METHODS OF ALTERATION OF STATE CONSTITUTIONS IN THE UNITED STATES AND AUSTRALIA

By R D Lumb*

1 INTRODUCTION

An Australian lawyer seeking to identify the basic differences between the Australian and American constitutional systems is immediately struck by certain features of the latter system. The differences in that system flow from the break between the American colonies and England embodied in the Declaration of Independence of 1776 and are reflected in the changes to the individual State Constitutions which were made after the Revolution.

The major changes which were made to those Constitutions over a period of time were basic and fundamental: the replacement of the *gründnorm of* British parliamentary supremacy with the principle that sovereignty is derived from the people and, as a concomitant, the establishment of a Bill of Rights; the replacement of a British appointed Governor by a locally elected Governor; the incorporation of the doctrine of separation of powers pursuant to which the Governor as chief executive officer was not to be a member of the legislature and had no power to dissolve it. Finally, basic changes were made to the methods of constitutional alteration. It is this latter phenomenon and its comparison with methods of alteration of Australian State Constitutions to which the following discussion is directed.

The assault on British hegemony in America meant that the governing bodies of the 13 original States—in effect revolutionary law-making bodies described as provincial congresses—were required to modify their Constitutions to adjust to the new situation. In the case of two of the States (Connecticut and Rhode Island) the original charters were continued but with the necessary amendments to implement independence from Britain. In other States basic changes were made by the new law-making bodies. These were generally not submitted to the people for approval but were brought into operation by the *de facto* governments.[1]

However in Massachusetts and later New Hampshire the method of a constitutional convention for framing and amending the Constitution was utilised: in Massachusetts a Constitution framed by such a convention was adopted by popular vote in 1780.[2] As Sturm observes, the procedure of formulation by convention and adoption by popular referendum proved attractive to other States and became the predominant pattern of procedure for constitution-making and ratification.[3] The effect was that the constituent

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1 See generally A L Sturm, *Methods of State Constitutional Reform* (Ann Arbor, 1954) 4; W F Dodd, *The Revision and Amendment of State Constitutions* (Baltimore, 1910) Ch 1; J A Jamieson, *A Treatise on Constitutional Conventions* (4th ed Chicago, 1887) Ch IV, 99 ff.

2 W F Dodd, *op cit* n 1, 10.

3 A L Sturm, *op cit* n 1, 5.

power (the power to adopt and amend a constitution) was elevated above the ordinary legislative power.

Although the convention method was regarded as appropriate for formulating new constitutions and revising existing ones, it was recognised that piecemeal and *ad hoc* amendments through direct legislative action would still be necessary. Consequently the State legislatures were given power, subject to a more difficult procedure (usually the requirement of a two-thirds majority), to make amendments, and at a later stage such action was also made subject to the approval of the voters at a referendum.[4] At the turn of the nineteenth century a new method was adopted by some States—the constitutional initiative. Thus at the present time the three methods of amending and revising State Constitutions are: proposals by the legislature, constitutional convention, and (in about 17 States) the initiative. In all three cases the proposals must be submitted to the voters for ratification.[5]

While this may suggest that the legislative body is downgraded in constitutional reform this is (apart from the initiative method) not really the case, for the calling of a constitutional convention usually depends on the legislature which is the "permanent organised instrumentality through which [the popular] will can be expressed . . .".[6]

In contrast to the American system, the system of constitutional amendment in the Australian States may be described as basically a flexible one to which have been added some rigid requirements which are usually described as "manner and form" requirements. This flexibility, as was decided in *McCawley's* case,[7] is derived from the fact that, once a State Constitution or a major part thereof has been "indigenised", that is, relocated from the original Imperial source to a local source, the ordinary rule of legislative supremacy operates and the previous statutory enactment, even though it is characterised as a "Constitution", may be amended by the local legislature.[8] For the Constitution Act is not a fundamental law elevated above the ordinary legislative structure.

