CONSTITUTIONAL CENTENARY FOUNDATION

SOUTH AUSTRALIAN CHAPTER

BONYTHON HALL, THE UNIVERSITY OF ADELAIDE

13 AUGUST 1996

THE BLESSINGS OF THE CONSTITUTION

The Hon Justice Michael Kirby AC CMG

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TO SEE OURSELVES ...

Time impatiently hastens to the end of the millennium. Soon the new century will be upon us. For Australians, there will be a double cause for celebration. A new era and a century

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* Text for an address to the South Australian Chapter of the Constitutional Centenary Foundation of Australia. Bonython Hall, The University of Adelaide, 13 August 1996.

** Justice of the High Court of Australia. President of the International Commission of Jurists.

of peaceful government under the Constitution which established the Commonwealth.

There is little sign at this time of general public appreciation of the significance of the achievement of a hundred years of nationhood. There must be few countries on earth so ignorant about, and seemingly indifferent to, their constitutional charter. Perhaps it is a sign of success of the Constitution, fashioned in such a different age, that it rarely troubles the consciousness of the ordinary Australian. If the media are any guide, the big celebration of the new millennium will be a three weeks sporting festival in Sydney. Are these truly the priorities of a people reasonably content with their system of government? Is a short celebration of excellence in sport truly more important in this nation's priorities than a serious reflection upon the way it is governed?

To the extent that the Australian public, five years short of the centenary of the Constitution, is aware of the coming event, it probably does not go far beyond a vague consciousness of the debate about a republic, a Bill of Rights and the occasional criticism of the distribution of powers within the Australian federation. For many people in Australia, these are somewhat esoteric subjects. They cannot compete with the tangible passions of nationalism promised by the Olympic Games. Yet in all truth, a consideration of our constitutional arrangements is of

more abiding importance than a sporting display, however brilliant and temporarily exciting.

The fact that, such reflection as has appeared, has tended to concentrate on negative perceptions of the Constitution may, unless corrected, blind our citizens, as only occasional visitors to constitutional considerations, to the strengths of Australia's Constitution. Sometimes, it is necessary to see ourselves as others see us. Occasionally, we may gain a perspective of our own affairs by looking at them from the viewpoint of less happier lands.

When he visited this country in 1995, President Vaclav Havel of the Czech Republic gave Australians the benefit of the impressions of a poet turned politician. Most of his life had been spent in struggle against an oppressive and intolerant constitutional order, recently overthrown. It is worth quoting an extract from his perspective[1]:

> "... For virtually my whole life, with the exception of a short period in the late 1960s, I was barred from leaving my country. As the long decades went by, I got so used to this absurd situation that I simply assumed I would never get to see any other parts of the world. Needless to say, visiting a continent as distant as Australia was, I thought, absolutely

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1 V Havel, address to the National Press Club of Australia, Canberra, 29 February 1995, 1-2.

> impossible. In my mind, Australia was one of those fabulous worlds beyond reach, worlds one cannot enter, just as one cannot land on a far-away star, or step into another century ...
>
> We must start systematically to transform our civilisation into a truly multicultural civilisation, one which will allow everyone to be themselves while denying no-one the opportunities it offers, one that strives for the tolerant co-existence of different cultural identities, one that clearly articulates the things that unite us and can develop into a set of shared values and standards enabling us to lead a creative life together. I am happy to be able to reiterate this profound conviction here in Australia - a country that could serve to many others as an example of a working multicultural democracy that is trying to follow a course which can offer a way out of the maze to pitfalls humankind currently finds itself lost in."

Still more vividly, the blessings enjoyed by a nation which is governed peacefully and for the most part justly, emerge from even a brief encounter with societies which, in recent times, have experienced constitutional disorder more brutal than that of which President Havel spoke. I have had the opportunity in recent years to work for the United Nations. I have seen a variety of constitutional governments in a world undergoing rapid transition. For the International Labour Organisation, I was in South Africa on the brink of its transformation to a multicultural democratic country. I have met the judges and lawyers whose function had been to uphold a constitutional and legal order imposed on the majority by a minority with power. In Malawi, for the United Nations Development Programme, I chaired a constitutional conference which transformed that former British colony from a society with a Life President (Dr Hastings Banda) to a democracy upholding the rule of law. For the same

organisation, I participated in the preparation of Lesotho's transformation from a one-party State to a multi-party democracy. For a short time, I was privileged to participate in the Court of Appeal of Solomon Islands, whose constitutional arrangements are in many ways similar to our own but whose economic vulnerability puts pressure on its institutions which ours have never had to bear.

But it is in Cambodia, where for three years I served as Special Representative for Human Rights of the Secretary-General of the United Nations, that the blessings which Australia enjoys under its Constitution were most vividly brought home to me. Cambodia has suffered successively from *coups d'état,* revolution, warfare, genocide, invasion and international isolation. Now, following United Nations assistance, it is attempting to rebuild the basic institutions of government: a legislature, a public service, police, military, an effective executive and courts. These institutions, for the most part, had to be recreated from nothing. The Khmer rogue regime, adhering to ideas of institutional anarchy, had destroyed most of the vestiges of Cambodia's former constitutional government. I was therefore able to observe, at close hand, the perils and injustices which visit a country which does not have a stable constitution. In the main courtroom of the Supreme Court in Phnom Penh I took part, with judges from many parts of the world, in a crash course to teach a group of lay-people what it was to be a judge. Sometimes in the remote provinces of Cambodia, close to

ruthless insurgents, surrounded by landmines, frustrated by the continuing reports of grave human rights abuses, I thought of Australia's institutions and their remarkable capacity to respond to criticism and to adapt to change.

Some readers of these words will react with impatience to an essay by a judge on the blessings of the Australian Constitution. They will deny comparisons with Czechoslovakia. They will regard the perspective from Phnom Penh as absurdly irrelevant - the artifice of an advocate comparing, to advantage, things profoundly unalike. Perhaps they are right. Certainly, a reflection upon the strengths of our Constitution should avoid the cloying self-satisfaction which was a feature of the belief in the racial superiority of British people which was never far from Australians in the years of my youth. Furthermore, we should acknowledge that some of the strengths of Australia's system of government, and of its laws, derive not from the letter of the 1901 Constitution but from other blessings which Australia enjoys. It is a land of great natural riches, with a strong economic infrastructure, good general education and a lively involvement in the arts and in sport. It is the only nation on earth which governs a whole continent, speaking the same language. It enjoys a great economic and spiritual potential deriving both from its history and geography.

