CONSTITUTIONAL BROKERAGE IN AUSTRALIA: CONSTITUTIONS AND THE DOCTRINES OF PARLIAMENTARY SUPREMACY AND THE RULE OF LAW

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Constitutional commentators have long been troubled by the question as to whether the notion of the rule of law operates, on the one hand, as a conduit for the expression of the supreme legislative authority of Parliament, or, on the other (at least to some degree) independently of, and thereby potentially in conflict with, parliamentary supremacy.[1] As an alternative to both of these suggestions it might be held that according to the circumstances, the notion of the rule of law is capable of portraying both of these characteristics. Curiously, relatively little has been written on this specific issue in relation to Australia. The attention directed towards the vexed questions of the nature and extent of the federal division of powers in Australia (admittedly, themselves issues not unrelated to the present concern) has marginalised interest in the *nature* of legislative authority in Australia. "The one legal doctrine", it has been recently proclaimed, "that Australian and other Commonwealth lawyers are never taught to question (or perhaps are taught never to question) is AV Dicey's theory of parliamentary omnipotence".[2] Though perhaps somewhat overstated, this claim certainly strikes a chord. The relationships (for there is more than one) in Australia between the constructs of the rule of law and parliamentary supremacy are qualitatively different from the relationship which pertains in the United Kingdom. There is undoubtedly some service to be had from employing in Australia those theoretical analyses of the relationship developed by United Kingdom writers (despite their being designed principally to explain domestic circumstances), but the resultant perception of the Australian dynamics of the relationship will be seriously skewed if, at

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1 See, for example, John Locke's efforts to come to terms with their association in *Two Treatises of Government* (1956, J W Gough (ed)) at ch xi: "Of the Extent of the Legislative Power". In Dunning's view, Locke saw the legislative arm of government as "*bound* ... to rule according to the law of nature, to carry on its functions through fixed and general laws rather than arbitrary decrees ..." (emphasis added). W A Dunning, *A History of Political Theories: From Luther to Montesquieu* (1928) at 360.

2 G de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (1988) at 144. Geoffrey Marshall has observed in the same vein, that "[r]emarks about 'absolute' and 'uncontrollable' authority seem sometimes to have been repeated as a kind of juristic platitude": *Parliamentary Sovereignty and the Commonwealth* (1957) at 49.

the same time, the crucial constitutional differences that exist between Australia and the United Kingdom are not fully recognised.[3] Whilst there is a substantial body of literature devoted to the identification and analysis of the constitutional characteristics that distinguish Australia,[4] the significance of these features in terms of the relationships between the two doctrines of parliamentary supremacy and the rule of law in Australia is seldom explored. This article attempts to perform this task.

In Australia, as in the United Kingdom, one begins with Dicey's record of the essential elements that he perceived as underpinning the late-Victorian constitutional structure in England. Dicey's nomination of both the *sovereignty* of Parliament and the *supremacy* of the rule of (ordinary) law in his treatise and his apparently deliberate choice of the two words emphasised above have formed the basis of a huge body of literature on what Dicey meant by the terms both separately and, more importantly, in conjunction. It is, in the present context, quite unnecessary to rehearse the long history of this debate in the United Kingdom[5] and its adoption in Australia.[6] Rather, it can be fairly said that Dicey's testimony on the constitution as a description of the current situation in the United Kingdom (and indeed even of the situation existing at the time Dicey was writing) is lacking in a number of important respects.[7] In relation to Australia, despite the undoubted influence that his writing has had, Dicey's view has *never* accorded with the operation of the existing constitutional system. As Walker has said of the unwarranted impact of the Diceyean notion of parliamentary sovereignty in Australia (albeit in an article the bulk of which he devoted to a critique of the doctrine's application in the United Kingdom), "[i]t seems that Dicey's theory is like some huge, ugly Victorian monument that dominates the legal and constitutional landscape and exerts a hypnotic effect on legal perception".[8]

The concern over the interaction between the two doctrines — that is, whether they oppose or complement each other, is at base a concern over what is meant by parliamentary sovereignty. Whilst I do not wish to deny that there exist a number of critically differing opinions as to what comprises the rule of law,[9] the single most

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3 As McIlwain was moved to proclaim barely 10 years after the birth of the Australian Constitution, "[T]he existing theory of parliamentary sovereignty, which has undoutedly served a valuable purpose in England, is not comprehensive enough for the British Empire. With new conditions, changes in machinery must be made to meet them and the theory must follow": C H McIlwain, *The High Court of Parliament and its Supremacy* (1910) at 369.

