RESPONSIBLE GOVERNMENT IN THE AUSTRALIAN COLONIES: TOY V. MUSGROVE RECONSIDERED

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[*This paper presents, in its centenary year, a reassessment of this famous Victorian case. Although Higinbotham C.J. and Kerferd J. held that Victoria received a full grant of responsible government in relation to local affairs under its Constitution Act, the majority held that it received only a partial grant. The author rejects the majority view of degrees of responsible government, and argues that responsible government must be seen as a 'threshold' concept. Talk of degrees of responsible government misses the point that a general transfer of executive power was required for responsible government to come into existence in Victoria in 1855.*]

1. *INTRODUCTION*

Nineteen eighty-eight marks not only Australia's bicentenary, but also the centenary of the 'great'[1] Victorian case of *Toy v. Musgrove*,[2] concerned with the extent of the grant of responsible government to Victoria under its Constitution Act of 1855. As Higinbotham C.J. told the specially constituted Full Bench of all six judges of the Victorian Supreme Court, the case:

> raises for the first time in this Court constitutional questions of supreme importance. We are called upon for the purposes of adjudicating upon the rights of the parties in this case to ascertain and determine what is the origin and source of the constitutional rights of self-government belonging by law to the people of Victoria, and, if such rights exist, what is the extent and what are the limits assigned to them by law.[3]

The case is not, however, only of relevance to Victoria. As Professor Zelman Cowen points out, it 'must be almost unique in the law reports, so far as it provides an elaborate examination of the scope and nature of responsible government by majority and dissenters alike'.[4]

The facts are straightforward. The plaintiff was a Chinese subject who had arrived in Melbourne aboard a British ship, 'The Afghan', on April 27th, 1888. Under a quota system then in force designed to restrict Chinese immigration, a ship arriving at a Victorian port was permitted to carry only one Chinese for every hundred tonnage.[5] Although a ship of only 1,439 tons, 'The Afghan' was carrying 268 Chinese. The defendant, the Collector of Customs, acting on instructions from his responsible Minister, the Commissioner of Trade and Customs, refused all Chinese who were not British subjects permission to land. The plaintiff brought an action for damages.

The plaintiff argued that because he was willing to pay the ten pound poll tax required under section 3 of the Chinese Act 1881 (this being a further measure

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1 Cowen, Z., 'A Historical Survey of the Victorian Constitution, 1856 to 1956', 1 M.U.L.R. 9, 21; Quick J. and Garran, R., *The Annotated Constitution of the Australian Commonwealth* (1976) 45.

2 (1888) 14 V.L.R. 349.

3 *Ibid.* 379; *cf.* 405 *per* Kerferd J.

4 Cowen, *op. cit.* 21.

5 The Chinese Act 1881 (No. 723) s. 2.

designed to discourage Chinese immigration), he had a statutory right to land. That the quota provisions had been so obviously violated did not affect his legal position, as they imposed obligations only on the ship's master.[6] The defendant contended that, as a matter of statutory interpretation, payment of the poll tax was merely a condition on landing, and gave rise to no legal right to land. He was more concerned, however, with two further propositions. The first was that his action was defensible as an Act of State. The Court unanimously rejected this claim, holding that the power to do an Act of State was not vested in a colonial governor, and therefore could not be exercised on the advice of local Ministers.[7]

It was the second proposition that raised the major issue of the case, that of 'the constitutional powers conferred upon the Government of Victoria'.[8] This was the proposition that the defendant's action in refusing the plaintiff permission to land was justifiable as an exercise of the royal prerogative to exclude aliens. The defendant claimed that this prerogative, or an equivalent power had been transferred to Victoria with the granting of responsible government under the Constitution Statute of 1855.[9] The plaintiff denied that any such transfer had occurred, and argued that it was therefore irrelevant for the defendant to claim that he was acting on the instructions of his responsible Minister, for even he could not prevent him from landing. Such power lay only with the Queen, acting on the advice of Imperial Ministers.[10]

This argument was accepted by Williams, Holroyd, A'Beckett, and Wrenfordsley JJ. who found for the plaintiff, but was rejected by Higinbotham C.J. and Kerferd J. The latter held that the power to exclude aliens was exercisable in Victoria, having passed to the local executive under the Constitution Act. Although the decision was overturned by the Privy Council, this was on the different ground that the plaintiff did not have an enforceable right to enter the Queen's dominions.[11]

Higinbotham C.J.'s judgment is well-known, and rightly so. The case provided him with the ideal opportunity to expound his controversial thesis that under the Constitution Act Victoria received a full grant of responsible government in relation to local affairs. The other judgments, however, also warrant close consideration. This paper will undertake a detailed analysis of the individual judgments insofar as they are concerned with the central issue of responsible government.

It will be argued that the reasoning of the majority judges is not as sound as it is often believed to be. What seems to be the standard reading of the case[12]

6 (1888) 14 V.L.R. 405 *per* Kerferd J.

7 *Ibid.* 375-7 *per* Higinbotham C.J.; 406 *per* Kerferd J.; 413 *per* Williams J.; 431-2 *per* Holroyd J.; 434-5 *per* A'Beckett J.; 422-3 *per* Wrenfordsley J.

8 *Ibid.* 405 *per* Kerferd J.

9 18 and 19 Vict., c. 55 (Imp.). The Constitution Act was included as Schedule 1 to the Constitution Statute. The normal practice is followed here of reserving the phrase 'Constitution Statute' for the Imperial Act, and 'Constitution Act' for the Constitution itself.

10 Doubt was also expressed as to whether the prerogative had not fallen into disuse.

11 [1891] A.C. 272. See, *e.g.*, Zines, L., 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth', in Zines, (ed.) *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (1977) 1, 5.

12 This is examined in greater detail in Section 6.

roundly endorses the majority view that Victoria received merely partial responsible government regarding local affairs under the Constitution Statute. It is clear both from the history of the legislation, and subsequent constitutional practice, if not from the Act itself, that the Imperial Government and Parliament intended no more than this. Complete responsible government in local affairs was a gradual process, and this process was far from complete at Federation, let alone at the time of this case.

So strongly entrenched is this evolutionary view that the idea that Victoria, or any Australian colony, could have received complete local responsible government at a stroke, whether through an Imperial or local Act,[13] is dismissed as quite implausible. Thus it is contended that the minority's claim can be most sympathetically assessed as the product of forward-looking statesmen, rather than the work of sound and sober lawyers. As Sir Keith Bailey said of Higinbotham C.J.: '[s]tatesman rather than lawyer, [he] had the future with him'.[14]

This paper rejects the standard view. It contends that Higinbotham C.J.'s admittedly rather inadequate defence of the full local responsible government position can be bolstered by considering a simple, but powerful, argument suggested by Kerferd J. The paper sets out to lay the foundation for a general reassessment of the case. The key to this reassessment lies in seeing responsible government as a 'threshold concept'.

This concept can best be explained in the context of an important point relied upon by the majority judges; that there are many varieties and degrees of responsible government.[15] While it is clear that the Constitution Act was intended to introduce responsible government of some sort, it cannot be claimed that it was intended to introduce a particular type of responsible government, namely 'full' or 'complete' responsible government in relation to internal Victorian affairs. However, it is argued here that this point is not as persuasive as it may at first appear. There certainly are varieties and degrees of responsible government. Nevertheless, there is a minimum or core element — a threshold — that must exist if the concept of responsible government can properly be said to apply. As Kerferd J. points out, a general transfer of prerogative power is required for responsible government to have come into existence in Victoria. This 'threshold' feature of the concept of responsible government is missed by talk of degrees. The contrast the majority judges appealed to, between full and partial responsible government, is thus inappropriate. The presumption behind this distinction — namely that because they argue for the stronger position, the onus is on the minority judges to show that the Constitution Act of 1855 gave Victoria full, and

[13] Victoria, New South Wales (Constitution Act 1855, 18 and 19 Vict. c. 54), and Western Australia (Constitution Act 1890, 53 and 54 Vict. c. 26) received responsible government under Imperial Acts, South Australia (Constitution Act 1855-6) and Tasmania (Constitution Act 1854) under local Acts. Queensland obtained responsible government when it achieved independence from New South Wales in 1859, by an order-in-council under s. 7 of the New South Wales Constitution Act. See Fajgenbaum and Hanks, *Australian Constitutional Law*, (1st ed. 1972) 2, 199-200.