So far as government is concerned, many of the blessings we enjoy flow not from the written text of the Constitution, as

such, but from the centuries of heroic struggles in England which preceded the Australian Federation. By those struggles the people asserted, eventually, their paramountcy over the Crown and other powerful interests. Our Constitution is part of this lineage of the constitutional struggles of the peoples of the United Kingdom. We should never forget it. The political conventions by which we live are part of the heritage of an English-speaking nation. The text of the *Commonwealth of Australia Constitution Act*[2] may be uninspiring and austere for some readers. But it is for Australians, the end product of a continuous stream of constitutional instruments from which it takes character and strength. It offered a new start for the government of a new nation. Its forebears include the *Magna Carta,* the English *Bill of Rights* of 1689, the *Act of Settlement* of 1701, the *American Declaration of Independence* of 1776 and the *United States Constitution* which, in turn, was very largely the attempt of the American settlers to enshrine in one document their conceptions of the essential features of good government which had been won by the English people at home but which were being partly denied in the settlements and plantations in North America.

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2 63 and 64 Victoria c 12.

It has become fashionable in some quarters to deny or belittle the past links with the United Kingdom and even to rewrite Australia's history. But we cannot expunge something so indelible as the lineage of our constitutional form of government. There may indeed be elements in it that we should change and improve. But we diminish ourselves when we deny the past as it was. A balanced view of our Constitution will only emerge from an identification of its strengths, to be put in the scale with its suggested defects and weaknesses.

THE SUGGESTED DEFECTS

It would be unsurprising if there were not a catalogue of faults in the Australian Constitution. Just compare the different age in which it was drafted and the world of today. That was an age when the British Empire was reaching its apogee. Penal settlements had only lately changed themselves into rustic settler societies. Men of affairs controlled the colonial governments of Australia. For the most part, women's suffrage but was a distant dream. It was a time of White Australia, in which most of the immigrant settlers who came to this land derived from the United Kingdom of Great Britain and Ireland. The Aboriginal and other indigenous peoples of the continent were generally regarded as uncivilised nomads. Their land was taken without compensation. Their culture was ignored or belittled. If they were not killed, they were all too often marginalised or promised assimilation. The fear of hordes invading from the north was

ever-present in the colonial mind. Imperial preference in peace and the Royal Navy in war were the foundations of Australia's national security. Yet, in an astonishingly short time these settler societies had won for themselves self-government. They had busy, elected parliaments earnestly debating the statutes and issues of the day. They had established independent courts which reflected the legal traditions of "home". They had introduced innovations in industrial relations and in other spheres and had developed economic activity which had already won for the settlers one of the highest standards of living in the world.

Contrast that world with the world we live in, a century later. The composition of Australia's population is radically changed and rapidly changing. "White Australia" is abandoned. An attempt, often faltering, to achieve a new accommodation with the indigenous people of Australia and a correction of past injustices is reflected in the law[3] and in the policies of successive governments. The British Empire has completely faded away. Symbolically, its last substantial vestige, Hong Kong, is to be surrendered in 1997. Imperial preference in trade has been replaced by strong trading links with the countries of the region and a commitment to global liberalisation of trading restrictions. A great network of international and regional institutions has

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3 *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1.

sprung up to respond to the many problems which defy national solution and to the opportunities which demand global cooperation. Nuclear fission and information technology have revolutionised war. Man has walked on the moon and now explores the outer reaches of space. Computers are linked across the world, integrating a million minds and defying national borders. Genomic research promises even the possibility of a redefinition of the human species.

In such a world of change, the fact that the Australian Constitution endures and still, for the most part, works to the apparent satisfaction of most of its people is truly astonishing. We should not be surprised that many of our fellow citizens point to defects and call for change. Ten areas, in particular, may be singled out as the subject of the most persistent and oft-repeated criticisms:.

1. ***Aboriginals:*** A number of commentators on the Australian Constitution assert that it should be amended to reflect the special place in our nation of its indigenous peoples. As originally enacted, the Constitution even omitted people of the Aboriginal race from the powers of the Federal Parliament to make special laws with respect to the people of any race. That exclusion was repealed with the passage

of the *Constitution Alteration (Aboriginals)* 1967[4]. However there is still no recital about the special position in Australia of the Aboriginal and Torres Strait Islander people who are descendants of the people who were here before the settlers arrived. Some advocates propose the inclusion of recitals which acknowledge the special position of the indigenous peoples. Others call for a constitutional Treaty of Reconciliation. Still others suggest the need for substantive provisions affording larger rights and constitutional compensation for past wrongs. These are controversial questions. They continue to trouble many Australians.

2. ***The Crown:*** The suggestion that all references to the Crown should be removed from the Constitution and that Australia should adopt a republican form of government is not entirely new. Indeed, there were advocates (a small minority) who suggested that course to the Conventions which drafted the Constitution in the 1890s. There have

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4 Altering s 51(xxvi) of the Constitution. At the same time, s 127 of the Constitution was repealed which precluded the counting of "aboriginal natives" in reckoning the numbers of the people of the Commonwealth. See also *Commonwealth v Tasmania* (1983) 158 CLR 1; *Western Australia v Commonwealth (Native Title Case)* (1995) 183 CLR 373. On the topic of Aboriginal reconciliation, see W P Deane, Vincent Lingiari Lecture, reported *Canberra Times,* 23 August 1996 at 11.

always been a number of Australians who favoured the severance of links with the Crown of the United Kingdom. Only in the past decade or so have they commanded much popular support. Some of the advocacy for an Australian republic seems curiously outdated: in the form of appeals to nationalism: more in keeping with the 19th than the 21st century. But other, more rational voices suggest that a change in this feature of the Constitution is but a natural historical evolution. For them, the process began with the surrender of all legislative and executive powers belonging to the United Kingdom in respect of Australia, now finally terminated by the *Australia Acts* of 1986. It progressed through the gradual termination of judicial powers with the end of Privy Council appeals from the High Court and Federal courts[5] and, finally, State courts[6]. Now the only avenue of appeal to the Queen in Council is that vestigial remnant in s 74 of the Constitution which is contingent on a certificate from the High Court, which the Court has said it will never again give[7]. These constitutional

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5 *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth); *Ex parte Attorney-General for Queensland* (1985) 159 CLR 461.

