PARLIAMENTARY SOVEREIGNTY

IN THE COMMONWEALTH

A Case Study

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in the University of Glasgow.

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List of Principal Abbreviations

A.C.	Appeal Cases (House of Lords and Privy Council Reports)
A.D.	Appellate Division (South African Law Reports)
A.L.J.	Australian Law Journal
C.B.R.	Canadian Bar Review
C.L.R.	Commonwealth Law Reports
H.L.R.	Harvard Law Review
H.C.Deb.	House of Commons Debates
H.L.Deb.	House of Lords Debates
H.Ass.Deb.	House of Assembly Debates (South Africa)
J.C.L.	Journal of Comparative Legislation
L.Q.R.	Law Quarterly Review
M.L.R.	Modern Law Review
S.L.T.	Scottish Law Times Reports
S.A.L.J.	South African Law Journal
T.L.R.	Times Law Reports
T.L.J.	Toronto Law Journal

'The omnipotence of Parliament in the mouth of a lawyer, and understood exclusively of the restraints and remedies within the competence of our law courts is objectionable only as bombast. It is but a puffing, pompous way of stating a plain matter of fact.

SAMUEL TAYLOR COLERIDGE

'The British Commonwealth took the law by surprise'.

R.T.E. LATHAM

CHAPTER ONE

Introduction

1

'Do you know', wrote Mr. Justice Holmes of the United States Supreme Court, to Harold Laski,[1] 'I really am bothered by the old difference, between us, if there is one, as to sovereignty, because as I understand the question, it seems to me one that does not admit of argument.'

> 'What I cannot understand (Holmes continued) is the suggestion that the United States is bound by law, even though it does not assent. What I mean by law in this connection is that which is or should be enforced by the courts, and I can't understand how anyone should think that an instrumentality established by the United States to carry out its will and that it can depose upon a failure to do so should undertake to enforce something that is ex hypothesi against its will. It seems to me like shaking ones fist at the sky when the sky furnishes the energy that enables one to raise the fist. There is a tendency to think of judges as if they were independent mouthpieces of the Infinite and not simply directors of a force that comes from the source that gives them their authority.'

Thomas Hobbes said a not wholly dissimilar thing in observing that:-

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1. The Holmes-Laski Letters 1916-1935 (Vol.II) 1953, p.822 (Jan 29th 1926)

> 'To those laws which the Sovereign himself, that is which the Commonwealth maketh, he is not subject. For to be subject to laws is to be subject to the Commonwealth.. that is to himself; which is not subjection, but freedom from the laws.'[1]

Freedom from the laws - that attribute of the princeps legibus solutus has long provided political theorists with the materials of a debate that has ranged across the boundaries of law, politics, philosophy and history. Thus 'the problem of sovereignty' is, in a way, a misleading phrase. There is a congeries of problems. 'Sovereignty' appears in the context of international law; as a problem in the philosophy of law; as a question of political theory; and as a subject demanding the attention of the political scientist and student of comparative constitutional law. The author of a study of 'Recent Theories of Sovereignty' published some years ago reached the conclusion that, although 'much ink and paper has been employed in discussing it since the time of Greece, and particularly after the appearance of Bodin's Les Six Livres de la Republique - yet the discussion seems to have no end.'[2] This is not really a matter for astonishment. It is true that 'the theory of sovereignty' has often been regarded as if it were analogous to empirical hypothesis or description

1. 'Leviathan' (ed.Oakshott) p.212.
2. 'Recent Theories of Sovereignty' Su Ching Sen (Canton.1929) p.172

presented for verification to political scientists. But this treatment is logically inappropriate. Philosophical, political, and legal analysis have this in common - that they do not present intractable problems in the way that, for example conducting a census of pupulation may present an intractable problem. The seeming endlessness of the discussion is a typical rather than an extraordinary characteristic of such analysis.

This is not to say that empirical investigation is completely irrelevant to questions about 'sovereign authority'. But it is to say that the various types of discourse to be found in 'theories of sovereignty' must be disentangled; and in the vaguely defined areas common to the academic lawyer and the political theorist this has not always been done. Talk about sovereignty may be in any one of several categories. It may be philosophical and political talk - as for example that of Hobbes or T.H. Green. It may be jurisprudential talk - as for example that of John Austin. Or it may be the talk that goes on in courts of law in the course of litigation. These levels of discourse are not without influence one upon the other. 'Legal sovereignty' or 'legal supremacy' (in the British context 'Parliamentary sovereignty') can hardly be understood without reference

to the interaction between these levels. As reflected in judicial discourse, it is in part the result of jurispruden-tial discourse, which has been in turn influenced by philosophical discourse.

In British courts of law, judicial discussion of the sovereignty of Parliament is not common. It has even been remarked that 'no direct authority in the shape of decided cases can be adduced in support of the legislative omnipo-tence of Parliament', and that, 'for almost three centuries it has been universally acknowledged, and no doubt the only reason why during all that period it has never been called into question in a court of law is that no one has ever thought it worth while to dispute it.'[1] In modern times the sovereign authority of the Queen-in-Parliament is a datum, and the corresponding rule which is applied by, and which underlies the activities of the courts may be regarded as the basic rule or '<u>grundnorm</u>' of the British system of law. It is this very certainty of application and absence of dis-agreement which may obscure a correct understanding of the status and scope of the rule which enunciates the legal supremacy of Parliament. As a legal concept in the United Kingdom 'sovereignty' is very much what its political and

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1. Stephen's Commentaries on the Laws of England (21st ed. 1950 vol.iii, p.288)

theoretical ancestry has made it. It is the result of a constitutional struggle carried on within a certain philosophical mould. The struggle related to the exercise of an authority associated with the 'majesty' or supremacy of the King. Even the ultimate transference of royal authority from the King in person to an elective body left intact the formal conception of the self-same power being exercised with the advice and consent of that body. The political philosophers' assertions about the nature and attributes of sovereign power - about its illimitability, and about its indivisibility - were merely transferred by jurists into a legal context, and attached themselves to the 'will' of a power 'free of the laws' but now expressed as a legally defined Parliamentary command. Thus historical development; the concept of law as 'command'; and the vocabulary suggested by political theory, conspired to mould the theory of Parliamentary sovereignty so as to foreclose certain lines of enquiry and to supply answers to legal questions which might otherwise have remained open. The effects of the theory in a constitutionally stable society with well established legislative procedures whose bases are never questioned, may not differ politically and practically from the effects of any other theory. But certain situations in which legal

change raises fundamental questions about the nature of the legislative process and its relationship to the judicial process, involve the doctrine of Parliamentary sovereignty as traditionally formulated, in difficulties which have rarely been thoroughly examined. One reason for this has been simply the large part necessarily played by speculation in such inquiry. The development of the United Kingdom constitution in modern times has provided students of constitutional theory with little material for fundamental analysis. Nevertheless, the legal evolution of the Commonwealth has opened a fresh field of study. The working of Parliamentary systems of government without the political background from which those institutions developed in the United Kingdom has provided a number of controlled experiments whose impact on legal theory is a matter of considerable interest to both lawyers and political scientists. 'Parliamentary sovereignty' is now an expression with large political implications whose application is no longer confined to the legislative institutions of Great Britain, and it can no longer be examined (as it was by Dicey) solely by reference to those institutions. As the same time, since the Parliament at Westminster is widely regarded as a prototype and as a source of constitutional doctrine, the legal

theory exemplified by the exercise of authority by Parliament in the United Kingdom is not merely of historical interest.

In one part of the Commonwealth the force of these conclusions has been especially apparent during the years since 1948. Following the General Election of that year in the Union of South Africa there has arisen a constitutional crisis whose legal aspects are in the present context especially relevant. The Union Parliament has claimed to exercise sovereign authority of the kind attributed to the United Kingdom Parliament. In doing so it has come into conflict with the courts, and loosed a flood of Parliamentary and legal discussion of the function of the Judiciary, of the 'meaning' of Parliamentary sovereignty, and of the relationship between legislative authority in the Commonwealth and legislative authority in the United Kingdom. As a piece of Commonwealth history the struggle between the legislature and the courts in South Africa is worthy of study in itself. But placed in a slightly wider setting and viewed against the historical and theoretical background of British constitutional theory, it provides an ideal case study of the way in which that theory has been and may be even further transformed by political necessity, by novel

legal problems, and by a different type of theoretical approach to the 'doctrine of sovereignty'.

PART ONE

CHAPTER TWO

Sovereignty: The Doctrine and its 'High Priests'

> 'An Act of Parliament may not make adultery lawful; that is it cannot make it lawful for A to lie with the wife of B; but it may make the wife of A to be the wife of B and dissolve her marriage with A.'
>
> LORD CHIEF JUSTICE HOLT. City of London v.Wood (1701)

Part 1

The English invented the doctrine of Parliamentary sovereignty; but (it has been remarked)[1] even those commonly regarded as the high priests of the mystery were never free from doubt as to its meaning and scope. It is certainly true that until a remarkably late date in the development of British constitutional theory, the doctrine was overlaid with qualifications and that exponents of the legal 'omnipotence' of Parliament have not infrequently expressed

1. R.F.V. Heuston. 32 J.C.L. 116

equivocal and sometimes seemingly contradictory opinions about the exact nature of that omnipotence. Unlike most inventions too, 'sovereignty' cannot be said with any certainty to have originated at a particular time. For a number of reasons it is hard to state with exactness when 'Parliamentary sovereignty' in its modern form may be said to have been acknowledged as an undoubted part of the law and custom of the constitution. Professor C.H. McIlwain in his early study of the 'High Court of Parliament', selected May 27th 1642 as the first occasion on which the theory of Parliamentary supremacy emerged in action - the Lords and Commons declaring in opposition to the King, that Parliament was 'a Council to provide for the necessity.. and preserve the publick peace and safety of the Kingdom.. and what they do herein hath the stamp of royal authority'.[1] Similar claims and variations of it had of course been put forward by Parliamentary pamphleteers against the Stuart assertion of Divine Right. The political theory behind such claims may be dated from the earliest part of the 17th century. Whitelocke[2] in 1610 distinguished between the

1. 'The High Court of Parliament and its Supremacy (1912) p.390
2. For an account of Whitelocke's theory see W.S. Holdsworth. 'Some Lessons from our Legal History' (1928) pp.124-5; and G.L. Mosse. 'The Struggle for Sovereignty in England' (1950) pp.73ff.

power of the King out of Parliament, and the power of the King in Parliament. The distinction is one which bears a clear relation to even earlier constitutional theories - for example to the well known assertion of Fortescue that the government of England was a form of royal constitutionalism not a mere personal monarchy. Statutes were 'not enacted by the sole will of the Prince, but with the concurrent consent of the whole Kingdom by their Representatives in Parliament.'[1] 'A King of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his government is not only regal but political.'[2] But constitutional theories of this type sprang from a desire to limit power by subjecting it to Parliamentary or legal control. And assertions of the 'Sovereignty of Parliament' in the 17th century are clearly the result primarily of a dispute as to the location of legislative power, and not necessarily statements about the 'unlimited' nature of such power. Prynne's 'Sovereign Power of Parliaments and Kingdoms' published in 1643 has as its principal aim (as had the Parliamentary declaration of 1642) the assertion that the

1. Sir John Fortescue. 'De Laudibus Legum Angliae' (Translated as 'A Commendation of the Laws of England' 1917) p.28. The 'De Laudibus' was written around 1470
2. Ibid. p.17

basis of the constitution rests in Parliament and not in the person of the King. Parliamentary 'supremacy' may therefore mean 'The highest authority known to the law'. Its supremacy may be merely relative to that of other organs of Government. It may be considered (as it was by the Common lawyers) as the highest court of law in the land - or as a body supreme in its collective capacity over any of its elements taken singly. None of these contentions amounts logically to an assertion of legal irresponsibility. It is well to make this reservation before taking hold of any statement about 'supreme' power and allowing it to stand as a first indication of the recognition of the doctrine of sovereignty. Otherwise such recognition may be divined in a wide selection of dicta ranging from Sir Thomas Smith [1] to the Glorious Revolution. This point might be emphasised by reference to the political theory of John Locke. Locke's theory of government notoriously embodies a whole series of restraints on legislative power. Yet the legislature is referred to as the '<u>one supreme power</u> ... to which all the rest are and must be subordinate.' [2] Such supremacy is not

1. 'A Discourse on the Commonwealth of England' (1583) (Ed.Alston 1906) pp.48-9
2. 'Second Treatise of Civil Government' (1690) chap.X111 p.74 (Ed.Gough 1946) Locke of course himself points the contrast between 'supreme' and 'arbitrary' government (chaps X11 and X111)

'sovereignty'. How many earlier statements of Parliamentary authority are implicitly combined with a belief in legally effective restraints on legislative power imposed in the interests of social contract, right reason, or natural law, is a matter on which legal historians do not seem destined to agree.[1] But whatever adumbrations of a theory of 'absolute' authority are to be found at an earlier date,[2]

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1. Sir William Holdsworth for example has held that Professor McIlwain exaggerated the part played by 'fundamental' law in the 17th century, and that 'fundamental' rights usually meant rights asserted as given by existing law and essential bases of the constitution, rather than law unchangeable by King, Lords, and Commons. Exceptions were rare, and found for example in the mouths of extreme prerogative lawyers where no better arguments could be mustered. ('History of English Law' Vol.2p.442n.). For some examples of arguments involving restrictions on Parliamentary competence see J.W. Gough 'Fundamental Law in the Seventeenth Century (Political Studies Vol.1 No 2 (1953))

2. Reference to 'uncontrollable and arbitrary' authority seems sometimes to have been accepted as a kind of juristic platitude which is compatible with the existence of natural law in the sense that controls on 'supreme' governors are God's business and outside the scope of jurisprudence. Halifax, the 'Trimmer' for instance remarked that 'supreme power can no more be limited than infinity can be measured' (Foxcroft's Life of Halifax Vol.2 pp.298-9)

Hobbes does not appear to have been the only one, however to have given a practical application to the academic theorem. A claim has been advanced in favour of the Parliamentary pamphleteer Henry Parker, (M.A. Judson 'Henry Parker and the Theory of Parliamentary Sovereignty' in Essays in Honour of C.H. Mc.Ilwain. Harvard 1936 p.138) An interesting set of passages is cited from Parkers 'Observations', a pamphlet published in 1642: 'The whole Kingdom is not so properly the Author as the essence itself of Parliament..That there is an an arbitrary power in every state somewhere t'is true. Parliament..is indeed the state itself; it is of no good consequence, though the King makes so much of it that Parliament doth abuse power because it may. ..Both Houses have an arbitrary power to abridge the freedom of the subject. .. They may if they please subject the whole Kingdom for ever to the same arbitrary rule as France groans under'. (pp.147, 150, 151, 157)

there can be little doubt that such a theory did not stand unchallenged in the eighteenth century. The challenge was of course couched largely in broad political terms rather than as a legal doctrine. But the literature of protest against 'Hobbist' principles and 'arbitrary power' is not without influence on the narrower constitutional doctrine. Sir Matthew Hale wrote a broadside specifically directed at Hobbes,[1] and his followers were many.[2] Whig doctrine, whether aimed at Divine Right or Leviathan is inevitably the exercising of an option for limited government. Even God is 'a limited monarch limited by the rule which infinite wisdom prescribes to infinite power' And, 'If governing without any rule, and by arbitrary will be not essential to our idea of the monarchy of the Supreme Being, it is plainly ridiculous to suppose them necessarily included in the idea of a human monarchy'.[3] The coalescence of political and legal argument in this sphere is inevitable, and is clearly

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1. Printed as Appendix 3 in History of English Law Vol.5
2. For a survey, see John Bowle. 'Hobbes and his critics' (1951)
3. Bolingbroke. The Patriot King. (~~Works Vol.III~~ 1831 ed. p.152-3) Yet Bolingbroke also subsribes to the doctrine that 'there must be an absolute, unlimited and uncontrollable power lodged somewhere in every government' (*ibid* pp150-1) c.f. Algernon Sydney 'Discourses Concerning Government.(1698) Remarks of this kind, made by theorists advancing doctrines of natural law and social contract seem a recurrent phenomenon and their practical effect is difficult to estimate.

seen in the Parliamentary debates on the Septennial Act of 1716. The proposal to extend the life of Parliament (including the existing one) from three to seven years evoked protest in both Lords and Commons against what is probably the plainest assertion of a power which for the first time may be regarded as the doctrine of Parliamentary sovereignty in its modern form. There was much talk in the petitions presented against the Bill, and in the Protest entered by the dissenting Peers of 'the fundamental constitution of the Kingdom', and Locke was quoted in support of the reservations implied by the concept of power as a trust conferred by the electors.[1] 'The Bill now before you' said Bromley, 'is of higher concern to the Commons of Great Britain than any that ever yet was before you.. and in my opinion, wounds the constitution of Parliaments very deep.'[2] 'Supposing' he continued, 'this Bill should undergo the forms used in the passing of Bills, would (it) carry with it the obligation of a law? Of this I own myself much in doubt'[3]

Similar views were expressed by Archibald Hutcheson.

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1. Snell's speech in the Commons against the Bill (Parlt. Hist. VII. cols. 328-30
2. Bromley at col. 330
3. At col. 333

> 'If it should go through all the forms of an Act of Parliament, pass both Houses, and have the royal assent.. it will still remain a dead letter and not obtain the force of a law; for I am warranted by one of our greatest lawyers to affirm 'that an Act of Parliament may be void in itself', and if there are any cases out of the reach of the legislature, this now before us must be admitted to be one.'[1]

For what, Hutcheson went on, could be more against common sense and reason than to be a felo de se, to destroy the constitution or any essential part thereof on which the existence of members in their political capacity depended? For the sake of those gentlemen who seemed so very fond of the unlimited power of parliaments he would mention some cases to which they themselves would agree that that unlimited power did not and could not extend. Such cases might include laws intending to make Parliament indissoluble without its own consent or to vest the whole legislative authority in a prince or dictator so as 'to put all things hereafter intirely into the power and to be disposed of at the will and pleasure of the prince'. No true Briton would surely say that Acts of Parliament such as this could have the least validity or force.

> '..- which I think is a full proof of what I have affirmed, That the powers given by the people to their representatives are not absolutely unlimited, nor the power of the Parliament so omnipotent as some are willing to suppose it.'[2]

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1. Parlt. Hist. VII cp.349
2. Ibid. cp.349, 350

Hutcheson referred also to the doctrine that members were chosen 'with full powers to consent to such laws as we shall judge for the benefit of the nation'. This was, in general, true but the words 'full powers' could not be construed in such a way as to imply a right to overturn the basis on which the powers were granted. An attorney with full powers could not use those powers to extend the duration of his power to act.

> 'No doubt what he shall do pursuant to those powers during that term shall bind me, but what he shall afterwards do is void, and it cannot be said that by the general words of doing all acts in my name that he is enabled to add four years to his power.'[1]

What is essentially the same point was made by another opponent of the Bill, Shippen:-

> 'It may be thought a presumption if I should affirm in this present Parliament which hath given so many proofs of its omnipotence, that even the whole legislature cannot do everything. I must, however, always be of opinion that although it is a received maxim in civil science that the supreme legislature cannot be bound; yet an implied exception must be understood viz. that it is restrained from subverting the foundation on which it stands;'[2]

There is a hint here of the paradox of 'unlimited sovereignty' Both those who claimed that the powers of Parliament were limited and those who asserted the existence

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1. Parlt. Hist. VII cpl.348
2. Ibid. cpls.317-20

of limitations were in effectual agreement about the status of legislation purporting to transfer Parliamentary authority to a dictator. The grounds advanced on the one hand for believing such legislation to be void were that it would constitute a betrayal of the electoral trust and an overturning of the basis of authority. On the other hand such an attempt could be represented as an attempt to bind future Parliamentary action. The agreement of the two views at this point results from the paradox that to say that a body or person is 'unlimited', seems to imply that he can do anything. If he can do anything, he can always change his mind. If he can always change his mind, he cannot bind himself not to do so. If he is thus incapable of binding himself, he cannot be omnipotent and do everything since there is at least one thing which he cannot do.

The argument about the basis of authority is an important one. Indeed it touches the crux of almost all dispute about the nature of 'legal sovereignty'. If the expression 'unlimited power' contains no seeds of paradox and contradiction, the same can hardly be said of the notion of 'unlimited authority' For all 'authority' must be defined. And it cannot be defined without a rule which is logically prior to the rules made in its exercise. Hobbes was not

unaware of this.[1] Nor did Jean Bodin so widely regarded as having fathered the modern doctrine of sovereignty ever assert that the 'potestas legibus soluta' - the power free to make and unmake legislation was free to make and unmake the constitutional framework.[2] 'La puissance souveraine' is defined in the 'Six Books of the Republic' as that of 'un droit gouvernement'[3]

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1. Even in the case of a sovereign making law by his uncontrolled command, there is a necessary distinction between law and mere will '..For by disobeying Kings we mean the disobeying of his laws, those his laws that were made before they were applied to any particular person; for the King..commands the people in general never but by a precedent law, and as apolitic, not a natural person. (Behemoth. Works ed. Molesworth vol. 6 p. 227)
   c.f. An Answer to Bishop Bramhall. Works. vol. 4 pp.370-1
   Where the sovereign is a group of persons, the distinction between the 'authority' of the group and the personal wills of its members is even plainer. c.f. 'A Dialogue of the Common Laws' (Works. vol. 6 pp.151-52)
   I am indebted to Mr. J.H. Warrender for drawing my attention to these passages.
2. Professor C.H. McIlwain has written a number of articles stemming from this thesis. e.g. 'Sovereignty', 'A Fragment on Sovereignty' and 'Whig Sovereignty and Real Sovereignty' (Reprinted in 'Constitutionalism and the Changing World (1939) c.f. his later 'Constitutionalism Ancient and Modern (1947)
3. Bodin's work was published in 1576. The first English translation was published by Richard Knolles in 1606. There is to the writer's knowledge no modern reprint.

This is not the elementary inconsistency which some commentators have made it appear. It was an implied doctrine about the nature of legislative power well enough known on both sides of the Atlantic in the eighteenth century. During the debate which preceded the loss of the American colonies, it provided a basis of argument against the constitutional theories of George III and Lord Mansfield. 'The supreme legislative power' said Samuel Adams in his Massachusetts Circular Letter of 1768 'cannot overleap the bounds of it (the constitution) without destroying its own foundation'. And it was on similar theoretical grounds that the author of 'Junius' attacked the administration at home - namely that the Legislature was supreme relatively to the constitutional situation and not in the sense of being able to transcend that situation.[1] Such, in fact, became the American doctrine. Benjamin Franklin said that the theory of sovereignty 'made him quite sick', and Daniel Webster, half a century later, was making the same point with rather more delicacy when he

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1. 'Junius' (Dedication to the English Nation. p.88 (Bohn's Ed.Vol.1 (1876)) "When we say that the legislature is supreme we mean that it is the highest power known to the constitution .. In this sense the word supreme is relative not absolute. The power of the legislature is limited not only by the general rules of natural justice and the welfare of the community but by the forms and principles of our particular constitution. If this doctrine be not true we must admit that King, Lords and Commons have no rule to direct their resolutions but merely their own will and pleasure."

wrote that, 'The sovereignty of government is an idea belonging to the other side of the Atlantic. No such thing is known in North America.'[1] It has been aptly remarked by a recent commentator that, 'The meekness of the American sovereign testifies to the beating he had received. Instead of putting up a fierce and embarassing battle against the limits of natural law and separation of powers..he accepted those limits with a vast docility.'[2]

2

Amongst modern text-book writers in the United Kingdom the 'sovereignty of Parliament' has produced few dissenting voices. A notable piece of self questioning, however, was that essayed by Sir John Salmond. In an appendix to his 'Jurisprudence' (which survives in the latest edition) Salmond asked:-

> 'If the law can regulate the manner of the exercise of legislative power why not also its matter?.. What would be the effect of a statute providing that no statute should be repealed save by an absolute majority of all the members in each House. Would it not create good law?.. What if it is provided further that no statute shall be repealed until after ten years from the date of its enactment? Is such a statutary provision void?.. And if a statute can be made unrepealable for ten years, how is it legally impossible that it should be made unrepealable for ever? Such a rule may be very unwise, but by what argument are we to prove that it involves a legal absurdity?'[3]

1. Works III p.469 ['American Political Thought & the American Revolution']
2. Louis Hurtz XLVI American Political Science Review (1952) p328
3. (10th ed.) pp.495-6

Although:-

> 'That sovereign power may be legally controlled within its own province is a self contradictory proposition; that its province may have legally appointed bounds is a distinct and valid principle.'[1]

This is more than doubt. It is heresy!

Salmond chose as an illustration of his thesis - and here is another illustration of the interrelationship between the political and legal concepts of sovereignty - a passage from Jeremy Bentham's 'Fragment on Government' in which Bentham urged that obedience to authority need not be boundless. There might thus be limits to political authority since the habit of obedience is 'as easy to conceive as being absent with regard to one sort of acts as present with regard to another.'[2] Bentham, however makes use elsewhere of essentially political arguments to establish the impossibility of legal restraints on the legislature imposed by its own action.

> 'Every arrangement by which the hands of sovereignty for the time being, are attempted to be tied up and precluded from giving existence to a fresh arrangement is absurd and mischievous.'[3]

For the sovereign has only vague information about the future; and 'immutable' laws constitute in effect a transference of

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1. 'Jurisprudence' p.478
2. 'Fragment on Government' Ch.4 ss.35, 36
3. 'The Book of Fallacies' (Works. ed. Bowring) Vol.2 p.407

government from those who possess the best possible means of information to those who 'from their very position are necessarily incapacitated from knowing anything at all about the matter.'[1] 'Irrevocable laws'[2] are classified by Bentham under the heading 'Fallacies of Authority' They are considered along with 'Vows and Promissory Oaths' and the same criterion is considered applicable to both. For once the utility of a fresh arrangement is established the existence of prohibitory clauses 'ought not to be considered as opposing any bar to the establishment of it,[3] and all attempts to exercise any such power 'are in their own nature, to use the technical language of lawyers, null and void'.

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1. Works. Vol.2 p.402
2. 'Irrevocable' is not, Bentham says, sysnonymous with 'perpetual' 'All laws, all political institutions are essentially dispositions for the future, but..the principle on which all lows ought to be, and the greater part of them have been established, is that of defeasible perpetuity; a perpetuity defeasible only by an alteration of the circumstances and reasons in which the law is founded'. (p.407)
3. Ibid. p.407

The lectures of John Austin contain, of course, the classix exposition of the legal 'illimitability' of a sovereign whose characteristics are so obviously those which result from basing a theory of law on the maxims of political theorists about the nature of supreme power. Here is the theorem whose variants are so well known to students of the British constitution:-

> 'The position that sovereign power is incapable of legal limitation will hold universally or without exception. The immediate author of a law, or any of the sovereign successors to that author may abrogate the law at pleasure.
>
> ...If the sovereign for the time being were legally bound to observe it, that present sovereign would be in a state of subjection to a higher or superior sovereign.'[1]

Or as the canon runs in Dicey:-

> 'A sovereign power cannot whilst retaining its sovereign character, restrict its own powers by any particular enactment. ..Limited sovereignty, in short, is in the case of a Parliamentary, as of every other sovereign, a contradiction in terms.'[2]

And yet, the 'freedom' of the sovereign acting by law is never complete. The 'freewill' of the legislator provides a problem as thorny in its way as the 'free will' of the

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1. 'The Province of Jurisprudence Determined' Lecture VI para 312
2. 'Introduction to the Study of the Law of the Constitution' (9th ed.) p.69n.

individual. As law, in one sense, both limits and constitutes an essential framework of human action, so law, in another sense, both circumscribes the scope and constitutes an indispensable pre-requisite of legal action. In each case there is a linguistic tangle to be sorted out involving the expression 'limitation'. A clear statement of the point here in issue is to be found in Henry Sidgwick's 'Elements of Politics' first published in 1891. Reviewing the theory of sovereignty which emerges from Austin's jurisprudence,[1] Sidgwick observes that there is usually a sense in which the proposition that sovereign power cannot be limited is true. That is:-

> 'There is usually some legislature, ordinary or extraordinary - some individual body or complex system of bodies - that has the legal right to alter any law whatever'.

But, he continues:-

> '..In many cases it would be at least misleading to say that there is no legal limit to its power; since the very structure of this supreme legislature being legally determined, may practically limit its power of acting.'[2]

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1. In his 'The Austinian Theory of Law', Jethro Brown, it may be noted conceded that 'the Austinian position that a supreme legislature is incapable of legal limitation, is a position which does not rest as Austin supposes upon logical necessities, but on the humbler ground of expediency.' (p.164n.)
2. (Elements of Politics (2nd ed.) p.623)

Although the sovereign's power is not restricted by legal rules -

> '..in another sense it has legal limits of great importance, since it is prevented from acting, except under certain conditions by the legal rules determining its structure and procedure.'[1]

The importance of the structure of the sovereign authority as distinct from its powers is a matter on which, because of the political origins of the theory of legal supremacy, insufficient stress has been laid. But the power of law to control the manner in which law is made, (which is the form in which the judiciary is confronted with problems about the structure of the legislative authority) is a power of great significance in constitutional systems which have inherited the jurisprudence of English Parliamentary government without its history. In the interpretation placed on that power there is involved an important part of the mechanism of the 'rule of law'.

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The role of the courts in establishing Parliamentary 'illimitability' has been, though crucial, a passive rather than an active one. Compared with the philosophical,

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1. 'Elements of Politics' (Appendix A.) p.655

political and juristic sources, the judicial materials for a history of the doctrine of Parliamentary sovereignty are extremely meagre. The effect of the doctrine is in a sense negative - namely the absence of any disposition on the part of the courts to question the binding nature of Acts of Parliament passed in due form. In no case, it is agreed, has a court of law ever declared the provisions of such as Act to be ultra vires. Sir William Holdsworth advanced as explanatory of this state of affairs the traditional coincidence of membership between the legal and legislative professions in this country.[1] Whether this in itself provides a sufficient explanation is perhaps doubtful. The influence of the academic theory on the practice of the courts may at least be suspected. Whatever doubt may have existed about natural law, or the limits of authority, Parliament is clearly recognised by the commentators as competent to law down binding rules of law in all normal cases. Sir Thomas Smith's assertion of the all embracing powers of Parliament in 1583 [2] echoes the

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1. See 'The Influence of the Legal Profession on the Growth of the English Constitution' (In Essays in Law and History 1946); 'Some Lessons from our Legal History' (1928) p.34 & 122ff.; History of English Law. Vol.2 pp.441-3
2. 'De Republica Anglorum' ('A Discourse on the Commonwealth of England' (Cambr.1906)) p.48-9

assurance of Sir John Fortescue, a century earlier that statutes are enacted 'with the concurrent consent of the whole kingdom by their representatives in Parliament. So that it is morally impossible but that they are and must be calculated for the good of the people'.[1] The recognition of Parliamentary authority (meaning of course the King's authority[2] with Parliamentary assent) is compatible with a belief in natural law (such as Fortescue had), and with pious exhortation to the sovereign to obey that law. But a theoretical conflict between the principles of legislative sovereignty and of the ultimate authority of natural law, or 'right reason' is inevitable. In political controversy and in the textbooks the signs of that conflict are apparent. In the courts conflict between the principles ~~are~~[is] avoided. Yet the precise nature of the process still provides a ground of dispute. Was Coke going beyond the authorities in declaring in the case of Dr. Bonham in 1610 that:-

> '..in many cases the common law will control Acts of Parliament, and sometimes judge them to be utterly void: for when an Act of Parliament is against

1. Opcit. Ch.XVIII ('How Statutes are made in England') p.28
2. The position of the judges as (to use Bacon's phrase) 'Lions under the throne' and the recognition of the King's 'High Court of Parliament' as not merely a legislative body but as the apex also of the judicial system and a final 'court of appeal' must be placed alongside the alliance between Parliamentarians and lawyers as factors explanatory of the undisputed supremacy of Parliamentary authority.

> common right or reason or repugnant[1] or impossible to be performed, the common law will control it and adjudge such act to be void'.[2]

In any event did his dictum spring from a desire merely to dispose of absurdity in the statute - to advance a canon of statutory interpretation rather than a theory of unconstitutional legislation? It has indeed been argued[3] that Coke should be so interpreted, and that his words in Bonham's case are not to be interpreted in the light of philosophical or theological doctrines of natural law. And it is true that the vocabulary of natural law did not come easily to the tongues of the common lawyers. Nevertheless academic doctrines about the law of God and of reason as a limiting factor on positive laws left their mark at least in one way on the judicial approach to statutes. In his 'Doctor and Student' Christopher St. Germain had written of the law of reason that 'It may not be put away.. and therefore against this law, prescription statute nor custom may not prevail; and if any be brought in against it, they be no prescriptions, statutes nor customs but things void and against justice.'[4]

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1. Professor Plucknett ('Bonham's case and Judicial review') 40 H.L.R 30, 34 instances three possible meanings of 'repugnant' - 1. Distasteful to the court. 2 Self-contradictory. 3. Contrary to common law.
2. 8 Co.Rep. 114, 118
3. See S.E. Thorne, 'Dr. Bonham's Case'. (54 L.Q.R. 543)
4. Op.cit at p.5 ('Of the law of reason) St. Germain's work 'The Doctor and Student, or Dialogues Between a Doctor of Divinity and a Student in the Laws of England' was written about 1520.

In R. v Love (1653) Keble J. is reported as saying that 'Whatsoever is not consonant to Scripture in the law of England, is not the law of England' [1] And Blackstone in the eighteenth century was still paying lip service to natural law [2] as a theoretical limit on legislative power at the same time as he reasserted the doctrine of Coke's Fourth Institute that, 'The power and jurisdiction of Parliament is so transcendent and absolute that it cannot be confined either for causes or persons within any bounds' [3]

But the theory that an Act of Parliament might be 'void in itself' [4] if contrary to the law of nature, became deflated in two ways. Its application seems never to have been

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1. 5 S.T. 43 at 172
2. 1 Comm. 40, 43, 90, 91
3. Blackstone continues (1 Comm. 160, 161) 'It hath sovereign and uncontrollable authority in the making, confirming enlarging, restraining, abrogating repealing reviving and expounding of laws..this being the place where that absolute despotic power which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. ..It can change and create afresh even the constitution of the kingdom and of Parliaments themselves..It can inshort do everything that is not naturally impossible and therefore some have not scrupled to call its power by a figure rather too bold, the omnipotence of Parliament. True it is that what the Parliament doth, no authority upon earth can undo. ..and as Sir Matthew Hale observes, this being the highest and greatest court over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it the subjects of this kingdom are left without all manner of remedy.'
4. Day v. Savadge (1615) Hob. 85 at 87

wider than the assertion of the controlling influence of the common law; and in particular, of the maxim that a man may not be judge in his own cause (this was the ground on which Coke had denied the power of the Royal College of Physicians to fine Dr. Bonham). And in the second place this controlling influence was exerted under the guise (and it may of course be argued that it never had any other) of a maxim of statutory interpretation. Thus there is a clear formal compliance with the principle of legislative supremacy. The legislature is presumed not to have intended absurdity, unreasonableness or self contradiction and the statute is construed accordingly.[1] The control of the courts over the substance of legislative policy becomes by this means solely exhibited in the judicial duty so to construe the words of the legislature as to enforce its true intention. As the canons of interpretation become stricter, such effective power as may have existed to exercise common law control in the shape of statutory construction becomes attenuated. Against the express words of the statute the courts are powerless. As Blackstone

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1. For a survey of the cases in which Coke's principle became 'decently veiled under the cloak of interpretation' see Plucknett Op.cit.pp.45 ff.

conceded, 'If the Parliament will positively enact a thing to be done which is unreasonable I know of no power in the ordinary forms of the constitution that is vested with authority to control it.[1] ..There is no court that has power to defeat the legislation when couched in such evident and express words as leave no doubt whether it was the intent of the legislature or no.'[2] It is noteworthy however that as late as 1871 a measure of doubt appears to have existed as to the effect of a statutory provision offending against the common law maxim that a man may not be judge in his own cause.[3] In that year it was said in Lee v. Bude & Torrington Junction Rly Co. that dicta to the effect that a court might disregard Acts of Parliament making a man judge in his own cause 'stand as a warning, rather than an authority to be followed.' 'We sit here', Willes J. declared, 'as servants of the Queen and the Legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords and Commons? I deny that any such authority exists'.[4]

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1. The phrase '..in the ordinary forms of the constitution' was inserted in the 9th edition. See Plucknett loc.cit.
2. 1 Comm.91
3. cf.C.K. Allen. 'Law in the Making' (5th ed.) p.428
4. (1871) L.R. 6 C.P. 576 at 582

The principle that the courts must give effect to the express words of Acts of Parliament has the important implication that international law or the provisions of treaties cannot be regarded, any more than the maxims of the common law as limitations upon Parliamentary sovereignty.[1] Whilst language has on occasion been used to suggest that Parliament cannot legislate in derogation of international law, or confer an unlimited jurisdiction over the persons and property of foreigners on British courts of law, it is generally asserted that such statements merely enunciate presumptions about the intention

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1. An interesting constitutional question might arise if the United Kingdom were to become an active participant in an international organisation requiring a delegation of the powers of Parliament for certain purposes to that organisation. The question of French participation in the European Defence Community has revealed a difference of opinion between French constitutional lawyers as to the effect of such a delegation of power on the sovereign authority of the Assemblee Nationale. Whilst some have argued that nothing more was involved than a normal treaty obligation whose incorporation as part of French law is already provided for by Articles 26 and 28 of the Constitution, others have contended that ratification of the agreement involved a major constitutional change by which the sovereign authority in France 'se transforme en une collectivité différente'. 'Le Traite de Paris ne pose pas simplement des règles de droit que le legislateur français devrait respecter: il institue un pouvoir législatif supranational, dont le législateur français ne fait point partie...C'est une tout autre chose; plus qu'une délegation, un véritable transfert du pouvoir législatif'. (See the symposium of views published in 'Le Monde' June 2nd & 9th, 1954)

of the legislature. Statutes will be interpreted so as not to be inconsistent with international comity or established rules of international law.[1] Legislation framed in general terms will not thereby be construed as intended to apply to acts done by foreigners outside the jurisdiction of British courts.[2] But if such an intention were stated in unmistakable language, the courts must enforce that language.

> 'Legislation of the Imperial Parliament even in contravention of generally acknowledged principles of international law is binding upon and must be enforced by the Courts of this country, for in these Courts, the legislation of the Imperial Parliament cannot be challenged as ultra vires.'[3]

That no duly enacted statute of the United Kingdom can be ultra vires or 'unconstitutional'[4] has of course become one of the uncontested trivia of elementary treatises on the British Constitution. Attempts to dispute the unlimited scope of Parliamentary authority in the courts have in the present century never been a matter of serious con-

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1. Maxwell. 'Interpretation of Statutes' (9th ed.) p.152
2. Colquhoun v. Brooks (1888)
3. Croft v. Dunphy (1933) A.C. 156 at 164
4. Webb v. Outrim (1907) A.C.81 at 88, 89 'In the British Constitution though sometimes the phrase 'unconstitutional' is used to describe a statute, which though within the legal powers of the legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such a law, still notwithstanding such condemnation, the statute in question is the law and must be obeyed'.

templation. There has, however, been one recent attempt, which is of considerable interest. In May 1953, proceedings were instituted in the Court of Session in Edinburgh seeking inter alia a declaratory order that the proclamation of Her Majesty as Elizabeth II involved a contravention of Article One of the Treaty of Union.[1] As against a contention of the Lord Advocate that the assumption of the title was expressly authorized by the Royal Titles Act 1953 which as an Act of Parliament could abrogate Article One or any article of the Act of Union[2], it was argued for the petitioners that Parliament was not sovereign in the sense that it could abrogate a fundamental article of the Treaty of Union. Article One being a fundamental condition of Union, it was ultra vires of the Parliament of the United Kingdom to amend that article, or to pass legislation contradictory of its provisions. The Parliament of the United Kingdom, which came into being on 1, May 1707, was, it was contended, created by the Treaty of Union which con-

1. MacCormick v. Lord Advocate (1953) S.L.T. 255
2. Dicey. 'Law of the Constitution' (9th ed.) pp.65-6. C.f p.145:- 'Should the Dentists Act 1878 unfortunately contravene the terms of the Act of Union, the Act of Union would be pro tanto repealed.' See, however, the remarks of Sir Ivor Jennings on the effect of the 'fundamental' articles and their abrogation. ('The Law and the Constitution' (3rd ed.) pp.146-7). Cf. Jennings & Young ('Constitutional Laws of the Commonwealth (1952) p.124')..Historical precedents..are not legal precedents."

tained articles defining and limiting its powers in certain respects. The Scottish Parliament prior to 1707 had not been sovereign, for underlying the constitutional law of Scotland was the belief that the community was sovereign. If the Scots citizen had the power before 1707 to ask a court to declare an Act of the Scottish Parliament to be invalid he still had that power. The Scottish Parliament could not have conveyed to the Parliament of the United Kingdom, sovereignty of a kind which it had never possessed. Acticle XVIII of the Act of Union intended that after 1707 the public law of the two countries should be assimilated, but only by Acts of Parliament which were not inconsistent with the original Treaty. If the English Parliament was sovereign in the sense contended for by the Lord Advocate, prior to 1707, it was no longer so thereafter as it then became subject to the fundamental articles of the Treaty. These were 'entrenched clauses' analogous to those in the Constitution of the Union of South Africa which the South African Supreme Court had recently held could not be abrogated.[1]

In the Outer House of the Court of Session, Lord Guthrie considered that the propositions advanced by the petitioners constituted 'a challenge to the sovereignty of the Parliament

1. (1953) S.L.T. 255 at 259, 260

of the United Kingdom' Dicey (he said) had described the sovereignty of Parliament as the dominant characteristic of our political institutions, and his 'Law of the Constitution' had been accepted in schools of law in Scottish Universities as an authoritative exposition of the constitution of the United Kingdom. No Scottish court had ever held an Act of Parliament to be ultra vires. The petitioners contentions must be regarded as unsound in law.[1]

On 30th July 1953 a reclaiming motion was refused in the Inner House where it was declared that Article One of the Treaty did not bear upon the adoption of the numeral objected to, and that the Court had no competence to make the order sought by the petitioners. In the course of his judgement, however, the Lord President (Lord Cooper) addressed himself to the general question raised as to the 'sovereignty' of the United Kingdom Parliament:-

> 'The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey. ..Considering that the Union Legislation extinquished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament, but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives

1. At p.259

were admitted to the Parliament of England. That is not what was done. Further the Treaty and the associated legislation by which the Parliament of Great Britain was brought into being...contain some clauses which expressly reserve..powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different provisions.

The Lord Advocate conceded this point by admitting that the Parliament of Great Britain 'could not' repeal or alter such 'fundamental and essential' conditions. He was doubtless influenced in making this concession, by the modified views expressed by Dicey in his later work entitled 'Thoughts on the Scottish Union' from which I take this passage (pp.252-3): 'The statesmen of 1707, though giving full sovereign power to the Parliament of Great Britain, clearly believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws.' ... I have not found in the Union legislation any provision that the Parliament of Great Britain should be 'absolutely sovereign' in the sense that Parliament should be free to alter the Treaty at will... In the latest editions of the 'Constitutional Law', the editor uneasily describes Dicey's theories as 'purely lawyer's conceptions', and demonstrates how deeply later events such as the Statute of Westminster have encroached upon the earlier dogmas. As is well known, the conflict between academic logic and the political reality has been emphasised by the recent South African decision as to the Statute of Westminster /Harris v. Minister of the Interior (1952)/... From the standpoint both of constitutional law and of international law the position appears to me to be unique." 1

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1. pp. 262, 263.

Lord Cooper's remarks and especially his reference to Harris's case may serve as an apt judicial introduction to a study of the way in which Parliamentary sovereignty has come to be interpreted in the British Commonwealth. It would hardly be accurate to say that the principles embodied in the South African Supreme Court's constitutional decisions of 1952, - which are directly relevant to that study - reveal a conflict between academic logic and political reality. What is in question is a conflict between two kinds of academic logic, generated at a point in time by a conflict between political forces. To an examination of that conflict and of its constitutional background we now turn.

PART TWO

CHAPTER THREE

The Entrenched Sections and the Sovereignty of the Union 1931

'..Parliament composed of its three constituent elements can adopt any procedure it thinks fit; the procedure, express or implied in the South Africa Act is, so far as courts of law are concerned, at the mercy of Parliament like everything else.'
NDLWANA v. HOFMEYR (1937) A.D.229

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Most political scientists would agree that a constitution might be defined as 'a selection of the rules which govern the government' of a country. The precise sense in which government is 'governed' by constitutions, however is less obvious and is the subject of a debate which is open to all comers. It is in this area of dispute that the academic lawyer, the political theorist, and even the theologian on occasion, are to be found operating with concepts such as 'sovereignty', and 'constitutional limitation'; which are less legal theories than theories of various other kinds about law and legality. The nature of legislation is not a topic which is much discussed in courts of law, and yet every legal system presupposes certain propositions about the relationship between the rules (implicit or explicit) governing the working of the system, and those rules originat-

ing within the system. Even where, as under the British Constitution, the law-making body is competent to revise the constitutional framework in the same manner that it revises anything else, there is still a distinction of 'constitutional logic' between legislative rules which exercise this 'unlimited' power of revision, and the rule of law that this power is what it is.[1] In the majority of states, the relationship between constitutional law and normal legislation is set out in a formal instrument, and it has been customary to make a rough classification of systems of government into those where the 'sovereign' power of unlimited legal revision may be exercised by the 'normal' legislative body, and those where the legislative and 'constituent' powers are in the hands of different or differently constituted bodies. (In such cases, it is sometimes said that sovereignty resides in the constitution, or in the body competent to amend the constitution.[2])

The dispute as to the location and nature of sovereignty in the Union of South Africa, arose from the contention that the constitution of the Union, though starting its career as a system of the second kind, became at the point

1. Cf. Jennings "The law is that Parliament may make any law in the manner and form provided by the law." (The Law and the Constitution 3rd ed. p.144)
2. On the classification into sovereign and non sovereign legislations on this basis, see below Ch.XIV

in time when Imperial power to legislate for the Union ceased, a system of the first kind. In other words, from 1909 until 1931, the Parliament of the Union was a non-sovereign legislative body, bound as to its exercise of authority, by the provisions of a constitution, namely the South Africa Act,[1] which both fettered its legislative competence in certain directions, and prevented constitutional revision except on terms laid down in the Act itself. In 1931 with the enactment by the Imperial Parliament, of the Statute of Westminster,[2] the Parliament of the Union acquired sovereign authority. It thereby became competent to legislate without restriction on any subject, and to revise the South Africa Act, its constitution, by the normal process of legislation. This contention received judicial endorsement in the Union in 1937;[3] it was accepted by the great majority of constitutional authorities as an undoubted proposition of law; and remained unchallenged until 1952. In that year the Appellate Division of the Supreme Court of South Africa reversed its own previous decision of 1937, and declared that the constitutional provisions of the South Africa Act were still of full force and effect, and that the legislature remained bound by them.

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1. 9 Ed. 7, c.9
2. 22 Geo. 5, c4
3. Ndlwana v. Hofmeyr (1937) AD.229.

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Three points of major importance are raised by the claim that the provisions of the South Africa Act are no longer binding on the Parliament of the Union. It may be asked:-

1) On what did the former admitted priority of the Constitution depend?

2) What was the effect of those sections of the Statute of Westminster which 'conferred sovereign legislative powers' on the Union Parliament?

and, 3) What is now the relationship (in a unitary state) between the judiciary set up under the Constitution and a 'sovereign' Parliament which rejects the supremacy of that constitution?

Before the passage of the Statute of Westminster, the Union Parliament was a subordinate or non-sovereign legislature in the sense that it was characterised by certain marks of inferiority resulting from the existence and supremacy of the Imperial Parliament. It could not, for example legislate repugnantly to British statute law,[1] or

1. By the terms of s.2 of the Colonial Laws Validity Act (28 & 29 Vict., c.63)

(though some doubt existed) give to its legislation extra-terrotorial effect.[1] But within the Union itself, the exercise of legislative power was made subject to certain conditions by the terms of the South Africa Act. Section 35 of that Act declares in two subsections that, in effect, no person who is capable, or who may become capable, of being registered as a voter in the Union shall be disqualified from being so registered, by reason only of a criterion based on race or colour, unless the Bill embodying such a provision:-

> '..be passed by both Houses of Parliament sitting together, and at the third reading, be agreed to by not less than two thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both House of Parliament.'

