THE COMMONWEALTH LECTURES

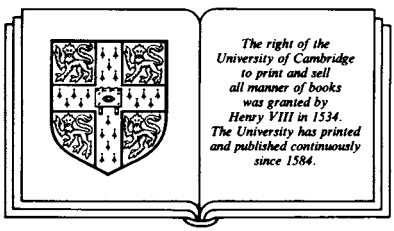
DELIVERED AT THE UNIVERSITY OF CAMBRIDGE

ON 8, 15, AND 22 NOVEMBER 1988

CONSTITUTIONAL CHANGE IN THE COMMONWEALTH

LESLIE ZINES

Robert Garran Professor of Law, Australian National University



CAMBRIDGE UNIVERSITY PRESS

CAMBRIDGE

NEW YORK PORT CHESTER MELBOURNE SYDNEY

Published by the Press Syndicate of the University of Cambridge
The Pitt Building, Trumpington Street, Cambridge CB2 1RP
40 West 20th Street, New York, NY 10011, USA
10 Stamford Road, Oakleigh, Melbourne 3166, Australia

First published 1991

British Library cataloguing in publication data

Zines, Leslie, *1930* –
Constitutional change in the commonwealth.
1. Commonwealth countries. Constitutional law
I. Title
342.20917 1241

Library of Congress cataloguing in publication data

Zines, Leslie.
Constitutional change in the Commonwealth: the Commonwealth lectures delivered at the University of Cambridge on 8, 15 and 22 November 1988 / Leslie Zines.
p. cm.
ISBN 0 521 40039 2
1. Commonwealth of Nations – Constitutional law. I. University of Cambridge. II. Title. III. Title: Commonwealth lectures.
K3165.Z9Z56 1991
342'.03'09171241–dc20
[342.2309171241] 90–43071 CIP

ISBN 0 521 40039 2 hardback

Transferred to digital printing 2003

US

CONTENTS

I

CONSTITUTIONAL AUTONOMY

This chapter is concerned with steps taken by Canada, Australia, and New Zealand, successfully completed only in the last few years, to end their constitutional ties with the United Kingdom Parliament and Government, to examine the present legal foundations of the Constitutions of those countries, and to see what has happened to the notion of 'the Crown'.

In Canada, Australia, and New Zealand, many academics in fields of law, politics, and history have had difficulty in answering a frequently asked question from foreign scholars: 'When did your country obtain its independence from Britain?' At times the courts have also adverted to that question and have been just as perplexed. The difficulty is that, unlike the case with other Commonwealth countries, one cannot point to an occasion when one flag was lowered and another raised at midnight amid sentiments of joy and nostalgia.

In a desperate effort to find some exact date for the event, the Balfour Declaration of 1926 or the Statute of Westminster of 1931 are seized on as roughly approximating independence days. Yet in 1939 and 1940 the Governments of Australia and New Zealand assumed that they were auto-

matically at war with Germany and Italy when Britain was at war. Amendments to the *British North America Act* were made by, and could only be made by, the United Kingdom Parliament at various times up to and including 1982. A British parliamentary committee in 1981 and 1982 said that the British Government had an element of discretion or judgement in deciding whether to accede to a federal Canadian request for amendment.[1] It was accepted in 1979 that laws of the Australian States were invalid if they were inconsistent with Imperial legislation.[2] In 1974, it seems that the British Government refused to recommend an extension of the term of a Queensland Governor, opposed by the Commonwealth but desired by the Government of that State. While it was possible for constitutional lawyers and others to reconcile at least some of these facts with national independence, it caused confusion and bewilderment to others, particularly outsiders.

The evolutionary manner in which the independence of these countries was achieved in fact left many legal problems in its wake and, to some degree, still does. In order to understand what has happened in the last few years, it is necessary to traverse briefly some well-trodden ground.

Part of the difficulty has been caused by the fact that the Empire and then the British Commonwealth of Nations had few legal principles or rules that reflected political reality. The growth in status of the older Dominions was achieved

[1] First Report from the Foreign Affairs Committee Session 1980–1, British North America Acts: The Role of Parliament, House of Commons, 30 January 1981.

