The Constitutional Structure of the Commonwealth, by K. C. Wheare, F.B.A., Rector of Exeter College, Oxford, London. Oxford University Press, 1960. xiv and 201pp. (£2/6/6 in Australia.)

The Commonwealth of Nations presents many baffling features, not the least of which is its lack of a clearly articulated constitutional basis. Possibly the constitutional aspects of Commonwealth relations are no less enigmatic than the British constitution itself, but with the Commonwealth the difficulties of comprehension are compounded by the rudimentary character of its institutions and by the rapidity with which constitutional change has taken place. Hitherto, scholarly writing about the constitution of the Commonwealth has been concerned principally with the implications of attainment of independence and what used to be called "Dominion Status" as regards the relationship between the United Kingdom on one hand, and on the other those former non-self-governing British territories which now enjoy full membership of the Commonwealth. K. C. Wheare's, *The Statute of Westminster and Dominion Status*, first published in 1938, followed this line of approach, an approach, one should add, eminently well suited to the circumstances existing at the time.

While the fifth (1953) and last edition of this admirable little book deals not only with the Statute of Westminster but with the Independence Acts of India and Pakistan, events since then have underlined the shortcomings of a scheme of analysis which is oriented towards the rules and usages governing relations between the former Imperial power and the nations which it has spawned. Certainly these matters must continue to occupy a substantial part of any exposition of the Commonwealth, but the growth in stature of Commonwealth members *vis-à-vis* the United Kingdom has entailed a number of developments having no necessary connection with either independence statutes or the removal of inequalities flowing from colonial status. These developments relate principally to the working out of rules governing admission to membership of the Commonwealth, withdrawal and "expulsion" therefrom, and the privileges and obligations which attach to membership.

Most people who take an intelligent interest in such events as Prime Ministers' conferences probably are aware that the last decade has witnessed something in the nature of a gradual metamorphosis in the Commonwealth, however, precisely how far and in which directions the transformation has affected the constitutional basis of the association, is seldom likely to be appreciated in full. In large part, ignorance on such matters can be accounted for by the secrecy of deliberations at Prime Ministers' meetings and by the manner in which major decisions are expressed. The pious sounding but cryptic pronouncements which so often emanate from these gatherings scarcely are calculated to put the outsider wise to what is going on.

In his new book, *The Constitutional Structure of the Commonwealth*, K. C. Wheare has assumed the difficult task of trying to ascertain the full import of some of these statements. Duplication of *The Statute of Westminster and Dominion Status* has been avoided and where there was any possibility of overlap, the author has contented himself with summary re-statement of the matters dealt with more fully in the earlier book. The new volume should therefore be regarded not as a replacement but rather as a complement to the 1938 volume. Understandably, more attention is given to the consequences of the granting of independence to the Afro-Asian Commonwealth countries, and to those issues which have figured most prominently over the last decade or so, than to the development of Dominion status and the effects of the Statute of Westminster for Australia, Canada and New Zealand. An entire chapter, for example, is devoted to membership, another, "Symbols", to the altered significance of the Crown following the Prime Ministers' declaration of 1949, and another to examination of the implications of the declared obligation of members to co-operate

with one another.

Despite its title, *The Constitutional Structure of the Commonwealth* concerns a constitution conceived in the broadest sense, and one might add, the sense normally understood by students of the British constitution. All the author means by "constitutional structure" is "that collection of rules, understandings and practices by which the position and mutual relations of the countries, and, more particularly, of the Members of the Commonwealth, are regulated and described" (p.17). The only reason why he has chosen to speak of a "constitutional structure" rather than of a constitution, is that he felt that the term "constitution" had come to be identified with constitutions contained in a single legal instrument. For this reviewer, any misunderstanding the author hoped to avoid could have been better avoided by using the word "constitution" with an explanation of the sense in which it was being employed. As it is, if the book proves anything, it is that the Commonwealth is deficient of structure, constitutional or otherwise.

