Deakin: Popular Sovereignty and the true foundation of the Australian Constitution*

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1. Alfred Deakin remembered

A recent study in the United States revealed that 59% of the public could name the Three Stooges, however, only 17% could name three Justices of the Supreme Court of that country.[1] In Australia, the percentage would probably be much smaller, at least on the latter statistic. It is interesting, as we approach the centenary of the Australian Constitution, to question how many of our citizens could nominate three of the Founders of the Constitution. How many would even remember Alfred Deakin? How many would recall his constructive and progressive contribution to the birth of our Commonwealth?

It is appropriate, on an occasion such as this, to recall to mind that extraordinary man for whom this University and this Oration are named. By common consent he was the most constructive, conciliatory and successful of the Founders of the Australian nation.

Born in 1856 at Collingwood, Melbourne, Deakin's family had made their way to Victoria, like so many of the time, in search of gold.[2] He was an indifferent student, who strayed somewhat reluctantly into the study of law. His passions were poetry, spiritualism and theosophy. He was later to add

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1 Biskupik, J. 'Has the Court Lost its Appeal?', *Washington Post,* 12 October 1995 at p. A23 citing Smith, S.B. *The Constitution of Jurisprudence* (unpublished paper).

2 See Nairn, B. & Serle, G. (eds), 1996, *Australian Dictionary of Biography,* Vol 8, Melbourne University Press, Carlton, 248.

to these two further passions, not inconsistent at the time: for Australian federation and Empire cooperation.[3]

He moved through journalism and colonial parliamentary politics to an active participation in the federal movement which quickly took over from his earlier political obsession, which was with planned irrigation. His enthusiasm for federation was fuelled by the imperial apathy which he saw at the Colonial Conference in London in 1887. He was the youngest delegate to the National Australasian Convention of 1891 in Sydney. He polled third in the popular election of ten Victorian delegates to the Australasian Federal Convention of 1897-98. He was one of the small band sent to London in 1900 to 'sell' the Commonwealth Bill after it had been accepted in the Australian referendum campaigns of 1898-99. The compromise struck with the British Government over what became s. 74 of the Constitution (concerning the effective finality of the High Court of Australia in *inter se* constitutional questions) represented a triumph for his negotiating skills.

Upon his return to Australia, Deakin effectively determined the choice of Barton as the first Prime Minister of Australia by declining to serve under Sir William Lyne. He became the first Federal Attorney-General. His skills of negotiation then secured the passage of the *Judiciary Act* 1903 (Cth) and setting up the High Court as envisaged by the Constitution. The proposal, now seemingly inevitable, had struck much hostility. It was to be described as Deakin's most 'cherished' legislative measure. In a sense, the forty Justices who have served on the Court, including myself, and those still to come, including now Justice Hayne, are heirs to Deakin's legacy.

When Barton retired from the Parliament on his appointment to the High Court in 1903, Deakin became Prime Minister. He was to serve, as such, on three occasions, the last in 1909-1910. He was constantly urging the indifferent imperial authorities that they should establish a permanent secretariat in London to give the self-governing dominions, such as Australia, an effective voice in the Empire's foreign policy, defence and economic arrangements. His proposals received a cold reception in

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[3] Id at 254.

London. The British were never as interested in the dominions and colonies as the latter were fascinated by the hub of the Empire.

Deakin retired from Parliament in 1913, a spent force. He refused appointment as the first chairman of the Interstate Commission in 1914. One wonders if a man of his personality and imagination might have breathed life into that failed idea of federalism. Deakin died in 1919. At his State funeral his coffin was draped, in the manner of those times, in the Union Jack.

Some of Deakin's causes have withered - such as his mystical faith in the destiny of the white British race and in the civilising mission of the British Empire. Such transient political theories counsel us to ponder upon the passing nature of political ideals. We should ask: what are the political truisms today, that seem so important and engender so much heat, which, in a century's time, will appear completely irrelevant to Australia's life as a nation?

