RECENT SUGGESTIONS OF AN IMPLIED "BILL OF RIGHTS" IN THE CONSTITUTION, CONSIDERED AS PART OF A GENERAL TREND IN CONSTITUTIONAL INTERPRETATION

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Following the High Court's decision in the *Election Advertising* case, Toohey J's extra-curial speech at a 1992 conference on constitutional law[1] has inspired speculation as to the existence of an implied "Bill of Rights" in the Constitution. As reported in the *Australian Financial Review*,[2] Toohey J's thesis avoided any direct challenge to the doctrine of Parliamentary supremacy by, "resorting to the Constitution — albeit implications arising from the Constitution as opposed to the written text — to legitimise judicial scrutiny of legislation".

At first sight this report is suggestive of oversimplification, since on conventional doctrine, any implication must arise from the written text of the statute. However, Toohey J argued that:

> [I]t might be contended that the courts should ... conclude that where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties — a presumption only rebuttable by express authorisation in the constitutional document. Just as Parliament must make unambiguous the expression of its legislative will to permit executive infringement of fundamental liberties before the courts will hold that it has done so, it might be considered that the people must make unambiguous the expression of their constitutional will to permit Parliament to enact such laws before the courts will hold that those laws are valid.[3]

This suggests that a new method of interpretation may be in mind; one which owes less to traditional methods of statutory interpretation than to a special regime for interpretation of the Constitution, laying emphasis upon its function in erecting an institutional and conceptual framework for the governance of Australia. In this context, it may not be erroneous to draw a distinction between the text and implications arising from the Constitution, since the relevant implications appear to arise not from the text itself but from a conjunction of three factors: (i) the function of the document, (ii) the manner of its juridical creation or adoption and (iii) the absence of contra-indications in the text.

The traditional view as to the powers of colonial legislatures was that subject to their territorial limitations and any overriding imperial legislation, it was the intention of the Imperial Parliament that their powers should be of the

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2 15 October 1992, 9

3 *Supra* n 1, 10.

same nature and quality as those of the Imperial Parliament. Despite the circumstance that it was found necessary, by reason of havoc wrought by Boothby J in South Australia in the 1850s and '60s, to clarify this point with the Colonial Laws Validity Act, 1865 (Imp), it may fairly be said that Boothby J's views[4] did not represent orthodoxy even without the effect of that statute.[5]

SHAPE OF THE METHOD AND PROSPECTS FOR ADOPTION

The novelty of the suggested method of interpretation may be a reason why the High Court may be reluctant to embrace it. In particular, it may be seen as undermining the foundation of literalism laid in *Engineers*,[6] whereby the Court was able to escape from a similarly purposive tradition of exegesis which emphasised the federal nature of the Constitution. Similar criticism has been levelled against the "implied nationhood" power championed by Murphy J. On the other hand, one can detect on the Court as currently constituted a mood of willingness to overturn old fictions, presumptions and distinctions, when it considers them to be no longer credible or useful, and to establish or re-establish the Court's doctrine upon a more modern basis. One may see an example of this in *Giannarelli v Wraith*.[7] In view of long standing criticism that the *Engineers* approach was and is a shield for an underlying centralist policy, the Court may be willing to embrace a new theory of interpretation which allows it to recognise intellectually the process of national centralisation which has in fact occurred in Australia's constitutional development since 1920.

In assessing such an approach, it would be wrong to interpret it as a product of blind centralism, notwithstanding that, to those committed to federalism, it may have the appearance of an inappropriate antipathy to the States. One must examine the wellsprings of the approach adopted by the Court's members. If that is done, one may find not a blind antipathy to the States but, rather, a national view of Australia's long term development from colony to independent nation. In this process the States have a role which, perhaps, is transitional but is nevertheless of great and, as yet, unexpired importance.[8] The commitment is to the development of Australia as a regionally integrated nation rather than to a blind faith in the wisdom of Canberra.

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4 That colonial parliaments did not have power to pass legislation repugnant to the law of England.

5 See *R v Burah* (1878) 3 App Cas 889; *Hodge v The Queen* (1883) 9 App Cas 117; *Powell v Apollo Candle Co* (1885) 10 App Cas 282.

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

7 (1988) 165 CLR 543. There the Court upheld barristers' immunity from action for negligence in court, but did so on the ground of public policy, discarding the old basis of the special (non-contractual) relationship between counsel and solicitor. The most notable consequence of this was that the benefit of the immunity was extended also to solicitors.

8 See, eg Sir Anthony Mason, "The Australian Constitution 1901-1988" (1988) 62 *ALJ* 752.

Accordingly, in any new theory of interpretation, one would expect to find not merely a basis for legitimisation of the centralist development which has occurred since 1920, but also a reflection of Australia's continuing emergence from colonial to national status. Since the nationalist approach is not inconsistent with the existence of limitations of some kinds upon central power, it may be that a new theory of interpretation might also accommodate new conceptual limitations, particularly if this occurred in such a way as to emphasise Australia's national character. Such a development in the form of an implied Bill of Rights would also reflect the marked liberal character of the Court and might also deflect some of the criticism that too much power has been concentrated in the centre.

It is in this context that the second of the above-mentioned factors (the manner of the juridical creation or adoption of the Constitution) in the suggested new method of interpretation is of particular interest. It is the factor of greatest novelty and, therefore, from an historical perspective, the one of greatest significance. In particular, it appears to lay an emphasis upon the ratification process which, on one view, does challenge the doctrine of parliamentary supremacy, at least in its traditional formulations. No doubt it can be rationalised on the basis that, notwithstanding that the Constitution is an Imperial enactment, it is relevant to consider that the Imperial Parliament itself chose, in the Preamble and in ss 3 and 6 of the covering clauses, to recognise the "will of the people" of the several States as expressed by referenda. Similarly, s 128 of the Constitution, providing for its amendment by referendum, can be seen as deference by the Imperial legislature to the voters of Australia. Accordingly, it can be argued that the Imperial Parliament recognised and intended to enact the Constitution adopted by the Australian people with all of the implications arising by reason of such adoption.