6 *Australia Act* 1986 (Cth), s 11.

7 *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 461 at 465. See also *Attorney-General of the*

Footnote continues

developments, allied with the evolution of the Crown's new role in the Commonwealth of Nations and the changing composition and full independence of the Australian nation and people, lead a number of thoughtful advocates of a republic to call for the final termination of the last formal link with Australia's colonial past, in the person of the Sovereign as Queen of Australia. Obviously, this is a subject for serious debate. The appeal of the proposition often appears to founder on the disagreements about the alternative arrangements to be put in its place; the untroublesome nature of the present system; and the established reluctance of Australians to alter their Constitution by referendum[8].

Commonwealth v T & G Mutual Life Society Ltd (1978) 144 CLR 161.

8 Only eight alterations have been effected by the Constitution Alteration Measures on Senate Elections (1906); State Debts (1909); State Debts (1928); Social Services (1946); Aboriginals (1967); Senate Casual Vacancies (1977); Retirement of Judges (1977); and Referendums (1977). On the topic of republicanism see A Abbott, *The Minimal Monarchy and Why it Still Makes Sense for Australia,* 1994; A Atkinson, *the Muddle Headed Republic,* OUP, 1993; M L Brabazon, "Mabo, the Constitution and the Republic" (1994) 11 *Aust Bar Rev* 229; Z Cowen, "The Legal Implications of Australia's Becoming a Republic" (1994) 68 ALJ 587; B Galligan, *A Federal Republic - Australia's Constitutional System of Government,* Cambr UP, 1996; Republic Advisory Committee (M Turnbull, Chairman), *An Australian Republic,* 1993; G Winterton, *Monarchy to Republic: Australian Republican Government,* OUP, 1994.

Furthermore, the Crown is mentioned repeatedly in the Constitution. The form and structure of the document, as well as the history of its operation, are profoundly monarchical. This would not change by the mere erasure of references to "the Queen". It would then simply be a constitution providing for a constitutional monarchy but without a monarch. Indeed, there is a tension in the Constitution, for federation is inescapably republican in character. Once the Crown is divided in many parts and the people are included with the Crown in Parliament for the referendum procedure under s 128 of the Constitution, the ultimate foundation of the legitimacy of the Australian constitutional settlement is revealed as the people of Australia who approved the Constitution and whose concurrence is exceptionally required for any formal alteration. Yet so powerful in the mind of the Australian people at the time the Constitution was established was the idea of monarchy, with its centralising forces coming together in a personal Sovereign, that the early federal notions evinced in the original decisions of the High Court soon gave way. The tendency to centralisation of power continued to gather apace, at the cost of the federal elements in the Constitution. Centralisation of power is still a feature of the Australian Constitution and it is monarchical and not federal or republican in its essential character.

3. *Parliament:* It is probably fair to say that there is less respect today for the institution of Parliament than existed at the time of Federation. In part, this is because of disillusionment with the public performances of some Parliamentarians. But, in part, it is also a reflection of the loss of power from Parliament to the bureaucracy, to the judiciary and, particularly, to the Executive Government. Whilst the formal system of government in every Australian jurisdiction remains parliamentary, the realities have enhanced the power of cabinet, and especially of the head of government. This feature of modern realities is given emphasis by media coverage of political affairs. There is a widespread feeling that problems today are often too complex for a representative Parliament of lay-people who often appear to concentrate their attention upon simple, symbolic issues associated with the race for office rather than the hard business of government when office is won.

4. *No Bill of Rights:* Then there is the absence of a general Bill of Rights. True it is there are particular rights guaranteed by the terms of the Australian Constitution. But Justice Dawson was clearly correct when he pointed out that the Founders of the Australian Constitution

deliberately rejected the proposal to include a Bill of Rights, believing that the better safeguard for the liberties of Australians would be found in a democratic Parliament[9]. Such guarantees as existed in the Constitution, save for that found in s 92[10] have often attracted a rather narrow construction from a High Court respectful of parliamentary democracy and, until lately, unaccustomed to the jurisprudence of basic rights[11]. Australia is now one of the few nations of the world without a constitutional charter of rights. Even the United Kingdom has a kind of charter in the *European Convention on Human Rights and Fundamental Freedoms*. Although not incorporated into domestic law, that Convention can afford an avenue of redress by citizens of the United Kingdom through

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9 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 186. See also 133-134 (per Mason CJ) and *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 193. Note *Cunliffe v Commonwealth* (1994) 182 CLR 272, 361; *McGinty v Western Australia* (1996) 70 ALJR 200 at 215.

10 Guaranteeing freedom of trade, commerce and intercourse among the States. See now *Cole v Whitfield* (1988) 165 CLR 360.

11 See eg *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 581-582; *Kingswell v The Queen* (1985) 159 CLR 264. Cf *Cheatle v The Queen* (1993) 177 CLR 541 and P Hanks, "Constitutional Guarantees" in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives,* Law Book Co, 1992 92 at 98-100.

proceedings in the European Court of Human Rights. It can also affect local judicial decisions[12]. In Australia, the High Court has found implied constitutional rights, which are derived from the democratic character of the polity established by the Constitution[13]. International human rights treaties to which Australia is a party have come "inevitably"[14] to affect the content of Australia's domestic law. In these circumstances, proponents of constitutional change urge that a more modern, democratic and honest way to enshrine basic rights is now to adopt a constitutional Bill of Rights given legitimacy by the approval of the people. But proponents fear that such a proposal would founder on the rock of constitutional conservatism. Opponents fear the politicisation and excessive empowerment of the judiciary at the expense of the other, more accountable, branches of government.

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12 See eg *Derbyshire County Council v Times Newspapers Ltd* [1992] 1 QB 770.

13 See eg *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v The Herald and Weekly Times Limited & Anor* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211.

14 *Mabo v Commonwealth [No 2]* (1992) 175 CLR 1 at 42.

5. ***Federal weaknesses:*** Within a federation, it is inevitable that there will be debates about the distribution of powers between the national and the sub-national areas of government. These debates accompany political life in every federation. Critics take to task both the heads of power settled in 1901 and the interpretation of the approach to the constitutional grant of power to the Federal Parliament which was established in the *Engineer's Case* in 1921[15]. As a result of this constitutional approach, the federal character of the Constitution was weakened significantly. No implication, derived from federation itself, could stand against a clear grant of power to the Commonwealth. Advocates of federalism urge a reassignment of powers to enhance those of the outlying governments. They are specially concerned about the diminishing avenues of State revenue which have a potential to erode the viability of the surviving functions of State governments. The failure of the Constitution to provide clearly for the democratic character of State governments[16] is said to be a weakness which requires attention before any redistribution of powers from the centre is contemplated.