[2] *China Ocean Shipping Co. v South Australia* (1979) 145 Commonwealth Law Reports 172.

mainly, not by changes in law or alterations to the Constitutions of those countries, but by the development of constitutional conventions and understandings, particularly the convention as to who advises something called 'the Crown'.

In law all four countries were originally part of one system, subject to an indivisible Imperial Crown and an omnipotent Imperial Parliament. The Constitutions of Canada, the Commonwealth of Australia, the Australian States, and New Zealand derived from enactments of that Parliament. Their status as law depended upon a grundnorm requiring obedience to that Parliament. Judicial review of the legislation of a Dominion Parliament followed, on this view, as inevitably and naturally as review of any legislation authorized by an enactment. Thus Professor A. V. Dicey in his famous work *The Law and the Constitution* was able to place in the same category labelled 'non-sovereign legislatures' the Dominion of Canada, a London county council, and a railway company.[3]

The other feature of the system was the one indivisible Crown in which was reposed all the royal prerogatives. With few exceptions,[4] these prerogative powers operated throughout the Empire. What was not clear, either in the Constitutions or in the Royal Instructions, was which of them could in the overseas Dominions be exercised locally, that is by the Governor on the advice of local ministers. On

[3] A. V. Dicey (1959) *The Law and the Constitution*, 10th edn., Macmillan, London, chapter 11.

[4] Local circumstances could exclude or modify the application of a prerogative. This was the case with the prerogatives of the Sovereign as head of the established church.

this subject all British laws and instruments were, during this period, obstinately silent.[5]

The courts also shied away from laying down any general principles to distinguish those executive powers which were Imperial and those which were local. The matter was handled, by and large, administratively. A vice-regal representative had two capacities – Imperial officer subject to direction from the Crown, that is a British minister, and local representative of the Queen instructed to act on the advice of local ministers. While normally required to accept the advice of local ministers, the Governor was also required to ensure that matters of Imperial concern were not impaired by local legislative or executive action.

In retrospect it was perhaps fortunate that no clear dividing line between Imperial and local responsibility was devised. This imprecision enabled more and more executive power to be transferred to the Dominions, without any alteration to constitutional law, by simply changing the rule or understanding as to who advises the Crown.

The Constitutions were also broad enough in language for the courts to assume that the legislative powers of the Dominions conformed with whatever were the political understandings of the time as to the status of those Dominions. The judges were prepared to have regard to political changes in interpreting the Constitutions. A good example is a decision of the Privy Council in 1947 upholding the power of the Canadian Parliament to abolish appeals to the Privy

[5] On 1 October 1947 the King, by Letters Patent, authorized the Governor-General of Canada to 'exercise all powers and authorities lawfully belonging to Us in respect of Canada . . .': N. Mansergh (1953) *Documents and Speeches on British Commonwealth Affairs* (1931–52), Vol. 1, Oxford University Press, 78–81.

Council from any Canadian court.[6] The relevant provision was section 101 of the *British North America Act* which gave power to 'provide for the constitution, maintenance and organization of a general Court of Appeal for Canada . . .'. Their Lordships declared that it was irrelevant that when section 101 was enacted it would have been unthinkable that Canada should have the power to abolish the prerogative appeal. To deny the power in 1947 would, they said, be inconsistent with the political conception embodied in the British Commonwealth. The Constitution had to be given the interpretation 'which changing circumstances require'.

The only relevant formal legal changes to the powers of the Dominions were made by the Statute of Westminster. That Statute achieved one important result. It enabled the Dominions to override Imperial law. For the rest it achieved little that was not merely symbolic. Empowering the Dominions to give extra-territorial effect to their laws was probably unnecessary.[7] Requiring the request and consent of the Dominion to Imperial legislation operating in the Dominion was already an established rule. Issues of war and peace and succession to the throne were fudged.

For the most part, therefore, it was conventions and practices, embodied partly in Conference resolutions, and international recognition, rather than the creation of judicially enforceable legal rules, that created the sovereign status in the world of Canada, Australia, and New Zealand. Although their Constitutions originated as governmental frameworks of self-governing colonies of an Empire, their international and political independence was brought about

[6] *Attorney-General (Ont) v Attorney-General (Can)* [1947] Appeal Cases 127.