However under s 5 of the Colonial Laws Validity Act 1865, and possibly under a more general doctrine of "restructuring" which can be distilled from the "peace, welfare (order) and good government" sections of the State Constitutions, manner and form requirements can be imposed in relation to future State constitutional changes, which will bind later State Parliaments.[9]

The Australian position is complicated because of s 2 of the Colonial Laws Validity Act (the "repugnancy" section) which, *inter alia*, ensures that manner and form requirements specified in s 5 relating to "the consti-

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[4] *Ibid* 6.

[5] The only exception is Delaware where legislative amendments to the State Constitution are not required to be submitted to the people.

[6] A L Sturm, *op cit* n 1, 19.

[7] [1920] AC 691 (PC).

[8] The actual power of making the Constitution "indigenous" must be derived from the original Imperial Act or Order-in-Council conferring a Constitution on the Colony. See *McCawley* v *R* (1918) 26 CLR 9, 60 ff, for a discussion of the manner in which the Queensland Constitution was transmuted from an Imperial to a local source.

[9] *Trethowan* v *Attorney-General for New South Wales* (1931) 44 CLR 394 (HC); [1932] AC 526 (PC); *Clayton* v *Heffron* (1960) 105 CLR 214.

tution, powers and procedure" of the legislature cannot be overridden by local legislation. There is also another British Act, the Australian States Constitution Act 1907, which imposes manner and form requirements in relation to certain categories of legislation.[10] Finally, it must be noted that there is authority for the view that the power of alteration of State Constitutions is affected by s 106 of the Commonwealth Constitution.[11]

In relation to Australian State Constitutions (as contrasted with the Federal Constitution) the referendum procedure is the exception rather than the rule although it has been used as a manner and form requirement for additional categories of legislation in the 1970's, particularly in relation to the composition of the Houses of Parliament, electoral matters and the status and powers of the Governor.[12] In this regard, the position is in stark contrast with that in the United States where the referendum must be used for all State constitutional alterations. On the other hand, the requirement of a special majority[13] for making constitutional amendment proposals by the legislature is common to both systems.

In relation to the content of United States State Constitutions, American commentators have emphasised that the original recognition of the principle that constitutions should regulate only fundamental subject matter such as the power and structure of government has been overtaken by multitudinous changes which have introduced detailed provisions and *ad hoc* material into the State Constitutions, with the consequence that large parts "are now more basic or fundamental than the product of the regular legislative process".[14] A scrutiny of content reveals much detail in the areas of education, the public service, declaration of rights and qualifications thereto (affecting the criminal law), finance and taxation.

In Australia the content of State Constitution Acts is still of small compass, although amendments in the twentieth century to certain parts (for example qualifications and disqualifications of Members of Parliament) have added provisions of "detail".

But the greater difference is one of form. In the United States a State Constitution is embodied in one document and amendments form part of that one Constitution. In Australia the "State Constitution" is not located in one Act with its amendments. It is located in other legislation besides the so-called basic Constitution Act.[15] For example, one will find provisions dealing with the executive government in a Ministers of State Act[16] and provisions dealing with the legislature in a Legislative Assembly Act.[17] Only skeletal provisions relating to the judiciary are to be found in the State Constitution Acts. There is also the question of the status of conventions

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[10] See also *R* v *Commissioner for Transport; ex parte Cobb and Co Ltd* [1963] QdR 546.

[11] *Western Australia* v *Wilsmore* (1981) 33 ALR 13 (WA Supreme Court). See also (1982) 40 ALR 213.

[12] Constitution Amendment Act 1977 (Qld); Constitution Amendment Act 1975 (SA); Constitution (Amendment) Act 1979 (NSW); Acts Amendment (Constitution) Act 1978 (WA).

[13] R D Lumb, *The Constitutions of the Australian States* (4th ed 1977) 102-3.

[14] A L Sturm, *op cit* n 1, 3.

[15] *McCawley* v *R* (1918) 26 CLR 9, 52 *per* Isaacs and Rich JJ.

[16] See Ministers of the Crown Act 1923 (Tas).

[17] See Legislative Assembly Act 1867-1978 (Qld).

such as responsible government. Such conventions are not expressly recognised (although they may be implicitly recognised) in the Constitution Acts.