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15 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1921) 28 CLR 129 affd (1921) 29 CLR 406 (PC).

16 Cf *McGinty v Western Australia* (1996) 70 ALJR 200 (HC).

6. *Local government:* Local government is not mentioned in the Constitution although it long preceded the establishment of the Commonwealth of Australia. There are some advocates of change who contend that a proper redeployment of power within Australia should be between the federal Parliament and government and local government, bypassing the States. If this seems too adventurous for a nation which has been described as "constitutionally speaking, a frozen continent"[17], the recognition and protection of the democratic character of local government could be an appropriate reform which would have many supporters.

7. *International treaties and external affairs:* One area of acute concern in several quarters has been the effective expansion of the power of the Federal Parliament by the making of laws with respect to external affairs[18]. Fears are often expressed that this head of power, allied with international treaties dealing with topics hitherto the subject of State law, may be used to undermine the federal

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17 G Sawer, *Australian Federalism in the Courts,* Melbourne, Melbourne University Press, 1967 at 208.

18 s 51(xxix). See *State of Victoria & Ors v Commonwealth,* High Court, unreported, 4 September 1996.

compact and to redistribute power to the Commonwealth's advantage without the "irksome" necessity to secure the approval of the people. Concern about the direction of international treaties, ratified for Australia by the federal executive, came to a head after the decision of the High Court in *Teoh v Minister for Immigration and Ethnic Affairs*[19]. The decision produced State legislation purporting to afford relief from some of its implications[20]. A Bill introduced into the Federal Parliament designed to overcome the effect of the decision lapsed with the prorogation and dissolution for the 1996 general election[21]. The Howard Government has announced proposals which will afford the Federal Parliament a greater role in the scrutiny of international conventions, with their now clearly revealed scope for affecting Australian domestic law[22]. Critics of the Constitution urge the adoption of a clear break on the power of the Federal Executive to ratify international treaties without the concurrence of the States

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19 (1995) 183 CLR 273.

20 *Administrative Decisions (Effect of International Instruments) Act* 1995 (SA).

21 Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth).

22 Australia, Department of Foreign Affairs, *Treaty Making Reforms,* May 1996.

or at least of the Senate established to reflect State diversity. Some even urge the need to secure the approval of the Parliament as a whole. This is one area where it is said that the growing influence of globalisation and regionalisation are not reflected in a constitution drafted in a different age. Yet its adaptation by court decisions has altered the distribution of powers, reducing not merely the powers of the States under the Constitution but also the prerogative of the Australian people to approve or disapprove such changes.

8. ***The judiciary:*** The growing appreciation of the importance of the High Court of Australia in determining the federal balance, and in the general development of the law, has led to several demands for constitutional controls upon the appointment of Justices of the High Court and of other Australian courts. Whilst the spectacle of congressional hearings, such as attended the nomination to the United States Supreme Court of Judges Bork and Thomas seem out of place and even undesirable in Australia, some public scrutiny of the opinions and attitudes of judicial appointees is said to be appropriate, given the great power which Justices of the High Court, in particular, enjoy, once appointed. By their decisions and orders they may affect the very nature of the society we live in. So long as the public believed in the rhetoric of the declaratory theory of the judicial function, such democratic scrutiny was

considered inappropriate. Alternatively, it was sufficiently satisfied by the appointing function of the Executive, answerable to Parliament. But once it became plain, and acknowledged, that judges in deciding cases have choices and are not engaged in a purely mechanical function (least of all in constitutional controversies) appointments to the judiciary become more arguably a matter of legitimate political interest. Moreover, the qualities appropriate to appointment become more debatable. The notion that lawyers skilled in the traditional areas are necessarily the most suitable to have a seat on the High Court becomes more controversial.

9. ***Outside power:*** There is a growing recognition that changes in the realities of the world in which the Constitution operates affect the capacity of the Australian political system it establishes to afford good government to the Australian people. Transnational corporations, the international market in capital and global media operate, to a large extent, beyond the power of the governments of any but the most significant nations. What can be done about this increasingly important feature of the world we live in is unclear. Perhaps it merely underlines the diminishing significance of the nation state, and the constitutions by which they live. As governmental and regulatory powers increasingly pass to international agencies, it becomes imperative that a national

constitution, such as Australia's, should reflect the realities of the regional and global environment to which Australian institutions must respond and which they must try to influence.

10. ***Difficulty of change:*** There is finally the obstacle of the mechanism for change of the Constitution. Very few amendments have secured the majorities required by s 128 for a valid alteration. This number is even smaller when it is remembered that three of the eight proposals approved by the necessary majorities were adopted on the same occasion in 1977. Critics suggest that the requirements for formal change are too burdensome and that this is part of the reason for the pressure to adopt an expansive interpretation of the Constitution, out of recognition of the fact that formal amendment is next to impossible. A simpler procedure, combined with community education in the merits of regular constitutional change, are said to be the path proper to a people who take their own responsibility for modernising and reforming their basic law. It is to the people, rather than judges, that we should look in the future as we adjust the centenary Constitution to the rather different nation and circumstances it must serve in the century to come.

I trust that I have done justice to the major demands for constitutional change in Australia. Others exist. They include

the position of the States, the system of responsible government envisaged by the Constitution (claimed to be the "big mistake" of the Constitution[23]) and the demand for a more appropriate and realistic reference to the public service than exists in the antique fiction that they are merely part of the Executive power vested in the Governor-General as the Queen's representative[24]. Some of the language[25] of the Constitution is assailed as outdated, inappropriate and misleading. Some of the bright ideas enshrined in the Constitution are now, effectively a dead letter[26]. Some transitional provisions are clearly spent. They could be tidied up without offence to anyone[27]. But these are trifles. The basic system of government established by the Constitution endures. It is this achievement which needs recognition. It deserves celebration at the very time that, as a free people, Australians contemplate the changes that might be needed to adapt the Constitution to the future.

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23 H Evans, "Reflections on the Founders", Australian Parliament, *The House Magazine,* 1 March 1995 4 at 8.