A number of objections may be raised in answer to such theorising. It may be said that the Imperial Parliament intended to recognise the "will of the people" only as aggregates in the several States and only on the question of the membership of the several States in the Commonwealth (and only *thereafter* on amendments to the Constitution). Accordingly, it may be said, the Imperial Parliament did not intend by those provisions to defer to the "will of the people" on questions of the original content of the Constitution (to which witness the preservation of appeals to the Privy Council, contrary to the final draft submitted by the Constitutional Convention).

As to an assumption that the voters would not have contemplated that power might be conferred to invade fundamental common law liberties, it may be objected that no basis exists upon which to isolate any one factor of political history whilst ignoring others, or that difficult questions would arise in balancing the various factors (such as the intentions of the draftsmen, the debates and resolutions of the Constitutional Conventions or the reluctance with which Western Australia entered the Federation). It may be objected that the people could not have contemplated limitations upon legislative power pursuant to an implied Bill of Rights since such a concept would have been quite alien to them. The most significant objection, however, is that the new method, despite all pretence at lending it a colour conformable to the doctrine of parliamentary supremacy, is fundamentally inconsistent with that doctrine, as it has been understood since 1688. It is fundamental that parliamentary supremacy requires literalism and literalism requires consideration of the

words of the statute rather than its political history prior to, or during the course of, its enactment. To control the interpretation of the Constitution by reference to a non-parliamentary institution or concept,[9] to the limitation of the written text, is to go beyond all accepted criteria of exegesis (which are directed to the resolution of textual ambiguity) and is to elevate that concept or institution to a position of conceptual superiority, if not indirect supremacy, over Parliament.

Nevertheless, the suggested method has the advantage that it provides a means by which fundamental common law liberties may be entrenched without detraction from the national concept, as it may be conceived by some members of the Court. It does not necessarily enhance the powers of the States at the expense of the Commonwealth (although to some limited degree it may do so by default if the implied limitations do not affect State legislatures). In imposing limitations on the centre, such a method would emphasise the *vox populi* of the nation rather than the dictates of the Empire or any inviolability in the States, thus enhancing the nascent juridical concept of the Australian nation. It is capable of development in a form lending legitimacy to gradual centralisation. One can envisage arguments along the lines that the people intended to create one nation, must have envisaged a gradual integration of the nation, and envisaged that the centre would therefore gradually assume wider responsibilities (such as international responsibilities and the need for a wider external affairs power), that the era was one infused by a pervasive belief in the gradual progress of humanity, that the people must therefore be taken to have envisaged a dynamic constitutionalism and that for all of these reasons the people must be taken to have contemplated that the role of the States would gradually diminish. This would represent a further development of some of the ideas articulated by Sir Anthony Mason.[10] There can be no doubt that the High Court, if it were sufficiently convinced of the new method to overcome all threshold objections to it, would find in it a more palatable basis for limiting the powers of the centre than any other which has hitherto been employed.[11] Contrary to Craven's expectation,[12] the new method suggested by Toohey J is no less capable of being reconciled with what Craven describes as "intentionalism" than it is with "progressivism". It points the way to a development and synthesis of those interpretative methodologies which would obviously be more consistent with the current Court's policy objectives than would be the restrictions inherent in Craven's view of "intentionalism".

As to the most significant objection, that the new method undermines the doctrine of parliamentary supremacy, it may well be that it does so in a way which is precisely congruent with that which members of the Court may hope to achieve. I have pointed out[13] that parliamentary supremacy requires literalism and that the new method is inconsistent with literalism. Craven has

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9 As, eg the people of Australia, speaking by referenda.

10 Sir Anthony Mason, "The Role of a Constitutional Court in a Federation" (1986) 16 *F L Rev* 1.

11 G Craven, "Cracks in the Facade of Literalism: Is there an Engineer in the House?" (1992) 18 *MULR* 540, 563-564; G Craven, "After Literalism, What?" (1992) 18 *MULR* 874, 888.

12 G Craven, "After Literalism, What?" (1992) 18 *MULR* 874, 891-892.

13 *Supra* 257.

referred[14] to the decline of literalism and suggested its imminent replacement with competition between "intentionalism" (focusing on the intentions of the founding fathers) and "progressivism" (focusing on the policy needs of contemporary society). It would seem that members of the Court do not share the view that these must be in competition. The important point, however, is that literalism is being eroded in any event in the course of the Court's recent constitutional jurisprudence. In view of this development, an objection to the new method on the ground of repugnancy to literalism might be regarded as an anachronistic objection. However, the concomitant of that is an erosion of parliamentary supremacy, in that the Court assumes a position less subordinate to Parliament than has been traditional since 1688. The importance of the approach suggested in Toohey J's speech, therefore, is that it affords a conceptual framework for this development by implicitly dethroning the notion of parliamentary sovereignty from its traditionally accepted place (Sir Owen Dixon notwithstanding)[15] as the ultimate foundation of the Australian Constitution. The elevation of the concept of the Australian people to a position of constitutional superiority or indirect supremacy over the Imperial Parliament exactly suits the concept of a nation gradually emerging from colonial to national status.[16] It must be remembered that Australian parliaments are, in any event, the creatures of written constitutions and do not enjoy the benefit of the doctrine of parliamentary supremacy in its fullest and purest form. The possibility of judicial review ultimately requires a different conception of parliament and parliamentary power, except for so long as one continues to adhere to the concept of Australian parliaments as subordinate creatures of the Imperial Parliament. The new method would strike primarily at the traditional conception of the Imperial Parliament's sovereignty and would shift Australian constitutionalism some of the distance towards the American model of popular sovereignty. It has the added rhetorical advantage that it does not amount to a repudiation of parliamentary supremacy for all purposes. It merely places a particular concept (the will of the Australian people manifested in referenda) and institution (the electorate) in a position of limited superiority over the Constitution, leaving Australian parliaments with a subsisting subordinate supremacy; a position to which they have always been relegated. Given the increasingly fictitious power of the Imperial Parliament to legislate for Australia (especially since the Australia Act, 1986 (Imp)), a High Court bench not enamoured of obsolete fictions may well be persuaded that parliamentary supremacy in its purest form has had its day. Counsel indignantly protesting violation of its virginal purity might, invidiously, find a Court already suspicious of its virtue.