Yet the instrument of government which Deakin did so much to secure - the Australian Constitution - is still with us. It is still the basis of the rule of law in our nation. It still organises the Australian polity around the four 'great constitutional principles' which are stated in its text and structure.[4] These four principles are representative government, federalism, the separation of powers and responsible government under the Crown. To those who have striven to find a fifth principle, republicanism, in the constitution, it seems apt to answer in the words of Stephen Gageler:[5]

> The inclusion of the institution of responsible government created the British heart in an otherwise American federal body.

2. Monarchy v. Republic

I have elsewhere tried to point out that the Australian Constitution can be viewed as reflecting a struggle, which is still ongoing, between British and

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4 Winterton, G. 1983, *Parliament, the Executive and the Governor-General*, Melbourne University Press, Melbourne, 1.

5 Gageler, S., 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Fed L Rev* 162 at 172.

United States elements captured in its text. These may be portrayed as the struggle between the popular, democratic features emphasised in some parts of the Constitution (the democratic House, the Senate directly elected by the people and the referendum procedure in s. 128) and the stable, unchanging elements of government reflected elsewhere in the text (the Crown, the civil service and the judiciary)[6]. Others have discerned in federation itself essentially republican features of government by which the Crown, formerly unified, was divided into the many 'rights' of the jurisdictions of the Constitution. But these provisions, and the others inviting a popular role in government, are locked in battle with the centralising tendencies of the Constitution which reflect the deep-seated monarchical viewpoint of the Founders, including Deakin. The monarchical idea, formerly centred in a personal sovereign, is still in our minds and in our constitutional charter[7]. It finds reflections in the Executive elected by, and responsible to, the Parliament, a strong federal government, and a High Court which, at least since the *Engineers'* case[8] has often tended, by its approach to constitutional interpretation, to uphold the enlargement of federal constitutional powers.[9]

Republican government tends to be diffuse and subdivided so as to be more immediately accountable to the people. Monarchical government tends to be strong and centralised - formerly in the person of the sovereign but now in whoever the Parliament elects to govern. The rejection of direct election

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6 Kirby, M.D., 'The Australian Constitution - A Centenary Assessment' (1997) 23 *Mon LR* 229.

7 The same is true in republican Hungary which has lately adopted as its national symbol the Holy Crown of the Hungarian Kings. See Szakats, A., 'A Republic with a Royal Crown - the Historical Development of the Holy Crown Concept in the Hungarian Constitution' (1997) 27 *VUWLR* 183 at 193, 200. In the United States it has been suggested that it is the Constitution, as personified by the Supreme Court, which is the symbol of national unity in place of the Crown. See Bikel, A. 1962, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics*, Bobbs-Merrill, Indianapolis, 32, discussed in Kan, L., 'A Theory of Justice Souter' (1996) 45 *Emory LJ* 1373 at 1404.

8 *Amalgamated Society of Engineers v. Adelaide Steamship Company Ltd* (1920) 28 CLR 129.

9 Garran, R.R. 1958, *Prosper the Commonwealth,* Angus & Robertson, Sydney, 180-183 & 192; Craven, G. 'The Founding Fathers: Constitutional Kings or Colonial Knaves?' in *Australian Parliament, Papers on Parliament and the Constitution*, 1983; Craven, G. 'The High Court and the Founders: An Unfaithful Servant' (unpublished paper, 1997).

of the Executive by the people, and the insistence upon the system of responsible government in both the federal and State constitutions in Australia, mark the fundamental departure of our governmental practice from the popular notions which attracted the revolutionary authors to the United States Constitution and those of the world which have followed it since.

3. Conventions and Referendums

Stimulated by the proposal for a convention to examine suggestions for the establishment of a 'republic' in Australia, historians have begun to cast backward glances at the process by which Conventions were formerly established to do constitutional business for English-speaking people. There have been two Convention Parliaments in England itself. The first was convened in 1660 to terminate the republican Commonwealth and to summon King Charles II back to the English throne. The second occurred in 1688-9 after King James II fled the Kingdom. Each of these Convention Parliaments was so described because neither was properly summoned under the Great Seal of the Kingdom affixed by the King's order.[10] They were regarded, at their time, as temporary expedients. Their laws were re-enacted by the next Parliament so as to reaffirm their legitimacy. Doing this emphasised, once again, that the legitimate mode of governance in England was not government by the people. It was government by the people's representatives in a Parliament summoned by the Crown.