24 Australian Constitution, s 61.

25 See eg *ibid,* 58, 59, 60.

26 See eg s 101 (Inter-State Commission).

27 See eg ss 69, 70, 95.

INSTITUTIONAL ADAPTATION

Given the great changes which have occurred since the establishment of the Commonwealth, it has been imperative that the institutions created by the Constitution should adapt. And adapt they have.

1. ***The Crown:*** At the time of federation, it was the decision of the people to whom the Constitution was twice submitted for a vote, to federate "under the Crown of the United Kingdom of Great Britain and Ireland"[28]. Recent research has shown that the founders, who participated in the debates of the Convention, were by no means rabid imperialists. They rather liked old Queen Victoria, who had been on the throne for most of the century. But imperialism was a doctrine which grew in the fertile soil of the Great War. It only really flourished in Australia for a brief interval after the 1920s.

   Queen Victoria sent her grandson, the Duke of York (later King George V) to open the first Federal Parliament in Melbourne. This symbolism of constitutional continuity is

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28 Preamble to the covering clauses of the Constitution.

captured forever in the enormous tableau painted by Tom Roberts. With the Crown, symbolised by a succession of dutiful monarchs, a system of government was established which took much of its basic character from the United Kingdom. However, it had grafted upon it federal and other features borrowed from the United States of America. It takes a sense of history and a sense of humour to understand the contradictory symbols of constitutional monarchy. Appearances are usually completely contrary to reality. Over the century, the Crown, as in England, has normally performed its duties as the peoples representatives advised. So it was when Governor Strickland, under Royal instruction, extended the duration of the New South Wales Parliament in 1916. He was then relieved by the King for his initial hesitation[29]. So it was when King George V accepted, ever so reluctantly, the insistent advice of Prime Minister Scullin that Sir Isaac Isaacs, an Australian, should be appointed as his representative and Governor-General[30].

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29 H V Evatt, *the King and His Dominion Governors,* London, OUP, 1936 at 146-152.

30 See P Hanks, *Constitutional Law in Australia,* 1991 at 140.

King George V gave his assent to the Statute of Westminster enacted by the United Kingdom Parliament to confirm the complete legislative independence of the self-governing dominions of the Crown. King George VI assented to the *Statute of Westminster Adoption Act* 1942 (Cth) by which it was enacted that no Act of the Parliament of the United Kingdom, passed after the commencement of the Act, should extend or be deemed to extend to a dominion unless expressly declared in that Act that the dominion has requested and consented to such enactment[31].

It was King George VI, also as the Duke of York, who opened the first Parliament to sit in Canberra in what is now the old Parliament House. It is another symbol of constitutional continuity that, seventy years later, the Duchess of York, still lives as Queen Elizabeth, the Queen Mother. Those who see about them in the world so much evidence of constitutional instability sometimes value the symbols of stable institutions, particularly when they prove adept to changing with the times.

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31 *Statute of Westminster*, 1931 (UK), s 4.

It is in the reign of the present Queen that the most significant changes affecting the Crown in Australia have occurred. Hers was the first visit of a reigning monarch to Australia. Soon after her accession, she approved her separate designation as Queen of Australia[32]. This designation was itself a final recognition of the rejection of the old notion of the indivisibility of the Crown. Now, a separate Australian Crown was clearly established. Another contradiction and paradox, that the one person could at the one time personify differing constitutional functions. Not a notion to cause much trouble to lawyers accustomed to fictions but confusing to some not brought up with their notions.

In 1984, the Queen revoked the Letters Patent issued under the Sign Manual by Queen Victoria in October 1900 relating to the office of the Governor-General of the Commonwealth of Australia. She issued new Letters Patent, more modern in form and more appropriate in content, doing so on the advice of her Australian

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32 *Royal Style and Titles Act* 1953 (Cth). See R D Lumb and G A Moens, *The Constitution of the Commonwealth of Australia,* 5th ed at 10-11.

ministers[33]. In 1986, in Canberra, the Queen gave the Royal Assent to the *Australia Act* 1986 (Cth). She assented to an Act of the same title enacted in substantially identical terms by the United Kingdom Parliament[34]. This statute was enacted pursuant to a request made and to consent given by the Parliament and Government of the Commonwealth in the *Australia (Request and Consent) Act* 1986 (Cth), and with the concurrence of all of the States of Australia by Acts passed in 1985. Amongst other things, these statutes finally terminated the remaining appeals to the Privy Council, save for the vestigial residue in s 74 of the Constitution already mentioned[35]. They repeated the termination of the power of the Parliament of the United Kingdom to legislate for Australia. They restated[36] the requirement that the Parliaments of the States must act in the manner and form required by law[37]. They entrenched

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33 Letters Patent relating to the office of Governor-General of the Commonwealth of Australia. 21 August 1984 in Australia, *The Constitution*, Canberra, AGPS 1986, 42-45.

34 1986 c 2. See discussion Lumb and Moens, above n 32 at 13-14.

35 *Australia Act* 1986 (Cth), s 11.

36 *Ibid*, s 1.

37 *Id*, s 6.

and clarified the role of State Governors as representatives of the Queen[38].

Although the Crown and its representatives retain the traditional privileges of a constitutional monarchy (to be consulted, to advise and to warn) the convention has been that they invariably act in accordance with the advice of their Ministers. It was the apparent breach of that convention in 1975 which caused surprise and concern to some Australians. But for present purposes, it is enough to note that when the Speaker of the House of Representatives attempted to contact the Queen over the dismissal of the Whitlam Government, which until the dismissal enjoyed a majority in the House of Representatives, the message was clear. The Queen took the view that this was a matter for the Governor-General of Australia. The evolution of that office and of its powers placed responsibility for an Australian crisis where it should be - with Australian institutions.

It is perhaps ironic that the reason often advanced as to why the events of November 1975 damaged the position of the Crown in the Australian Constitution is precisely

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38 *Id*, ss 7, 8.

because what happened contrasted so strongly to the usual reticence of Crown representatives and departed from the traditions of candour and transparency which have otherwise marked the modern relations in Australia between representatives of the Crown and the elected government.

2. ***Parliament:*** The Parliaments of Australia have also adapted to changing times. Under the Constitution, the Australian Parliament contained two features which were unique when adopted. The first was the provision for direct election of the members of the Senate. This is still not the case in Canada. Only later was it adopted in the United States. The second is the provision for the resolution of conflict between the Chambers found in the innovative provisions in s 57 of the Constitution[39].