By Section 137, Bills affecting the equal status of the English and Dutch languages are made subject to a similar provision. The amendment of the constitution is finally made proof against a removal of Sections 35 or 137 by normal legislation, by the enactment that any constitutional amendement affecting them, together with any

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1. See Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation 1929. para.39. (Cmd.3479)

amendment of the amendment section itself, shall not be valid unless submitted to the two thirds, unicameral procedure. Section 152 dealing with amendment of the South Africa Act, reads:-

> 'Parliament may by law repeal or alter any of the provisions of this Act...Provided that no repeal or alteration of the provisions contained in this section ...or in Sections 35 and 137, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading, be agreed to by not less than two thirds of the total number of members of both Houses...'.

Thus, certain sections of the constitution were 'entrenched' against attack by the 'normal' legislative power. It should be noticed that in terms of the location of the 'sovereign' power of amendment, this situation could be described in either of two days. It might be said either that the legislature was sovereign[1] (although constituted in different ways for different purposes), or that sovereignty lay in the hands of the joint body competent to amend the constitution, and that the (normal) legislature was a non-sovereign body legally fettered as to its freedom of action. On either view, it remained true, however, that prior to 1931 certain forms of action were undisputedly obligatory for the exercise of legislative power in South

1. Apart that is, from its subordination to Imperial Statute Law

Africa, and that the South African Courts would uphold the binding nature of these forms of action.[1] Both these propositions were illustrated by a Supreme Court decision of 1930 in which Chief Justice De Villiers rejected the contention that legislative procedure was in its entirety a matter to be decided by the legislature itself, and not a subject for judicial enquiry. His formulation of the issue was significant.

> 'Under Section 58 of the South Africa Act, each House of Parliament is free to frame its own rules with respect to the order and conduct of its business and proceedings. Into the due observance of such rules this Court is not competent to enquire. But whether an Act has been validly passed by Parliament is another matter...
>
> If an Act contained a clause offending against Section 35, the Court would have to assume that the clause was ultra vires, in the absence of some indication in the Act, or proof aliunde, that such clause was passed as contemplated in the section.'[2]

The criteria of 'an Act validly passed by Parliament' were plainly those laid down in the South Africa Act. But the question may be asked: Why were those criteria to be enforced by the courts against the criteria adopted by the legislature? Was it 'a proposition too plain to be contested'- as Chief Justice Marshall contended in asserting the testing

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1. No power to invalidate Acts of the Union Parliament is specifically conferred on the Courts by the South Africa Act. The only testing right mentioned is the jurisdiction over Provincial enactments exercised by the Provincial Divisions of the Supreme Court. Sect.98 (3) (b)
2. Rex v. Ndobe (1930) AD.484 at 496

right of the United States Supreme Court[1] - 'that the constitution controls any legislative act repugnant to it'? In fact, there was no necessity to invoke the status of the South Africa Act as a constitutional instrument. It was, of course, also an Act of the Imperial Parliament. Any legislation it could, therefore be claimed, which was contrary to its terms would be repugnant legislation within the meaning of Section 2 of the Colonial Laws Validity Act 1865, and invalid to the extent of such repugnancy.

But where stood the Constitution and its entrenched sections after 1931? In that year the Statute of Westminster conferred on the Union Parliament, in common with the Parliaments of Canada, Australia, New Zealand, the Irish Free State, and Newfoundland, the power to legislate repugnantly to to Imperial Statutes, and to repeal any such statute in its application to the Union.[2] The restriction on legislation

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1. Marbury v Madison (1803) 1 Cranch 137
2. Section 2 (1) of the Statute reads:- 'The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.'
and Section 2 (2):- 'No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion, shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule, or regulation in so far as the same is part of the law of the Dominion.'

of the Union Parliament hitherto imposed by the Colonial Laws Validity Act thus came to an end. If then it chose to legislate repugnantly to its constitution, the South Africa Act, or to amend it, either implicitly or expressly, was it not, as a fully sovereign body, entitled to do so?[1] What protection was there for the entrenched sections if Parliament chose to ignore them, both on the specific ground that it had been authorised to amend the South Africa Act, and on the general ground that a sovereign body could not be bound as to the form of its procedure. Formerly the courts had had a constitution to uphold, whose priority over the legislature was undoubted, and buttressed by its status as an Imperial enactment. Now they were faced by a Parliament which was the acknowledged recipient of that power enjoyed by the Imperial Parliament itself, of supremacy over the law, and freedom from judicial scrutiny of its formal expressions of will.[2] If a constitution is to be regarded as

1. The constitution of Canada (The British North America Acts, 1867 to 1930), of Australia (The Commonwealth of Australia Constitution Act 1900), and of New Zealand (The New Zealand Constitution Act 1852), were, it should be noted, specifically safeguarded by Sections 7 and 8 of the Statute of Westminster.
2. 'The three traits of Parliamentary sovereignty, as it exists in England' wrote Dicey, are, '..first, the power of the legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws; secondly, the absence of any legal distinction between constitutional and other laws; thirdly, the non-existence of any judicial or other authority having the right to nullify an Act of Parliament, or to treat it as void or unconstitutional.' ('Introd. to the Study of the Law of the Constitution.' (9th ed.) p.91

an instrument legally and logically prior to legislative acts, South Africa it seemed no longer had a constitution. Less dramatically, the constitution had become completely 'flexible'; fulfilling the criteria of a 'flexible' constitution enunciated by Dicey, namely 'one under which every law of every description can legally be changed with the same ease and in the same manner, by one and the same body.[1] The two thirds majority rule was, in consequence 'as dead as the proverbial Dodo'.[2]

Nothing, however, seems clearer than that in 1931, no such catastrophic view of the effects of the Statute of Westminster, was universally taken in either Great Britain or South Africa. Unlike the federal Dominions, the Union Government had no fears for the safety of its constitutional structure,[3] and made known to the British Government its

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1. Ibid p.118
2. H.J. May. The South African Constitution (2nd ed.) Cape Town 1949 p.33
3. Though the misgivings of the South African Opposition expressed in debate on the proposed legislation were not without legal support. (W.Pollak.'The Legislative Competence of the Union Parliament.' 48 S.A. Law Journal (1931) at pp.284, 285:-
'..It will no longer be true to say that any sections of the South Africa Act are entrenched. ..It is still not too late for the Union Government to approach the British Government with a view to securing the insertion in the proposed Statute of the Parliament of the United Kingdom, of a clause safeguarding the entrenched clauses.')

opposition to the insertion in the Statute, of any specific restriction, corresponding to the sections which protected the constitutions of these Dominions.[1] It was with this fact that British criticism of the effects of the unconditional enabling section was stilled.[2] In the Union Parliament similar fears were met by assurances on the part of General Hertzog's Government that there was no question as to the entrenched provisions ceasing to constitute a binding obligation on successive Parliaments, and no necessity therefore to insist on the insertion of a safeguarding section.[3] Resolutions were then passed in April

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1. Section 8, for example, reads, 'Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia, or the Constitution Act of the Dominion of New Zealand, otherwise than in accordance with the law existing before the commencement of this Act.' Section 7 (1) provides similarly for Canada
2. Lord Hailsham replying to criticisms on these grounds, of Section 2 said, 'Dominion legislation'..(apart from the safeguarding sections)..'might be thought otherwise to override the ordinary authority of their Constitution, In the case of South Africa, they would not have in this Statute any clause protecting those rights, because they resented (I think unreasonably, but that is not for us to say) the suggestion that the Imperial Parliament should put into an Imperial Statute, anything which seemed in any way to limit the rights of the Dominion Parliament of South Africa. (House of Lords Debates, Vol.133 col.221)
3. House of Assembly Debates. Vol.17 col.2739

and May of 1931, by the Senate and House of Assembly in the following terms:-

> 'That on the understanding that the proposed legislation will in no way derogate from the entrenched provisions of the South Africa Act, this House, having taken cognisance of the draft clauses and recitals which it was proposed by the Imperial Conference of 1930 should be embodied in legislation to be introduced in the Parliament at Westminster, approves thereof, and authorizes the Government to take such steps as may be necessary with a view to the enactment by the Parliament of the United Kingdom of legislation on the lines set out in the Schedule annexed' (The Schedule contained the provisions applicable to South Africa which were enacted in the Statute)

If this resolution, whose ineffectiveness to alter the law was never denied, seems, in retrospect, a curiously half-hearted attempt to protect by moral force guarantees which could be secured beyond question only by legal provisions, it is perhaps worth noting that the state of the law resulting from the enactment of the Statute of Westminster, was, in its application to the newly acquired powers of the Dominions, by no means clear. In 1931 the Resolution could justifiably be regarded as declaratory, not merely of a constitutional convention, but equally of a proposition of strict law. Sir Arthur Berriedale Keith, reviewing, in 1932, the legal effect of the Statute, was of opinion that the South Africa Act remained 'a superior

authority to any Union Act,' and that, 'Union authority does not legally extend to the alteration of the Constitution, which as the source of Union legal power, can be changed only in accordance with its own terms.'[1] This was an expression of what came to be called the 'conservative interpretation' of Section 2 of the Statute of Westminster.[2] On this interpretation the protective clauses relating to Canada, Australia and New Zealand could only be regarded as concessions to feeling in those Dominions and unnecessary in strict law, since the effect of Section 2 was only to remove the disabling stigma of repugnancy from laws made by the Parliament of a Dominion within its area of competence, and not to enlarge that area. The ability to legislate repugnantly to Imperial statutes could not, in other words, be used as a licence to disregard the provisions of the constituent statute which prescribed the conditions on which legislation took place at all. The contention is of some interest, since it was to be raised again twenty years later (in a different form) in 1951. As a general doctrine as to the effect of the new grant of powers to the Dominion Parliaments, however, it seemed beyond doubt to have been judicially rejected, when in 1935, the Privy Council

1. XIV Journal of Comparative Legislation p.102 (1932)
2. See K.C. Wheave 'The Statute of Westminster & Dominion Status' 5th ed. pp.157-163

delivered its judgement in the case of Moore v. The Attorney General for the Irish Free State.[1] In this case the validity of the purported abolition by the Oireachtas of the right of appeal from the Irish courts to the King in Council was disputed and a declaration was sought that the abolition was void as being legislation repugnant to the terms of the Treaty of 1921 (which was scheduled to the Constituent Act of the Irish Free State).[2] The effect of the Statute of Westminster on the area of the powers exercisable by the Irish Parliament was the issue in point, and it was held that this area had been extended so as to enable legislative abrogation of the Treaty. The implicit rejection of the petitioners' argument that 'the Statute of Westminster does not make it competent for a Dominion to legislate on classes of subjects which before the Statute were outside its competence',[3] amounted to, and was taken to be a judicial endorse-

1. (1935) A.C.484.
2. Section 2 of the Constituent Act declared Constitutional amendments repugnant to the Treaty (which guaranteed the right of Appeal) to be 'absolutely void and inoperative.' The Oireachtas had repealed this section in 1933 by an amendment whose validity was thus also in dispute, and had thereafter proceeded to abolish the Appeal.
3. (1935) A.C.484 at p.486

ment of the liberal' view of the Statute of Westminster.[1]

The position of Ireland after the Statute of Westminster provides an interesting parallel with that of the Union. Unlike the Parliaments of Canada and Australia, the Oireachtas and the Union Parliament had both possessed power to amend their constitutional instruments without the intervention of the Imperial Parliament, subject on the one hand, to the provisions of the amendment clause of the South Africa Act, and on the other to the requirement that amendments should be within the terms of the Treaty scheduled to the Constitution. Both, also, were unitary states. In 1929, each of these facts had been noted by the Conference on the Operation of Dominion Legislation in its recommendation that nothing need specifically be inserted in the proposed Statute corresponding to Sections 7, 8 and 9 which related to Canada, Australia, and New Zealand.[2] But it is difficult to see from

1. See for example Jennings 52. L.Q.R. p.187 (1936) for the contention that as far as the South African Parliaments powers were concerned the conditions affecting the repeal of the entrenched sections now represented, merely a 'gentlemen's agreement'.
   See also R.T.E. Latham, 'The Law and the Commonwealth' (1937) p.588. '..Sections 2 and 3 are to be construed as an independent grant of power. It is impossible now to say what are the legal limits to the power of those Dominion Parliaments which take the full benefit of these sections of the Statute.' (In 'Survey of Commonwealth Affairs 1937. Vol.1 W.K. Hancock)
2. After setting out the 'special provision' necessary to safeguard the continued authority of the federal structure of Canada and Australia, and the Constitution of New Zealand, the Report of the Conference continues:- 'Similar considerations do not arise in connection with the Constitutions of the Union of South Africa, and the Irish Free State. The Constitutions of both countries are framed on the unitary principle. Both include complete legal powers of constitutional amendment.' Para.57 (Cmd.3479)

the words of the Conference's Report exactly what weight was given to each consideration since their effects in this respect were not distinguished. An assumption might for example seem to have been implied that the power of constitutional amendment was complete <u>because</u> the states in question were unitary; and 'complete' seems (in view of the admitted restrictions on the amending process) to mean merely 'not calling for the intervention of the Imperial Parliament.' The connection between the incompleteness of the amending power (in this sense), and the federal nature of the Dominion and the Commonwealth, is of course, historical rather than logical. Canada could still have been a federal state if power to amend the constitution of the federation had been complete, in the sense of 'situate exclusively in Canada.' But the power of constitutional amendment of the Parliament in a federal system is normally 'incomplete' also in the sense that it cannot unilaterally amend the legal distribution of powers as between itself and the legislatures of the constituent parts of the federation. The 'full legislative powers' which the Conference believed would 'follow as a necessary consequence'[1] of the provisions of the Statute, might, it could be argued, imply two things, corresponding

1. Para 57 of the Report.

to the two senses of 'complete' and 'incomplete' distinguished above. The Statute, would, apart from any specific restrictions contained in it, extend the powers of Dominion Parliaments so as to make them 'complete' (a) in the sense that they could secure a constitutional amendment without the intervention of the Imperial Parliament, and (b) in the sense that the power of constitutional amendment could be exercised by the Parliament[1] or central legislative body acting alone - and hence potentially as a means of overturning the federal basis of the State. (It was of course to guard against both these contingencies that Sections 7, 8 and 9 were inserted in the Statute.)

But there is yet a third, and vital sense, in which the phrases 'full', 'complete', or 'extended' powers could be used. In this sense the phrase refers to the competence of a body possessing powers to make and unmake by a single process, any law whatsoever, including previously made law purporting to inhibit this process. Now this sense of 'full powers' has no inherent connection either with the federal

1. Since the grant of power in S.2 of the Statute of Westminster is admittedly to 'the Parliament' of a Dominion. This term, as will appear, was to become the crux of the constitutional dispute in South Africa. Where the elements of such a Parliament may, under its constitution, operate in different ways, the question may be raised, 'What is the Parliament of the Dominion?'

or unitary nature of a state, or with the question of its freedom from external legislative authority. It is in this sense that the Imperial Parliament is said to possess 'full' or 'sovereign' power when its ability to make and unmake law is held to be unfettered by any existing law as to its action in this respect.[1] The Conference Report did not consider the possible effect of the Statute in conferring 'full' powers in this sense;[2] but it is in just this sense that the phrase was to be used when the claim was made that the Union Parliament had been endowed by the Statute with 'full legislative power' to amend the Constitution of South Africa. (This claim rested also of course on the 'liberal' interpretation of the specific power granted by Section 2 to legislate repugnantly to British statutes, and hence to the South Africa Act. But these claims should be distinguished. It is true that the general 'sovereign' power to legislate in the manner of the Imperial Parliament is also derived, if it exists, from Section 2, but this general claim could have been denied, without denying the

1. This contention is discussed below. (Chap.XIV)
2. Though its statement that 'complete legal powers of amendment' were exercised in South Africa, taken together with (1) the assertion that the exercise was conditioned by the Constitution, and (2) the implication that no restriction need be placed in the Statute to prevent its affecting the continuance of this state of affairs - seemed to indicate that no change in the constitutional situation in the Union was contemplated.

validity of the specific contention that power existed to abrogate the provisions of the South Africa Act. In other words this latter assertion is a special case of the exercise of 'sovereignty'. It could be conceded without conceding that the Union Parliament had now become incapable of binding itself as to its manner and form of legislating - which is what a claim to 'full legislative powers' in the third sense distinguished, amounts to.)

The potential consequences of conferring on the Irish Free State and on the Union of South Africa, powers which could be interpreted so as to endanger the undertakings embodied in their constitutions, were fully canvassed in both Houses during the United Kingdom debates on the Statute in 1931. In the Commons, at least one critic had no doubt at all as to the meaning of the disputed sections. 'Section 2 of the Statute of Westminster is not obscure or cryptic', declared Mr. Winston Churchill. 'It is the plainest Act of Parliament I have ever read.'[1] He was supported in his interpretation by Mr. Marjoribanks, whose view was that, 'Section Two of Clause Two makes perfectly clear...that those Dominions which have no special reservation concerning constitutional status, from the operation of this Bill, will

1. 259 H.C. Debates 1194

have the power to repeal any law passed by the Imperial Parliament, including their own Constitutions ...Of course that means that they can repeal not only this Act, but the Act under which they derive all their rights and constitution.'[1] Mr. Hopkin Morris agreed. The constitution of South Africa would become alterable not by two thirds, but by simple majority. Both the Irish Free State and South Africa would acquire 'complete sovereign rights'. 'Once this Bill becomes law, then they can,..under the forms of law, and without being open to any charge of a breach of obligation, and indeed, without breach of any moral obligation even, do what they like'. Russia, said Mr. Morris, as a sovereign power, had repudiated the renunciation of her Black Sea rights which she had made by Treaty. 'If Russia was once admitted to be a sovereign power, as she was, she had a complete right to do what she had done... That is, I think, sound constitutional doctrine at the present time'.[2] The Bill, went on Mr. Morris, would put the Irish Free State in precisely the same position. 'She will be a sovereign power, as every Dominion Parliament will be a sovereign Parliament'.[3]

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1. 259 H.C. Debates 1215
2. 259 H.C. Debates 1209-1210
3. 259 H.C. Debates 1210

Several points might be made about the argument advanced here. First, it should be noticed that the way in which the term 'sovereign' is used in the phrase 'sovereign state', is not the way in which it is used in the phrase 'sovereign Parliament'. It is true that where there is a sovereign Parliament there is also necessarily a sovereign state. But the converse is by no means true. There may be states sovereign and independent, whose Parliaments are not in the traditional sense 'sovereign'. The United States is an obvious example.[1] Secondly, it is far from clear exactly what use is being given to the phrase 'breach of obligation'. It may be the case that moral judgements in international relations are a waste of time, and it may also be the case (tautologously) that if a state is 'sovereign and independent', it can 'do as it likes'; but neither of these propositions has any relevance to the sense in which a 'sovereign Parliament' is unable (if it is unable) to commit a breach of legal obligation; nor does either of them seem to contemplate the possibility that the exercise of a legal right might constitute a breach

1. This point was to be made in the 1952 judgement of the Appeal Court in Harris v. Dönges. 'A state can be unquestionably sovereign, although it has no legislature which is completely sovereign.' (1952) 1.T.L.R.1245 at p.1259 (per Centlivres C.J.)

of a constitutional convention or of an undertaking 'binding on public morality' such as was constituted (it could be suggested)[1] by the South African Parliamentary Resolutions of 1931 .

One question of general significance can be seen, however, to emerge here. Granted that the legal powers of the Irish and South African Parliaments were to be left without specific restrictions, out of respect for the desires of, and the assurances given by those Parliaments; what would be the position of future Dominion Parliaments in relation to the undertakings given by their predecessors? When, in the Lords' debate on the Statute, the assurances given by the Prime Minister of the Irish Free State (Mr. Cosgrave) were referred to by Lord Salisbury,[2] a query on this point was raised (by Lord Danesfort). He accepted, he said, Mr. Cosgrave's assurances - 'But neither Mr. Cosgrave, nor his government can last for ever. ... Is this declaration binding on his successors? Suppose another Prime Minister comes in, and he desires to depart from that declaration of Mr. Cosgrave, would he be justified in doing so, and if he did so, should we be able to tell him that he had no right

1. H.J. May 'The South African Constitution (1949) p.33.
2. 183 House of Lords Debates. 190

or authority to do so, because Mr. Cosgrave had bound the Irish Free State not to embark upon such a course?'[1]

In the Commons too, the Solicitor General, Sir Thomas Inskip, who defended the Statute as drafted, on the grounds that specific restrictions on the amending powers of the Irish and South African Parliaments would be contrary to the expressed wishes of those Parliaments, was queried by several members as to the rights which future Parliaments (especially in the Free State) would derive from the absence of such restrictions. If the moral issues arising were uncertain,[2] little else could be said for the issue as one of strict law. Whereas the Law Officers of the Crown were of the opinion, for example, that the binding force of the Irish Treaty would not be affected by the proposed legislation (i.e. that constitutional amendments contrary to its terms would not henceforward become possible); Mr. Churchill had been advised 'on high technical authority', 'by extremely high and weighty legal luminaries'[3] that the passage of the

1. 183 House of Lords Debates.206
2. Suppose, said Mr. Reid, that the Solicitor General were party to a lease for twenty one years, and acquiesced in a supplementary agreement that it could be terminated at seven or fourteen years. Could anyone say that any moral obloquy was incurred by terminating it?
   Sir Thomas Inskip countered by asking Mr. Reid, 'What would happen supposing that I gave my solemn word that I would not exercise my power?' (259 H.C. Debates.1230)

Bill would make it legal and simple for the Imperial Act embodying the Articles of Agreement to be repealed by the Oireachtas.

It is hard to see how in 1931, in view of the way in which the Statute of Westminster came to be passed, and of the wishes expressed by the various Dominion governments, any other course could have been taken with regard to the constitutions of South Africa and the Irish Free State, than that which, in fact, was taken. To insert the 'blanket protection' for Dominion constitutions, whose absence from the Statute has sometimes in retrospect, been regretted, would have been to fly in the face of those for whose benefit, and at whose request the Statute was enacted. (This fact should be remembered, for inferences of various kinds as to the interpretation of the Statute of Westminster were later to be drawn from the fact that such protection was omitted.[1]) The Imperial Parliament had done its legislative best to secure for the Parliament of each Dominion the constitutional status which each desired. Both South Africa and the Irish Free State chose to take all that (and on some views, more that) Imperial legislation could give them. Both inherited problems which are associated in various ways with the con-

1. e.g. By the Judicial Committee of the South Africa High Court of Parliament in 1952 (see below p. 250); and by the Law Advisors to the Union Government in 1949 (see below p. 93

cept of legislative sovereignty. More significantly, from the point of view of constitutional theory, they inherited them without the background against which questions about Parliamentary supremacy have most usually been asked and answered -- namely that of the King-in-Parliament as Westminster. The experience of the Union Parliament in particular, was to suggest the possibility of doubt as to the generality and applicability of at least some of the traditional answers.

CHAPTER FOUR

Parliamentary Supremacy and the Constitution

1931-51

'We claim the sovereignty of Parliament, which means that this Parliament can decide exactly what it wants to decide, and that there is no court which can prevent it.'
(Hon. J.F.T. Naudé. House of Assembly. April 1952)

1

It is not entirely a simple matter to say whether in 1931, the Union Parliament became or did not become a 'sovereign Parliament'. Whether a body is, or is not sovereign, is, of course, in a sense, merely a matter of words. 'What is sovereignty?' is a question for lawyers and political scientists to settle amongst themselves by a process of persuasive definition. But the definition may turn out to have considerable practical importance. Two sets of considerations have normally been thought to play a part in any such definition. It has been said that a body is sovereign, if, in broad terms:-

(a) It is an autonomous body, free from the control of any other body or authority external to itself.
and,(b) Its internal authority to legislate on any subject matter cannot be made the subject of judicial inquiry.

These considerations are sometimes distinguished as 'external', and 'internal' sovereignty. But this is misleading. There are not two different kinds of sovereignty in question; nor is 'internal' sovereignty' separable from 'external' sovereignty in the way which the distinction might be thought to suggest. It is true that an internal judicial check on legislative authority is a separate matter from, and may exist without any loss of national autonomy, but the fundamental question is simply one of limitation, or lack of limitation on the area of legislative competence. As applied to legislative bodies, there is only one kind of sovereignty. The lack of 'external' sovereignty of a British colony, for example, is simply a lack of sovereignty. The Parliament of the Union of South Africa before the year 1931, lacked an unquestioned right to legislate on any subject matter without restriction because of its 'external' subservience to the Imperial Parliament.

The Union Parliament could then, rid itself of this fundamental bar to its exercise of sovereign authority (whatever restrictions it might remain subject to, for reasons connected with its own constitutional framework) if, and only if, the power of the Imperial Parliament to legislate for the Union could be effectively terminated. And the termina-

tion must of necessity be not merely effective in law but also irrevocable in law, since a temporary~~ily~~ power to legislate, subject to a possible future repeal of the concession, amounts to a continued assertion of the supremacy of the concessive authority. This is the logical force of the assertion to be found in theories of sovereignty dating back to that of their traditional author Jean Bodin, that sovereign authority cannot be temporary. ('Temporary' here is a piece of logical shorthand. It id not an antonym of 'everlasting'.[1] Unrestricted authority can be exercised 'temporarily', in the sense that it is short-lived, but it cannot be exercised with a temporal restriction. i.e. It cannot both be unlimited and at the same time incapable of removing any restriction - including a temporal one - on the exercise of power by itself.)

Here, a difficulty suggests itself. Before the Union Parliament could begin its career as a sovereign legislature, the area of competence of the Imperial Parliament had of necessity to be irrevocably restricted, so as to prevent future exercise of the Imperial power to pass laws extending

1. This point might be made against the contention that sovereignty need not be 'perpetual' since it can never be known that any given authority will in fact exercise its powers for all time. (W.J. Rees 'The Theory of Sovereignty Restated' Mind Oct.1950 pp.505-6 takes 'unrestricted temporally' as equivalent to 'everlasting' in this way and concludes that 'perpetualness' need not be a characteristic of sovereigns.)

to South Africa. But if the Imperial Parliament was itself a sovereign body, as above defined, how could the area of its legislative competence be restricted at all? Could it by its own act restrict itself so as to confer on the Union the desired 'sovereign' status? Here is the crucial difficulty of the theory of 'unlimited' legal sovereignty. How can there be room within a single theory of law for more than a single 'sovereign' possessing the characteristics which such sovereigns have been said to possess; and how can such a body successfully bind the future exercise of its own powers?

To these questions the jurisprudence of Austin and Dicey, supplies a simple answer. Section 4 of the Statute of Westminster had enacted that:-

> 'No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested and consented to the enactment thereof.'

Bitish constitutional authority was practically unanimous that this did not constitute and could not be construed as an irrevocable termination of the power to legislate for

a Dominion.[1] This power ..'though nullified by convention.. could not be abolished by convention. And what was more, it could not be abolished by legislation either. The rule of strict law, rendered impotent by convention, remained unrepealed and unrepealable.'[2] No action which the Imperial Parliament could take, could succeed in divesting it of its legal supremacy. 'In a purely legal point of view', (to quote the words of Sir Owen Dixon, written in 1935) 'supremacy over the law is a thing which, from its very nature, the law itself cannot restrict.'[3]

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1. Sir Arthur Berriedale Keith, reviewing the provision of Section 4 as it had been proposed in the Report of the Conference on the Operation of Dominion Legislation had written in 1931:-

   'Legally, of course, the clause is nugatory, for the Imperial Parliament, being sovereign, cannot bind itself, and there is a certain objection to any attempt to accomplish the impossible.' (XIII Journal of Comparative Legislation p.28)

   and in 1932, of the enacted Statute, that:-

   'The Act itself of course, is a singular assertion of the sovereign authority which still adheres to the Imperial Parliament.' (XIV J.C.L. p.101)

2. K.C. Wheare. 'The Statute of Westminster and Dominion Status' 5th ed. pp.297-8
   c.f. British Coal Corporation v. the King (1935) A.C. 500 at p.520 . 'The Imperial Parliament could, as a matter of abstract law, repeal or disregard Section 4 of the Statute."

3. 'The Law and the Constitution'. (1935) L.Q.R. 590 p.611
   The Statute was '..a legislative denial of the supremacy of the Imperial Parliament over the law of the Dominions. But it is a legislative denial made by the British Parliament in the very exercise of that supremacy.' (ibid)
   cf. Latham Op.cit. p.530

The theory of sovereignty which is implicit in these propositions was not accepted in the Union (or in the Irish Free State). Whether a total abdication of sovereign power over a particular geographical area is a 'restriction of sovereign power' is perhaps arguable,[1] but it plainly cannot be denied by anyone who concedes that the creation of new sovereign authorities is possible, that such an abdication can be made. The consequences of the view that the sovereignty of the Imperial Parliament could not be impaired by any rule of law made by itself were aptly indicated by a South African author in an examination of the legal status of the Dominions contributed in 1933, two years after the passage of the Statute of Westminster. 'If', he argued 'the legal omnipotence of the British Parliament is accepted, the Treaty of Versailles of 1783, whereby the United States is declared independent, has not affected in any way, the legal right of the British Parliament.'[2] The South African view that termination of its authority by the Imperial Parliament was possible in law, and had in fact taken place,

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1. cf. Ch.XIV below.
2. H.L. van Themaat. (1933) XV. Journal of Comparative Legislation p.48

is implicit in the wording of the Status of the Union Act,[1] passed by the Union Parliament in 1934. Even if the Act is interpreted as adding nothing to the effect of the Statute of Westminster[2] (Sections 1-6, and 11, 12 of the Statute

1. Act No.9 of 1934. Section 2 of the Act reads:-
   'The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December 1931 shall extend, or be deemed to extend to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union.'
   The preamble to the Act refers to the definition of Dominion status adopted by the Imperial Conferences, of 1926 and 1930, and recites that '...it is expedient that the status of the Union as a sovereign independent state as herein before defined shall be adopted and declared by the Parliament of the Union..' It can thus be contended that no more is implied by the use of the word 'sovereign' in the Act than was contained in the Conferences' acceptance of the ambiguous Balfour formula. But Section 2 which refers explicitly not to the sovereign independence of the state but to the sovereignty of the Union Parliament, is a clear indication of the South African view that as a matter of strict law the former sovereignty of the Imperial Parliament had been definitely divided so as to create a number of sovereign authorities legally as well as practically co-ordinate in status. This is at least a plausible view of the statement made by the Conference on the Operation of Dominion Legislation, that 'by..the effective recognition of the equality of these Parliaments with the Parliament of the United Kingdom, the law will be brought into harmony with the root principle of equality governing the free association of the members of the British Commonwealth of Nations.' (Report para.58 Cmd.3479)
2. c.f. Latham. 'The law and the Commonwealth' p.533. Also p.532 'The equation of sovereign independence with 1926 Dominion status in the preamble, coupled with the provision now to be found in Section One of the South Africa Act, that, 'the people of the Union humbly acknowledge the sovereignty of Almighty God', strongly suggest that in South Africa, 'sovereignty' is less a term of art than a complimentary expression'.

are scheduled to the Act, with minor modifications, and, by Section 3, are 'deemed to be an Act of the Parliament of the Union) it is plain what the authors of the Status Act considered the existing state of the law to be. Moreover, on at least two occasions the courst in South Africa, have implicitly rejected the doctrine of permanent indestructible Imperial sovereignty entailed by the dictum of Lord Sankey in British Coal Corporation v. the King [1] to the effect that legislation extending to the Dominions, without their consent is, in strict law, still possible, despite the terms of Section 4 of the Statute of Westminster. In Ndlwana v. Hofmeyr [2] it was stated by the Appellate Division of the Supreme Court that an argument based on the proposition that the Imperial Parliament remained competent to repeal the Statute of Westminster could not be taken seriously, and that 'Freedom, once conferred, cannot be revoked'. And in 1952, this view was endorsedin the course of the judgement in Harris v. Dönges, where the Chief Justice used the following words:-

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1. (1935) A.C.500 at p.520 See above p. 70 n.
2. (1937) A.D.229 at p.237

> 'The only legislature which is competent to pass laws binding in the Union, is the Union Legislature. There is no other Legislature in the world that can pass laws which are enforceable by Courts of Law in the Union.'[1]

To the extent then that these propositions are accepted, by the courts and by constitutional authorities in the United Kingdom it must be conceded that the traditional theory of an indivisible, illimitable sovereignty inhering in the Imperial Parliament has undergone modification, since, they imply that:- (1) A number of autonomous legislative authorities has been created none of which is in law subordinate to any of the others; and (2) The former unitary sovereign has effectively restricted its future competence to legislate in those spheres over which it has abandoned or abdicated its authority.

2

Paradoxically enough, when the claim came to be made that the Union Parliament was a sovereign body in the widest sense i.e. that it could not be bound as to its competence to legislate in any way and on any subject, that claim was pursued by presenting the Union Parliament as equal in status and powers to the Imperial Parliament. Yet that very equality could only be a legal fact on the assumption that the claim

1. (1952) 1 T.L.R. 1245 at p.1261

itself was false i.e. that a body sovereign in the widest sense, could be effectively bound as to its future legislative competence (as the Imperial Parliament must be conceded to be if Dominion legislative autonomy was to be effective in law.) This point should be borne in mind. But it should be noted also that the authority of the Union Parliament to amend the constitution by ordinary legislative process did not rest primarily upon this wider claim, but simply on the specific authorisation given by the Statute of Westminster to legislate in a manner repugnant to Imperial legislation and to amend Imperial Acts as provided by section 2 of the Statute. Even granting the Austinian claim that as part of an Imperial statute, this provision itself could not be immune from repeal by the United Kingdom Parliament, the immediate legal effect of section 2 was undoubtedly to remove the subordination of law made by the Union Parliament to the external authority of Imperial enactments. The Parliament of the Union thereby acquired the freedom from external control without which the rights of 'sovereign' legislation could not be exercised But did it follow from this fact alone that those rights, as understood in the United Kingdom could be so exercised? As already noted, legislative authority was 'complete' in the sense that it

was subject to no Imperial restriction, and situate entirely within the Union. But whether 'unrestricted' legislative powers could now be wielded by the Parliament of the Union was a different matter. It could only be settled by reference to the law in South Africa which governed the exercise of legislative authority, and the relationship between this basic law and the 'normal' processes of legislation. The answers given to the question involve a consideration of the nature of constitutions and of the meaning of 'legal supremacy'.

3

A constitution is normally said to be 'superior', or 'prior to' the processes which it authorises, and so much may be admitted. But what is the cash value of these expressions in terms of what a law-making body may or may not do? One sense in which a constitution might be said to be 'supreme' would be if it were recognised to be absolutely unchangeable by any process of legislation. But no modern constitution is 'supreme' or 'superior' in this sense. Almost all constitutions lay down the method by which they may be amended, and thus may be described as 'superior' or logically prior to the legislation which amends them,

provided that such legislation is possible only on the terms laid down for its operation by the constitutional instrument itself. A constitution might conceivably decree that it could be amended by any method which the legislative body set up by it, chose to adopt. In this case the rule laid down by the constitution would still be 'logically prior' to the legislative process, (It would still "prescribe the terms of its own amendment") but the constitution itself could not be described as a 'superior' body of law in the sense used above. It has been customary to characterise constitutions as 'flexible' or 'uncontrolled' where they do not impose conditions of any special kind for their own amendment. The British constitutional structure, Dicey asserted, is completely flexible because a single legislative process suffices to make or unmake any law, constitutional or otherwise.[1]

The practical importance of the decision as to the 'superiority' of a constitutional instrument, can be illustrated by the situation which arose in the Irish Free State as a result of a provision of the Constitution Act of 1922. Article 50 of that Act[2] laid down that constitutional

1. cf. the discussion in Chap XIV below.
2. Act No.1 of 1922

amendment should, after a period of eight years (later amended to sixteen) be by a process involving the submission of such amendments to a referendum, but that within the specified period after the passage of the Act, amendments could be made by ordinary legislative process. The question was raised whether during this period, the constitution could be said to have lost its superior status. Now it might be thought that the statement 'Where the constitution can be amended by normal legislative process, it is no longer a superior instrument' is merely analytic, and true by the definition of its terms. But this is hardly the case. Suppose the legislature, without any repeal or amendment of the constitution, merely attempts to legislate in a way inconsistent with some of its provisions. Does such 'legislation' implicitly repeal the constitutional provisions in conflict with it, or will the constitution control 'legislative acts repugnant to it until repealed in the manner laid down by itself (in this case, by normal but explicit legislative process). When the point was raised in the Dail, the Speaker ruled that, 'the Constitution is a fundamental matter in connection with which all legislation

passed in the Dail must be construed.'[1] There is inherent in a statement such as this, the view expressed in the often-quoted judgement of Chief Justice John Marshall, which asserted the judicial duty to uphold the 'superiority' of the United States Constitution - namely that:- 'If the courts are to regard the Constitution, and the Constitution is superior to any ordinary Act of the Legislature, the Constitution and not such ordinary Act must govern the case to which they both apply.'[2] The fact that the Constitution of the United States can be amended only by special process, whilst the Irish Free State Constitution could be amended by ordinary legislation (i.e. that in Dicey's terms, one was inflexible, the other flexible) does not in the least detract from the similarity of these two views of 'superiority' or fundamental-ness'. Each contends, in effect that a constitutional rule, until amended on its own terms, binds or controls legislative action taken under it. The assertion by a legislative body of a power of implicit repeal is really a negation of what a constitution, in this sense, stands for.

1. See Kohn. 'The Constitution of the Irish Free State (1932) pp.254-5. cf. McCawley v The King (1920) A.C.691 especially the dicta of Lord Birkenhead on 'controlled' and 'uncontrolled' constitutions; and the decision in the Supreme Court of the Irish Free State in The State (Ryan) v. Lennon (1935) I.R.170
2. Marbury v Madison (1803) 1 Cranch 137 at 175

The notion of 'legislative sovereignty' is customarily linked with the notions of implicit repeal and of 'flexibility'. A parliamentary assembly is to be called 'sovereign' if it cannot be 'bound', or 'controlled' by the enactments of its predecessors.[1]

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1. Similarly, as a term of political theory, 'sovereignty' is defended by all the arguments which Paine in 1791 launched at the head of Edmund Burke. 'Every generation is and must be, competent to all the purposes which its occasions require'. 'There never did, there never will and there never can exist a parliament or any description of men..possessed of the right or the power of binding and controlling posterity..' But there is a dangerous confusion of ideas here. If the sense in which a constitution 'binds' or 'controls' legislation is linked with the sense in which political conservatives would wish the actions of society to be 'bound' and 'controlled' (by what Burke called 'the great primaeval contract of eternal society') it becomes all too easy to assume that the notion of legislative sovereignty is antithetical to the notion of a 'binding' constitution. There must, as Cromwell believed be 'somewhat fundamental' in every system of government. This, as an article of political belief, may or may not be true in various sense. But as a statement of legal fact, it merely conceals the undoubted (though tautological) truth that every system of legal action is 'governed' by legal rules. All constitutions 'bind', or 'govern' in this sense, but only the more 'inflexible' ones are likely to 'bind' also in Burke's sense.

South Africa had, we have seen, in 1931 a constitution.[1] It had also, it was claimed, a sovereign legislature. What effect, it could be asked had the advent of the latter on the status of the former? Was this status as a 'superior' instrument incompatible with the 'supremacy' of Parliament? If 'legislative supremacy means that the validity of an Act of Parliament cannot be questioned by the courts which are bound to accept as law the validity of all Parliamentary enactments'[2], in what sense were such enactments still 'controlled' by the rules of the constitution? Moreover, was the definition of 'the Union Parliament' for purposes of constitutional revision to be drawn from the provisions of the constitution, or from the analogy provided by the working of the 'sovereign' Imperial Parliament? Was the decision as to what constituted an 'Act of the Union Parliament' a matter of legislative privilege, or a matter

1. The respects in which the constitution was 'inflexible' could well be said to be the result of a desire to 'bind' the people of South Africa in the Burkeian sense, since the instrument itself embodied the terms of a contract between the provinces uniting to form the Union in 1909 - a contract which sought to secure the existing political situation in certain respects against future revision. The constitutions of federal states are invariably inflexible for this reason. But there is nothing in the nature of a unitary state which decrees that its constitutional structure must be otherwise. (If it is true that society is in some sense a contract and partnership between past present and future, then geographical federalism is not the only federalism. Society is, as it were, a 'federalism through time'.)
2. Wade & Phillips 'Constitutional Law' 4th ed. p.39

of constitutional law? How far would the courts inquire into the proceedings of Parliament if the validity of such proceedings was disputed? These were the questions which were to be debated in the courts, and later, on the election platforms of the Union, and which were eventually to produce a constitutional deadlock between Parliament and the Supreme Court of South Africa.

The role of the courts should be emphasised. Hitherto, British courts of law had been faced with the enactments of the Imperial Parliament claiming supremacy over the law. They had also been faced, overseas and in appeals brought to the Privy Council, with the enactments of colonial legislatures operating under formal constitutions, and subject to them. But they had never been faced with legislation emanating from a body, created by a formal constitutional instrument but claiming complete supremacy over that instrument. In relation to legislation enacted at Westminster, the courts had laid down for themselves (in some circumstances) the rule that the Parliament Roll was conclusive as to the will of the legislative bdoy, and that no inquiry into the internal procedure of enactment was permissible.[1] Was this rule to be

1. Edinburgh and Dalkeith Railway Co. v Wauchope. (1842) 8 Cl & F.710 at 724-5 . cf, Sir A.B. Keith (Introd. to British Constitutional Law pp.124-5) 'A further characteristic of Imperial legislation is its exemption from any judicial investigation as to the regularity of its formal passage. ..The courts will not do more than satisfy themselves that the Bill has been accepted by both Houses and assented to.'

applied by the courts in South Africa to legislation emanating from the Union Parliament? The courts had already, it will be remembered attempted to distinguish in 1930,[1] between the procedure of each House, which was a matter of privilege not open to judicial inquiry, and the provisions declared by the South Africa Act to be legally necessary for the passage of legislation falling within the scope of the entrenched clauses. But could it not now be contended that the sovereign Parliament of the Union might make valid law on any subject by its normal processes of legislation and that if it chose to ignore the provisions of the South Africa Act in any such legislation, those provisions must be regarded as to that extent implicitly repealed? Implicit repeal had, after all, been declared within the powers of the Union Parliament even before the State of Westminster,[2] as far as the unentrenched portions of the South Africa Act

1. Rex v. Ndobe (1930) A.D. 484 at 496
2. Krause v. Commissioner of Inland Revenue. (1929) A.D.286 at 290 'If a later Act of Parliament is inconsistent with the South Africa Act, the court may hold that the later Act impliedly varies such part of the South Africa Act as is inconsistent with the later Act. The court cannot say that Acts of Parliament must be so interpreted as to conform to the South Africa Act..'
   cf. the ruling cited above (p.78)

were concerned. The Imperial Parliament, it could be contended, could always have amended any portion of the South Africa Act by a simple majority, or repealed the Act implicitly by enacting a fresh Statute inconsistent with it. Since the Parliament of the Union was now the equal of the Imperial Parliament and since all restrictions deriving from its former non-sovereign status were now removed, it too could repeal expressly or by implication any section of the South Africa Act by a Bill passed in the normal way with a simple majority in both Houses. To quote Professor Wheare's early essay of 1933:-, 'With the repeal of the Colonial Laws Validity Act, as far as South Africa is concerned, it is legally possible for the Union Parliament to repeal the South Africa Act as a whole, and replace it with an Act which perhaps contained none of the entrenched clauses'.[1] The consequences which Smuts had feared in 1931 came thus to be accepted by both British and South African constitutional authorities as those which must be conceded to follow as a matter of 'strict' law from the passage of the Statute of Westminster. The authors of the leading South African textbook of constitutional law put the matter briefly as follows:-[2]

1. 'The Statute of Westminster' (1933) pp.108-9
2. W.P.M. Kennedy and H.J. Schlosberg. 'Law and Custom of the South African Constitution'. (1935) pp.100-101

> 'The clauses of the South Africa Act 'entrenched' by Section 152 of the Act are no longer safeguarded by law. The Union Parliament will be able validly to repeal or alter the entrenched clauses of the South Africa Act without observing the requirements of Section 152...The Constitution of the Union was made as flexible, as uncontrolled, as easy to amend in every detail as the constitution of the United Kingdom...The Parliament of the Union now has the legal power to pass legislation altering any section of the South Africa Act by a simple majority in Parliament.'

It was not until 1937 that this doctrine was tested in courts. In 1934, however, during the course of the debate on the Status of the Union Bill, the Speaker (Mr. Jansen) stated that the procedure laid down in the South Africa Act would, in his view, have to be followed by the House if any legislation was to be validly passed seeking to amend the entrenched sections.[1] The two thirds unicameral procedure was in fact followed two years later, in 1936 when an Act was passed[2] providing for a Natives' Representative Council and a separate scheme of Parliamentary representation for natives throughout the Union. The validity of this measure

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1. cf. Kennedy and Schlosberg. op.cit. p.103 '..It seems that the clauses will be respected on the ground that they constitute,a solemn undertaking, not only by the national convention but also by successive Parliaments. The Speaker might thus have stated what is a constitutional convention based upon a sense of public honour. It appears to be a definite and living force in the constitution, and as such merits cognizance by students of constitutional law.'
2. The representation of Natives Act 1936 (Act 12 of 1936)

was contested in the Cape Provincial Division of the Supreme Court by Ndlwana, a native who had previously been registered on the voters roll in Cape Colony. It was contended for Ndlwana that the unicameral procedure laid down in Section 35 of the South Africa Act not merely need not, but must not be followed in passing the Act. Ndlwana lost his case in the Provincial Division, but on appeal his contention, true or false, was rendered immaterial by the reasoning of the Appelate Division. This was to the effect that the Union Parliament, as a sovereign legislative body could adopt any procedure which it chose, and that no court of law had any jurisdiction to question its decision in this sphere. The British doctrine of Parliamentary omnipotence was claimed to be fully applicable to the Parliament of the Union.

There were, before the court, in Ndlwana's case, two issues. First, what was, in view of the passage of the Statute of Westminster, the correct method of legislating in South Africa, for matters falling within the scope of the entrenched sections? Secondly, to what lengths could a court of law go in declaring that this or any other form of legislative procedure was binding upon the legislature? But the court in Ndlwana's case settled both questions as they affected South Africa at a single stroke by declaring

that the sovereignty of the Union Parliament was incompatible with the existence of any judicial check on the activities of Parliament. Since, said Acting Chief Justice Stratford,[1] 'Parliament is now the supreme and sovereign law-making body in the Union', and since moreover it had in the Status Act of 1934, 'defined its own powers and declared them to be sovereign', no legal bounds to the exercise of supremacy could remain. For:-

> 'It is obviously senseless to speak of an Act of a sovereign law-making body as ultra vires. There can be no exceeding of power when that power is limitless.'

The British constitutional rule as to the relation between legislature and judiciary, must consequently be applied:-

> 'Parliament's will..as expressed in an Act of Parliament cannot now in this country, as it cannot in England, be questioned by a court of law, whose function it is to enforce that will, not to question it.'

In the specific case of the restrictions on the Union Parliament contained in the South Africa Act:-

> 'The question..is whether a court of law can declare that a sovereign Parliament cannot validly pronounce its will unless it adopts a certain procedure - in this case a procedure impliedly indicated as usual in the South Africa Act. The answer is that Parliament, composed of its three constituent elements can adopt any procedure it thinks fit; the procedure, express or implied in the South Africa Act, is, so far as courts of law are concerned, at the mercy of Parliament,

1. (1937) A.D.229, 236, 237, 238.

like everything else.'

It had been contended by the appellants that Act 12 of 1936 was not an Act of Parliament since the manner and form of its passage did not comply with the terms of the South Africa Act. Here, two dicta of the Acting Chief Justice are of considerable theoretical importance. Clearly, if a contention, that a purported Act of Parliament is not in law an Act of Parliament at all, is to be maintainable, there will arise the query as to what lengths judicial inquiry into the observance of admittedly binding procedures will go. At this point 'procedure' becomes a somewhat slippery concept. A resolution of the British House of Commons, for example, is not in law, an Act of Parliament. Is this because a certain legally binding 'procedure' (namely the formal assent of all three estates) has not been followed? If it is to be so described, then certain 'procedures' at least are judicially cognizable, for, as Stratford noted, (citing Dicey) a resolution of one of the Houses would never be enforced by the courts as an Act of Parliament.[1] But, he added, the present case was not one where one or more constituent elements of the Union Parliament had failed to function. The contrary was to be inferred from the royal

1. (1937) A.D.229 at p.238. cf. Bowles v. Bank of England (1913) 1 Ch.57

assent and from the fact of promulgation. The latter was to be regarded as a conclusive answer to the question whether an Act of Parliament had in law been passed, for, 'an Act of Parliament, in the case of a sovereign law-making body, proves itself by the mere production of the printed form published by proper authority..'[1]

Thus the decision in Ndlwana's case came to be regarded as having clarified beyond doubt the position of the Union Parliament within the constitutional system of South Africa. As a 'sovereign' legislative body, it had attained supremacy over the law. Its formal expressions of will once they had taken place, could only be applied by the courts: they could not be questioned. Nor, it would seem, could the question whether they had taken place at all, be raised for judicial consideration, provided only that the technical conditions of recital and official publication were adhered to. A single process of law-making was now competent to secure any legislative change in the Union, and the constitutional provisions which had bound the Parliamentary body up to the year 1931 were incapable of binding its newly sovereign successors.