Furthermore, a consequence of the decision in *McCawley* is that a basic provision in a Constitution Act may be amended by a provision in an ordinary Act, the title of which has no *prima facie* connection with constitutional matters.[18] It is therefore true to say that in Australia a State Constitution is fissiparous both in content and form. It is an elusive beast, hard to pin down.

2 METHODS OF ALTERATION OF STATE CONSTITUTIONS IN THE UNITED STATES[19]

A *Proposal by the Legislature*

This is the most simple of the three methods and the method most widely used.[20] In the greater number of States a special majority is required (usually two-thirds but in some cases three-fifths of both Houses) for approval of a proposal before it can be submitted to the electors. However, there are a number of States which merely require an absolute majority of members for approval of the proposal. In a small number of States the approval must be given in two sessions.

Ratification by the voters is in most States by a simple majority of voters voting on the amendment at a general election or special election called for the purpose, but in a few States it is by majority of the electors voting at the election. (In these States, abstention on the constitutional proposal constitutes a negative vote). A small number of States have a limitation on the number of amendments which may be submitted at the one election.

It should be noted also that constitutional amendment proposals (unlike ordinary legislative proposals) do not require gubernatorial assent. They are not therefore subject to veto by the State Governor.[21]

Although there are dicta in a decision of the California Supreme Court[22] to the effect that this method is not available to *revise* a Constitution, it is clear that over the last 20 or 30 years the method has been used in various States to achieve substantial change. Therefore the method of calling a constitutional convention (which itself may be limited to specific subject-matter) is not the sole method for achieving the *revision* of a State Constitution.

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[18] Even by a humble Dog Act! See [1920] AC 691, 704.

[19] Much of the information for the following analysis has been taken from A L Sturm, *Methods of State Constitutional Reform* (Ann Arbor, 1954) Chs III, IV, and V. It is the classic text on the subject. See also W F Dodd, *The Revision and Amendment of State Constitutions* (Baltimore, 1910); W B Graves, *Major Problems in State Constitutional Revision* (Chicago, 1960). Useful summaries and statistics are to be found in *The Book of the States* (Council of State Governments, Chicago), a biennial publication. See in particular *The Book of the States* (1980-1981) XXIII, 1 ff; *The Book of the States* (1968-1969) XVII, 15-18.

[20] The statistics covering the last decade are to be found in *The Book of the States* (1980-1981) XXIII, 3.

[21] A L Sturm, *op cit* n 19, 38-39.

[22] *Livermore* v *Waite* (1894) 36 Pac Rep 424. The effect of this decision has since been overriden by constitutional amendment.

B *The Constitutional Initiative*

A typical provision for the initiative is to be found in the California Constitution which provides:

> The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the People reserve to themselves the powers of initiative and referendum.[23]

Article II s 8(a) defines the initiative as "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them".[24]

The "initiative" must be distinguished from the "referendum" which is defined in Article II s 9(a) of the California Constitution as:

> the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State.

This is a definition of only one type of referendum[25]—the petition referendum—by which a proportion of the electors (usually a minimum of 5 per cent) may request that a statute passed by the legislature be submitted to the people for approval. It is of course not necessary to provide for the petition referendum in relation to constitutional proposals by the legislature for these are required to be submitted to the people. This type of referendum is known as the "compulsory referendum".[26] There is also a third type of referendum not widely used which is known as the "advisory referendum" under which the legislature may voluntarily submit a law to the people for opinion. The result of this referendum is not binding. Probably, one should identify a fourth type of referendum whereby the proposals of a constitutional convention are submitted to the voters for approval.[27]

To return to the constitutional initiative, it may be remarked that direct action by the people has an ancient lineage and is associated with the meetings of the Greek citizens in the market place, of the Swiss citizens in their Cantons, and with the town meetings in the New England colonies. However, the constitutional initiative is not based on a direct vote in a "face to face" situation but on a signed petition in favour of a proposal which, if it secures the requisite number of signatures, is then submitted to

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[23] California Constitution, Article IV s 1.

