# Constitution Act 1900.
## Covering Clause 5

## Operation of the Constitution and Laws.

**This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.**

**The Annotated Constitution makes the following comments;** Page 345

HISTORICAL NOTE

This clause was based in part upon sec. 20 of the Federal Council of Australasia Act, 1885.

“The Federal Council of Australasia was a forerunner to the current Commonwealth of Australia, though its structure and members were different. It consisted of the then British colonies of New Zealand, Victoria, Tasmania, South Australia, Fiji, and others. However, the largest colony in the region, New South Wales, never joined the Council. It was a limited legislative body, starting in 1885, to discuss matters of importance and common interest. It had no power to enforce its decisions beyond that provided by the member colonies.”

All Acts of the Council, on being assented to in manner hereinbefore provided, shall have the force of law in all Her Majesty's possessions in Australasia in respect to which this Act is in operation, or in the several colonies to which they shall extend, as the case may be, and on board of all British ships, other than Her Majesty's ships of war, whose last port of clearance or port of destination is in any such possession or colony.”

The provision as to British ships in the Federal Council Act was not included in the draft of that Act framed at the Sydney Conference in 1883, but was inserted by the Imperial draftsmen.

At the Sydney Convention, 1891, there was some discussion as to this provision. At the Adelaide session, 1897, the clause as adopted in 1891 was introduced exactly.

The provision as to British ships was again discussed. It was thought to be much too wide, and was even criticized as “sheer nonsense,” but being sanctioned by the Federal Council Act, it was not altered.

## This Act.

The expression “This Act” occurs in Clauses 1, 2, 3, 4, 5, 6, and 8. **The Act consists of Clauses 1 to 9 inclusive, and Clause 9 enacts the Constitution; so that the Constitution is unquestionably a part of the Act.** In the construction of the words “**This Act” the question will ever be open to argument as to whether the preamble is part of the Act** and to what extent it may be used to explain, enlarge, or contract the meaning of words in the Constitution.

## And all Laws”.

No difficulty is suggested by the words, “and all laws made by the Parliament of the Commonwealth under the Constitution.” The words “under the Constitution” are words of limitation and qualification. **Not all enactments purporting to be laws made by the Parliament are binding; but laws made under, in pursuance of, and within the authority conferred by the Constitution, and those only, are binding on the courts, judges, and people. A law in excess of the authority conferred by the Constitution is no law; it is wholly void and inoperative; it confers no rights, it imposes no duties; it affords no protection.** The Act itself is binding without limitation or qualification because it is passed by the sovereign Parliament (UK), **but the laws passed by the Parliament of the Commonwealth, a subordinate Parliament, must be within the limits of the delegation of powers or they will be null and void.**

To be valid and binding they must be within the domain of jurisdiction mapped out and delimited in express terms, or by necessary implication, in the Constitution itself**. What is not so granted to the Parliament of the Commonwealth is denied to it. What is not so granted is either reserved to the States, as expressed in their respective Constitutions, or remains vested <u>but</u> <u>dormant</u> in the people of the Commonwealth.**

Every legislative assembly existing under a federal constitution is merely a subordinate law –making body, whose laws are of the nature of by-laws, valid whilst within the authority conferred upon it by the constitution, but invalid or unconstitutional if they go beyond the limits of such authority.

### THE COLONIAL LAWS VALIDITY ACT.

A detailed reference may be here appropriately made to a subject which was not specifically discussed during the progress of the Commonwealth Bill through the Federal Convention, but which was raised by the Law Officers of the Imperial Government whilst the Bill was under consideration in England, namely, **the applicability of the Colonial Laws Validity Act, 1865, to the Constitution of the Commonwealth.**

**Can the Federal Parliament, legislating in reference to subjects assigned**

**to it, enact laws repugnant to Imperial legislation applicable to the colonies, in force at the establishment of the Commonwealth, or passed subsequently? It was a rule of common law that a colonial legislature was subordinate to the English and afterwards to the British Parliament; that it could not pass laws in conflict with the laws of England expressly applicable to the colonies.** The commissions and instructions of colonial governors used to require that ordinances passed by the Governor in Council should not be repugnant to the law of England. The extent of this prohibition was very uncertain, and doubts frequently arose as to what constituted a repugnancy. A vague limitation was even supposed to exist, that the laws of a Crown colony must not be repugnant to the common law.

This vague and sweeping rule of invalidity was ultimately superseded by the Colonial Laws Validity Act 1865, Sec. 2 of that Act declares **that any colonial law which is in any respect repugnant to an Act of the Imperial Parliament extending to the colony or repugnant to any order or regulation made under any such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be absolutely void**.

**The Colonial Laws Validity Act was, therefore, an enabling Act, not a restrictive or disabling Act. This proposition may be best illustrated and confirmed by a reference to authorities.**

**The Annotated Constitution makes the following comments;** Page 348

**Even before the passing of the Colonial Laws Validity Act it was recognized in law as well as in practice that a colonial Legislature could not repeal an Imperial Act applicable to the colonies, whether that Act was in force before or came into force after the constitution of such colonial Legislature. That Act limits rather than enlarges the doctrine of repugnancy; it enlarges rather than limits the power of colonial Legislatures**

(1) by repealing the common law rule that every colonial law repugnant to English law is void, and restricting nullity for repugnancy to cases where statutes are expressly intended to apply to the colonies, and

(2) by restricting the nullity to the inconsistent provisions only, and not allowing a particular variance to invalidate the whole colonial Act. Attention may be now drawn to cases which have occurred, and contentions raised, since the passing of the Validity Act.