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1. Loc.cit. at p.238

The decision in Ndlwana's case was to remain unchallenged as a proposition of law until the parliamentary victory of the National Party [1] at the General Election of 1948. Eleven years earlier it had been argued (with what seemed complete justification) that, 'the entrenched clauses have been removed from the fundamental law of the Union, and converted into a solemn international obligation of good faith'.[2] In 1948 the precarious status of the constitutional rights 'entrenched' in the South Africa Act was borne in upon those who opposed the policy of Apartheid for which the Nationalist Party declared that it had received a mandate. Would the Government attempt to revise the franchise qualification by simple majority votes [3] in both Houses, or would it, as General Smuts demanded, in the House of Assembly abide by the entrenched clauses of the constitution?[4]

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1. As a result of the General Election held in May 1948 the United Party led by General Smuts was defeated by a coalition of the Nationalist and Afrikaner parties (later passed into a single party in 1950)
2. R.T.E. Latham 'The Law and the Commonwealth'. p.529n.
3. The Government's legislative programme included besides the revision of the electoral system, a Mixed Marriages Act, a Population Registration Act, a Group Areas Act and a Bantu Authorities Act, none of which required passage by the entrenched procedure.
4. 66H.Ass.Deb. Cols. 64-76 (1949)

This question could be asked and answered in a number of ways. The guarantees of the South Africa Act might be thought to be 'binding' in any one of, or in a combination of several different senses. They might be a legal obligation on the Union Parliament, a moral and political obligation on the Parliament or the people of South Africa, or a constitutional convention of greater or lesser force. On the politico-moral plane, both Government and Opposition parties could muster plausible arguments. Whatever the position in strict law it was said on the one side, any abrogation of the entrenched sections, would be a breach of solemn undertakings given by the Union Parliament in 1931 as a condition on which it had entered into its fully sovereign freedom of action. No Parliament or sovereign people, it was held, on the other, could subordinate itself to the 'dead hand of the past', or curtail its freedom to legislate by deference to the extra-legal resolutions of a previous(and differently constituted) Parliament. It might be necessary, it was suggested by Dr. Malan (Prime Minister and Leader of the Nationalist Party), to hold a referendum as was done in the United States and Australia in order that the matter should be settled in accordance with the will of the people. This

proposal was, however pursued no further. On December, 3rd, 1948, the Prime Minister announced that the legal position had been investigated, and that all doubt had been 'removed authoritatively'. 'The sovereignty which was previously vested in the British Parliament to maintain the South Africa Act with its restrictive clauses, or to amend or repeal by a simple majority', was now vested without restriction in the Union Parliament. Consequently, it was proposed to introduce and pass by simple majority in each House of the Union Parliament [1] legislation to amend the common voters' roll in Cape Colony and to place the Cape coloured voters on a separate electoral roll. The legal basis of the Government's attitude towards the entrenched sections was set out in detail when on January 24th, 1949 the Opinion of the Law Advisers was tabled in the House. After referring to Ndobe's case (1930) [2] the Opinion stated that:-

> 'A material alteration in the position ..has, however, been brought about since 1930 when Ndobe's case was decided, in consequence of the adoption of the Statute of Westminster in 1931 by the Parliament of the United Kingdom, and of the Status of the Union Act 1934 by the Parliament of the Union.

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1. A joint session of both Houses could not have produced the two thirds majority required by Section 35 for legislation affecting the basis of the Cape franchise.
1. See above p.47.

> ...The limitations imposed by the Colonial Laws Validity Act upon legislative competence of the Union Parliament prior to 1931 have, therefore, now been removed, and with that, Sections 35 and 152 of the South Africa Act have lost their effectiveness.'

In the matter of the saving sections placed in the Statute of Westminster in its application to the other Dominions, the Law Advisers were of the opinion that:-

> 'If it were the intention that the existing limitation upon the legislative competence of the Parliament of the Union as regards the so-called Entrenched Sections in the South Africa Act should continue, one would have expected a provision to that effect in the Statute of Westminster.
>
> The absence of such a provision is a strong indication that the legislative powers of the Union Parliament are now unlimited also in respect of the entrenched sections of the South Africa Act.'

The Opinion continued:-

> 'It is perhaps worth while at this stage to draw the attention of the Cabinet to the attached resolution[1] passed by the House of Assembly and the Senate in 1931 in connexion with the proposed Statute of Westminster.
>
> It could perhaps be argued that the preamble to that Statute refers to the fact that the Union has requested and agreed to the passing of the Statute by the British Parliament, and that it would therefore be permissible, in connexion with the interpretation of the Statute to have regard to the express reservation contained in this resolution and that accordinly the Statute should be so interpreted as not to affect the entrenched provisions.

1. The resolution requesting enactment of the Statute 'on the understanding that the proposed legislation will in no way derogate from the entrenched provisions of the South Africa Act. (see p.52)

We do not think, however, that such an argument could be advanced successfully..

The fact that in 1936 with the adoption of the Representation of Natives Act, Parliament apparently proceeded on the assumption that the provisions of the entrenched sections had to be observed..from which it appears that Parliament itself gave a different interpretation to the Statute of Westminster, also cannot alter the legal position.

Even if it were our own Act, and not an Act of another Parliament, an incorrect view on the part of the Legislature as to the meaning thereof would not be sufficient to alter the law..

We have also considered the question whether it could be argued that in 1931, even before the passing of the Statute of Westminster, the British Parliament could make laws for the Union only in pursuance of and in accordance with a request from the Union itself, and that the Statute of Westminster is therefore, in so far as it is in disregard of the reservation contained in the resolution adopted by the House of Assembly and the Senate in 1931, not binding upon the Union, but we can find no sufficient reason for accepting such a limitation upon the then prevailing sovereignty of the British Parliament...

It follows that Sections 35 and 152 (and the other entrenched sections) of the South Africa Act no longer involve any limitation whatsoever upon the legislative competence of Parliament...

This conclusion is in accord with the concept of the legislative authority within the State.

That the Union Parliament is, in consequence of the passing of the Statute of Westminster, the supreme and sovereign legislative authority in and for the Union is not open to doubt...

In our view no special procedure is necessary in order to ensure the validity of the contemplated legislation.

It is for Parliament and Parliament alone to determine what procedure it should adopt...

The Parliament of the Union has sovereign legislative powers and may have regard to the limitations imposed upon its legislative competence by the entrenched sections for as long only as it pleases.

For the first time (perhaps since the American revolt against George III,) the English doctrine of Parliamentary sovereignty had become a live issue of day to day politics. Much of the editorialising and inter-party recrimination which resulted, has only an ephemeral interest, but there is also in the South African debate of 1950-52 (as in its 18th century predecessor) a vein of workable material which is of permanent theoretical value for the student of political and constitutional doctrines. The usefulness of the debate as an elucidation of 'the meaning of sovereignty', is all the greater because it took the shape not of an assertion of 'sovereignty' by one side and a rejection of it on the other; but of an assertion by <u>both</u> sides that the Union Parliament was 'sovereign', coupled with a total disagreement as to what this statement implied. The dispute offers not only the possibility of an answer to the question 'What is sovereignty?', but is, in itself a working model of what it is like to ask questions of this kind, and to accept anything as an answer to them. The choice in this sphere between rival theories, procedes less by investigation, than by what William Paley called the 'competition of opposite analogies'. The theoretical difference between the contend-

ing parties in South Africa was, in consequence, less a disagreement about matters of fact, than an attempt by each side to impose on the other, a particular 'working picture' of the Union Parliament, whose associated vocabulary entailed the conclusion which it was sought to establish.

When the threatened constitutional crisis [1] culminated in what the opposition parties in South Africa termed the Government's attempt to abrogate the constitution, the 'working picture' of the sovereign legislative body contemplated by the Government's legal advisors was not seriously disputed.[2] Given the premiss that a sovereign legislature lay subject to no restriction on the scope of its authority, opponents of the proposed legislation were compelled to say either that the Union Parliament was not in this sense a sovereign body at all, or that if it was, and could for that reason, in strict law, ignore 'constitutional' fetters on its legislative action, so to do would be to violate solemnly undertaken (though admittedly extra-legal) pledges. A rather

1. The introduction of the Separate Representation measure had been delayed for two years by a disagreement within the Nationalist-Afrikaner Party coalition (the latter being represented in the cabinet by its leader Dr. Havenga) as to the effect of the entrenched sections. The proposed Bill was not introduced until March 8th, 1951.
2. The Minister of Justice later claimed with some justification that at the time of its passage the Government's legislation was 'completely in accord with the existing constitutional and legal position. It was in agreement with the practically unanimous views of constitutional authorities'. (H.A.Deb. 8th May, 1952)

different claim, aimed at the legal basis of the Government's position, was, however, soon to be made. In February 1951 Professor D.V. Cowen,[1] Professor of Law in the University of Cape Town, published an essay,[2] in which he argued briefly but cogently that the entrenched sections of the constitution remained binding on the Union Parliament. The essay advanced a number of contentions amongst which were the following:-

1) That the efficacy of the entrenched sections had never depended upon the existence of the Colonial Laws Validity Act, but solely upon the provisions of the South Africa Act (as an Act defining the manner of operation of the Union Parliament)

2) That the Statute of Westminster, in repealing the Colonial Laws Validity Act in its application to South Africa, had therefore done nothing to impair the efficacy of the entrenched sections.

3) That the reasoning of the Appeal Court in Ndlwana's Case had been mistaken.

and4) That the efficacy of the entrenched sections was in no

1. Professor Cowen in an article entitled 'The Entrenched Sections of the South Africa Act (published in 1949) had already dissented from the opinion of the Law Advisors to the Union Government to the effect that Sections 35 and 152 of the South Africa Act could be amended by the ordinary legislative process.
2. 'Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act'. (Cape Town & Johannesburg. 1951)

incompatible (on a true view of the nature of legal sovereignty) with either the sovereign status of South Africa, or with the sovereignty of the Union Parliament.[1]

The interest of these propositions goes beyond the mere question of the construction to be put on the South Africa Act and its disputed sections. It is admitted by Professor Cowen that:-

> 'It is of the essence of the doctrine of Parliamentary Sovereignty that when the constituent elements of Parliament have duly declared their will in an Act of Parliament, the authority of that Act, no matter what it decrees, cannot be questioned in the courts. But this result, follows only when the constituent elements of Parliament have observed the rules which prescribe what must be done in order that their will may be duly declared.' [2]

The doctrine of legislative supremacy, as Dicey and Jennings have stated, is itself a rule of law, which, in the words of the latter, can be formulated in the proposition:- 'The law is that Parliament may make any law in the manner and form provided by the law.' [3] It follows, therefore, that

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1. After the judgment of the Appeal Court in 1952 had given judicial support to his contentions, Professor Cowen developed some of their implications for the theory of sovereignty in two articles in the Modern Law Review. ('Legislature and Judiciary' (1952) 15. M.L.R. 282, and (1953) 16.M.L.R.273)
   Professor B.Z. Beinart of the University of Cape Town also attacked the legal basis of the Government's position in an article 'Sovereignty and the Law' written in 1951 and published in the following year. (See bibliography)
2. 'Parliamentary Sovereignty..' p.42
3. 'The Law and the Constitution'. pp.139-40 (3rd ed.)

in order to understand the doctrine of Parliamentary Sovereignty:-

> 'It is necessary to distinguish between what Parliament may do by legislation, and what the constituent elements of Parliament must do in order to legislate.[1]

The theory of legal supremacy merely states the unlimited scope of the former. It does not bear on the latter.

> 'The bald statement that Parliament is sovereign does not end the matter; for as we have seen, the really vital question remains: 'What is Parliament?'[2]

This question must be answered in the case of South Africa by a perusal of the rules laid down in the South Africa Act which define the Union Parliament as a legislative body. These rules were, and had at all times been effective, not because they were a fetter on legislative action, maintained by the sanction of the Colonial Laws Validity Act (before 1931) but because any Parliamentary action not according to their terms would not have been an authentic expression of the will of the Union Parliament at all.

> 'A measure passed in contravention of these rules would not be an Act of Parliament. This is quite different from saying that it would be ultra vires and so void; for to speak of a duly made Act as being beyond powers of a sovereign Parliament would obviously be a blatant contradiction in terms.[3]

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1. 'Parliamentary Sovereignty'. p.10.
2. Op.cit. p.42
3. Op.cit. p.43

Parliament was undoubtedly sovereign, but this was in no way incompatible with the continued efficacy of the entrenched sections, since the sovereignty of the Union Parliament is divided so as to provide two distinct forms of law-making.

> 'There is a division of legislative power between the constituent elements of the Union Parliament functioning bicamerally, and the same elements functioning unicamerally, and it is my contention that in respect of subjects within the scope of the entrenched sections, legislative power belongs exclusively to the constituent elements of the Union Parliament functioning unicamerally in terms of those sections.'[1]

If the argument advanced here is accepted, its effect is to present a different answer to the question 'What is the Union Parliament?' from that furnished by the Government's legal advisors. Perhaps more important, it brings out that an implicit answer had hitherto been given to this question without the question itself ever being explicitly asked or answered. The implicit answer had been that the Union Parliament as a law-making body could be sufficiently defined by the enumeration of its elements (King, Senate, and House of Assembly) together with the assumption that these elements 'normally' functioned bicamerally, and by simple majority voting. Any different method of functioning, naturally appears, on this view as an 'extraordinary' process, fetter-

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1. Op.cit. p.43.

ing (or if less complex, easing) the work of the 'normal' body. But if the alternative rules of action are regarded as definitive of the Parliamentary body, the vocabulary of 'fetters' and 'absence of fetters' becomes inappropriate. One form of law making is no more 'normal' or 'unfettered' than the other. In this frame of argument, the procedure laid down in the entrenched sections becomes not a condition ~~binding~~ binding on Parliament, but part of what is meant by 'Parliament'. It is not sufficient on this view to define 'Parliament', simply by enumerating its elements. This only provides a description of its static structure. A definition of Parliament as a 'dynamic' body must include the rules (whatever they are) governing its mode or modes of operation. Accordingly:-

> 'Section 19[1] does not by enumerating the constituent elements of Parliament give a complete picture of the concept of the Union Parliament as a law-making body.'[2]

Such a picture will include the rules which provide for the functional distribution of power between the elements which together make up the sovereign whole. Sections 35,

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1. Section 19 of the South Africa Act vests the Legislative power of the Union in 'the Parliament of the Union.. which shall consist of the King, a Senate and a House of Assembly.'
2. Op.cit. p.7.

137, and 152[1] of the South Africa Act contain these rules; and it follows that:-

> 'the provisions of the entrenched sections do not involve a limitation upon the powers of the Union Parliament, but are part of the dynamic concept of that Parliament as a law-making body.'[2]

7

The significance of the foregoing contentions is difficult to overestimate. In the prolonged legal and Parliamentary battle which was about to break out, they were to provide the Opposition with its principal arsenal of dialectic. The Parliamentary engagement was not long delayed. Preliminary skirmishing between Government and Opposition had already taken place. At the opening of the 1951 session of the House of Assembly, the election of the Nationalist Party's nominee(Mr. J.H. Conradie) for the office of Speaker had been contested - a new departure in South African Parliamentary history. It had been argued by United Party members that Mr. Conradie would have to rule on the validity of the proposed franchise legislation when it came before the House, and that his decision could not be impartial, since he had already expressed his views on the matter as a private member. Mr. Conradie was, however

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1. Together with Section 63 which provides for a joint session of both Houses in case of deadlock.
2. Op.cit. p.47.

elected by 82 votes to 59.

On the 8th of March the Minister of Justice, Dr. Donges moved for leave to introduce a Bill to secure the separate representation of non-European voters in Cape Province and to amend the law relating to the registration of Parliamentary and Provincial Council voters in that Province. Mr. J.G.N. Strauss, leader of the United Party, accordingly, put his point of order to the Speaker, seeking from him a ruling as to:-

> 'Whether the proposed Bill does not, in terms of Section 35, and/or Section 152 of the South Africa Act, require to be passed by a joint sitting of both Houses of Parliament.'

- since its provisions:-

> '..seek to remove from the Register, persons registered as voters in the Cape of Good Hope and Natal, by reason of a disqualification based on race or colour, thereby infringing the provisions of subssection (2) of Section 35 of the South Africa Act, which said section cannot be amended or repealed save in the manner laid down in Section 152 of the South Africa Act...
> ...and whether, therefore, the motion for leave to introduce the Bill should not be disallowed.'[1]

In support of this contention, Mr. Strauss adduced the points made by Professor Cowen in his essay. Parliament was undoubtedly sovereign, but in order to exercise sovereignty,

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1. H.A.Deb. 8th March 1951

its elements must be assembled in accordance with the procedure prescribed in its constitution, the South Africa Act.

On the 10th April, Mr Speaker Conradie gave his ruling to the House. The Opposition's point he said, must fail. By the passing of the Statute of Westminster, the Parliament of the Union came to be recognised as the supreme and sovereign law-making body in the Union. It had by the Status Act of 1934, itself declared and asserted this fact. Constitutional authorities [1] had expressed the view that the disappearance of the bar contained in the Colonial Laws Validity Act had removed the inability of the Union Parliament to legislate repugnantly to the South Africa Act. If any doubt at all remained, as to the legal position, that doubt had been moved by the 1937 decision of the Appeal Court in Ndlwana's case, in which it had been laid down that the House as a sovereign body could decide upon its own procedure. The decision in Ndlwana's case had been noted in the Clerk's annual Report to the House in 1937, and must therefore be

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1. The Speaker cited K.C. Wheare, 'The Statute of Westminster (1933) p.108, Sir A.B. Keith, 'The Dominions as Sovereign States' (1938) p.177n, 'The Governments of the British Empire' (1935) p.47; Sir Ivor Jennings and C.M. Young 'Constitutional Laws of the British Empire'. (1937) p.265; W.P.M. Kennedy & H.J. Schlosberg, 'The Law and Custom of the South African Constitution' (1935) p.100; K.C. Wheare 'The Statute of Westminster and Dominion Status' (1949 ed) p.247; H.J. May, 'The South African Constitution' (1949) pp.26, 33; E.C.S. Wade, Introduction to Dicey's 'Law of the Constitution' (9th ed.) p.li; R.S. Welsh, 'Commercial Law Reporter', (Nov.1948) pp.671-2; E. Kahn, 'Annual Survey of South African Law' (1948) p.9 (75 H.Ass.Deb. cols 4201-4219)

assumed to have corrected the opinion given in 1934, by Mr. Speaker Jansen, that the entrenched sections remained binding on Parliament. The assurances given by both Houses in 1931 as to the continuing validity of Sections 35, 137 and 152 must be regarded as merely a statement of the view of the government of the day, and not as a precedent binding on the Speaker. Such a resolution could be reversed by a similar resolution at any time, and would be implicitly reversed by the House if it decided on a vote to give leave for the proposed Bill to be introduced. The Government's motion could not, therefore, for these reasons, be ruled out of order.[1]

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1. This ruling was the subject of a dissenting report tabled in the Senate on May 18th 1951 by Mr. A.J. Piennaar, one of the Parliamentary Draughtsmen. The report asserted that the provisions regulating legislative action in the South Africa Act were not mere matters of procedure, but 'a fundamental and continuing part of the constitution'; and that it would be competent for the courts to consider whether a Bill such as that envisaged, did in fact, if passed bicamerally, constitute an Act of Parliament. ...For..'In order to function as Parliament, and make effective laws, it' (Parliament) 'must be constituted and function according to the law from which it derives its authority - the South Africa Act; and for the purposes of this Bill, Sections 35 and 152 are still of force and effect'.
   The President of the Senate, however, giving his ruling on the point on 24th May followed that given by the Speaker in the House.

The debate on the Government's motion for leave to introduce a Separate Representation Bill [1] opened on the 16th April. The Opposition proposed the amendment that:-

'this House declines to consider, otherwise than at a Joint Sitting of both Houses of Parliament the Bill for separate representation of Europeans and non-Europeans, which in its opinion constitutes a breach of the rights safeguarded by entrenchment at the time of Union because, inter alia -

(a) it is subversive of the solemn compact which led to the establishment of Union on the understanding and in the belief that the safeguards therein provided would be scrupulously preserved.

(b) it is a repudiation of the pledges and assurances given by the leaders of the people that the safeguards of the constitution would be steadfastly maintained.

(c) it is a breach of a moral obligation which is calculated to bring the good name and honour of South Africa into disrepute and to create misgivings both at home and abroad as to the stability of our political institutions; and

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1. The motion was for leave to introduce a Separate Representation of Europeans and non-Europeans Bill. The title later adopted was the Separate Representation of Voters Bill.

(d) it is in conflict with the resolutions of both Houses of Parliament adopted on 22nd April and on 8th May 1931 to the effect that nothing contained in the Statute of Westminster should derogate from the provisions of the entrenched sections of the South Africa Act.[1]

The Government's sttitude towards the entrenched clauses was defended at some length in the debate which followed Mr. Strauss' moving of the amendment, by the Prime Minister and by Dr. D.G. Conradie (Deputy Speaker of the House of Assembly). The question of the entrenched clauses was, Dr. Conradie asserted, 'exclusively a legal question'. They were not based on what General Hertzog or any other statesman had said:-

> 'They are based on the actual wording of the South Africa Act, as a matter of fact on the wording of Section 35 of that Act. We have here the legal position which you Mr. Speaker have put to us. I fully concur with you.. When the South Africa Act was passed, there was not the slightest doubt that those constitutional rights existed and were recognised. We have consulted a whole series of regulations and Acts and after we had interpreted them properly, we arrived at the conclusion that this entrenchment no longer exists. It means that there has been an evolution, that a change has come about in our legal system. Who brought about that change? This Parliament has not brought it about, this Parliament did not make those changes. The actor who played the principal role in the evolution of the Act as far as this point is concerned, is Great Britain herself. Our jurists studied the resolution and Acts passed by

1. 75 H.Ass.Deb. cols.4466-7 (16th April 1951)

> Great Britain, and as a result of their findings and interpretations they arrived at the altered legal position which we recognise today in connection with this matter. Not even the highly extolled and much lauded amendment of General Smuts in 1931 had anything to do with this matter. It was transmitted together with the resolution and nothing came of it.[1]

The moral aspects of the Government's reliance upon the unbounded sovereignty of Parliament, were, of course heavily underlined by the Opposition. Mrs. Ballinger, speaking 'as an ordinary citizen of the country' declared, for example, that:-

> 'Whatever the legal argument may be, whatever the rights of the case are in that regard, the people of South Africa, until the last few months, believed that they had a Constitution. ...And they were in very good company, I may say. General Hertzog also believed that we had a constitution and that the South Africa Act was that Constitution.
> ...General Hertzog said he believed in the Constitution. And he had very good reasons for not believing in it. He was anxious to get his Native legislation on the Statute Book...But he waited for ten years in spite of the Statute of Westminster, and in spite of the Status Act.'[2]

The Minister of the Interior, went on Mrs. Ballinger, had claimed that the Union Parliament was now founded on the same basis as the British Parliament. But:-

> 'If we have not got a Constitution, if we are assuming, as we all seem to be assuming in a broad general fashion that Parliament is sovereign, we are also

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1. Cols.4627-8
2. Cols.4636, 4638

> assuming..that our Constitution is completely elastic, and that we can do what we like. But the assumption of that is that we are building up our political life, our constitutional life in the way in which the British Parliament has built up its constitutional life, that we are building it up on precedents and conventions and established forms. But are we?

Mr. Strauss, in his attack on the Governments attitude to the guarantees given in 1931, used his Hansard to some effect. The entrenched clauses, said the the Leader of the Opposition had been placed in the Act of Union in the belief and on the understanding that they would be honoured for ever by succeeding Parliaments and succeeding statesmen. General Smuts the late leader of the United Party, and one of the last survivors of those present at the National Convention of 1908, had dealt in 1949 with the question of entrenchment and the intentions of the authors of the Constitution. Moving a vote of no confidence in the Government, based on its intended step of proceeding in violation of the entrenched clauses, he had said:-[1]

> 'The question is, Why did we bind the future? Why should one generation bind the future? The House will see that was the very object..The whole object was to bind the future, and the statesmen at the National Convention had this very situation before them, a situation such as we have today'.[2]

In 1931, when Parliament had requested the passage of the Statute of Westminster, General Hertzog had said in the

1. 66 H.Ass.Deb. Col.67 (1949)
2. (Strauss) 75 H.Ass.Deb. Col.4469 (1951)

House of Assembly:-

> 'I may say here that the leader of the Opposition, General Smuts, came to see me this afternoon and asked how far, if it were passed, the so-called entrenched articles in our Act of Union would cease to be entrenched... I have gone into the matter and it is very clear to me that it cannot affect the entrenched articles of the Constitution in the least. It is very clear, because all that will be done here if the Act is passed by the British Parliament, is that the British Parliament in future will cease to be a legislative influence or authority in South Africa. It cannot affect our Constitution in the least.'[1]

That view had been adopted by members of the present Government. In the 1931 debate, the present Minister of Justice (the hon. C.R. Swart) had said:-

> 'We feel that the entrenched clauses are a matter of good faith, and I cannot imagine that any government would alter them by a bare majority'.

The Prime Minister, continued Mr. Strauss, had a habit of getting up and saying that the entrenched clauses were not freely placed in the Constitution, but inserted under pressure of British influence. On this point he would call the late Dr. N.J. Van der Merwe leader of the Nationalist Party in the Free State in 1931. His opinion was that:-

> 'Our Constitution was drawn up by representatives of the people delegated for that purpose..but as it has the value of an honourable agreement on the basis of which Union came about, it does not only bear the stamp of the British Parliament..it has greater significance: That on our Constitution is placed the honour of the seal of the people of South Africa. ..Therefore

1. (Strauss) Ibid. cols.4470-1

> our Constitution means more to us than an ordinary Act, and if we are going so far as to alter our Constitution in a manner different from that provided in 1909 and 1910, because the imprimatur of the British Parliament does not any longer rest upon it, then we should consider this as a sort of breach of faith'.

When the Statute of Westminster came to be debated at Westminster, it was the unanimous acceptance of this point of view in the Union and the assurances given by its Government which had prevented the insertion in the Statute of a clause which would have placed the matter beyond doubt.[1]

Nationalist Party Speakers showed some impatience under this assault by quotation. 'Today', declared Mr. Van den Berg, 'we have the position that we have adopted a policy which is today the public policy of our country, the doctrine of apartheid, and how can anyone expect that apartheid will gradually materialise if you are not prepared to do it in the political field'?

> '...How can one expect that, if you want to curb perpetually the future political development of South Africa..because Mr. So and so one day stated certain things? Is that our calling? Or are we called upon to govern the people to the best of our abilities, for the welfare of all sections of the country?'[2]

The moral implications of a changing political situation were developed in greater detail by the Rev. Van Schoor. It was true that a promise or contract was sacred and that those

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1. 75 H.Ass.Deb. cols.4469-73
2. Ibid col.4519

who broke them committed a breach of faith and an immoral act. But this was only one side of the question. Absolute truth was not the truth unless it had two sides. It was, for example a sacred duty to keep a promise made to the Lord or to a fellow human being. But if some time after that promise had been made, it was found to be in conflict with the will of the Almighty, then it became not a breach of faith but a moral duty to break that promise. The promises incorporated in the entrenched clauses were not freely adopted and had very little value at the present time. Circumstances had changed. A British Colony had become a Dominion; the Dominion had become a free country, which in turn had become a sovereign state with full powers to pass or amend its own laws by a bare majority. On May 26th 1948, the Nationalist Party was called on to undertake a higher duty. They were conscious and convinced of the will of the Lord in this matter, and it was therefore, for the sake of this and future generations that they were violating the entrenched clauses without becoming guilty of a breach of faith or an immoral act.[1]

The Minister of the Interior, also, although not venturing to claim divine acquiescence in the bicameral passage of the Separate Representation of Voters Act, asserted the right

1. Ibid. cols. 5467-8

of the Nationalist Party to carry out the mandate it had received whatever its policy might have been in the past. The Opposition, he thought, had been guilty of an alarming confusion of thought on the moral issue. Analysis of speeches made by the hon. members opposite showed that the issue had been interpreted in at least five different senses, two of them relating to the method and procedure of the Bill, and three to its principle and contents. In relation to the method of the proposed legislation, the charges were that it was contrary to section 35 of the Constitution, and inconsistent with certain pledges given in 1931. These were question-begging charges and dependent on the proof (which had not been given) that the Bill actually did fall within the mischief contemplated by Section 35. In relation to the substance of the matter, the Opposition had argued that the principle of separate representation itself was immoral and unfair. It had also been argued that the Bill, although not a breach of Section 35, was immoral as being a diminution of the rights of the Coloured people. The Nationalist Party accepted neither of these assertions. Finally, it had been argued that the contents of the Bill were immoral since they represented the fruits of a change in party policy. That there had been a change of policy since 1929 had never been

denied, and indeed had been frankly admitted by the Prime Minister. The Opposition was claiming that party policy should be sacrosanct and immutable no matter how the interests and needs of the country might have altered. Was it practicable? - Was it statesmanship?- to attempt to claim for a party's policy the immutability of the laws of the Medes and Persians.[1] On the legal side, at least, one proposition could be laid down without question, namely that Parliament possessed the sovereign's absolute juridical right to alter any clause of the South Africa Act by a bare majority, in the way that it altered any other Act.[2]

The opposition, despite its protests, did not, Government supporters alleged, accept the unqualified sovereignty of the Union Parliament. Entrenchment itself was incompatible with legal sovereignty. Opposing the motion for leave to introduce the Bill on the 16th April Mr. Strauss had declared that:-

> 'The United Party..will fight this Bill inch by inch and all the way. It will fight it not only in this Parliament by every legitimate means at its disposal, but should the fight of the United Party not prevail in this House, that fight will be carried on in the law courts of this country. And if it should happen that the United Party does not prevail in its fight in the law courts, if it should be held by the highest court in this land that the entrenched clauses are no longer in full force and effect, then the United Party

1. Ibid cols. 5688-93
2. Ibid cols. 5697

> will make it its business to see to it that a new entrenchment will take place of these fundamental provisions in our Constitution'.[1]

In the course of the second reading debate, Mr. Strauss again asserted that when the United Party was returned to power it would 'take the necessary steps to entrench in a new Bill of rights in the Constitution, the fundamental liberties of the people of South Africa'.[2] Both the Prime Minister and the Minister of Lands (the Hon. J.G. Strydom) ridiculed the notion that Parliament could with any effect 'solemnly pass a Bill of Rights as was done in the early days in an historical period of England's past'.[3] The Leader of the Opposition, said the latter, was proclaiming a new doctrine. He wanted to change the Constitution and introduce a 'Bill of Rights' which would rank above the sovereignty of Parliament. This could not be done without rejecting the sovereignty of people and Parliament. How could a Bill of Rights be entrenched? It had been said that a National Convention would be necessary. But what one Convention could do, another could undo. Where then was the entrenchment?

Mr. Russell attempted to set right what he termed a 'masterly political distortion' of Mr. Strauss' proposal.

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1. Ibid col. 4488
2. Col. 5417
3. Cols. 5515-6

The Union Parliament was and would remain, he said, a free and sovereign Parliament. But a sovereign Parliament could and should where necessary bind itself to observe entrenchments, safeguards and procedures without any loss of its sovereign status. What the United Party proposed to do was to safeguard franchise and language rights and also certain fundamental liberties, within the framework of the law.[1]

This, in the eyes of the Minister of the Interior was a 'half baked scheme', 'conceived in haste, and born in desperation'. How was the United Party going to meet the constitutional difficulties in the way of implementing their idea?:-

The MINISTER OF THE INTERIOR: ..I would like the hon. member to tell us, if he thinks this Bill of Rights can be embodied in an ordinary Act of Parliament, does he think that it can be done by an ordinary majority, or will he require a two thirds majority for that?...My submission is that a Bill of this nature cannot be introduced by an ordinary Act of Parliament, for the simple reason that no Parliament can bind its successors. If the object is to have an entrenchment which will be secure for all time, an ordinary Act of Parliament will not fill the bill.

Mr. BARLOW: We know that.

The MINISTER OF THE INTERIOR: You know that? There is a sensible answer. ..We are progressing. A new National Convention is then the only other way, apparently if this sovereign Parliament cannot legislate to introduce a Bill of Rights of this nature. I take it then that the other alternative would be a new National Convention. No new National

1. Col. 5610

Convention can proclaim a new constitution until the existing Constitution has been repealed.

HON. MEMBERS: It has been.

Mr. SPEAKER: Order, order!

The MINISTER OF THE INTERIOR: While this present sovereign Parliament is in existence there cannot be called into existence another sovereign legislature competing in legislative powers simultaneously. So in order to get this National Convention, it will therefore be necessary, constitutionally necessary for hon. members on the other side to abolish Parliament first in order to create the necessary constitutional vacuum into which the new Convention can proclaim a new Constitution.

Mr. BARLOW: Is that how you are going to do the Republic?

Mr. SPEAKER: Order, order!

The rights which were to be entrenched, continued the Minister were all to be entrenched 'subject to the law of the land'. This proviso made the entrenchment worthless because the law of the land could be altered in the ordinary way by Parliament. On the other hand, if the proviso were omitted, the provisions to be enshrined in the Bill of Rights were dangerous and politically retrograde. The scheme proposed by the United Party sought to entrench, for example, South Africa's membership of the Commonwealth. This would be to abolish the country's freedom of choice and to put South Africa into a perpetual constitutional straitjacket whatever its future interests might be.[1]

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1. Cols.5701-5

Mr. Strauss, in his turn, expressed his amazement at the constitutional propositions laid down by the Minister of the Interior. It was absolutely untrue that the United Party was attempting to put South Africa into a constitutional straitjacket. Entrenchment was not unchangeability. The Prime Minister had himself recently said in the House that it was not his policy to declare a Republic by a bare Parliamentary majority. As to the Minister's implications about a constitutional vacuum, he (Mr. Strauss) had never heard such an unfounded argument from a lawyer in the whole of his life. Laws were repealed in Parliament every day, and new laws passed to take their place ...

Mr. STRAUSS: ..There is never any need for a constitutional vacuum because we make provision that as soon as old laws are repealed, then at the same time that the one law disappears, the new law takes its place.

The MINISTER OF THE INTERIOR: Is the Constitution then the same as an ordinary law?

Mr. STRAUSS: My hon. friend still refuses to see how mistaken he is.

The MINISTER OF THE INTERIOR: I am only asking.

Mr. STRAUSS: Well, I can very easily put my hon. friend right. I don't think I am called upon today to give my hon. friend a lecture in constitutional law, but I do think that my hon. friend will find if he studies the constitutions of other countries, that it is sheer nonsense to talk about a constitutional vacuum.

Mr. H.T. VAN G. BECKER: They are all republics.

Mr. STRAUSS: Yes, and I will give him a republic as an example. I will give the example of the Republic of Ireland. It is recorded -

> The Constitution come into force on December 29th, 1937..on the same day as the repeal of the Irish Free State Constitution took effect in accordance with the provisions of Article 48

The Republic of Ireland had no difficulty at all in doing this, and there will not be the slightest difficulty for South Africa to do it.

Dr. FRIEDMAN: The vacuum is in a different place.

Mr. STRAUSS: Yes, the vacuum is in a different place. For the sake of courtesy I won't say where it is, but it is in a different place.

I want to mention a few fundamental propositions here, which I hope all sides of the House will accept..because they relate to the whole question of the competence of a Parliament, if it is in a sovereign independent country, to set up its own Constitution, and the first fundamental proposition which I want to mention is this, that the Union of South Africa is a sovereign independent democratic state, therefore it can set up its own Constitution. Secondly, that it is the essence of democracy that that the will of the people, when it has been clearly expressed will be carried out by its government...

An HON.MEMBER: That is what we are doing now.

Mr. STRAUSS: ...And in the third place, that the sovereignty of Parliament shall contain this, that Parliament is free in every respect to act on behalf of the people, but this does not prevent the people from defining expressly the nature and the functions of Parliament in a properly formulated written Constitution, and that the Constitution consequently is the supreme law of the country.

...It is quite clear from what I have already said that the hon. the Minister of the Interior was entirely wrong in the way he tried the other day to dismiss the United Party's proposal. ..I ask him to look at the Constitution of the Fourth Republic of France. ..Proper entrenchments are set up in that Constitution and there is not the slightest doubt

that such entrenchments can be set up. I therefore say, with all the seriousness that is in me, that there is not the slightest doubt that we have the rights as a sovereign state, and that we have the right as a sovereign people to place entrenchments in our Constitution, and that we have the right to place such a Bill of Rights in our Constitution. I say with all emphasis that not only can it be done, but I say in the interest of South Africa that it must and will be done.[1]

The leader of the Opposition, in his speech opposing the motion for the third Reading of the Bill, also made much of what he took to be indirect threats made by the Prime Minister, against the Supreme Court. In the previous year, Appeals to the Privy Council in England had been deliberately abolished, and the Supreme Court made the final Court of Appeal for South Africa. ...

Mr. STRAUSS: And now Mr. Speaker, after that step has been taken, the Prime Minister comes here and makes a statement in this House..in which he indirectly makes a threat against the Supreme Court of South Africa. I just want to put the position. I don't want to put it too high, but he says very clearly -

> If the courts decide to declare this Act of Parliament - if it becomes an Act of Parliament, as we hope it will - invalid, then it is self-evident that it would be a serious matter for Parliament and for the country.[2]

He spoke about a crisis, and he said -

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1. Cols.6546-6549
2. The speech here referred to was made by the Prime Minister on the 17th April 1951. After the passage cited by Mr. Strauss he had continued:- '..It would mean the undermining of Parliament's sovereignty; it would mean that the judicial authority would assume powers belonging exclusively to the legislature'. (75 H.Ass.Deb. col.4584)

I hope that no crisis of that nature will arise in the Union of South Africa.

The MINISTER OF JUSTICE: We all hope so.

Mr. STRAUSS: I hope that the hon. Minister of Justice will give me a chance.

The MINISTER OF JUSTICE: I am speaking to the Prime Minister.

Mr. SPEAKER: Order, order! I must ask hon. members to listen silently to the Leader of the Opposition.

Mr. STRAUSS: You see that exactly is the trouble. I want to ask the Prime Minister a question, and I hope my hon. friend will not disturb me so that I may do so. I want to know from the Prime Minister exactly what he meant by the remark he made the other day. I want to know exactly where this Government stands in relation to the Supreme Court of South Africa. I want to put this question pertinently to my hon. friend the Prime Minister. Say we go to the Supreme Court with this matter; if the Supreme Court gives judgement and that judgement goes against the Government's attitude, and if that judgement states that our Constitution has been violated in this case and that the law is not valid, then the Prime Minister must tell the country whether he is going to accept that finding or not. I think the country is entitled to have a reply to that question.

Hon. MEMBERS: Hush, hush, hush.

Mr. STRAUSS: Mr. Speaker, I don't know what is going on.

Mr. SPEAKER: Order, order! The hon. member must proceed.

Mr. STRAUSS: I am quite prepared to proceed. ...We in this country have so far been in this position that the Supreme Court has been a guarantee of the liberty of the individual, and we have so far been in this position that no government has ever threatened the Supreme Court of South Africa that it must follow one course or another. As my hon. friend knows, a similar case was recently referred to the Supreme Court.

The PRIME MINISTER: The Supreme Court has not taken unto

itself the right of testing our laws.

Mr. STRAUSS: I will come to that point..We have had the case of Ndlwana v. Hofmeyr, and the issue there was about the same kind of constitutional question which we are going to take to the Supreme Court if this Bill is passed. ..The Prime Minister's decision - I mention this as a fact-is largely based on the judgement in the case of Ndlwana v. Hofmeyr. I think that the country wants to know, and the people want to know, if we have a case of Ndlwana v. Donges, whether the finding will be accepted by the Government if that finding goes against the Government, and not in favour of the Government. I think it is essential that we should know beforehand.

The MINISTER OF THE INTERIOR: Did you people accept the judgement in the case of Ndlwana v. Hofmeyr?

Mr. STRAUSS: We did not threaten the Supreme Court and we never told the Supreme Court that it did not have the right to give that judgement, and I only want to know whether it is the Government's point of view - according to the Government's interpretation - that the Supreme Court in future will not have the right to give the kind of judgement which was given in the case of Ndlwana v. Hofmeyr. That case cannot be evaded. The Prime Minister cannot come here with a threat and then try to evade the issue and leave it where he put it.

The PRIME MINISTER: I was very clear.

Mr. STRAUSS: My point is that the Prime Minister must be clear

The PRIME MINISTER: I was sufficiently clear.

Mr. STRAUSS: No, the hon. Prime Minister was not at all clear. All we have at this stage is a threat against the Court, but I think the Prime Minister will have to tell us what the Government's attitude is going to be if this legislation falls down, as it may do if it comes before the Supreme Court of South Africa.[1]

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1. Cols. 6538-41.

The question of the Government's attitude to an adverse decision of the Supreme Court had already been raised by Opposition speakers, from the earliest stages of the debate. Dr. Jonkers, for example, had said (at the Report stage):-

> 'The Prime Minister had in anticipation, used threatening language against the law courts. I want to give him the assurance that the courts will not take the slightest notice of those words.

The verdict of the Court, he continued, might be either for or against the validity of the proposed legislation. But:-

> '..I want this Government rather to reconsider the matter, even at this late stage and before the guillotine falls within a few moments. The Government will land our country in such misery as it has never known before. If it is found that this Parliament has gone beyond the bounds of its own Constitution what is the Government going to do? Are they going to abolish the Court of Appeal? Are they going to have another election? Or will they simply carry on as if no verdict had been given by the Court of Appeal?'[1]

In such an atmosphere of threat and counter threat, the Bill received its three readings with narrow Government majorities, after more than eighty hours of debate in the House of Assembly. On the 15th June, the Royal assent was signified by the Governor General, and the Act promulgated as No. 46 of 1951. The title declared it to be:-

> 'An Act to make provision for the Separate Representation in Parliament, and in the provincial council of

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1. Cols. 6526-6527. c.f. Mr. Lawrence 17th April 1951. (75.H. Ass.Deb. col. 4602)

the Cape of Good Hope of Europeans and non-Europeans in that province, and to that end to amend the law relating to the registration of Europeans and non-Europeans as voters for Parliament and for the said provincial council; to amend the law relating to the registration of non-Europeans and natives in the province of Natal as voters for Parliament and for the provincial council of Natal; to establish board for Coloured Affairs; and to provide for matters incidental thereto'

By Section 6 of the Act, Cape Province was to be divided into four Union, and two provincial electoral divisions. In each division there was to be drawn up (Section 2) separate voting lists for coloured persons,[1] who were to be removed from the old common voters roll. Each of these divisions was to elect one representative to the House of Assembly. The voters' lists for the election of the main body of members were to contain only the names of white, or European voters as defined.

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In the course of the debates on the Separate Representation Bill, the Opposition had made it plain that if the

1. 'Coloured' or 'non-European' is defined by Section 1, as any person 'who is not a white person, and who is not a native for the purposes of the Representation of Natives Act 1936. 'White person' is defined as 'a person who in appearance obviously is, or is generally accepted as a white person, but does not include a person who although in appearance obviously a white person, is generally accepted as a non-European.'

measure was to be forced through, by application of the closure its validity would be contested outside Parliament by every political and legal means. The threat was quickly put into practice. On the 29th August, an application was filed with the Cape Supreme Court in the names of Ganief Harris, Edgar Franklin, William Daniel Collins, and Arthur Deane, four non-Europeans registered as voters in the Cape of Good Hope, seeking a declaration that Act 46 of 1951 was 'invalid, null and void, and of no legal force and effect, by reason of the provisions of Sections 35 and 152 of the South Africa Act 1909 as amended.' This application was considered by the court (De Villiers, Newton Thompson, and Steyn J.J.) in the following October, and dismissed. The court was, said Judge President De Villiers bound by the 1937 decision of the Appellate Division in Ndlwana v. Hofmeyr. This decision conflicted with the decision in Rex v. Ndobe (1930). Nevertheless only the Appeal Court could give a final decision in the matter, and answer the questions now raised, namely the effect of the passage of the Statute of Westminster, and the true meaning in South Africa of the term 'Parliament'.[1] An application for review of this order was immediately filed by Harris and his co-appellants, and the politico-legal puzzle of sovereignty (in a significantly

1. Reported in A.D.1951 (4) at p.707

different shape) lay once more squarely before the highest judicial authority in the Union.

CHAPTER FIVE

Harris v. Dönges [1]

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The judgement of the Appellate Division (Centlivres C.J., Greenberg, Schreiner, Van den Heever, and Hoexter J.J.) was delivered on March 20th 1952. It was to the effect that Act 46 was of no legal force, and that consequently, the order made by the Provincial Division must be reviewed and the coloured voters' application granted. The decision is worthy of examination.

Setting out the reasons for the conclusion reached by the Court, the Chief Justice stated that the appeal raised 'a constitutional question of the very greatest importance, namely, whether..the entrenched clauses of the South Africa Act 1909 are, in view of the passing of the Statute of Westminster..still entrenched, or whether Parliament, sitting

1. (1952) 1 T.L.R. 1245. Reported as Harris and Others v. Minister of the Interior and Another, at 1952 (2) S.A. 429 (A.D.) All page references are to the former report.
The text of the Court's decision as delivered by the Chief Justice was also reprinted and published in pamphlet form by The Friend Newspaper of Bloemfontein.

bicamerally, is free, by a bare majority in each House, to amend any section of the Constitution'.[1] The court below had drawn attention to the judgement of the Appeal Court in Ndlwana's case as being authority on this point. Stare decisis would seem to indicate that this decision should be followed. It was true, said the Chief Justice, that a decision of the court on a point of law should, in general, be adhered to. As had been said in Bloemfontein Town Council v. Richter,[2] 'Unless a decision has been arrived at on some manifest oversight or misunderstanding..a subsequently constituted court has no right to prefer its own reasoning to that of its predecessors. Such preference, if allowed, would produce endless uncertainty and confusion'. But although stare decisis was 'a good rule to follow', 'Where a court is satisfied that its previous decision was wrong, and more particularly where the point was not argued, then.. it is not only competent for the court, but it is its duty in such a case, not to abide by its previous decision but to overrule it'. (Rex. v. Faithful and Gray)[3]. The Privy Council, it might be noted, did not consider itself bound by its own decisions, and the contrary doctrine adopted by

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the House of Lords [1] was 'far removed from the practice of Roman Dutch law'. 'My conclusion is', continued the Chief Justice, 'that this court is bound to consider any reasons that may be advanced to show that its previous decision in Ndlwana's case was wrong'.[2]

Two preliminary contentions had, however, first to be disposed of. It had been asserted, as part of the respondents' argument, that Act 46 was not an Act which 'disqualified' coloured voters within the meaning of Section 35 of the South Africa Act. This had been asserted on the ground that the Act did not prejudice any such voters in the exercise of franchise rights, but provided an alternative and more generous form of representation.[3] But, in destroying the existing electoral register in favour of two new registers, drawn up on the basis of a colour qualification, the Act could be re-

1. In London Street Tramway Co. v. L.C.C. (1898) A.C.375, it was said that 'A decision of this House upon a question of law is conclusive, and..nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgement of this House.' (per Lord Halsbury, p.381)
2. (1952) 1 T.L.R.1250
3. It had been contended also by the Government that Act 46 did not disqualify any person from appearing on the register. It merely allocated him to a particular division of it. The Act provided for the use of the existing register to secure elections to the new native constituencies, and as there was nothing in the South Africa Act entrenching the law relating to electoral divisions, such divisions were alterable by normal bicameral procedure in the Union Parliament.

garded as disqualificatory both of Europeans and non-Europeans (since it prevented both from appearing on the common register). Moreover, Section 55 contained 'a guarantee of defined rights, not of their equivalents'.[1] The contention, therefore, that the Act was not disqualificatory, could not stand.