[24] For a general discussion of the initiative, see A L Sturm, *op cit* n 19, Ch IV; A L Sturm, "The Procedure of State Constitutional Change—with Special Emphasis on the South and Florida" (1977) 5 Florida State University Law Review 569, 578 ff; G Hahn and S C Morton, "Initiative and Referendum—Do they Encourage or Impair Better Government" (1977) 5 Florida State University Law Review 926. For discussion of the California structure see W W Crouch, D E McHenry, J C Bollens and S Scott, *California Government and Politics* (4th ed 1967) Ch 5; W W Crouch, *The Initiative and Referendum in California* (Los Angeles, 1950); D S Greenberg, "The Scope of the Initiative and Referendum in California" (1966) 54 California Law Review 1717.

[25] For a discussion of the "referendum", see W W Crouch and J C Bollens, *Your California Governments in Action* (2nd ed Berkeley, 1960) 111 ff.

[26] A number of State Constitutions prescribe the referendum (vote of the people) not only for constitutional amendments but also for legislative action on important matters such as the issue of new bonds. See W B Graves, *op cit* n 19, 232-234.

[27] On the question of the popular vote on convention proposals see A L Sturm, *op cit* n 19, 104-105. Sturm comments that "the procedure of securing the approval of the electorate has become almost universal practice . . .".

the voters for approval or rejection at an election.[28] Certainly the approval of the Californian voters in 1978 of Proposition 13—the "taxation limits" proposal—drew world-wide attention to the importance of the initiative in introducing limitations on government.

Actually, the initiative was first introduced not in California but in South Dakota in 1898. It reflected the influence of the Populist movement in the Western States at the end of the nineteenth century and the beginning of the twentieth century.[29] This movement emphasised "grass-roots" politics—of giving the ordinary citizen more say in government. To some extent it reflected a distrust of representative government which had been extolled by the founders such as James Madison. According to the ideology of the movement, the ordinary citizen was to be brought into the mainstream of politics where, unencumbered by concern for vested interests, he could vote for appropriate legislation to remedy injustices and to set the ship of state on a firm course.

The basic argument over the initiative has continued since that time, the protagonists arguing that it gives the electors more control over the government, the critics saying that it downgrades representative government and that it leads to "mobocracy".[30]

The majority of the initiatives were provided for in the State Constitutions by constitutional amendments between 1898 and 1918.[31] While approximately 21 States have an initiative process covering constitutional amendments or statutory legislation, 17 have an initiative process covering only constitutional amendments.[32] A distinction is also made between the direct and indirect initiative: the direct method, which operates in a majority of the States, involves the direct submission of the proposal to the people; while the indirect method requires that the proposal go to the legislature before going to the people, with the legislature having the power to submit alternative proposals of its own.[33]

The initiative process is instituted by means of a petition. Generally speaking, the requirement of the number of signatures in the various States for this petition ranges from 8 per cent for a constitutional initiative through 10 per cent to a high of 15 per cent. The number is usually based not on a percentage of the total votes of the electorate but on the number of votes cast in the previous general election (usually for the position of Governor or Secretary of State). The majority of States require no geographical distribution of signatures so that the signatories may be, on the whole, urban dwellers.

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[28] See generally D Butler and A Ranney, *Referendums: a Comparative Study of Practice and Theory* (Washington, 1978) Ch IV.

[29] D S Greenberg, "The Scope of the Initiative and Referendum in California" (1966) 54 California Law Review 1717; B L Hyink, S Brown and E W Thacker, *Politics and Government in California* (2nd ed New York, 1961) Ch 5, 90.

[30] H Graham, "The Direct Initiative Process" (1979) 27 UCLA Law Review 433, 437-8.

[31] *Ibid* 436.

[32] A L Sturm, "The Procedures of State Constitutional Change—with Special Emphasis On the South and Florida" (1977) 5 Florida State University Law Review 578 ff.

[33] Only a handful of States have adopted the indirect method. It was abolished by constitutional amendment in California in the 1960's, apparently because of infrequent use.