REFLECTIONS AND RESERVATIONS

It is possible therefore to see in the argument reportedly outlined by Toohey J, a continuation of some existing lines of development in the constitutional

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14 *Supra* n 12.

15 Sir Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation" in *Jesting Pilate* (1965) 203.

16 See also, in the context of the Australia Acts, of 1986, the views of G Lindell in "Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *F L Rev* 29.

thought of the High Court. Of course, the Court has not yet gone so far as to commit itself irrevocably to a new method of the sort outlined. The decision in the *Election Advertising* case[17] can be justified on the basis that certain freedoms necessary to the subsistence of the institutional framework of responsible government are impliedly entrenched by those provisions in the written text of the Constitution which expressly or impliedly provide that responsible government on the Westminster model is to be the system in place in Australia. Justice Toohey's speech may therefore be seen as a fortuitous notice of one direction in which the High Court's doctrine might move in the future. Despite the criticism which has been made of his Honour's extra-curial speech, it was timely, if it reflects the Court's potential thinking, to give some notice of that thinking to the general public, since it is desirable that both the lay public and legal commentators should have an opportunity to debate the direction in which constitutional interpretation ought to travel. It can hardly be doubted that it would have been appropriate for public discussion to take place prior to the fundamental departure from previous doctrine which was effected in *Engineers*. The doctrinal development suggested in Toohey J's speech would be a departure of no less significance.

It is appropriate therefore at this time to consider whether it is desirable to import into the Australian Constitution the thinking underlying the suggested new method. Do we really want to place such emphasis upon the notion that the "will of the people" is constitutionally significant as, to borrow Sir Owen Dixon's phrase, an "ultimate constitutional foundation"? No doubt it would be a mistake to assert that the thinking which I have outlined travels the full distance on the road to "popular sovereignty" in the American sense. Nevertheless, it does travel a good distance down that road. Is it a road which should be taken at all and, if so, under what limitations?

THE RELEVANCE OF A DOCTRINE OF COMMON LAW LIMITS ON LEGISLATIVE POWER

One element of the speculation which has occurred since Toohey J's extra-curial speech has been consideration of the possibility of resort to "the common law itself as a protector of individual rights from legislative encroachment".[18] The *Australian Financial Review* referred to unspecified dicta by Sir Robin Cooke[19] and to a judgment of the High Court[20] where the question was adumbrated but not explored. Significantly, the *Australian Financial Review*

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17 *Australian Capital Television Pty Ltd v The Commonwealth (No 2); NSW v The Commonwealth (No 2)* (1992) 66 ALJR 695.

18 *Supra* n 2.

19 Presumably, *L v M* [1979] 2 NZLR 519, 527; *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Fraser v State Services Commission* [1984] 1 NZLR 116, 121 and *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 304, 398.

20 Presumably *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10, which refers to *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations & Anor* (1986) 7 NSWLR 372, 382-387 *per* Street CJ; 420-422 *per* Priestley JA.

added the following comment on the prospect of this course being taken by the High Court:

> In doing so, they would break free from even a pretext of constitutional anchorage, with the result that this approach to judging would attract even greater controversy than that mooted by Justice Toohey.

This comment reflects the primary difficulty which has historically plagued the attempt to formulate a doctrine of judicial review by reference to the common law, namely, the failure to identify its conceptual and technical limits clearly and precisely.

Following its misapplication in *Godden v Hales*[21] the concept of common law judicial review of legislative action fell under suspicion on the parliamentary side of politics. Following the Glorious Revolution, it fell into desuetude, despite some efforts to keep it alive.[22] Had sufficient consideration been given to the proper limitations on its application, the concept might well have been developed fruitfully down to the present day.

It will be immediately apparent that such a doctrine stands very much removed from the main trend of the High Court's thought. The speculation by the *Australian Financial Review*, to which I have referred, would seem to be reactive. The debate over the current trends in the Court's interpretative method and the ultimate fate of literalism is not really germane to the question of common law limitations on legislative power. If anything, the tendency of the Court has been to assimilate, to the orthodox theory of literalism, certain presumptions of legislative intent which had their historical origins in the royal prerogative and pre-dated the theoretical sovereignty of Parliament, which has come to be accepted since 1688. In *Bropho v Western Australia*,[23] it was held that the presumption that statutes do not bind the Crown, which formerly had to be displaced by express words or words of necessary intendment, may now be displaced by any ascertainable legislative intention so to do. This presumption, from an historical perspective, may be seen to have a closer familial connexion with the prerogative of mercy and the dispensing power than with rules of statutory construction and it may be surmised that it began its life as a prerogative of the Crown rather than as a rule of statutory construction. However, since 1688 it has assumed the latter status and in *Bropho* the High Court has completed the process of assimilating it to that orthodoxy. Even *He Kaw Teh v The Queen*[24] is very much founded on a trenchant literalism.