The second preliminary point to be made, was that the court in cases such as the present one, did not lay itself open to the charge of 'controlling the Legislature'. It was merely discharging its duty to declare and apply the law. (This, of course, was a point of rhetoric rather than of logic, since the precise area and meaning of "a duty to apply the law" is what is in issue when charges of judicial invasion of the legislative sphere are made)

The Chief Justice now proceeded to examine the Respondents' claim that the Statute of Westminster had destroyed the special status of the entrenched sections of the South Africa Act. In order to ascertain the construction to be put upon the Statute of Westminster, it was, he said, legitimate to consider (on the principles laid down in Heydon's case) the state of the law prior to the Statute and the mischief which the Statute was intended to remedy. As could be seen from the Imperial Conferences of 1926 and 1930, whose Reports had pre-

1. Loc.cit.p.1251

ceded the drafting of the Statute,[1] the paramount mischief for which legislative remedy was sought was that the Dominions were not, in law, autonomous communities. The passage of the Statute had supplied the remedy by removing the disabilities which underlay this situation, namely the supremacy of the Imperial Parliament, and the inability of Dominion legislatures to legislate with extra-territorial effect. There had, however, been no express repeal of the entrenched sections of the South Africa Act, and no intention to authorize repeal of those sections by implication. It was true that the Statute had conferred additional powers (i.e. powers to legislate extra-territorially, and repugnantly to Imperial legislation) on the Union Parliament; but no additional powers had been conferred to amend the South Africa Act, since these powers already existed. In 1931, 'there was no section of the South Africa Act which could not be repealed or amended by the Union Parliament, sitting either bicamerally or

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1. 'In order to understand the reasons for passing a constitutional act like the Statute of Westminster, it is permissible to refer to the events which led up to such Act being passed. Those events may throw a light on the meaning of the Statute of Westminster'. (Loc.cit.p.1255) Besides the Imperial Conference Reports, the Chief Justice cited the declaration on the status of the entrenched sections made by the House of Assembly in its Resolution of 1931.)

unicameraly in accordance with the requirements of the Act.'[1] This fact had been noted in 1929 in the Report of the Conference on the Operation of Dominion Legislation.[2]

Section 2 of the Statute of Westminster had ended the application of the Colonial Laws Validity Act to laws made by a Dominion, and had enacted that the powers of a Dominion Parliament should include the power to repeal or amend any existing or future Act of the United Kingdom Parliament in so far as such an Act was part of the law of the Dominion. It had been contended for the Government by Beyers C.C. that since the South Africa Act was just such an Act, it could be repealed, together with its entrenched provisions, either

1. Loc.cit.p.1255. It had been suggested in Rex v. Ndobe (1930) A.D.484 that this was not so, and that Section 35 (2) contained an absolute prohibition of removal from the register on grounds of race, or colour. Removal of the guarantee even by two thirds bicameral majority would thus be invalid. 'Under Section 59 of the South Africa Act, Parliament has full powers to make laws for the peace order and good government of the Union, but that section cannot be invoked to enlarge its powers under Section 35.' (per Villiers C.J. at pp.492-493). It is difficult to see the force of this contention, as Section 35 is not excluded from the power of constitutional amendment given under Section 152.
2. 'The Constitutions of both countries' (i.e. those of South Africa and the Irish Free State)..'include complete legal powers of constitutional amendment. In the case of the Union of South Africa the exercise of these powers is conditioned only by the provisions of Section 152 of the South Africa Act 1909'. (Para.67 Cmd.3479) It should be noted that this is rather different from Centlivres formulation. It does not mention the Parliament of the Union, but says merely that the constitution includes complete powers of constitutional amendment. This statement is neutral as between the assertions (a) that constitutional revision is within the competence of the normal legislative body, and (b) that some revisions require special Parliamentary, or extra-Parliamentary procedures.

either explicitly or impliedly by subsequent legislation. The Union Parliament was in a similar position to the Imperial Parliament with respect to the South African constitution. The entrenched provisions in that constitution were therefore, as had been said in Ndlwana's case, at its mercy. It could abrogate or disregard them by the same simple majority legislation as could the United Kingdom Parliament. As the recipient of sovereignty in South Africa it could not be bound as to the nature of its legislative activity.

These implications were categorically rejected by the Court. The removal of the Colonial Laws Validity Act it was held had in no way affected the power of constitutional amendment in the Union. That Act, before the passage of the Statute of Westminster, had had no application to amendment of the South Africa Act. It did not prevent amendment in a sense repugnant to Imperial legislation since a repugnancy of this sort was authorized by the South Africa Act itself - a later statute than the Colonial Laws Validity Act.[1] The

1. But c.f. a remark of Dixon J. on this point in Attorney General for New South Wales v. Trethowan (1931) 44 C.L.R. 394 at p.404:- 'I think the result now is that sec. 3 (of the Colonial Laws Validity Act) applies to the Commonwealth Constitution, and the Commonwealth Constitution is not to be treated as a later inconsistent law. ..There has been a judicial tendency to say that the Colonial Laws Validity Act does apply generally to all present and future constitutions, and you are not to treat the fact that the Constitution is later in point of date as militating against the conclusion that it applies to the Constitution.'

expression 'Parliament' in the Statute of Westminster must mean Parliament as defined by the law of the Union. Here some important passages of the judgement must be quoted in full.

> 'It is clear', said Chief Justice Centlivres, that when it' (that Statute) 'refers to a law made by a Dominion such law means in relation to South Africa, a law made by the Union Parliament functioning either bicamerally or unicamerally in accordance with the requirements of the South Africa Act. The reference was not only to Parliament sitting bicamerally.'
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> The object of the Statute was (he went on)..to give the Union Parliament a power which it did not possess prior to the Statute of Westminster. But prior to that Statute the Union Parliament had full powers to amend the South Africa Act. It is true that the Union Parliament sitting bicamerally did not have full power to do so, in that the entrenched clauses could be amended only by Parliament sitting unicamerally, and by a two thirds majority. But there is nothing in..subsection 2 of Section 2 of the Statute of Westminster..to justify the inference that there was any intention to repeal or modify the provisions of Section 152 of the South Africa Act. There is nothing to prevent the two provisions standing together. The words 'Parliament of a Dominion' in the Statute of Westminster, must, in my opinion, be read, in relation to the Union, in the light of the South Africa Act. ...<u>In my opinion, one is doing no violence to language when one regards the word 'Parliament' as meaning Parliament sitting either bicamerally or unicamerally in accordance with the requirements of the South Africa Act.</u>
>
> ...When this was put to Mr. Beyers, during the course of the argument, he..contended that the Statute of Westminster gives the Union Parliament the option of sitting either bicamerally or unicamerally, whether the subject matter of the legislation falls within the entrenched clauses of the South Africa Act or not. If this contention were sound, it would follow that the Statute of Westminster had, by mere implication, effected a radical alteration of our constitution.

> ...I find it impossible to uphold the implications Mr. Boyer's contention, namely that after the passing of the Statute of Westminster, the Union found itself with a Constitution which had been radically altered.
> ...The South Africa Act, the terms and conditions of which were, as its preamble shows, agreed to by the respective Parliaments of the four original colonies, created the Parliament of the Union. It is that Act and not the Statute of Westminster which prescribes the manner in which the constituent elements of Parliament must function for the purpose of passing legislation. While the Statute of Westminster confers further powers on the Parliament of the Union, it in no way prescribes how that Parliament must function in exercising those powers'.[1]

Counsel for the Government had argued that the first part of sub-section 2 of Section 2 of the Statute of Westminster (enacting that no Dominion law should be void on the ground of repugnancy to Imperial law) was sufficient for his purpose but that the same conclusion could be reached by a consideration of the second part of this subsection (to the effect that the power of a Dominion Parliament should include the power to repeal existing or future United Kingdom legislation). But, said Centlivres C.J., these concluding words could not be considered as carrying the matter any further, 'once it is clear that 'parliament' means Parliament functioning in accordance with the South Africa Act.'[2] This, in short, was the Court's basic answer to every contention put forward by the respondents. All the sovereign powers which were

1. (1952) 1 T.L.R. 1257, 1258, 1259.
2. Loc.cit.p.1259

relied upon in the latter's argument, were admitted to belong to the Union Parliament, but only to the Union Parliament as defined in the South Africa Act; and the 'restrictions' on Parliamentary action in that Act were to be regarded as being definitive of 'Parliament', in perhaps the same way that the 'conditions' of parliamentary action inherent in the necessity for a triple assent of the three estates, can, in the United Kingdom be regarded as definitive of 'the Queen in Parliament'.

An essentially similar process of reasoning was applied in order to distinguish the decision in Moore v Attorney General for the Irish Free State,[1] also relied upon by the Respondents. In that case, which had turned upon the effect of the Statute of Westminster on the powers of the Irish Parliament, the Court had formulated its conclusion in three propositions:-[2]

(1) The Anglo-Irish Treaty and the Constitution of the Free State formed part of the Statute law of the United Kingdom.

(2) Before the Statute of Westminster, the Colonial Laws Validity Act prevented the Irish Parliament from passing legislation repugnant to the terms of the Treaty.

1. (1935) A.C.484
2. at p.498

(3) The Statute of Westminster removed this fetter.

The Irish legislature became competent to pass legislation contrary to the terms of the two Imperial Acts of 1922 (The Irish Free State (Agreement) Act, and the Irish Free State (Constitution) Act).

Taking these propositions one by one the Chief Justice remarked that the first could be taken as applicable to the status of the South Africa Act. The second and third, however, were of no relevance at all to South Africa. The Colonial Laws Validity Act had at no time prevented amendment of the South Africa Act by the Union Parliament, (as defined) for the reason already given - that any repugnancy to Imperial Acts that might be involved was specifically authorized by the amendment provision of the South Africa Act. The Union Parliaments power of constitutional amendment was not therefore affected by the removal of the provisions of the Colonial Laws Validity Act.[1] The powers of

1. The Government's view was of course that it was the repugnancy provision of the Colonial Laws Validity Act which had prevented constitutional amendment contrary to the terms of the South Africa Act. The view was succinctly put, in the opinion sought by the Governemtn and its legal advisors, from Professor E.C.S. Wade of Cambridge. '..The Union Parliament could not, by the ordinary bicameral procedure amend the rules for legislating unicamerally so long as the Colonial Laws Validity Act applied to the Union, because Section 152 of the South Africa Act was contained in a Statute of the United Kingdom Parliament, and the amending Act of the Union Parliament would necessarily have been repugnant to that Section.'

the Irish Free State Parliament to amend the Constitution, unlike those of the Union Parliament, were externally limited by the inability to ignore the constitutional provision that amendments should not be repugnant to the terms of the Anglo Irish Treaty;[1] and it was this fetter which the Statute of Westminster struck away. For these reasons,[2] Moore's case

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1. Section 2 of the Constituent Act declared that,'..If any provision of the said Constitution, or if any amendment thereof ..is in any respect repugnant to any of the provisions of the scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative'. Article 50 of the Constitution gave the power of constitutional amendment to the Oireactas with a similar restriction. (Constitution of the Irish Free State (Saorstat Eireann) Act. No.1 of 1922)
2. The reasons given by Professor Cowen, in support of the view that the Colonial Laws Validity Act had never had the effect claimed by the respondents were more elaborate. If, whilst that Act had applied to the Union, the constituent elements of the Union Parliament had passed in bicameral session a measure coming within the scope of the entrenched sections, '..such measure would have been void on the sole ground that having regard to the nature of the Union Parliament as created by the South Africa Act, it was not an authentic expression of the will of the Union Parliament. No question of the operation of the Colonial Laws Validity Act could have arisen, because that Act presupposes the existence of a measure which apart from repugnancy to a British Statute, complies with the conditions necessary to qualify as a duly made law or Act of the Colonial Parliament concerned. The Colonial Laws Validity Act speaks of a Colonial <u>law</u> which is repugnant to an Act of the United Kingdom Parliament. Moreover a Colonial law which is repugnant to an Act of the United Kingdom Parliament, is declared to be void only to the extent of the repugnancy...A question of repugnancy under the Colonial Laws Validity Act presupposes <u>two</u> laws in conflict..The Colonial Laws Validity Act resolves the conflict in favour of the United Kingdom law; but adapting the popular proverb, it takes two laws to make a conflict.' (Parlt.Sov. and the Entrenched Sections of the South Africa Act' p.3)

   Moore's case concerned a restriction on the <u>area of power</u> of the Irish Parliament and the consequences of its removal. Section 152 of the South Africa Act raised a question of the <u>manner and form</u> of legislation. Section 152 was not a 'restriction' on the power of the Union Parliament, and no restriction as to constitutional amendment existed therefore to be removed. (Loc.cit.pp.2-19, 37-40) The decision of the court plainly endorses Professor Cowen's view

was not an authority in favour of the respondents.

The arguments already advanced as to the interpretation of the word 'Parliament' sufficed also to dispose of two further contentions put to the Court by counsel for the Government, namely those relating to the effects of the Status of the Union Act (1934)[1] and of the omission from the Statute of Westminster of any clause safeguarding the Constitution of the Union, similar to those inserted specifically to guard those of Canada, Australia, and New Zealand. Sections 7 and 8 of the Statute of Westminster had specifically enacted that nothing in the Statute should be deemed to confer any power to amend or repeal the Acts containing the constitutions of the Dominions of Canada and New Zealand, and of the Commonwealth of Australia, otherwise than in accordance with the law existing before the passage of the Statute.[2] For the Government it could therefore be urged that:-

> '..the absence in the Statute of Westminster of any express reservations relating to the entrenched sections of the South Africa Act, in contradistinction to the detailed reservations enacted at the request of the three other member states of the Commonwealth, negatives any intention to limit the scope of legislation by the Union Parliament. It was because it was not in 1931 intended to confer any new power to alter, for example, the Constitution of New Zealand, which is also a unitary state like South Africa, that Section 8 was included in the Statute of Westminster. There is,

1. No.69 of 1934
2. See above, Chap.3

> of course, no corresponding reservation in the case of South Africa; accordingly, the Union Parliament can legislate without restriction on its powers.'[1]

On this point, the Chief Justice contented himself with remarking that, 'On the interpretation of the Statute of Westminster which I have given above, there was in the case of the Union, no need to insert a saving clause in the Statute'.[2] Nor were the saving clauses relating to the constitutions of the other Dominions, he implied, necessary in strict law, but rather inserted 'ex majori cautela' to still any doubts as to the law, which might otherwise have existed.[3]

1. E.C.S. Wade's Opinion. Para.15
2. Loc.cit. p.1260
3. This amounts to an endorsement of some of the contention of those who had held the 'conservative' view of the effect of Section 2 of the Statute. On this view, the restriction as to repugnancy was removed from Dominion legislation, but Dominion Parliaments remained confined within the area of power laid down in their constitutions. On the 'liberal' view, all restrictions, including those laid down in their constitutions, would, in the absence of saving sections, be removed by Section 2. (The 'liberal' view had received support from the decision in Moore's case. But Professor Cowen, it may be noted, does not, at any point rest his case on the 'conservative' view of the Statute's effects. At p.23 of his pamphlet, he writes:- 'It may be that..there is something to be said for the view that the effect of Section 2 (2) of the Statute was to extend the area of power of some of the Dominion Parliaments, by removing all limitations on power, including those contained in their Constitutions. But, as I have stressed.. the entrenched sections did not impose limitations upon the power of the Union Parliament. They merely prescribed the manner in which the constituent elements of the Union Parliament must act in order to exercise power. Accordingly..it is immaterial whether the true view be the conservative view or the liberal view.'

The Status of the Union Act was dismissed by the Court in equally summary fashion. For, 'If the Statute of Westminster did not have the effect of modifying or repealing the entrenched clauses of the South Africa Act, then those provisions remained intact after the Statute was passed, and the Union Parliament could not, by means of an Act like the Status Act, passed bicamerally, repeal or modify those entrenched clauses'.[1] Here again, the approach of the Court was essentially that which it had already taken towards the propositions put to it by counsel for the Government. The declaration in the Status Act that, 'The Parliament of the Union shall be the sovereign legislative power in and over the Union',[2] carries the argument already pursued as to the meaning of 'the Parliament of the Union' no further. The admittedly 'sovereign' and unlimited power of constitutional amendment must be exercised by the sovereign in law and this sovereign body is defined, on the Court's view, in the South Africa Act.

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1. Loc.cit.p.1261
2. Status of the Union Act (1934) Section 2. The preamble to the Act after referring to the definition of Dominion autonomy adopted by the Imperial Conferences of 1926 and 1930 recites that '..it is expedient that the status of the Union of South Africa as a sovereign independent state, as hereinbefore defined shall be adopted and declared by the Parliament of the Union..'

The point here made is connected with a disclaimer which the Court throughout was anxious to make - namely that nothing in its decision was to be taken as denying the claim that South Africa was a sovereign state. Indeed, in declaring that, 'the only legislature which is competent to pass laws binding in the Union, is the Union Legislature', and that, 'there is no other legislature in the world that can pass laws which are enforceable by courts of law in the Union',[1] the Appeal Court committed itself to an explicit denial of the view that the United Kingdom Parliament retains a theoretical sovereign competence to legislate in any sphere and to pass laws extending without their consent to Commonwealth countries.[2] But a distinction must be drawn between a sovereign state and a sovereign Parliament. 'The conclusion at which I have arrived in no way affects the sovereignty of the Union,' said the Chief Justice. The contention that the Union was not a sovereign state unless its legislature was sovereign, was based on a fallacy. For, 'a state can be unquestionably sovereign although it has no legislature which is completely sovereign'.[3]

1. Loc.cit.p.1261
2. See the comments cited on the Statute of Westminster above (Chap.4) and the dictum of Lord Sankey in British Coal Corporation v. The King (1935) A.C.500 at 520. c.f. Wheare 'The Statute of Westminster and Dominion Status'. (5th Ed.) p.153ff.
3. Loc.cit.p.1259

> 'To say that the Union is not a Sovereign State simply because its Parliament functioning bicamerally, has not the power to amend certain sections of the South Africa Act, is to state a manifest absurdity... It would be surprising for a constitutional lawyer to be told that that great and powerful country, the United States of America, is not a sovereign and independent country, simply because its Congress cannot pass any legislation which it pleases.'[1]

As Lord Bryce had pointed out in his study of the American political system, sovereignty may be divided between two authorities.

> 'In the case of the Union, legal sovereignty is, or may be, divided between Parliament as ordinarily constituted, and Parliament as constituted under Section 63 and the proviso to Section 152. Such a division of legislative powers is no derogation from the sovereignty of the Union, and the mere fact that that division was enacted in a British Statute (namely the South Africa Act) which is still in force in the Union, cannot affect the issue in question.'[2]

Two distinct points have been made here about the use of the term 'sovereignty'; first, that a 'sovereign' (or autonomous) state need not have a 'sovereign' (or unlimited) Parliament, and secondly that 'sovereign' (i.e. 'omnicompetent') legislative powers can be divided. An autonomous state may clearly have a legislative body whose powers are divided or undivided, and is possible in either case for those powers to be limited or unlimited in area. But the point which the

1. Loc.cit. p.1259
2. Loc.cit. p.1259

court wished to make was not merely that the Union was an autonomous and sovereign community with a legislature legally limited as to the area of its powers (for it did not believe this); but that the Union was an autonomous community whose legislature was none the less 'sovereign' for being subject to rules as to the exercise of its legally unlimited powers. The fact that 'all Dominion Parliaments have Constitutions which define the manner in which they must function as legislative bodies' did not prevent the powers wielded in the various manners prescribed by law from being collectively described as 'sovereign' powers (since unlimited in area). Nor did it prevent the Parliaments (in the totality of ways in which they might be constituted for legal action under their constitutions) from being described as 'sovereign' bodies. A legislative sovereign, in other words, was a sovereign because the area of its possible field of action was unlimited by the constitution under which it operated, and there was nothing incompatible with sovereignty in the existence of binding (and therefore, in a sense, 'limiting') rules as to the manner and form of legislation. These rules were not restrictions on, but definitions of the sovereign'.

Reference, had been made by counsel, went on the Chief

Justice, to 'a large number of writers on constitutional law', whose opinions could be cited in support of the proposition that the entrenched clauses were no longer binding on the Union Parliament. But these writers had all based their views on:-

(1) The effect of the repeal of the Colonial Laws Validity Act, which as had been shown had no relevance to amendment of the South Africa Act:

(2) Section 2 (2) of the Statute of Westminster - which made no difference when 'Parliament' was understood as defined:

(3) The absence of 'saving clauses' in the Statute relating to the Union Constitution - a matter which had been adequately dealt with in the preceding analysis:

and,(4) The decision in Ndlwana v. Hofmeyr.

The decision in Ndlwana's case had now to be considered since it clearly conflicted [1] with the conclusions reached by the court. Here the Chief Justice quoted from the report

1. This makes clear the Court's disagreement with the view put forward by some supporters of the Parliamentary Opposition that the 1937 decision had contained nothing to overturn the contention that a joint session was the competent body to amend the entrenched sections, but had revolved merely around the question of the power of the courts to inquire whether any particular procedure had been followed inside Parliament. In an article in the Rand Daily Mail on the 21st April, the Hon. F.A.W. Lucas, a former judge of the High Court put forward this contention and argued that the 1937 Court's statements as to the competence to ignore the entrenchment provisions were obiter and not part of the ratio decidendi.

the words of the Court in 1937 in asking counsel to deal with the point 'whether this court had any power at the present time to pronounce upon the validity of an Act of Parliament, duly promulgated and printed and published by proper authority, in as much as Parliament is now since the passing of the Statute of Westminster, the supreme and sovereign law-making body in the Union'. This question had been answered by the Court in the negative. It had said that, 'An Act of Parliament in the case of a sovereign law-making body proves itself by the mere production of the printed form published by proper authority...Parliament's will, therefore, as expressed in an Act of Parliament, cannot now in this country, as it cannot in England, be questioned by a Court of Law, whose function it is to enforce that will not to question it'.[1]

'I shall assume', said the Chief Justice, 'that no exception can be taken to this statement of the law as regards what purport to be Acts of the British Parliament i.e. Acts which purport to have been enacted by the King, by and with the advice and assent of the Lords and Commons. It had been said in The Prince's case (1606)[2] however that, '..If an Act be penned that the King with the assent of the Lords, or

1. Cited loc.cit. at p.1262
2. 8 Co.Rep. at 20b

with the assent of the Commons, it is no Act of Parliament, for three ought to assent to it, scil. the King, the Lords and the Commons, or otherwise it is not an Act of Parliament'. The question of the conclusiveness or otherwise of a recital the correctness of which was disputed, did not, however arise in the present case.

> 'Had Act 46 of 1951 stated that it had been enacted by the King, the Senate, and the House of Assembly in accordance with the requirements of Sections 35 and 152 of the South Africa Act, it may be that Courts of Law would have been precluded from inquiring whether that statement was correct,'

But, said the Chief Justice:-

> 'That Act states that it was enacted by the King, the Senate and the House of Assembly. Prima facie, therefore, each constituent element of Parliament functioned separately in passing the Act.
>
> The original of that Act, signed by the Governor General and filed with the Registrar of this Court, bears the certificate of the President of the Senate and the Speaker of the House of Assembly to the effect that it was passed by the Senate and the House of Assembly respectively. This clearly shows that the Act was not passed by the two Houses of Parliament sitting together.'

Since, therefore, he went on, the Statute of Westminster had, as already argued, left the entrenched clauses intact, it followed that

> 'The principles enunciated in Rex v. Ndobe are still sound law, namely that Courts of Law have the power to declare Act 46 of 1951 invalid on the ground that it was not passed in conformity with the provisions of Sections 35 and 152.'[1]

1. Loc.cit. p.1263

Several difficulties, remarked the Chief Justice, occurred to him in connection with the statement in Ndlwana's case that Parliament was free to adopt any procedure which it might choose. It would be a 'very novel and surprising doctrine' to constitutional lawyers, that the Houses should be able to use joint or bicameral sittings entirely as a matter of discretion. The doctrine would imply that a Government in a minority in the Commons could, by advising the Sovereign to convene a joint sitting of the two Houses, use its majority in the Lords to obtain a majority for the passage of legislation. Such a doctrine and its implications could not be accepted. To deny the judicial power to inquire whether a purported Act of Parliament had or had not been passed, would, as had been said in Ndobe's case, be to imply that Courts of Law were powerless to protect the rights of individuals which were specially protected in the constitution of the Union.[1]

The Court in deciding Ndlwana's case, he continued, had never really applied its mind to the question whether the Statute of Westminster had impliedly repealed the entrenched clauses. The appellant's case had rested on the assumption that it had, and that bicameral, not joint, sessions were obligatory on the Houses; whilst counsel for

1. Loc.cit. p.1263

the respondents had assumed it too, and had only to confine himself to the preliminary question put by the Court as to its ability to inquire into the validity of a promulgated Act. Consequently the Court in Ndlwana's case had, '..per incuriam pronounced a decision on a question of vital constitutional importance without hearing argument for or against the main conclusion at which it arrived.'[1] As compared with the mass of material which had been put before the Court in the present case, such argument as there had been in 1937 had been extremely brief.[2] (Counsel for the appellant had argued for 65 minutes in all, and counsel for the respondent 15 minutes). The Court had good reason, therefore, to reverse its previous decision,[3] for that decision had 'enabled Parliament to deprive by a bare majority in each House, sitting separately, individuals of rights which were solemnly safeguarded in the constitution.' It was impossible to separate the good from the bad in the Act purporting to remove non-Europeans from the common voters roll, as it was not disputed that all provisions of Act were dependent on each

1. Loc.cit. p.1265
2. The argument put to the Court in 1952 occupied a period of six days
3. The Chief Justice had previously remarked that in reversing the decision in Ndlwana's case, the Court would not be placing itself in the invidious position of preferring its own reasons to those of its predecessor, since no reasons had been given for the categorical statements made in that case. (loc.cit. p.1262)

other. 'The whole of the Act', therefore, concluded the Chief Justice, should be declared invalid. Greenberg, Schreiner, Van den Heever, and Hoexter J.J. concurred, the appeal was allowed with costs, and the order of the Provincial Division set aside.

2.

No one reading the decision handed down by the Court in Harris v. Donges could fail to notice the fidelity with which the line of reasoning advanced by Professor Cowen,[1] and adopted by the Opposition in the Parliamentary debates on the Separate Representation Act, was followed by Chief Justice Centlivres. Professor Cowen's view of the effect of the Colonial Laws Validity Act, and of its removal by Section 2 of the Statute of Westminster; his distinguishing of the decision in Moore v. Attorney General for the Irish Free State; his rejection of the Status of the Union Act as immaterial; and his attack upon the basis of the reasoning in Ndlwana's case - all found a place in the Appeal Court's decision. The validity of each one of these common contentions rests upon two centres of argument; one in the sphere of constitutional logic, and the other in the sphere of statutory construction. Two questions, similarly related, may be seen to arise. These are

1. See above pp.97-102

(1) What (if any) are the legal rules governing the working of the legal sovereign in the Union?; and, (2) What is the meaning of those sections of the Statute of Westminster which confer powers on the Parliament of the Union?

The second of these questions had, as already seen, given rise to two apparently irreconcilable points of view. The words of the Statute, the circumstances of its making, and the probable and expressed intentions of its sponsors had all been appealed to, both in Parliament and before the Supreme Court, as evidence of its 'meaning'.

The relation between 'intention' and 'construction' of constitutional instruments is of course part of a large and thorny subject. It occurs here with special force, if it be asked whether the court's interpretation of Section 2 of the Statute of Westminster in Harris's case is correct.

CHAPTER SIX

Legislative 'Intention'

'It is not the letter, but the intendment or meaning; that is to say the authentique interpretation of the law (which is the sense of the Legislator) in which the nature of the Law consisteth'

THOMAS HOBBES 'Leviathan' ('Of Civill Lawes')

1

'Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning, which however obscure and latent, had none the less, a real and ascertainable pre-existence in the legislators mind'.[1] This remark of Mr. Justice Cardozo exposes a cardinal difficulty of the judicial application of constitutional instruments. The Court in Harris's case faced this difficulty in an acute form. What was the effect in law of the legislative intent embodied in section 2 of the Statute of Westminster? The treatment of legislative intention by courts of law, is of course a matter about which critics of the traditional canons of construction have in recent years found much to say. The current importance

of the 'intention' or 'purpose' of the Statute of Westminster, makes however, a brief excursus on the point worth while.

2

The relative sanctity attributed to the language of the legislator may of course vary under different constitutional systems. It has suggested itself to at least one American jurist that a different approach to problems of statutory interpretation in the United States may be not unconnected with the different constitutional relationship between Congress and the Courts which results from the theory of separation of powers. Congress does, within its constituted powers issue directions which the courts must obey, but this is so not because the Legislature is sovereign and the courts its servants. Rather is it that the Constitution imposes on the legislature the duty of issuing directions as it imposes on the courts the duty of interpreting them. It is the theory of the Legislator as sovereign which gives rise to the belief in the sanctity of the exact words of the Statute.[1] The notion that because the words are plain, the meaning is equally plain has been stigmatized by Mr. Justice Frankfurter as 'a wooden English doctrine of rather recent vintage'.[2]

1. Max Radin 'A Short Way With Statutes' 56 H.L.R. 388. 406-7
2. U.S. v. Monia et al. 317 U.S. 424

The implications of the theory of legislative sovereignty for the interpretation of statutes are certainly interesting and not, considering the bulk of the literature very much dwelt on. But they do not all cut the same way. One set of considerations - namely that the 'will' of the sovereign can be formulated only through the ceremonial process of passing a given form of words into law as an Act of Parliament to the exclusion of other forms of direction and command - may suggest a literalist approach. 'What the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact'.[1] Or as has been said by the Supreme Court of South Africa:-

> 'Evidence that every member who voted for a measure put a certain construction on it cannot affect the meaning which the courts must place upon the Statute, for it is the product not of a number of individuals but of an impersonal Parliament.' ..'Its sovereign powers are exercised by human beings, but..legislative powers were conferred on Parliament, not on them.'[2]

On the other hand, the doctrine that the 'will' of the sovereign should prevail, and should bind the courts may equally well suggest a more teleological view of 'enactment', and

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1. Solomon v. Solomon & Co. (1897) A.C. 22, 38 . c.f. the opinion of Lord Halsbury in Hilder v. Dexter (1902) A.C. 474, 477. that the worst person to construe a statute was the person responsible for its drafting since 'he is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed'.
2. Swart & Nicol v. De Kock & Garner 1951 (3) S.A. 589 589 (A.D.) at 621

make for a concurrence in the often quoted opinion of Chief Justice Holmes that it is not an adequate discharge of judicial duty for a court to say 'We see what you are driving at, but you have not said it.' There is here a cleavage of opinion as to the nature of judicial duty which lies behind the multifarious and potentially inconsistent dicta laid down by the courts at different periods and thrown into juxtaposition in the textbooks. The latest manifestation of this cleavage of opinion in this country is to be seen in some (now notorious) remarks of Lord Justice Denning, and in their reception by the House of Lords. In Seaford Court Estates Ltd. v. Asher it was said by Denning L.J.:-

> 'The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with Divine prescience and perfect clarity. In the absence of it..a judge..must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the Statute but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. ..A judge should ask himself the question : If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should

iron out the creases'.[1]

These propositions have been criticised in the House of Lords as 'stated rather widely' and as 'a grave misconception' - 'a naked usurpation of the legislative function under the thin disguise of interpretation' 'The duty of the court', said Lord Simonds,[2] 'is to interpret the words that the legislature has used. Those words may be ambiguous, but even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited'.

Lord Justice Dennings dicta stem of course from the position illustrated by the rules laid down in Heydon's case to the effect that a court may consider the law before the passing of a statute, the mischief for which the law had failed to provide, the remedy appointed by Parliament, and the reason of the remedy.[3] This has always been respectable doctrine. 'The Statute is to be expounded according to the intent of them that made it'[4] But the collision of this principle with the evidential rule that the Parliamentary history of an enactment is not admissible to explain its

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1. (1949) 2 K.B. 481 at 499
2. Magor & St. Mellons R.D.C. v. Newport Corporation (1952) A.C. 189 at 191
3. (1584) 3 Rep. 7b p.1
4. Maxwell. 'Interpretation of Statutes (9th ed

meaning[1] has been a prolific source of unhappy logic.[2] Against this and the 'plain meaning' rule there has been a good deal of academic protest.[3]

On the basis of the rules laid down in Heydon's case, there seems no reason why Parliamentary debates might not be admissible as 'extrinsic circumstances'[4] throwing light on the mischief which an Act is intended to remedy. A distinction may, indeed be drawn between using a debate or the

1. For citations see Maxwell. Op.cit. p.29 and Craies on Statute Law (5th ed. C.E. Odgers) Part 1 chap. 1)
2. c.f. Sir Carleton Allen on the 'casuistical distinction' drawn between 'all negotiations previous to the Act or the original form of the Bill' and the subject matter with which the Legislature was dealing and the facts existing at the time with respect to which the Legislature was legislating. ('Law in the Making' 5th ed. p.495)
3. eg. H.J. Laski Report of the Select Committee on Ministers Powers (Cmd.4060) Annex V.
   R.A. Eastwood 'A Plea for the Historical Interpretation of Statute Law' (Journal of the Society of Public Teachers of Law. 1935 p.1) H.A. Smith 'Interpretation in English and Continental Law' (9 J.C.L. (1937) 153) has written that, 'the restrictive English doctrine' creates a new and needless breach in the relations which connect our law with the legal traditions of Europe. 'Judges are 'supposed to know - or at any rate to be free to study - the well established facts of nature and history. Parliamentary proceedings..form an important part of the historical records of the nation...The rule in its present form forces him (the judge) to close his eyes to facts' (loc.cit. pp.156, 164)
4. 'In construing Acts of Parliament, the words which are used are not alone to be regarded. Regard must also be had to the intent and meaning of the legislature...(which is to be) ..'collected from the cause and necessity of the Act being made, from a consideration of several parts, and from foreign (meaning extrinsic) circumstances, so far as they can justly be considered to throw light on the subject'. Hawkins v. Gathercole. (1855) 6D.M.& G.1 at p.21

Report of a Royal Commission in this way to obtain information about the purpose of the Act, and using such material 'directly to ascertain the intention of the words used in the Act'.[1] But the distinction between using a piece of evidence to ascertain 'directly' the meaning of the language used by the Legislature, and interpreting that language in a certain way as the result of admitting evidence as to its underlying purpose, is capable in certain circumstances of losing any obviousness which it may have.

Especially is this the case where broadly drafted constitutional legislation is in question.[2] It has frequently been asked whether constitutions should be interpreted in the way that ordinary legislation is interpreted. The status of constitutional legislation and discussion at the methods of interpretation which are permissible invariably figure together in dicta on the point. 'In the interpretation of a ..Constitution founded upon a written organic instrument such

1. Assam Railways and Trading Co. v. Inland Revenue Commissioners (1935) A.C. 445 at 457-9
2. Professor W.P.M. Kennedy discussuing interpretation of the Statute of Westminster in 1933 wrote that 'The real creating minds behind the Statute should not be neglected.. We shall have in the future perhaps to do work in the law courts which we once did amid the give and take of political discussions and conferences.' ('Essays in Constitutional Law' (1934) p.166) cf. the remarks of Sir Ivor Jennings in 'Constitutional Laws of the Commonwealth p.127-128

as the British North America Act', it was said in Attorney General for Toronto v. Attorney General for Canada, if the text is explicit, the text is conclusive.'[1] This is an expression of the view that the 'meaning' of a constitution, like that of an ordinary statute is inherent in the words in which it is enacted into law. M.J. May, in 'The South African Constitution'[2] (pp.29-32) quotes Cooley's statement that, 'the meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time,'[3] - and remarks that, 'The South Africa Act is an ordinary Act of the Parliament of the United Kingdom...That is creates a Constitution is not a deciding factor.' 'The fundamental principle..is that it is to be interpreted according to the well recognised standards of interpreting documents in British Courts, that is to say by reference to its terms and

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1. (1912) A.C.571 at 583
2. Capetown (2nd ed) 1949
3. 'Constitutional Limitations' (1903) p.89
   c.f. South Carolina v. United States (1905) 199 U.S. 437:-
   'The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. ..While the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning.' (at pp.448-9)

without regard to external factors'.[1] May admits that the status of the Act as a constitution may properly be taken into account in cases of 'ambiguity'. 'Ambiguity', however, in constitutional matters, is simply another name for disagreement about the meaning of a constitutional provision, and the question reduces to the relative importance which is to be attached by the judiciary to arguments about 'meaning' drawn from considerations external to the language of the Act (its nature, history, purpose etc), as compared with arguments about 'meaning' drawn from a (potentially restrictive) inspection of the language itself. In this respect American jurists have shown themselves ready to follow out the implications of the special status of the

1. c.f. Kerr. 'Law of the Australian Constitution' (1925) p.44 'The Australian Constitution is to be expounded and given effect to according to its own terms, finding the intention from the words of the Compact, and upholding the Constitution throughout precisely as framed'. c.f. also dicta in Amalgamated Society of Engineers v. Adelaide Steamship Co. (1920) 28 C.L.R. 129 In this case Isaacs J. cited with approval Lord Haldane (Wachers Case 1913 A.C.113) to the effect that speculation on legislature motives was not a topic for judges to enter on. 'Their province is the very different one of construing the language in which the Legislature has finally expressed its conclusions.' In James v. Commonwealth of Australia (1936) A.C. 578 at it was said that, 'the true test must as always be the actual language used.' And in The Commonwealth v. Bank of New South Wales (1950) A.C. 235, 307 approval was given to statements that 'the object, the purpose and the intention of the enactment is the same', and that 'what the Legislature intended to be done or not to be done, can only be legitimately ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication'.

Constitution as a Constitution, with a special standing and purpose. They have not hesitated to indulge in 'progressive interpretation' and to reject the view of an intrinsic meaning hypostatised in the language of the Constitutional document. British courts have found it harder to relinquish the tradition of judicial discovery of the law as offered to judicial law-making. The sovereign Parliament has had greater success in this country, than the theory of the separation of powers in the United States, in rebutting the truth of Bishop Hoadley's apothegm that he who has the interpretation of a law is the true legislator. In consequence, the interpretation of constitutional provisions that has taken place, (notably in Privy Council decisions on appeal from Commonwealth and Colonial courts) has wavered between the traditional search for the 'meaning' inherent in the language of the Statute, and the recognition that 'fundamental' legislation confronts the judiciary with a duty to do something more than merely inspect the grammar and syntax of an enacted text.[1] A judge here, is

1. 'It is true that a constitution must not be construed in any narrow and pedantic sense...It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning'. James v. Commonwealth of Australia (1936) A.C.578 at p.614 (italics supplied) The former attitude of the Privy Council to the British North America Act occasioned a certain amount of criticism in Canada. c.f. W.P.M. Kennedy 'Law & Custom in in the Canadian Constitution' (In 'Essays in Constitutional Law. (1934) p.85) 'They have refused to see in it anything of a constitutional nature or to be guided by its historical origins. As a statute of the British Parliament, they have applied to it arbitrary rules of construction which have at times robbed it of its historical context and divorced its meaning from the intentions of those who in truth framed it.

faced as a matter of course with the situation long since delineated by Gray in 'The Nature and Sources of the Law'. 'The difficulties of so-called interpretation' (Gray held) 'arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind if the point had been present'.[1] This remark is perhaps especially pertinent to judicial attempts to interpret certain sections of the Statute of Westminster; and to any interpretation of instruments intended to give the force of law to propositions of general, and in greater or in lesser degree, vague, constitutional import. The Privy Council in interpreting the Canadian Constitution found itself, when faced with a problem of this nature,[2] compelled to extend its enquiries beyond the language of the British North America Acts. In Edwards v. Attorney General for Canada[3] it was said that dicta concerning the admissibility of evidence of legis-

1. Sec. 370 op.cit.
2. c.f. with Gray's remark just cited, Lord Jowitt in Attorney General for Ontario v. Attorney General for Canada (1947) A.C. 127 at p.148-9 'Their Lordships have felt the familiar difficulty of determining which of two alternative meanings is to be given to an instrument, the authors of which did not contemplate the possibility of either meaning'.
3. (1930) A.C.124, 134, 136

lative objects and purposes 'must not be pushed too far' and that 'their Lordships are disposed to agree..that although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a Statute, the inferences to be drawn therefrom are extremely slight'. But, having said this, Lord Sankey went on to observe that, 'The British North America Act planted in Canada, a living tree, capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada'. It was therefore fitting that the Act should be given 'a large and liberal interpretation'. He agreed that:-

> 'The Privy Council has indeed laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case for example, of a penal or taxing statute, or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony'.[1]

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1. (1930) A.C. 124 at 136-137
In British Coal Corporation v. the King (1935) A.C.500, 518, and Attorney Gen. for Ontario v. Attorney Gen. for Canada (1947) A.C. 127, it was said that flexible interpretation should be given to the Constitution Act as a 'constituent or organic Statute', and in the latter case reference was made to 'the spirit with which the preamble to the Statute of Westminster is instinct', and to 'the political conception which is embodied in the British Commonwealth of Nations'. (at 153, 154)

CHAPTER SEVEN

The 'Meaning' of Section Two

> 'The meaning of words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document'.
>
> Lindley L.J. (1891) 1 Q.B. 79,85

1

How far, it may be asked, do similar considerations apply to interpretation of the Statute of Westminster? The Statute is of constitutional importance. Should it receive the construction appropriate to an Act passed (to adopt Lord Sankey's example)- in order to regulate parish affairs?. The effect of one of its crucial sections (section 2) is in dispute[1]

1. 'Ambiguity' is present by definition where a problem of constitutional interpretation exists. The distinction between giving effect to the words of the statute where they are plain, and invoking external aids to interpretation where there is ambiguity would seem here (as perhaps elsewhere) impossible of application. The existence of a 'plain and undisputed meaning' is itself a matter far from plain and always potentially disputable. Statutes do not contain plain and ambiguous provisions in the way that they contain ordinary letters and capital letters, semicolons and full stops.
(cf. on the 'plain meaning' rule J. Willis 'Statute Interpretation in a Nutshell' (1938) 16 C.B.R.1)

May the dispute be resolved by reference to the history of its making, the Reports of the Imperial Conferences, the views of the Conference on the Operation of Dominion Legislation (which drafted in substance the disputed section), or the debates in the United Kingdom and Dominion Parliaments which preceded the passage of the Statute? What limits are there to such enquiry? Is it possible to draw any distinction between what the makers of the Statute intended to do, and the legal effect of the language with which they clothed their intent?

The application of the judicial dicta and distinctions cited earlier is not particularly easy. The relation between the history of the Statute's making and its actual passage into law by the United Kingdom Parliament, is, for example, in some ways rather a special case, and different from the relation between Parliamentary history and legislation with which the canons of statutory interpretation are normally called upon to deal. The preamble to the Statute explicitly indicates that 'the delegates of His Majesty's Governments.. at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty six, and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences', and

that the Act was passed 'for the ratifying, confirming and establishing of certain of the said declarations and resolutions'. This would seem to give a more than ordinary measure of authority to the resolutions and Reports of the Conferences as sources of information about the objects and purpose of the Statute. This is true to some degree also of the Resolutions passed in the Dominion Parliaments (especially the South African Resolutions), and of the Commons and Lords debates in the United Kingdom. All these are 'extrinsic circumstances' which throw light on the 'mischief' which the Statute of Westminster was intended to remedy. The differences between them as aids to interpretation are differences of weight rather than differences of admissibility. There is very little to be gained by attempting to distinguish between using any of these sources directly to establish the 'meaning' of the language employed in the Statute, and using any one or all of them in order to throw light on the reason for the Statute's existence, and thereafter construing disputed sections of the Statute in a particular way. Once historical enquiry is embarked upon in construing constitutional documents at any rate, there is, however the objects of such an enquiry are to be described, no logical justification for the ruling out, on principle, of Parliamentary debates as inadmissible sources

of evidence.[1]

As sources of evidence for the present purpose, however, whether as to 'legislative intent', 'meaning', or 'mischief', all the material referred to suffers from a common defect. It is, to a serious degree, inconclusive. That which might be referred to, to resolve ambiguity is itself radically ambiguous. Of nothing is this more true than of the United Kingdom Parliamentary debates. It would be extremely difficult to distil from these debates a homogeneous 'intent' of the Imperial Legislature in relation to a number of topics with which the Statute deals. In relation to Section 2 whose meaning was disputed in Harris v. Donges the difficulty is peculiarly complicated. For it seems plain that Parliament in 1931 was far from unanimous in its interpretation of this section. Moreover, a number of members, although in no doubt as to what the object of the Statute ought to be, and in no doubt either of what they intended it to mean, were yet in considerable doubt as to the legal construction which might be put upon the language which had been used in section 2 to

1. The rule has been treated with less respect in Canada as in the United States.
c.f., K.C. Davis. 'Legislative History and the Wheat Board case'. 31 Canadian Bar Review. p.1; and D.C. Kilgour. 'The Rule against the use of Legislative History; Canon of Construction or Counsel of Caution'. 30 Canadian Bar Review p.769.

express that intent. The effect of that section in conferring powers on the Parliament of the Irish Free State was the subject of acute controversy, and of an attempt to amend the Statute[1] so as to extend to Ireland the use of a 'saving section' similar to those inserted to safeguard the constitutions of Canada, Australia and New Zealand against the powers conferred on the Parliaments of those Dominions. The attempt was defeated not because the sponsors of saving sections for the Free State and South Africa[2] were persuaded that Section 2 without statutory restriction would not have the effect they feared in allowing the Irish and South African Parliaments an unlimited supremacy over their constitutions, but because Parliament was persuaded (indeed morally compelled) to adopt the view urged upon the Government by the Governments of the Free State and the Union that such specific restriction would not be welcomed and was unnecessary. The assurances of

1. H.C. Deb. 259. Nov. 20th 1931. See especially the speeches of Mr. Churchill, Mr. Hopkin Morris and Mr. Marjoribanks. And cf. the extracts already cited in Chap.111.
2. Mr. Marjoribanks, for example remarked (ibid.col.1220) that 'South Africa did the same thing' (as the other Dominions) 'by resolution. That seems to be a distinction without a difference in principle, but in law it is extremely important and I should have liked to see it in the Statute. cf. Mr. Hopkin Morris ...'Even the Parliament of South Africa had misgivings...and passed a Resolution which is not even to be given a place in the Statute, making an attempt to safeguard the Constitution.. It speaks well for the good feeling of the Empire but it speaks badly for the attempt at legislation by the Imperial Parliament (ibid. col.1211)

Mr. Cosgrave on the one hand, and on the other the resolution of the Union Parliament that legislation was sought on the understanding that it would not derogate from the Constitution and its entrenched clauses were accepted as substitutes for the insertion in the Statute of sections designed to maintain existing constitutional guarantees in the Free State and the Union (in particular the status of the Treaty[1] in one case and the entrenched sections in the other). Lord Hailsham, defending the Government's acceptance of these assurances admitted that the power apparently conferred without restriction in Section 2, 'might be thought..to override the ordinary authority of their Constitutions'. But both South Africa and

1. Mr. Cosgrave's letter to Mr. MacDonald expressed his concern at 'the possibility that your Government would take the course of accepting an amendment relating to the Irish Free State', and continued, 'I need hardly impress upon you that the maintenance of the happy relations which now exist between our two countries is absolutely dependent upon the continued acceptance by each of us of the good faith of the other. ...The solemnity of this instrument in our eyes could (not) derive any additional strength from a Parliamentary law. So far from this being the case, any attempt to erect a Statute of the British Parliament into a safeguard of the Treaty would have quite the opposite effect here, and would rather tend to give rise in the minds of our people to a doubt as to the sanctity of this instrument'. (259 H.C. Deb. 24th Nov. 1931)
Lord Salisbury in the House of Lords referring to Mr. Cosgrave's assurance, said (H.L. Deb.183 col.190, 191):-
'I have characterised that letter as a most important state document..If the House of Commons carried this Bill as it did, and if your Lordships carry this Bill as I hope you will, it will be relying on that statement of Mr. Cosgraves'

the Irish Free State had objected to the insertion of any restrictive provisions, and had been supported in this by the other Dominions.

> 'Every one of the other Dominions at the Imperial Conference last year supported them in objecting to this... They said, 'As a matter of principle we object, and we shall resent very much any attempt to limit by Imperial Statute the powers of any Dominion except at the request of that Dominion.
>
> You are recognising in this Statute that you cannot legislate for a Dominion except with the consent and at the request of the Dominion. You cannot consistently with that, immediately proceed to put into the Statute with respect to a Dominion, something which it violently objects to having included.'[1]

These passages from the debates on the Statute are of some importance, since they provide evidence for saying that the Parliamentary motives involved in omitting saving sections applicable to South Africa and the Free State were above all political rather than legal. If this is so, there is clearly little foundation for the argument later to be advanced (by the Union Government's legal advisors and by counsel in Harris's case) that an intention to confer 'unlimited' sovereignty on the Union Parliament might be inferred from the mere fact that the restrictive clauses applicable to the other Dominions were omitted in the case of the Union.[2] No

1. H.L.Deb.185 col.221, 222
2. e.g. E.C.S. Wade. 'The absence in the Statute of Westminster of any express reservations relating to the entrenched sections of the South Africa Act, in contradistinction to the detailed reservations enacted at the request of the three other member states of the Commonwealth, negatives ~~any intention to limit the scope of legislation by the Union Parliament~~'. (Opinion para.15)

such intention can be inferred. The impression which emerges from the debates is that the desire of the legislators was not to confer an unlimited supremacy over its constitution on the two Houses of the Union Parliament as assembled for ordinary legislation, but that nevertheless opinion was mixed as to what 'intention' had been conveyed by the Statute as drafted. The law officers of the Crown were, certainly, of the opinion (at least in regard to Ireland) that the language of the Statute could not be interpreted in the liberal sense feared by some members. But it could perhaps be contended that the legislative 'intent' conveyed in the language adopted was that of conferring a power in strict law, which it was believed would never be exercised in practice in the particular ways in question; and that this position was acquiesced in with more or less reluctance accordingly as greater or less faith was put in the political guarantees given. Either contention made twenty years later about the power conferred on the Union Parliament could accordingly be supported by evidence from the debates preceding the Statute of 1931. On the one side it will be said that there are as a matter of fact no restrictive sections relating to the Union, and that the United Kingdom Parliament was perfectly aware of the possible

consequences of omission when it passed the Statute.[1] On the other hand it will be contended that both the South African and United Kingdom Governments and Parliaments in requesting and enacting legislation with the restriction mentioned in the Union Parliament's resolution in mind, could not be assumed to have intended the language used in the Statute to be interpreted in any contrary sense. The judge faced with the task of interpretation must either choose between these counterbalancing sets of considerations, or seek evidence of the 'meaning' of Section 2 elsewhere.