Once the required number of signatures has been obtained and certified for the proposed measure (proposition), the procedure for submission is then put in force. In a majority of States publicity requirements are imposed in the form of either a publicity pamphlet or press advertisement.

The proposed measure is then submitted to the people at a referendum. In most cases the election specified is the next general election (whether Congressional, State or Municipal), although in half the States a special election may be called for voting on the proposition. The vote required for approval is a simple majority of the votes that are cast on the proposal.

Much of the enthusiasm for the initiative in recent times stems from its success in California in dampening down taxation "hikes". The particular proposal that was successful there mainly concerned local government property taxes: it imposed limitations on the level of taxation that could be raised from that source, and on the valuation of property. Additionally, one of the amendments which was accepted by the voters was that no tax, whether local or State, could be increased without a specific approval requirement being complied with: in the case of State taxation this was a two-thirds vote of both Houses.[34] The consequence is that within the formal structure of the State Constitution there is laid down a "rigid" manner and form requirement in the area of taxation; and this manner and form requirement can only be eliminated by means of a vote of the people.

The success of Proposition 13 in California was soon followed by the success of another initiative proposal in 1979: Proposition 4. This imposed limitations on the appropriation of moneys by the legislature. Under this amendment to the State Constitution no increases in State expenditure, which are not related to increases in the cost of living in the State or in the State's population, are allowable without a vote of the people.[35]

However, the restrictive effects of Proposition 13 are beginning to be felt at local government level with the run-down of some services and a search for alternative forms of local taxation apart from the property tax. It cannot be denied, however, that the burden of property taxes was large and that the Californian electorate, by more than a 60 per cent majority vote, approved the constitutional amendment.

On the other hand, looking at the use of the initiative throughout the States which have adopted it, it can be seen that its actual success rate has not been encouraging, being in the region of 30 per cent.[36] This indicates that the electorate has not responded favourably to this method of constitutional alteration compared with the other methods.

Some political scientists have expressed the view that votes on initiative measures do not indicate that either a "conservative" or "liberal" stance has generally prevailed.[37] On the other hand, adverse comment is made on the growth of commercial organisations which promote the initiative, particularly by way of the gathering of signatures. If the initiative proposal

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[34] California Constitution, Article XIII(A). See B P Herber, "Recent Fiscal Trends in the American Public Sector" (Centre for Research on Federal Financial Relations, ANU Reprint Series No 37, 1980) 2.

[35] California Constitution, Article XIII(B); B P Herber, *op cit* 2.

[36] *The Book of the States* (1980-1981) XXIII, 2, 4.

[37] D Butler and A Ranney, *op cit* n 28, 85.

is really to reflect the popular will, it should be a grass-roots activity and not an artificially promoted enterprise.

From a legal point of view, one might question the value of the direct initiative, while supporting the indirect initiative. If, as is claimed, the tardiness of the legislature in instituting constitutional reform is one of the main reasons for sanctioning the initiative, an acceptable compromise would be to submit popularly-initiated measures to the legislature which would have the option of adopting the measure as its own or of submitting an alternative constitutional amendment.

At the very least, this would assist in preserving the distinction (to the extent that the distinction still applies) between ordinary statutory law and constitutional law, and thus prevent the adoption of a proposal as a constitutional amendment which would find a more appropriate place in the body of State statutory law.

C *The Constitutional Convention*

The constitutional convention[38] is the major (but, as we have seen, not the exclusive) method of securing overall revision of a State Constitution. It is obvious that the initiative or legislative proposal methods will ordinarily result in the presentation of piecemeal amendments (unless a whole range of proposals are submitted which are integrated with the existing constitutional structure). The constitutional convention is therefore the more universally accepted method of effecting major changes or revisions, and for formulating new constitutions.[39]

It should be realised that it is a complex procedure in that three popular votes are required: at the stages of approving of the calling of the convention, the election of delegates, and the approval of the proposals of the convention.