In the revolutionary situation which arose in the American colonies a century later, the Royal Governors would not summon the colonial legislatures. Instead, conventions were called to remake what became the State constitutions and to provide a model for the convention which ultimately approved the Constitution of the United States.

This was the background for the Australian, or more properly Australasian, Conventions which ultimately sent the Commonwealth Bill to the electors of this country for their approval. In this, the Australian colonies took a course different from their Canadian cousins. Although the latter had conferences, the Canadians had no convention to draw up a constitution for popular acceptance. In their conferences, they merely agreed on basic

[10] Hirst, J., 'A Novel Convention: Adelaide 1897' (1997) 41 *Quadrant* 24.

principles which were then sent to Westminster to be put in the form of the *British North America Act.*[11] In Australia, we took a different course. The story is told by John Hirst[12] describing the way in which the Adelaide Convention was summoned in 1897, exactly a hundred years ago. The earlier Australasian meetings had been called 'Conventions'. But all of them contained only delegates from the colonial parliaments. Hirst raises the question as to whether those parliaments had the power to legislate extra-territorially for a national and a nation-making body and hence to delegate participation in such a body.[13] 'Our sombre founding fathers', he remarks, 'might in truth have been law-breakers'.[14]

However that may be, the big debate a hundred years ago concerned the fracture point between the role of the people in creating and then governing a Commonwealth and the role of legislatures, voted for by the people, but safely containing experts and providing a filter against the risk of popular passions. American republics might like the direct voice of the people. But British monarchies, including in Australia, were much more dubious about that idea. They felt safer with Parliaments, including the Crown, which they were pleased to call 'sovereign'. The direct voice of the people, as the perceived excesses and instabilities of the French and American Revolutions had shown, might introduce dangerous elements of chaos and populism, with risks to property interests and, despite the rhetoric, with perils to life, liberty and the pursuit of happiness.

A hundred years ago, Australia was edging in this way towards its compromise Constitution. A sticking point concerned the manner of its amendment. Two proposals were discussed. The one envisaged the summoning of State conventions - a safely filtered procedure. The other 'rival method of securing the assent of the sovereign people, the Swiss referendum, was already beginning its run'.[15] Sir Samuel Griffith, a traditionalist in most things, predictably favoured the former. Alfred Deakin argued that since, at any such convention, the delegates would merely be expected to say yes or no to a proposal, the people were perfectly

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11 Ibid.
12 Ibid.
13 Id at 28.
14 Ibid.
15 Id at 26.

capable of doing the same. The referendum proposal was defeated at the 1891 Convention in Sydney. But it gathered support amongst liberals and radicals, who saw it as a more or less regular instrument of government in the future Australian Commonwealth. As the movement gathered pace in the 1890s, it eventually came to affect the way in which the Adelaide Convention itself was constituted and the way in which the constitutional alteration provision was finally drawn. Unlike the other Conventions, that held in Adelaide, a hundred years ago, comprised delegates elected directly by the people. There seems little doubt that this popular element in their selection gave an impetus and legitimacy to what they did. It affected their approach to key constitutional issues (such as the direct election of the members of the Australian Senate). And it reinforced the ascendancy of the referendum procedure both as the pre-condition to the adoption of the new Constitution and as the means provided to secure its subsequent formal amendment.

In such matters, Deakin sided with the liberals and radicals. But his life as an Australian nationalist and Empire protagonist encapsulated the tensions which remain to this day in the Australian Constitution. I refer not only to the visible link with the departed Empire in the person of the Queen. Much more fundamentally, I refer to the deep-seated British notions which remain in the Australian Constitution and which Deakin and most of the Founders undoubtedly cherished and passionately favoured. The institution of the Crown (as distinct from the person of the sovereign). The institution of responsible government (not an Executive directly elected by the people). A permanent and unchanging public service. And a judiciary appointed by the Executive Government without the slightest inter-meddling by the Parliament or the people.