Unfortunately the sources of information which might also be expected to reveal the 'intention' embodied in Section 2, are equally infected with a similar radical ambiguity. The Reports of the Imperial Conferences of 1926[2] and 1930,[3] and in particular the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation (1929),[4] do not, any more than the Parliamentary debates, furnish an unequivocal answer to the question 'How is the

1. This point was embodied in the Report of the Judicial Committee of the High Court of Parliament on the basis of which the High Court set aside (August 27th 1952) the judgement in Harris's case. 'Is it conceivable' the Report asks, 'that the central lawgiver would not imagine in the circumstances that it was advisable to preserve the effect of Section 152 if indeed, the lawgiver had no intention of liberating the Union from the limitations placed on it by the said section.' cf. The Opinion of the Law Advisors to the Union Government (above pp.88-90)
2. Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926. Cmd.2768
3. Cmd.3717 and Cmd.3718
4. Cmd.3479

power given in Section 2 of the Statute to be interpreted in its application to the Union Parliament?' They may be used to establish either that (a) The makers of the Statute did not on the whole desire to bring about any major alteration in the internal constitutional structure of the Dominions; or that, (b) There was an assumption made in the Report of the Conference on Dominion Legislation, and embodied in the sections of the Statute which it drafted, that the effect of the language used in Section 2 would, if unqualified, confer an unrestricted power to alter by legislation the internal constitutional structure in a Dominion. Both these contentions may be supported by an examination of the language of paragraphs 57 and 58, and 62-67 of the Conference's Report. It could be pointed out in support of contention (b) that it was stated (para.57) that 'the acquisition by the Parliaments of the Dominions of full legislative powers' would 'follow as a necessary consequence' of the Conference's recommendations.

It was also pointed out that 'the acquisition of full legislative powers by the Parliaments of the Dominions possessing federal constitutions' called for 'special treatment', and that the inclusion was 'required' of 'express provisions' (para.66) dealing with the maintenance of the federal structure in those Dominions and of the existing modes of constitutional amend-

ment. New Zealand, though not a federal Dominion was included for reasons of the latter kind. Paragraph 66 went on to recommend the adoption of two saving clauses which should provide that nothing in the Statute should be deemed to confer any power to alter the Constitution Acts of Canada, Australia or New Zealand, otherwise than in accordance with the law and constitutional usage and practice already in existence; and that nothing should be deemed to authorize the Parliaments of the Dominion of Canada and the Commonwealth of Australia to make laws on any matter then within the authority of the provinces or states of Canada and Australia, not being a matter within the authority of the Parliaments or Governments of the Dominion or of the Commonwealth respectively. It could be claimed that the inference to be drawn from these clauses and from the statement that their 'inclusion was required', could only be that the uses of legislative power against which they sought to guard, would in their absence be possible.[1] It is difficult however to know what conclusion to draw from paragraph 67 of the Report. 'Similar considerations', it

1. c.f. Wheare. 'The Statute of Westminster and Dominion Status' (5th ed.) p.162. 'The assumption appears to have been that in the absence of these express provisions to the contrary, the powers conferred by section 2 would have authorized the Parliaments of these Dominions to repeal any Imperial Act whatsoever in so far as it was part of the law of the Dominion, and thus would have extended the area of their powers laid down in their Constitutions'

stated, 'do not arise in connection with the Constitutions of the Union of South Africa and the Irish Free State. The paragraph continues:-

> 'The Constitutions of both countries are framed on the unitary principle. Both include complete legal powers of constitutional amendment. In the case of the Union of South Africa the exercise of these powers is conditioned only by the provisions of Section 152 of the South Africa Act, 1909. In the case of the Irish Free State they are exercised in accordance with the obligations undertaken by the Articles of Agreement for a Treaty signed at London on the 6th day of December, 1921.'

Several points call for clarification here. What, in the first place, are the 'similar considerations' which do not arise? It would seem from the preceding paragraphs (63-65) in which the status of the constitutions of Canada, Australia, and New Zealand is described, that the consideration, which the Conference had in mind was that each of these constitutions required in some respects action by the United Kingdom Parliament to secure its amendment, and that this constituted a form of restriction on the Parliaments of those Dominions which (together with the restrictions imposed by the federal structure in two of them) it was not proposed by the Statute to alter. If this is so, what relevance has the statement in paragraph 67 that both South Africa and the Irish Free State have unitary forms of Government? The same

is true of New Zealand, for which special provision was considered necessary. No distinction then is being drawn between unitary and federal states as far as the necessity for 'saving clauses' goes. The distinction appears to be between Dominions already possessing and Dominions free from restrictions on constitutional amendment, the distinction being equated with that between a completely local and a partly Imperial mode of amendment. Both the Union and the Free State were regarded as possessing 'complete legal powers' of amendment. How is the completeness of these powers compatible with their exercise subject to conditions? Is a distinction to be drawn between the South African power which is 'conditioned' by constitutional requirements, and the Irish power which is 'exercised in accordance with' provisos written into its constitution? It was of course true that the Union 'constitution' provided for complete power of local amendment (disregarding the disputed question of repugnancy to Imperial legislation) but this is by no means necessarily equivalent to the statement that the Union Parliament enjoyed such complete power. It seems odd that the Report, whilst pointing out the danger of the language of section 2 in relation to the legislative activity of federal Parliaments limited by the constitutional requirements of federalism, and whilst making full and speci-

fic recommendations to avoid the danger, should regard the limitations internally imposed by constitutional provisions on the Oireachtas and the Union Parliament as different in kind and requiring no special protection. The fact that the Conference, as it would seem, did not consider the 'conditions' or the obligations' which it mentioned in the South African and Irish cases respectively as standing in any jeopardy from its proposals might indeed be cited as evidence in favour of the first contention noted earlier - namely that there was neither desire nor intention to authorise legislation to confer on the Parliament of the Union or of any Dominion the power to overturn or ignore the limitations imposed by its own constitution.[1] The 'conservative' view of the effects of section 2, in other words, it might be argued was implicitly adopted. But if it was, the Parliaments of the federal Dominions and New Zealand would not any more than the Union Par-

1. General Smuts, for example suggested in the House of Assembly, in 1949 that the lack of protection for the entrenched Sections was an oversight. '..South Africa had not a federal Constitution. It was a legislative Union, and for some reason or other, probably simply by oversight, per incuriam, no similar reservation was made about the entrenched clauses in our constitution'. (66 H.Ass.Deb. col.68). Whatever the reason for the omission of specific safeguards from the Report, however, it seems certain in view of the South African resolutions of 1931 and the British governemtn's unwillingness to embody a corresponding legal provision in the Statute (for the reasons stated by Lord Hailsham: See above pp. 169-70) that an 'oversight' view applied to the Statute itself is untenable.

liament or the Oireachtas have acquired on such a view any of the powers which the 'saving sections' were intended to prevent them from exercising. It would thus be necessary to argue that the 'saving sections' were not regarded as necessary in law but merely added to put the question if it should arise beyond doubt and to guard against the adoption by courts of law in future litigation, of any contrary view. (paragraphs 63 and 64 are not explicit on this point. The former, after detailing the origin and dependence of the Canadian Constitution on Imperial legislation, merely states that 'It was pointed out that..it was desirable...to make it clear that the proposed Act of the Parliament of the United Kingdom would effect no change in this respect;' and of the federal limitation, that, 'An express declaration was desirable that nothing in the Act should authorize..'etc.) The court in Harris v. Donges, it will be remembered did, in fact, make an assumption of this kind, namely that the saving sections were added in the case of Canada, Australia, and New Zealand 'ex majori cautela'. On the whole, this would seem a not unjustified view of the matter.

6

The Appeal Court, in coming to its decision, had, of

course, not merely to construe the Statute of Westminster, but to construe also, and in relation to the Statute, the Constitution of the Union, embodied in the South Africa Act 1909 as amended. The crucial question which it had to answer here was: Are the inabilities of the Union Parliament to legislate in certain ways set out in the South Africa Act, marks of inferiority of the sort which the Statute was intended to remove, and without which the Union and its Parliament could not lay claim to the legislative sovereignty befitting an autonomous community? This is partly a question of statutory interpretation involving inquiry into the motives which went into the making of the Statute of Westminster (which, it has appeared, yields little that can be regarded as conclusive); and partly a question of 'constitutional logic' dependent upon judicial views as to the nature of a constitution and the meaning of the term 'sovereignty'. The court in Harris's case did not, it should be noted, take the line of arguing that the Union might be an autonomous community in no way subordinate in law to the United Kingdom, even if its Legislature were a strictly limited and non-sovereign body (though it did say this in passing). Centlivres C.J. took upon himself to establish what on the face of it appears the more difficult and less plausible conclusion, that the Union

Parliament was and had always been even before the Statute of Westminster, a sovereign body, in relation at least to its own constitution. The Statute had neither added to nor detracted from its powers in this respect, apart from removing doubts as to the extraterritorial effect of South African legislation and removing equally beyond all doubt the overall restriction involved in repugnancy to Imperial legislation of laws properly passed by the Union Parliament (though repugnancy of constitutional amendments, Centlivres claimed, was already authorised by the South Africa Act). It could not be the case that 'fetters' had been removed from the Union Parliament giving it the sovereign freedom which previously it had lacked because it was previously 'unfettered'. The entrenched sections of the South Africa Act prescribing alternative methods of legislation for different classes of subject matter were in no sense 'fetters' or 'limitations' on anything. Not on Parliament, because without them there would be no Parliament. Any powers which 'Parliament' possessed or acquired were powers exercised by the persons and institutions defined in this way. And (it may be assumed) any attempt to amend its forms of action by Parliament cannot be considered to be 'hindered' 'fettered' or 'limited' by the necessity to observe them in the process of amendment. It is simply that unless

they are observed 'Parliament' has not acted, and there has been no legal expression of its will. This doctrine, it should be observed, although it results in a similar conclusion, differs from the old 'conservative' view of the Statute of Westminster. Its vocabulary is subtly different. A proponent of the 'conservative' view, from 1931 until the decision in 1935 in Moore's case, which was assumed to have scouted it, would have said that a Dominion Parliament was empowered by the Statute to legislate repugnantly to Imperial Acts provided that it was legislating within its powers as laid down in the Imperial Act defining its powers; but that it could not enlarge its powers by legislating repugnantly to such constituent Act, as the Statute was not intended to confer the power to do so. This argument lost its foundations when the Privy Council apparently decided that the Imperial Parliament had intended to confer a power to do so. On Centlivres view, however, the contention is revived, but grounded solely upon a point of logic. A legislature acting outside 'its' powers is not a legislature. The fact that a body legally defined 'cannot' overturn its constitution or legally defined mode of action becomes not a fact to be gleaned from a scrutiny of legislative intent, but a tautology.

It is quite clear that the decision in Harris's case

embodies a radically different interpretation of the South Africa Act and of the Statute of Westminster from that given by the Appeal Court in 1937 and (probably) from any interpretation which might have been conceived of by the legislators of 1931. Hitherto, one may safely assume, the entrenched sections of the constitution had been universally regarded as 'fetters' or 'limitations' on the free legislative action of the Union Parliament - fetters which had been struck off by the gift of sovereignty conferred by the Imperial Parliament in 1931. The whole discussion in the twenty years which followed, had been carried on in terms of 'pledges' made by the Union and its Legislature and of their subsequent moral and legal effect on a sovereign Parliament. The language of 'pledges' and constitutional 'guarantees' implies that somebody or something is morally or legally 'bound'. And a 'binding' implies a 'fetter'. Since the entrenched sections had been conceived and designed as guarantees of the rights of individuals against over-precipitate legislative action, it was perhaps natural to classify them, along with such devices as referenda, special majorities, temporal restrictions, and dissolutions of the legislature, as being constitutional limitations restricting and fettering the unconditioned power to act of the Parliamentary body. This interpretation, the

Court declared, was mistaken, and it proceeded, in effect, to put its own interpretation, its own vocabulary, and its own definition of 'the Union Parliament' into the mouths of the United Kingdom legislators of 1931. No reference to 'merely declaring' and 'finding' the law can conceal the fact that the court was reinterpreting the language of the South Africa Act and the Statute of Westminster, and giving to it a 'meaning' consonant partly with what it took to be the broad objectives of the makers of the Constitution, and partly with its own juridical philosophy.

It is the implications of this philosophy which the student of constitutional theory must find particularly significant. For its answering of the question, 'What is the Union Parliament?' suggests a general answer to the question, 'what are the presuppositions governing the working of a sovereign legislative body?', which is significantly different from that often given by exponents of the doctrine of Parliamentary sovereignty. The twin pillars of that doctrine are commonly asserted to be the omnicompetence of the sovereign both as to the area, and the manner and form of its legislative activity, and the absence of any judicial review of the formal or substantive validity of that activity. Yet here, both the existence of binding rules of action and of a

judicial power and duty to require the observance of them by wielding the sanction of invalidity, is being asserted as compatible with the legal sovereignty of the body thus controlled. How far is this removed from that limitless unconfined legal authority displayed by Austin (as by Hobbes before him), which Dicey discerned in the operation of the sovereign Parliament at Westminster!

And yet what is in question is not a frontal assault on, or an outright denial of the doctrine of sovereignty, but a reinterpretation and reassertion of it coupled with an analysis which makes explicit the paradox which is involved in 'unlimited sovereign authority'. Dicey implicitly acknowledged the existence of this paradox in his discussion of the proposition that the sovereignty of Parliament far from being antithetical to the rule of law, in fact favoured the supremacy of the law of the land,[1] and 'greatly increases the authority of the judges'. This follows from the fact that

1. 'Law of the Constitution' Ch.XIII It is noteworthy that Dicey here remarks that his contention is true of 'the sovereignty of Parliament as contrasted with other forms of sovereign power' (p.406) whilst in his earlier discussion (Ch.1) he makes little effort to distinguish between sovereignty as embodied in the King-in-Parliament and any other form of Parliamentary or non-Parliamentary sovereignty.

'the commands of Parliament (consisting as it does of the Crown, the House of Lords, and the House of Commons) can be uttered only through the combined action of its three constituent parts..The will of Parliament can be expressed only through an Act of Parliament'.[1] Legal authority as distinct from arbitrary power can only be exercised in legal form. A resolution of the House of Commons for example is not, any more than the fiat of a civil servant a command having the force of law.[2] The general point, of which this provides an illustration, was made some years ago by the late R.T.E. Latham in his essay on 'The Law and the Commonwealth'. 'Where the purported sovereign', he wrote, 'is any one but a single actual person, the designation of him must include the statement of rules for the ascertainment of his will, and these rules, since their observation is a condition of the validity of his legislation, are rules of law logically prior to him'.[3] It was this view of the nature of legal

1. Loc.cit. p.407
2. Stockdale v. Hansard (1839) 9 A. & E. 1
   'The strongest argument', Dicey thought, 'in favour of the so-called bi-cameral system, is to be found in the consideration that the co-existence of two legislative chambers prevents the confusion of resolutions passed by either House with laws, and thus checks the substitution of the arbitrary will of an assembly for the supremacy of the ordinary law of the land'. p.407n.
3. Loc.cit.p.522. The essay was printed in 'Survey of Commonwealth Affairs'. (1937) Vol.1. It has since been republished separately (1949)

sovereignty which the court was applying in Harris v. Donges. It is a view which was combatted by counsel for the Government (and later by the High court of Parliament) with arguments drawn from an 'absolute' theory of sovereign power which it was claimed could be deduced from English constitutional practice. Which of these views prevails, is not a trivial matter of words having importance only for constitutional theorists. The judicial decisions involved are capable, as in South Africa, of having extensive political consequences. The implications of Harris's case for the jurisprudence of the Commonwealth are as yet a matter of speculation. The effect of the decision in the Union, however, was immediate and obvious. Here, the debate on sovereignty was not concluded. It was about to be carried to the point where the limits of tolerance which Parliamentary government demands, were reached and all but overstepped.

CHAPTER EIGHT

The High Court of Parliament Bill

-Everything the judges are allowed to do is called a judicial power -
-And, persisted Alice, Everything Parliament is allowed to do is called a legislative power
-Quite right
-And everything the King is allowed to do is called an executive power
-But I thought that the Duchess said that if the King were allowed to exercise legislative or judicial powers, there would be terrible results
-Terrible! - said the Lord Chancellor
-But the King never could exercise legislative or judicial power - said Alice - For if you gave those powers to him, you would not call them legislative and judicial powers any more. You would call them executive powers.

GLANVILLE WILLIAMS.
'A Lawyers' Alice'

1

On Thursday 20th March, the day on which the Appeal Court gave its decision, the Prime Minister, Dr. Malan announced in the House of Assembly that the judgement had created a constitutional position which could not be accepted. He continued:-

> 'Neither Parliament nor the people of South Africa will be prepared to acquiesce in a position where the legal sovereignty of the lawfully and democratically elected representatives of the people is denied, and where an appointed judicial authority assumes the testing right, namely the right to pass judgement on the

> exercise of its legislative powers by the elected representatives of the people, particularly since that judicial authority does not or is not obliged to act consistently.
>
> ...There is no certainty that a subsequent Court of Appeal may not perhaps reverse the latest decision, just as the present Appeal Court has reversed its previous decision of 1937. ....It is most undesirable that decisions of this kind should vary with a change in the composition of the Court, because this would certainly bring with it the danger of a 'packed' Bench as has happened in other countries. There is the further danger, which is no longer imaginary, that the prestige and authority of the highest Court is bound to suffer if it is called upon to adjudicate on political-constitutional questions of fundamental importance. No matter how carefully such a court comports itself, which sometimes demands an almost superhuman effort, it will be difficult for it to avoid altogether the appearance of prejudice one way or another. It is not fair and right towards the Court to expose it to such a danger, particularly since its authority in general must necessarily be undermined thereby.
>
> It is thus clear that the situation which has now arisen is an intolerable one, and the Government would be grossly neglecting its duty towards the people, and towards a democratically elected Parliament if steps are not taken to put an end to this confusing and dangerous situation. It is imperative that the legislative sovereignty of Parliament should be placed beyond any doubt, in order to ensure order and certainty'.[1]

Mr. Strauss, leader of the Opposition immediately asked that an early opportunity should be given to the House to debate the Prime Minister's statement. 'The Hon. Prime Minister', he said, 'talks about the sovereignty of Parliament. There is a greater sovereignty; the sovereignty of the people of this country'. On the 22nd March the Opposition

1. H.Ass.Deb. Vol.78 col.3124

attempted, without success to adjourn the House. A second (and equally unavailing) attempt to secure an adjournment was made on the 24th March after Dr. Malan had reiterated in a statement to the press [1] his intention to introduce legislation to establish that the courts had no testing right over Acts passed by the Union Parliament. The legislation he said was to have retrospective effect as from the date of coming into operation of the Statute of Westminster, December 11th 1931.

An ever sharpening edge of acerbity was now discernible in the extra-Parliamentary controversy.[2] Both the Nationalist and United Parties issued statements accusing each other of

1. Cape Times, March 25th 1952
2. Reaction was particularly strong in the predominantly English-speaking Province of Natal. In June 1951 the Provincial Council had passed a resolution seeking a fresh representative constitutional convention to re-affirm and re-entrench the basic guarantees of the South Africa Act. Enrolment in organisations such as the 'Defenders of the Constitution' and the War Veterans' Torch Commando, pledged to uphold the compact of the Union and the 'rule of law', was rapid. There was talk of a possible secession. The fears behind such talk were plainly expressed in a Senate speech made in May 1952 by Senator Heaton Nichols. 'Somewhere', he said, 'along the Government's path of tearing up the Act of Union, there will come a point where it can truly, legally and constitutionally be said that the compact of Union is at an end'. (Senate Debates 20th May 1952 col. 2972) The Provincial Council resolution specified five basic principles of the Union Constitution which should be re-affirmed and re-entrenched:
   (1) The existence and constitution of each element of the Union Parliament.
   (2) The equality of the Afrikaans and English languages
   (3) The franchise qualifications for elections to the House of Assembly and Privincial Councils
   (4) The unabridged continuance of the existing powers and constitution of the Provincial Councils.
   (5) The powers and jurisdiction of the Supreme Court; the maintenance of the Appellate Division as the highest Court in the land; and the continued independence of the judiciary

masking a thirst for political power with a feigned concern for constitutional principles. The United Party, said the Nationalist statement, was opposing the sovereign rights of the Union Parliament and demanding that it should remain subordinate to the provisions of a British Act of Parliament. The United Party had shamefully deviated from the policy of the late General Smuts who had accepted the Appeal Court's decision in 1937 that Parliament was sovereign. Their claims to be maintaining the sanctity of the Constitution were merely false slogans aimed at a denial of popular sovereignty and the substitution for it of control by the judiciary.

A counter statement, issued by Mr. Strauss for the United Party and its associates on 28th March, re-iterated what his party had consistently contended - that both Smuts and Hertzog had emphasised in 1931 that the Statute of Westminster should not affect the validity of the entrenched caluses, and that in 1949, shortly before his death, General Smuts had referred to the maintenance of the clauses as a matter of honour and good faith. The recent judgement of the Appeal Court had shown the United Party, in adopting this attitude, to be justified in law as well as on moral grounds. The law had said that whilst Parliament was sovereign within the constitution, it was an impostor if it purported to legis-

late on the entrenched clauses without following the prescribed unicameral procedure. It was the function of the courts as an integral part of the constitutional machinery that guaranteed the rights of the people to interpret the law. The decision which they had given was not an attack on the sovereignty of Parliament but merely a discharging of the duty to give a final and authoritative statement of the law.

The United Party's theory of the judicial function was not without its supporters amongst the legal profession. Mr. Graeme Duncan Q.C. (who had appeared for the appellants in the Harris case) protested in a letter to the Cape Times against the Government's 'misrepresentation' of the court's findings and against references to the 'whim' of the Court. 'Such a contemptuous attitude to our legal system', he wrote, 'is not only an affront to the highest court in the land, but to every member of the legal profession'.[1] On the legal and theoretical plane, however, the Government had a further card to play. It made public the opinion which had been sought (before the Appeal Court's decision) from Professor E.C.S. Wade of Cambridge, which emphatically supported the view of the entrenched clauses and of the 'sovereignty' of Parliament which it had taken in passing the Separate Representation Act, and

1. Cape Times March 24th 1952

in pleading its case before the Court. The opinion,[1] appeared in a fairly full summary in the Cape Times (March 24th 1952), and is worthy of some attention, since it presents in a succinct and forcible way the doctrine of legislative supremacy which counsel for the Government had sought to apply to the Union Parliament.

Two questions had been put to Professor Wade. He had been asked, first, to what extent English authority existed for the rule that the will of Parliament as expressed in an Act of Parliament cannot be questioned in a court of law; and secondly why the repeal of the Colonial Laws Validity Act had had the effect of rendering ineffectual the entrenched sections of the South Africa Act. In answering, Professor Wade first noted that the question related to the review by courts of law of both the power of Parliament to legislate, and the manner and form of such legislation. Historically, the concept of Parliamentary sovereignty had originated in the seventeenth century alliance between Parliament and the common lawyers. In subordinating royal power to the law (as laid down by Parliament) the lawyers had been compelled to relinquish the claim that Parliament could not legislate in derogation of the common law. The principle was not however derived from statute or from any formal constitutional enact-

1. See Appendix

ment. Case law could nevertheless be cited in support of the following propositions:-

(1) That a court cannot take any note of the procedure in Parliament whereby a Bill came to be enacted

(2) That a court will not allow judicial process to be used in a sphere where Parliament and not the courts has jurisdiction.

(3) That Parliament cannot bind itself as to the form of subsequent legislation, and, therefore, the provisions of a later Act, so far as they are in consistent with an earlier Act must prevail.[1]

It was, said Professor Wade, worth remembering that the idea that a court of law could determine the legality of legislation came not from any English or Scottish court but from the United States. Only under federal constitutions was this function given, in modern times, to the courts (the Republic of Ireland being an exception). The powers of the legislature might under a unitary constitution be specifically limited, but it did not follow that excess of authority was not a matter between the legislature and the electorate rather than an issue appropriate for judicial action. It followed from the cases cited that no attempt to challenge in an English court whether in the passage of a Bill either House of

1. For the cases cited in support see Appendix

Parliament had followed the procedure prescribed by itself in Standing Orders, or by both Houses acting together could be successful. No such attempt had apparently ever been made.

Moreover the cases cited established that since Parliament, being sovereign, cannot bind itself as to the form of subsequent legislation, the provisions of a later Act made in a different form must prevail. Act No. 46 of 1951 could be interpreted as amending the procedure laid down in the South Africa Act, by necessary implication. The distinction drawn by Professor Cowen between the power of Parliament to pass substantive law, and the power to prescribe how substantive law shall be enacted, was untenable. Both could be amended expressly or by implication, by subsequent legislation of a sovereign Parliament. Acts of the Union Parliament had been freed from the stigma of invalidity by reason of repugnancy to Imperial statutes, and that Parliament had power to amend or repeal Acts of the United Kingdom Parliament. It could not be contended that this power was subject to an implied limitation, namely that the Union Parliament could not alter the rules governing the exercise of legislative power by itself, as laid down by the United Kingdom Parliament. The South African resolutions of 1931 had made use of the expression 'derogate' rather than the technical expression

'amend', or 'repeal', and it might therefore be contended that the Statute of Westminster did not change the South Africa Act, but that it made the change possible on the initiative of the Union Parliament acting as a sovereign legislature. The House and Senate in 1931 had shown themselves fully alive to the fact that as a matter of law the Statute of Westminster would 'derogate' from the entrenched sections.[1]

The Status of the Union Act, also relied on by the Government, was, contended Professor Wade, simply declaratory of what had since 1931 been the law of the Union, although without being previously enacted on the Statute Book. It might be asserted that the word 'sovereign' used in that Act was ambiguous. But the answer to that was that in a court of law there was no ambiguity. It meant that whatever Parliament enacts must be accepted as law, whether the law in question be substantive or procedural. Reference had been made in the Provincial Division to 'the meaning of Parliament' and to the question whether it could be defined with its functions excluded. But the meaning of 'Parliament' in a unitary state in the Commonwealth was the same in South Africa as in the United Kingdom. The sole concern of the Statute of

1. What the resolutions said, however, was that the request for legislation was made on the understanding that it did not derogate from the entrenched sections!

Westminster had been to equate the legislative powers of the States who were parties to it with that exercised by the Parliament at Westminster. Subject to the reservations inserted at the request of Canada, Australia, and New Zealand, the Statute placed the member states of the Commonwealth on an equality as legislating bodies i.e. in the same position as is the United Kingdom Parliament.[1] No court can query how[2] that Parliament functions. ...Thus the Union Parliament is only bound by the sections of the South Africa Act so long as it does not change them..by express enactment or necessary inplication. ..The Union Parliament cannot ignore the relevant provisions for its procedure as a legislature, but it can repeal them at its will. ..The entrenched sections..ceased to

1. On the view taken in the British Coal Corporation case above p.70n) and by British constitutional authorities in 1931, this contention would have, of course, to be disputed. It should be observed that even if statements about the equal legislative authority of the member states of the Commonwealth are accepted by United Kingdom jurists, the issues raised by Professor Cowen are evaded rather than met. It does not follow from the proposition that the totality of powers exercised by the Union Parliament and the United Kingdom Parliament are the same that 'the meaning of Parliament' in both countries is the same. (If the powers exercised by Parliament 'a' in country 'A' are the same as those exercised by Parliament 'b' in country 'B', it does not necessarily follow that the rules accepted in 'A' as definitive of 'a' are the same as the rules accepted as definitive of 'b' in 'B'.)
2. But would the dicta in Stockdale v. Hansard and similar cases support the conclusion that the courts may always *query* whether Parliament has functioned? c.f. Cowen. 16 M.L.R. 280. 'The courts' (in South Africa) - 'do not seek to control the legislature. On the contrary, the inquiry is simply: has Parliament spoken' (see below Chap. XIII)

be entrenched so soon as the Union Parliament acquired in 1931 equal powers with the United Kingdom Parliament.'

In the same issue in which the published summary of Professor Wade's Opinion appeared, the Cape Times, a paper strongly supporting the United Party's attitude, headed its editorial column : 'Malan Plays with Revolution'. The Nationalist Party it declared, would 'clutch at Professor Wade's Opinion as a dying man clutches a straw'. But the editorial continued, his was only one of an imposing list of opinions (Professor Berriedale Keith's was another) which the Supreme Court had considered and rejected. If the Government's Bill had not been invalidated it would have meant that the entrenched clauses were worthless from the outset, and that the fathers of the constitution were elementary fools. It would have meant that the constitution could be enacted in 1909 and in 1911 the Government could have come along with a Bill instructing the courts to ignore any illegality in its legislation.[1] It was surprising, the editorial concluded, that 'sturdy republicans' should put forward the view that the British Parliament had in 1931 not only unasked, but in direct conflict with expressly stated South African desires,

1. It was in fact later argued before the High Court of Parliament's Judicial Committee by Government counsel that bicameral legislation creating the High Court to review constitutional decisions would have been possible before or after the Statute of Westminster.

so interfered in the affairs of the Union as to bring about an alteration of its constitution.

2.

When Parliament reassembled on April 15th, the Opposition immediately moved that the House of Assembly should decline to go into Committee of Supply on the Budget until the Government gave an undertaking that it would accept the judgement given by the Appeal Court on the continuing validity of the entrenched sections of the Constitution. In the ensuing debate, Opposition speakers argued that the Government was attempting to set itself above the law, and that the courts far from denying the sovereignty of the Union or of its Parliament, were merely enforcing the legal rights which the constitution gave to individuals. In return, the Government asserted that a sovereignty in which Parliament was bound by a procedure laid down whilst it was subservient to the United Kingdom Parliament, was no sovereignty at all. Democracy meant the execution of the will of the people, and the sovereignty of the people was delegated by them to Parliament, a body accountable to them at periodic intervals. The legal advisors to the Government, the Speaker of the

House, and the President of the Senate had been unanimous in their advice, and that advice had been followed by the Government in the action it had taken. That action had followed the decision given by the Supreme Court in 1937. The fact that there were now two conflicting judgements on the constitutional issues in question plainly revealed a need for further action to establish certainty as between them.

The Opposition motion was defeated by 78 votes to 61 and the Government proceeded with its measures to establish constitutional certainty. What these measures were to be became clear in the following month when Dr. Donges, the Minister of the Interior, announced that it was intended to set up a Parliamentary Court of Appeal to review the decision in constitutional matters of the ordinary courts of law. Moving for leave to introduce a Bill setting up such a body, to be known as the 'High Court of Parliament' he explained that the Court would consist of all members of the Senate and House of Assembly. The constitution of the Court in this manner was 'influenced by the desire that the representatives of the people, whether elected directly or indirectly, should be clothed with the power finally to determine whether an Act of Parliament is valid or not'. This, continued the Minister,

1. House of Assembly Debates. Vol. 78 col. 4109 (April 22nd 1952)

was the law in Great Britain, where ordinary courts of law could never be called upon to adjudicate upon the validity of Acts passed by Parliament. In Bradlaugh v. Gossett (1884)[1] it had been said that, 'No precedent has been or can be produced, in which any court has ever interfered with the internal affairs of either House of Parliament'. It was most important that the judiciary should be spared from incurring the suspicion of political bias.

The Opposition, making the arguments of the Appeal Court its own, straightway set out to supplement them with the less guarded shafts of righteous indignation. The Government's proposals said Mr. Strauss were 'calculated to undermine the independence of the law courts and to smash the constitution'[2] The plan to set up the High Court of Parliament was an illegal absurdity. It would entail 'Parliament establishing Parliament in a new form to say that a majority of the Government was itself right by a verdict of its own members'.[3] 'This phoney court, this fake court', it was asserted, 'will amount to nothing more than a Select Committee of this Parliament.. packed by a majority of Nationalist members, who will be bound to follow the instructions of the Lord High Chancellor Donges, ..and give effect to the decisions of the Nationalist Party

1. (1884) Q.B.D.271
2. 178 H.A. Deb. col.4136
3. Mrs. Ballinger, Ibid, col.4149

Caucus.'[1]

Nationalist Party speakers, supporting the motion ~~against the Opposition's attacks~~ on its legality and motives drew heavily on the notions of national independence,[2] and legal and political sovereignty. 'What the Opposition has to explain', declared one such member, 'is that the British Parliament has the right to repeal the entrenched clauses with a majority of one, but that the Union Parliament, according to them, does not have that right. In spite of the long struggle for sovereignty in South Africa, and for independence, we are now in the position that if we compare our powers with those of the British Parliament, we are according to them in a subordinate position.'[3] The High Court of Parliament would, in effect, protect the sovereignty of the present generation in South Africa.

> 'If the citizens of 1909, when they put the entrenched clauses into the Constitution, thought that they could bind all future generations by means of those clauses, it would have been highly improper of them to have had such thoughts. ..It is out of the question that one

1. Mr. Bloomberg, Ibid. col.4209
2. 'I welcome this Bill', said Mr. Potgieter, 'because this Colour franchise as entrenched in the Constitution was most certainly not entrenched there with an eye to promoting the interests of South Africa. It was an Act of the British Government'. (Col.5094)
3. Mr. Basson. Col.4161. Contrast the statement of Mrs. Ballinger (col.4150) that. 'We do not agree that a country is not free because it has a written Constitution with guarantees in it for the maintenance of certain procedures.'

> generation can bind another. It can bind itself... But later generations, we who are now sitting here, made no agreements or promises. To us it only has a historical value, and it can only bind us if we accept it.'[1]

In a strictly legal view, the existence of sovereign legislative power entailed, it was further argued, the truth of the dictum of Blackstone, endorsed and developed by Dicey, that 'Acts derogatory to the powers of subsequent Parliaments bind not'. If this is true:-

> 'How can a previous Parliament bind this one? This Parliament sitting here tonight cannot even bind the Parliament which will be sitting here next year, to say nothing of a Parliament which was elected five years ago, and which was a totally different Parliament.'[2]

If the sovereignty of Parliament and people could not abase itself before the legislative processes of the past, neither could it stand in awe of judicial process in the present. Parliament and not the Courts was the appropriate body to decide disputed questions of validity where its own legislation was concerned. 'If honourable members of this House have not got the ability to say how the laws must be made', said Dr. Donges, winding up the debate, 'will not the public be entitled to say: 'Have they got the ability then to make laws?'[3]

When the House divided, the Government's majority secured

1. Mr. Basson. Col.4164
2. Mr. Deysel. Col.4199
3. Col.4209

the passage of its motion. Leave to introduce was given; the Bill was ordered to be read for the first time; and April 30th appointed for the debate on the second reading.[1]

3

The second reading debate opened in what had come to seem almost standard fashion - with the Oppositions attempt to persuade the Speaker that any discussion on such a Bill as that proposed by the Government must be ruled out of order. The Bill, said Mr. Strauss, addressing the Chair on this point, could not be considered by the House sitting as it was, since it embodied provisions which amended section 152 of the South Africa Act and had therefore to be taken in joint session by both Houses in terms of section 152. The Bill as it stood was a transaction 'in fraudem legis'. It was 'clearly designed to override the Constitution' and was 'in its very essence, a fraud on the Constitution'. The Speaker's ruling on the Separate Representation Bill of the previous year [2] had been given largely in reliance on the decision of the Supreme Court in Ndlwana's case - a decision which had now been overruled.

1. Mr. Strauss for the Opposition opposed this date as too early, in view of the fact that the Bill had not yet been published, and little time remained for it to be studied before the debate.
2. See above p. 104-5

The principles laid down in Rex v. Ndobe (1930) and Harris v. Donges (1952) were now the law, and an appropriate ruling should be given in accordance with these cases.[1]

Mr. Strauss' view was supported by Mr. Trollip. The Speaker, he urged, had given it as his opinion in 1951 that the 1931 resolution of the House affirming the validity of the entrenched clauses, had been annulled and superseded by the House's acceptance of the motion for the introduction of the Separate Representation Bill by simple majority. But the legislation in question had now been invalidated by the Courts, and this must have the effect of restoring the resolution of 1931 as the opinion of the House. That opinion should guide, and indeed bind the Speaker.[2]

Dr. Donges, putting the Government's point of view, strongly contested the soundness of the Opposition's attack on the proposed legislation. The Bill was no more 'in fraudem legis', he claimed, than any law passed by Parliament to set right what it took to be a wrong or inconvenient judicial decision.[3] If

1. 178 H.A.Deb. Col.4675-6
2. Col.4695
3. The essential weakness of this analogy from the Opposition's standpoint is revealed by an insistence on the distinction between the legal powers of 'Parliament', and what must be done in order that 'Parliament' may be said to have expressed its legal will. An amendment of the law, even a retrospective amendment of the law to set right, or overturn a judicial decision, since it is an example of the former kind, would not be disputed as within the legal powers of 'Parliament' (rightly constituted)

it were maintained that Parliament had no right to set up a constitutional court of the kind envisaged, it would follow that the constitution was only subject to the interpretation of such courts as existed at the time of its coming into existence. But under the constitution, any section, apart from those entrenched, could be amended by simple majority legislation of the normal kind. It must follow that:-

> 'We can therefore amend any provision regarding our courts of law by a majority of one vote. ..We can introduce a Bill here tomorrow stating that the Appeal Court is being abolished. We can abolish any of the Provincial Courts. ..We can therefore set up any court of any kind whatsoever. ..This Parliament is in no way bound by procedures or limitations if it wants to abolish any court existing here in terms of the South Africa Act, or if it wants to set up any other court in its place.'[1]

Here, perhaps, the Government's case stood at its strongest and the Opposition's at its weakest. The letter of the Constitution, at least, was not obviously violated by a Bill which purported simply to amend the judicial system. The nature and the composition of courts of law were not amongst the matters withheld by the Constitution from the area of competence of the two Houses sitting bicamerally and with simple majorities. The power of a sovereign Parliament to make and unmake courts of law could be supported by authority.[2]

1. Col.4703
2. c.f. Stephen's Commentaries on the Law of England. (21st ed.1950) 'The supremacy of the law rests in practice on the power of the courts to investigate all questions where a party alleges that the law has been broken..Nevertheless there can be no doubt of the capacity of Parliament to legislate so as to destroy the jurisdiction of the courts.' (Vol.III p.291)

All that the Opposition could on the face of it establish, was that the true purpose and nature of the legislation in question was such that it impliedly amended the entrenched sections, or was impliedly included within the area of subject matter reserved by them to Parliament sitting as a unicameral body. The Speaker, ruling on Mr. Strauss' point of order on May 2nd. held that this had not been established. It had not, he declared, been indicated in what respect the Bill amended Section 152 of the South Africa Act. Parliament's powers undoubtedly included the power to create courts; and to rule the motion out of order would be to frustrate the House in the exercise of its rights.[1]

Dr. Donges thereupon opened the second reading debate for the Government with an exposition and defence of the proposed High Court of Parliament Act. The effect of the legislation, he explained, would be to make any order of the Appellate Division of the Supreme Court which invalidated in whole or part an Act of Parliament, subject to the review (on the application of a Minister of State) of a Parliamentary court to be known as the High Court of Parliament. Every Senator and member of the House of Assembly was to be a member of the Court. Section One of the printed Bill defined 'Act of Parliament' for the purposes of the Act so as to include any

1. Col.4863 (2nd May 1952)

instrument irrespective of its subject matter and irrespective of the joint or bicameral manner of its passage, which purported to be passed by the King, Senate, and House of Assembly, and was enrolled under the terms of the South Africa Act [1] as an Act of Parliament.

This definition, Dr. Donges was careful to point out, was not intended as a general or legal definition of 'Act of Parliament', but only as a definition for the purposes of the Bill. If this were not the case, the other provisions of the Act which provided that an Act referred to the High Court might be invalidated, would be in conflict with Section One. For an Act validly defined could not logically be declared invalid.[2]

The present legislation, the Minister went on, had no connection with the question of the validity or otherwise of the entrenched clauses. It merely provided for a choice between two incompatible decisions of the Appeal Court. There was no question of undermining of the functions of the normal courts of law, since the jurisdiction of the High Court of

1. The South Africa Act (Section 67) provides that after the Governor General has signified his assent to a Bill, '..The Clerk of the House of Assembly shall cause two fair copies of such law one being in the English and the other in the Dutch language (one of which copies shall be signed by the Governor General), to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa; and such copies shall be conclusive evidence as to the provisions of every such law.'
2. Col.4913

Parliament would be limited to cases in which the power and dignity of Parliament were in issue.[1] This would be a natural extension of the powers of the 'High Court of Parliament' in Great Britain. The judicial functions exercised by that body were well known. There was nothing novel about the idea of a Parliament being a Court of Law and exercising such functions The judicial power of the House of Commons in the matter of its own legislative proceedings was untrammelled by the United Kingdom courts of law.[2] 'The House of Commons', in the words of Sir Thomas Erskine May, was 'not subject to the control of His Majesty's Courts in the administration of that part of the statute law which has relation to its own internal proceedings'.[3] It was to be remembered that the South Africa Act contained no provision for judicial review of the actions of the legislature. The question to be asked, and which the present Bill would allow to be answered, was:-

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1. Col.4912 c.f. Dr. Donges defence of the Bill in the Senate (Senate Debates 20th May Cols.2943, 2950) 'The jurisdiction of the High Court of Parliament is restricted to instances where a judgement of the Courts brings into question the powers and dignity of the elected representations of the people. ..The further step..must therefore be considered as purely a natural extension of the interest right of Parliament to protect its own dignity its own powers and its own privileges'.
2. Cols 4914-7 C.f. Senate Debates 20th May 1952 Cols. 2946, 2947
3. May is here citing Stephen J. in Bradlaugh v. Gossett (1884) 12 Q.B.D. 271

'Who is to have the final say as to the validity or otherwise of Acts? This Parliament which represents the people and enacts the laws, or the courts which are appointed to interpret the laws?'1

The points made by the Minister of the Interior set the pattern of argument for Government speakers in the debate which followed. Democracy, autonomy, and freedom from judicial review were the dialectical key-words. If we, as the legally elected representatives of the people, declared one Nationalist member, 'can in this House, pass the laws which the people want us to pass, we are sovereignly independent. If we cannot do so, we are not sovereignly independent, and then this struggle which was waged by General Hertzog, and which culminated in the passage of the Status Act, was a futile struggle.'2 Mr. Van Den Heever, for the Nationalist Party, also argued that if the Government's legal view were not accepted, Parliament would be committing itself to the theory that as a legislative body it remained in an inferior position to the United Kingdom Parliament, since that Parliament could, after a resolution passed by the Parliament of the

1. Col.4924. A neat debating point was fashioned by Mr. Strauss from Dr. Donges assertions that his proposed legislation would vindicate the sovereignty of Parliament; and that the Court would have a free choice on legal grounds between the judicial decisions of 1937 and 1952. The former statement, Mr. Strauss insisted, could only mean that the decision of the High Court was prejudged and that the 1937 decision would be preferred. There could in these circumstances be no free choice by the Court. (col.4932)
2. Mr. Klopper. col.4945

Union, amend the South Africa Act in any respect by a majority of one, whereas the Union Parliament itself was incapable of doing so.[1]

The Opposition, for its part, hurled its thunders first and foremost on the proposals setting out the composition of the 'High Court'. The Court, argued member upon member was a fraud - a facade for the Government's attempt to circumvent the decision of the highest court in the land. If English legal precedents and nomenclature were to be followed, it was suggested ironically, the proposed 'court' might well be named (in the style of some ancient titles) 'the Court of Errors', 'the Court of Peculiars', 'The Court of Pie-Crust Promises.[2] By the same member, it was urged, in similar vein, that to clause six of the Bill, which enacted that the Judicial Committee of the High Court should consist of ten members, there should be added the qualification: -'None of whom shall have their political value vitiated by any knowledge of or subservience to the fundamental principles of law'.[3]

1. Col.4937. But in what manner may an amendment by the United Kingdom Parliament become law in the Union? The Status of the Union Act (1934) declares that no United Kingdom Act shall extend to the Union as part of the law of the Union unless extended thereto by an Act of the Parliament of the Union. Could a bicameral simple majority Act extend to the Union an amendment to the South Africa Act (passed by the United Kingdom Parliament) which that Act prohibits from being law in the Union except after unicameral legislation? On the doctrine of Harris v. Donges the answer would seem to be 'no'.
2. Mr. Stuart. Col.5436
3. Mr. Stuart. Col.4959

The pretence, he added, that Parliament was already a Court, because under its Standing Orders it exercised some judicial functions was a sophistry.

> 'It is of course obvious that almost every organisation on earth, big or small, limited or unlimited, has some power of dealing with its members. ..Of course, in a limited sense, Parliament is a court; but so is a magistrates court, so is a licensing court, and so is a water court.'
>
> AN HON. MEMBER. 'And a tennis court!'[1]

At this point, the House, through an irritated interlude of rejoinder and interjection, pursued the definition of the word 'court'. What precisely in the legal sense must a body be and do to be properly called a 'court'. The point was the subject of an altercation between the Minister of Economic Affairs and Mr. Trollip:-[2]

Mr.TROLLIP: 'The Minister of the Interior went to great pains to show that although this Parliament was a High Court, yet the members of Parliament were not judges. How you can have a court without a judge I do not know.

An HON. MEMBER: It is a people's court.

Mr.TROLLIP: That is one of the mental contortions or distortions for which the Minister of the Interior is so famous. I find that a court is defined as a place - it comes from the Latin word 'curia'.

Mr.LAWRENCE: That's why it becomes curiouser and curiouser.

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1. Col.4959
2. Col.5048

Mr.TROLLIP: A court is defined as a place where justice is judicially administered. How can you administer justice judicially without a judge? I would like to know that. Now I have a quotation here...'It is a common and essential feature of all courts that there is a judge or judges, so essential indeed that they are even called 'the court' as distinct from the subordinate officers' - One does refer to the court when you mean the judges.

The MINISTER OF THE INTERIOR: And what do you do in the magistrate's court where there are no judges?

Mr.TROLLIP: There the court is the magistrate.

The MINISTER OF THE INTERIOR: But he is not a judge, and you said there cannot be a court without a judge.

The application of the term 'sovereign' to the British, American, and South African systems of government, similarly provided material in plenty for misunderstanding.

The MINISTER OF ECONOMIC AFFAIRS: If the Union Parliament, as alleged, is bound by Clauses 35 and 152 of the Constitution, then it is not wholly sovereign..We say that if we are bound by those clauses, then this Parliament is not sovereign and we are in the same position as the Congress of the United States of America, which is not a sovereign Parliament. The sovereignty of the U.S.A. Congress is limited.

Mr.BARLOW: Says you!

The MINISTER OF ECONOMIC AFFAIRS: 'Says you!' I'll tell you what, 'Says Bryce'. I do not know whether the hon. member for Hospital (Mr. Barlow) knows who Bryce is. He states the position very clearly in his 'Studies in History and Jurisprudence' -

> Thus in the United States..each legislature therefore (Congress and the State Legislature) has only a part of the sum total of supreme legislative power. The sovereignty of each of these authorities will then be a partial sovereignty.

Mr.LAWRENCE: Then the sovereignty is divisible, obviously.

The MINISTER OF ECONOMIC AFFAIRS: Bryce says further...

Mr.LAWRENCE: The sovereignty is divisible.

The MINISTER OF ECONOMIC AFFAIRS: No, there is no complete sovereignty.

..Bryce..goes on to say -

> In England therefore the judges need never inquire whether an Act of Parliament was invalid when first passed. Invalid it could not have been because Parliament is omnipotent. And Parliament is omnipotent because Parliament is deemed to be the people. Parliament is not a body with delegated or limited authority. The whole fullness of popular power dwells in it. The whole nation is supposed to be present within its walls.