[7] *New South Wales v Commonwealth* (1975) 135 Commonwealth Law Reports 337; *Union Steamship Co. of Australia Pty Ltd v King* (1988) 82 Australian Law Reports 43.

without any amendment being made to those Constitutions in order to achieve that end.

R. T. E. Latham, writing in 1937, put it this way:

> When the political institutions of the colonies were first set up ... their constitutions were not intended to be the framework of a generally competent political organism, but only to exercise certain select powers. But those institutions became in fact political frameworks for nations, the reality of whose nationhood transcended the institutions of their origin.[8]

When, for example, section 61 of the Australian Constitution declared that the executive power of the Commonwealth was exercisable by the Governor-General, no judge at the time it was enacted would have considered that it included the power to declare war or to enter into treaties. Decades later it could be assumed without argument that such Commonwealth power existed. Yet the wording of section 61 had not changed.[9]

Similarly, the Canadian and Australian Constitutions, for example, give power to the Queen personally to appoint Governors-General. Those provisions have not been altered since they were first enacted in 1867 and 1900, respectively. Their operation today is, however, very different from when they were enacted. But from a constitutional point of view, all that has been altered are the Queen's advisers.

The federal Government of Canada (together with those of Ireland and South Africa), in the 1920s and 1930s, pressed strongly for these developments towards greater Dominion autonomy. Australia and New Zealand were dragged along

[8] R. T. E. Latham (1949) *The Law and the Commonwealth* Oxford University Press, London, 579.

[9] G. Winterton (1983) *Parliament, the Executive and the Governor-General*, Melbourne University Press, Chapter 1; L. Zines (1987), *The High Court and the Constitution*, 2nd edn, Butterworths, Australia, 224–5, 244–5.

on their coat-tails. They were cautious, suspicious, and at times alarmed at attempts to define by clear convention or legal rules the relationship between members of the Commonwealth. Their defence and trading interests, as well as the sentiments of their people, no doubt were responsible for this attitude.[10]

They, together with Newfoundland, insisted on a provision in section 10 of the Statute of Westminster that the major parts of the Act should not extend to them unless adopted by their Parliaments. Australia waited eleven years and New Zealand sixteen years before they adopted the Statute in 1942 and 1947 respectively.[11] In the meantime the United Kingdom Parliament had enacted laws extending to those countries at their request.[12]

It was thought necessary in the case of both Canada and Australia expressly to ensure that nothing in the Statute of Westminster would affect the federal systems of those countries (sections 7 and 8). New Zealand, perhaps not wanting to appear more radical, but with no federal system to defend, was also included in section 8 which saved the Constitutions of all three countries.

In Australia, there was an added level of suspicion and concern – that of the States in respect of the federal Government. The States of Australia (unlike the Canadian Provinces) had attended the Colonial Conferences of 1887 and 1897, but then found themselves shut out after fede-

[10] F. Scott (1933) *Cambridge History of the British Empire*, Vol. 7, Pt 1, Cambridge University Press, 542.

[11] *The Statute of Westminster Adoption Act 1942* (Cth) adopted the Statute from 3 September 1939.

[12] For example, *Whaling Industry (Regulation) Act 1934, Emergency; Powers (Defence) Act 1939, Prize Act 1939, Army and Air Force (Annual) Act 1940, Geneva Convention Act 1937.*

ration, despite vigorous protests and energetic attempts to obtain admission to the 1907 Conference. They were concerned that any increase in the autonomy of the Dominions should not take place at their expense. Also, they did not want the Commonwealth Government interfering in their relations with the United Kingdom Government.[13]

Unlike the Canadian Provinces, the States of Australia had direct communication with the British Government on all matters within their authority. The British Government therefore played a larger part in Australian State affairs than in those of the Canadian Provinces. The appointment of State Governors, their instructions, and the reservation and disallowance of State legislation were British responsibilities. In Canada it was the federal Government which exercised those functions in respect of the Provinces. Before federation the Australian colonies were quite scornful of the position of the Canadian Provinces. For example, delegates to the Constitutional Convention of 1891 resoundingly rejected a proposal of the chief architect of the Constitution (Sir Samuel Griffith) that all communications between the States and the British Government should be sent through the Governor-General. The States, they insisted, must have equal status with the Commonwealth on all matters within their governmental responsibilities, including communication with the Home Government.[14]