The period in the United States between 1921 and 1945 might be described as a constitutional stalemate in that there was no popular ratification of a new State Constitution. But with the adoption in 1945 of a new Constitution in Missouri by way of a constitutional convention, that method became re-established as a major method leading in some States to overall revision and in others to piecemeal revisions of their Constitutions.

Although the State of California has not been successful with its use, the method has over the last twenty years been used successfully elsewhere. The Constitutions of the new States of Alaska and Hawaii were proposed by constitutional conventions and ratified by popular vote before those States were admitted to the Union. A new Constitution was adopted by Michigan in 1963. In the last decade, twelve conventions have been held in ten states. New Constitutions were adopted in Illinois, Louisiana and

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[38] See generally A L Sturm, *Methods of State Constitutional Reform* (Ann Arbor, 1954) Ch V; W B Graves, *Major Problems in State Constitutional Revision* (Chicago, 1960) 32 ff.

[39] It has been held by several State courts that even though there is no specific clause in a State Constitution empowering the calling of a convention, approval is implied from the principle of the sovereignty of the people which is recognised in the Bill of Rights articles of those Constitutions. The sovereignty of the people comprises a right (subject always to the United States Constitution) to alter or reform the structure of government when it becomes necessary. See *In re Constitutional Convention* (1935) 55 RI 56.

Montana by this method. In two States new Constitutions were rejected.[40] In three other States specific proposals were accepted and others rejected.[41]

The following general features of constitutional conventions may be noted. A constitutional convention may be initiated in roughly half of the States by a majority vote of the Legislature (two Houses), in the other half by a two-thirds majority. The proposal for convening the convention must then be submitted to the voters at a general or special election.[42] If approved by a majority of voters voting on the proposal (in some cases by a majority of voters voting at the election), the convention may then be called. The proposals of the convention are submitted to the people and become effective if approved by a majority of the voters voting on the convention proposals (in some cases by a majority of voters voting at the election[43]).

As to the composition of a convention, there are substantial variations in State constitutional provisions. In some States the number of convention delegates is specified. This may be equivalent to the number of members of the Lower House, of the Upper House, or of both Houses. In other States only a maximum or minimum number of delegates may be specified. It appears that the membership of the Lower House is the most widely used method. In the overwhelming number of States, the delegates are elected by the people. Such an election is usually on a non-partisan basis, that is the candidates do not run on a party ticket.

There are different ways in which the proposals of the convention are submitted to the people. They may be submitted as a total unified package or by separate proposals or by a combination of both, leaving it to the people to accept the whole package or parts of it. The success or otherwise of the convention proposals may well depend on the manner of submission.

One failure which may be especially noted is that a convention may be either unlimited (that is, with an "open" agenda) or limited (that is, with the specific parts of the Constitution or subject-matter to be considered listed in the convention call).[44] During the 1970's, of 17 convention calls, 14 were unlimited and 3 limited. The voters of 8 States rejected the call for unlimited conventions, while in the 3 States where the call was for a limited convention, it was approved.[45]

Finally, a word should be said about constitutional commissions. The Florida State Constitution is the only State Constitution under which authority is given to a constitutional commission (an expert body) to propose amendments directly to the people without the intervention of the legislature. Other States have made use of the constitutional commission as an expert

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[40] *The Book of the States* (1980-1981) XXIII, 9-10.

[41] *Ibid* 10.

[42] In some States there is a compulsory requirement for the submission of the question of calling a constitutional convention to the electors at periodic intervals.

[43] Only a few States require this type of vote. Its effect is that if electors vote for candidates at the election but do not vote on the constitutional proposal, then such abstention amounts to a negative vote.

[44] See generally "State Constitutional Conventions: Limitations on their Powers" (1969) 55 Iowa Law Review 244; H D Levine, "Limited Federal Constitutional Conventions: Implications of the State Experience" (1973-4) 11 Harvard Journal on Legislation 127, 131 ff. (There is much controversy as to whether a limited convention is possible at the federal level.)