That, Mr. Speaker, is our view: The whole South African nation is supposed to be present within these walls. The electors of this country are supposed to be present within these walls when Parliament is in Session.[1]

> .....But the important point is this, viz. that in so far as sovereignty is concerned, the Union Parliament succeeded to all the powers and privileges of the Parliament in Westminster. ..That is the effect of the passing of the Statute of Westminster. It includes the right of this Parliament to change any law, however fundamental...

Mr.RUSSELL: In the proper way.

The MINISTER OF ECONOMIC AFFAIRS: It gives us the right to determine our own procedure. It also means that there is no testing right for the Courts. ..I will quote what Dicey says..

> It is certain that there is no legal basis for the theory that judges as exponents of morality may over-rule Acts of Parliament. A modern judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral, or because it went beyond the limits of Parliamentary authority.

1. H.Ass.Deb. Cols.5032, 5033

Mr.RUSSELL: Does that mean that you are being immoral now?

Mr. Trollip's urging of the Appeal Courts grounds of decision [1] drew equally indignant fire from the Government benches:-

Mr.TROLLIP: If Parliament wants to alter the South Africa Act, then it must alter it in the way prescribed in the South Africa Act, according to the law. ..The Minister of Economic Affairs and the Minister of the Interior..stated that, according to the judgment of the Appeal Court Parliament is not sovereign, and therefore a court of Parliament has to be established to enforce the sovereignty of Parliament. I think it is nonsense to say that Parliament is not Sovereign.

The MINISTER OF ECONOMIC AFFAIRS: Do you really believe that?

Mr.TROLLIP: Yes, I do

The MINISTER OF ECONOMIC AFFAIRS: You do not agree with Dicey then.

Mr.TROLLIP: I will come to Dicey in a moment. ..The proposition I want to put to the Minister is this, that if his argument is correct that Parliament is no longer sovereign, then I think there is some confusion of thought on the part of the Minister, because the Status Act of the Union talks about making the State sovereign. Then it goes on to say that Parliament, acting as one of the Trinity, is the sovereign law-making body.

The MINISTER OF ECONOMIC AFFAIRS: That is what we say too.

The MINISTER OF THE INTERIOR: But the Appeal Court does not say so.

Mr.TROLLIP: It is not the sovereign judicial body, nor the sovereign executive, but it is the law-making body which is Parliament. In other words, as was said by a well-known

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1. Col.5044-5

writer, you cannot pull yourself up in your own jackboots. That is what it amounts to. The Minister of the Interior has referred at length to Dicey. I do not know whether he has read that Dicey also said this. 'A river cannot rise above its source'. That means that we in Parliament cannot make laws unless we do so in terms of our Constitution which is our source.

The MINISTER OF ECONOMIC AFFAIRS: Our source is the Parliament in England. That is our source. Your are quite wrong.

Mr.TROLLIP: What Dicey says was this that in Britain Parliament is sovereign; it is omnipotent..and the reason, of course, is that in Britain they have no written constitution. Then Dicey goes further and says that where you have a written Constitution, your law-making body, although it may be sovereign, still has to act in terms of that Constitution, and then he used the expression I have just quoted, namely that a river cannot rise above its source.

The MINISTER OF ECONOMIC AFFAIRS: But the source is the British Parliament.

Mr.TROLLIP: No that is where the Minister makes a mistake. Our source is the South Africa Act, not the British Parliament. ..As I have said, you cannot pull yourself up in your own jackboots, and the Status Act clearly shows that the Statute of Westminster laid down quite definitely that the State was sovereign and that Parliament was sovereign as a law-making body.

The MINISTER OF THE INTERIOR: If it makes laws which can be upset it is not sovereign.

Mr.TROLLIP: I have tried to show that Parliament is the sovereign law-making body. The Minister of Economic Affairs stated that if the Union Parliament is bound by the entrenched sections then it is no longer a sovereign body.

The MINISTER OF ECONOMIC AFFAIRS: Just what Dicey said of the United States.

Mr.TROLLIP: I do not think I shall take that point any further, as it is clear the Minister cannot understand it.

The MINISTER OF ECONOMIC AFFAIRS: No, you are quite right; you cannot take it further.

Mr.TROLLIP: I have done my best to show what the position is.

Mr.RUSSELL: He cannot rise above his 'Sauce'.

But behind these points of logomachy, a fundamental question of definition lay unresolved - the definition of the word 'Parliament'. In this, as in the debates of the previous year lay the real root of disagreement. It is in terms of their issue that failure to agree about the meaning of the doctrine of legal sovereignty can be most clearly formulated. To Nationalist members, secured by the theory of the legislators as a sovereign unity animated by the authority of the electorate, and looking for textual support to the classical statements of English legislative supremacy, the Opposition campaign appeared as a plain attempt to wield legal pedantries and the judicial process in defiance of the facts of political life. The Government had a mandate.[1] The United Party as part of its tactics of opposition was attempting to prevent by extra-Parliamentary and litigious means the implementation of that mandate. The theoretical conflict of views on the nature of the Union Parliament was clearly brought out

1. 'If we had a mandate' said Dr. Donges, 'for the separate representation of voters, it must have been a mandate for the separate representation of voters by a bare majority.' (Col.5505)

in two speeches made by Mr. Van den Heever (Nationalist) and by Mr. Russell (United Party). Mr. Van den Heever took the Opposition's point directly.

> 'The question has been raised as to when Parliament is not Parliament, and it has been said that for certain purposes Parliament is only Parliament when it sits unicamerally and there is a majority of two thirds. I want to say this, that if we have a joint sitting, then it is either Parliament or it is not Parliament. It cannot be Parliament only if there is a majority of two thirds.

Mr.WARING: 'Ask the five judges!'

Mr. VAN den HEEVER: '..We cannot determine according to the majority whether Parliament is in fact Parliament. ..What counts is the composition and not the majority. The composition determines whether or not this body is in fact Parliament.'[1]

The Opposition view, put by Mr. Russell was that:-

> 'We have, Sir, two separate legislatures for two separate purposes. We have a Legislature that exists in a certain bicameral form with certain rules of procedure to pass ordinary legislation. Sitting thus, they can of course decide their own procedure. They can decide to stand on their heads while they are passing an Act if they like. But for the purpose of entrenched legislation, we have a different Legislature, we have a differently constituted Parliament. That Parliament must obey its own laws, must sit in a certain way, must have a prescribed majority. It is true that when they are together, when they are sitting in joint session, they can also decide their own procedure. They can also pass a Bill standing on their heads if they like, and as they are then a properly constituted unicameral Parliament, that law would be valid. Unless Parliament is properly constituted, you cannot pass a valid law through this House.'[2]

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1. Col.4974
2. Col.5438-9

The question in issue here could be described in a number of ways. It could be regarded as an argument about the area of Parliamentary privilege; or as a dispute over the existence of the power of judicial review; or again as a difference of opinion as to the consequences of legal supremacy. It is of course all of these. But, it could be submitted, there is, more fundamentally, a question posed about the logic of legislative action. Parliamentary privilege judicial review, and the doctrine of sovereignty inhering in the legislative body, all raise facets of this question. In its most general form the question could be posed as:- 'What is implied by the existence of a system of government by law?' More particularly the problem reduces to a series of questions about the extent to which principles such as legislative supremacy, and legislative privilege may be accomodated within the wider principle that in any system of law there must be something which preserves a distinction between legal authority and that which is not legal authority. Both Parliamentary privilege and the doctrine of sovereignty (defined in one way) are at their logical extremes destructive of this distinction. The theory of the separation of legislative and judicial powers is at bottom only a statement of this truth. In any system of government, legislative bodies will enjoy an area

of privilege or discretion both as to the form and content of legislation. Constitutional provisions for judicial review, where they exist, cut down this area of privilege. But even where they do not exist and the legislature enjoys the benefits of legal sovereignty, the area of privilege can never be absolute. This is only to say that if authority is to be legally exercised there has to be a judicial (or something equivalent to judicial) means of ascertaining whether it has or has not been so exercised. This proposition was the implicit premiss of the South African Supreme Court in Ndobe's case (1930) where the distinction was clearly made - as in the speech of Mr. Russell quoted above - between the investigation by judicial agencies of matters of discretionary procedure, and the enquiry as to whether the criteria formally necessary for enactment have been fulfilled. Ndobe's case might, however, convey the suggestion that there is a distinction of kind between the two types of enquiry. But this is not so. 'Procedure' is not by nature a matter which falls into classes labelled 'necessary' or 'discretionary'. The discretionary procedure mentioned by Mr. Russell, could notionally for example, become necessary to a formal act of legislation. It might conceivably be provided (though the event is not likely) that certain kinds of legislation should not be deemed to re-

ceive the force of law unless passed by members standing on their heads. Such a provision differs only in probability not in principle from one enjoining a unicameral sitting or a special majority. It cannot be laid down a priori that 'The composition determines whether or not this body is in fact Parliament'; or that; 'Parliament is' (as a matter of fact) 'either Parliament or it is not'. It is the law which determines the issue. 'What is Parliament?', and 'When has Parliament acted?' are not questions of fact.[1] The correct principle would seem therefore to be that whatever conditions respecting the form of legislation are regarded by the courts as definitive[2] in law of the actions of Parliament' must remain within the area of scrutiny of the judiciary,[3] or some judicially acting body. This is a general point, not necessarily connected with the 'superiority' of a constitution over

1. As remarked by C.A.W. Manning (Modern Theories of Law. 1933) p.200:) 'Once we start personifying collectivities, we have already left the world of fact for the world of ideas, and in this world of ideas, the question when a given collectivity is to be deemed to have exercised its collective will can scarcely be a mere question of fact'.
   c.f. a dictum of Lord Somers cited by Sir William Holdsworth (Some Lessons from Our Legal History' 1928 p.136):- 'We are not now..speaking of the natural existence of things ..We are speaking of a legal subject, touching the construction of a law where fictitious relations and conclusions have place.' 'The Bankers' Case (1700) 14 S.T. at p.90.
2. The difficulty of deciding what rules are 'definitive' of a complex legislative body may be acute, and the solution crucial as Harris's case demonstrates
3. c.f. Cowen 'Legislature and Judiciary' 14 M.L.R.273 (1953)

the legislature in the sense in which the term is sometimes employed (that is as indicating that some laws are of special or fundamental importance and not to be tampered with by ordinary legislative means).

There was, however, in the course of the debate no clear distinction maintained on this issue. Mr. Russell, for example, after his admirable paraphrase of the Appeal Court's findings, went on to discuss the 'superiority' of the constitution over the legislature and of the 'limited' nature of the majority of the world's legislative bodies - both of which had been specifically denied as propositions applicable to the Union Parliament.[1] Almost without exception, he urged constitutions contained 'superior' law:-

> 'There are only two countries in the world that have constitutions that are not superior to the Legislature.

An HON. MEMBER: 'South Africa!'

Mr. RUSSELL: 'No, the two are England and New Zealand. ..But any other country in the world has in its Constitution entrenchments. They tie their Legislature; they tie their Parliament to observe certain rules before they can alter their Constitution.[2]

In England, he went on, the 1931 resolution would have been observed as a matter of constitutional convention binding

1. The Union Parliament (rightly defined) had, it was held, sovereign power to amend its constitution in any respect (1952) 1.T.L.R. 1245, at 1255, 1257.
2. Col.5439. Mr.Kahn later instanced the Soviet Constitution as 'the most democratic in the world', but which yet had a provision for constitutional amendment by two thirds majority' (Col.5447)

the Government and Parliament in good faith if not in law. That resolution was one which had been 'subscribed to by the Prime Minister, subscribed to by the Minister of Finance, subscribed to by two thirds of the present cabinet, and universally endorsed by the whole of South Africa'.[1] Smuts and Hertzog had plainly regarded it as a binding obligation on the people and Parliament of the Union. (Both sides, it may be noted were anxious to claim the authority of Smuts and Hertzog in support of their theses, and a good deal of exegesis of the Assembly Debates was directed to this end. The Opposition insisted on the fact that both statesmen had accepted, in a way which the Government was refusing to do, the moral obligations arising from the entrenched clauses. The Government, for its part, contended, from the same texts, that Smuts's very insistence on the moral obligation constituted an acceptance on his part of the proposition that the obligation imposed was a moral obligation merely, and not a legal one.[2]

1. Col.5440
2. A particular bone of contention was provided by a speech made by Smuts in the House of Assembly in 1949, moving a motion expressing disapproval of the Government's proposed bicameral legislation. Both sides cited a passage in which he declared:- 'Whatever the legal position may be - and I say nothing about that - let us stick to the old practice which we have followed up to the present.' (H.Ass.Deb.Vol. 66 Col.76). Dr. Donges claimed that Smuts had stressed 'the moral aspect of the question' and 'left the matter there as far as the legal aspect was concerned because he was convinced that on legal grounds we had the fullest right to follow the procedure which we are now following.' (7th May 1952 Col.5139). Opposition speakers sought to show that if Smuts admitted the bare legal right, his attitude was one of uncompromising opposition to its use, and that he did not, in any case have the advantage of the Appeal Court's decision in 1952, which he would have accepted as authoritative.

If in the eyes of the Opposition, the Government's appeal to the law and usage of Great Britain was grounded in sophistry, the attempt to cite as precedent the constitutional practice of France stood in no better light. It was claimed that the High Court of Parliament was no more than an assertion of the right of Parliament to have disputed constitutional and legislative matters settled by a body other than the normal courts of law. This was fully recognised by the French constitution in its provision for a constitutional committee to have jurisdiction where the legislation of the Houses was alleged to be incompatible with an article of the constitution.[1] But to suggest that the situations were analogous, declared Mr. Mortifee (United Party) was 'completely and utterly wrong'.[2] The French Constitutional Committee was a vastly different thing from the proposed Court. The ten members appointed to that Committee by the two Houses of the French Parliament were all from outside

1. Dr. Donges had claimed that, 'The idea of members of Parliament sitting as members of a court was not unknown. ..In connection with this point one can also refer to the Con- Constitutional Committee in France. ..It is a non-judicial body and this body, although it does not consist entirely of members of the two Houses in France, consists either of members of the two Houses in France, or members elected by members of the two Houses in France. Again it is tantamount to the same principle. (Col.4920). In the Senate (20th May, Col.2952) Dr. Donges declared that the French Constitutional Committee was, '..not the members of parliament themselves, but it is people who are elected on a party political basis by the members of the two Houses of Parliament..so that the will of the people is sovereign and the people who are responsible for any action taken in this connection can be called to account at the next election.'
2. Col.5457

Parliament,[1] and not therefore, members who had already voted on the issue they were to judge. The Minister had misled the House by this claim to be following precedents already established elsewhere. Would the members on the opposite side say whether, in view of the restrictions on constitutional amendment embodied in the French Constitution, they regarded the French Parliament as sovereign or not?[2]

The unfitness of members of Parliament to act the role of judge was protested on grounds of personal ignorance and potential bias by more than one Opposition speaker.[3] The proposed High Court of which they were all to be members would thrust on them duties of which they were incapable and which

1. Article 91 of the Constitution of the Fourth Republic provides that the Comité Constitutionel shall consist of the Presidents of both Houses, seven members elected by the Assemblée Nationale, and three members elected by the Conseil de la République. The latter must be elected from outside Parliament ('choisis en dehors de ses membres') The Committee is elected at the beginning of each yearly session and is presided over by the President of the Republic. Its function is to consider, on the inititiative of the Conseil, whether any Bill passed by the Assemblée involves a revision of the Constitution.
2. Col.5457
3. e.g. Mr. Lovell:- 'Two cases will be going on before that Court. The one will be Harris and Others v. Donges, and the other will be the case of the Opposition v. the Government or vice versa. They will go on at the same time. I, as one of the Judges, or Assessors, as the Minister of the Interior calls it, find myself completely and utterly unfitted to hear these two cases...I say that I am unfitted because I have directly expressed opinions adverse to, or hostile to, one of the parties in the case. And I say further that I am not trained, nor can I compare the slight training I have had in law, with the very erudite knowledge and experience of the judges on whom I am supposed to sit in judgment.' (Col.5235-6)

moreover, even if knowledgeable in the law, they were disqualified from exercising in a judicial manner, since their opinions were already formed and expressed both during the present debate and that which had taken place in the previous year. The members of the Government in particular had already argued for and presented before the Appeal Court a view which that court had rejected. How could their arbitration between their own opinion and the opinion of the Court be an impartial or judicial one?:-

> 'The judgment that the Hon. the Minister will deliver when the matter of Harris v. Donges comes before him will present no legal difficulty to him. His judgment is already in print. It is to be found on pages 438 to 449 of the South African Law Reports for 1952'[1]
>
> (i.e. the argument of Government counsel in Harris's case)

The last word in favour of the High Court was spoken by the Minister of the Interior. He rejected, he said, the doctrine that a democratic Parliament should be placed in a subordinate position to the law courts.[2] The consequences of judicial review had been summarized by Mr. Justice Holmes of the United States Supreme Court in the dictum that, 'We are

1. Col. Jordan (United Party) at col.5472
2. c.f. Mr. Van den Berg (col.5182) 'Are judges different from other people? Are they not just as partisan as any other person? ..Are they the people who must triumph over the people and over the representatives of the people? Are the people to be told which problems can be solved by way of legislation and which cannot? ..The law for which I stand is not the law forced upon me, or which is interpreted by officials, but the rule of law of the majority of the people.

under the Constitution, but the Constitution is what the judges say it is.'

> 'Do we (Dr. Donges asked) 'want that position in South Africa? This Bill is giving an opportunity to the democratically elected representatives of the people to decide that question one way or the other.'

For the alternatives were that:-

> 'You can either have judicial supremacy as you have in the United States, or you can have Parliamentary supremacy as you have in the United Kingdom'.[1]

The power of judicial review, he continued, had been assumed by the courts. It was not specifically given to them by the South Africa Act, except in relation to Ordinances passed by Provincial Councils. A non-sovereign legislative body existed where a legislature was bound by a constitution. France, Belgium, Holland and Sweden had such legislatures. In each case limitations were imposed by the constitution; but in no case was there given to the courts power to deal with the position if those limits were overstepped. The final decision as to the validity of its enactments should rest in the hands of Parliament itself. In adjudicating appeals from the law courts under the proposed legislation M.P.s would act according to their consciences. They would be acting as any court of law acts, for example, in its power to deal with instances of contempt, where the court certainly

1. Cols.5497, 5498

judges in its own case. But whatever decision the High Court of Parliament came to in this matter, it would be able to claim judicial support. It would merely be choosing between the reasons furnished by the Supreme Court in 1937 and those put forward in 1952; and thus whatever the outcome, would be fortified by a decision of the normal courts of law.[1]

So, after a continuous sitting of thirty hours, the debate ended. The Bill secured a second reading by a majority of fourteen (79-65). Hereafter, its progress to the Statute Book, though contested at every step, was relatively rapid. At the Committee Stage, Mr. Strauss announced that the Bill would be opposed clause by clause, but that no amendments would be moved, since the proceedings were 'a fraud on the Constitution, and a sordid stratagem, designed to circumvent the entrenched clauses'. On the Third Reading,[2] the Opposition attempted to adjourn the House in protest against the Government's application of the closure. The attempt, however, failed and the Bill was read a third time with a majority of

1. Cols.5498-5502
2. Opposing the motion for a Third Reading, Mr. Strauss listed twenty six countries (including Italy, Israel and West Germany) which had constitutional provisions for the testing of legislation in the Courts. In Australia, Canada, Ceylon, Norway, and the United States, the practice had been established by judicial precedent. These were, he urged, the logical precedents for South Africa. The Government had gone to Communist countries for a precedent. (H.Ass.Deb. May 14th)

twenty five.

4

In the Senate, events took a similar course. The Opposition having unsuccessfully raised its point of order,[1] Dr. Donges reiterated the substance of his defence of the High Court Bill. The Bill itself, he asserted prescribed nothing. It merely created the opportunity for the decision as to the validity of any particular piece of legislation to be made by members of Parliament. If Parliamentary sovereignty was to be limited in any way, the restrictions should be imposed by the people through their representatives:-

> 'If some outside body is to impose them on us, then we have no freedom; but if we ourselves voluntarily accept it, we still retain our freedom, for we have the freedom to bind ourselves, and that is what this Bill gives us the opportunity of deciding. It merely gives us the freedom to bind ourselves or not to bind ourselves. This Bill does not say a word about what we are going to do.[2]

If the government's proposals were indeed as the Opposition claimed, a tearing up of the constitution and a

1. In refusing to rule the Bill out of order, the President of the Senate, having noted the contention that it represented an attempt to circumvent the provisions of the entrenched sections, continued:- 'In my opinion..it would be exceeding my functions for me to look beyond the contents of the Bill as actually before this House, and to enquire into, and take cognizance of matters which are not embodied in its provisions.' (Senate Debates 19th May 1952 col.2872)
2. Senate Debates 20th May 1952 col.2954

destruction of the rule of law, then continued the Minister, the rule of law must have been destroyed between 1937 and 1952; for if the High Court, in the event, were to decide that Parliament had the right to decide the manner and form of its procedure without check from the courts, it would merely be re-establishing the state of affairs which had prevailed between the two judgments of the Supreme Court in 1937 and 1952. The right to settle its own code of procedure was one which was undoubtedly enjoyed by both Houses of the British Parliament. The House of Commons, as Mr. Justice Stephen had said in Bradlaugh v. Gossett was 'not subject to the control of Her Majesty's courts in the administration of that part of the Statute Law which has a relation to its own internal proceedings'. For such purposes, the House of Commons could, it was said in Erskine May, 'practically change or practically supersede the law'.[1] That fact was important, since the powers exercised by the House of Commons were declared by the Powers and Privileges of Parliament Act of 1911 to be exercisable also by the Houses of the Union Parliament.[2]

1. The citation is from May's 'Parliamentary Practice' (15th ed) p.60
2. Section 36 of the Act provides that, 'Save as is otherwise expressly provided by this Act, the Senate and the House of Assembly of the Union of South Africa, or either of them, and the members thereof respectively shall hold, enjoy, and exercise such and the like privileges immunities and powers as at the time of the promulgation of the South Africa Act 1909 were held enjoyed and exercised by the Commons House of the United Kingdom and by the members thereof.' Professor D.V. Cowen (16 M.L.R.273 at 282) has contended that since the Powers and Privileges of Parliament Act was enacted by the Union Parliament functioning bicamerally in the ordinary way, it 'cannot be invoked to render the entrenched Sections nugatory'.

If this were not the case Parliament and its presiding officers would be placed in a position of constant dilemma with no permanent basis on which to arrange their procedure; since having acted, they would always be liable to the retrospective interference of Appeal Judges who might differ from their predecessors as to the validity of the procedure decided on by Parliament. The object of the Bill under discussion was to place the power to determine how laws should be made unequivocally in the hands of the representatives of the nation and to remove it from the orbit of fluctuating opinions in fluctuating courts.

The Minister of the Interior was supported in his championing of the rights of the legislative body by Senator Wynne. Lord Bryce had said in a footnote in his 'American Commonwealth (vol.1 p.251) - which the Senator proceeded to read - that

> '..There are countries on the European continent, where, although there exists a constitution superior to the legislature, the courts are not allowed to hold a legislative Act invalid, because the legislature is deemed to have the right of taking its own view of the constitution.'

It was in pursuit of this aim that the Parliament of South Africa now sought to institute a court with final ultimate and conclusive jurisdiction in this respect. The Opposition

had asserted that the proposed Parliamentary body could not be considered to be a Court. The questions as to the nature of a court and as to whether any particular decision could truly be called 'judicial' were of a rather technical nature, but Professor Paton of the University of Melbourne ('an approved student', declared Senator Wynne, 'of the professors of the University of Oxford, including Dr. Allen, the Warden of Rhodes House') had considered the matter briefly in his 'Textbook of Jurisprudence' (2nd ed) published in 1951. A true judicial decision, Professor Paton had written presupposed an existing dispute between two or more parties, and then involved four requisites:- (1) The presentation (not necessarily orally) of their case by the parties to the dispute. (2) If the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties. (3) If the dispute between them is a question of law, the submission of legal arguments by the parties. (4) A decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required, a ruling upon any disputed question of law.[1] Judged by these criteria, the

1. The analysis is that made in the Report of the Committee on Ministers' Powers (1932) Cmd.4060 (at p.73)

High Court of Parliament would be a Court, because it complied with the concept and functions of a Court. It would be a court comparable to the High Court of Parliament in England, which had been analysed by Professor McIlwain under that title - a title specifically admitted and conferred, for example, by Sir Matthew Hale.

Here, in the composition and function of the proposed court lay the Opposition's obvious materials of debate. Condemnation was couched in even stronger terms than those used in the lower House. The Court was a monster lacking even the appearance of impartiality.[1] It was not a court at all, but 'a marionette show, with the members of the court as the puppets and marionettes, and the hon. the Minister of the Interior as the puppetmaster, pulling the strings and watching his puppets doing exactly what he asks them to do'[2] It was a Gilbertian creation. 'In the opera, the Pirates of Penzance' said Senator Browne, 'all the pirates become members of the House of Lords..In the Gondoliers, the drummer becomes a King and the King becomes a drummer..In the opera which the hon. The Minister of the Interior is now writing, the judges refuse to become politicians, so all the politicians become judges'. The farce had its prototype two hundred years

1. Senator Jackson. Col.3102
2. Senator Campbell. Col.3171

before in Moliere's comedy, 'Le Medicin Malgre Lui! Senators might apply to themselves a similar title - le juge malgre lui. 'I have no ambition to be..a judge, or even an assessor', declared Senator Duthie (Labour). 'I did not come down here to become a judge ..This greatness thrust upon me of becoming a judge, is unpalatable to me for the very obvious reason that I do not feel competent to rise to that high honour.' The United Party would, it was stated, boycott the High Court of Parliament [1] (though suggested Senator Ballinger, they might thereby run the risk of impeachment!). The Court would consist of 100 per cent of members of the Nationalist Party. There were some who would take their seats on the bench only out of party loyalty. 'I beg them', said Senator Browne, 'to join with us in refusing to sit on this mockery of a court.' 'The High Court of Parliament Bill', he added, 'whatever it may be, does not set up a high Court of Justice. Mr. hon. friends..are attempting to tell the country that this High Court of Parliament envisaged in this Bill will be a high court of justice. Sir, we have heard already that the verdict

1. In addition, it would not attempt any revision or amendment of the Bill setting up the High Court. Col.3071: 'There is no need..to go into the mechanics of this Bill. It has no mechanics worth talking about, and it is a considered policy of the Opposition that it is not going to try and amend it in any shape or form'. (Senator Ballinger)

has been given by some hon. judges of that court.[1] It will be a low court of injustice and I shall not vote for it.'

Senator Heaton Nicholls of Natal was an equally assertive opponent of the Bill. An inevitable clash between legislature and judiciary would be provoked by the Government's proposals. 'If the courts declare this Bill invalid', he asked, what then?:-

> 'Where are we? What do we do about it? ..If there is a clash between Parliament and the judiciary, where do we stand? Do we obey the law declared by the courts, or the law declared by the Executive acting in defiance of the law? Who obeys who in South Africa? What are the people expected to do about it?[2]

The Bill was, asserted Senator Nicholls, one more step in the Government's progress towards a republic in South Africa. There had been, he had noticed, for many years:- a

> 'a subtle kind of propaganda going on..to reinforce the academic expounders of constitutional law derived from overseas, a propaganda designed to create the impression in legal circles that some profound change is taking place in the Constitution of South Africa, without our being aware of the fact..A mere statement by the Prime Minister going overseas, and cabled out here without any authority at all from this Parliament, is regarded as bringing about a change in the Constitution, and having the force of law. And the great airs

1. It was claimed by Senator Jackson. (Col.3544) that:- 'We know that as far as this new Bill - this High Court of Parliament Bill - is concerned, the judgment has been written in advance. We have it on good authority that the hon. Senator Petterson and the hon. Senator Struben have already written out that judgment. ..Before the court is even convoked, before even the constitution of the court is made law, we know what the judgment is going to be.'
2. Col.2965

> of learning, armed with the weight of academic authority with which the Minister comes along has induced many people to believe that the Act of Union may after all have vanished from the Statute Book and no longer be there. Perhaps there was no such treaty as the Act of Union. Perhaps there was no National Convention. Perhaps there is no such law..
>
> Somewhere along the path of tearing up the Act of Union, a definite point will be reached where it can be legally and truly and constitutionally said that the Union compact is at an end. When that point is reached, Natal will have to reconsider the matter afresh.[1]

The interpretation by the Minister of the Interior, of the sovereignty of Parliament was not allowed to go unchallenged. The sovereignty of Parliament, asserted Senator Jackson was not in issue. The Appeal Court had pointed out that Parliament could function only in terms of the Constitution, and that if the Constitution were broken there would be no Parliament - 'just as little as a man could remain sitting on a chair after you had kicked the chair out from under him'.[2] It was nonsense, as the Chief Justice himself had remarked, to deduce from these facts that Parliament was not sovereign. The meaning of the Appeal Court's decision was that a number of members of Parliament had got together and declared something to be an Act of Parliament. The Courts had cogently and unanimously said that it was no Act of Parliament. The same people were therefore now proposing to get

1. Col.2969, 2972
2. Col.3097

together again, call themselves something different, and say that it was an Act of Parliament.[1] In all this the Government was refusing to abide by the decision of the courts, and trying by a roundabout method to evade the provisions of the entrenched clauses.[2] There was no other reason for the Bill. It existed for one reason - to validate a 'pseudo, bogus, so-called Act of Parliament'.[3]

The Bill received its second reading in the Senate on the 27th May, and the remaining stages in both Houses were taken within the space of a week. As in the House of Assembly, no discussion or amendment was attempted by the Opposition in the Upper House,[4] (though several minor Government amendments were carried and accepted, under Opposition protest, by the House of Assembly.[5]) A final attempt to delay the passage into law of the Bill was made by way of petition to the Governor General, requesting that the Royal Assent should be withheld on the ground that the prospective legislation was in conflict with the provisions of the South Africa Act. The

1. Senator Browne. Col.3489
2. Senator Tucker. Col.3514
3. Senator Browne. Col.3488
4. 'At this stage in the reading of a Bill, Parliament usually takes into consideration the wording of the clauses with the object of improving a Bill, but this is a Bill with which we can have nothing whatever to do..We do not propose to take part at all in the discussion of any of the clauses, so we shall resist the passage of every clause as it comes along.' (Senator Heaton Nicholls. Col.3250)
5. Two of the amendments provided that the Court should be 'A Court of Law', and that it should be empowered to set aside, confirm, or vary Supreme Court judgments or orders, 'on any legal ground'.

attempt was, however, unsuccessful and the Royal Assent was given on June 3rd to Act No.35, 1952 - an 'Act to establish a High Court of Parliament, and to define its jurisdiction, and to provide for matters incidental thereto'.

CHAPTER NINE

The High Court's Decision

'The people are sovereign, and their mouthpiece, Parliament is also sovereign. A body cannot be sovereign without its mouthpiece being able to interpret that sovereignty.'

(Mr. Liebenberg. House of Assembly. May1952)

1

The constitution of the body set up by Act 35 was described in the third Section of the Act. The Section provided that:-

'Every Senator and every member of the House of Assembly shall be a member of the Court, and shall, notwithstanding the dissolution of the Senate or the House of Assembly as the case may be, continue to be a member of the Court until a new Senate has been constituted, or as the case may be, a general election of members of the House of Assembly has been held, or until any matter under review by the Court has been disposed of by it, whichever may be the later..'

A President of the Court was to be appointed from amongst its members by the Governor General, and fifty such members were to constitute a quorum at any sitting of the Court. It was further provided that:-

'No member of the Court shall be disqualified from sitting as a member of the Court or a Judicial Committee by reason of the fact that he participated in the proceedings of Parliament in his capacity as a Senator or a member of the House of Assembly during the passing

> of the Act of Parliament which forms the subject matter of the judgment or order under review.'

The powers of the High Court were provided for in the second Section of the Act which laid down that;-

> '..Any judgment or order of the Appellate Division of the Supreme Court of South Africa..whereby the said Appellate Division declared or declares invalid any provision of any Act of Parliament[1]..or whereby it declared or declares that any such Act is not an Act of the Parliament of the Union, or whereby it refused or refuses to give effect to any provision of such an Act.. or in any other manner rendered or renders such a provision inoperative or denied or denies that it has the force of law, shall, subject to the provisions of this Act, be subject to review by the High Court of Parliament'

The High Court was to hold its sittings in the Chamber of the House of Assembly (Section 4) and an application for review of a judgment or order of the Appellate Division might be made by a Minister of State within six months of the giving or making of any such judgment or order. (Section 5). An application for review was to be referred by the President of the Court within thirty days to a Judicial Committee of the Court, which should consist of ten members appointed by the President (four to constitute a quorum). The decision of a

1. 'Act of Parliament' is defined in Section one, for the purposes of the Act, as:- '..Any instrument..enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa..or which may at any time hereafter be so enrolled, by virtue of the fact that it purports to be an Act of Parliament, and which purports to be enacted by the King, the Senate, and the House of Assembly, whether it purports to have been passed by a joint sitting of the Senate and the House of Assembly or by the Senate and the House of Assembly in separate sittings, and irrespective of the subject matter thereof.'

majority of the members present should be the decision of the Judicial Committee. (Section 6) Any person or persons, it was provided, who had lodged written representations with the Secretary of the Committee might appear before it and address argument to it, personally or by counsel, on the matter subject to review. Thereafter the Judicial Committee should make a report to the full body of the High Court of its recommendations on the application for review, after taking into consideration the representations made to it, and the record of the proceedings and reasons given by the judges in the Appellate Division. The Court might then, at a sitting convened to consider its Judicial Committee's recommendations, by resolution (on a simple majority vote) confirm, vary, or set aside, 'on any legal ground' the order or judgment in question. (Sections 6-8). The decision of the Court taken in this way was to be final and binding, and executed in every respect as if it were a decision of the Division of the Supreme Court in which the matter was originally heard.

On the 17th June, two weeks after the Act had received the Governor General's assent, the Rules of Procedure of the High Court were published in the Government Gazette. Argument before the Committee was to be in public. All other proceed-

ings, however, except the announcement of the High Court's decision would take place in camera. The President of the High Court was to be empowered to terminate discussion, 'as soon as it appears to him that the question before the Court has been adequately discussed'.

The instrument thus fashioned was straightway put to its intended use. The Speaker of the House of Assembly (Mr. Conradie) in his role as President of the High Court announced by notice in the Government Gazette on June 26th that the Prime Minister had applied to the Court under the terms of Act 35 for a review of the Appeal Court's decision in Harris v. Donges, and that ten members[1] of the Senate and House of Assembly had been appointed to form the Judicial Committee which would hear the appeal. The Committee would hold its sessions in the Transvaal Provincial Council Chamber in Pretoria.

The Opposition, however, declined any contact with the ritual. They would take no part, announced Mr. Strauss,[2]

1. Six Nationalist Party members were nominated:- Mr. Swart (Minister of Justice) who was to be Chairman of the Committee ; Mr. Erasmus (Minister of Defence) ; Mr. Naudé (Minister of Posts and Telegraphs) ; Senator Vermeulen (Deputy President of the Senate) ; Dr. Conradie (Deputy Speaker of the House of Assembly) ; and Dr. Hertzog. Representing the Opposition there were to be three United Party members (Mr. Strauss, Mr. Van Coller, and Dr. Steyn); and one Labour Party member (Senator Duthie).
2. House of Assembly 18th June

in the unconstitutional proceedings of the High Court. To do so would be to stultify their opposition to illegality. The Nationalist Party must take full responsibility for any decision reached by its puppet Court. Consequently the Judicial Committee which met in Pretoria on July 21st., consisted of the six Nationalist Party members only.[1] They were addressed by Beyers Q.C. who had argued the Government's case before the Appellate Division (and who was now, therefore, briefed by one Minister to support that case before the Minister's colleagues sitting as members of the Judicial Committee). Harris and his friends did not appear, and no written representation was submitted by them to the Court.

In the course of his argument as reported by the Press, counsel for the Government stood firmly upon the principle that the Parliament of the Union was a sovereign body, and that no law passed by such a body could be declared ultra vires or invalid. 'Neither you nor the Appeal Court', he said, 'has the right to tell Parliament how to act. If you accept the principle that the Courts do have the right to test Acts of Parliament then every little magistrate has the right to say that he does not agree with an Act of Parlia-

1. The Opposition members were stated by the Chairman of the Committee to have resigned.

ment, and to refuse to apply it'. The notion that the legality of laws could be tested in Courts, came he added, from America. A sovereign Parliament and a controlled [1] constitution were totally incompatible. The question was simply whether South Africa had a sovereign Parliament or a controlled constitution. The British Parliament had conferred sovereignty on the Union Parliament in the act of resigning (by the Statute of Westminster) its right to legislate for South Africa. The British Parliament could negate the Statute of Westminster, but such legislation would be valid only in Britain. It would follow from the Appeal Court's decision that, 'Even if the greatest catastrophe occurred, even if the United Kingdom disappeared beneath the North Sea', the entrenched clauses must remain unalterable except by two thirds of both Houses sitting together. The sovereignty principle was undoubtedly the law of South Africa, and there was no justification for the American approach. The Appeal Court had, (1) not given the basis for its verdict that the entrenched clauses were of stronger legal effect and, (2) had

1. The term 'controlled' as applied here to constitutions by Beyers Q.C. was adopted by Lord Birkenhead in McCawley v. The King (1920) A.C. 691. At p.704 it was said that, 'If it (a Constitution) were uncontrolled, it would be an elementary commonplace that in the eye of the law, the legislative document or documents which defined it occupied precisely the same position as a Dog Act, or any other Act, however humble its subject matter.'

not explained on which the Court had the right to say so.[1]

It would appear that the argument presented on behalf of the Government met with the Judicial Committee's approval. For after a relatively brief hearing,[2] it adjourned to prepare its report for submission to the High Court itself. That body was convened for the first time on August 25th. It consisted, in the event, of Nationalist Party members only, since the Opposition members of the House and Senate maintained their refusal to participate and absented themselves from the sitting. Thus constituted, the High Court, presided over by the Speaker, acting as its President, considered in private the report of its Judicial Committee, and announced three days later (August 27th) that on the legal grounds set out in the Committee's Report, the judgment and orders made by the Appellate Division in deciding Harris's case had been set aside.

The report of the Committee to the Court set out at some length the reasons which had impelled it to the conclusion that the Appeal Court's decision in the case under review had been wrong in law. The crux of the issue, the Report stated, (following the lines of the argument adopted by Government counsel before the Courts and the Judicial Committee) was

1. Cape Times 22nd July 1952
2. July 21st, 22nd, 23rd

whether Sections 35 and 152 of the Constitution had greater legal effect than an Act enacted in the usual manner by the Parliament of the Union. The 'fundamental law' conception (as found in the United States, Ireland, the Netherlands, Belgium, and other European states) was entirely foreign to British Constitutional law, which knew no such fundamental law, but regarded the legislative competence of its law-making bodies entirely on the basis of sovereignty. That approach had been followed by the Appeal Court in 1937 in Ndlwana's case, but the findings of the Court in 1952 could only have been arrived at on the basis of a fundamental law approach.

The superior force of Sections 35 and 152 had arisen not from their fundamental nature but from their embodiment in an Imperial Act. (If the contrary contention had been correct there would have been no necessity for the 'saving clauses' in the Statute of Westminster). The sections were thus undoubted limitations imposed on the powers of the Union Parliament. But, since the Statute of Westminster had terminated the superior legal force of all British Statutes vis à vis any future Act of the Union Parliament, no ground for imputing invalidity to such an Act of Parliament could now exist. The decision of the Privy Council in Moore v. Attorney General for

the Irish Free State [1] supported this view. A consistent application of the sovereignty approach of British Constitutional Law led inevitably therefore to the conclusions that the Parliament of the Union had become the completely sovereign legislature in and over the Union; that no criterion any longer existed whereby the validity of its laws could be tested; and that accordingly, the so-called testing rights of the Courts had disappeared.

Here the Report turned to the question of Parliamentary privilege and its effect in limiting the powers of inquiry of the Courts. The question of the rights of Courts of Law, it stated, to investigate the correctness of the provedure adopted by the two Houses of Parliament remained, whether one interpreted the entrenched sections as limits on the power of Parliament or as necessary procedural rules. In England it was clear that the House of Commons, though naturally not sovereign and admittedly bound by the laws of the land, nevertheless remained the sole judge of the correctness of its procedure, regardless of whether that procedure was prescribed by Common Law, or by Statute, and that Courts of Law had no jurisdiction to question the correctness of any decision made in this regard by the House of Commons. Since all the powers and privileges of the House of Commons were claimable by the

1. (1935) A.C.484. See above p.54

Senate and House of Assembly (Section 36 of the South Africa Act), it followed that they alone were competent to interpret and apply the law in so far as it related to the procedure to be followed by them for the enactment of legislation. It was for them to decide whether a Bill should be passed in the ordinary manner, or in accordance with the extraordinary process prescribed by Sections 35 and 152. The wisdom of leaving a decision of this nature in the hands of Parliament must, if uncertainty and confusion were to be avoided, be obvious and apparent.

In the matter of 'the definition of Parliament', the Report took issue with the interpretation given by the Appellate Division. It drew attention to the importance of the use of the Constitution in Section 63, of the words 'taken to have been duly passed'.[1] This was a recognition that a joint sitting, in which a Bill was 'deemed' to be passed was not a sitting of either House of Parliament as such. The deeming provision was necessary because the two Houses sitting unicamerally were not, in terms of the South Africa Act, the Senate and

1. Section 63 of the South Africa Act provides for a 'joint sitting of the members of the Senate and House of Assembly' in case of deadlock between the two Houses. It enacts that amendments agreed to by a majority of the members present shall be taken to have been carried', and that a Bill affirmed under the same conditions 'shall be taken to have been duly passed by both Houses of Parliament'.

the House of Assembly, but merely a body consisting of the members of these two Houses. (The Court in Harris's case had held that the Constitutional provisions in respect to joint sittings, constituted alternative definitions of 'parliament' and that legal sovereignty was 'divided between Parliament as ordinarily constituted, and Parliament as constituted under Section 63, and the proviso to Secion 152'.[1] The 'deeming' provision occurs also in Sections 35 and 152, regulating the manner and form of legislation under the entrenched sections and of constitutional amendment affecting these Sections. The contention now made by the Judicial Committee, was that 'Parliament' must be unambiguously defined as the Houses legislating separately by simple majorities, in the 'normal' manner, and that Bills submitted to the 'extraordinary' processes of Sections 35 and 152 were not the work of 'Parliament' exercising legislative power but were under the Constitution, (binding until 1931), merely 'deemed' to be law. The point was categorically rejected in the Appeal Court's

1. (1952) 1 T.L.R.1245 at 1259 c.f. D.V. Cowen 70 S.A.L.J. 238 (1953) at p.257

decision.[1] Here it is re-asserted and found valid.)

Finally the Report turned its attention to the statements made in the Appellate Division and elsewhere, as to the state of mind of the Imperial Parliament in passing the Statute of Westminster. It had been asserted that the United Kingdom legislature could not have intended to make by implication a radical alteration of the constitutional position of the Union Parliament.[2] But, the Report contended, the Imperial legislators could not have been blind to the fact that the omission (of saving clauses from the Statute) specifically preserving the effect of the entrenched sections, would give rise to the inference that it was not intended to

1. It may be noted that the Chief Justice himself conceded (at p. 1264) that when a joint sitting was held, '..neither the Senate nor the House of Assembly functioned at that sitting', though, 'members of both Houses attended the sitting.' He clearly, however did not suppose that this prevented the application of the title 'Parliament' to the body thus constituted. But the admission may be thought dangerous to the general position adopted by the Court, in view of the statement in Section 19 of the Constitution that, 'Parliament..shall consist of the King, a Senate, and a House of Assembly'. The implications of the Judicial Committee's doctrine are nevertheless in some ways peculiar. It would have to be held that the body competent to amend the Constitution (under the proviso to S.152) was not 'Parliament' -even Parliament operating under constitutional restrictions, but some other body; and that, for example, Act 12 of 1936 (the Representation of Natives Act) was not an Act passed by Parliament but only a provision which the Courts would 'deem' to have been passed into law.
2. Centilivres C.J. had remarked (1952 1 T.L.R.1245 at 1258) that if the Government's contentions were sound, 'it would follow that the Statute of Westminster had, by mere implication, effected a radical alteration of our Constitution'.

restrain the Union Parliament in this sphere. It was:-

> '..inconceivable that the central law-giver would not imagine in the circumstances that it was advisable to preserve the effect of Section 152 if indeed the law-giver had no intention of liberating the Union Parliament entirely from the limitations placed on it by the said Section.[1]

There was no analogy, the Report concluded, to be drawn from the constitutional limitations which the Appeal Court had referred to as existing in the United States, or the Old Orange Free State Republic. These limitations were imposed from within the State by the people who were the creators of their own constitutional instruments. The limitations incorporated in the entrenched sections had been imposed from without by an external sovereign Legislature. To contend that the Union Parliament was still bound by them was to admit the sovereignty pro tanto of another sovereign state over the Union which could not itself, therefore be a completely sovereign state.

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Such were the 'legal grounds' (as required by the High Court of Parliament Act) after consideration of which the

1. As shown above (chaps I & VII) the considerations raised here by the Judicial Committee's Report were fully discussed in 1931. The absence of saving sections was the result of South African assurances as to the continuing validity of the entrenched sections, and certainly not of any implied legislative intention to authorise their abrogation.

Court declared the judgment and orders made in Harris's case set aside. Meanwhile however, the Opposition parties had struck the blow (threatened during the debate on the High Court Act) by which they hoped to establish the unconstitutionality of the Government's strategem. On August 12th 1952, Harris, Franklin, Collins and Dean wrote their second footnote to history by applying to the Cape Provincial Division of the Supreme Court for an order declaring the Act setting up the High Court of Parliament invalid and of no effect. The Court did not give an immediate decision but awaited the conclusion of the High Court's proceedings.[1] It then, on the day following the announcement that the decision in Harris's case had been set aside, granted the voters' application, and declared the High Court of Parliament Act invalid as being made in contravention of the provisions of Section 152 of the Constitution

Appeal was taken by the Government, and the five judges of the Appellate Division now found themselves faced with the taks of deciding whether the force of the general propositions, which they had already laid down as to the manner in which sovereign legislative authority must be exercised, could be evaded by an attempt on the part of the Legislature to screen

1. It had already made an order restraining the Cape Electoral Officer from removing the applicants' names from the electoral roll, pending its decision, even if such action were authorised by the High Court.

proposals of substantive law behind the exercise of its (allegedly unrestricted) adjectival power to amend the judicial system.

CHAPTER TEN

Minister Of The Interior v. Harris

'Under pretence of declaring the law, they have made a law, and united in the same persons the office of legislator and of judge.'

WILLIAM PITT
(House of Commons. 1770)

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On October 27th, Beyers Q.C. who had supported the Government's view of Parliamentary sovereignty before four tribunals in the space of two years, set about his task for the fifth time, and the constitutional carousel swung full circle. Had the Legislature exceeded its powers and infringed the provisions of the Constitution in enacting the High Court of Parliament Act? This was the question which now came before the Court of Appeal (composed in the same manner as in the first Harris case.)

The Parliament of the Union, as was conceded by both parties, exercised sovereign authority. That authority the Courts had decided, was constitutionally circumscribed in certain ways. Did that circumscription effectively extend,

however, to control a legislative attempt to evade the consequences of constitutional control, by an operation on the judicial system designed to oust the jurisdiction of Courts of Law as hitherto exercised. For the Government, it was contended that it did not. In Act 35, Parliament had legitimately exercised its power given in Section 59 of the South Africa Act to make laws for the peace order and good government of the Union. The power of Parliament argued Beyers Q.C. must (as was said in R. v Burah)[1] be determined

> '..by looking to the terms of the instrument by which, affirmatively the legislative powers were created, and by which, negatively they are restricted. If what has been doen is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited..it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.'

Similar language to that used in the South Africa Act, employed to confer power on Colonial Legislatures had consistently been interpreted by the Courts as conferring original and plenary powers of legislation covering 'the entire area of political action' [2] (R. v McChlery 1912. A.D.199, 220).

