Australian Parliament, probably after having secured popular approval,[76] declares that the Constitution Act no longer has any legal force in Australia, and simply re-enacts the identical Constitution document as part of an Act of the Australian Parliament. The power to do so would be said to reside in the Australian People, and the Australian Parliament would be enacting the Constitution Act on their behalf. A variant on this would be for the Australian Parliament to follow the same course but call itself a Constituent Assembly to further distance itself from the preceding constitutional order. Alternatively the Irish example of 1937 could be followed whereby the People as a whole re-enact the Constitution. A slightly less dramatic method would be to follow the example of India, whereby the Australian Parliament would re-enact the Constitution, provide for it

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[73] *Ibid* 79.

[74] *Eg* in the analogous case of the abrogation of the Constitution of Fiji in 1987 by a military coup, initially the Governor-General refused to resign and the majority of the judges refused to recognise the coup and resigned *en masse*. The Chief Justice, Sir Timoci Tuivaga decribed Rabuka's proceedings as an unconstitutional and illegal rebellion, punishable as treason. Subsequently, however, the Governor-General resigned, the Queen accepted his resignation on the basis of his advice that a Republic was in being (on 16 October 1987) and the Chief Justice accepted a decree establishing a new court system (and accepted office as Chief Justice on 18 January 1988).

[75] See V T H Delany, *supra* n 65, 7. A similar course was adopted by Fiji, see n 74.

[76] See *infra* text at nn 79-80 in relation to the issue of in what units the people give their approval.

to come into effect on a certain day and not seek Royal Assent.[77] The effect of any of these methods would be to break legal continuity with Britain and establish a new constitutional order.

8 EVALUATION

To recapitulate, the six methods by which the Australian Parliament might be able to repeal the Constitution Act and re-enact the Constitution are: an Australian Act authorised by a British enabling Act; a unilateral Act of Parliament; using s 51(38) of the Constitution; using s 128 of the Constitution; repeal of s 8 of the Statute of Westminster combined with either of the previous two methods; and a peaceful legal revolution. The distinction to be drawn is between the first five methods, which posit legal methods of re-enacting the Constitution, whereby legal continuity would be preserved, and the sixth method which is not legal according to the present constitutional order and which would cause a gap in legal continuity. Of the first five legal methods it was concluded that the first four methods would not be possible. It was concluded that the fifth method would be legally possible and that the sixth method would be constitutionally effective. Whether the United Kingdom subsequently regularised its own position by repealing the Constitution Act on their statute books need not concern us. It now remains to consider which of these last two methods is more desirable.

Both the fifth and sixth methods would achieve the result of the Australian Constitution being contained in an Australian statute rather than a British statute. But would the new constitution be truly autochthonous in each case? Campbell has taken the strict view that the only way in which a truly autochthonous constitution can be brought into being is by a break in legal continuity.[78] Without a break in legal continuity, the ultimate source of the power to enact the constitution would still be traceable back to Britain. To be fully 'home grown' in a legal sense, it must not be necessary to look beyond the shores of Australia to explain the binding force of the new constitution. Indeed, Campbell would require that there must be a general acceptance that the new order is based on a violation of the old. (This should be kept in mind if the peaceful legal revolution were to be effected by simply failing to attain the Royal Assent.) On this definition of autochthony the Constitutions of South Africa and India (if the first interpretation is adopted) were not truly autochthonous, and only the sixth and not the fifth method would satisy the aim of achieving an autochthonous constitution for Australia.

A less strict view of autochthony would be to say that so long as the enactment of the constitution took place in Australia, it would be legally 'home grown'. Even if legal continuity were preserved, many of the attributes of the strict view of autochthony would still be present. The document would appear on its face to be an expression of the national will, the enacting body would reside in Australia and our most basic law would be an Australian Act. It might be argued that autochthony is really a matter of degree. It is not a legal term of art, but rather a way of describing the attributes of a constitution. Therefore, a constitution enacted by the fifth method could be described as autochthonous. It is thought that the better view is the strict view of Campbell. If constitutional autochthony is all important, therefore,

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[77] K C Wheare, *supra* n 6, 111.
[78] E Campbell, *supra* n 37.

only the sixth method would do. The case of South Africa suggests that the government might decide that near enough is good enough, even if true autochthony is not achieved.