[14] 'Self-Government in Australia', 7 *Cambridge History of the British Empire* (1933) 395, 397. *Cf.* Cowen, *op. cit.* 25; Stephen, N., 'George Higinbotham', Daniel Mannix Memorial Lecture, Newman College, University of Melbourne, 17 September 1983 (unpublished) 25.

[15] (1888) 14 V.L.R. 416ff *per* Williams J.; 428 *per* Holroyd J.; 434 *per* A'Beckett J.

not merely partial responsible government in respect of its internal affairs — can therefore be rejected.

This does not, however, amount to a complete vindication of the minority judges' position. If the contrast between full and partial responsible government is to be rejected, the option of defending one of the positions contrasted is no longer open. The way in which the threshold view constitutes an intermediate position between the full and partial local responsible government views is spelt out in the course of the paper. It is submitted, however, that Higinbotham C.J. and Kerferd J. were closer to the truth than they are usually assumed to be.

2. *THE MEANING OF 'RESPONSIBLE GOVERNMENT'*

Before examining the individual judgments in *Toy's* case, various matters should be noted as beyond the scope of this paper. To start with, no attempt is made to consider the case against the background of the strongly felt, but still undoubtedly racist concerns of the time, with Asian immigration. The relevance of *Toy's* case to the evolution of Australian immigration law and policy is not explored. Secondly, no survey is offered of the complex set of events that led to Victoria, as well as New South Wales, Tasmania and South Australia, being granted responsible government in the mid-eighteen fifties.[16] Likewise, no attempt is made to set out in any detail the contents of the Constitution Act of 1855.

Its salient features can, however, be stated briefly. Principally, the Act provided for a new Legislative Council and Assembly to replace the existing Legislative Council (s. 1). It is for the most part concerned with spelling out such details of the two new Houses as their composition (ss 3, 10), the qualification of their members (ss 4, 11), and the duration of the lower House (s. 19). Various procedural matters such as the requirement of a quorum for each House (ss 9, 21) and the election of the President of the Legislative Council (s. 6) and of the Speaker of the Legislative Assembly (s. 20) are also covered. Schedules to the Act set out the boundaries of the electorates of both Houses.

Certainly references to the principle of responsible government are meagre. The relevant sections are 17, 18, 37, 48, 50 and 51. Section 17 provides for the resignation of members of either House of the legislature who accept 'offices of profit under the Crown'. Section 18 states that at least four of a list of government officials should be members of either House. Section 37 vests appointment of 'officers who are liable to retire on political grounds' in the Governor alone rather than the Governor on the advice of the Executive Council. Similarly, section 48 authorizes the Governor alone to abolish certain political offices, mainly Cabinet offices. Sections 50 and 51 provide for pensions for officers 'liable to retire on political grounds'.[17]

However, reference should also be made in the context of responsible government to section 54, which vested control of Crown lands in the Legislature.

[16] This task has been ably undertaken by others. See, for instance, Cowen *op. cit.* 10-13, and Jenks, E., *The Government of Victoria (Australia)* (1891) ch. 21. See also Sweetman, E., *Constitutional Development of Victoria 1851-6* (1920).

[17] Jenks, *op. cit.* 207.

Given the importance of the sale of such lands as a source of revenue, responsible government would exist in name only if the Imperial Government were to retain control of them. As Brennan J. pointed out in the *Franklin Dam Case*[18] the granting of responsible government 'would have been impossible in the mid-nineteenth century if the colonial legislatures had not secured control of the revenues derived from sale or other appropriation of waste lands'.[19] Certainly, the most serious concession made by the Imperial Government between the Australian Constitutions Act (No. 2) of 1850[20] and the various colonial constitution statutes of the mid-eighteen fifties was the handing over of control of Crown lands to local legislatures in return for the provision of Civil Lists.

Although the history of Victoria's attaining responsible government cannot be considered at any length here, the term 'responsible government' itself has not always carried the same connotations, and therefore some mention of its history is required.

The term is Canadian in origin. It seems to have first been used in 1829 by E. G. Stanley, the future Earl of Derby, in presenting to the House of Commons a petition forwarded by a public meeting in Yorktown (*i.e.* Toronto), and signed by over two thousand inhabitants of Upper Canada.[21] It gained far wider currency as a result of Lord Durham's *Report on the Affairs of British North America*,[22] which recommended granting this form of government to what was to become Canada. Indeed, Lord Durham was later described as having '[given] to the world the doctrine of responsible government'.[23] The Report was laid before the Imperial Parliament on February 11th, 1839, and soon became the subject of considerable interest in the Australian colonies. The *Sydney Gazette* of June 13th of that year contained a detailed outline of the Report, and published it in instalments over the next four months.[24] The *Port Phillip Patriot* brought the Report to the attention of the inhabitants of the fledgling settlement of Melbourne on July 18th, 1839. The demand for responsible government in the Port Phillip District was closely interwoven with the call for separation from New South Wales. A petition forwarded to the British Parliament following a well-attended public meeting held at Scots School in Melbourne on June 13th, 1840, requested *inter alia* '[a] Responsible Government entirely separate from, and independent of, New South Wales'.[25] As Sweetman observes, the use of the phrase in such a document showed that it was common currency even at this early stage.[26]

The current meaning of the term 'responsible government' was succinctly summed up by Barwick C.J. in the *Seas and Submerged Lands* case:

18 *Commonwealth v. Tasmania* (1983) 46 A.L.R. 625.
19 *Ibid.* 764
20 13 and 14 Vict. c. 96.
21 Lucas, C.P., (ed.) *Lord Durham's Report in the Affairs of British North America*, Vol. 1, 137 (1912). *Cf.* Sweetman, *op. cit.* 19.
22 *Supra* n. 19.
23 Sweetman, *op.cit.* 29.
24 *Ibid.* 20.
25 *Ibid.* 19.
26 *Ibid.* 20.

> . . . on the one hand, leaving aside most exceptional circumstances, the Crown acts on the advice of its ministers and, on the other hand, the ministers are responsible to the Parliament for the actions of the Crown. In the long run Parliament . . . is in a position to control the executive government.[27]

The term 'responsible government' originally possessed, however, the added dimension of a transfer of political power from the Imperial Government and Parliament to the colony in question. Indeed, it has been suggested that, far from being seen as an end in its own right, responsible government was considered in the Australian colonies as little more than the most appropriate means for attaining self-government. For instance, Melbourne claims that '[t]he early statesmen of Australia were chiefly anxious to obtain self-government in local matters'.[28] Cowen likewise says that '[t]he principal concern was to secure self-government in local matters and to take over responsibility for those matters which between 1851 and 1855 had been under the control of the United Kingdom government'.[29] Indeed, both Melbourne and Cowen put down the paucity of references to responsible government in the Constitution Act to the fact that the colonists were not particularly concerned with responsible government, in the proper sense of the term, as opposed to self-government. An even less flattering view is that of J. W. Cell, who claimed that responsible government was merely a battle-cry, being regarded by the colonists 'as a suitable slogan for agitation'.[30]

There is a danger, however, of exaggerating this point. Certainly the politics behind the demands for responsible government were complex, each interest group obviously being concerned to further its position to the greatest possible extent. Nevertheless, the Australian colonists were not concerned just with a quantitative matter, namely the size of the transfer of power from the United Kingdom to the colonies, but also with a qualitative matter, namely the way in which that power was to be exercised in the colony in question. There was no desire, at least beyond the squatting interests, to merely replace an Imperial dictatorship or semi-dictatorship with a domestic one. As has been seen, the Canadian precedent was clearly etched in the minds of local reformers.[31] The demand there was not merely for self-government, but a particular form of government, namely that believed to have evolved, and then exist, in the United Kingdom.[32]

It is submitted in the following section that the paucity of references to responsible government in the Constitution Act of 1855 can be explained by appealing to factors which render implausible Melbourne's and Cowen's contention that those charged with the task of drafting the Bill were not particularly concerned

[27] *New South Wales v. Commonwealth* (1975) 135 C.L.R. 337, 364-5.