4. A new *Grundnorm*?

When the new Australian Constitution came into force few would have questioned the source of its legal legitimacy. Indeed, this was symbolised quite vividly by the voyage of Deakin and his colleagues to London as suppliants to the United Kingdom government to persuade them to have the Commonwealth Bill enacted by the Imperial Parliament at Westminster. The notion of a wholly autochthonous constitution, made by the people of Australia at the Convention in Adelaide or elsewhere, would have seemed to most of the Founders, and to the people of Australia at that time, to have

been illegitimate, if not bizarre. The chain of legal validity, that could be traced back (with but rare interruptions) a thousand years, had to be maintained, unbroken, as the Australian colonies became the new Commonwealth in the British Empire. To do this, an Imperial Act was essential. There was no rebellion against British authority.[16] There was continuity.

An alternative proposition has been advanced by Justice Lionel Murphy. In *Kirmani v. Captain Cook Cruises Pty Ltd [No 1]*[17] he said:

> 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.

Although this theory has some emotional attractions to Australian nationalists, it scarcely fits in with the contemporary historical reality which saw the gradual emergence of a completely independent Australian nation as something that happened much more slowly. It occurred by the incremental steps which represent the usual way of legal systems of the common law, derived from England. Indeed, it should not be forgotten that it was the provenance of the Australian Constitution as an Imperial Act which encouraged Justice Isaacs and his supporters to adopt the approach to interpretation expounded in the *Engineers'* case in 1921 and substantially followed ever since. If the United Kingdom Parliament, after 1 January 1901, had no legal authority whatsoever to enact any laws in relation to Australia, as a separate sovereign nation, one might ask: what business was it of the parliaments of Australia, federal and state, to request and consent to

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[16] Winterton, G. 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in Sampford, C. & Preston, K. (eds), 1996, *Interpreting Constitutions: Theories, Principles and Institutions*, Federation Press, Leichardt, 121. This issue is discussed in Wright, H.G.A. 'Sovereignty of the People - A New Constitutional *Grundnorm'* (1998) 26 *Fed L Rev* 165 to which the author pays tribute.

[17] (1985) 159 CLR 351 at 383.

the enactment of the *Australia Acts* of 1986? [18] What business was it of the United Kingdom Parliament (except native British politeness) to respond to such Australian parliamentary requests which, I would remark, did not directly involve, in the slightest, the request of the people of Australia themselves? Nevertheless, enact those statutes, the legislatures of Britain and Australia certainly did. Amongst other things, they ended the residual appeals to the Privy Council from State Supreme Courts and renounced further imperial legislative designs on Australian law-making.[19]

At law schools throughout Australia, well into the 1960s and possibly much later, it was taught that the historical origins of the Australian Constitution, and they alone, gave that document its legal authority. The origins emphasised were the passage of the Commonwealth Bill through the Parliament at Westminster. Rarely indeed was there reference to the agonising process of the meetings, conferences, conventions, enactments and referenda of the people conducted in this country.

The Constitution has proved highly resistant to formal change. Far more so, I suspect, than Deakin and his referenda enthusiasts would have expected.[20] It is as if all that talk about referenda involving the direct participation of the people, was naive. In actuality, such 'changes' as have been brought about have occurred, in part, by political initiatives using the text of the document in ways that would not have been conceived and, in part, by court decisions endorsing and upholding such legislation or occasionally finding rights and guarantees which the legislators themselves neither saw nor wanted. Of this process, Justice McHugh has said:

> The meaning that the Constitution has for the present generation is not necessarily the same meaning that it had for the earlier generations or for those who drafted or enacted the Constitution.[21]

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[18] See *Australia Act* 1986 (Cth); *Australia Act* 1986 (UK), Ch. 2, enacted pursuant to the *Australia (Request and Consent) Act* 1985 (Cth) and with the concurrence of each State of Australia. See also *Australia Act Request Act* 1985 of each Australian State.