It will be seen therefore, that whilst an erosion of literalism undermines the conceptual sovereignty of Parliament, it does not follow that the reverse is

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21 (1686) 2 Show 475; 89 ER 1050; Comb 21; 90 ER 318; 5 Bac Abr 536; 11 St Tr 1165.

22 *Day v Savadge* (1614) Hob.85; 80 ER 235, *Lord Sheffield v Ratcliffe* (1615) Hob 334; 80 ER 475; *Thomas v Sorrell* (1674) Vaughan 330, 336-339; 124 ER 1098, 1101-1103; *King v Earl of Banbury* (1695) Skin 517, 527; 90 ER 231, 236; *City of London v Wood* (1701) 12 Mod. 669; 88 ER 1592; *Leigh v Kent* (1789) 3 TR 362; 100 ER 621; *The King v Inhabitants of Cumberland* (1795) 6 TR 194; 101 ER 507; *Green v Mortimer* (1861) 3 LT 642; 1 Blackstone's Comm, 40, 90-91, 162.

23 (1990) 170 CLR 1.

24 (1985) 157 CLR 523.

necessarily true. Thus, if the High Court is being driven by a disenchantment with the results of literalism's effect on the Court's work of interpreting the written Constitution, it is quite possible that the Court will embrace a theory of subordinate parliamentary supremacy which goes no further than to give scope for limiting the application of literalism to the Constitution by counterbalancing, against the will of the Imperial Parliament, the will of the Australian electorate. However, the effect of a general theory of common law limits on parliamentary power cannot be confined to amelioration of the application of strict literalism in interpretation of the written Constitution. To this extent, speculation that the Court may embrace common law limitations may be wide of the mark. That is not to say that a general theory of common law limits cannot provide a brake on the application of literalism. It may, for example, strengthen the status of certain presumptions which under current theory are treated as rules of construction of legislative intent. It may also introduce rules (whether of construction or otherwise) preventing legislative imposition of legal irrationality or impossible obligations. This may be attractive to the Court as it moves to strengthen the constitutional protection afforded to human rights. However, it cannot provide the Court with the foundation for a general theory of the institutional effect of the written Constitution of the Commonwealth in the same way as did the early Court's federalism or the later Court's nationalism.

Nevertheless, on the occasion of any questioning of the notion of parliamentary sovereignty, it is necessary to consider what would replace the idea. If there is room to allow for a notion of popular will, it is necessary to consider whether that is to lead to a thoroughgoing constitutional theory of popular sovereignty (as in the United States of America) or whether the role of the popular will is to be limited and, if so, by what.

It is possible to formulate a constitutional theory on the basis that the intention or presumed intentions of the people of the several States are controlling factors in the construction of the written Constitution, but that the permissible influence of those intentions is itself subject to control by reference to certain limitations, arising at common law, on the legislative power of Parliament. Thus, if the Imperial Parliament is seen as having intended to carry out the wishes of the people of the several States, then it is possible to see how Toohey J's suggestions could be reconciled in some sense with traditional constitutional and legislative theory (though not with strict literalism). At that point, the question of common law limits on legislative power becomes relevant by way of suggestion that the Imperial Parliament's power to give effect to the wishes of the people is subject to the common law limits on its own power.

On the other hand, if it is thought that the wishes of the electorate were supreme and that the Imperial Parliament was a mere instrument, a more radical doctrine of popular supremacy is then in place. It would still be possible, however, to formulate a theory that the popular supremacy was itself subject to certain fundamental common law limitations. It is possible, for example, to see a trace of this in the "rights of Englishmen" which were important in American revolutionary thought. It was the Americans' thesis that George III's intrusions upon the rights of Englishmen held in common by the colonists were so extreme as to justify them in throwing off their allegiance to the King. The resultant statelessness of the revolutionaries may therefore be

said to depend ultimately on certain of their common law rights. Therefore the revolutionaries and the new states into which they combined were still subject to the common law, *mutatis mutandis*. No doubt this is all much further than Australian jurisprudence can be expected to travel, but it illustrates the point that even if one goes so far as to supersede entirely the authority (in 1900) of the Imperial Parliament, the existence of common law limits on legislative power is still a question to be answered.

It would seem, therefore, that whether one wishes to be radical or conservative, the time is ripe for reconsideration of the question of common law limits on legislative power. An essential part of such a reconsideration is a review of the origin of this idea and its fall from grace. Its mediaeval origins and a complete review of the authorities are beyond the scope of this article. However, some clarification of the principal authority is warranted and, in addition, I shall attempt an analysis of the effect of *Godden v Hales* in inducing a reaction of disfavour and promoting the rival idea of sovereignty.

DR BONHAM'S CASE

In *Dr Bonham's* case[25] the idea that there are common law limits on legislative power was given its classical formulation by Sir Edward Coke. In Coke's hands it was intended to give effect to his theory of the supremacy of the law over both the King and Parliament.