[28] Melbourne, A.C.V., 'The Establishment of Responsible Government', 7 *Cambridge History of the British Empire* 271, 295 (1933) VII 271, 295.

[29] Cowen, *op. cit.* 21.

[30] Cell, J.W., *British Colonial Administration in the Mid-Nineteenth Century: the Policy Making Process* (1970) 169. See also Main, J.M., 'Making Constitutions in N.S.W. and Victoria 1853-1854', in Beever, M. and Smith, F.B., (eds) *Historical Studies: Second Series* (1967) 51, 61.

[31] This does not mean that there was 'slavish following' of the Canadian precedent (Sweetman, *op. cit.* 47). In contrast with Canada's upper house of Crown nominees, Victoria insisted upon an elected upper house, albeit of limited franchise.

[32] Lucas *op. cit.* Vol. I 137-8, Vol. II 278-9.

with this form of government. These factors include the understandable reluctance of the framers of the Bill to attempt that which the Imperial Parliament had not itself attempted and saw no reason to undertake: the reduction to writing of that portion of the British Constitution concerned with the relation between the executive and the legislature. Furthermore, the practical circumstances of the time, dominated as they were by the discovery of gold, hardly lent themselves to the accomplishment of deft feats of constitutional law. In contrast with Melbourne and Cowen, Quick and Garran point out that:

> It was the great ambition of the framers of the Australian Constitutions of 1855-6 to acclimatize, in the colonies which they were helping to found, the system thus known as responsible government.[33]

As Stawell C.J. said in *Reg. v. Whelan*,[34] the Constitution Act of 1855 commenced an era of responsible government similar to that in force in the United Kingdom. Lord John Russell himself delighted at 'the imitation of our free institutions in the Australian colonies'.[35]

In arguing that responsible government is a threshold concept, it is 'responsible government proper' that this paper has in mind, and not an appellation conceived of as a means for the introduction of self-government. The relevant point is that a certain transfer of executive power is required if responsible government can genuinely be said to have come into existence in Victoria, as well as other colonies, as a result of their respective Constitution Acts. Rather than responsible government being a means for the introduction of self-government, a certain degree of self-government is logically, but not historically presupposed by responsible government. It is quite meaningful to talk of degrees of self-government without invoking any theoretical threshold, but this is not so with responsible government. Self-government has a purely quantitative matter, whereas responsible government has a strong qualitative dimension, being concerned with the way in which the power is exercised.

3. *MINORITY JUDGMENTS*

(a) *Higinbotham C.J.*

Dismissing doubts about the continued existence of the prerogative to exclude aliens, Higinbotham C.J. states that '[t]he question we have to determine in the present case is whether a power equivalent to this prerogative has, or has not, been vested by law in the representative of the Crown in Victoria, and can be exercised by the Crown upon the advice of his responsible Ministers'.[36] This question depends, he says, on the origin and extent of Victoria's constitutional rights of self-government. He argues that Imperial statute law, more specifically the Victorian Constitution Statute, is the sole source of such rights. He rejects the

33 Quick, J. and Garran, R., *The Annotated Constitution of the Australian Commonwealth* (1976) 704.

34 (1868) 5 W.W. and A'B (L) 7, 19.

35 Sweetman, *op. cit.* 10. As Professor Ernest Scott said specifically of the N.S.W. Constitution, it was 'as far as possible a copy of the British Constitution'. *A Short History of Australia* (1944) 211.

36 (1888) 14 V.L.R. 348, 379; *cf.* 377-8.

view that the powers conferred on the Governor by this Act are somehow defective, and its corollary that any deficiency can be remedied by bestowing on him supplementary powers through his Commission and instructions. Since they are revocable, the latter cannot be a further source of constitutional rights.

Higinbotham C.J. draws a sharp distinction between the role of the Governor prior to, and following, the granting of responsible government under the Constitution Act. Formerly, he was a 'mere agent'[37] of the Crown, and his instruments 'constituted almost the only source of the authority of government in Victoria'. While he retains this role, representing the Monarch in matters affecting Imperial interests, he gains, with the granting of responsible government, a 'new and distinct authority' as 'the local Sovereign of Victoria'.[38] Henceforward, in all local matters he acts on the advice of local ministers. In so far as his instruments purport to bestow on him powers already possessed by virtue of the Constitution Act, they are void. Examples include the power to appoint judges and other officers[39] and the power to convene and prorogue Parliament and to dissolve the Legislative Assembly.[40]

However, in so far as the Governor's instruments are contrary to the Act, Higinbotham C.J. holds, they are illegal.[41] Of the numerous examples he gives, perhaps the most important is the controversial Instruction VII, dated February 21st, 1879. This instruction purported to authorize the Governor not to follow the advice of the Executive Council in exceptional cases, provided that he reported his decision to the Queen (in effect, the Imperial Government) as soon as possible. The Governor was free to take such a course of action even if there was no doubt about the matter at issue being genuinely one of local concern. Higinbotham C.J. stresses that the exercise of the Governor's powers under, and in accordance with, the Constitution Act 'cannot lawfully be interfered with by Her Majesty or Her Majesty's Imperial advisers'.[42] Indeed, he says, '[i]t is the duty of Victorian statesmen to protect the law of the Constitution from unlawful interference'.[43]

Higinbotham C.J.'s view of the constitutional status of the Governor's instruments followed logically from his understanding that the Constitution Act provided Victoria not merely with a partial, but with a full grant of responsible government regarding local affairs. The important question, then, is how he defended this interpretation of the Act.

Higinbotham C.J.'s defence falls naturally into two stages. To start with, he is obviously mindful of the need to reject a literal approach. As has been seen the Constitution Act contains at most scanty references to responsible government.[44] In the first stage therefore, he argues for a broader 'judicial vision', and

37 *Ibid.* 381.
38 *Ibid.*
39 Section 37.
40 Section 28.
41 (1888) V.L.R. 349, 381.
42 *Ibid.*
43 *Ibid.* 384-5.
44 See ss. 17, 28, 37, 48, 50, 51.

the relevance of 'the history and external circumstances which led to their enactment'.[45] However, it is not sufficient merely to establish the latter's relevance. The second stage is concerned with showing that 'the history and external circumstances' in question actually support his interpretation, and that the intention of both the local Legislative Council and the Imperial Parliament and Government indeed was to provide 'a complete system of responsible government in and for Victoria'.[46] It is submitted below that this defence fails, because the requisite intention on the part of the Imperial authorities cannot be established. This is scarcely controversial. The central proposition here is that an intention to establish full local responsible government is more than is needed. Even an intention to establish the threshold of local responsible government is not required. There need be no suggestion that the Imperial Parliament conceptualised responsible government in this way. The point rather is that in order for the intention to establish responsible government in Victoria in some form to be realized, the threshold must be granted. Without this, there can be no implementation of responsible government, irrespective of whether those having the intention to introduce this form of government realized this or not.

The majority judges in general[47] rejected the first stage of Higinbotham C.J.'s argument, maintaining that a literal approach had to be adopted, and that such an approach leads to the conclusion that Victoria received at most a partial grant of responsible government under the Constitution Act. Setting out his broad approach, Higinbotham C.J. states that:

> we are bound, in my opinion, in trying to arrive at the meaning of these Acts, and at an exact conception of their scope and objects, to consider the history and external circumstances which led to their enactment, and for that purpose to consult any authentic public or historical documents that may suggest a key to their true sense.[48]

It must be admitted that Higinbotham C.J.'s defence of his broad approach to the Constitution Statute is rather thin. It amounts to little more than a statement of faith that the general rule of statutory interpretation, that the parliamentary history of an Act is not admissible to explain its meaning, should in this instance be set aside.