4 See L Zines (ed), *Commentaries on the Australian Constitution* (1977); H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (1992); and G Craven, *Australian Federation: Towards the Second Century* (1992), for three notable contributions.

5 For such an historical analysis see, for example, M Loughlin, *Public Law and Political Theory* (1992) at ch 7.

6 See, for example, Cheryl Saunders, "Governments, Legislatures and Courts: Striking a Balance", in M P Ellinghaus, A J Bradbrook and A J Duggan (eds), *The Emergence of Australian Law* (1989) at ch 13.

7 See generally, M Loughlin, above n 5 and P P Craig, "Dicey: Unitary, Self-Correcting Democracy and Public Law" (1990) 106 *LQR* 105.

8 G de Q Walker, "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with the Freedom of Religion" (1985) 59 *ALJ* 276 at 283-284. His comment was directed at the apparently unquestioned acceptance of Dicey's view by the South Australian Supreme Court in *Grace Bible Church v Reedman* (1984) 36 SASR 376.

9 See below, n 39 and accompanying text.

significant problem in defining the nature and application of the doctrine within Anglo-Australian discourse arises when one considers how it relates to the notion of parliamentary sovereignty. In the United Kingdom, the Diceyean vision of parliamentary sovereignty has been heavily criticised: for one pair of authors, for instance, it is one of the prime constituents in the false consciousness (or "noble lie" as they prefer to call it) that comprises the British constitutional system;[10] for another commentator the doctrine cannot be defended or supported in terms of legal philosophy, nor can it be accurately characterised as a legal rule, a legal principle or a political fact, but rather it must be viewed merely as a historically successful (albeit flawed) guiding constitutional principle.[11] Yet despite the manifest problems that are encountered in its application, it is generally accepted that the definition of the doctrine of parliamentary sovereignty remains much the same as when Dicey first described it — that is, an *expression* of the absolute legislative supremacy of Parliament. Moreover, the limitation inherent in the claim to sovereignty (or absolute supremacy) in respect of *legislative* competence alone was readily acknowledged by Dicey. The prevailing social and political mores are ever-present inhibitions on Parliament's exercise of this legislative omnicompetence;[12] there are, in other words, in the domain of *praxis*, always matters which are beyond the reach of Parliament.[13] In the United Kingdom, in the absence of any constitutional legislation of the nature with which Australians are familiar, the examples invoked to illustrate these limitations have matured beyond Leslie Stephen's notorious example of Parliament's practical inhibition on passing legislation that provides for all blue-eyed babies to be murdered at birth;[14] through the effectively inviolable sentiments expressed in the Parliament Acts 1911 and 1949 (UK);[15] to the politically entrenched circumstance of the United Kingdom's membership of the European Union by way of the European Communities Act 1972 (UK). It was s 2(i) of the 1972 Act that provided the basis for the iconoclastic decision of the House of Lords in 1991 to "disapply" an express provision of a United Kingdom Act of Parliament[16] at the behest (in effect) of the European Court of Justice.[17] None of these examples necessarily presents the Diceyan version of Parliament's legislative sovereignty with any insurmountable obstacles, for it remains the case that, for

10 I Harden and N Lewis, *The Noble Lie* (1986) at ch 1.

11 A G D Bradney, "Parliamentary Sovereignty — A Question of Status" (1985) 36 *NILQ* 2; Bradney concludes his article by saying that the strength of the doctrine "lies not purely in its ability to provide an explanation of facts but more in the comfort that it provides its adherents" (at 11). For other interpretations see, for example, N Johnson, *In Search of the Constitution* (1977) at ch 4; A W Bradley, "The Sovereignty of Parliament — in Perpetuity?" in J Jowell and D Oliver (eds), *The Changing Constitution* (2nd ed 1989) at 25; and, P P Craig, above, n 7.