The States feared that section 4 of the Statute of Westminster providing for the request and consent of a Dominion to the enactment of United Kingdom legislation applying to the Dominion could result in the central Government med-

[13] L. Zines, 'The Growth of Australian Nationhood and Its Effect on the Powers of the Commonwealth', In L. Zines (ed.) (1977) *Commentaries on the Australian Constitution*, Butterworths, Australia, 24.

[14] *Ibid.*, 16–20.

dling in their sphere of responsibility. There was, therefore, introduced into the Statute section 9(2) which declared that nothing was deemed to require the concurrence of the federal authorities to any United Kingdom law with respect to a matter solely within State authority. The States actually wished to go further and prevent the federal Government from requesting or consenting to such legislation. The British claimed that would be achieved by section 9(2), but that clearly was not the case because, while section 9(2) prevented any suggestion that Commonwealth consent was required in this area, the amendment requested by the States would have prevented the Commonwealth from making any submissions.[15]

What is clear is that the States trusted the British Government more than they did the federal Government, which they saw, quite rightly, as a competitor for power. The Imperial tie was regarded as some protection for States rights. I should mention, tangentially, that it proved unavailing on the only occasion when a State attempted to secede from the Australian Commonwealth. As a result of a referendum in 1933, two-thirds of the electorate of Western Australia voted in favour of secession from the Australian Commonwealth. A delegation was sent to Britain to request an amendment to the *Commonwealth of Australia Constitution Act* to achieve that result. This action was opposed by the federal Government, and a Joint Committee of the House of Lords and the House of Commons advised that the petition should not be received unless supported by that Government.[16]

The result of this internecine political fighting within

[15] *Ibid.*, 30.

[16] 1934–5 *Parliamentary Papers*, Vol. 11, 63.

Australia was that the States did not seek to have applied to them the substantive provisions of the Statute of Westminster. On the other hand, the Canadian Provinces were freed from the *Colonial Laws Validity Act* and expressly empowered to make laws overriding Imperial laws. Neither did the States acquire (nor, I think, seek) the power given to the Dominion Governments to advise the Queen directly on matters within their authority. The Secretary of State still ruled. From 1934 to 1947 Western Australia had no Governor because the British Government refused to recommend the appointment of an Australian, as desired by the Government of that State.[17]

The consequent difference in status between the federal and State Governments of Australia gave rise to many constitutional and legal conundrums. Whereas relations between the British and Australian Governments came to be primarily on an international and diplomatic level, the States in their relations with Britain retained all the elements of colonial status. Until 1986 it was the British Government which formally advised the Queen of the United Kingdom on such matters as the appointment of State Governors or the making of orders or proclamations relating to the States under Imperial legislation. As section 2 of the Statute of Westminster did not extend to the States, they could not amend or repeal legislation such as the *Merchant Shipping Act* which applied to them.

To make matters worse, modern amendments by the British Parliament to former Imperial legislation were not extended to the States, so that it was the legislation as enacted around the turn of the century that applied, rather

[17] J. Fajgenbaum and P. Hanks (1972) *Australian Constitutional Law*, Butterworths, Australia, 20.

than the legislation in its modern British form.[18] Similarly, it seemed that the States could not abolish appeals to the Privy Council from judgements of State courts.[19]

By federal legislation enacted in 1968 and 1975, appeals to the Privy Council ceased from the High Court of Australia, federal and territorial courts, and all State courts exercising federal jurisdiction.[20] Appeals from State courts exercising State jurisdiction continued. The States differed among themselves as to whether such appeals should be abolished. In the meantime, the High Court had indicated that it did not regard itself as bound by Privy Council decisions. As it was possible in many cases to appeal from a State court in a matter arising under State law to *either* the High Court *or* the Privy Council, the system of precedent threatened to become chaotic. The High Court of Australia found it could not give the State courts guidance as to what they should do where prior High Court and Privy Council judgements differed.[21]

Federal Governments from the early 1970s onwards became anxious to clear up this situation and that of the status of the States generally, which was seen as an affront to Australian national sentiment as well as legally absurd. As late as 1981 a Foreign and Commonwealth Office memorandum to the Foreign Affairs Committee of the House of Commons was able to describe the States of Australia as 'self-governing dependencies of the British Crown'.[22]

[18] *Copyright Owners Reproduction Society Ltd v EMI (Aust.) Pty* (1958) 100 Commonwealth Law Reports 597.