In describing the constitution of the Commonwealth, K.C. Wheare casts his net wider than is customary among students of national constitutions. He is not concerned simply with those rules which are recognised by the courts as rules of law; nor is he content to draw the line at constitutional conventions. Usage — that "which is done but is not yet required to be done" (p.19) — figures as prominently in his analysis as conventions. K.C. Wheare hardly can be charged with straying from the path of orthodoxy. The late Sir Arthur Berriedale Keith habitually ranged far and wide over what some might choose to call contemporary diplomatic history, others political science. The short answer to any disciplinary purist who would insist that the constitutional lawyer confine himself to norms firmly established as binding — whether by the criterion of general acceptance or by formal criteria — is that usage is the stuff that conventions are made of. So long as the distinction between convention and usage is adhered to, no harm is done; indeed, some positive service may be rendered, in diagnosing conventions in embryo.

Both in the chapter on "Symbols" and elsewhere in the book, K.C. Wheare betrays a hitherto unrevealed flirtation with the linguistic preoccupations of some of his fellow Oxonians. Happily, a method of analysis which in less competent hands might have produced little more than a pedantic exercise in lexicology, in Wheare's hands has been disciplined to serve the purposes of better clarification and description of rules and usages frequently obscured by political double-talk. The first chapter, frankly but unpromisingly entitled "Vocabularly", traces through mutations in the nomenclature of the association now called "the Commonwealth of Nations", and its component parts. With this useful preliminary, the author proceeds to orientate his examination of the constitution around various phrases commonly invoked to express the characteristics of the Commonwealth. In Chapters II, IV and VI, for example, Wheare takes as his keynote a phrase or sentence from the report of the Imperial Conference of 1926 — "Equality of status . . . is . . . the root principle governing our Inter-Imperial Relations"; "They [the members of the Commonwealth] are autonomous communities"; "free co-operation is its [the Commonwealth's] instrument".

On the effect of s.2 of the Statute of Westminster and its counterparts in the Independence Acts of Ceylon and Ghana, K.C. Wheare has seen no reason to alter the conclusions he expressed in *The Statute of Westminster and Dominion Status*. In his view the Statute assumes the supremacy of the United Kingdom Parliament and merely lays down a rule of construction of British statutes, a rule to determine when the power of the United Kingdom Parliament to legislate for the Dominions "has or may be deemed to have been exercised" (p.27). On the other hand, he abstains from predicting how a court of law outside the United Kingdom would regard a British statute expressly declared to apply to a

Dominion but which omitted the declaration of request and consent. The difficulty, he admits, is theoretical but in any event he finds in s.2 (2) of the Statute sufficient legislative authority for any Dominion Parliament to nullify any British Act. Under this provision, he writes, a Dominion Parliament might —

> . . . repeal or amend any act of parliament of the United Kingdom which contradicted implicitly or explicitly those provisions whether of the Statute of Westminster or of the Indian, Ceylon, or Ghana Independence Acts which laid down the relationship between the parliaments of the United Kingdom and the parliaments of the other members.

While approximately one half of the chapter is devoted to the Cape-Coloured Voters cases, it comes as a small disappointment to find that the author does not venture any opinion on their possible relevance to the British scene. As it is, K.C. Wheare does not pursue the matter any further than to indicate that there has been some re-thinking of late about the supremacy doctrine and that not all authorities agree with his interpretation of the Statute.

K.C. Wheare does, however, concede that by unilateral action, a Commonwealth country might so arrange its "constitutional position that no question could arise, even hypothetically, of law-making by Westminster for other Members of the Commonwealth" (p.35). This result, he says, has been achieved by India, Pakistan and Malaya, each of which has ceased to be part of the Queen's dominions. In relation to these countries the United Kingdom Parliament now stands in the same position as the parliament of Norway. Logically such a conclusion does not square completely with Wheare's previous position regarding the supremacy of the United Kingdom Parliament. Even accepting the proposition that the United Kingdom Parliament has conferred authority on the parliaments of India, Pakistan and Malaya to effect such a withdrawal, surely a United Kingdom statute expressly declared to apply to each of these countries would, on Wheare's analysis, be tantamount to repeal of the previous authorization. As far as British courts are concerned no objection can be taken to legislation declaring Norway to be part of the Queen's dominions or that an Act shall be deemed to extend to Norway.

Later in the book, K.C. Wheare devotes a chapter to what may well be one of the most significant constitutional developments in the Commonwealth in recent times. This is the working out of a principle "of constitutional autarky or, to use a less familiar but accurate word, a principle of constitutional *autochthony*. . . ." (p.89). "Autochthony" means simply "home-grown" and in the present context it refers to the assertion in the Constitutions of the Irish Free State, India and Pakistan that the authority of the Constitution derives from the people it binds — rather than from any United Kingdom enactment.