[45] *The Book of the States* (1980-1981) XXIII, 10.

body to formulate proposals for consideration by the legislature or by a constitutional convention.[46]

3 IMPLICATIONS FOR CONSTITUTIONAL AMENDMENT IN AUSTRALIA

It can be said that the methods of constitutional amendment which are used in the United States are not, apart from the initiative, peculiarly American.

Amendment by action of the legislature has some similarity with the Australian system, although the two-thirds majority is certainly more common in the United States than in Australia, and the referendum is only used here for what may be described as "important" changes which go to the constitution of the legislature and associated matters.

The constitutional convention, which initially was an American device, was used in Australia in the 1890's for drafting the Federal Constitution.[47] Since 1973 a non-elected (should one say a "partisan"?) convention has been examining the need for reform of our Federal Constitution.[48]

In Australia, no constitutional convention has been used to formulate and revise a State Constitution. The activity of formulating a new Constitution or of revising an existing State Constitution by way of a convention has not been seriously considered by State politicians. Necessity, of course, led to the establishment of this method as the appropriate method in the United States. In Australia the State system has evolved under the umbrella of British parliamentary sovereignty, and continuity is the legal norm. Thus, all State Constitutions *historically* are dependent on that source, even though a local Constitution Act may constitute the indigenous source of the "State Constitution". But, as we have seen, that indigenous source cannot be "self-supporting" because of the existence of the Colonial Laws Validity Act and other British legislation of paramount status.

It is not the purpose of this article to discuss the methods by which a completely indigenous State system may be established. It is sufficient to note that at the Premiers' Conference in June 1982 it was decided to abolish the residual constitutional links with Britain,[49] which will lead to indigenous State Constitutions. Once that source exists, the question of updating these Constitutions and revising manner and form requirements will need to be considered by State Governments.

The first step would be one of consolidating the existing State constitutional legislation of a fundamental nature into one Constitution Act. As we have already said, the various State Constitution Acts do not contain all those statutory provisions which could properly be described as "constitutional". Some of that legislation goes under the titles of Acts such as Minister of State Acts and Legislative Assembly Acts. There is also the

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[46] *Ibid* 7-9. See also W B Graves, *op cit* n 38, 86 ff.

[47] For details see J Quick and R R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 163-5.

[48] R D Lumb, "Reform of the Constitution: the 1973 Session of the Australian Constitutional Convention" in L Zines (ed), *Commentaries on the Australian Constitution* (1977) 233.

[49] Press Release by Attorney-General 37/1982 (25 June 1982).

separate question of the existence of conventions (binding usages) which are not to be found in statutory form.

If the exercise is to be merely one of consolidation then the existing manner and form provisions relating to amendment (providing for special majorities in some areas, referenda in others) will be retained and the basic flexibility of the State Constitutions preserved. If, however, the process is seen as one of updating and modernisation, then the more fundamental question of what methods should be used in achieving these ends must be faced.

At this point, the American processes should be seriously considered. Taking account of the various criticisms of the amount of detail in the State Constitutions and the consequential need for frequent amendments in that country, it may well be that in Australia a revision process should distinguish between the fundamental subject-matter which should go into the "Constitution Act", the amending process of which would be fairly rigid, and other subject-matter which should go into associated Acts, the amending process of which would be flexible. The consequence would be that the Constitution Act would be elevated above the status of ordinary law. The manner and form requirement relating to amendment could be either a special majority of the members of the legislature, or preferably, a referendum[50] to be held either at the time of the next general State election or at a special date determined by the Governor on the advice of the State Government.

Any updating should also be accompanied by a consideration of what manner and form requirements should be imposed in addition to the amendment process, that is, in relation to particular changes to legislation dealing with topics such as finance and electoral matters. This would raise the question of whether manner and form requirements may be imposed in relation to particular topics.[51] If the answer to this question is in the affirmative, then the Constitution Act should be seen as the sole method by which such "entrenchment" can be achieved. In other words, while recognising that a Constitution Act may impose a manner and form requirement not only for amending the Act itself (a "constitutional amendment") but also for amending legislation on specific topics which may be regulated only partially by the Constitution Act (for example a "taxation" or "property" or "civil rights" topic), it should also be affirmed that such manner and form requirements can only be imposed by the "Constitution Act" and amendments thereto. The rationale would be that the re-ordering of the constituent power in relation to specific subject-matter is itself part of the constituent power.