1. (1878) 3 App.Cas. 889, at 904, 905.
2. Subject of course to the authority of Imperial Acts. (Lord Selborne in Burah's case had earlier remarked that, 'The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it..But when acting within those limits..it has and was intended to have plenary powers of legislation as large and of the same nature as those of Parliament itself.' (p.904)

The Parliament of the Union similarly, (counsel continued) was entirely unconstricted in its power to amend or repeal any article in its Constitution, save only for those restrictions imposed in the 'entrenched' sections. In particular, Sections 95-116 of the Constitution dealing with the judicial system were in no way entrenched or protected - a position in marked contrast to that prevailing in Australia and the United States, where the Judiciary was specifically protected against the Legislature. The provisions of the South Africa Act relating to the Judicial system had on numerous occasions been amended by Parliament in the ordinary exercise of its legislative powers, just as in India radical changes in the Judiciary had been made and upheld [1] in respect of matters not enjoying specific protection. In any case arising in which an Act of Parliament was impugned there was a field of enquiry which, it was conceded, belonged properly to the courts. But it was Parliament's function and right to determine by ordinary legislation what courts there should be, and which courts should have jurisdiction to determine the questions involved in the predicated enquiry. The High Court of Parliament, it was further argued, constituted an alteration of adjectival, not of substantive law. None of

1. King Emperor v. Benoari Lal Sarma. 1945 (1) A.E.R. 210, 216.

the limitations imposed on Parliament by the entrenched sections of the Constitution had any connection with the creation of a court and there was no provision requiring Parliament to act unicamerally and with a two thirds majority for the purpose of creating a court. Such a provision could only be found by implication and the Court was not entitled to import such a provision into the South Africa Act or to read into the Act under consideration a concealed intention on the part of the Legislature.

For the respondents Graeme Duncan Q.C. argued that Parliament was not competent to enact in bicameral session that a Bill passed contrary to the provisions of Section 152 of the Constitution might be treated as valid. So to enact would be to alter Section 152. Parliament, moreover, could not enact that a person or body of persons not part of the judicial power in the Union might decide whether a measure held to be invalid by reason of Section 152 was in fact valid. The Legislature could not have been intended by the framers of the South Africa Act to be empowered to legalise their own illegal acts. A statute which was ultra vires was not the act of the Legislature, but of the individuals who purported to enact it. Stripped of the features giving it the appearance of an established Court of Justice, counsel

concluded, the so-called court was merely a body of persons illegally authorised to resolve a conflict between the courts and themselves, such conflict having arisen only by reason of the refusal by one organ in the state to accept the decision of another organ to whom the power of decision was entrusted under the Constitution.

The judgment of the Court was delivered on the 29th October. The decision was a unanimous one, but each of the five Justices read a separate opinion.

Chief Justice Centlivres, after resuming the provisions of the Act under review, took up the contentions made on behalf of the Government, as to the unentrenched nature of the existing functions of the Courts established by the South Africa Act. Section 152 of that Act, he declared, entrenched certain constitutional rights, and by so doing entrusted the Courts with the sanction of invalidity. It was conceivable that a Constitution might provide for an entrenchment which could not be enforced in this way (the Swiss Constitution for example), but this was not what the South African Constitution prescribed. Under the South Africa Act, it was the duty of courts of law to protect and make effective the guarantees entrenched by that Act, unless and until they were modified by the legislation in such a form as under the

Constitution could validly effect such modification. Beyers Q.C. had:-

> '..contended that either before or after the Statute of Westminster, Parliament sitting bicamerally could validly have passed an Act providing that no court of law in the Union should have jurisdiction to adjudicate upon the question whether any Act had been passed in conformity with the provisions of Section 152 of the Constitution. ..This is a startling proposition. As I understand Mr. Beyers' argument, the substantive right would, in the event of such an Act having been passed, remain intact, but there would be no adjective or procedural law whereby it could be enforced. In other words, the individual concerned, whose right was guaranteed by the Constitution would be left in the position of possessing a right which would be of no value whatsoever. There can to my mind, be no doubt that the Authors of the Constitution..could never have intended to confer a right without a remedy.'1

Even granting the appellants' distinction between adjective and substantive law, there was no warrant for the contention that whatever could be described as adjective law could be freely altered by the Union Parliament sitting bicamerally, regardless of the effect on the rights guaranteed by Section 152.

If the High Court of Parliament could properly be described as a court, continued the Chief Justice, then it was a court which differed in material respects from such courts of law as were envisaged by Section 152 of the Constitution:-

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1. 1952 (4) S.A. 769 (A.D.) at 780

> 'Members of the kind of courts envisaged by Section 152 do not pass legislation relating to the substantive rights of individuals, and they are therefore never called upon in their capacity as judges to discharge the invidious task of deciding whether they erred in thinking that they had the power to pass legislation the validity of which is in question.'[1]

Other differences could be perceived in the facts that individuals had no right to bring matters before the Court (the only person entrusted with that right being a Minister of State); and that no provision existed for oral argument to be put to the High Court itself, the body which actually gave the decision. These differences were so material that it might be held that although Parliament sitting bicamerally might create a Court of Appeal to hear appeals from the Appellate Division, the fact that the High Court of Parliament was not such a court was sufficient to justify the view that Act 35 was invalid. A better approach to the problem was, however, to ascertain what the substance of the disputed legislation was, as distinct from its mere form. (Were the Court only to look at the form of legislation, the Chief Justice remarked, constitutional guarantees might be of very little value). It was true that the courts were bound by a definition in a legislative enactment, in so far as that enactment fell within the powers of the Legislature, but:-

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1. At p.782

'..when the question is whether or not those powers have been exceeded, the definition itself is in issue along with the whole enactment, and the enactment must be judged, by its substance and not by the nomenclature it uses.'1

In form, the High Court of Parliament was 'a court of law'; in form, there was a 'judicial committee'; and in form the Court might on 'legal grounds', 'confirm, vary, or set aside' the judgments of the Appeal Court. But Courts of law did not delegate to judicial committees the task of ascertaining the law, and then give their judgments by resolution. This procedure was Parliamentary and unknown to Courts of law. Looking therefore, at the substance of the matter, one must come to the conclusion that the so-called High Court of Parliament was not a Court of law but simply Parliament functioning under another name. That its decision was to be taken 'on legal grounds', carried the matter no further.

'All that those words mean in the context of the Act read as a whole is that Parliament sitting unicamerally may, by a bare majority, resolve on what it thinks to be a legal ground, to confirm, vary, or set aside any such judgment of the Appellate Division: it is still Parliament that is functioning and not a Court of Law. The result is exactly the same as if Parliament had sat unicamerally in passing Act 46 of 1951, had passed that Act by a majority falling short of the prescribed two thirds majority, and had, after hearing counsel in Select Committee, inserted therein a section declaring that on legal grounds the Act was valid. ...In the hypothetical case I have given, it would be beyond doubt that the body that functioned was Parliament and not a Court of Law. In the case before

1. At p.783

> us, Parliament has described itself as a Court of Law, but such a description does not alter the fact that the High Court of Parliament is Parliament functioning under Act 35 of 1952 and not a Court of Law. In my view, Parliament cannot, by passing an Act giving itself the name of a Court of Law, come to any decision which will have the effect of destroying the entrenched provisions of Section 152 of the Constitution.'[1]

The insistence upon judicial protection of constitutional provisions emerges clearly from this, as from the judgment delivered by the Chief Justice in Harris v. Donges. The question might, however, be asked whether the judicial right and duty to interpret and protect the Constitution exists because it is specifically intended and provided for by the Constitution itself (as interpreted); or whether it can be said to exist apart from specific provisions as implied consequence of the nature of constitutions in general. The statement that 'the method employed by Section 152 to entrench the rights conferred by Sections 35 and 137 is the sanction of invalidity',[2] suggests that the former is the case - suggests that the judges have the testing right because it is conferred on them, if not specifically, then by necessary intendment by an article of the Constitution.[3] The citation[4] on the other

1. At p.784
2. At p.779
3. c.f. Schreiner J.A. (post. at p.787):- 'The Constitution makes no express provision for the determination of questions of validity or invalidity, and must therefore be taken to have left such determination to the Courts of Law of the land.'
4. At p.779

hand, of a dictum of Lord Selborne to the effect that:-

> 'The established Courts of Justice, when a question arises (in regard to a constitution) whether the prescribed limits have been exceeded, must of necessity determine that question.'[1]

-suggests the wider implication that wherever a Constitution exists, the Courts must 'of necessity' and apart from specific authorisation, exercise the power to decide whether ~~powers~~ rights exercised under the Constitution have been infringed. It is perhaps worth pointing out that 'judicial determination of the question whether the prescribed limits of the Constitution have been exceeded', and 'judicial exercise of the testing right', are not, strictly speaking, equivalent expressions. It is usual to refer to a 'testing right' as a right exercised by courts of law as against the Legislature in relation to Acts passed by the Legislature as an enacting body. In such cases the Legislature may be said to be 'controlled' in its activity by the courts when its Acts are subject to invalidation. But this charge, the Appeal Court had specifically denied in deciding Harris's case. It was not assuming the power to control the Legislature.[2] The burden of its argument was to the effect that the Legislature had not acted; that a purported Act was not an Act at all. Parliament was sovereign and there could be no testing or

1. The Queen v. Burah 3 App.Cas889 at 904. Also James v. Commonwealth of Australia (1936) A.C.578 at 613
2. See (1952) I.T.L.R.1245, 1255

controlling of its Acts made in due form; but the Court could and must decide whether the due form had been followed. This is a vital distinction and the remarks of the Chief Justice about the 'sanction of invalidity' tend here to obscure it. They at least begin to suggest a kind of opposition between the legislative and judicial functions which the Court in its previous decision had been at pains to deny.

'Determined by the established Courts of Justice', is an expression which raises a further problem. The difficulty can best be seen by examining in some detail the concurring judgments in Minister of the Interior v. Harris.

Greenberg J.A. followed Chief Justice Centlivres in attacking the constitution of the High Court of Parliament as set up by Act 35. He was, however, of the opinion that it was not beyond the competence of Parliament sitting bi-camerally to provide for a court of review in constitutional matters:-

> 'I assume that it is..open to Parliament by ordinary legislation to establish a tribunal with jurisdiction to review the decisions of the Appellate Division, whether it be a general jurisdiction, or a jurisdiction limited to certain questions' [1]

But the function of such a tribunal, he continued, must be the same as that exercised by the Appeal Court if it were now

1. 1952 (4) A.D.768 at 785

asked to reconsider the correctness of its decision in Harris's case. That was to say that its decision must have the effect of a judicial and not that of a legislative pronouncement. In other words the law as pronounced by the tribunal in question must derive its force not from the fact that it had been so pronounced but because it was in truth the law. The difference was that in the former case the decision as pronounced must be regarded as immutable except by legislation, whereas in the latter, subject to the rule of stare decisis, its correctness could always be questioned in the same Court of Law. The issue therefore to be decided was whether the High Court of Parliament Act in truth established such a tribunal. Here, it had to be borne in mind that when the authors of the South Africa Act provided the safeguard, implicit in Section 152, of recourse to Courts of Law, they must have had in mind the elements of the judicial system in existence at the time of Union and incorporated in the South Africa Act. A high standard of impartiality necessary to the judicial determination of questions both of fact and law, was a cornerstone of that system. It was preserved by the undoubted principle that no one should be a judge in his own cause, and that a litigant should always be able to ensure the effectiveness of this principle by exercising the

right of recusation. The constitution of the High Court of Parliament and the impossibility of a litigant's exercising the right of recusation on the grounds that the members of the Court were interested parties, accorded ill with these fundamental requirements of judicial impartiality.

Criticism of the proposed tribunal might also be based on the qualification of the judges - or rather 'on the absence of qualification'. It was indeed surprising that for membership of a body whose function was to enquire into the correctness in law of the decisions of the Supreme Court, no legal qualifications whatever were required. Futhermore, if the Legislature in passing the Act had been actuated by what was the only permissible aim, viz. to create a tribunal whose function was to decide what was the correct law on the question of the validity of Acts of Parliament, it would have been expected that in its desire for a correct decision, its doubts as to the correctness of the decisions of the Appellate Division would not have been limited to cases where the decision had been adverse.[1]

1. c.f. Hoexter J.A. at p.797:- 'If the object of the Act had been to correct the legal errors of the Appellate Division, it would not have provided for a review only in the case of a judgment of the Appellate Division declaring a Statute invalid. A judgment declaring a Statute valid is just as likely to be wrong in law.'

The fundamental criticism of the body as set up was, however, that it was not a judicial tribunal. Its pronouncements would be necessarily legislative and not judicial. They would have effect not because they were correct statements of law but because they were given this effect by the High Court of Parliament Act. For these reasons, concluded Greenberg J.A., 'the tribunal is not such an appellate tribunal as, in my opinion, it is competent to create by ordinary legislation for the purpose of deciding whether because of Section 152 an Act of Parliament is invalid.'

The difficulty about the meaning of 'established Courts of Law' reveals itself when one recalls the remark that 'the authors of the South Africa Act ..had in mind the elements of the judicial system in existence at the time of Union'. What is the force of this statement when taken in conjunction with the contention that the High Court of Parliament was a tribunal which it was not competent for Parliament to set up? Is the reference to the judicial elements established under the South Africa Act intended merely to show that the departure from the standards of impartiality maintained by the existing system of courts is such as to disqualify the High Court of Parliament as a judicial body. Or is the implication that the constitutional guarantees embodied in the Constitution must

continue to be protected by the judicial elements established by the Constitution, and that the removal of this function to a body outside that system of courts is not constitutionally possible (at least as effected by ordinary legislation) - even if the body in question measures up to the required standards of competence and impartiality. Was Greenberg J.A. saying, in short, that the functions intended to be exercised by the High Court of Parliament were not, under the Constitution to be exercised at all; or was he contending that such functions could be exercised by a court (specially created by ordinary legislation) - but that the High Court of Parliament was not such a court? It would seem to be implied by his earlier remark ('I assume that it is .. open to Parliament by ordinary legislation to establish a tribunal with jurisdiction to review the decisions of the Appellate Division') - that the latter assertion is being made, and that the remarks about the judicial system existing at the time of Union were directed only towards indicating the fundamental characteristics which a judicial system should possess.

Schreiner J.A. however showed himself to be in some disagreement with this point of view. He agreed that the High Court of Parliament was not a Court of Law. Though the distinction between bodies which were and bodies which were not

Courts of Law was hard to draw,[1] he said:-

> 'I do not in the least degree dissent from the view that, assuming one has to decide whether the High Court of Parliament as set up by Act 35 of 1952 is or is not a Court of Law, the proper conclusion is that it is not, but is only Parliament wearing some of the trappings of a Court'[2]

But, he continued, it would be unnecessary and to some extent unsatisfactory to proceed merely on these lines. For this would be to suggest that no question of invalidity would arise if only the proposed court had as a matter of fact been a judicial body. And:-

> 'It would be unfortunate if it were thought that an Act passed bicamerally would necessarily be valid if it created for the purpose of deciding questions of validity in relation to Section 152 and the Statute of Westminster, a tribunal to which the title of Court in the strict sense, or Court of Law, could not be denied. Supposing, for example, an Act was passed bicamerally giving the Magistrate's court of any named South African

1. Schreiner J.A. here cited Lord Sankey (in Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation (1931) A.C.275 at 296):- 'The authorities are clear to show that there are tribunals with many of the trappings of a Court, which nevertheless are not Courts in the strict sense of exercising judicial power. ..In that connection it may be useful to enumerate some negative propositions on this subject: (1) A tribunal is not necessarily a Court in this strict sense because it gives a final decision. (2) Nor because it hears witnesses on oath. (3) Nor because two or more contending parties appear before it between whom it has to decide. (4) Nor because it gives decisions which affect the rights of subjects. (5) Nor because there is an appeal to a Court. (6) Nor because it is a body to which a matter is referred by another body.'
c.f. on the definition of 'judicial power' Huddart, Parker & Co. Pty. Ltd. v. Moorehead (1909) 8 C.L.R.330 at 357; and R. v. Commonwealth Rent Controller (1947) 75 C.L.R. 361

2. At p.789

> town or city jurisdiction to hear without further appeal, appeals from the Appellate Division of the Supreme Court in matters involving the validity or invalidity of Acts of Parliament. It would be difficult to deny to such a magistrate's court the name of Court of Law, assuming that it presented the normal features of magistrates courts. Nevertheless, it might very well be (I need put it no higher) that the Act in question would be held to be invalid because it would involve a radical departure from the judicial hierarchy set up in the Constitution, and a grave impairment of the protective system implicit in Section 152.
>
> Other tribunals can readily be conceived which would ordinarily be called Courts of Law, but to which it is difficult to believe that Parliament could effectively entrust by bicameral legislation the power to declare the invalidity of Acts of Parliament.' [1]

An entirely sufficient and convincing reason for holding the High Court of Parliament Act invalid (Schreiner J.A. continued) was that in altering Section 152 without being passed in accordance with the procedure laid down in that Section, it interfered with and departed from the protective judicial system implied in the Section. That system was the Supreme Court of South Africa, based on the Supreme Courts of the four colonies at the time of Union, with the Appellate Division set up at the apex. It must be concluded that:-

> 'The High Court of Parliament is markedly different from the superior Courts of Law known in South Africa before and after Union. And each one of these differences operates in the direction of weakening the effectiveness of the judicial protection inherent in Section 152. In their sum they result in a tribunal wholly unlike what was contemplated by the framers of our Con-

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1. At p.788

> stitution, and out of all comparison weaker as a protection against invasions of its guarantees. The High Court of Parliament Act which sets up this tribunal, thus infringes Section 152 and is invalid.'1

Schreiner J.A.'s opinion might perhaps be summed up in the following way. Whereas Centlivres C.J. and Greenberg J.A. conceded that the Legislature might by bicameral process set up a tribunal to exercise the function of interpreting the Constitution to the exclusion of the established system of courts (though in this case they had not in fact succeeded in creating a 'court'); he himself regarded such an alteration of the judicial system as having the effect of amending the rights entrenched by Sections 35 and 152 of the Constitution, and hence as coming implicitly within the area of legislative objects incompetent to be dealt with in bicameral simple majority sessions.

A stand on more general constitutional principles was taken in what is in some ways the most interesting of the five opinions - that of Van den Heever J.A. The conclusions of the Chief Justice were, he declared inescapable, but as he himself had been compelled to them by somewhat different reasons, he felt that he should state these reasons.

Sections 35 and 152 of the Constitution, he said, effected a double entrenchment of the Cape Franchise. The object

1. At p.789

of this was plain. Parliament, as ordinarily constituted was unable to expand its mandate by deleting the inhibition of its powers in relation to that franchise. It stood to reason that what it could not do itself, it could not empower another to do. Nor could the restraint be avoided by disguising the exercise of power as an alteration of method and procedure.

> 'No legislative organ can perform an act of levitation and lift itself above its own powers by the bootstraps of method.'[1]

The appellants had suggested that the abdication by Great Britain of its Imperial position in relation to the Union had destroyed the inhibiting force of the constitutional guarantees embodied in the South Africa Act. But the product of the Union was 'a constitutional Kingdom, with the checks and safeguards which one expects in a body politic so organised'.

> 'How it can be contended that since the Imperial abdication of Great Britain, that check has become weakened, I cannot grasp. That contention assumes that as soon as the policeman is round the corner there is no law.[2]

Van den Heever J.A. continued:-

> 'In this connection the fact that our Constitution is the creature of the British Parliament seems to me a fortuitous circumstance which is quite irrelevant;

1.At.p.790
2.At p.791

> so too is the fact that we have a written constitution. I would have been of the same opinion if it had been framed by a constituent assembly of the people, made by Solon, or extracted from the laws of Hammurabi. ..The fact remains that the South Africa Act is our Constitution, and apart from that Constitution there are no organs of state and no powers.[1]

Neither the people nor any other constituent authority had conferred upon Parliament as ordinarily constituted the power to alter the Cape franchise. In fact such power had been expressly withheld. Parliament as ordinarily constituted had not as yet effectively and finally assumed such power in a revolution, nor had Parliament functioning unicamerally with the requisite majority conferred such power. There was no other conceivable source of the power. Consequently it did not exist.

> 'If nevertheless, Parliament as ordinarily constituted assumes the power to alter the Cape franchise, its act would have no greater validity than if the City Council of Bloemfontein had presumed to do so. Only British bias could prompt the thought that since such a power resides in the Legislature in Britain, our Parliament as ordinarily constituted must necessarily have it too.'[2]

At this point Van den Heever J.A. turned his attention to the question already discussed at some length - namely the extent and relevence of the legislative power to create courts of law. Here, his more general remarks do not seem entirely

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1. At p.791
2. At p.791

consistent with the propositions earlier laid donw by him as to the constitutional limitations on the Parliament of the Union. Parliament as ordinarily constituted, had, he conceded, 'unlimited power to reorganise the judiciary'. It could create a Court or Courts superior to the Appellate Division, and confer on them such jurisdiction as it saw fit'. (But if Parliament 'could not empower another to do what it cannot do itself' - could it hand over to such a bicamerally-created court the power to decide whether the rights protected by the entrenched sections had been infringed? Here the remarks of Schreiner J.A. might be thought apposite) Van den Heever himself was even prepared to admit that the framers of the Constitution had not necessarily contemplated that the judicial power should for ever be exercised by courts of the kind to which they were accustomed. 'We have had', he said, many kinds of Courts; we have had trial by battle, by fire, and by flood. We have heard of modern 'people's Courts'.'' In this respect the Legislature had absolute freedom of action, and it was not for the existing courts to criticise the wisdom or equity of a measure passed in the exercise of that power, by a comparison of the Court established with Courts answering to some preconceived standard. The only limitation and qualification - one which

had no relation to the character or competence of the newly created body - was that it must be a Court.

> 'Since it was conceived as being the arbiter between Parliament as ordinarily constituted, or even in joint session, and subjects who complain that they have unconstitutionally been deprived of their rights, it must necessarily be a body other than Parliament, and capable of passing judgment on that issue.' 1

It was in the light of these considerations that the High Court of Parliament Act must be examined. And:-

> 'If we winnow out the chaff of nomenclature, what have we here? Parliament as ordinarily constituted enacts that Parliament in joint session may change its venue and its name, and by a bare majority of those present..and at one reading..pass a declaratory Act as to the meaning of Sections 35, 137, and 152.' 2

The matter was in no way affected by the proviso that the High Court's decision should be taken 'on legal grounds'.

> 'Save as an evasion I can see no virtue in these words. If an Act is beyond the competence of a legislative body, its motives are irrelevant, whether they be ethical legal or political.
> ——I have come to the conclusion therefore that in Act 35 of 1952, Parliament as ordinarily constituted, purports to empower Parliament in joint session to ignore the checks limiting the powers of both. The measure is therefore invalid.' 3

Van den Heever J.A. concluded his judgment with an interesting amplification of the Chief Justices's remarks

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1. At p.792
2. At p.792
3. At p.793

about the substance as distinct from the form of the Act. It may be recalled that Mr. Strauss, leader of the United Party had claimed in raising his point of order in the House of Assembly before the second reading debate on the High Court of Parliament Bill that the Bill was a 'transaction in fraudem legis'. Could the legal principle of fraus legis be applied in the present context? (Considering the South Africa Act as the 'lex' and Act 35 as the disputed transaction). Van den Heever appeared to indicate that it could. Where Statutes sought to achieve their objects indirectly he said, it might be expected that such indirect purposes behind the Statute would not receive judicial futherence if means of evasion were practised.[1] In this case, however, the Statute to be interpreted (i.e. the Constitution) had a clearly expressed purpose, namely to curb legislative power in the interests of the subject. In such a case:-

> 'A Court would not be doing its duty if, by mechanical adherence to words, it allowed the patent intention of the constituent Legislature to be defeated and the rights to be proscribed.'[2]

1. Van den Heever here cited Innes C.J. (Dadoo Ltd. v. Krugersdorp Municipal Council (1920) A.D.530):- 'Parties may genuinely arrange their transactions so as to remain outside its (a Statute's) province. Such a provision is in the nature of things perfectly legitimate.'
2. At p.794

Hoexter J.A. was equally convinced that the Court should not approach its task by a 'mechanical adherence to words'.

> 'To accept the proposition that the High Court is a Court of Law because the Act says so would be to assume the validity of the Act, and therefore to beg the very question in issue. It is because this Court may not assume the validity of the Act that it is its duty to penetrate the form of the Act in order to ascertain its substance.[1]

In substance, and in effect, a declaration by the High Court that a Statute was valid must remain a legislative act. 'I cannot', concluded Hoexter J.A., 'avoid the answer that:-

> 'The object of the Act is to ascertain the legal opinion of Parliament as to the validity of any Statute declared invalid by the Appellate Division, and, whether that opinion is right or wrong in law, to make it unassailable in any Court of Law. It is clear from the Act that a sitting of the High Court is nothing but a joint sitting of the two Houses of Parliament.' [2]

Thus through five peripherally distinct but convergent processes of reasoning, the Supreme Court of South Africa reached and declared its unanimous decision that the High Court of Parliament was not such a body as the legislative power in the Union sitting bicamerally was competent to create. The Government's appeal was accordingly dismissed, the order of the Provincial Division confirmed, and Act 35 of 1952 declared invalid, null and void, and of no legal

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1. At p.796
2. At p.795

force and effect.

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It is not perhaps an overestimation to regard the two Harris cases as milestones in the judicial development of the constitutional law of the Commonwealth. The decisions involved consideration of issues which may not unjustly be called legal fundamentals - the status of a constitution; the extent of sovereign legislative power ; the interpretation of Statutes; and the nature of the judicial process. Of particular interest are certain propositions laid down in relation to the first two topics, whose range of application requires discussion. The starting point of such a discussion, it may be suggested, could be found in a remark of Centlivres C.J. in Minister of the Interior v. Harris. The Chief Justice was discussing the legal effect of definition by Parliament. But suppose the question be raised of the definition in law of Parliament. Can it then be said that:-

> 'The Courts are bound by..a legislative enactment, in so far as that enactment falls within the powers of the Legislature. But when the question is whether those powers have been exceeded, the definition itself is in issue along with the whole enactment.'

CHAPTER ELEVEN

J.S.B. 1 - '53

'The electorate as the supreme authority has now empowered us..to maintain the complete sovereignty of Parliament, in spite of any testing right which the Courts may claim.'

DR.D.F. MALAN 17th April 1953

The decision in Minister of the Interior v. Harris terminated a chapter in the constitutional struggle; but it accentuated the tension between Courts and legislative majority. The government happily refrained from the ultimate absurdity of a re-submission to the High Court of Parliament of the Appellate Division's invalidation of the High Court of Parliament Act itself (a move advocated by some Nationalist Party supporters); but it retained its view that the Appeal Court's decision was incorrect in law and a threat to the sovereignty of Parliament and people. The general election which took place in April 1953 offered an opportunity in the shape of an increased Nationalist Party majority to attempt a vindication of that sovereignty in a manner not

open to attack in the Courts. Policy stresses within the United Party fed the hope that defection might, on the question of separate representation, give the Government a two thirds majority and allow the issues determined by the first Harris case to be reopened. Consequently, on the 13th July 1953, members of the Senate and House of Assembly met in the Assembly chamber and were convened by a message from the Governor General as a Joint Sitting to consider certain proposals falling within the scope of Sections 35 and 152 of the South Africa Act.

An Opposition point of order was immediately raised. Mr. Stuart 'spied strangers', and put to the Speaker that there were 'certain reputed members of Parliament and of the Senate sitting here who, whatever their rights may be when the Houses of Parliament are sitting separately, are not competent to sit in a joint sitting.' The South West Africa Act,[1] he went on in elucidation, had in 1949 added to the number of members sitting in the Senate and House of Assembly. That Act had been passed bicamerally in the normal way. It could not therefore effectively provide members competent to sit in a joint session which represented as the final House, the absolute and unchallenged sovereignty of the people. If that were not the case, not six

1. The South West Africa Affairs Amendment Act (No.23, 1949)

or eight, but twenty five, fifty, or a hundred members could be added in this way by simple bicameral legislation, and the constitutional guarantees implied by the joint session deciding by two thirds majority be completely nullified. The House did not need to be reminded that what the Legislature could not do directly, it could not do indirectly.[1] Mr. Speaker Conradie, giving his ruling, rejected this contention.[2] The rules for the joint sitting were then submitted and adopted, and on the following day the Prime Minister moved:-

> 'That leave be granted to introduce a Bill to amend the South Africa Act, 1909, to validate and amend the Separate Representation of Voters Act, 1951, and to define the jurisdiction of Courts of Law to pronounce upon the validity of Acts passed by Parliament'.

The provisions of the proposed Bill, already published in the Government Gazette[3] were, as the Prime Minister's motion indicated, of two kinds. By Section 3, the Seprate Representation of Voters Act of 1951 was to be re-validated

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1. Joint Sitting (July 1953) Cols.2-5
2. The point had been raised, he said, in 1949 that the South West Africa Affairs Amendment Bill required a joint sitting, and Mr. Speaker Naudé had ruled that there was no substance in it. (Votes and Proceedings (1949) p.349). Section 27 of the Act provided that the additional members should have the same rights, powers, privileges and immunities as members of the House of Assembly elected under the South Africa Act 1909.
3. 3rd July 1953

and given the force of law. Sections 1 and 2 repealed Section 35 of the South Africa Act and removed the reference to that section in Section 152 (the amendment Section). On the other hand Section 4 of the Bill provided that:-

> 'No court of law shall be competent to enquire into or to pronounce upon the validity of any law passed by Parliament, other than a law which alters or repeals or purports to alter or repeal the provisions of section one hundred and thirty seven or one hundred and fifty two of the South Africa Act 1909'.

and that:-

> 'For the purpose of this section 'law passed by Parliament' means any instrument which has at any time prior to the commencement of this Act been enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa in terms of section sixty seven of the South Africa Act, 1909, or which may at any time hereafter be so enrolled by virtue of the fact that it purports to be an Act of the Parliament of the Union, and which purports to be enacted by the Queen, the Senate and the House of Assembly, whether it purports to have been passed by a joint sitting of the Senate and the House of Assembly, or by the Senate and the House of Assembly in separate sittings, and irrespective of the subject matter thereof, and includes any portion of such a law.'[1]

The twin aims of the Bill thus might be seen to conform to those announced in general terms by the Prime Minister

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1. This subsection is a substantial reproduction of Section One of the High Court of Parliament Act. 'Law passed by Parliament' has been substituted for 'Act of Parliament'; the specification is of instruments enrolled 'at any time prior to the commencement of this Act' rather than 'at any time since the eleventh day of December 1931'; and the final phrase 'and includes any portion of such a law' has been added.

after the Nationalist Party had increased its majority at the polls - namely to implement the mandate given for separate representation, and to place the sovereignty of Parliament beyond the reach of the Courts. The Bill itself, however, provided for an entrenchment and a 'testing right' in relation to purported Acts within the sphere covered by Section 137 (the language guarantee). What was the effect of such a provision in the light of the theory of sovereignty propounded by the Government? According to that theory Parliament retained complete discretion in matters of procedure. The correct view of the matter was that laid down by the Appeal Court in 1937.[1] In the second reading debate, the Minister of the Interior made it clear that this was the view which the Government held, the decision of 1952 notwithstanding. The Joint Session procedure was not a concession to the correctness of the decision in Harris's case. Parliament had chosen the procedure. 'We say it chooses that procedure', he declared, 'because it is entitled to choose it.' 'And we are doing that', he added, 'because we say that it is in any case, in complete accord with both judgments - we need not be untrue to the 1937 judgment by taking this decision.[2] But

1. 'That is the decision on which even today we base our attitude and will base it in future' (Dr. Malan. col.237)
2. J.S. (July 1955) col.82

what then of the 'entrenchment' of language equality offered in the Government's Bill? This was it could be objected, conceding nothing at all. 'If', as Sir De Villiers Graaf remarked, 'the 1937 judgment is correct, that is no entrenchment at all, and if the 1952 judgment is correct, then the entrenchment already exists.'[1] The Minister of the Interior's debating skill proved equal to that of his hecklers on this point, but at the expense of an adoption of some dangerously double-edged remarks about sovereignty.

The MINISTER OF THE INTERIOR: The Bill retains for Section 137 the protection which Section 152 confers upon it. ..In other words Parliament in the exercise of its full and complete sovereignty lays fetters on itself and limits its own powers by that clause...

An HON. MEMBER: And yet Parliament remains sovereign?

An HON. MEMBER: What about the common sense of Parliament?

The MINISTER OF THE INTERIOR: ..The positive side is this. Parliament confers in this Bill, again in the exercise of its full and complete sovereignty, specifically the testing right on the court in this particular field, whilst making it clear that it no longer exists in the field covered by the other section.

Mr. DU TOIT: What about the sovereignty of Parliament?

The MINISTER OF THE INTERIOR: The sovereignty of Parliament can be exercised and it can be master of its own soul by laying restraints on itself, just as the hon. member can show the mastership of his own soul by restraining himself from making interjections. The fact that you laid a fetter upon yourself a restraint upon yourself, does not mean that you give away your sovereignty, and it does not show that you are not master of your own fate. It simply shows that you

1. At col.228

are the master of your own fate.[1]

The Minister of Posts and Telegraphs (Hon.J.F.T. Naudé) in his support of the Bill, took up and developed a remark of Dr. Donges, that it had not been within the contemplation of the National Convention, prior to Union, to confer the testing right on the Courts. General Smuts, he said, had advocated the British system 'under which the Courts administered the law as laid down by Parliament, but had no power to alter the law'. The British rather than the American system had been deliberately adopted. 'That is why', he added, 'we so strongly adopt the attitude that this Parliament is sovereign. This Parliament has the same right as the Parliament of England, and if we have those rights, then we cannot be bound.[2] It was very clear that the National Convention had rejected the idea of a general testing right over Acts of Parliament since they had specifically stipulated that the Courts should be competent to test the validity of Provincial Ordinanaes'[3]

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1. At cols. 90-91
2. Col.186
3. In Rex v. Thompson (1914 T.P.D.426) it was suggested that the specific provision for the testing of Provincial Ordinances was intended to remove any doubts which might have existed as to whether the old testing right of the separate Supreme Courts (which on the passing of the South Africa Act became Provincial Divisions of the Supreme Court of South Africa) sufficed to allow the exercise of a testing right over Ordinances of the other Provinces. See D.V. Cowen, 16 M.L.R. 273 at 285.

But, as in America, The Courts had taken the right unto themselves. In the United States, the Courts were thus the highest authority. In South Africa, legislation had been passed declaring Parliament to be the highest authority, and that supremacy could only be secured by taking away the testing right of the Courts.

The Minister's remarks about the National Convention were challenged by Opposition Speakers. The statements quoted about the adoption of British rather than American constitutional forms had been made in the Convention, it was asserted, when the question of Federation or Union was under discussion. But 'the moment the entrenchments were introduced into the Constitution at a subsequent stage, it must have been perfectly clear to every lawyer present that the entrenchments were of no value whatever unless the Courts were to have the testing right'[1] To suggest that the convention gave that right inadvertently or never intended to give it was to put a gloss on history which it could not bear.[2]

Other members of the United and Labour Parties were anxious to know what the Government's intentions would be if the Bill before the Joint Sitting failed to receive the two

1. Sir De Villiers Graaf. Col.228
2. Ibid.

thirds majority required to pass it into law. Mr. Strauss, early in the debate had asked for an assurance from the Prime Minister that if he failed to obtain the two thirds majority ('and', said the leader of the Opposition, 'I can tell him in advance that he will not') - the Government would always in any future action abide by the Constitution and follow the path of the Joint Sitting in dealing with the entrenched sections. On these points, however, the Prime Minister was not to be drawn. He had no intention of answering hypothetical questions. But, he said, if the effort to proceed by what the hon. members opposite regarded as the only constitutional road, should fail, 'other steps' would follow. As to what these were, his only answer to the hon. the Leader of the Opposition was that he should wait and see.[1]

The possibility of agreement was now clearly gone. As with the Separate Representation and the High Court of Parliament Acts, no Opposition amendments were moved at the Committee stage.[2] Many Bills, said Mr. Strauss had been strongly opposed by the Opposition, but they had nevertheless given assistance and put forward suggestions for improvements in Committee. That stage normally offered the opportunity to improve measures submitted to the House. But in this

1. Col.230
2. The Bill went through Committee in three hours.

case there was no room for suggestions to improve the Bill.[1]

The difficulty was, of course, one with which both Houses of the Union Parliament were by now, all too familiar - namely that of distinguishing discussions of principle from discussions of detail, where the principle of the Bill in question was contained in one or two simple clauses. In the present case Mrs. Ballinger attempted to discuss (in detail) the weaknesses of Section One ('Section 35 of the South Africa Act, 1909 is hereby repealed') - and was quickly called to order by the Speaker as dealing with the principle of the Bill already accepted on the second reading. But, she asked, in some exasperation, 'Will you kindly tell me how I can discuss this clause without making what you call a second reading speech?' Mr. Hepple, for the Labour Party took the short way with clause one. 'We are', he said, 'opposed to this clause. ..We also will not waste any time at this Joint Sitting by arguing the four principles involved in the legislation. I want to say that we cannot improve upon this Bill, except by throwing it out, and we will begin by saying that we reject clause one, and that we will reject all the other

1. Col.243

clauses also.'[1]

In such an atmosphere was the Bill eventually presented[2] for its vital third reading. In the course of the debate an appeal was made by Mr. Eaton (Labour) to the Prime Minister to discharge the Bill without a vote being taken, and to re-introduce the Separate Representation Bill of 1951, with an assurance that it would be referred to a Select Committee of both Houses before the second reading debate on it took place.[3]

This suggestion was however repudiated by Mr. Hepple on behalf of the Labour Party,[4] and the Prime Minister was not inclined to take it seriously. Instead, he referred again in his closing speech to the 'other measures' which might be necessary if the Bill failed to pass by the requisite majority. He had been asked 'What next? All he could say was that:-

1. Col.244 When the Separate Representation of Voters Bill was in Committee (8th May 1951) the point was made by Mr. Trollip (United Party) that where a clause was 'one of the pillars of the Bill', argument directed to showing that the clause was a bad clause and should be withdrawn, was in order (75 H.Ass.Deb. col.6115)
2. The third reading debate was twice deferred and finally took place on September 16th, two months after the Bill's introduction. In the meantime there had been an exchage of correspondence between the Prime Minister and Mr. Strauss; and indications that the Government hoped by informal contact between members of the parties (rather than by the nomination of a Committee to explore differences) - to gain the support of some United Party members before the third reading. The United Party ultimately decided to vote against the Bill in its final stage.
3. Col.276-7
4. Col.317

> 'We shall go on. If this course cannot be followed - and you tell me that we shall not succeed this afternoon - then I say that the only other way is that course which we have already foreshadowed, and for which we have received a mandate, and I hope that we shall be successful there. Like the present one, that course, as I have stated here before, will also be constitutional.'[1]

The Joint Session thereupon divided. 122 votes were cast for the Bill and 78 against. A moment's arithmetic, and the Speaker announced that Joint Session Bill No. 1 of 1953 had failed to pass in terms of the South Africa Act.[2]

Two days later in the House of Assembly, the Minister of the Interior moved for leave to introduce a Bill to amend the law relating to the Appellate Division of the Supreme Court. This it now appeared, was the 'other course' hinted at during the joint session debate by the Prime Minister. No details of the proposed Bill were provided before the debate, and the Opposition suspected the worst. Would an attempt be made to 'pack the Court'? The fear was not allayed by the text of the Bill as published.[3] The Appellate Division was to be divided into two parts - a Court of Civil and Criminal Appeal, and a Court of Constitutional Appeal. The Court of Constitutional Appeal was to consist of a President and four judges of constitutional appeal to be appointed (and if

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1. Cols. 346, 353
2. Total membership of the two Houses being 207, 138 votes were required.
3. Government Gazette, 22nd September 1952

necessary added to) by the Governor-General from amongst the judges and acting judges of the Supreme Court.[1] After a short but acrimonious debate, the Government's motion was agreed to, and the Bill given a first reading.[2]

Here again, there were joined in issue the two concepts of Parliamentary supremacy whose conflict had supplied the theme and variation for the legislative struggles of 1951 and 2. On the one view, that supremacy implied that courts of law (at least 'ordinary' courts of law) - being subordinate to the sovereign will embodied in Parliament - must not 'test' the validity of legislation by reference to any 'superior' body of rules governing form or substance. On the other view, Parliamentary supremacy is found compatible with the existence of legal control at least over the 'manner and form' of legislation, and the expression 'testing right' is one whose use

1. Section 3 (2) of the Bill provided that:-
   'The Governor-General may, whenever he deems it expedient to do so, designate any judge or acting judge of the Supreme Court to act as the President or as a judge of the Court of Constitutional Appeal either in the place of a judge of constitutional appeal or in addition to the judges of constitutional appeal or to fill temporarily a vacancy on the Court of Constitutional Appeal'.
2. Parliament was prorogued before the second reading, and the Government did not afterwards proceed with the Bill. Instead a second Joint Sitting was convened in October 1953 to consider a Bill relating solely to the principle of separate representation (clause three of the Bill rejected by the first Joint Sitting). This Bill was committed to a Select Committee before the second reading.

begs the constitutional question in issue. The difference on this point between Government and Opposition can perhaps be illustrated by an extract from a speech of Mr. Russell (United Party) opposing the motion for leave to introduce the Appellate Division Amendment Bill. There existed, he said:-

> '..an absolute misapprehension on the part of the Minister of the Interior as to what the sovereignty of Parliament really is, and what the functions of the Appellate Division really are. The Appellate Division has never assumed unto itself, nor has it ever possessed what is called a - 'general testing right of legislation'. The Appellate Division exists to interpret the laws of this land; one of the laws of this land is the Act of Union. And they merely do their duty by interpreting the supreme law of South Africa'.

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1. 83 H.Ass.Deb. col.3690 (18th Sept. 1953)

PART THREE

CHAPTER TWELVE

'Improper Reflection'

> 'No member shall use offensive or unbecoming words against either House of Parliament, or any member thereof, nor reflect upon any Statute unless for the purpose of moving for its repeal.'
>
> (Standing Order No.73 of the House of Assembly.)

The unsuccessful attempt of the Union Parliament to set itself up as a court of law raises for discussion a number of serious juridical issues. Within the Union Parliament, however, it also raised some questions of procedure which although of lesser importance, are nonetheless, not without constitutional interest.

On January 26th 1953, Mr. Strauss, Leader of the Opposition, remarked in the House of Assembly:-

> 'During the last session..it became necessary for the Party, in view of the treatment that we had from my friend and his colleagues on the other side, during our consideration of that iniquitous proposal the setting up of this buffoonery of the High Court of Parliament....

At this point Mr. Strauss was interrupted by the Minister of

Transport.

The MINISTER OF TRANSPORT: On a point of order, may an honourable member make a reflection on a decision of the House? A decision was taken by this House and the hon. member says that the decision was iniquitous, which is a reflection on the decision of this House.

Mr. STRAUSS: There has been no such legislation passed by this House.

The MINISTER OF TRANSPORT: On a point of order, I would like to know whether a vote taken by this House does not constitute a decision of the House.

Mr. STRAUSS: Mr. Speaker, the whole point - apparently my hon. friend does not appreciate it yet - was that this was not a decision taken by the House. The Supreme Court has said so. It was not this House which took that decision. This iniquitous proposal for the setting up of the High Court of Parliament was completely irregular. It was not this Parliament sitting. There is no piece of legislation like that at this moment. The Supreme Court has said so. Parliament did not function. I am replying to my hon. friend's point of order. That is why that piece of legislation is not worth the paper it is written on. It is as good as torn out of the volume of Statutes, if it was ever bound in it. I am well aware that where this House has passed legislation, functioning as Parliament, it would be out of order for me and against the rules and practice of this House to cast any aspersions or to make any criticism of any decision of this House, or legislation passed by it. But that is just what has not happened. It is now as clear as daylight that this was not legislation passed by this House, and therefore, I say I am entitled to use even stronger language with regard to this buffoonery of the High Court of Parliament, and my hon. friend should know that.

The MINISTER OF TRANSPORT: I think the ruling is that no one may make a reflection on any decision taken by this House. A decision was taken by this House. Whether Parliament had the right to take that decision or not is immaterial. The point is that Parliament came to a certain decision.

An HON.MEMBER: It was not Parliament.

The MINISTER OF TRANSPORT: The hon. member has made a reflection not only on Parliament but a reflection on the Chair which allowed that discussion to take place. I put it to you, Sir that the hon. member should withdraw that reference of his to 'this iniquitous proceeding'.[1]

On the following day, the Speaker gave a ruling on the matter. Although, he said, the High Court of Parliament Act had been declared invalid by the Appellate Division the proceedings and decisions which had led to the passing of that Act formed part of the records of the House. Immoderate reflections on those proceedings and decisions, or on the Act, or on the sitting of the High Court itself, would not be conducive to maintaining the dignity of the House, but rather to bringing its proceedings into disrepute. It had always been the practice to hold the Government of the day responsible for its actions, and whatever strictures or criticisms in respect of the passing of the High Court of Parliament Act were made, should obviously be directed at the Government's actions and decisions which led to the passing of the legislation and the setting up of the Court.[2]

The Speaker did not, it may be noted refer directly to Mr. Strauss' point that the result of the Appeal Courts decision was that no legislation or statute existed to be reflected on, and that consequently the House had never acted

1. 81 H.Ass.Deb. cols.12-14
2. 81 H.Ass.Deb. col.80

at all as part of the effective legislative machine. (The latter inference would have to be drawn if the force of Standing Order No.70 - that 'No member shall speak against or reflect upon any vote of this House.'- were to be evaded.) The distinction moreover which is implied in the ruling - namely that between criticising the motives and policy which have issued in legislation, and reflecting (moderately or immoderately) on the policy of the legislation itself - must be an extremely delicate one.[1]

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1. e.g. on May 19th 1952 (79 H.Ass.Deb.col.6009); Mr. Christie (United Party) said:-

> 'A good deal of time has been lost this past session..Some of the measures that have gone through will be of no economic advantage to the country whatsoever and will be of no benefit to the people of this country.
>
> Mr. SPEAKER: Order. The hon. gentleman cannot reflect on legislation which has been passed.
>
> Mr. CHRISTIE: I have no desire to reflect on legislation passed by this House. I am just referring to the futility of certain measures.

On the same day, Mr. Lovell was called to order by the Speaker after he had alleged that a Select Committee appointed under the Suppression of Communism Act (of which he had himself been a member was not an impartial body.

> Mr. SPEAKER: I wish to point out to the hon. member that the Select Committee was appointed in terms of the Act..The hon. member is now reflecting on legislation that has been passed.
>
> Mr. LOVELL: May I say that I was biassed? Is there any objection if I reflect upon myself?
>
> Mr. SPEAKER: The hon. member cannot get out of it that way.

A related point of constitutional propriety which assumed some interest in the context of the debates of 1952-3 was the inadmissibility of reflections upon the judiciary. Here again, since the issue which divided Government and Opposition was bound up with a difference of opinion as to the correctness of certain judicial decisions, the line which divided legitimate debate from improper comment, became increasingly difficult of discernment. Was the citation for example, by the Minister of Justice, of American criticisms of the United States Supreme Court, in an endeavour to portray the evils of judicial review, an implied accusation directed against the Supreme Court of South Africa. The Minister thought not. He was making no accusations of dishonesty or incompetence. Direct criticism of the decision of the Appellate Division in Harris's case was, however attempted by some Government speakers. Chief Justice Centlivres' remarks about the manner of deciding Ndlwana's case, said the Minister of Posts and Telegraphs (16th April 1952) amounted to an accusation of judicial incompetence. On the raising of a point of order that the Minister was reflecting upon the conduct of the Chief Justice, the Deputy Speaker ruled that the words used might be quoted but that criticism of conduct based on them

was out of order.[1]

On August 24th 1953, the Speaker made the following statement:-

> 'This House has frequently discussed the actions of the courts and judges, and I feel that it is now the opportune time that I should give guidance in connection with criticism of courts, and I want to give the following ruling.
>
> In 1935 one of my predecessors, Mr. Speaker Jansen referred in a ruling to 'Todd's Parliamentary Government in England', where this authority on constitutional law laid down that -

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1. 78 H.Ass.Deb. cols.3741-2. An extensive range of expressions was ruled out of order by the Speaker during the debates of 1951-3. The feelings which underlay the party struggle could perhaps be indicated by this (roughly chronological) selection:-

'Rat'. 'Is there another Speaker here?' That is the voice of Moscow speaking'. 'You know that that is a lie'. This distortion which we repeatedly get from the other side'. 'What this Government has done has turned out not only to be dishonourable, but has also been demonstrated to be completely illegal'. 'Twisting'. 'We know what a Select Committee is'. 'Let us examine this monumental example of oleaginous duplicity'. 'Tell that to the Marines'. 'The sinister Minister'. 'It seems as if there are now packed courts in South Africa also'. 'This monstrous Minister'. 'I accept your ruling but I think what I like'. 'This Nazi dominated Parliament'. 'This Facist dominated Parliament'. 'The crypto-communists on the other side'. 'And they joined hands in defiance of white rule in this country with your assistance'. 'The Government has brought this defiance campaign, rioting and bloodshed to this land of ours'. 'Party hacks'. 'I hope you Mr. Speaker, will wake up'. 'The hon. member is a donkey'. 'That is bloody nonsense'. 'You are a communist'. 'The member for Mental Hospital'. 'The hon. members spiritual friends live in Russia'. 'Black Minister of Injustice'. 'I do not want to destroy my integrity like Senator ... and live out my life like a forlorn begging dog'.