12 A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed 1915) at 74-82. In the realm of "political sovereignty" (which he distinguished from "legal sovereignty"), Parliament, according to Dicey, "is limited on every side by the possibility of popular resistance": ibid at 76.

13 Such legal sovereignty is, according to McIlwain, most peculiar. "One, in fact, whose very precarious existence is dependent upon the whim of a power outside itself"; above n 3 at 381.

14 Quoted by Dicey, above n 12 at 79.

15 These Acts together establish the primacy of the House of Commons over the House of Lords in cases of conflict between the two over proposed legislation.

16 *R v Secretary of State for Transport, ex parte Factortame & others* [1990] 3 WLR 818.

17 *R v Secretary of State for Transport, ex parte Factortame & others* [1990] 3 CMLR 867.

instance, the United Kingdom Parliament may repeal the European Communities Act, in response to which the domestic courts would duly recognise (even if the European Court of Justice would not) the validity of the repealing legislation. In such circumstances the only limitation on Parliament would be the political soundness of the decision to withdraw from the European Union.[18]

The situation in Australia, however, is quite different. It is, to return to fundamentals, almost always misleading to use the terms parliamentary sovereignty and parliamentary supremacy synonymously; for whilst the basic matter to which they relate is the same — that is, legislative competence — they are crucially distinct in terms of degree. To possess legislative sovereignty (or, as Dicey and others sometimes prefer, *absolute* legislative supremacy), a Parliament is subject to no *legal* limitations in its exercise of that power. A Parliament, on the other hand, which is said to possess legislative supremacy (that is something less than *absolute* legislative supremacy) is guaranteed only a superior claim against any other body claiming legislative competence, and *not* necessarily that in its exercise of legislative power it is not subject to any legal limitations. Accordingly, the extent of the legislative competence exercised by any of Australia's Parliaments can only be characterised as "supreme" and under no circumstances as "sovereign". "Such supremacy", as Geoffrey Marshall has argued, "is not 'sovereignty'".[19] An understanding of the distinction is, I submit, critical to appreciating the nature of the relationship between the doctrine of the rule of law and the legislative competence of Australian Parliaments. Yet often the point is obscured rather than exposed. Indeed, even the classic statement in the *Engineers'* case that "[t]he grant of legislative power to the Commonwealth is ..., within the prescribed limits of area and subject matter, the grant of an 'authority as plenary and as ample ... as the Imperial Parliament in the plentitude of its power possessed and could bestow'",[20] is open to question in this regard. The qualification in this statement is of such significance that it effectively destroys the principle to which it relates. The 'plentitude' of the United Kingdom Parliament's *legally unlimited* legislative authority is precisely what distinguishes it from Australia's Commonwealth Parliament. More recently, it has been observed by one of Australia's foremost legal theorists that, "*acting within their constitutional powers* it is said that the Australian parliaments are sovereign, and their

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18 In this respect I am in agreement with Neil MacCormick, "Beyond the Sovereign State" (1993) 56 *MLR* 1 at 3. See also G Winterton, "The British Grundnorm: Parliamentary Supremacy Re-Examined" (1976) 92 *LQR* 591 at 615.

19 G Marshall, above n 2. In part of his reasoning, Marshall proposes that Parliament's supremacy "may be merely relative to that of other organs of government", which is not, he continues, a contention that "amounts logically to an assertion of legislative omnipotence": ibid at 48-49.