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[50] *Cf* W F Dodd, *op cit* n 19, 291: "measures of fundamental importance—of a real constitutional character—should . . . in every case be subject to a popular vote".

[51] While Dixon J has maintained that an alternative constituent power (*ie* alternative to s 5 of the Colonial Laws Validity Act) is derived from the peace, welfare (or order) and good government section of a State Constitution Act (see in particular the majority judgment of the Court in *Clayton* v *Heffron* (1960) 105 CLR 214, 252), other judges have disagreed. See *West Lakes Ltd* v *The State of South Australia* (1980) 25 SASR 389, 422 *per* Matheson J. If s 5 of the Colonial Laws Validity Act were repealed for the Australian States, a constituent power would need to be derived from the peace welfare and good government sections. Such a constituent power would then form the basis for the exercise of legislative power in relation to the structure of the legislature, the executive and the judiciary, and in relation to specific matters that are dealt with in the Constitution Acts.

The manner in which such updating or modernisation of a State Constitution may be effected will no doubt be a matter of great controversy. Certainly the State Parliaments and Governments of the day will want a major hand in the work. But serious consideration should be given to the work being undertaken by either a constitutional convention (fully elected or partly elected and partly appointed) or a constitutional commission, which would make recommendations or report to the Government and the Parliament. If a procedure of this nature were not adopted it might be difficult to say that the updating was of a fundamental nature which was elevated above the political objectives of the Government and Parliament of the day or of the period. The value of such a body would be that it would include experts and representatives of the people. Consideration should also be given to the incorporation into the new Constitution of a requirement that a convention or commission, to make recommendations or revision, be convened or held at certain intervals (say every 20 years).

Would the "initiative" have any place in a revised State Constitution? My own view is that the direct initiative would sit very awkwardly in the Australian constitutional structure which is not based, as is the American system, on the doctrine of the sovereignty of the people. As the Privy Council pointed out in the case of *In re The Initiative and Referendum Act*[52] the initiative (whether direct or indirect) would involve a by-passing of the Crown and also of the representative law-making body in the *making* of legislation.

Our system of representative democracy is based on the concepts of parliamentary supremacy and responsible government. While this indicates that there can be no abdication of parliamentary control or elimination of the Crown as part of that system[53] there is no doubt that the law-making body can be expanded to give the electorate what is in effect a veto over legislation.[54] Perhaps in the end result there could be devised some "Australianised" form of the *indirect* constitutional initiative which avoided the strictures of the Privy Council, that is, which recognised that a State Parliament has the responsibility for enacting constitutional amendment legislation initiated by petition and subject to the final approval of the electorate. That of course would be quite different from the American indirect initiative, for it would give to a State Parliament as a representative legislature a primary veto. As long as the "representative" element in a State Constitution and its corollary the principle of "non-abdication" are regarded as fundamental,[55] there can be no elimination of the requirement of the approval of the legislature. Therefore the only effective method of introducing a direct or indirect initiative along American lines would be by amendment to s 106 of the Commonwealth Constitution.

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[52] [1919] AC 935. The case concerned legislation of a Canadian Province establishing an (indirect) initiative. The reasoning adopted by the Privy Council would be applicable to the Australian States. *Cf R* v *Nat Bell Liquors* [1922] 2 AC 128, and see also P W Hogg, *Constitutional Law of Canada* (Toronto, 1977) 220-222.

[53] See R D Lumb, "Fundamental Law and the Processes of Constitutional Change in Australia" (1978) 9 FL Rev 148, 174 ff.

[54] As was decided in *Trethowan's* case (1931) 44 CLR 394 (HC); [1932] AC 526 (PC).

[55] This was the opinion of a number of the judges of the Court of Appeal of Manitoba in the case *In re The Initiative and Referendum Act* (1916) 27 Manitoba Law Reports 1. See especially Howell CJM at 6-7.