Although Higinbotham C.J. does not provide it himself, further argument is not difficult to supply. The alternative adopted by the majority judges (with the exception of Wrenfordsley J.) of considering only the written words of the Constitution Act is scarcely plausible. Certainly, we are today familiar with the idea that constitutions must be interpreted broadly, that they are not to be construed in the same manner as ordinary statutes, but as instruments of government. As O'Connor J. said of the Federal Constitution in a now famous and much approved passage from *Jumbunna Coal Mine NL v. Victorian Coal Miners' Association*:

45 (1888) 14 V.L.R. 349, 386-7.
46 *Ibid.* 387-92.
47 Wrenfordsley J. is an exception on this point.
48 For other cases in which Higinbotham C.J. adopted a similarly modern approach to interpreting statutes, see Stephen *op. cit.* 42-3.

> . . . it must be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.[49]

As is argued in the following section, the majority judges (Wrenfordsley J. excepted) fail to read the Constitution Act subject to the relevant conventions. They take as their starting point the written words of the Act, but in so doing miss its proper import. It is not a question so much of what the Act says as what it does. As pointed out earlier, its contents are mainly concerned with the details of the composition, procedures and rights of the two new Houses of Parliament it creates. However, the salient feature of the Act is that it was the vehicle for the introduction of responsible government to Victoria.

There are other considerations to note here. It seems reasonable to assume that if legislators have a particular purpose in passing a certain statute, they are capable of stating that purpose in the statute itself. That, after all, is the best evidence there can be for their possessing the purpose in question. Evidence gleaned, for instance, from parliamentary reports is obviously inferior. There are, however, sound reasons for setting this presumption aside in the case of constitutional legislation, at least within the British tradition. Indeed, it could be argued that it would have been quite anomalous for the framers of the Constitution Act to have tried to set out clearly the form of government they wished to have introduced to Victoria. Even if it were to be conceded, for the sake of argument, to Higinbotham C.J.'s opponents that the framers merely wanted, in Williams J.'s term, an 'instalment' of responsible government, it is still the case that the *form* of government they desired was that which existed in the United Kingdom; and that is a form of government based on convention rather than a written constitution. To try to reduce to writing such a constitution, or even that part of it concerned with the relation between the legislature and executive, would have been self-defeating. It would, in addition, have appeared quite impertinent for a colonial legislature to attempt to achieve what the Imperial Parliament itself would never have considered undertaking.

Neither would this be just a matter of impertinence. It would also display a wilful failure to understand the British system of government. Attempting to reduce the unwritten British constitution to writing would necessarily involve constitution makers limiting the role of Parliament, contrary to the doctrine of Parliamentary sovereignty. This would take out of Parliament's hands the capacity to define the relationship between the executive and itself. It would also interfere with the natural evolution of the relevant conventions concerning this relationship, and have the effect of freezing them at a particular stage of their development.

Another problem raised by any purported 'codification' of these conventions is the fact that they admit of competing interpretations. They are not hard and fast rules, and there is in general no unanimous agreement as to their exact statement. Rather they are broad principles, encompassing a diversity of views. Furthermore, there simply does not exist a body possessing the requisite authority to lay

[49] (1908) 6 C.L.R. 309, 367. Cited, for instance, in the *Franklin Dam Case* 46 A.L.R. 625; 694 *per* Mason J.

down one of a number of alternative statements as definitive. Neither is it the case, given the doctrine of Parliamentary sovereignty, that there could be such a body.[50]

To turn to more practical considerations, the circumstances of the times, marked as they were by acute social disruption caused by the discovery of gold and the huge increase in population this brought about, hardly provided the ideal setting for the drafters of the Constitution Act to go about their complicated task. The situation was further exacerbated by the considerable pressure placed on government institutions through public officials deserting their posts, to try to make their fortunes on the gold-fields. It is therefore little wonder that, as Higinbotham C.J. says, being fully engaged in the task of laying down 'the foundations of law for a nation that had been suddenly called into existence', the members of the Legislative Council Committee established to draw up the new Constitution failed to take the time to 'commemorate' their work in a more inspiring document which would faithfully reflect its real purpose.[51] The Select Committee of the Legislative Council to inquire into the best form of constitution for the Colony was appointed on September 1st, 1853. It was only slightly more than three months later, on December 9th, that it presented its report together with the draft Constitution Bill. By March the following year, subject to certain amendments (the most important of which concerned substituting an elected upper house for a merely nominated one) the Bill had been passed, and was on its way to the Imperial Parliament. Even when allowance is made for the fact that the Victorian Legislative Council had before it the model of the N.S.W. Constitution Bill (from which it departed on the question of an elected upper house), this was still a rushed timetable.[52]

To conclude the first stage of his argument, then, it seems that there was adequate justification for Higinbotham C.J. taking a broad view of the Constitution Act. This is perhaps not to say that he himself sufficiently justified his taking this view, for as has been seen, he gave the issue only passing attention. Even if he did not avail himself of them however, there were convincing arguments at hand.

The second stage, however, presents greater difficulties. The 'history and external circumstances' to which Higinbotham C.J. appeals simply do not appear to support his claim that through this legislation Victoria received a full grant of responsible government concerning local affairs. On the contrary, they seem to constitute evidence for the majority judges' claim that only partial responsible government was intended. Even if the Victorian Legislative Council wanted full internal responsible government, as Higinbotham C.J. claimed,[53] the same can hardly be said of the Imperial Parliament and Government. For various reasons,

[50] On difficulties involved with codifying constitutional conventions, see Sampford, C.J.G., 'Recognize and Declare: An Australian Experiment in Codifying Constitutional Conventions', (1987) 3 *Oxford Journal of Legal Studies* 369, and Sampford, C. and Wood, D., 'Codificiation of Constitutional Conventions in Australia', [1987] *Public Law* 231.

[51] (1888) 14 V.L.R. 349, 388.

[52] Sweetman, *op. cit.*; Jenks, *op. cit.* 19.

[53] (1888) 14 V.L.R. 349, 392; *cf.* 387.

sound or unsound, the United Kingdom authorities had serious reservations about the idea.

To start with, there was the fear that granting too much local control to the Australian colonies would lead to their going their own way, and being lost to the Empire. This is certainly ironic, for proponents of complete local autonomy such as Higinbotham C.J., were passionate supporters of the Empire. He was as insistent that the Victorian government keep out of matters genuinely of Imperial concern, as he was that the Imperial government leave well alone issues merely of local concern.[54] However, even if based on a misinterpretation of the demands for responsible government, this fear of the United Kingdom authorities was still quite genuine. As Melbourne points out, the Imperial government 'thought that these demands were for an independent colonial executive, and that compliance with them would entail the destruction of the Empire'.[55]

Another factor was the not altogether paternalistic fear that the colonies were too young and politically immature to be trusted with complete control of their own affairs. *The Times* objected that '[a] responsible executive would throw all Australia into the hands of political agitators'.[56] As subsequent events showed, this apprehension of political immaturity was not without justification. Between 1856 and 1900 Victoria had twenty-eight ministries, the only one with any stability being the McCulloch Ministry in which Higinbotham served as Attorney-General. (During the same period, New South Wales and South Australia possessed even worse records, having twenty-nine and forty-two ministries respectively.)[57] These fears were manifested in the rejection by the Imperial Government of the clear-cut distinction the colonists demanded between local and Imperial matters, and its insistence instead on general powers of reservation and disallowance.[58] In the light of these measures, then, it seems clear that the conclusion that the Imperial Parliament and Government intended to provide Victoria with full responsible government in respect of its internal affairs, cannot be accepted. Indeed Higinbotham C.J. glosses over this matter, not discussing the deliberations of the Imperial Parliament and Government at all. All he says is that the undoubted intention of the Victorian Legislative Council to provide for full local responsible government 'was carried into full legislative effect with the knowledge and approval and at the instance of the Imperial Government by the Constitution Statute passed by the Imperial Parliament'.[59] As with the first stage of his argument, this sounds like little more than a statement of faith.