Inevitably, as with any attempt to insist on fundamental liberties, Coke founded his theory on natural law. It would be a mistake, however, to see Coke as identifying the common law entirely with natural law and considering the whole to be unalterable. For example, Coke's opposition to the statute *De Donis Conditionalibus*;[26] is clear. He regarded the estate in fee tail as a lamentable departure from the common law. Yet, there is no suggestion that he regarded that legislation as invalid.[27] His identification of the common law with natural law is only partial, as may be seen from his reasons in *Calvin's* case[28] where he adumbrated the criteria by which that part of the common law which is founded on natural law may be distinguished from the balance of the common law. Elsewhere in the judgment, he expressly stated that the law of nature is only a part of the law of England.[29] It seems necessary to restate that notwithstanding his commitment to the common law, Coke was by no means so ignorant as to fail to take any distinction between the various categories of law (as natural, divine, human, etc) current in mediaeval and early modern thinking.[30]

It seems clear from the very trouble which Coke took in *Dr Bonham's* case to set out, albeit very shortly, the several grounds upon which legislation might be held invalid,[31] that it was not Coke's intention to assert that any departure

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25 (1609) 8 Co Rep 107a; 77 ER 638; 2 Brown. 255; 123 ER 928.
26 Stat Westminster II (1285) 13 Edw I, Stat 1, c 1.
27 Preface to 3 Co Rep. xxxiii; 6 Co Rep 40.
28 7 Co Rep la, 12b-14a; 77 ER 377, 391-394.
29 *Ibid* 4b; 382, "this law of nature is part of the laws of England" and 12b, 14a; 391, 394, "parcel of the laws".
30 Preface to 2 Co Rep v.
31 As "... against common right and reason, or repugnant, or impossible to be performed ..." 8 Co Rep 118a; 77 ER 652.

at all from the common law must be invalid. Otherwise the grounds would have been otiose or repetitious. Rather than require a rigid adherence to every rule of the common law, he made the more sophisticated contention that the common law "*controls*" Acts of Parliament when they fall into one of the specified grounds.[32] Parliament itself was conceived as a creature of the common law, having a role to play in the common law constitution and susceptible to be controlled where it departed from that role or from certain fundamental precepts.[33]

Unfortunately for this doctrine, Coke did not elucidate its limits with sufficient clarity. Some of the statements in *Calvin's* case as to the extent of natural law are undoubtedly too cavalier. The first two of the three grounds of review set out in *Dr Bonham's* case are obscure and some of the distinctions are not obvious. Their proper understanding requires a thorough research into the authorities upon which Coke relied in formulating the rule.[34] In addition, an important starting point may be to recognise the reference to "common right and reason"[35] as founded upon two concepts. Firstly, "common right" may be referable to the concept of universality set out in *Calvin's* case[36] to the effect that a principle must have universal currency in the affairs of mankind, rather than merely in those of a single kingdom, in order to be recognised as a rule of natural law. Secondly, "reason" may be referable to the rational test that, "whatever is necessary and profitable for the preservation of society is due by the law of nature".[37] This parallelism between "common right and reason" and the two limbed analysis of *Calvin's* case is too striking to be ignored.[38]

At all events, with the fall of Coke the doctrine's fortunes suffered from the loss of Coke's guiding hand. It was reiterated in too extravagant terms by Hobart CJ (in King's Bench) in, inter alia, *Lord Sheffeild v Ratcliffe*, where reference was made to,

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32 *Id.*

33 See also *Rowles v Mason* (1612) 2 Brown 192, 198; 123 ER 892, 895.

34 In this respect, see C H McIlwain, *The High Court of Parliament and its Supremacy* (1910) 273-278, 285-301; T F T Plucknett, "Bonham's Case and Judicial Review" (1926-1927) 40 *Harvard Law Review* 30, 35-48.

35 It appears that Coke extracted this phrase out of his precedents by a process of induction, rather than finding it expressly present in them. See J W Gough, *Fundamental Law in English Constitutional History* (1955) 34.

36 7 Co Rep la, 13a, 14a; 77 ER 377, 392, 394.

37 *Ibid* 13a; 392.

38 Dismissals of *Dr Bonham's* case as merely espousing a formula of strict interpretation fail to reckon properly with *Calvin's* case and, in any event, involve an attempt to strain Coke's words too far from their natural meaning. See S E Thorne, "Dr Bonham's case" (1938) 54 *LQR* 543; J W Gough, *supra* n 35, 34-37. Plainly, Coke's words were intended to support his ruling that the Statute of 14 H.VIII (the statute in question in *Dr Bonham's* case) could not, despite its express terms, authorise the Defendants to fine the Plaintiff because they would thereby become judges in their own cause (they taking one half of the fines). Thorne, at 548, seeks to minimise this as a mere refusal to follow a statute absurd on its face. 14 H.VIII may be unjust, but how is it absurd? It only contains a contradiction if one presupposes a fundamental rule, that none may be judge in his own cause. One cannot escape from resort to a fundamental law. Moreover, the very proposition of absurdity as a ground of invalidity is itself far more than merely strict interpretation.

> that liberty and authority that Judges have over laws, especially over statute laws, according to reason and best convenience, to mould them to the truest and best use ...[39]

Coke's views were vigorously attacked by Ellesmere.[40]

GODDEN v HALES

Notwithstanding this initial hostility from the Royal party, an appeal to the supremacy of the common law was later made in an attempt to support James II's resort to the dispensing power.[41] In *Godden v Hales*,[42] Northey, *arguendo* (for the Plaintiff) relied on the limitations at common law which existed upon the King's dispensing power. It did not extend to a statutory proscription on a *mala in se* but did apply to a *mala prohibitum*. Further, it did not extend to a disability and the effect of 25 Car II, c 2 was to impose a disability, remediable only by taking the oath of supremacy. He denied, apparently correctly,[43] the authority of the *Sheriff of Northumberland's* case[44] and then submitted, "it is the single opinion therefore of Coke", referring to 12 Co Rep 18. It is to be observed therefore, that this was not an attack on *Dr Bonham's* case. However, in the fullest account extant of Northey's argument, Northey, after referring to 12 Co Rep 18 says, "This and some other matter of the like nature, which are put together by my Lord Coke, are, with submission, the only authorities in the law that seem to give countenance to the dispensation now before your lordship".[45] It is to be noted that *Calvin's* case was cited in the same breath as

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39 (1615) Hob 334, 346; 80 ER 475, 486.