[19] *Nadan v R* [1926] Appeal Cases 482; *British Coal Corporation v R* [1935] Appeal Cases 500; but see *Commonwealth v Queensland* (1975) 134 Commonwealth Law Reports 298 at 311–12.

[20] *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth).

[21] *Viro v R* (1978) 141 Commonwealth Law Reports 88.

[22] G. Marshall (1984) *Constitutional Conventions*, Clarendon, Oxford, 173.

To some degree, the Australians may have been spurred on by events in Canada, where Provincial concerns also acted as a preserver of the Imperial bond. Whereas the Australian Constitution contained a provision for local amendment (section 128), the *British North America Act* did not, except to a limited extent.

As I mentioned earlier, section 7 of the Statute of Westminster saved from the operation of that Statute the alteration or repeal of the *British North American Act*. Most of the provisions of the *British North America Act* could, therefore, be legally altered only by the United Kingdom Parliament. It was, of course, a clearly expressed rule that Parliament would make no law for Canada except at the request and with the consent of Canada. To that extent, as a matter of practical reality, this situation did not derogate from Canada's independence.

But the conventional rule did not make it clear what 'Canada' was or how its request and consent was to be expressed. Was it sufficient for the British Parliament to enact legislation if the request had been made simply by both Houses of the federal Parliament? Should the British Government inquire as to the agreement of the Provinces? If so, must all the Governments, or, possibly, legislatures of the Provinces affected agree, or only a majority of them, or nearly all of them? Although all amendments to the *British North America Act* from 1895 had arisen out of joint addresses of the Canadian House of Commons and Senate, constitutional practice regarding the consent of the Provinces was not clear.[23]

Attempts to obtain an agreement on an amending for-

[23] P. W. Hogg (1985) *Constitutional Law of Canada*, 2nd edn, Carswell, Toronto, 52–3.

mula were made at federal–Provincial Conferences on many occasions between 1927 and 1979. They all failed. The Prime Minister of Canada, Mr Trudeau, declared in 1981 that, if Provincial consent could not be obtained to certain proposed alterations to the *British North America Act* (including an amending process and a Charter of Rights), the federal Government would, after a resolution of both Houses of the Canadian Parliament, unilaterally request a British enactment.

This caused some fluttering in the dovecotes in Whitehall and in the United Kingdom Houses of Parliament, as well as in Canada. Was it for Britain to lay down the rules and refuse a federal request? Had the old notion of trustee for the Empire survived to a degree so as to impose fiduciary obligations on Britain to protect Canadian federalism? A Committee of the House of Commons – known as the Kershaw Committee – proceeded in 1981 to examine and report on the question.

The Canadian Government refused to give evidence to the Committee, considering it 'inappropriate for the executive government of one nation to offer advice to a committee of the Parliament of another nation'. The Committee however declared that the Parliament should only comply with the Canadian request for amendment if there was *in the view of that Parliament* 'a sufficient level and distribution of provincial concurrence'. This differed from the view expressed by the Canadian Government and by Laskin CJ at the Australian National University five years before, that any attempt by the British Government or Parliament to go behind a resolution of the federal Houses would be strongly resented and could lead to the departure of Canada from the Commonwealth. However that may be, it could obviously have led to great diplomatic conflict between the two countries. It

should be mentioned that the position taken by the Kershaw Committee was not necessarily that of the British Government.[24]

In the end, no conflict eventuated, partly as a result of unusual action by the Supreme Court of Canada. After Mr Trudeau made his threat of unilateral request, a number of Provinces commenced suits for advisory judgements which reached that Court. The Supreme Court affirmed the legal power of the Canadian Houses to pass the appropriate resolutions and declared that the Parliament at Westminster was legally 'untrammelled' and 'omnipotent' in relation to Canada.