[19] *Australia Act* 1986 (Cth), s. 11.

[20] Ponnambalam, T., 'Role of the High Court as Foreseen by the Founding Father Alfred Deakin' (1988) 104 *Victorian Bar News* 38.

[21] *Theophanous v. Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 197.

To the same effect is Justice Gummow's remark:

> [R]epresentative government is a dynamic rather than a static institution ... [T]he Constitution continues to speak to the present and allows for development of the institution of government by changes which may not have been foreseen a century ago.[22]

But when one looks at the Australian Constitution - even separating it from the Imperial Act to which, like a legal umbilical cord, it is still attached, some things are immediately plain. Its history is indelibly written in every line. It does not begin, as the Constitution of the United States does in its preamble:

> We the people of the United States, in Order to form a more perfect union, establish justice, ensure domestic Tranquillity, provide for the common Defence, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Prosperity, do ordain and establish this Constitution ...

On the contrary, as I have pointed out, the direct voice of the people was limited in its origins and has been circumscribed in its history ever since.

Notwithstanding the difficulty for theory and practicality that these inescapable facts of history present, it is impossible to ignore the growing movement which suggests that the ultimate sovereignty, reflected in the Australian Constitution, is now to be taken as reposing in the Australian people themselves. The line of authority on this point can probably be traced to early hints by the original Justices, for example in *R v. Smithers.*[23] But the modern impetus began with the then heretical expositions by Justice Murphy.[24] It gained support from repeated opinions of Justices Deane and

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22 *McGinty v. Western Australia* (1996) 186 CLR 140 at 280-281. Cf Lindell, G. 'Why is Australia's Constitution Binding? The Reasons in 1900 and Now and the Effect of Independence' (1986) 16 *Fed L Rev* 29 at 44.

23 (1912) 16 CLR 99 at 108 ('The citizen ... has the right to come to the seat of government ... to seek its protection, to share its offices ... and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it'). See Wright, fn. 16 at 35.

24 *Kirmani v. Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 383.

Toohey.[25] More cautiously, Chief Justice Mason in the *Australian Capital Television* case[26] observed:

> The *Australia Act* 1986 (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people.

In *McGinty v. Western Australia,*[27] Justice McHugh acknowledged the difficulties in the way of ready acceptance of the Australian people as the ultimate foundation of the legal legitimacy of the Australian Constitution. Yet the conclusion he reached was that:

> [T]he political and legal sovereignty of Australia now resides in the people of Australia.[28]

For the most part, courts can deal with constitutional questions by focusing their attention on the text and structure, upon legal elaboration and upon those documents (such as the Convention debates) which throw light upon the text's meaning. It is rare that the bedrock of a Constitution is explored or even thought about. At least it has been rare in Australia until now. However, an indication of the possibility of things to come may be found in some of the arguments which were advanced in *Levy v. State of Victoria.*[29] One of the arguments put to support the invalidity of the regulation forbidding Mr Levy access to places of duck shooting was that any such regulation was invalid on the ground that the people of Victoria had not empowered their Parliament to take from them the rights of protest and other actions, the exercise of which Mr Levy and his supporters asserted. The argument was not successful.

5. 'Deep lying rights' of the people

If it is accepted that the people of Australia are the source of the legitimacy of the Australian Constitution, does this mean that the people have reserved

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[25] *Leeth v. The Commonwealth* (1992) 174 CLR 455 at 483; *Cunliffe v. The Commonwealth* (1994) 182 CLR 272 at 336.

[26] *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 CLR 106 at 138.

[27] (1996) 186 CLR 140.

[28] Id at 230.

[29] (1997) 71 ALJR 837; 146 ALR 248.

to themselves some rights which even the Constitution, and the laws made under the Constitution, cannot extinguish?

The notion that there are some 'deep lying rights' which have never been ceded by the people in the Constitution or otherwise to Parliament (or to any of the other organs of government) may find some reflections in the extra-curial comments of Justice Toohey in his important lecture in Darwin: 'A Government of Laws, and Not of Men?'.[30]

> [W]here the people of Australia, in adopting a Constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties.