Practically, there may not be any significance in the distinction sought to be taken between a constitution which derives its force as law by reason of its emanation from the United Kingdom Parliament and one whose legal foundation is said to rest upon something such as general acceptance. Nationalistic sentiment, as Wheare emphasises, may not be satisfied with anything less than the latter, in which event the problem arises of how the necessary break in legal continuity may be accomplished. Wheare discusses several possible alternatives but on balance finds the simplest and most effective method that of enactment of a new constitution without presentation for royal assent. "The essential point", he writes, in all of the alternatives open, "is that such action as is taken must not be taken under the authority of an act of parliament of the United Kingdom" (p.112). "At the same time", Wheare urges (p.112) —

> . . . some arrangement would have to be made to ensure that the courts would accept this new constitution, to avoid the difficulties that might arise if they acted as the Federal Court of Pakistan acted in 1955. Here the Irish Constitution offers a useful suggestion. Article 34 provides that every judge

shall, on appointment, make a declaration to uphold the constitution and the laws and that any judge who declines to do so shall be deemed to have vacated his office. A provision of this kind, or alternatively a provision that the question of the validity of the constitution should not be entertained in any court, or both, would surely suffice to remove difficulties.

One wonders whether even this would deter a judiciary so minded to reject the new constitution as law. The dilemma confronting judges in such situations may not be one soluble in terms of legal logic. Legal revolutions cannot properly be reconciled with notions of constitutionality unless judges are themselves prepared to acknowledge that the obligatory character of a constitution is derived from its general acceptance by the society it is supposed to govern.

ENID CAMPBELL*

Legal Aspects of Foreign Investment edited by Wolfgang G. Friedmann, Professor of Law and Director of International Legal Research, Columbia University, and Richard C. Pugh of the New York Bar. London, Stevens & Sons Ltd., 1959. xiii and 812 pp. (£9/16/- in Australia).

International Transactions and Relations: Cases and Materials, by Milton Katz, Henry L. Stimson Professor of Law and Director, International Legal Studies, Harvard University, and Kingman Brewster, Jr., Professor of Law, Harvard University. London, Stevens & Sons Ltd., 1960. xliv and 863 pp. (£7/12/6 in Australia).

The scene is a legal office in Sydney or any other Australian city. An important and impatient client enters and demands prompt advice on a plan to establish a subsidiary company in Indonesia or Burma or Argentina. One might be pardoned for contemplating the probable reaction with some amusement. No doubt some legal offices have faced similar problems already. No doubt a considerable amount of legal advice is available from Australian government departments, foreign consular officials and banks. There cannot be the slightest doubt that this form of enquiry will increase — particularly if the promotion campaign of the Commonwealth Department of Trade results in a significant increase in manufactured exports. Already a few legal firms in the United States derive most of their income from advice on international commercial transactions and it would be easy to slip into cliches about a "smaller world" and to imagine that this pattern will be repeated in Australia.

There are, however, limiting factors. The most important of these is the fact that the marketing of many Australian primary products is controlled by governmental marketing authorities. In the case of wool, our most significant export, a group of private firms have developed a sufficient expertise to cope with the more common problems in the trade. So, at least in relation to the staple Australian exports, central commercial organizations, government or private, can supply required legal advice more efficiently than the ordinary legal office.

One development seems assured. There will be an increasing demand for legal advice from all the available sources. Overseas this demand has led to the publication of an increasing number of texts. As well as the books under review the *Harvard World Tax Series*[1] and the works of Proehl,[2] the Southwestern Legal Foundation[3] and Seyid Muhammad[4] — to mention a representative selec-

---

* LL.B., B.Ec. (Tas.), Ph.D. (Duke, U.S.A.), Senior Lecturer in Law, University of Sydney.

[1] The *Harvard World Tax Series* consists of a series of volumes published in the International Program in Taxation of the Harvard Law School. Each volume analyses the taxation law of a separate country.

[2] P. O. Proehl (ed.), *Legal Problems of International Trade* (1959).

[3] The Southwestern Legal Foundation, *Proceedings of the 1959 Institute on Private Investments Abroad* (1959).

[4] V. A. Seyid Muhammad, *The Legal Framework of World Trade* (1958).