40 For Ellesmere's comments, see his address to Montague CJ at Moore 826, 828; 72 ER 931, 932 (where he, however, concedes the field as to two of the three grounds (*supra* n 31) on which Coke ruled that legislation will be controlled by the common law, namely, "impossibilities or direct repugnancies"). See also the *Earl of Oxford's* case (1615) 1 Chan Rep 1, 11-12; 21 ER 485, 487-488 and his "Observations on the Lord Coke's Reports" 21 (extracted at 77 ER 652 n C). As to the authorship of the latter work, see Holdsworth, *History of English Law* (1924) Vol 5, 478 n 1; Sir Frederick Pollock, "Notes" (1920) 36 *LQR* 4.

41 The ancient prerogative power to dispense with compliance by a person with a statutory requirement. Readers will recall that James II resorted to this power in order to relieve Catholics of the obligation to swear the oath of supremacy required, by 25 Car.II c.2, to be sworn, within three months of receipt of their commissions, by the holders of most of the significant offices within the kingdom.

42 (1686) 2 Show 475; 89 ER 1050; Comb 21; 90 ER 318; 5 Bac Abr 536; 11 St Tr 1165. This was a collusive action brought by James II's agents to get a judicial endorsement of the King's dispensing policy. The King had granted a dispensation to Sir Edward Hales, whom he had commissioned as a colonel in the army. Godden was Hales' coachman. He successfully prosecuted Hales at the Rochester Assizes for breaching the requirement to take the oath. He then sued in the Court of King's Bench to recover the fine imposed. One of the issues there was issue estoppel, but the whole case was argued and the estoppel plea was unsuccessful.

43 T F T Plucknett, *supra* n 34, 46-48 and Hargrave's annotation to Co Lit 12, reproduced at 11 St Tr 1188, but see *contra*, Sir Edw Herbert, "*A Short Account, ...*" 11 St Tr 1251 1255.

44 Y B Mich 2 Hen VII, 20 (which concerned a patent for life *non obstante*, allegedly contrary to 28 Edw III, c 7 and 42 Edw III, c 5).

45 5 Bac Abr 546-547.

was 12 Co Rep 18 by Serjt Glanvil (for the Defendant).[46] In *Calvin's* case,[47] Coke expressed the view that the *Sheriff's* case was good authority for the King's dispensation with an Act and commented, "for that the Act could not bar the king of the service of his subject, which the law of nature did give unto him". That appears to go further than a mere statement of the prerogative dispensing power. Although it may be ambiguous, in that Coke may have meant merely that the mere existence of the statute does not indicate an intention to displace the dispensing power, it does on its face seem to suggest that Parliament could not, in any event, abrogate the dispensing power, even by express provision, because to do so would infringe a rule of natural law.

In *Godden v Hales* it was not doubted on any side that the King had, at common law, a dispensing power and this, obviously, cannot be said to be an invention of Coke's. The real question was as to the limits of the power and the doctrine of *Dr Bonham's* case was not strictly in issue. The dispensing power and the doctrine of judicial review are associated only by their common assumption that the supremacy of Parliament is not unlimited. The *Sheriff's* case was invoked not as an example of invalidity in an Act, but of a power to dispense with an Act. However, it appears that Coke's comment on the case (in *Calvin's* case) clouded the issue.

Thus, the judges, in holding that the King was the sole judge of the necessity of dispensing with penal laws and that the King might so dispense with them (where they grant no private benefit), held also, "that no Act of Parliament could take away that power".[48] There is great room for doubt whether this represented a purported application of the doctrine of *Dr Bonham's* case, since Herbert LCJ's first proposition was, "that the kings of England were absolute sovereigns"[49] and Coke was not cited in the judgment, although the *Sheriff's* case was approved and followed. It is probably true that Coke's comment in *Calvin's* case at least partly underlies the judgment. It is to be noted that Herbert LCJ expressly relied upon Coke's formulation in *Calvin's* case in his "A Short Account of the Authorities in Law, upon which Judgment was given in Sir Edward Hales's case".[50] The resolution that the power could not be taken away by statute amounts to a positive ruling partially consistent with (though not directly relying on) *Dr Bonham's* case. However, Coke's ruling in the latter case appealed to the supremacy of natural law, whereas Herbert LCJ appealed to royal absolutism. It is in this, somewhat indirect, sense that *Godden v Hales* amounts to a misapplication of the idea, fundamental to *Dr Bonham's* case, that there are limits on Parliament's power. Of course, Coke's comment in *Calvin's* case did nothing to advance a theory that the dispensing power was without limitation at common law or even that in any matter not involving a power annexed to the King by a principle of natural law, the dispensing power could not be controlled by statute.[51]

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46 Comb 23; 90 ER 320; 2 Show 477; 89 ER 1051.

47 7 Co Rep 1a, 14a; 77 ER 377, 393.

48 2 Show 478; 89 ER 1051; Comb 25; 90 ER 321; 5 Bac Abr 536; 11 St Tr 1199.

49 2 Show 478; 89 ER 1051; Comb 25; 90 ER 321; 5 Bac Abr 536; and Bishop Burnet's account 11 St Tr 1195 n.

50 11 St Tr 1251, 1256-1257. See also, Sir Robert Atkyns', "Enquiry into the Power of Dispensing with Penal Statutes" 11 St Tr 1200, 1238.