But this and like remarks[31] may amount to nothing more than an interpretative presumption. There is nothing unusual in suggesting that a document such as a constitution or any other statute should be construed with the assumption in mind that basic common law rights are only abolished or diminished by language expressed in the clearest of terms.[32]

Yet across the Tasman in New Zealand, without a written constitution, Justice Cooke (as Lord Cooke of Thorndon then was) repeatedly propounded the 'deep lying rights' thesis. For him, this went beyond an interpretative principle. He sought to rest the thesis upon the suggestion that laws made by Parliament are ultimately binding only because courts say they are. If Parliament purported to make a law which, for example, took away the rights of New Zealand citizens to resort to the courts of law for the determination of their rights, such a law would (he suggested) be of dubious validity.[33] This would be so although it had passed all the formal tests, carried on its face the Royal Assent and bore all the other apparent hallmarks of an Act of Parliament.

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30 (1993) 4 *Public Law Review* 158 at 170.

31 See, for example, *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1 at 69.

32 *Black Clawson International Ltd v. Papierwerke AG* [1975] AC 591 at 638; *Sorby v. The Commonwealth* (1983) 152 CLR 281 at 289, 309, 311; *Baker v. Campbell* (1983) 153 CLR 52 at 96-97, 104, 116, 123; *Corporate Affairs Commission (NSW) v. Yuill* (1991) 172 CLR 319 at 348.

33 *New Zealand Drivers' Association v. New Zealand Road Carriers* [1982] 1 NZLR 374 at 390.

In *Fraser v. State Services Commission,*[34] Justice Cooke put it quite vividly:

> This is perhaps a reminder that it is arguable that some common law rights may go so deep that even Parliament cannot be accepted by the Court to have destroyed them ...

In judicial writing and elsewhere I have doubted this thesis, suggesting that our true guarantee against such an unthinkable law lies in the collective wisdom of our Parliaments and in their regular accountability to the people.[35] Rather ungraciously perhaps, I repeated my hesitations at a conference convened to celebrate Lord Cooke's many contributions to the jurisprudence of the common law world.[36] I suggested that, in this regard, his view was heresy, even dangerous heresy. He took it all with good grace and patient fortitude.

However, several developments are occurring which should be noted and which are relevant to the thesis of 'deep lying rights'. They include the greater willingness of constitutional courts to construe the constitutional instrument and other legislation against a presumption of respect for fundamental human rights; their greater willingness to invoke the international law of human rights to lend support to this endeavour,[37] their greater sensitivity to constitutional implications found in the language and structure of the document[38] and their insistence upon the protection of the

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[34] [1984] 1 NZLR 116 at 121.

[35] *Builders Labourers' Federation v. Minister for Industrial Relations* (1986) 7 NSWLR 372 (CA) at 406-407.

[36] Kirby, M.D., 'Lord Cooke and Fundamental Rights' in Rishworth, P. (ed), 1997, *The Struggle for Simplicity - Essays in Honour of Lord Cooke of Thorndon,* Auckland.

[37] *Tavita v. Minister of Immigration* [1994] 2 NZLR 247 (CA) at 266; *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273 at 291; *Newcrest Mining (WA) Ltd v. BHP Minerals* (1997) 71 ALJR 1346 at 1423-1426; *Kartinyeri v. The Commonwealth* (1988) 152 ALR 540 at 598-600. Cf Kirby, M.D., 'The Impact of International Human Rights Norms: A Law Undergoing Evolution' (1995) 25 *WA L Rev* 1 at 10-11; Donaghue, S., 'Balancing Sovereignty in International Law: The Domestic Impact of International Law in Australia' (1995) 17 *Adelaide L Rev* 213.