A majority, then, answered questions that related not to law but to constitutional convention. They said that there was a constitutional convention requiring the agreement of the Provinces to a federal petition to Britain for the kind of constitutional alteration that was proposed. They expressly refrained from comment on, or advice to, the British Government and Parliament. The convention, they held, required a 'substantial' degree or measure of Provincial consent, but not necessarily unanimity.[25]

In the upshot only Quebec dissented from the proposals, which differed in a number of respects from those that had been before the Court. The Supreme Court of Canada held later that there could be a substantial degree of Provincial consent, for purposes of the convention, without the consent of Quebec.[26] The British Parliamentary Committee agreed,

[24] P. W. Hogg, Comment (1982) 60 *Canadian Bar Review* 307–34.

[25] *Reference re Amendment of the Constitution of Canada* (1982) 125 Dominion Law Reports (3d) 1.

[26] *Re Objection by Quebec to Resolution to Amend the Constitution* [1982] 2 Supreme Court Reports 793.

and that Parliament enacted, as its last law operating in Canada, the *Canada Act* 1982.

This legislation provided, among other things, for local amendment of the Constitution of Canada and for a *Canadian Charter of Rights and Freedoms*. It further provided that no Act of Parliament of the United Kingdom would henceforth extend to Canada as part of its law. Consequently, section 4 of the Statute of Westminster (the request and consent provision) was repealed in relation to Canada.

In the meantime, in Australia, the federal Government was having difficulty getting the States to agree on the method of getting rid of their colonial restrictions and their dependence on the United Kingdom authorities. One problem was the issue of advice to the Queen. It was said that the Queen, herself, did not relish the idea of being advised directly by State Governments. The Commonwealth Government also considered that, as it was the national Government, any advice to the Queen of Australia should be channelled through it. The States strongly resisted. When the Whitlam Government attempted to persuade the British Goverment to take unilateral action regarding such matters as Privy Council appeals, the Australian States, in 1973, addressed a memorandum to that Government as follows:

> The Government and Parliament of the United Kingdom are constitutionally bound to consider the wishes of the Governments of the States when faced with requests by the Commonwealth upon a matter which is primarily one of concern to the States.[27]

One problem was that of the possibility of the Queen receiving conflicting advice, with each Government claiming that it was the appropriate Government to give the effective advice.

[27] G. Marshall (1984) *Constitutional Conventions* Clarendon, Oxford, 189.

This spectre of differing advice from Governments in a federation in the somewhat cloudy area of constitutional law and practice was raised in connection with requests by the Queensland and Tasmanian Governments to the British Government in 1973 to advise the Queen to refer to the Judicial Committee of the Privy Council, under section 4 of the *Judicial Committee Act* 1833, a question related to the ownership of and dominion over the territorial sea and seabed adjacent to Queensland and Tasmania. This occurred three weeks after the introduction into the federal Parliament of the *Seas and Submerged Lands Bill*, which, among other things, declared that sovereignty over the territorial sea and seabed was vested in the Commonwealth. The validity of this legislation depended, in part, on whether the territorial sea was part of the territory of each of the States. When the federal Government heard of the States' requests, it advised against such a reference on the ground that it was properly a matter for the High Court of Australia. The British Government also advised against the reference.

The State Governments concerned were informed by the Foreign and Commonwealth Office that the Queen had acted on the advice of the British Government. The Governor-General sent letters to the two State Governors stating that the Queen had acted on the advice of the Australian Government that the petitions should be rejected on the grounds that the High Court of Australia was the appropriate tribunal to determine the issues.[28] In referring to this matter in her speech to the Australian Parliament on 28 February 1974, embarrassment was avoided by the Govern-

[28] Dispute as to the significance of these events is referred to in correspondence in the *Australian Law Journal* (1981) 55 *Australian Law Journal* at 360, 701, 763, 829, 893. See also Harders (1982) 56 *Australian Law Journal* 132.

ment recording in her speech that she had acted on the advice of 'My Australian and United Kingdom Ministers'.[29] This posed the question of what would have happened had the two advices conflicted.