20 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the *Engineers'* case) (1920) 28 CLR 129 at 153 (per Knox CJ, Isaacs, Rich and Starke JJ). The source from which their Honours quoted was the case of *Hodge v R* (1884) 9 App Cas 117 at 132. The problem, however, may be overcome if one calls in aid the prescient interpretation of the Court's judgment provided by Leslie Zines: "[T]he Commonwealth parliament was not of course 'sovereign' in the sense that the British parliament was or even in the sense that the New South Wales parliament was before federation. ... The British legal notion of the supremacy of parliament with its concomitant consequence of political rather than legal checks on power is the clear philosophy in the *Engineers'* case": "Federal Theory and Australian Federalism — A Legal Perspective" in B Galligan (ed) *Australian Federalism* (1989) 16 at 22.

power to change law unlimited provided they do so in clear terms".[21] In light of the definition of parliamentary sovereignty given above such a claim must be considered plainly self-contradictory. The legal limitations that delineate the boundaries of the "constitutional powers" of Australian Parliaments are precisely what deny them any claim to legislative sovereignty.[22]

Legal limitations exist in respect of both State and the Commonwealth Parliaments in the form of their respective constitutions. Albeit to different degrees, the constitutions stipulate, *inter alia*, the nature and boundaries of legislative power to be exercised by the relevant Parliaments. The heads of power under which the Commonwealth Parliament may legislate are exhaustively enumerated in the Constitution (principally under ss 51 and 52); beyond the boundaries set by these provisions the Commonwealth Parliament cannot act. Furthermore, the Constitution prescribes that in certain circumstances Parliament must exercise its legislative power according to set procedures — namely, where there is "deadlock" between the two chambers (s 57)[23] and where it is proposed that the Constitution be amended (s 128).[24] The Commonwealth Parliament, therefore, is plainly not free to legislate without legal restriction; it does not possess legislative sovereignty but rather merely supremacy (the constitution, under s 1 vests in the Federal Parliament alone "the legislative power of the Commonwealth").[25] The significance of such limits can hardly be overestimated in

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21 J Goldsworthy, "The Constitutional Protection of Rights in Australia" in Craven (ed), above n 4 at 157 (emphasis added). See also, G de Q Walker who, despite repeating the same statement as quoted above (at n 8) in his book *The Rule of Law* (above at n 2) at 161, appears to have succumbed to the very hypnotic effect he derides when he fails earlier in the work to acknowledge the distinctive nature of parliamentary *sovereignty* and its impertinence to Australian circumstances (at 144-161). Cf, however, Street CJ in *Building Construction Employees and Builders' Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 383; and Sir Anthony Mason, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience" (1986) 16 *F L Rev* 1.

22 All would be well with Goldsworthy's statement, in my view, if "supreme" were substituted for "sovereignty". It is apposite here to note Goldsworthy's novel, if pragmatic, solution to what he considers to be the "exaggeration" that is the doctrine of parliamentary sovereignty. He suggests that: "[S]ince parliament is unlikely to enact truly evil laws, why not ignore complications which for practical purposes are unnecessary, and indeed dangerous, in that any acknowledgement of limits to parliament's authority would tempt judges to define them and to draw them much too narrowly. The considerations which justify the authority of parliament — legal certainty, institutional competence, the avoidance of intragovernmental conflict, and above all the many principled and pragmatic grounds for representative democracy — justify an authority which, if limited, is vast": above n 21 at 160.

23 On the limiting effect of which see *Victoria v Commonwealth* (the *PMA* case) (1975) 134 CLR 81.

24 This section provides that any such proposed amendment be put to a referendum. Though he was referring to a different set of circumstances, it is apt to quote McIlwain on this point: "[w]hen the referendum really comes, the sovereignty of Parliament must go"; above n 3 at xi.

25 See, for example, Barwick CJ's declaration that "[t]he law-making process of Parliament in Australia is controlled by a written constitution": *Cormack v Cope* (1974) 31 CLR 432 at 452; and, Brennan J's reference to the "supreme law of the constitution", in *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681 at 668.

the context of the relevance of the doctrine of parliamentary sovereignty to Australian constitutional discourse.