When clause 5 was under consideration, it was suggested that the clause might be made clearer by inserting the words “the laws of the Commonwealth in so far as the **same are not repugnant to any Imperial Act relating to shipping or navigation.”**

**It was then suggested that even that addition was unnecessary, as the laws of the Commonwealth would be subject to the Imperial laws relating to repugnancy, the Imperial laws being paramount**.

The amendment declaring that "the laws of the Commonwealth shall be Colonial laws within the meaning of the Colonial Laws Validity Act, 1865," appeared in Clause 6 of the Bill introduced into the House of Commons. As a result of subsequent negotiations, however, the Imperial Government decided to omit these words, and also to omit the definition of "colony," and in Committee this was done.

**It may be assumed, therefore, that the Crown Law Officers were satisfied that the Colonial Laws Validity Act is applicable to the Constitution as it stands."**

## Shall be Binding on the Courts, Judges and People.

The importance of these words, as indicating one of the fundamental principles of the Constitution, should be specially noted. Under this clause, the Act, the Constitution, and laws of the Commonwealth made in pursuance of its powers, **will be the supreme law of the land, binding on the Courts, Judges, and people of every State,**
**despite anything to the contrary in the laws of any State.** The latter words operate as a **rescission** of all State laws incompatible with the Act, with the Constitution, and with such laws as may be passed by the Parliament of the Commonwealth in the exercise of its Constitutional rights. **Therefore, by this clause, coupled with sections 106, 107, 108 and 109, all the laws of a State, constitutional as well as ordinary, will be in effect repealed so far as they are repugnant to the supreme law.** All the laws of any State, so far as not inconsistent with the supreme law, will remain in force until altered by the proper authority.

## And of Every Part of the Commonwealth.

TERRITORIAL LIMITS.—The Constitution and laws of the Commonwealth are in force within the territorial limits of the Commonwealth. By the law of nations the territorial limits of a country are allowed to extend into every part of the open sea within one marine league from the coast, measured from low water mark. This coastal margin is called "territorial waters," or the "three-mile limit.

But there may be "parts of the Commonwealth" which are not States. The territorial limits of the Commonwealth will not be necessarily co- boundary with the boundaries of the States and their territorial waters added; they will also embrace any other regions, with their adjacent territorial waters, which for the time being may not be included within the boundaries of a State, but which may be acquired by the Commonwealth in any of the ways authorized by the Constitution.

## Extra-Territorial Operation Of Laws.

There are only two provisions in the Constitution Act explicitly relating to the extra-territorial operation of laws. The first is in Clause 5, which makes the laws of the Commonwealth in force on British ships voyaging solely between ports of the Commonwealth; the second is in sec. 51 x., which empowers the Federal Parliament to legislate as to "fisheries in Australian waters beyond territorial limits.

The legislative powers given by sec. 51—xxix., as to "external affairs," and by sec. 51—xxxviii., as to powers previously exercisable by the Imperial Parliament or by the Federal Council, do not necessarily imply extra-territorial operation, and it is therefore submitted that they do not sanction any such operation.

No State can by its laws directly affect, bind, or regulate property beyond its own territory, or control persons who do not reside within it, whether they be native born subjects or not; a different system, which would recognize in each State the power of regulating persons or things beyond its territory, would exclude the equality of rights among different States, and the exclusive sovereignty which belongs to each of them.

The British Parliament, being a sovereign legislature, may pass laws binding on its subjects all over the world; but, according to the principles of international law, it ought not to legislate for foreigners out of its dominions and beyond the jurisdiction of the Crown. The British Parliament has not, according to the principles of public law, any authority to legislate for foreign vessels on the high seas or for foreigners beyond the frontiers of the Empire.

## Territorial Waters.

Some further explanation of the rule of the "three mile limit" may be here added:—

Of the marginal seas, and enclosed waters, as being susceptible, the case of the first is the simplest. In claiming its marginal seas as property a state is able to satisfy the condition of valid seizure, because a narrow belt of water along a coast can be effectively commanded from the coast itself either by guns or by means of a coast-guard.

## The Laws of Any State.

The laws of the States will comprise the following classes:—

(i.) Imperial Acts relating to the Constitution and government of the colonies when they become States:
(ii.) Imperial Acts relating to matters of ordinary legislation expressly applicable to the colonies when they become States:

(iii.) The Common law so far as applicable and not modified by colonial or State legislation:
(iv.) Laws of the realm of England made applicable to some colonies by the general terms of the Act of 9 George IV. c. 83, and not since repealed or amended by colonial legislation:
(v.) Acts relating to constitutional matters as well as to matters of ordinary legislation passed by the colonial or State legislatures in the exercise of Statutory authority conferred by Imperial law.

All these laws will remain in full force and effect until they become inconsistent with—

(1) The Commonwealth of Australia Constitution Act, or
(2) some Act amending the Constitution, or
(3) laws to be made thereunder by the Parliament of the Commonwealth. By the Constitution of the colonies their legislatures have power to make laws in and for those colonies respectively in all cases whatsoever. When those colonies become States their large powers will by degrees be considerably cut down.

## The Laws of the Commonwealth.

This is a more suitable and comprehensive expression than the one which appears at the beginning of this clause, viz., “this Act and all laws made by the Parliament of the Commonwealth.” The laws of the Commonwealth will consist of the following classes:—

(I.) The Commonwealth of Australia Constitution Act.
(II.) Alterations of the Constitution pursuant to the provisions of Chapter VIII (Referendum).
(III.) Laws made by the Parliament of the Commonwealth under the Constitution.

It will be noticed that the second group of laws as above classified will not be laws made by the Parliament; they may be laws proposed either by one or both of the Federal Chambers, subject to certain conditions, and afterwards approved by the qualified electors of the Commonwealth and assented to by the Governor-General or by the Queen.