Finally, no examination of Higinbotham C.J.'s judgment could ignore his triumphantly stated conclusions regarding responsible government in Victoria. They may be divided into two groups, the first group comprising the first, second and fourth conclusions, and the second group the remaining three.

The first group may be dealt with briefly, as the arguments for them have

54 Consider, for instance, Higinbotham's stance during the visit of the confederate warship 'Shenandoah' to Melbourne. See Cowen, *op. cit.* 1, 25; Bailey, *op. cit.* 43.
55 Melbourne, *op. cit.* 277.
56 Cited in Shaw, A.G.L., *The Story of Australia* (1967) 127.
57 Bailey, *op. cit.* 397.
58 Cowen, *op. cit.* 24-5.
59 (1888) 14 V.L.R. 349, 387.
60 *Ibid.* 396.

already been adequately canvassed. The first conclusion is that 'the Constitution Act as amended and limited by the Constitution Statute is the only source and origin of the constitutional rights of self-government of the people of Victoria'.[60] As has been seen, Higinbotham C.J. emphatically dismisses the idea that the Governor's instruments could be a further source of such rights. There is certainly no question of any other legislation being relevant.

Higinbotham C.J.'s second conclusion is concerned with the extent rather than source of responsible government in Victoria. It refers to the 'historical' argument, as it could be called. As was contended above, this argument is very weak. The second conclusion states 'that a constitution or complete system of government by responsible advisers, as well as a constitution of the Houses of the Legislature, was the design present to the minds of the framers of the Constitution Act and that that design has found adequate, though obscure legal expression in that Act'.[61] It should be noted that this proposition is far less contentious than it at first appears. The crucial question that Higinbotham C.J. skirts over, is whether the Imperial Parliament and Government had the same intention.

The fourth conclusion is that 'the Executive Government of Victoria, consisting of Ministers of the Crown, are responsible to the Parliament of Victoria, for the exercise of all the powers vested by the Constitution Act in the Governor as the representative of the Crown in Victoria; and that they, and they alone, have the right to influence, guide, and control him in the exercise of his constitutional powers created by the Constitution Act.'[62] It is worth noting that no mention is made here of what are the Governor's constitutional powers as created by the Constitution Act. Like the second conclusion, this is more limited than it initially appears. Indeed, it seems to do little more than state the obvious, simply confirming that powers under the Act are to be exercised on the advice of local as opposed to Imperial Ministers.

To turn to the second group of conclusions, the third warrants close attention, raising what could be called a new 'model' argument for the full local responsible government view. The fourth and sixth conclusions are corollaries to the third.

The third conclusion states that:

> the two bodies created by the Constitution Act, the Government and the Parliament of Victoria, have been invested with co-ordinate and inter-related but distinct functions, and are designed, on the model of the Government and the Parliament of Great Britain, to aid each other in establishing and maintaining plenary rights of self-government in the internal affairs for the people of Victoria.[63]

It is submitted that this is a far stronger argument for the full local responsible government view than the historical argument. Despite this mention of the 'model' argument among his conclusions, however, Higinbotham C.J. does not consider it in the body of his judgment.[64] This task is left to Kerferd J. As will be seen shortly, it is his presentation of this argument that makes his judgment so

61 *Ibid.*
62 *Ibid.* 396-7.
63 *Ibid.*
64 The closest he comes to it is at 395.

important. Examination of the 'model' argument will therefore be postponed until consideration of Kerferd J.'s judgment.

The fifth and sixth conclusions fill out the idea that the Victorian executive and legislature are modelled on their British counterparts. Higinbotham C.J. no more argues for these conclusions than he does for the third. The fifth states that the Victorian executive possesses, by virtue of the Constitution Act, the same functions regarding the internal affairs of Victoria as the Imperial executive has regarding the internal affairs of Great Britain. According to the sixth conclusion, subject to parliamentary approval, the Victorian executive possesses the power to do all that is 'in its opinion necessary or expedient for the reasonable and proper administration of law and the conduct of public affairs, and for the security, safety, or welfare of the people of Victoria'.[65]

(b) *Kerford J.*

Higinbotham C.J. was principally concerned with the general question of the extent of transfer of executive power to Victoria brought about by the Constitution Statute. The question of whether the specific power at issue, that to exclude aliens, was properly regarded as local or Imperial, he dealt with only briefly, saying that he was happy to adopt Kerferd J.'s reasons for treating it as the former.

In contrast, Kerferd J. was mainly concerned with the power over aliens, or more exactly, the question of whether, if he were prepared to pay the poll-tax of ten pounds as required by section 3 of the Chinese Act 1881, an alien acquired a right under the statute to enter Victoria. Kerferd J. dismissed this argument, holding that both this Act and the Chinese Immigration Statute 1865 merely prescribed the manner in which Chinese persons were to come into Victoria. The Acts just say that Chinese immigrants are prohibited from entering Victoria unless they come in the way prescribed. There was no intention to provide them with a right to enter if they conformed with the provisions of the Act.

With the possibility in mind of appeal to the Privy Council, however, Kerferd J. felt obliged to deal with the broader issue of the constitutional powers of the Victorian government. In considering this issue, he takes up a point which, as just noted, Higinbotham C.J. mentions in his conclusions but does not argue for in his judgment. This is the proposition that the Victorian executive created by the Constitution possesses all the powers in relation to local Victorian affairs that the United Kingdom executive possesses in relation to the domestic matters of Great Britain, the former being modelled on the latter.

In arguing for the 'model' proposition, Kerferd J. starts by appealing to Dicey's view that colonial legislatures are 'within their own sphere, copies of the Imperial Parliament'.[66] Where local matters are concerned, they are sovereign bodies. Mindful, as was Higinbotham C.J., of the problems inherent in attempting to transplant the unwritten British constitution to a colony, Kerferd J. appeals to the unwritten law of Parliament, the '*lex et consuetudo Parliamenti*'. He says that:

[65] *Ibid.* 397.
[66] Dicey, A.V., *Law of the Constitution* (2nd ed.) 103.

> The problem, which perplexed the minds of statesmen forty years ago, of whether it would be possible to transplant a copy of the British Constitution in such of the dependencies of the Empire as had outgrown the form of Government which obtains in Crown Colonies, must, I think, so far as Victoria is concerned, be considered as having been successfully solved. I do not think that it can be denied that we have here in Victoria responsible Government as fully as it obtains in the mother country.[67]

Pointing out that, except for minor differences, the Legislative Assembly is 'an exact copy of the British House of Commons', Kerferd J. states that '[t]he Victorian Parliament is the supreme authority in and for Victoria, subject only to the legislative powers of the Imperial Parliament'. After a brief examination of the constitutional powers 'which have been and now actually are exercised in Victoria', he concludes that it is clear that 'the Constitution under which Victoria is governed rests on a wider basis than the actual terms of the Constitution Act would appear to indicate'.

It is necessary here to dispel a possible misapprehension. It might be thought that in the above quotation Kerferd J. is suggesting not that Victoria acquired full local responsible government under the Constitution Act, but that this constitutional position was achieved at some unspecified time between 1855 and *Toy's* case in 1888. It is submitted, however, that such an interpretation of Kerferd J.'s view is erroneous. On the contrary, he held that relevant events between 1855 and 1888 merely confirmed the proposition that the Constitution Act of 1855 gave Victoria full local responsible government. That this is the correct reading of his position is, it is suggested, made clear by his endorsement of the 'model' argument. As he is noted as holding below, all prerogatives necessary to responsible government passed to Victoria as a result of the grant of self-government in 1855. The implicit transfer of power occurred at that point, even though it may have taken some time for this to be generally realized. Indeed, Higinbotham C.J. and Kerferd J. were the only two members of the Victorian Supreme Court who properly appreciated this fact even as late as the time of *Toy's* case.[69]

Kerferd J., then, rejects the literal approach to the Constitution Act favoured by the majority judges (with the exception of Wrenfordsley J.). He also rejects the view that this leads to, namely that the prerogatives in force in Victoria are restricted to those specified in the Constitution Act or the Governor's instruments, saying that '[t]he system of responsible government would be utterly unworkable without the discretionary prerogative powers vested in the Crown, and which are not provided for by any Statute'.[70] Reminiscent of the sixth of Higinbotham C.J.'s conclusions, he goes on to state:

> I would say that all the prerogatives necessary for the safety and protection of the people, the administration of the law, and the conduct of public affairs in and for Victoria, under our system of responsible government, have passed as an incident to the grant of self-government (without which the grant itself would be of no effect), and may be exercised by the representative of the Crown, on the advice of the responsible Minister.[71]

Kerferd J.'s argument here is simple but powerful. The most obvious way to

67 (1888) 14 V.L.R. 349, 408.
68 *Ibid.*
69 Higinbotham C.J. also appeals to the claim that full local responsible government was actually in existence at the time of *Toy's* case at 392.
70 *Ibid.* 410.
71 *Ibid.*

understand the Victorian Parliament is through the model of the United Kingdom Parliament. Similarly, the most natural way to understand the grant of responsible government to Victoria is on the basis of responsible government in the United Kingdom. Certainly, no element of control in Imperial matters could be handed over to a merely colonial legislature, but there is no reason why the transfer of control in regard to local affairs cannot be total. Given that responsible government was introduced by this Act, the Victorian government must possess sufficient power to undertake measures it regards as necessary for the safety, security, and general good of the colony. It is misconceived to try to find all the required powers in specific documents, such as the Constitution Act and the Governor's instruments. Rather the question is one of a general transfer of executive power.

Although Kerferd J. does not explicitly refer to the idea of a threshold of executive power for responsible government to exist, he appeals to it implicitly. According to this notion, for responsible government to exist, broad executive powers are required to act for the general good and welfare of the community. To use Kerferd J.'s words above, these are the powers 'necessary for the safety and protection of the people, the administration of the law, and the conduct of public affairs in and for' the colony in question. Or as Higinbotham C.J. puts it, they are the powers 'necessary or expedient for the reasonable and proper administration of law and the conduct of public affairs, and for the security, safety, or welfare of the people' of the particular colony. Reference to the idea of a general transfer of power offers the best way of meeting the majority judges' point that there is no single form of responsible government, but on the contrary that it admits of many varieties and degrees. Despite these differences, a minimum threshold of power is still required. Whatever the variety and degree of responsible government, this threshold must be satisfied.

The main challenge the threshold argument faces is the historical objection that there simply was no intention on the part of the Imperial Parliament and executive to grant the Australian colonies full control over their own local affairs. If the threshold argument is to succeed, it must be shown that the majority judges' appeal to this point was illicit. It is necessary to realize that appeal to the idea of a threshold does not amount to a full defence of the minority judges' position. The truth is that they overstate their case. They do not require full local responsible government for their argument to succeed, but merely the threshold of responsible government. In the instant case, this is sufficient to justify transfer to Victoria of the power to exclude aliens. The relevant historical events, at least in the United Kingdom if not the Australian colonies, may not support what Higinbotham C.J. and Kerferd J. called 'full' or 'complete' responsible government in respect of local affairs. But the same history certainly supports the view that responsible government of some sort was introduced to Victoria by the Constitution Act. Appeal cannot be made to this history in order to deny a general transfer of executive power to Victoria. Such a transfer cannot be denied without rejecting responsible government itself. Talk of degrees of responsible government distracts attention from this central point. Whatever the degree or extent of responsible government, the threshold must still be satisfied. Without a

general capacity to act for the security, welfare and good of the community, responsible government cannot be said to exist.

It should be noted that appeal to the idea of a threshold of responsible government is not merely a semantic quibble that serves to hide the substantive issue between the full and partial local responsible government views. On the contrary, this idea shows that this contrast is highly misleading. It encourages the approach which, as will be seen shortly, was favoured by most of the majority judges, of starting from the basis of what is contained in the Constitution Act itself, and then seeing how this could be supplemented by considering other constitutional material, for instance, the Governor's Commission and instructions. However, adopting such an approach means missing the central point that a transfer of considerable executive power was required for the threshold of responsible government to be satisfied.

4. *MAJORITY JUDGMENTS*

As pointed out earlier, the majority judges' view that Victoria received only a partial grant of responsible government in respect of local affairs under the Constitution Act, has received overwhelming approval. Indeed, the rival view championed by Higinbotham C.J. and Kerferd J. has generally been regarded as owing far more to cherished political ideals than sober legal judgment. It was argued in the previous section that this assessment of the minority judges' stance is mistaken and unfair. The importance was stressed of understanding that responsible government is a threshold concept. It will become apparent from this section that the standard view of the majority judges' position is correspondingly far too generous.

(a) *Williams J.*

Williams J.'s approach is very different from that of Higinbotham C.J. and Kerferd J. The latter make it clear that the Constitution Act itself cannot be taken as the starting point, and that it is essential to consider the broader historical and constitutional context.[72] By contrast, Williams J. is concerned with the actual words of the Act, and apparently these alone. He endorses what could be termed the 'direct' argument for the right to exclude aliens.[73] He holds that for this right to have passed to Victoria, so as to be exercisable by the Victorian Governor on the advice of local Ministers, one of three propositions must hold: either this right has been expressly transferred to Victoria through the Constitution Act, or it is implied by some right or power that was so transferred, or the right was specifically assigned to the Governor by his instruments. There is, however, certainly no mention of the right to excude aliens in the Constitution Act. Neither is this right implied by a right which is expressly mentioned, being necessary for the 'existence, working, or functional life' of any such right; nor is there any question of it being transferred through either the Governor's Commission or his

[72] *Ibid.* 386 *per* Higinbotham C.J.; 409 *per* Kerferd J.
[73] Though note the 'indirect' argument to be considered shortly.

instructions.[74] It seems clear, therefore, that this right is not exercisable in Victoria.

Williams J. candidly admits that the end to which adoption of such a narrow legalistic approach leads him is quite untenable. 'I do not hesitate to say', he writes, 'that, if the conclusion at which I have arrived be a right one, we have no *legal* means of preventing cargoes of alien convicts, if they were sent here to-morrow, from landing on and polluting our shores'. Later he says that the withholding of this power 'leaves us in this most unpleasant and invidious position, that we are at present without the *legal* means of preventing the scum and desperadoes of alien nationalities from landing on our territory whenever it may suit them to come here'.[75]

Williams J., however, does not consider just the 'direct' argument for the power to exclude aliens outlined above. He also looks at an 'indirect' argument that this power passed under the general grant of responsible government to Victoria through the Constitution Act. His argument here, which has already been noted, is simple: there are numerous varieties and degrees of responsible government, and it cannot be discerned that there was any intention to grant Victoria one particular form of such government, namely what the minority judges refer to as 'full' or 'complete' responsible government concerning local affairs. Indeed, the conclusion Williams J. finds himself driven to, regarding responsible government is, he thinks, just as unpalatable as he finds his conclusion about the power to exclude aliens. He says that to suppose, as has generally been assumed, that Victoria enjoyed 'responsible government in the proper sense of the term' is merely to be suffering from a 'delusion'. On the contrary, Victoria only possesses 'an instalment' of such government.[76] He wishes he could agree with his Chief Justice, that Victoria received a full grant of local responsible government under the Constitution Act, but finds himself 'forced as a lawyer, construing our law as a lawyer', to differ from him. He can reach no stronger conclusion than that '*a* system or *a* measure of responsible government is created by the Act'.

A number of points should be noted here. Williams J. seems himself to admit the inadequacy of adopting a literal approach to the Constitution Acts. It is indeed surprising that he was willing to adhere to it, given the conclusions it forced him to accept. It may in fact be asked whether it is open for him even to consider the 'indirect' argument, given his stated allegiance to a literal approach. Moreover, this approach excludes appeal to what Higinbotham C.J. calls 'history and external circumstances', and what was referred to above as the 'historical' argument. Yet as was argued earlier, this is the strongest argument proponents of the partial responsible government view can put forward. The main problem facing the threshold view is that of how to meet the historical argument. It seems paradoxical to say the least, that a proponent of the partial responsible government view would adopt an approach to interpreting the Constitution Act which

[74] (1888) 14 V.L.R. 349, 415. *Cf.* 417, 419-20.
[75] *Ibid.* 422-3.
[76] *Ibid.* 416.

precludes appeal to what is his most telling point. Finally, it is not just history, but constitutional conventions that are excluded by the literal approach. As has already been argued, it it only through realizing that the Constitution Act was the means whereby the conventions which constitute responsible government were introduced to Victoria, that its true meaning can be recognized. To adopt the aproach taken by Williams J. is to be mistaken from the start.