As with the Commonwealth, the State constitutions prescribe both substantive (albeit in very limited terms) and manner and form limitations to the exercise of legislative authority. In respect of the latter, the circumstances in which special legislative procedures must be followed differ from State to State,[26] though the basic form of the limitation is the same in each case. In respect of the substantive limitations on (or, which amounts to the same thing, grants of power to) Parliament, however, the prescriptions in state constitutions lack the relative precision of ss 51 and 52 of the Commonwealth Constitution. Under the New South Wales Constitution, for example, the legislature is deemed to "have power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever";[27] whilst under the Victorian Constitution it is declared that "Parliament shall have power to make laws in and for Victoria in all cases whatsoever".[28]

In so far as the boundaries of these words have been tested in the courts, it is true that they have not occasioned the invalidation of an Act of a State Parliament on the ground that their limits (other than those of extra-territoriality)[29] have been breached. The most that has ever been said in this vein of the term "peace, welfare and good government" is that it comprises, "in a general sense", words of limitation.[30] Street CJ, who expressed this opinion in the celebrated *BLF* case, offered little guidance as to what these limitations might be,[31] which is at least one of the reasons why the expansive interpretation of the term preferred by Kirby P in the same case and later, as unequivocally expressed by the High Court in *Union Steamship*, has prevailed.[32]

For State parliaments, however, unlike the Commonwealth Parliament, the source of the legal limitations placed on their exercise of legislative power is not confined to their respective constitutions; since federation they have all also been subject to the provisions of the Commonwealth Constitution. As Dixon J proclaimed in *Uther's* case in respect of the competence of the New South Wales Parliament to make law for the peace, welfare and good government of the State, "[t]he content and strength of this

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26 See, for example, ss 5A, 5B, 7A and 7B of the NSW Constitution Act 1902 and ss 18 and 67 of Victoria's Constitution Act 1975. Furthermore, all such limitations are reinforced by s 6 of the Australia Acts 1986 (Cth).

27 Constitution Act 1902 (NSW), s 5.

28 Constitution Act 1975 (Vic), s 16. Section 2(1) of the Australia Acts 1986 (Cth), of course, reiterates, the "full power" of the States' Parliaments to make laws for the peace order and good government of their relevant States.

29 On which see, for example, *Cox v Tomat* (1971) 126 CLR 105; *Union Steamship Co of Australia Pty Ltd v King* (1988) 82 ALR 43 at 48 and *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 88 ALR 12.

30 *BLF* case (1986) 7 NSWLR 372 at 387; the case turned on the interpretation of s 5 of the New South Wales Constitution Act 1902.

31 Ibid at 382-385.

32 In Kirby P's opinion the term, which draws upon the "long-standing political realities and ... the desirable notion of an elected democracy", connotes no limitation on legislative competence. As a result, it provides no latitude for judicial review; ibid at 405. In *Union Steamship* (1988) 82 ALR 43 at 48, the High Court unanimously held that the term comprises words that "are not words of limitation".

power are diminished and controlled by the Commonwealth Constitution".[33] There are a number of areas declared under the Commonwealth Constitution (principally in s 52) to be within the exclusive preserve of the Commonwealth Parliament; in these areas State Parliaments are simply prohibited from enacting legislation. More importantly, perhaps, the Commonwealth Constitution stipulates (principally in s 51) a considerable number of areas in which the Commonwealth Parliament enjoys legislative competence concurrently with the States. Crucially, however, s 109 of the Commonwealth Constitution provides that where there is conflict between the law of the Commonwealth and that of any State, the former will prevail.[34] No matter, therefore, how broad an interpretation one accords to the term "peace, welfare and good government" and the like, the true extent of any State Parliament's legislative competence cannot be guaged until the relevant provisions of the Commonwealth Constitution are also considered. This was no more strikingly illustrated than in the *Tasmanian Dam* case in 1983. In this case the State's enactment of the Gordon River Hydro-Electric Power Development Act 1982 was clearly within the boundaries of the Tasmanian Parliament's legislative competence as provided under the Tasmanian Constitution.[35] However, the High Court's finding that the Commonwealth's directly conflicting World Heritage Properties Conservation Act 1983 was validly enacted under (*inter alia*) s 51(29) of the Commonwealth Constitution effectively invalidated the State Act, as any action taken under its provisions would inevitably fall foul of s 109 of the Commonwealth Constitution.[36]

In Australia, then, it is the constitutions (as supplemented by the Australia Acts),[37] and in particular the Commonwealth Constitution, that supply the *legal* limitations to the legislative scope of both State and the Commonwealth Parliaments. It is they which provide the critical link between the doctrines of parliamentary supremacy and the rule of law. As Dixon J trenchantly observed in the *Communist Party* case when referring to the Australian system of governance: "[I]t is government under the constitution and that is an instrument framed in accordance with many traditional

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33 *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 509 at 530 (Dixon J dissenting). Indeed, this is expressly recognised in s 5 of the NSW Constitution Act, the opening words of which read: "[t]he Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act ...". Note also that this was one of the recognised grounds of limitation (outside s 5) referred to by Kirby P in the *BLF* case: (1986) 7 NSWLR 372 at 397. See also s 5(a) of the Australia Acts 1986 (Cth).