[38] *Kable v. Director of Public Prosecutions (NSW)* (1996) 138 ALR 577. For interesting Indian analogies see *Golakanath v. State of Punjab* AIR 1967 SC 1643 and *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461. Cf Aikman, C.C., 'Fundamental Rights and Directing Principles of State Policy in India' (1987) 17 *Victoria University Wellington L Rev* 373; Morgan, D.G. 'The

integrity of the judicial process, the independence of the judiciary[39] and the availability of constitutional judicial review.[40]

In the old days, it was easy to find the fundamental basis - the *Grundnorm* for the Australian Constitution. It lay in the legal authority by which the document was clothed when the Imperial Act, endorsing it, passed through the Commons, was approved by the Lords Spiritual and Temporal and had affixed to it the sign manual of Queen Victoria. However, as the century has passed since Deakin contributed so mightily to bringing those events about, such explanations of the legitimacy of our Constitution no longer command universal acceptance. Increasingly they seem, like Deakin's dream of a trans-national Empire of white rulers, inappropriate and out of date.

That is why we are now looking to ourselves, for the authority of our Constitution and for the reason we accept it as governing everyone in our continental country. Is it, like many other features of our national life, just apathy that explains this acceptance? Do we not really care: considering that time should not be wasted upon such theoretical quandaries? Do we obey the Constitution because the police and perhaps the army would enforce its provisions against those in Australia who objected to it? Do we turn away from these debates because we realise that 'the people', who are said to be sovereign, have 'only the slightest inkling of how constitutional democracy operates'? Perhaps it is a constitutionally contented people that knows the three stooges and not three Supreme Court judges.

6. Consequences of popular sovereignty

The point of this contribution is to draw attention to our continuing debt to the Founders, and particularly Deakin, for what they achieved. Their work has secured for us, the Australian people, a century of stable government

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Indian "Essential Features" Case' (1981) 30 *International and Comparative LQ* 307.

39 *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

40 This was recently illustrated by proceedings in *Ellman v. The Commonwealth,* (unreported, HCA, Brennan CJ, July 1997); *Levy v. Victoria* (1997) 146 ALR 248 at 296-297.

resting on the four foundational principles which they adopted. It is unsurprising that, a century later, we should be looking afresh at their handiwork. The world in which it must operate today is so different from the world which gave it birth.

If the Australian people are (as is suggested) now the ultimate foundation of the legitimacy of the Constitution, we must realise that this hypothesis has consequences. They may lie not only in the arguments that will be advanced about the fundamental 'deep lying rights' which the people have reserved themselves. They will also lie in the work of the courts. If the Australian people, and not the notional legality traced back to an Imperial statute, are the ultimate source of constitutional authority in Australia, may it not be the duty of the courts in their mode of reasoning to be more accessible to the people? If we are not simply demonstrating to the professionally skilled the legal authority of our decisions, but must also speak to the people from whom that legal authority ultimately comes, should different modes of reasoning and explanation be adopted? A different judicial method? A greater attention to 'reconnecting jurisprudence' to ordinary people?[41]

One United States' scholar has recently made this point in words which deserve our attention in Australia:[42]

> Judicial opinions serve as the primary link between the courts and the populous. Presumably, opinions are written to assure the people that legal judgments are reasoned, not capricious. As forms of communication, opinions must therefore be widely intelligible if the judiciary is to maintain popular credibility. For the United States Supreme Court, this responsibility is paramount. 'Constitutional law is not pronounced principally for the benefit of the legal profession but for the American people as a whole'.[43] 'The Court maintains its constitutional authority in part by reinforcing the political principles

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41 Kammen, M. 1987, *A Machine That Would Go of Itself: the Constitution in American Culture,* Knopf, New York, reviewed Bernstein, R.B., 'Charting the Bicentennial' (1987) 87 *Colum L Rev* 1565, 1618, 1622.

42 Smith, fn. 1 at 19.

43 Miller, C. 1969, *The Supreme Court and the Uses of History,* Harvard University Press, Cambridge, 170.

> and political bonds of the country'.[44] Expositions of constitutional meaning ultimately must address the fundamental commitments of the populous. To do so, they must be easily understood. When constitutional opinions become unintelligible to the ordinary citizen, one of our nation's three central supports begins to crumble.

The United States Supreme Court has recognised this for itself. In a recent decision it remarked:[45]

> [T]he Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.