(b) *Holroyd J.*

Holroyd J. adopts the same literal approach as does Williams J., but shares none of his qualms about the conclusions to which it leads him, whether concerning responsible government in Victoria in general, or the power to exclude aliens in particular. Like Williams J., he takes as his starting point the Constitution Act itself. Noting the powers expressly conferred upon the Governor by this Act, he remarks that by the ordinary rules of construction all other powers are excluded. Holroyd J. also appeals to the maxim that the Crown is only bound by express words, and its corollary that the Royal prerogative cannot be touched except in so far as therein expressed.[77] Referring at least implicitly to what was termed above the 'indirect' argument for the power to exclude aliens being exercisable in Victoria, Holroyd J. points out that there is 'no cut-and-dried institution called responsible government, identical in all countries where it exists'.

Brief though it is, this in fact exhausts all Holroyd J. says that is of relevance here. He is far more concerned with what is by comparison a side-issue. This is the question of the constitutionality of the defendant's act of excluding the plaintiff as it relates to the claim that, since the responsible Minister had not been dismissed, his action had been adopted by the Crown.

In conclusion Holroyd J., no more than Williams J., provides a sound exposition of the majority view that Victoria received only a partial grant of responsible government in relation to local.

(c) *A'Beckett J.*

There is, similarly, little to be gleaned from the very brief judgment of A'Beckett J. He agrees with Holroyd J. that 'the right to exclude aliens is not exercisable in this country'.[78] Adopting the same literal approach as the previous two majority judges, A'Beckett J. says that he 'can find nothing in the Constitution Act, or in the system of Government which it originated, authorizing the exercise of this right by the advice of Ministers in Victoria'. Like those two judges, he rejects the 'indirect' argument for this right being exercisable in Victoria, the argument from a general transfer of executive power brought about by the introduction of responsible government, denying that the phrase 'responsible government' possesses 'a definite comprehensive meaning, necessarily including the power in question'.

(d) *Wrenfordsley J.*

In contrast with the other majority judges, Wrenfordsley J. seems to be willing to interpret the Constitution Act in the light of extraneous materials. These

[77] *Ibid.* 429.
[78] *Ibid.* 434.

include the despatch from Lord John Russell which accompanied the Act, and the changes made in the instructions issued to the Governor as a result of it. He appears to reject Higinbotham C.J.'s view that the Governor is a local sovereign, coming to the conclusion that 'the status of the colony is of a much more limited character' than is suggested by the view subscribed to by the minority judges. On the other hand, Wrenfordsley J. seems to be more concerned to strictly delimit the sphere of local issues which are genuinely the domain of the Victorian Parliament and executive, than he is to deny that, within this sphere, these two bodies have full authority. He does not appear to decide the case on the ground that Victoria receive only a partial grant of local responsible government under the Constitution Acts. Instead, he decides it on the ground that the exclusion of aliens is not properly a matter of local concern, because of possible adverse international repercussions. Indeed, despite suggestions noted above to the contrary, there is evidence that Wrenfordsley J. is in agreement with Higinbotham C.J. and Kerferd J. on the issue of responsible government. (It is this conflict of evidence that makes his judgment difficult to interpret). At the end of his examination of the Constitution Act he says:

> I have endeavoured to consider very carefully the several powers and provisions conferred by the Act of Constitution, and I fail to see that they go further than to provide for a perfect scheme of local government, limited to its internal relations. When I say a perfect scheme, I mean a system of responsible self-government, complete within itself, so far as representative institutions of a popular character can be said to be perfect.[79]

Later he says:

> It seems to me . . . that there does exist in this colony a form of Government consistent with a full grant of representative institutions, limited, no doubt, in the application of prerogative rights, but possessing ample power with respect to all internal administration. I think it possesses the *droit public enterne*, and I use the expression in order to distinguish its legislative powers from the *droit public externe*.[80]

The negative, rather apologetic, element in the first quotation is curious. It is quite unclear why it should be supposed that the Constitution Act went further than to provide for full internal responsible government. Certainly, Higinbotham C.J. was claiming no more. As has been seen, he insisted that local Ministers should have no say over matters genuinely of Imperial concern.

No attempt will be made to reconcile this apparent inconsistency in Wrenfordsley J.'s judgment here. Indeed, there is perhaps little more to be said than that Wrenfordsley J. was quite confused on the subject. It will only be noted that his judgment certainly does not provide the authoritative statement of the partial local responsible government view that the other majority judgments failed to supply.

5. *SUMMARY OF JUDGMENTS*

The main weaknesses and inadequacies of the majority judgments can be summarized as follows. Except for Wrenfordsley J., the majority judges were committed to far too narrow a view of how the Constitution Act should be

[79] *Ibid.* 439.
[80] *Ibid.* 442.

interpreted; one which denied them any opportunity of seeing it in its proper historical and constitutional setting. As a result of their adoption of a literal approach, they excluded themselves from taking into proper consideration not only the relevant events leading up to the Act being passed in 1855, but also subsequent developments. Adoption of this approach led them to take seriously the erroneous 'direct' argument concerning the written words of the Constitution Act, and ignore the 'indirect' argument, that is, the argument from the general transfer of executive power which was integral to the grant of responsible government. Their reasoning here went no further than pointing out that responsible government admits of numerous varieties and degrees, the implication being that the onus is on the minority judges to establish that their particular form of responsible government was the one introduced by the Constitution Act. This, of course, was an onus they were unable to discharge, because of the lack of relevant evidence favouring any particular form of responsible government, let alone that claimed by the minority judges to have been introduced. But although the minority judges failed to capitalize on this point, this reasoning can be rebutted by appealing to the fact that responsible government is a threshold concept. That is, for this form of government to pertain, sufficient power is required by the Victorian executive to enable it to act for the general good and welfare of the colony. The majority judges made no attempt to meet the proposition that with the granting of responsible government, there must of necessity have been some sort of general transfer of executive power to Victoria. This in itself is sufficient to show that the 'direct' argument adopted by all majority judges except Wrenfordsley J. is quite futile. A further consequence of adopting a literal approach was that, again except for Wrenfordsley J., the majority judges were unable to exploit fully what was their strongest card, namely the objection that the British parliament and government simply had no such intention as to hand over to the Australian colonies full control of their domestic affairs.

Turning to the minority judges' judgments, the main criticism concerns their failure to grasp fully (even if they did not use the same terminology) the point that responsible government is a threshold concept. They therefore let pass by a golden opportunity to deal decisively with the majority judges' objection based on the numerous varieties and degrees of responsible government. The existence of such varieties and degrees in no way detracts from the necessity of satisfying the threshold of executive power. Indeed, the 'model' argument ignored by Higinbotham C.J. (in the body of his judgment, if not in the statement of his six conclusions) could have been taken much further by Kerferd J. More importantly, however, remembering that the threshold view is an intermediate position between the full and partial responsible government views, failure to recognize this central feature of the concept of responsible government led the minority judges to defend a view which was far stronger than they really needed, and which therefore caused them unnecesary problems. The idea of responsible government as a threshold concept gave them all that they required. It was certainly sufficient in the instant case to justify the contention that the power to exclude aliens had been transferred to Victoria, and was in consequence exercisable on the advice of local Ministers.

6. *FURTHER EXAMINATION OF THE STANDARD INTERPRETATION*

This paper has attempted to defend an alternative to the 'standard' interpretation of *Toy's* case. To reiterate, this interpretation is one which rejects the view that Victoria received a full grant of responsible government in respect of local affairs under the Constitution Act. It endorses the opposing view that Victoria was given only partial responsible government under the Act, as being supported not just by a literal reading of the statute, and the pertinent events leading up to its enactment, but also by subsequent constitutional practice. The most that can be said of Higinbotham C.J. and Kerferd J. in defending the full local responsible government view is that they were very much ahead of their time.