51 7 Co Rep 1a, 14a; 77 ER 377, 393: "... the King may, by a special *non obstante* dispense with that Act, for that Act could not bar the King of the service of his

The consequence is that Coke's opinion on the *Sheriff's* case was obliquely prayed in aid of a submission that the King's prerogative power arising at common law to dispense with statutes was not susceptible to control by Parliament. Lord Chief Justice Herbert, probably in deference to the vigorous submission of Sir Edward Northey, felt that to rest his judgment solely upon the basis of the extent of the dispensing power as a prerogative recognised by the common law was too insecure a foundation. He therefore went so far as to enunciate a theory of royal absolutism, in aid of which he resorted to Coke's comment as proving that the power was invulnerable to Parliamentary control. There was some inconsistency in this formulation, as the third resolution of the judges[52] was confined within the ambit of common law limitations on the power. However, the resolutions certainly went further than Herbert LCJ had gone in argument[53] prior to consulting the other judges.

It was this misuse of Coke's doctrine which threw it under suspicion on the parliamentary side of politics, since it was felt that the judges could not be trusted.[54] However, this was a misuse which was only possible because in *Calvin's* case[55] Coke made use of the doctrine to strengthen the royal prerogative at a point where it must be very doubtful that a principle of natural law was really at stake. Thus, it may be concluded that the failure to confine the doctrine within properly defined limits was the chief reason for its downfall. If it could be invoked so easily in *Calvin's* case, it could also be invoked by James II's Judges without too much attention to the circumstances requisite to its availability. That is not to say that the very limited protection afforded to the dispensing power in *Calvin's* case supports the blanket invulnerability declared in *Godden v Hales*. However, the point is that unless a rigorous test and process of examination are applied as a condition of recognition of a principle as having the status of a rule of natural law, the danger exists that spurious claims will be uncritically received as matters invulnerable to legislative control. In order to be efficacious, the doctrine of *Dr Bonham's* case must, in the "common right and reason" category, be closely confined in its application to a few central principles. Otherwise, as *Godden v Hales* shows, there is considerable scope for counter-productive use.

It is unsurprising that Coke's aptness to express himself forcefully should have led him to express his view too crudely. The very zeal which drove him to wage war with the party of modern, efficient, centralist constitutional theory of his own day[56] caused him so to stumble that the supremacy of the common law was interpreted too indiscriminately. Thus, Sir Thomas Powys' submission, "that the king's prerogative was, and is as much the law of England, as any statute",[57] rendered the supremacy of the common law an idea that would not

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subject, *which the law of nature did give unto him*" (italics added). See also, at 13b; 392-393, the discussion of the law of nature's immutability, upon which this passage follows.

52 Herbert LCJ submitted the case for the opinion of all of the judges of the Courts of Common Pleas, King's Bench and Exchequer. Only Street and Powell JJ dissented.

53 Comb 24, 90 ER 320; 11 St Tr 1196-1197.

54 T F T Plucknett, *supra* n 34, 52-54, 69; Bishop Burnet, *History of His Own Times* Vol 1, 660, 671 extracted at 11 St Tr 1199n; see also 11 St Tr 1195n.

55 *Supra* n 51.

56 G de Q Walker, *The Rule of Law* (1988) 104-105.

57 2 Show 477; 89 ER 1051.

be countenanced by that party which might otherwise have welcomed it. As a result, the idea of sovereignty (albeit in the hands of Parliament) was ultimately preferred.

In this context, one cannot help but recall Coke's statement that, "*Magna Charta* is such a fellow, that he will have no sovereign".[58] It is commonly held that that certainly was not the outcome of 1688.[59] It may be doubted whether, in point of legal authority, that this is so.[60] Prior to the Bill of Rights,[61] the dispensing power was undoubted law, supported by plentiful authority. The Bill of Rights after declaring illegal the pretended suspending power, merely declared illegal the dispensing power, "as it hath been assumed and exercised of late". Then, after governing the succession of the Crown, it further enacted that the dispensing power be abolished *in futuro* expressly saving the effect of prior grants. It is difficult to find in this anything more than a triumph for the constitutional supremacy of Parliament over the executive. If Parliament was not, before the Bill of Rights an absolute sovereign (and the dispensing power surely evidences that it was not), there is nothing in the Bill of Rights which takes matters so far as to convert Parliament into a Hobbesian Leviathan.

However, as Sir David Lindsay Keir has said,

> Sovereignty in 1688 was for practical purposes grasped by the nation. ... Thus perished, at the hands of an assembly animated by an authority which can hardly be otherwise regarded than as popular sovereignty in action, the idea of sacred and inalienable governmental powers, inherent in kings possessing a divine, indefeasible, hereditary title ....[62]

The significance of the Glorious Revolution lies chiefly not in the amendments effected by statute, but in the manner in which old constitutional forms were brushed aside for a time. The sovereignty grasped was a political fact rather than a legal doctrine. It was a political fact which made survival very difficult for the doctrine of judicial review.

REVIVAL OF COKE'S DOCTRINE: DISADVANTAGES OF ALTERNATIVES

In the context of any current erosion of parliamentary supremacy as conceived since 1688, the present may be an opportune time to consider revival of Coke's doctrine, either in addition to, or as an alternative to the implication of a Bill of Rights by means of resort to the text of Australia's written Constitution or to the circumstances in which that Constitution came into existence. In this context it is possible to point to certain dangers and inadequacies in the latter method.

Firstly, there can be only a limited scope for implications arising from the text itself. The text, understandably, speaks much more of responsible government and political institutions than it does of many other matters related to fundamental liberties of importance equal to or greater than rights to

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58 (1628) 3 St Tr 194.