34 See the *Engineers'* case (1920) 28 CLR 129. Note also, the expression of the bindingness and primacy of Commonwealth law in covering cl 5 of the Constitution.

35 Constitution Act 1934 (Tas). Interestingly, the recognition of the Parliament's power is provided in the Preamble rather than in specific section of the Act.

36 *Tasmania v Commonwealth* (1983) 158 CLR 1. See also the first *Mabo* case, in which the High Court relied directly on s 109 of the Constitution to invalidate a Queensland statute that conflicted with a Commonwealth Act: *Mabo v Queensland* (1988) 83 ALR 14.

37 On the impact of the Australia Acts, Geoff Lindell has observed, "The fact that the British Parliament has vacated the authority to legislate for Australia without having freed the Federal and State Parliaments from certain limitations which restrict their authority to legislate inconsistently with the Constitution and also the Australia Acts should not be taken as being inconsistent with the attainment of Australian independence and sovereignty": "Why is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *F L Rev* 29 at 36.

conceptions ... [some] ... of which are simply assumed. Among these I think that it may be fairly said that the rule of law forms an assumption."[38]

The rule of law (which, following Dicey, I accept as being synonymous with the supremacy of law) comprises, at base,[39] two promises as to limited government: that our societal existence is conducted according to legal rules and that those persons and institutions which govern us and make these rules are themselves bound by law.[40] Caprice on the part of government acting in either sphere is said thereby to be minimised. The *raison d'être* of constitutions is to fulfil the second promise; that is the nature of the principle of constitutionalism.[41] In the case of the Australian Commonwealth Constitution it not only defines and divides power between the three governmental organs of the Executive, Parliament and the Judiciary,[42] it also stipulates the boundaries of the federal structure of Australian governance.[43] However, constitutions may also in part fulfil the first promise by providing certain substantive rights and duties, though invariably in respect only of relations between citizens and state (that is, vertically) rather than between citizens (that is, horizontally). The amendments to the United States Constitution that comprise the United States Bill of Rights offer a patent example of this result. Until recently the Australian Commonwealth Constitution was considered to provide little in this regard (some exceptions, for example, are the right to compensation for compulsory acquisition of property (s 51(31); the right to trial by jury (s 80); the right to freedom of religion (s 116); and the right to equal application of the law (s 117)),[44] but the present High Court appears to be intent on altering that. In a recent address to The Sydney Institute, the Chief Justice of Australia declared that "[t]he protection of rights of the individual

38 *Australian Communist Party v Commonwealth* (1950-1) 83 CLR 1 at 193.

39 This is so whether one sides with the minimalist (that is formal) view of the doctrine as expressed either by Joseph Raz, who emphasises the distinction between the rule of law and the rule of *good* law (see, for example, his "The Rule of Law and its Virtue" (1977) 93 *LQR* 195), or more controversially, by E P Thompson who saw in its inhibitive nature "an unqualified human good" (*Whigs and Hunters* (1977) at 266), or with the more committed view as exemplified by Geoffrey de Q Walker for whom in addition to the above formal, procedural requirements certain substantive qualities must also be present (comprising in sum a "twelve-point institutional definition" of the rule of law (above n 2 at 23-42), or R Beehler, "Waiting for the Rule of Law" (1988) 38 *U Toronto L J* 298. Equally, the proposition applies even if one prefers something in between these two extremes such as Jeffrey Jowell's perception of the rule of law as "a principle of institutional morality": "The Rule of Law Today" in J Jowell and D Oliver, above n 11 at 1.