The objection might be raised, however, that although considerable effort has been made in this paper to spell out the threshold view it defends, far less attention has been devoted to examining the standard view it purports to supersede. A concerted effort has been made to show that the majority judges in *Toy's* case are mistaken in defending the partial local responsible government view. However, commentators who support the standard view have been ignored. Indeed, it might even be alleged that this is merely a 'strawman' position, which no-one in fact holds. The aim of the present section is to rectify this possible failing.

In a passage in which he cites other authors he takes to support the same position, Professor R. D. Lumb says:

> The view of Keith, Jenks, and Windeyer that responsible government was not introduced solely by the Constitution Acts, in one fell swoop as it were, seems to be more in keeping with constitutional practice in the Australian colonies in the nineteenth century than does the view of Higinbotham. While one can agree with the latter that the doctrine was implicitly recognized in the Constitution Acts, one cannot agree that it was solely dependent on this source — it depended also on the attitudes and practices of the Imperial Government and Governors which accompanied the grant of self-government and on a gradual development of an awareness — an *opinio iuris* — that the Governor must act on the advice of his ministers.[81]

As though to clinch the point, Lumb goes on to cite the existence of a governor's reserve powers as evidence that full responsible government does not yet exist. 'Even today', he says, 'there are circumstances which would seem to justify the exercise by the Governor of his executive powers contrary to the advice of his ministers'.[82] There is no need to become embroiled in the controversial issue of the extent of the reserve powers presently possessed by a governor (or governor-general) to realize that Lumb's appeal is beside the point. The question of reserve powers goes to the intrinsic nature of responsible government, rather than the immediate issue of the extent to which this form of government was brought into existence in Victoria and other Australian colonies as a result of their respective Constitution Acts. This issue is far removed from those rare circumstances where it might be open to debate whether a governor should follow the advice of his responsible ministers, or act on his own best judgment. What is relevant here is not the question of whether a governor should follow advice or not, but that of

[81] Lumb, R.D., *The Constitutions of the Australian States* (4th ed. 1977) 67-8. In a footnote to this passage, Lumb cites Sir Kenneth Bailey as a further adherent to what is termed here the 'standard' view.

[82] Lumb, *op. cit.* 68.

whose advice — whether of local or Imperial ministers — he should follow. The continued existence of reserve powers in no way tells against a transfer of full executive authority regarding local matters to a colonial government. Indeed, insofar as the reserve powers are to be exercised by the governor himself, rather than the monarch, far from detracting from the transfer of power to the colony in question, their existence adds to it.

More serious, however, is Lumb's appeal to Imperial constitutional practice subsequent to the passing of the Constitution Act to try to refute Higinbotham C.J. Similarly, Cowen says that the conflicts between the Legislative Assembly and Council in the eighteen sixties and seventies 'show plainly that the Imperial government — and for that matter the Imperial Parliament — did not accept Higinbotham's view of the Governor's function and position'.[83] While attention must certainly be paid to constitutional practice, and the development of constitutional conventions, this is surely to beg the question. If the Constitution Act gave Victoria a full grant of local responsible government, as Higinbotham C.J. held, it is irrelevant to appeal to subsequent constitutional practice in Britain to reject this view. It is on this very ground of inconsistency, with what he takes to be the proper constitutional position, that Higinbotham C.J. so often rejected such practice, referring scathingly to what he takes to be illicit attempts by the Imperial Government to interfere with Victoria's constitution.[84]

An associated error here is to overlook the sharp distinction that Higinbotham C.J., among others,[85] held to exist between local and Imperial matters. Consider, for instance, a point made by A. B. Keith. He starts by noting that Higinbotham's doctrine 'that the Governor possesses essentially without specific words all the Executive authority necessary for the conduct of the Executive government is clearly justifiable, if it does not solve the question of what his powers include'.[86] Nevertheless, despite seeming far more sympathetic with Higinbotham than Lumb's appeal to him as a fellow traveller indicates,[87] Keith continues:

> But it is impossible to force from the [Constitution] Statute the legal doctrine that the Governor of Victoria must act solely on ministerial advice and could not receive instructions from the Crown.[88]

Higinbotham C.J., however, does not deny that with regard to Imperial matters the Governor should receive instructions from the Crown. Indeed, he insisted that on Imperial matters the Governor should not seek the advice of local Ministers.[89] Only with regard to internal colonial matters did Higinbotham C.J. insist that any such instructions be disregarded, and that the Governor be guided solely by the advice of Victorian Ministers. Note, however, that at least Keith goes on to say that he regards it a 'merit' of Higinbotham C.J.'s position that he drew a

[83] Cowen, *op. cit.* 27.

[84] Keith, A.B., *Responsible Government in the Dominions*, Vol II (2nd ed. 1928) 12; Bailey, *op. cit.* 396.

[85] Including the members of the Select Committee of the Victorian Legislative Council who drew up the Draft Constitutional Bill. See Cowen, *op. cit.* 24.

[86] Keith, *op. cit.* n. 84, II, 117.

[87] *Ibid.* 116.

[88] *Ibid.*

[89] Consider again his response to the 'Shenandoah' incident.

clear distinction between the function of the Governor as head of the local executive, and his function as an officer of the Imperial government.[90]

Finally, in the above quotations from Lumb and Keith, there appears to be the implication that Higinbotham C.J. was mistaken not just in the conclusion he reached, namely that Victoria received full local responsible government under the Constitution Act, but in how he reached it — namely, on the basis of considering the statute alone, and ignoring, or at least not taking proper cognizance of relevant constitutional practice and conventions. As a corollary to this, it seems to be also implied, that had Higinbotham C.J. been aware of this, he could not but have realized that the partial local responsible goverment view was correct after all. Thus Lumb accuses him of thinking that the existence of responsible government in the Australian colonies is 'solely dependant on' the 'source' of their respective Constitution Acts.[91] Similarly, Keith claims that it is 'impossible to force from the Statute'[92] (*i.e.* the Victorian Constitution Act) the view that the Governor should act only on the advice of Victorian Ministers.

However, Higinbotham C.J. was clearly not concerned only with the actual words of the Constitution Act.[93] On the contrary, as demonstrated above, it is the majority judges (Wrenfordsley J. aside) who are guilty of having adopted a narrow, literal, approach to the Act. As Bailey points out, Higinbotham C.J. scarcely claimed to reach the full local responsible government view 'upon the strict construction of the [Constitution] Act'.[94] It is to Higinbotham C.J.'s immense credit that he realized the necessity of being concerned as much with what the Act does and with its overriding purposes, as with what it actually says. He quite openly admitted that the doctrine of responsible government found only 'obscure' legal expression in the Act.

7. *CONCLUSION*

This paper has argued the case for a reassessment of *Toy v. Musgrove*, on the grounds that responsible government is a threshold concept. It proposes a *via media* between the full local responsible government stance of the minority, and the partial local responsible government view of the majority. Although the paper was mainly concerned with analyzing the individual judgments, in so far as they were concerned with this issue, it also discussed the history and meaning of the term 'responsible government', and examined in some detail the standard view of the case that it sets out to challenge. It remains to be seen how proponents of this view might respond.

[90] Keith, *op. cit.* n. 84, II, 116. Cowen, *op. cit.* 19 seems to make the same error as Lumb and Keith. He says that although 'Higinbotham dogmatically asserted that the [Constitution] Act was a complete charter of responsible government', he 'nevertheless admitted that "that design has found . . . obscure expression in the Act" [396]'. However, it is only on the mistaken assumption that Higinbotham C.J. approached the Act in a literal fashion that there can be any inconsistency here.

[91] Lumb, *op. cit.*

[92] Keith, *op. cit.*

[93] Of course, Kerferd J. equally rejects a literal approach. See *Toy* 409.

[94] Keith, *op. cit.*