59 *British Railways Board v Pickin* [1974] AC 765, 782 *per* Lord Reid.

60 Sir Frederick Pollock, "A Plea for Historical Interpretation" (1923) 39 *LQR* 163, 165.

61 1 Wm & M, sess 2 c 2.

62 *The Constitutional History of Modern Britain* (1960) 269, 270.

participate freely in the political processes of the Westminster system. It will be much more difficult to find implications in the text on matters on which it is substantially silent. It follows that implication from the text can only advance the cause of human rights to a limited extent.

Secondly, implication from the manner of creation of the Constitution suffers from the difficulty that the nature and extent of any such implication is vague and uncertain. There would seem to be no logical reason why such implication would be limited to the erection of prohibitions and limitations upon the use of express powers to impugn fundamental liberties. As suggested above, such a method of interpretation could be used in support of a doctrine of a dynamic constitution involving a shifting balance of powers between the States and the centre. No doubt in the hands of a continuing dominant nationalist school on the bench, there would be a certain measure of predictability in the rate and direction of this shift. However, there is no reason why that must be so. Implications of reserve powers and implied immunities in the States can be derived by this method just as easily as implications of increasing power for the centre, or an implied nationhood power. Moreover, there is no reason why an argument which essentially depends upon an assumption that the people did not intend to confer power to alter the *status quo* adversely to fundamental liberties cannot also be employed to counter attempts to alter the *status quo* in favour of fundamental liberties, or for that matter, liberties of any kind. Indeed, there seems no reason in logic why the *vox populi* should be presumed to have limited itself to questions of fundamental liberties. Why not also an implied bill of privileges, an implied bill of economic largesse, an implied bill of trade policies or an implied bill of popular prejudices?[63] The danger in resort, however indirectly, to popular sovereignty as a constitutional foundation is that there is no necessity binding the *vox populi* to support for human rights. After all, it is the Diceyan view that the legal sovereignty of Parliament is the instrument by which the political sovereignty of the people is manifested and yet it is precisely to protect us from Parliament that an implied Bill of Rights is suggested. It has been suggested that this is a result of a failure of Parliament to control the executive, but the same point was made as long ago as 1888 by Bagehot.[64] This is a constitutional defect which has arisen with responsible government and Parliament is unable to supply the remedy. However, there is no reason why the judiciary might more confidently be expected to champion the *vox populi* of 1900 or, even if it did, to assume that that could be determined with logical consistency or in uniform conformity with the observance of fundamental liberties. It would be unfortunate if the scope and operation of these implications were to be the subject of a continuing fluctuation of judicial opinion, changing with the composition of the bench and, apparently, entirely at large.

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63 These possibilities are not fanciful. One may envisage such a method of interpretation being put to quite frightening uses in wartime or in a time of intense cold war. Would the results in *Adelaide Company of Jehovah's Witnesses Incorp v The Commonwealth* (1943) 67 CLR 116 and *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 have been the same? *Queensland v The Commonwealth* (1989) 167 CLR 232 does not inspire confidence.

64 W Bagehot, *The English Constitution* (5th ed, 1888) 220, 227-230.

Thirdly, without any logical limitation upon the matters which may be the subject of such implied limitations, the court would stand in grave danger of encroaching too uncertainly upon the legitimate scope of legislative power and of binding the present to the attitudes of the past. All of these considerations point to a danger of over-politicisation of the role of the High Court.

Fourthly, it may be considered offensive to align the Australian Constitution even remotely with a doctrine (the sovereignty of the people) which in an era of monarchical absolutism had appeal, but which has itself shown no necessary propensity to advance the cause of human rights and has tended to an association with some of the more unsavoury ideologies and regimes of the past two centuries. In an age which has demonstrated that democracy can exist without constitutional recognition of the concept of popular sovereignty, there is no need to adopt so dangerous and unsatisfying a notion into the fundamental fabric of our Constitution. If, however, it is to be adopted, then a controlling doctrine of common law limits becomes even more attractive.

Fifthly, if the new method is to be limited to the implication of fundamental liberties, it would require the Court to define what a fundamental liberty is. This would seem to replicate the inquiry required by Coke's doctrine. Ultimately, it would seem that resort cannot be avoided to some notion that some rights are so fundamental that they must be accorded the status of or analogous to natural law. This seems to be recognised by Toohey J, in commenting,

> In short, the statements ... suggest a revival of natural law jurisprudence – that for law to be law it must conform with fundamental principles of justice.[65]

Accordingly, why not apply Occam's razor and abandon the attempt to rely upon implications arising from the manner by which the text was juridically created?

CONCLUSION

The doctrine that legislative power is subject to common law limitations undoubtedly requires further definition of its limits in order to bring it into a useable form. The objection that it tends to entrench matters which may be the subject of division in the community cannot be avoided. To some extent that is an inevitable result of any commitment to the inviolability of human rights. It may be argued that Coke's theory in its present form of arrested development contains the seeds of a development which would probably minimise this problem more effectively than the alternative methodology, whilst avoiding the other pitfalls of that alternative. There is also the advantage that it does have its roots in the common law and would provide the courts with rather more guidance, for the purposes of its further development, than would the alternative. However, unless and until the High Court gives an indication that it is prepared to consider a revival of the doctrine, its prospects must continue to be viewed as remote, although some encouragement may be gleaned from

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65 *Supra* n 1, 9.

the Court's non-committal adversion to it in *Union Steamship Co of Australia Pty Ltd v King*,[66] in that at least the Court did not dismiss it out of hand. In a time when some old certainties are crumbling, it may be that older controversies may be renewed with fresh vigour.

66 (1988) 166 CLR 1, 10.