Attempts have certainly been made to win back popular confidence in the Houses of Parliament, notwithstanding the modern ascendancy of the Executive. House and particularly Senate Committees, by diligent work avoiding the worst excesses of partisan politics, have won, especially for the Senate, a respected and important role in

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39 See *Cope v Cormack* (1974) 131 CLR 432.

federal government in Australia. The Senate is a deliberate brake on pure majoritarianism which only the naive believe constitutes the definition of a modern democracy. Although the Senate has not become, as such, a House of Parliament representing the States, it has ensured that the diversity of viewpoints reflected in all parts of this very large nation may provide a balance to the force of numbers reflected in the House of Representatives. Moreover, the Senate has become a Chamber in which political viewpoints which do not always embrace the two major political groupings in the nation, can have their say. This is doubtless viewed by some as a check on firm government and democratic mandates. However, because the Senate is itself elected, it is perceived by others as the protector of diverse points of view. It has helped to ensure that our national Parliament is so much more effective in preserving and reflecting the diversity of the federation than, say the Canadian Parliament in Ottawa.

In addition to specialist committees, the parliamentary innovations for the scrutiny of Bills and of subordinate legislation have been pioneered by the Australian Parliament. They have been followed in the Parliaments of the States and many lands overseas. Parliament has also established statutory guardians to help it in the performance of its own functions. The traditional office of Auditor-General, is now supplemented by the Ombudsman,

the Australian Law Reform Commission, the Human Rights and Equal Opportunity Commission and other bodies which assist and stimulate the work of the legislators. They, in turn, have promoted administrative reforms for the assurance of lawfulness, fairness and general reasonableness in the activities of the bureaucracy[40]. Over the course of this century, Federal Parliament has, to some extent, adapted to its greatly enhanced powers. From a body which began the century with powers to deal only with a small number of "federal" topics, it now sees itself, and is seen, as a truly national legislature presiding over Australia's legal, economic and social concerns and responding to Australia's place in the community of nations. To observe how far the Federal Parliament, under the same Constitution, has developed in the course of the century, one need only compare the size, subject matter and variety of the federal legislation in the early years of the Commonwealth with the enormous output of lawmaking which exists today. It is difficult to conceive how an effective response could have been given to the acute challenges of war and peace that have occurred in the century, without a national Parliament enjoying large

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40 M D Kirby, "The AAT - Twenty Years Forward", unpublished paper, Australian National University, July 1996.

powers. It appears likely that Members of the Parliament recognise the importance of rebuilding community respect for the institution. This rests upon another paradox. Whilst Parliament is divided, often bitterly, by party differences, it should remain united in defence of its own role as the elected voice of the whole nation.

3. ***The judiciary:*** In 1902, introducing the Bill which became the *Judiciary Act,* Alfred Deakin declared that:

> "The Constitution is the supreme law. The High Court determines how far and between what boundaries it operates. It is the Court which decides the orbit and boundary of every power".

There is no provision in the Constitution which reserves to the High Court the power of judicial review which it has exercised since its establishment. As in *Marbury v Madison*[41], this has just been a constitutional power accepted as inherent in a federal system of government itself. It is necessary to have an umpire. It is not institutional loyalty, but the pride of a citizen which obliges me to say that Australia has been fortunate in its supreme judicial institution. From the first, the High Court of

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41 (1803) 1 Cranch 137. See K Booker, A Glass and R Watt, *Federal Constitutional Law - An Introduction*, Butterworths, 1994, 324-337.

Australia established its independence and authority as the guardian and expositer of the Constitution. It recognised from the earliest days that constitutional interpretation required techniques which were different from those developed for other judicial tasks of interpretation[42]. Justice Isaacs in *The Commonwealth v Kreglinger*[43] pointed out that the Constitution was "made not for a single occasion but for the continued life and progress of the community". He stated that its meaning was to be derived from the "silent operation of constitutional principles". Similarly, Justice Windeyer in *Victoria v The Commonwealth*[44] explained that because the Constitution was the fundamental law of the land its "interpretation ... may vary and develop in response to changing circumstances".

As the century progressed, and the formal inflexibility of the Constitution became reinforced with each defeated referendum proposal, it became clear to every Australian, including the Justices of the High Court, that a broad

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42 *Jumbunna Coal Mine v Victorian Coal Miners' Association* (1908) 6 CLR 309, 367-8. See K Booker, A Glass and R Watt, *ibid,* 54.

43 (1926) 37 CLR 373.

44 (1970) 122 CLR 353.

construction of the Constitution was necessary if its words were to have any hope of adapting to the complex commercial, economic, social and political changes which were occurring in the nation[45].

The examples of the adaptation by the Court of the constitutional powers devised in an earlier age for later needs, are legion. The best known involve the expansion of the power with respect to industrial conciliation and arbitration[46]; external affairs[47]; corporations[48]; and the large expansion of the postal powers to embrace successively broadcasting[49] and television[50]. In time of war, the defence power was given a larger ambit to meet

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45 *Tasmania v Commonwealth* (1985) 158 CLR 1, 221 (per Brennan J).

46 See eg *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.

47 See eg *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; cf *Victoria v Commonwealth,* High Court, unreported, 4 September 1996.

48 *Strickland v Concrete Industries (Monier) Ltd* (1971) 124 CLR 468. Cf *New South Wales v Commonwealth* (1990) 169 CLR 482.

49 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262.

50 *Jones v Commonwealth* (1965) 112 CLR 206.

the vital need to ensure the very survival of the nation[51]. As the power and responsibilities of the Federal Parliament and Government expanded, so did the powers of federal taxation[52].

Yet for all this, it is sometimes more important to study the cases involving the denial of power and the assertion of authority to appreciate the impact of the High Court's decisions on the character of government in Australia.

The decision of the Court in the *Communist Party Case*[53] was certainly one of its most noble moments. By a majority of six Justices to one[54], the Court struck down as unconstitutional the *Communist Party Dissolution Act* 1951 (Cth). The decision came in the midst of what can now be seen as hysterical public and media concern about

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51 *Farey v Burvett* (1916) 21 CLR 433. Cf *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43, 83.

52 See esp *First Uniform Tax Case* (1942) 65 CLR 373; *Second Uniform Tax Case* (1957) 99 CLR 575; *Commonwealth v Sigamatic Pty Limited* (1962) 108 CLR 372.