Apart from the issue of true constitutional autochthony, several other factors should be considered in deciding which method is the most appropriate. One factor is the advantage of maintaining legal continuity. Legal continuity is a valuable force of cohesion in society.[79] If governments are seen to break the law this may lead to a decline in respect for the rule of law. This may have been a motivating factor in the method adopted by South Africa to enact its Constitution of 1961. Another factor to be considered is the constitutional propriety of each of the methods: whether they are right or proper according to general principles of constitutional law. In the case of the South African Constitution of 1961 it is noteworthy that popular approval was received even though this was not legally required. The fifth method, the repeal of s 8 of the Statute of Westminster by using s 15 of the Australia Acts, combined with an exercise of the s 51(38) power, might be seen as using a 'loophole' to avoid getting popular consent and therefore improper. In relation to the sixth method, a peaceful legal revolution, it is suggested that popular approval should be sought and that the idea of the Australian Parliament simply enacting the Constitution and not obtaining Royal Assent would not be proper if it did not include some expression of popular approval. Furthermore, it would have to be considered whether popular approval need also be received from a majority of voters in each State as it is arguable that it is in units of States that the popular will is expressed in Australia as a federation.

What other assistance can be drawn from the constitutional experiences of India, South Africa and Ireland? In general, it seems that radical constitutional change is most appropriate and likely to occur when driven by concurrent social and political forces. In India, the context of the constitutional change was the attainment of independence and republicanism; in South Africa, it was racial conflict and the desire to achieve republicanism; and in Ireland it was the continued conflict with Britain and Northern Ireland. In each case the desire to achieve constitutional autochthony or to enact the constitution locally was not a discrete development but part of a more general movement.

Taking into account these various factors, namely, the desire to achieve constitutional autochthony, the advantage of maintaining legal continuity, and constitutional propriety, it is suggested that the sixth method, a peaceful legal revolution, is the most desirable way for Australia to re-enact the Constitution. This method should incorporate popular approval, preferably in all the States so as to be cautious. The sixth method is preferable over the fifth as the achievement of constitutional autochthony is an important reason for the re-enactment. The sixth method has added appeal in that it makes an overt, clear break with Britain, which would be of considerable symbolic value. This method is honest in that it makes public what is sought to be and what actually would be achieved by the reform. While the social and political impetus for such reform is not as great as in the cases of India, South Africa and Ireland, this should not preclude this development.

One consideration which might be thought to work against re-enacting

[79] C Howard, *supra* n 33, 42.

the Constitution under either method is the need to preserve the existing manner and form requirements. At present the Commonwealth Parliament cannot unilaterally amend the Constitution but must comply with the proper manner and form of amendment prescribed by s 128 of the Constitution. If the Constitution were re-enacted by the Commonwealth Parliament, then there may not be this safeguard. It is suggested that this fear is misplaced as the Commonwealth Parliament would still be bound to comply with the manner and form requirements of the Constitution. Cases such as *Bribery Commissioner v Ranasinghe*[80] stand for the proposition that such requirements are binding on future Parliaments.

The issue of Australia becoming a Republic has not been considered in this paper as it is possible to re-enact the Australian Constitution without necessarily becoming a Republic. By virtue of the Royal Style and Titles Act 1973 (Cth), the Queen is our head of state as Queen of *Australia*, not Queen of England, and this can continue without alteration under an Australian enacted constitution. In the cases of India, South Africa and the Ireland, the re-enactment of the constitution locally was accompanied by republicanism, but this need not be the case.

In this paper it has been argued that there are serious problems associated with the fact that the Australian Constitution is contained in an Act of the British Parliament and that it is possible for the Constitution to be re-enacted by the Australian Parliament. The constitutional histories of other countries provide precedents for the re-enactment of our Constitution by the Australian Parliament; indeed many other countries which previously had British-enacted constitutions have since re-enacted them locally.[81] Australia's history has been a process of acquiring legal independence incrementally. This step is the logical, indeed inevitable, conclusion. Such a step is appropriate today given Australia's maturity as an independent nation. It is curious and surprising that this issue received so little attention in the year of our bicentenary and those which have followed.

[80] [1965] AC 172, 197-198; see also *Harris v Minister of the Interior* [1952] 2 SALR 428 and *Clayton v Heffron* (1960) 105 CLR 214.

[81] *Supra* n 3.