40 It is along the same line of division that Hart separates his primary rules of obligation from his secondary rules of recognition; H L A Hart, *The Concept of Law* (1961) at 89-96.

41 See S A de Smith "Constitutionalism in the Commonwealth Today" (1962) *Malaya Law Review* 205 and T R S Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 *CLJ* 111.

42 The State constitutions, of course, express no separation of powers doctrine and indeed provide little (or nothing) by way of definition of these organs.

43 It is, therefore, the constitutions that provide the means by which the Australian system of representative democracy is meant to right itself rather than as in the United Kingdom (in the absence of constitutional statutes separate from the ordinary law) where, to use Craig's term, the democratic system is "self-correcting": P P Craig, above n 7 at 6.

44 For a discussion of nature and extent of these and other constitutional guarantees, see P Hanks, "Constitutional Guarantees" in H P Lee and G Winterton, above n 4 at ch 4.

is better left to judges than politicians".[45] This proclamation, what is more, has been conspicuously backed in deed. In both the recent *Nationwide*[46] and the *Capital Television*[47] cases the Court discerned what is, in effect,[48] the right to freedom of political speech implicit in the nature of the Constitution.[49]

Notwithstanding the addition of this new dimension to our constitutional thinking, the imperative that one must glean from the above analysis is that the stipulation in Australian constitutions of the *legal rules* by which our Parliaments are obliged to exercise their legislative competences provides the clearest evidence of the *basic* harmony existing between the notions of parliamentary supremacy and the rule of law (that is, the rule of legal rules) as they are expressed in Australia. It is, of course, true that other, non-constitutional laws are what regulate most of our societal existence and whilst these, in the main, take the form of legislation duly enacted by Parliament under authority of the relevant constitution, they are not themselves constitutionally protected. Such ordinary law nonetheless falls by definition within the scope of the rule of law. It is at this level and not, as I argue below, any higher, that TRS Allan's thesis of how the necessity of interpretation effectively places limitations on the legislative authority enjoyed by Parliament has relevance. Allan's trenchant argument[50] is offered in response to the circumstances peculiar to the United Kingdom where, as I explained earlier, the notion of parliamentary *sovereignty* has purchase. The value of Allan's conclusion — that through his thesis of the intervention of the courts in an interpretative role the notions of parliamentary sovereignty and the rule of law may be reconciled as they operate in the United Kingdom — is largely lost in the Australian context, where by way of the existence of constitutions, the two notions have been redefined and their integration already basically assured. This is not to say, of course, that Allan's claim as to the essential limitations that judicial interpretation imposes upon Parliaments' legislative power does not apply in Australia — it does, including in respect of the application of constitutional provisions — but that, in the Australian

45 Sir Anthony Mason, Address to The Sydney Institute on 15 March 1994, as quoted in the *Australian*, (16 March 1994) at 1 .

46 (1992) 108 ALR 681.

47 *Australian Capital Television Ltd v Commonwealth (No 2)* (1992) 108 ALR 577.

48 In form, the "right" is expressed negatively — that is, as a limitation on legislative competence rather than as a positive, free-standing right.

49 For discussion of the cases and their implications, see H P Lee, "The Australian High Court and Implied Fundamental Guarantees" [1993] *PL* 606. For criticism of the decisions as being essentially anti-democratic, see K D Ewing, "New Constitutional Constraints in Australia" [1993] *PL* 256 and N Douglas, "Freedom of Expression under the Australian Constitution" (1993) 16 *UNSWLJ* 315. See also the collection of essays in a special issue of the *Sydney Law Review* entitled, *Symposium: Constitutional Rights for Australia?* (1994) Vol 16 No 2 145-305.

50 Which is developed principally through a series of articles, prominent amongst which are: above, n 41; "The Limits of Parliamentary Sovereignty" [1985] *PL* 614; and, as applied to judicial review under administrative law, "Pragmatism and Theory in Public Law" (1988) 104 *LQR* 422, and culminating in his recently published book: *Law, Justice and Liberty* (1993). For a placement (albeit brief) of Allan's interpretative argument in the Australian context, see G Winterton, "Extra-Constitutional Notions in Australian Constitutional Law" (1986) 16 *F L Rev* 223. For a more general analysis of the peculiar temporal problems of constitutional interpretation (best illustrated in US discourse on the matter) see, for example, P Brest, "The Misconceived Quest of Original Understanding" (1980) 60 *Boston University L Rev* 202.

context, is a separate matter. The impact of Allan's thesis in Australia, therefore, as distinct from in the United Kingdom, adds little to the understanding of the relationship between the two doctrines.