Questions of this sort also produced an argument that has been made in both Canada and Australia as to the propriety of British Governments consulting or considering the wishes of the regional Governments of those countries since they became independent States in international law. The Whitlam Government had at times suggested that, as the relationship of the Australian Government and the United Kingdom Government was an international and diplomatic one, rather than an Imperial and constitutional one, the British Government had no business going behind the federal Government to concern itself with the municipal organization of the country. The federal Government spoke for the whole of Australia in international affairs and at international law. The internal organization of government and the distribution of power within the country were of no concern to other countries, and that included Britain.

This argument was also made by the federal Government of Canada in protest against the view of the Kershaw Committee that it was for the British Government to satisfy itself that there was sufficient Provincial support for the proposed amendments to the *British North America Act*. The British Government, it was argued, should deal only with the Canadian Government, as it does in ordinary international affairs, and not seek the views of the internal governmental units. A background paper prepared by the Canadian

[29] Commonwealth Parliament Debates, House of Representatives, Vol. 88, 6.

Department of Justice attacked the Kershaw Report as constituting an interference in Canadian internal affairs.[30]

Whatever might be said of this reasoning from the point of view of constitutional and international propriety, it provided the seeds of a *legal* argument that the Australian Government had the constitutional power to deliver the States from colonial bondage, without the intervention of the British Parliament and Government. Indeed, once the States had generally come round to the idea of legal independence from Britain, one of the main arguments was whether, or the extent to which, British intervention was necessary or desirable.

One device considered was the power in the federal Parliament to make laws with respect to 'external affairs'. The subject matter of that power is concerned primarily with relations between Australia and other countries. Once relations between Australia and Britain became international as a result of independence, it was possible to argue that it was valid under the external affairs power to enact a federal law which was designed to prevent the application within Australia of laws of the Parliament of another country, that is, the United Kingdom, or actions of the Queen of the United Kingdom, that is, taken on the advice of British Ministers, or to prevent appeals to the courts in another country, namely the Privy Council. On this view, there could be no clearer example of a law relating to external affairs than one which ensured that the governmental authorities of another country could not interfere with Australia's domestic affairs. For this purpose, the quasi-colonial status of the States could not affect the fact that relations between Australia and the United Kingdom on the

[30] *The Role of the United Kingdom in the Amendment of the Canadian Constitution*, Department of Justice (1981) 37–8, Queen's Printer, Ottawa.

international scene were those between sovereign nations.

This issue came before the High Court of Australia in 1985, but was not fully resolved. Mrs Kirmani, while enjoying a cruise on Sydney Harbour, on a ferry operated by Captain Cook Cruises Pty Ltd, suffered injury as a result of the negligence of the company's servants. The company admitted liability, but pleaded that the damages were limited as a result of the provisions of the (Imperial) *Merchant Shipping Act* 1894. Mrs Kirmani, however, replied that the particular provision had been repealed by the federal Parliament in 1979. It was assumed that this provision was not authorized by the ordinary constitutional powers of the federal Parliament. The ousting of the Imperial law was designed to enable the States to legislate free of the overriding effect of the Imperial law. The Commonwealth argued that its law was valid under its power over external affairs, as it dealt with relations with another country.

It was held valid by four judges to three (Mason, Murphy, Brennan, and Deane JJ; Gibbs CJ, Wilson, and Dawson JJ dissenting).[31] However, only six of the seven judges (all except Brennan J) discussed the external affairs power, and they were evenly split. Three of the majority judges held that to prevent British law operating in Australia was a matter of external affairs, involving, as it did, relations with another country. The other three judges said the matter related to the internal law of the States. Even one of the minority judges, Gibbs, CJ, however, conceded that the *future* exercise by the United Kingdom Parliament of its powers in relation to Australia might be described as 'an external affair'.

The other federal power that became relevant is one that has caused puzzlement from the beginning of federation. It is

[31] *Kirmani v Captain Cook Cruises Pty Ltd [No. 1]* (1985) 159 Commonwealth Law Reports 351.