We could content ourselves in Australia by saying that none of this applies to us. Ours is a constitution without ringing phrases, with no bill of rights. It can safely be left to judges and lawyers to handle its problems. If, in the United States, only a small fraction of the populous reads judicial opinions and a smaller one consults law reviews,[46] the number is smaller still in Australia. This makes the people highly dependent upon the media for coverage of the courts' work. Perhaps, recognising this, the High Court of Australia may need to adapt its procedures so that the people understand better what it does and why it does it. If it fails to do this, the Court may be exposed, even more than it presently is, to misunderstanding and even to misrepresentations which are inadequately answered. The Court should not, in my opinion, lose sight of the truth that 'if society no longer identifies with the law, then its constitutional democracy is at risk'.[47]

7. Taking the Centenary seriously

So long as the foundation of the Australian Constitution was nothing more than an imperial statute enacted in 1901 and an ancient chain of legal title going back a thousand years, and so long as the declaratory theory of the judicial function reigned, the exposition of the Constitution could be safely left to technically expert lawyers skilled in construing bills of sale and

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44 Ibid, cited in Smith, fn. 1 at 19.

45 *Planned Parenthood v. Casey* 505 US 833 (1992) at 868.

46 Smith, fn. 1 at 24.

47 Id at 26. See the comments on the judgments of Murphy J. in Hocking, J. 1997, *Lionel Murphy - a Political Biography*, Cambridge University Press, Melbourne, 247-249.

contested wills. The point I have been at pains to make is a simple one. To the extent that we now accept that the ultimate foundation of our Constitution is the will and consent of the people of Australia, and not its imperial statutory provenance, we must adapt our thinking. If the people are the foundation, are there people's rights, even when not expressed, implied in the text and structure of the Constitution which the courts must uphold? Are there people's rights which the people, through their representatives, may declare in a Charter of Rights enforceable in the courts? Are there people's rights which the people have never surrendered to Parliament but jealously reserve to themselves? If the people are the ultimate source of all legal authority, and not a disembodied notion of Law, does that not have consequences for the way courts reason? And for the way they explain their reasons to the people of Australia who are, on this hypothesis, the source of all legal and governmental power - including that of the courts themselves?

In 1997, as we approach the centenary of the Constitution, we need more people who, like Deakin, can see the way ahead apt for our time. We cannot naively assert that the 'Australian people are sovereign' without considering the consequences of this assertion for a Constitution which, in many ways, was framed upon quite a different hypothesis. Political phrases acclaiming popular sovereignty come cheap. But a deeper reflection on our constitutional governance is what we should be attempting as the centenary of the federation draws nigh. This is, or should be, a serious and constructive reflective event in the life of a people and a nation. In my humble view, it is infinitely more important than the Olympic Games which, however ennobling of the human spirit, is transient and concerns the whole world - not our peculiar constitutional destiny. We need Australians to look ahead, as Deakin did - peering into the century yet to come. Reflecting upon our many constitutional blessings. Considering with gratitude our debt to those, like Deakin, who helped to install such a successful instrument of government. But alert, as Deakin was, to the times we live in and to the need to reconsider the document and to change it where change is necessary.

And if the people are truly sovereign in this land, we should seek to engage all of the people in the celebration of the centenary of our nationhood. Otherwise the bread and circuses of the Olympics will overshadow a truly

great Australian achievement - the century of federation. We will slide back to the view that government is really a matter for the experts. That the law is truly a disembodied science for lawyers and others in the elite. This would be a disappointing outcome. It would consign the so-called sovereignty of the Australian people to a mere fiction - a thing of legal theory. If Deakin were here I feel sure that he would attempt to breathe new life into the reality. It was he who did more than anyone else to bring about the Federation. It was he who stated that its actual accomplishment must always appear to have been 'secured by a series of miracles'.[48] But are we up to miracles today?

[48] Cited in Evans, R., Moore, C. Saunders, K., & Jamison, B. 1997, *1901 - Our Future's Past: Documenting Australia's Federation*, Macmillan, Sydney, 92.