Whilst there may be considerable differences in the characteristics that the various schools of thought attribute to the notion of the rule of law,[51] none of these *fundamentally* affects the nature of the relationship between the rule of law and parliamentary supremacy.[52] Rather what affects this relationship — to reiterate the assertion with which I began — is how one perceives the nature of a Parliament's role as legislator. Indeed, it is by way only of a *particular* vision of this role that I am able to anticipate an argument to counter that posited in this paper. According to Geoffrey de Q Walker the "true meaning of sovereignty" in the present context — that is, nothing more than the legislators' "ability to secure assent"[53] — has been lost amidst the plethora of legislation spawned by the corrupted legislative processes that today afflict modern democratic systems. In consequence, he argues, the principle of the rule of law has been "swamped" by the illegitimate exercise of legislative power in the name of parliamentary sovereignty.[54] The rule of law's twin elements of equality and certainty have been undermined and obscured by the mountains of legislative provisions which relate to them.[55] Walker considers, furthermore, that the limits placed on Australian legislatures, as mere "procedural safeguards", are insufficient.[56] "[A] minimum standard for the substantive content of enacted law" must also be established.[57]

Quite apart from contesting his implied claim that no (or at least, inadequate) substantive limitations presently exist in, especially, the Commonwealth Constitution,[58] it appears to me that Walker's concern that there is a *need* to reconcile parliamentary sovereignty with the rule of law in Australia is premised on his particularly narrow definition of the former. He may indeed be correct in saying that an original meaning of sovereignty had more to do with securing assent than with legislative competence, but that clearly does not comprise the whole connotation adopted by those constitutional theorists from Dicey onwards concerned to delineate the boundaries of *parliamentary* power — that is, *in actu*, legislation-making power.[59] To reverse the hierarchy, as Walker effectively seeks to do, by subsuming parliamentary sovereignty (in the sense of Parliament's power to secure assent) under the objects of the rule of law tends to eschew this crucial concern. The theory of Parliament's supreme legislative authority, together with the reality of the Executive's effective control of such authority, are constitutional features which will, for the

51 Which is an inevitable consequence of a notion that "transcends any particular technical description of its component parts and speaks to larger ideas about the quality of democratic life"; I Harden and N Lewis, "Sir Douglas Wass and the Constitution: An End to Fairy Tales?" (1984) 35 *NILQ* 213 at 215. See further, n 39 above.

52 See n 39 above, and accompanying text.

53 G de Q Walker, above n 2 at 356.

54 Ibid at 358.

55 Ibid at 313-316.

56 Ibid at 359.

57 Ibid at 359 and 374-400.

58 See, above nn 44-49 and accompanying text.

59 Indeed, in Diceyean terms the matter of securing assent is merely the duly acknowledged matter of external (or non-legal) limits on the legislature by another name; see above at n 12 and accompanying text.

foreseeable future at least, persist in Australia.[60] It is the constitutions that define and delimit the exercise of that power and it is to them that we must look for the basic means by which such legislative authority is reconciled with the rule of law.

Martin Loughlin has recently observed that "[t]he dominant styles of public law thought are ... rooted in the political ideologies which the nineteenth century bequeathed to the twentieth".[61] It is surely time in Australia to recognise the release from that part of the legacy that pits the doctrines of Parliament's legislative supremacy and the rule of law against each other. After all, since the year that joined the two centuries mentioned, there has been at the centre of Australia's system of government the very means by which a synthesis of the two doctrines has been brokered — the Commonwealth Constitution.

60 That is despite Walker's Hayekean-inspired proposals to the contrary in respect o Parliament; above, n 2 at 388-392.

61 M Loughlin, above n 5 at 240.