53 *Australian Communist Party v Commonwealth* (1951) 81 CLR 1.

54 Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ; Latham CJ dissenting.

communists in Australia. The decision saved Australia from the legal excesses which manifested themselves at the same time in the United States of America, South Africa and other countries.

The Court has also vigilantly defended its authority whenever it was challenged. Anyone in doubt should read the transcript of the exchanges with counsel recorded in *Tait v The Queen*[55].

I am but the fortieth Justice in the whole history of the High Court. Forty in nearly a century is not many. The capacity of our Constitution to provide a mixture of stability and change is nowhere more vividly illustrated than in the High Court itself. Indeed, a reflection on the role of the Court, in the context of the Constitution, leads to an appreciation of the way it provides for a nice symbiosis of stability and change. The Constitution creates, or envisages, at the one time, the stable, unelected elements of government (the Crown, the civil service, the military and the judiciary) and the impermanent but elected elements (the two Houses of Parliament; the Ministers of State who are to be Members

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55 (1962) 108 CLR 620 at 623-627.

of the Parliament[56] and, in the exceptional case of a referendum under s 128 of the Constitution, the whole body of the electors, representing the people of Australia). This is a complex mixture of authority and democracy, of permanency and impermanency, of paradoxes, fictions, conventions, practices and law. But it works remarkably well.

BLESSINGS REMEMBERED

So what can we say are the chief blessings of the Constitution as its centenary approaches? Just to survive and endure a hundred years - even so turbulent a century as that past - is not enough. That our country is still governed under a Constitution devised in a different time could theoretically be as much a commentary on lethargy, self-satisfaction and indifference to the needs for reform as on the value of the system of government which the Constitution puts in place. As to the missing ingredient of excitement as the centenary approaches, perhaps this is because the imperial power which formally granted the Constitution was no tyrant. The evolution of the Constitution owed more to the work of earnest, middle-aged, male settlers and their descendants than to the

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56 Australian Constitution, s 64.

revolutionary patriots whose fervour called forth the Constitution of the United States[57].

Few Australians can name the Founders of our federal Constitution. Once they get past Parkes, Barton, Deakin, Griffith and perhaps Kingston and Isaacs, most Australians are stumped. There are few memorials to the Founders. Selected suburbs of Canberra record some of their names. A University in Queensland is named after Griffith. But little else records the people whose efforts secured the Australian Constitution, save for that instrument itself and the fact that it is still the basis of Australia's government.

Objectively considered, many of the Founders were people of remarkable talent. They numbered three Prime Ministers (Barton, Deakin and Reid), one of whom, Deakin, is undoubtedly one of the greatest of our national leaders. There were 33 participants in the Conventions who were, had been, or later became Premiers of the States. There were two Chief Justices

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57 G Craven, "The Founding Fathers: Constitutional Kings or Colonial Knaves?" in *Australian Parliament, Parliament and the Constitution - Some Issues of Interest,* Papers on Parliament No 21, December 1993, 119, 121. See also B de Garis, "How Popular Was the Popular Federation Movement?", *loc cit,* 101. As to the Founders, see R R Garran, *Prosper the Commonwealth,* Angus & Robertson, 1958 at 112.

of Australia (Griffith and Isaacs). There were several Justices of the High Court and of the State Supreme Courts. They were fine drafters. If the language of the Australian Constitution is not considered inspiring, it at least has the merit of brevity. Surveys show that, as a document, its content is completely unknown to most citizens. Yet its principles work silently and rarely impinge upon the consciousness of the people governed under it. Many are the peoples of the world who would value such a tranquil constitution.

So what are the features of the Australian Constitution which we should chiefly celebrate as its centenary approaches? There are, I suggest, ten at least which deserve our consideration:

1. ***Securing a nation:*** By the Constitution, Australians established a nation. They secured a federation of a continental country which has survived a century of unstable national borders. If we look around the world today, we see the breakup of nations, particularly of federal states. The Union of Soviet Socialist Republic, Yugoslavia and Czechoslovakia have split asunder. Australia has done better than Canada and the United Kingdom because its Constitution recognised from the start the need, in a large and diverse country, to share the central and the outlying power. Our federal arrangements

have their weaknesses. But no-one seriously suggests that the solution is dissolution of the nation.

2. ***Stability and change:*** The Australian Constitution is the sixth oldest continuously operating constitution in the world. We share with other stable democracies, the United Kingdom, the United States, Sweden, Switzerland and Canada a stable order of constitutional arrangement within which change, reflecting the popular will, can be accommodated. Stability in itself may be no boast. The laws of the Medes and Persians were inflexibly resistant to change. But the secret of the success of the Australian Constitution has been its adaptability. Other lands, with longer histories, have seen their constitutions changed by war and revolution. Our stable constitution, and the strong institutions which it establishes, has provided Australia with the foundation upon which political, business, legal and social affairs can be ordered with the assurance that the fundamental features of society will not be changed by political whim or by the unstable exercise of power.

3. ***Rule of Law:*** The Constitution enshrines the rule of law throughout Australia. It is upheld by all the courts and supervised by the one national and federal supreme court:

the High Court of Australia[58]. The independence of the judiciary, protected in the High Court and in the federal judiciary by constitutional control over removal[59] ensure that judges will act, with neutrality and courage, separately from the other branches of government. Far from the rule of law becoming weakened with the complacency of a century of our constitutional government, recent decades have seen an enlargement in the facility of judicial review, both by the common law[60] and by statutes enacted by the Federal and State Parliaments[61]. No-one is above or outside the law in Australia. In practice it may often be inaccessible to citizens. When found, the law may sometimes be in need of reform. But, in the end, high and low are subject to its rule which is enforced by independents courts which are uncorrupted and highly trained. Cases are not decided in Australia by telephone calls to judicial officers on the part of powerful people. Yet

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58 Australian Constitution, s 71.

59 *Ibid,* s 72. See now as to State Supreme Courts *Kable v Director of Public Prosecutions (NSW),* unreported, 12 September 1996.

60 K Booker, A Glass and R Watt, *Federal Constitutional Law - An Introduction* (above) 324ff. But cf *Craig v South Australia* (1995) 69 ALJR 84.

61 *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

this is the reality of the exercise of power in the wider world in which most people live.

4. *Democracy:* The Constitution enshrines the elected feature of our representative democracy. Governments are peacefully changed by the vote of the people in elections conducted with integrity. It is a wonderful thing to be a citizen of a free country and to live through a peaceful change of government. All the trappings of power change. The conventions are not challenged. Moreover, the fact that leadership of the nation *can* change means that ideas constantly compete for the acceptance of the people. In turn, this means that our society is faced at all times with new ideas competing for the people's support. Autocracy tends to be closed to new ideas. Our Constitution provides the governmental and social environment in which ideas may flourish.

5. ***Federal government:*** The elected Senate ensures a break on pure majoritarian rule by ensuring that a different balance may be present in the Parliament. Senators are elected by the people in the scattered communities over the entire face of the continent. Minority viewpoints can be, and are, represented. The essence of a modern democracy - a reflection of majority will tempered by respect for minority interests - is better achieved in our federal arrangements than in most others.

6. ***The civil service:*** Our country has been well served by a talented, well trained and uncorrupted civil service. We are still a nation that is shocked by corruption in office when it is revealed. We have not embraced the notion that corruption is a way of life or a mollification of rigidity of laws or administration. The tradition that the civil service faithfully and loyally works within the law to whichever government the people elect is deeply embedded in our constitutional traditions.

7. ***The armed forces:*** Similarly, our armed forces are small in number, non-political in tradition and subordinate to the civil power. The command of them is vested in the Governor-General as the Queen's representative[62]. This fact symbolises their loyalty to the people of the nation, rather than to the transient government of the day. True, the Governor-General will act on the advice of Ministers. But the armed forces are not, in their self-concept or in law, the servants of any political power. Australia's strong tradition of a professional defence force which keeps out of politics is enshrined in the Constitution. It is also derived from the English constitutional tradition which

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62 Australian Constitution, s 68.

preceded it. The notion of our defence forces being involved in a military *coup d'état* is completely unthinkable. Yet in many countries of the world, and not just developing countries, the power of men with guns and other weapons has been exercised against the people. In times of war and in foreign conflicts, our military, naval and air forces have fought with valour in pursuit of national goals determined exclusively by the elected representatives of the people. They have conformed to the conventions of the Constitution. There is absolutely no suggestion that they will ever do otherwise.

8. ***Free expression:*** Without an express constitutional guarantee, free expression has been nurtured and has flourished in Australia for the whole history of the federation. Even the old legal inhibitions of sedition[63] and obscenity[64] have declined in the context of new media of communications and modern notions of the right of people to enjoy free expression. The High Court has found implied guarantees of free speech in the democratic and representative nature of the system of government

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63 *Byrnes v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121; *Cooper v The Queen* (1961) 105 CLR 177.

64 *Crowe v Graham* (1968) 121 CLR 375.

established by the Constitution[65]. We live in a community which enjoys one of the highest levels of free communication in the world. This is, in turn, an assurance of the free flow of ideas which is essential to sustain a modern society and a progressive economy. Some jurists contend that the right of free expression is the most important of civil freedoms because, without it, democracy is a sham or a fiction and human rights can be abused in secret. Long before the implied constitutional freedom was found by the High Court, Australians enjoyed a high measure of freedom to express their ideas and opinions. They did so because of the political system which the Constitution reflected and protected.

9. ***Adaptation:*** Our constitutional text has adapted with remarkable success to changing needs and times. This is the more remarkable when it is remembered that the text was conceived by the Founders as long ago as the 1870s. It is a text which has greater popular legitimacy than the constitutions either of the United States or Canada. The draft of our Constitution was twice accepted by the

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65 *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106; *Theophanus v The Herald and Weekly Times Co Ltd* (1994) 182 CLR 104. Cf *McGinty v Western Australia* (1996) 70 ALJR 200 (HC).

electors, with overwhelming majorities of those voting. There is no right conferred in it such as the "right to bear arms" which appears in the United States Constitution to embarrass later generations. Its language may not be inspiring. In some respects, its central provisions may work only by the operation of fictions and conventions. But some measure of popular satisfaction with the way it operates is the general disinclination of the Australian population to change its provisions. Sometimes at least, we must allow that such disinclination has been fully justified.

10. ***Freedom preserved:*** When great challenges have come to the tolerant and democratic character of the Australian Constitution, the institutions which it establishes have normally, in the end, provided the right answers. Sometimes, the Constitution has proved a noble protector of tolerance and diversity. No clearer illustration of this assertion can be seen than in the *Australian Communist Party v Commonwealth*[66].

Permit me to conclude these reflections with a personal recollection. It concerns my own first consciousness of the

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66 (1981) 83 CLR 1.

Constitution and of the Court on which I now have the honour to serve.

In the late 1940s, my grandmother remarried. Her new husband, Jack Simpson had been born in New Zealand. He fought at Gallipoli. He was gassed on the Somme. For his military prowess he was honoured with medals. But he was disillusioned with war and with the Depression which followed. He threw away his medals. He became a communist.

As a child of nine, I recall accompanying him on his rounds in Tempe, an inner Sydney suburb, as he fixed electoral posters to lamp-posts. They were red of course. "Vote 1, L L Sharkey, Communist".

His electoral efforts were completely fruitless. The Menzies Government was returned in the election . It had a clear mandate to ban the Australian Communist Party and to proscribe communists. The newspapers were full of frenzied condemnation of communists. Communists were demonised, as many minorities before and since have been. But for me, the only communist I knew was a kind and idealistic man who was now a member of my family. I recall that anxious time as the challenge to the *Communist Party Dissolution Act* was before the

High Court. Had the Act been upheld, my new uncle would surely have been "declared" under its terms[67]. In childhood days I knew nothing of the law; only that the happiness, and possibly the liberty, of my new uncle was somehow at stake.

When the news came that a court had removed the danger, I knew nothing at the age of 11 of the notion of *ultra vires*. Still less did I appreciate the blessings of the Constitution or the strength of purpose of the Justices of the High Court who had upheld it. I did not know then of the courage of the opponents of the legislation, in all political parties, who objected to a law which would penalise Australians for what they believed or thought, rather than for what they did. All I knew was that a cloud had lifted.

Only later did this first, personal encounter with the High Court of Australia come to assume its true significance for me. The Court reached its opinion against the clamour of popular opinion at the time. It upheld the essential character of the Australian Constitution as one emanating from a free, confident and just people for the good government of all who lived under its protection. In time, I have come to realise how courageous,

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67 *Communist Party Dissolution Act* 1950 (Cth), s 10(1) noted 83 CLR at 6.