> Nothing could be more injurious to the administration of justice than that the House of Commons should take upon itself the duties of a court of review of the proceedings of an ordinary court of law.
>
> Although members of this House have to accept in debate that decisions of the law courts are correct in law, the Government of the day may introduce legislation to vary the consequences of a decision of the courts. When such legislation is before the House hon. members can take cognizance of such a decision and can then freely discuss its consequences, but they should not question the correctness of the decision.'1

The question as to the limits of 'mutual respect' between the legislature and judiciary furnishes a preliminary form of inquiry into the larger question as to the function of the courts in reviewing the exercise of legislative authority. The impact of the South African decisions on this general problem must now be considered.

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1. 82 H.Ass.Deb. cols. 2156-7. c.f. a question put to the Speaker by Mr. Stuart on the 18th September.
'We have one difficulty about approaching anything to do with the Appellate Division, and that is the ruling given by you, Sir..on the question of the extent to which any doings, actions or inactions of the Appellate Division judges, past, present or future, could be attacked at all, and if this Bill is coming up ..and we have to deal with that position in the near future, then, Mr. Speaker, I would like to know whether in fact we would be bound by such ruling.' (83 H.Ass.Deb.cols3677-8. 18th Sept. 1953)
The Speaker ruled that the question was not relevant at that stage of the Bill. The Bill itself was, as already stated, not proceeded with by the Government.

CHAPTER THIRTEEN

Sovereignty and the Testing Right

'The Parliament men are as great princes as any in the world when whatever they please is privilege of Parliament'

JOHN SELDEN. Table Talk.

'Let (judges) be lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty'.

FRANCIS BACON. 'Of Judicature'.

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Some degree of mutual respect between the branches of government is a common and necessary feature in any constitutional system. Even where the judiciary are in theory the servants of a supreme legislature, a needful restraint may operate in both directions. As Denning L.J. has lately written:-

'Judges must never comment in disparaging terms on the policy of Parliament, for that would be to cast reflections on the wisdom of Parliament and would be inconsistent with the confidence and respect which should subsist between Parliament and the judges. Just as members of Parliament must not cast reflections on the judges, so judges must not cast reflections on the conduct of

Parliament'.[1]

It is usual, however, to draw a sharp distinction between mutual tolerance of this kind, and a doctrine of formal separation which makes judiciary and legislature 'co-ordinate departments', and gives to the judiciary the duty of reviewing legislative enactments in the light of a constitution. The absence of 'judicial review', or the 'testing right' is here regarded as a necessary condition for the existence of a 'sovereign' Parliament.

But the use of the expression 'testing right' in this way is not entirely free from ambiguity. In 1952 Dr. Malan declared that the Supreme Court of the Union of South Africa had assumed and exercised a testing right over legislation, and thereby undermined the sovereignty of Parliament.[2] There was nothing in the Constitution which authorised the courts to review Acts of Parliament in this way.[3] The Court itself, however, took an entirely different view of its action. Although said Schreiner J.A. in the second Harris case, the Constitution made no express provision for the determination of questions of validity or invalidity, it must thereby be

1. 'The Spirit of the British Constitution', 29 Canadian Bar Review 1193.
2. 78 H.Ass.Deb. col.3124
3. Ibid.col.5498

taken to have left such determination to the Courts of Law of the land.[1] More important however - the Court was not in any way exercising a 'testing right' in the sense imputed. Its duty was 'simply to declare and apply the law, and it would be inaccurate to say that the Court in discharg ing that duty was controlling the Legislature'. It was 'hardly necessary to add', Centlivres C.J. remarked, that,

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1. Minister of the Interior v. Harris 1952 (4) S.A. 769 A.D. at 787
c.f. the dictum from Burah's case cited in James v. Commonwealth of Australia (1936) A.C. 578 at 613 that:- 'The established Courts of Justice, when a question arises (in regard to a Constitution) whether the prescribed limits have been exceeded must of necessity determine that question' Hans Kelsen in his 'General theory of Law and State' 1949 writes:-

'If the legal order does not contain any specific rule to the contrary, there is a presumption that every law-applying organ has this power of refusing to apply unconstitutional laws. Since the organs are entrusted with the task of applying 'laws', they naturally have to investigate whether a rule proposed for application really has the nature of a law. Only a restriction of this power is in need of explicit provision.' (p.268)

In his 'American Commonwealth' Bryce wrote:- 'The interpretation of laws belongs to courts of justice. A law implies a tribunal.. The legislature..makes every law in reliance on this power of interpretation. It is therefore obvious that the question whether a congressional statute offends against the Constitution must be determined by the courts, not merely because it is a question of legal construction, but because there is nobody else to interpret it. Congress cannot do so because Congress is a party interested.' (Vol.1 pp.246-7)

'Courts of Law are not concerned with the question whether an Act of Parliament is reasonable or unreasonable, politic or impolitic'.[1]

The contention that in declaring an enactment void, a court is not usurping legislative power but merely applying the law, is in essence similar to the reasoning of Chief Justice John Marshall in 1806:-

> 'It is emphatically the province and duty of the judicial department to say what the law is..So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case so that the Court must either decide that case conformably to the law disregarding the Constitution, or conformably to the Constitution disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.'[2]

Less well remembered is the opposition and criticism which Marshall's doctrine encountered. It could be argued that the limitations imposed by the Constitution were of a political

1. Harris v. Donges (1952) 1 T.L.R.1245 at 1251
2. Marbury v. Madison 1 Cranch.137 at 175
   c.f. Kelsen (Op.cit.p.155):-
   'The usual saying that an 'unconstitutional statute' is invalid (void) is a meaningless statement, since an invalid statute is no statute at all. A non-valid norm is a non-existing norm, is legally a nonentity ..If the statute is valid it can be valid only because it corresponds to the constitution; it cannot be valid if it contradicts the constitution. The only reason for the validity of a statute is that it has been created in a way provided for by the constitution.'
   In South Australia v. Commonwealth (1942) 65 C.L.R.373 it was said that:- 'A pretended law made in exercise of power is not and never has been a law at all. ..A decision of a Court..is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it - and thereafter invalid. If it is beyond power, it is invalid ab initio.' (at p.408)

nature, and not intended to be applied by courts of law. No specific power was conveyed on the federal courts or the Supreme Court to uphold constitutional provisions against legislative Acts. As in the South African Convention of 1908 the intentions of the authors of the Constitution were not explicitly expressed.[1] The case against the Marbury v. Madison doctrine was strongly advanced in a dissenting opinion in Eakin v. Raub[2] decided in the Pennsylvania Supreme Court in 1825:-

> 'The Constitution and the right of the Legislature to pass the Act may be in collision. But is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ to revise the proceedings of the Legislature, and to correct its mistakes; and in what part of the Constitution are we to look for this proud preeminence?

1. The Federal Convention passed no specific resolution on the point. Both favourable and adverse opinions were however expressed. Benjamin Franklin thought that a power to negative legislation would give judges an undue authority and control over Congress. (M.Farrand (ed) 'The Records of the Federal Convention' (1923) Vol.1. p.109). Farrand was of the opinion that, 'It was generally agreed by the leading men in the Convention that this power existed.' (The Framing of the Constitution of the United States' 1913 p.157)
C.G. Haines. ('The Role of the Supreme Court in American Government and Politics 1789-1835. (1944)) cites Vattel's Law of Nations (1758):-
'If there arise in the State disputes over the fundamental laws, over the public administration, or over the rights of the various powers which have a share in it, it belongs to the Nation alone to decide them, and settle them according to its political constitution.' C.f.Haines.Op. cit. Chaps 1 and 10-15; E.K.Carr. 'The Supreme Court and Judicial Review' (1942) Ch.4.
Thomas Jefferson was strongly opposed to the idea that decisions of the Supreme Court could preclude the other branches of Government from taking their own view of the Constitution. See C.P. Patterson. 'The Constitutional Principles of Thomas Jefferson' (1953)
2. 12 Sergeant and Rawle 330

To concede the validity of Marshall's reasoning would be to admit the superiority of the Judiciary to the Legislature.[1]

> 'What would be thought' (the opinion continued) of an Act of Assembly in which it should be declared that the Supreme Court had in a particular case, put a wrong construction on the Constitution of the United States, and that the judgment should therefore be reversed?...It is the business of the judiciary to interpret the laws, not scan the authority of the law-giver; and without the latter it cannot take cognizance of a collision between a law and the Constitution. So that to affirm that the judiciary has a right to judge of the existence of such collision is to take for granted the very thing to be proved.
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> ...It has been said to be emphatically the business of the judiciary to ascertain and pronounce what the law is; and that this necessarily involves a consideration of the Constitution. It does so: but how far? If the judiciary will inquire into anything besides the form of enactment, where shall it stop? There must be some point of limitation to such an inquiry; for no one will pretend that a judge would be justifiable in calling for the election returns, or scrutinizing the qualifications

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1. Hamilton discussed this point at some length in No.78 of 'The Federalist:-

> 'If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be argued that this cannot be the natural presumption where it is not to be collected from any particular provision in the Constitution.
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> ..Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power...It can be of no weight to say that the courts on the pretence of a repugnancy may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen ..in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything would prove that there ought to be no judges distinct from that body.'

of those who composed the legislature[1]

...What I have in view in this inquiry is the supposed right of the judiciary to interfere, in cases where the Constitution is to be carried into effect through the instrumentality of the legislature, and where that organ must necessarily first decide on the constitutionality of its own act.'[2]

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1. Cases in which dispute as to the status of members raises doubt as to the validity of legislation are not common. The position of the members of the South African House of Assembly elected under the provisions of the bicamerally passed South West Africa Affairs Act (1949) in relation to legislation requiring passage in Joint Session, might however provide an example. (See Joint Sitting Report (July 1953) cols.2-5, and above pp.276-7)
C.f. the claim made as to the composition of the House of Commons in 1770 by the author of 'Junius', that:-
'If there be a defect in the representation of the people, that power which alone is equal to the making of laws in this country is not complete, and the acts of Parliament under that circumstance, are not the acts of a pure and entire legislature'. (Letter XXXVII March 19th 1770)
In 1929 doubt was raised as to the validity of a Maltese statute passed with the aid of two senators declared by the Court of Malta (to whom jurisdiction had been given) to have been improperly elected. (The Privy Council in Strickland v. Grima (1930 A.C.283) refused to entertain an appeal from the Maltese court's decision) Sir Arthur Berriedale Keith, however, believed that no authority existed to justify the impugning of legislation in the courts on these grounds - whether the legislature in question were a sovereign body or not. He referred to the 'fundamental rule that it is not the function of the judiciary (except by express delegation of authority) to attempt to control the composition of legislative bodies, a matter which is essentially part of the privilege of such bodies.' In the case of legislatures whose enactments could be disallowed on grounds of ultra vires (e.g. for repugnancy to Imperial legislation) the doctrine'..has reference to the substance of the legislation, not to the issue of the regularity of the constitution of the legislature by which the legislation was passed.' (Letters on Imperial Relations 1916-35 pp.290-2)
2. 12 S. & R. 330 at 353

The extent of and limitations on judicial inquiry in this sphere raise a number of essentially interlinked issues, namely:-

(1) The limits of Parliamentary privilege.

(2) The use of rules of construction by the courts restricting recourse to evidential materials extrinsic to the promulgated enactments of the Legislature.

(3) The distinction between constitutional requirements as to the substance of legislation, and requirements as to the manner and form of its enactment.

(4) The attitude adopted by the courts towards redefinition in whole or part, of the legislative process.

An extensive area of legislative privilege is contemplated in the doctrine put forward by opponents of the Marbury v. Madison doctrine. If under a formal separation of powers, the legislative organ must 'necessarily..decide on the constitutionality of its own act',[1] the legislative function becomes

1. It was remarked in Australian Communist Party v. Commonwealth (1951) 83 C.L.R. 1 that such might have been the law but for the dicta laid down in Marbury's case.
'If the great case of Marbury v. Madison..had pronounced a different view, it' (judicial disallowance) 'might perhaps not arise even in the case of the Commonwealth Parliament; and there are those, even today, who disapprove of the doctrine of Marbury v. Madison, and who do not see why the courts rather than the legislature itself should have the function of finally deciding whether an Act of a legislature in a federal system is, or is not within power.
At.p.262

implicitly a superior or 'sovereign'[1] function. What are the implications of 'privilege in the absence of a theory of separation of powers or a formal constitutional document? Does the undoubted privilege to decide unhindered the substance of legislation (which is not normally enumerated amongst the 'privileges of Parliament' at all) extend equally to the manner and form of law-making? The doctrine which has come to be enunciated as a constitutional commonplace about the Parliament of the United Kingdom, namely that it has exclusive control over its own internal procedure, is not without ambiguity if treated from the slightly eccentric angle (for the sovereign Queen-in-Parliament) of a potential judicial guardianship over the manner of constitutional change. The case law in this sphere is neither abundant nor always of undisputable relevance. In itself, the problem has never in modern times assumed any constitutional importance in this country; but the direct appeal which, as now appears, can be made to the privileges of the Westminster Parliament[2] as

1. In the passages quoted from Eakin v. Raub, legislation was described as 'an act of Sovereignty' and the authority of Blackstone cited for the proposition that 'sovereignty' and 'legislative power' were 'convertible terms'.
2. See the speeches made in support of the High Court of Parliament Bill (1952) in both Houses of the Union Parliament; the decision in Ndlwana v. Hofmeyr (1937) A.D.137); and the Opinion of Professor E.C.S. Wade. (Appendix)

furnishing support for a particular view of the necessary relationships between a sovereign legislature and the courts, makes a closer inspection of the position in Great Britain a matter of some importance.

The High Court of Parliament in South Africa was claimed by its creators to be less an innovation than an explicit institutional provision for the exercise of the judicial powers inherent in the sovereign British Parliament.[1] As against this contention, it was urged in the debates on the High Court Bill that the 'High Court of Parliament' at Westminster was now in substance a purely legislative body, and that its judicial functions were merely those relating to discipline and the efficient carrying out of its business, accorded to all corporate bodies.[2] Apart from the judicial functions of the House of Lords, it was contended, the idea of Parliament as a whole being considered as a court of law was an anachronism.

That the judicial and legislative functions are in Great Britain today as clearly distinct in this respect as any pro-

1. And given, it was further claimed to the Parliament of the Union by the Powers and Privileges of Parliament Act 1911. (Section 36 of the Act provides that, 'Save as is otherwise expressly provided by this Act, the Senate and the House of Assembly of the Union of South Africa, or either of them and the members thereof respectively, shall hold enjoy and exercise such and the like privileges and immunities and powers as at the time of the promulgation of the South Africa Act 1909 were held, enjoyed and exercised by the Commons House of the United Kingdom and by the members thereof.')
2. 78 H.Ass.Deb. col.4959

ponent of a separation of powers theory could wish, cannot be denied. The idea of Parliament as a court of law,[1] has however been used to some purpose in the explanation of the development of the doctrine of Parliamentary sovereignty. It was pointed out by Professor Holdsworth that the crucial period of English constitutional growth was marked by a close alliance between Parliament and the common lawyers. Did not then the reluctance to control the proceedings of Parliament derive from the lawyers' conception of it as the highest court in the land?[2] 'And as it is above all courts' the Journal of Speaker D'Ewes records, 'so it hath privilege above all other courts'.[3] The privilege is one which, in relation to its own

1. In Stockdale v. Hansard (1839) 9 A. & E.1 at 1934 Patterson J. said:
   'It is..argued that the Courts of Law are inferior courts to the Court of Parliament, and to the Court of the House of Commons, and cannot form any judgment as to the Acts and resolutions of their superiors. I admit fully that the Court of Parliament is superior to the Courts of Law, and in that sense they are inferior courts'. But, 'The House of Commons..is not a Court of Judicature for the decision of any question either of law or fact between litigant parties, except in regard to the election of its members'.
2. 'At no point in English history do we see any antagonism between the common lawyers and the Parliament...The lawyers recognise it not only as a court but as the highest court which the King has. ..The continual alliance between Parliament and the lawyers has always prevented the existence of any general disposition to question the omnipotence of Parliament.' Holdsworth 'History of English Law' Vol.2. pp.430, 443. See also Holdsworth's essay on 'The influence of the legal profession on the growth of the English Constitution'. (in 'Essays in Law and History 1946) and C.H. McIlwain. 'The High Court of Parliament and its Supremacy (1912) Chaps.3 & 4; M.A. Judson. 'The crisis of the Constitution' (1949); G.L. Mosse. 'The Struggle for Sovereignty in England' (1950)
3. Cited H.E.L. Vol.2 p.433

affairs, appears almost boundless. In the words of Coke's often-quoted exposition of the 'lex et consuetudo Parliamenti'[1] in his Fourth Institute:- 'Whatever matter arises concerning either House of Parliament, ought to be discussed and adjudged in that House to which it relates and not elsewhere.'

This, was the view so decisively taken by Lord Mansfield in 1770 when the House of Lords debated the right of the Commons, to expel John Wilkes. Though declarations of the law made by either House were, he thought, always attended with bad effects, and could not be taken as authoritative by the Courts, in the interpretation of its own procedure each House acted as a court from which there was no appeal:-

> 'Wherever a court of justice is supreme and their sentence final..the determination of that court must be received and submitted to as the law of the land; for if there be no appeal from a judicial sentence, where shall that sentence be questioned, or how can it be reversed? ...Judges might be corrupt and their sentences erroneous, but these were cases for which in respect to supreme courts the constitution had provided no remedy. That if they wilfully determined wrong, it was iniquitous indeed and in the highest degree detestable. But it was a crime of which no human tribunal could take notice, and it lay between God and their consciences.'[2]

1. It is from the lex et consuetudo Parliamenti and not from mere existence as a representative legislature that the privilege of Parliament to exercise its judicial functions derives. Colonial legislatures are not courts and (apart from express statutory provision) have inherently only such privileges as are necessary to the proper exercise of their functions (Keilly v. Carson (1842) 4. Moo.P.C.63). The principle was for long disputed in the courts of the overseas dominions, largely in relation to the power to punish for contempt. The cases are collected in C.Wittke. 'Parliamentary Privilege in the Empire' (in 'Essays in History and Political Theory. In honour of C.H. McIlwain.1936)
2. Parliamentary History XVI p.654

William Pitt, Earl of Chatham, denounced Mansfield's view of the Commons' privilege,[1] as a doctrine 'subversive of the constitution'. The Commons had 'united in the same persons the office of legislator and of judge'. 'Legem dicere', and 'legem facere' were powers clearly distinguished from each other, and wisely separated by the Constitution. No court of justice could have a power inconsistent with or paramount to the known laws of the land. The Commons had abrogated the legislative right which belonged to the whole legislature. This was potentially the beginning of a unicameral right to abolish the Upper Chamber or the Monarchy. Such action was not a matter between the legislators and God. Nor was it for the 'wisdom of the House' to decide. The House was subject to the control of the law:-

> 'What is this mysterious power undefined by law unknown to the subject, which we must not approach without awe, which no man may question and to which all men must submit'.

The divine right of Kings had been exploded.

> 'I have never expected to hear a divine right or a a divine infallibility attributed to any other branch of

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1. The Commons view of their privileges in matters of elections was strongly asserted in 1703 by the imprisonment for breach of privilege of the five Aylesbury men who had brought actions against the returning officers following the success of the paintiff Ashby in a similar action (Ashby v. White. 14 S.T. 695). See Holt C.J.'s dissenting judgment against the majority decision in the Aylesbury case that the House was the sole judge of its own privileges. (Reg. v. Paty (1704) 2 Ld. Raym. 1105 at 1113)

the legislature.'[1]

The question of judicial control over matters internal to the two Houses and claimed by them as within the area of Parliamentary privilege, was discussed at some length by Mr. Justice Stephen in Bradlaugh v. Gossett.[2] It is perhaps worthy of remark that here as in other cases, dicta laid down by the courts as to the competence of the legislature to adjudicate on matters arising 'within the walls of the House' have not been concerned with the forms of law-making, so much as with the right of the Houses to determine issues relating to contempt, the status of members and the conduct of business under Standing Orders. Nevertheless, if no reservation is

1. Parliament.Hist. XVI p.656
In the Commons debate (Jan.25th 1770) on a motion 'That in matters of Elections this House is bound to judge according to the Law of the Land', Sir William Blackstone expressed similar opinions to Lord Mansfield. The same resolution was debated, and rejected in the Lords, whereupon a number of dissenting peers entered a Protest declaring that if the principle asserted by the Commons were admitted and asserted to its full degree the law of the land would be overturned and 'resolved into the will and pleasure of a majority of one House of Parliament'. The protest cited the decision in Ashby v. White and declared. ..'Neither House hath any power by any vote or declaration to create to themselves any new privilege that is not warranted by the known laws and custom of Parliament.'

A Commons resolution against 'interference by the Lords in a matter within the jurisdiction of the Commons', produced a further Protest in which it was urged that the Commons claim if recognised would enable them to '..change the whole law of election..transfer the rights of the freeholders to copyholders..or totally extinguish rights by arbitrary declaration..alter the constitution of cities and boroughs..reverse all the franchises of suffrage which the people hold under the common law..(and)..trample upon the sanctions..of Acts of Parliament made for declaring and securing the rights of election.' (Parlt.Hist.XVI p.826)

2. (1884) 12 Q.B.D.271

placed upon these dicta, they may be used to support the proposition that the manner and form by which a Bill is passed into law is (as part of the internal affairs of the Houses) quite outside the scope of judicial scrutiny. This is exactly the use to which Mr. Justice Stephen's judgment was put in South Africa by the Minister of the Interior[1] in asserting the right of the Union legislators to decide upon the constitutionality of their own activities. Charles Bradlaugh, it may be remembered, claimed that in preventing him from taking his seat, the House of Commons had gone beyond its powers in the matter of internal procedural regulation and had deprived him and his electors of a right protected by law (The Parliamentary Oaths Act 1866) The House of Commons, as one branch of the legislature, could not, (as was laid down in Stockdale v. Hansard)[2] change the law of the land by its resolution. Bradlaugh's contentions were, in principle, those advanced a century earlier on behalf of Wilkes. Mr. Justice Stephen, like Lord Mansfield (and in remarkably similar words) held, however, that in relation to legal rights which had to be exercised if at all, within the House, the Commons exercised a judicial function:-

> 'They are bound...to guide their conduct by the law as they understand it. If they misunderstand it

1. 78 H.Ass.Deb. col.4109 (22nd April 1952); Senate Deb. 20th May 1952 Col.2954
2. (1839) 9 A. & E. 1

> or (I apologise for the supposition) wilfully disregard it, they resemble mistaken or unjust judges; but in either case, there is in my judgment, no appeal from their decision. The law of the land gives no such appeal. No precedent has been or can be produced in which any court has interfered with the internal affairs of either House of Parliament'.[1]

The resolution of the House was not the judgment of a court, not subject to revision, but it had much in common with such a judgment.

> 'The House of Commons is not a Court of Law, but the effect of its privilege to regulate its own internal concerns, practically invests it with a judicial character, when it has to apply to particular cases the provisions of Acts of Parliament.[2]

It would be indecent and improper, he continued, to suppose that the House deliberately and intentionally defied and broke the Statute law. The more decent, natural and probable supposition was that the House considered that no inconsistency existed between such Statute law and its resolution. It would be impossible for the House with any regard for its own dignity and independence to suffer its reasons to be laid before the court, or to accept the court's interpretation of the law in preference to its own.

Each of the judges in Stockdale v. Hansard, said Mr. Justice Stephen, had concurred in endorsing the maxim set down by Blackstone,[3] that matters concerning either House

1. (1884) 12 Q.B.D.271 at 286
2. At p.285
3. Commentaries on the Law of England 1. 163

ought to be discussed and adjudged in the House and not elsewhere. As the principal result of that case had been to assert in the strongest way the right of the Courts to ascertain the extent of the privilege of the House,[1] and to deny emphatically that they could be bound by a resolution of either House declaring any particular matter to fall within their privilege, those declarations must be of the highest authority. The conclusions to be drawn were that

> 'The House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the Statute law which has relation to its own internal proceedings'.[2]

and that:-

> 'The House of Commons has the exclusive power of interpreting the Statute so far as the regulation of its own proceedings within its own walls is concerned'.[3]

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1. Though the claim of the House to adjudicate as to the extent and limits of its privileges is one which has never been explicitly relinquished. (See Keir and Lawson 4th ed. 1954 p.125)
2. (1884) 12 Q.B.D. 271 at p.278
3. At p.280
   C.f. Erskine May 15th ed. p.60'..Another collective right of the House is to settle its own code of procedure. ..The House is not responsible to any external authority for following the rules it lays down for itself but may depart from them at its own discretion. This is equally the case where the House is dealing with a matter which is finally decided by its sole authority, such as an order or resolution, or whether like a Bill, it is the joint concern of both Houses. This holds good even where the procedure of a House or the right of its members to take part in its proceedings is dependent on Statute. For such purposes the House can 'practically change or practically supersede the law'.

The procedure followed by the Houses in enacting legislation is not of course a matter of Statute. But legislation about the manner and form of law-making is at least a possibility. The Parliament Acts of 1911 and 1949 provide an example.[1] Where, as in the Commonwealth and elsewhere, statutary definitions of the law-making process exist, considerable importance must attach to the willingness of the courts to extend or narrow the area of Parliamentary privilege in relation to the manner and form of legislative activity. If the United Kingdom Parliament is to be taken as the prototype of a 'sovereign' legislative body, therefore, such decisions as are relevant to the relationship between Parliament and British courts of law, are bound to have persuasive authority elsewhere. What may be doubted is whether there can be laid down at the present time any firm rule, based on the cases, that the elements of the legislative body in this country (the expression 'elements of the legislative body' is used advisedly, rather than 'Parliament') -

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1. D.V. Cowen (16 M.L.R. at 279) asks:-

'Suppose an attempt were made to prolong the life of Parliament beyond the five years by legislation which omitted the assent of the Lords, purporting to be passed under the Parliament Act? Is it likely that the courts would accept such 'legislation' as an authentic expression of the will of the British Parliament?

c.f. W. Friedmann 24 Australian Law Journal, at p.104

have a discretion to make law in any manner they choose, and that the courts have in this sphere no jurisdiction.

Interlinked with the question of Parliamentary privilege, is that as to the rules of evidence which a court will accept as concluding its inquiries. Just as the (plain) words of an enactment may be regarded as conclusive as to its policy and Parliamentary materials therefore inadmissible aids to the judge, so it may be contended that a Bill enrolled and published in the usual manner is conclusive as to the forms of its enactment having been duly complied with, and that no inquiry will be pursued as to the facts of its Parliamentary passage. In this connection, the remarks of Lord Campbell in Edinburgh and Dalkeith Railway Co. v. Wauchope[1] are often cited. In this case Lord Campbell referred to 'the point which has been raised with regard to an Act of Parliament being held inoperative by a Court of Justice because the forms prescribed by the two Houses to be observed in the passing of a Bill have not been exactly followed', and continued:-

> 'All that a court of justice can do is to look to the Parliamentary roll; if from that it should appear that a Bill has passed both Houses and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.[2]

1. (1842) 8 Cl. & F. 710
2. at pp.724-5

Wauchope's case provides authority for the proposition that the procedure prescribed by the Houses for themselves in Standing Orders is not a matter within the area of scrutiny of the Courts. But the phrase 'conclusiveness of the Parliament roll'[1] suggests the much wider proposition that the entire process of law making, and in particular the necessity for the assents of the separate elements which constitute the legislative body, are outside the scope of judicial inquiry. Here two questions arise: first, how far statements of the kind made in Wauchope's case may be applied to situations where the procedures to be followed by the elements of the legislative body are provided for by statute,[2] and are not merely dependent upon Parliamentary Standing Orders; and secondly, whether even where the latter situation prevails (as in this country) there is not a distinction to be made between the internal procedures of the elements and the more fundamental question of the action or concurrence of the elements themselves. Centlivres C.J. in Harris v. Donges hinted,

1. The King and Hunsdon v. The Countess of Arundel (1617) 80 E.R. 258-261 was cited in 1937 to the Court in Ndlwana v. Hofmeyr on the conclusiveness of the enrolled record. c.f. The Case of Shipmoney (1637) 3 S.T.825; and College of Phisitians v. Cooper (1675) 84 E.R. 894-5. The former case was referred to by Professor E.C.S. Wade, in his Opinion furnished to the Union Government, as leading to the conclusion that 'the courts knew nothing of the legislative process', and that, 'An Act which appears on the Roll of Parliament, is good law, whatever the method adopted for its passage.' (see Appendix)
2. Especially if in addition elements of federalism exist. Under such a system wrote Sir Owen Dixon, in 1935, 'men quickly depart from the tacit assumption to which a unitary system is apt to lead, that an Act of Parliament is from its very nature conclusive.' (51 Law Quarterly Review 590 at 604)

it may be remembered, that the enrolled copy of a Bill might be conclusive on the South African Courts, and that an untrue recital on the face of an Act might preclude inquiry into whether the procedure (in this case procedure imposed by Statute) indicated in the recital, had in fact been followed.[1] But he expressed no firm opinion on this point, and it may be submitted that such an admission would be inconsistent both with the statement made in deciding Ndobe's case (endorsed in Harris v. Donges) that the courts are competent to investigate whether the forms necessary to the valid passage of an Act of Parliament have been followed; and with the Chief Justice's own remark that it would be a surprising constitutional doctrine to hold that a Government in the United Kingdom could convene joint sittings and enact valid legislation with the help of its supporters in the upper House, whatever its strength in the lower.[2] Even in Ndlwana v. Hofmeyr (1937) in which the question raised as to the proof of an Act of Parliament before a court of law, was answered by the statement that in the case of a sovereign law-making body the Act 'proves itself by the mere production of the printed form published by proper author-

1. (1952) 1 T.L.R. 1245 at 1263
2. c.f. 'The King, Lords, and Commons meeting in a single joint assembly and voting by majority or even unanimously cannot enact a statute'. R.T.E. Latham. 'The Law and the Commonwealth'. p.523n. The passage is cited and adopted in E.C.S. Wade. Introduction to 9th ed. of Dicey's 'Law of the Constitution' p. xxxviii.

ity', it was conceded that the case under deliberation was not one where a constituent element of Parliament had failed to function. In such a case - for example a resolution of one of the Houses - no Act of Parliament would have existed, and a Court of law would recognise the fact.[1] It may very well be true that, allowing for a somewhat larger measure of caution on the part of the judiciary in Great Britain,[2] the role of the courts in relation to the legislative process, is in principle the same either under the 'flexible' British Constitution or under the newer and formal constitutional instruments of the Commonwealth, - namely to undertake such inquiries as are necessary to enforce the observance of existing legislation as to the manner and form of legislation. If this be true, the use of dicta about the 'conclusiveness of

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1. (1937) A.D.229 at 238
2. Particularly in the matter of injunctions restraining the action of Parliamentary officials, c.f. the attitude manifested in Bilston Corporation v. Wolverhampton Corporation (1942) 1 Ch.391, with the readiness of some Commonwealth courts to issue injunctions and declaratory judgments. See on this topic, G. Sawer 60 Law Quarterly Review p.83 (1944) W. Friedmann. 24 Australian Law Journal p.106 (1950); and (for South Africa) D.V. Cowen. 70. South African Law Journal p.245 (1953)

the Parliament Roll,[1] as indicating a necessary consequence of Parliamentary sovereignty, and as enunciating a rule for the guidance of Commonwealth courts, must be extremely misleading. In this sphere such scraps of authority as are more directly relevant to the issue under discussion, suggest the conclusion that the rules requiring the assent of King, Lords and Commons to the making of Acts of Parliament are rules of law which, in appropriate cases, will be enforced in courts of law. As was said by Lord Denman in rejecting the

1. In the United States, the authenticity of a Bill attested by the Speaker of the House of Representatives, the President of the Senate and the President, was said, in Field v. Clark 143 U.S. 649 (1892) to be 'complete and unimpeachable' It 'carries on its face a solemn assurance by the legislative and executive departments ..that it was passed by Congress. The respect due to co-equal and independent departments requires the judicial department to act upon that assurance, and to accept as having passed Congress all bills authenticated in the manner stated.' (at pp.671-3) The case was one in which it had been argued that the Tariff Act of 1890 had been enrolled with the omission of a section which had in fact been passed. No question of the manner and form of legislation was in issue. In an earlier case involving the right of the courts to examine the Journals of Congress (Gardner v. The Collector (6 Wall. 499 (U.S.1868)) it was held that, 'Whenever a question arises in a court of law of the existence of a statute .. or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question.' (pp.510-11) In 1949, (in Christoffel v. United States (338 U.S.84)) notice was taken that a quorum had not been present in a Committee of the House of Representatives. See, J.A.C. Grant (1950) Western Political Quarterly. Vol.3. p.364 ff.

claim that resolutions of the Commons were binding on the Courts:-

> 'The supremacy of Parliament, the foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not the Parliament, but only a co-ordinate and component part of the Parliament. That sovereign power can make and unmake the laws; but the concurrence of the three legislative estates is necessary.'[1]

In the same case, Patterson J. in his concurring judgment declared that if the House of Commons, by declaring itself to possess a power, could prevent all inquiry into the existence of that power;-

> 'I see not why it may not, by declaring itself to have any other power in any other matter, equally preclude all inquiry in Courts of Law or elsewhere, as to the existence of such power'...It is useless to say that the House cannot by any declaratory resolution give itself new powers and privileges; it certainly can, if it can preclude all persons from enquiring whether the powers and privileges which it declares it possesses, exist or not.'[2]

The Princes Case[3] reported by Coke, and cited in Harris v. Donges contains some remarks about the force of different declarations, on the face of Statutes:-

> 'Many Acts..were cited to show the variety of penning of Acts of Parliament...
> If an Act of Parliament be penned by Assent of the King and of the Lords Spiritual and Temporal, and of the Commons, or it is enacted by authority of Parliament, it is a good Act; but the most usual way is that it is enacted by the King, by the assent of the Lords

1. 9A & El at 108
2. 9A & El at 192
3. 8Co.Rep. 481

Spiritual and Temporal and of the Commons'.

Statutes penned as being enacted by the authority of the King alone, 'if they be entered in the Parliament Roll, and always allowed for Acts of Parliament' should be understood to have been enacted by the authority of Parliament. But:-

> 'If an Act be penned that the King with the assent of the Lords, or with the assent of the Commons, it is no Act of Parliament, for three ought to assent to it scil. The King the Lords and the Commons, or otherwise it is not an Act of Parliament'.[1]

The importance of this principle is fully recognised in the discussion in Erskine May of the effect of irregularities in the procedure of enactment. If a Bill were to receive the royal assent without amendments made by one House being agreed to by the other, '..serious doubts naturally arise concerning the effect of this omission, since the assent of the King, Lords, and Commons is essential to the validity of an Act, except where the provisions of the Parliament Acts. are enforced in relation thereto.' It may be necessary to consider, the passage continues, whether the Royal Assent will

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1. at 20b. c.f. Coke's Fourth Institute (Cap.1. 'Of the High and Most Honourable Court of Parliament'):- 'There is no Act of Parliament but must have the consent of the Lords, the Commons, and the royal assent of the King, and, as it appeareth by records and our books, whatsoever passeth in Parliament by this threefold consent hath the force of an Act of Parliament.'

cure all prior irregularities, whether the endorsement on the Bill recording the assent of King, Lords, and Commons is conclusive evidence of that fact, or whether the Journals of either House should be permitted to contradict it.[1]

4

These issues as to the precise limits of the rules of evidence adopted by the courts in applying statutes are, however, common to every kind of constitutional system. They have no inherent connection with the status of the legislative body, or the question of sovereignty. But in addition to arguments of this type relating to legislative privilege,

1. May. 'Treatise on the Law, Privileges, Proceedings and Usages of Parliament' (14th ed. Ed.Campion) pp.576-5
Maitland in his 'Constitutional History of England' (1908) p.381 wrote that:-
'A court of law, we may safely say..would never, for example, permit the question to be raised whether a bill had been read three times - the rule which requires three readings, ancient and punctually observed though it may be, is no rule of law. On the other hand, the assent of the King and the two Houses to the whole act in its ultimate form seems essential'. Maitland here referred to the receiving of a premature assent by a Railway bill in 1844, and the passing of legislation subsequently declaring that the royal assent should be deemed not to have been given. He concluded:- 'I may explain that a vellum copy preserved in the House of Lords is the ultimate evidence of a statute. Perhaps a court of law would allow a litigant to prove that as a matter of fact this document had never received the consent of King, Lords, and Commons, but I am not sure of this'.
c.f. Craies. 'Statute Law' (5th ed.) pp.34-7; and D.V. Cowen. 'Legislature and Judiciary' 16.M.L.R.pp.274-280

and to evidential rules, there is a further set of contentions directed to the same end, which is directly bound up with the 'sovereign' status of the legislature as it exists in Great Britain. The proposition that the Courts in this country are incompetent to control the form of the legislative process may be found supported by citation of expressions used by the courts in describing the relationship of the judiciary to Parliamentary enactments. This raises a crucial point. 'I would observe, as to these Acts of Parliament' said Willes J. in 1871 'that they are the law of this land:-

> '..We do not sit here as a court of appeal from Parliament. ..We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords, and Commons? I deny that any such authority exists'.[1]

Dicta of this kind are the nearest approach to be found, to direct judicial authority for the doctrine of the unlimited supremacy of Parliament.[2] But viewed, in the light of the propositions endorsed in the Ndobe and Harris cases, such

1. Lee v. Bude and Torrington Junction Railway Co., (1871) L.R. 6 C.P.576 at 582
2. c.f. Stephen's Commentaries. (21st ed. 1950) Vol.3 p.288 and Latham. 'The Law and the Commonwealth' (1937) p.525:- 'Dicey was unable to cite a single decided case as authority for his classic exposition of the sovereignty of Parliament'.

statements plainly emerge as supporting a conclusion which is not in dispute. They do not provide a foundation for an 'absolutist' theory of sovereignty, but rather emphasise the point insisted on in Harris v. Donges, that courts of law must give effect to acts of Parliament and are not concerned with their policy.[1] Such a situation is in a sense a special case. The legal rules relating to the making of law give an unlimited discretion as to the area of policy dealt with by legislation.[2] But it does not follow that no such rules of law exist. On the contrary, once the distinction endorsed by the Supreme Court of South Africa, between (1) What may be done by legislation, and (2) What must be done in order to legislate, is clearly made, it can be seen that no conflict need arise between the doctrine of legal sovereignty, and the statement that the courts have a right and duty to inquire whether the elements of the legislature have functioned according to law. In performing this duty the courts are not acting as 'regents over what is done by Parliament'. They are posing the question, 'Has Parliament functioned?'[3]

1. Or, as was decided in Lee v. Bude & Torrington Junction Rly. Co. with the question whether they were passed under misapprehensions or induced by untrue representations.
2. The fundamental rule or 'Grundnorm' (in terms of Kelsen's 'pure theory of law') is qualitatively different from one laying down criteria of legislative policy.
3. c.f. Cowen. Op.cit. p.280

The contention that the legislature has the right to 'take its own view of the constitution',[1] if it refers to a question of legislative policy, is (whether true or false) at least assertable without logical difficulty. But if the question in issue is whether or not 'the legislature' has operated in due form, it becomes impossible logically to speak of the disputed transaction as expressing the view of the legislature. As was said by Centlivres C.J. in Minister of Interior v. Harris, 'The courts are bound by a definition in a legislative enactment, in so far as that enactment falls within the powers of the Legislature, but when the question is whether or not those powers have been exceeded, the definition itself is in issue'.[2] The view of the legislature must be legally defined before it can be said to be expressed. The question 'What is the legislature?' now emerges as undoubtedly prior[3] to any question as to the expression of 'its' will. The will of Parliament is an artifact, which, as Dicey observ-

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1. A remark of Lord Bryce ('The American Commonwealth Vol.1. p.251) was cited on this point in the second Harris case. 1952 (4) S.A. 768 (A.D.) at 780. c.f. Bryces 'Studies in History and Jurisprudence' Vol.1. p.231
2. 1952 (4) S.A. 768 (A.D.) at 783
3. c.f. Van den Heever J.A.'s remark that except as constitutionally defined 'there are no organs of state and no powers. (at p.791)

ed, can 'be uttered only through the combined action of its constituent parts..The will of Parliament can only be expressed through an Act of Parliament.'[1] - a principle which 'greatly increases the authority of the judges'.[2] Moreover, the sovereign will of Parliament is not the will of the members of Parliament. For:-

> 'Parliament..is an abstract concept. Its sovereign powers are exercised by human beings, but that does not make them individually or jointly sovereign; legislative powers were conferred upon Parliament, not upon them'.[3]

5

The principle laid down in the Ndobe and Harris cases amounts to this - that a sovereign legislative body must follow whatever law exists as to the manner and form of law-

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1. 'Law of the Constitution' (9th ed.) p.407. Dicey remarked in a footnote to this passage that the coexistence of two legislative chambers prevented the confusion of resolutions passed by either House with laws, and thus contributed to the supremacy of the law. c.f. Bowles v. Bank of England (1913) 1 Ch.57; and Rex v. Electricity Commissioners (1924) 1 K.B. 171 per Atkin L.J. at p.207, and Younger L.J. at pp.212-3.
2. Dicey. p.407
3. Van den Heever, J.A. in Swart and Nicol v. De Kock and Garner 1951 (3) S.A. 589 (A.D.) at 621.
   Van den Heever, J.A. continued:-
   'Evidence that every member who voted for a measure put a certain construction upon it, cannot affect the meaning which the courts must place upon the Statute, for it is a product not of a number of individuals, but of an impersonal Parliament'.

making, under penalty of judicial disallowance of the measures in issue; not because it is in any way 'bound' or 'fettered' in its freedom of action by existing law, but because such law provides a definition of 'the legislature'. Except when acting as legally defined the legislators are nor legislators.[1]

This principle marks a significant step in Commonwealth constitutional thinking, and its practical effect on the attitudes adopted by courts of law has already been demonstrated. The struggle in South Africa over the question of constitutional amendment is a plain instance of the political importance of the abstract combat of ideas in this field. The sover eign power of constitutional amendment in the Union has been declared to be divided so as to inhere for different purposes in differently constituted legislative bodies. In their

1. c.f. Minister of the Interior v. Harris (at p.791):- 'If Parliament as ordinarily constituted, assumes the power to alter the Cape franchise, its act would have no greater validity than if the City Council of Bloemfontein had presumed to do so'.
c.f. Friedman 24 Australian Law Journal. p.107 (1950):- 'It might be said that an Act made by His Majesty with the consent only of the House of Commons was no better than an Act purporting to be made by a meeting of trade unionists or business men'.
c.f. also Bryce. 'The American Commonwealth'. Vol.1 p.245:- 'Any statute..which..is invalid..is in fact not a statute at all, because Congress in passing it was not really a law-making body, but a mere group of private persons'.
and E.N. Griswold 65 H.L.R.1361, 1369. 'Apart from the South Africa Act, the group of persons assembled as the Parliament of the Union has no more standing than a church convention or a political rally'.

totality these bodies possess a power of constitutional amendment which is unrestricted in area, and may therefore be collectively described as wielding sovereign authority. The forms laid down in this constitutional division of functions are, however, binding upon the members of the legislative collectivity if they wish to enact provisions having the force of law.

By the Union Government, its law advisers, and its High Court of Parliament, these conclusions were dubbed, 'a fundamental law approach',[1] as distinct from 'a sovereignty approach', since they involved a judicial 'testing right' in relation to the manner and form of legislation. There is of course a distinction to be drawn between a 'fundamental law approach' in the sense that there may be admitted to exist basic or fundamental rules which are outside the scope of amendment, and a 'fundamental law' approach in the sense in

1. See the Report of the Judicial Committee of the High Court of Parliament. (Above p.245) The contention was also made that the 'testing right' was confined to federal systems. See Professor E.C.S. Wade's Opinion. (para.3). The connection between federalism and the exercise of judicial review is not, however, a logically necessary one (judicial review became established in the United States, according to Lord Bryce for reasons other than the mere necessities of the federal system (American Commonwealth Vol.1 p.36); and in fact, a number of unitary constitutions authorise judicial review of legislative policy.

which the accusation was levelled against the South African Supreme Court. On the Court's assumptions, no law was beyond the reach of the legislature (rightly defined), but the definition and rule of action to be followed in legislating was certainly in a sense fundamental[1] and legally prior to Parliamentary action taken under it. The distinction between 'constituent' and 'ordinary' legislation is here dissolved. Indeed it is this dissolution which enables the claim to be asserted that the Parliament of the Union is legally sovereign. There is an implicit in this claim and its denial a conflict between two conceptions of sovereignty - what might be called an 'absolutist' and a 'definitionalist' doctrine. On the one hand a 'sovereign legislature' must it is claimed be able to make law on any subject by a simple majority vote, and no forms of action can be made legally binding on its members, or validly imposed on themselves by themselves. On the 'definitionalist' theory, the courts are held to have the necessary duty of ensuring that authority, however defined, is legally exercised by the elements in which at any one time the law

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1. c.f. Where the purported sovereign is any one but a single actual person, the designation of him must include the statement of for the ascertainment of his will, and these rules, since their observence is a condition of the validity of his legislation, are rules of law logically prior to him'. (R.T.E. Latham. Op.cit. p.522)

declares it to inhere.[1]

6

The arguments used to support the second set of assumptions are really arguments about the nature of legality and of a system of authority. The truth which (if valid) they enunciate is a general one which applies to any system which claims to embody the exercise of authority as distinct from the mere wielding of power. Basically it may be reduced to something very near to a tautology - namely that there cannot exist a systematic application of authority where there is no means of legal (and impartial) discrimination between valid and invalid forms of its exercise. The question, 'what counts as a means of discrimination?' between valid and invalid exercises of authority, is, however, one which leads the statement of the 'legalist' theory of sovereignty into a kind of paradox, and commits its adherents to the making of a particular kind of value judgment. The value judgment is similar to that which

1. It may be noted that this process of applying the law can be carried out without any reference to a 'principle of sovereignty'. c.f. Max Radin. 'A Short Way With Statutes' 56 Harvard Law Review. 388 at 393:- 'Although the British legislature is de jure and de facto sovereign, its statutary mandates are dealt with by courts without any reference to any indication of the sovereign will except as the courts choose to find it'.
See also the remarks of Dixon, J. in Attorney-General for New South Wales v. Trethowan (1931) 44. C.L.R. 394 at p.426

is implied in the maxim of 'natural justice' of the English common law, whose essence is shortly expressed in the statement that no man shall be judge in his own cause. Though more than three centuries separate Dr. Bonham's quarrel with the Royal College of Physicians from Minister of the Interior v. Harris there is an idea which is common to both - that of adjudication. The paradox of authority emerges if the question is raised as to the right of a legally supreme authority acting in due form to modify or, in the extreme case, abolish, the function of adjudication as normally exercised. If the first and second Harris cases are compared, the impact of this question on the doctrine of sovereignty appears as something more than academic. In Harris v. Donges the unlimited authority of the legislature, properly constituted, was directly asserted. In the second Harris case, the burden of the argument was addressed to the limitations imposed on the action of the bicameral legislature by the right of the citizen to an impartial adjudication between himself and the legislature so acting. But the arguments used to demonstrate this right are such as to raise the question whether they would remain valid as against action by the unicameral legislature competent to amend the Constitution. If they are (though it is nowhere stated in Minister of the Interior v. Harris that they are)

would the sovereign legislative body be something a little less than sovereign?

Here again the question is not one which is confined to any particular form of constitution. If sovereignty and the amending power are acknowledged to be equivalent terms, the query may be rephrased by asking whether there are limitations on the nature of the amendments which are possible within a given constitutional system; and this is a not unfamiliar question to which in differing legal climates differing answers may be suggested.[1] The extent of 'sovereign'

1. Limitations on the amending power may be derived variously from verbal analysis, ideas of implied contract, natural law doctrines etc. c.f. the dissenting judgment of Kennedy C.J. in the Supreme Court of the Irish Free State in The State (Ryan) v. Lennon (1935) I.R. 170 at 217
'In my opinion, any amendment of the Constitution purporting to be made under the power given by the constituent Assembly which would be a violation of, or be inconsistent with any fundamental principle so declared, is necessarily outside the scope of the power and invalid and void...The only argument advanced..is that the power to amend the Constitution gives power to amend the power itself. ..It is not in my opinion sound to argue that because the power of amendment, though standing in a separate self-contained article or clause, is written upon the same paper as the Constitution to which it applies, it must therefore come within its own operation. As well might it be said that one who lend another a pruning knife, and leaves it for the cultivator's convenience, hanging on the tree for the pruning of which it is lent, therefore authorises him for whom it is lent, by some process of inversion, to turn it upon itself and use it to prune and amend itself into some other kind of instrument wherewith to hack down the tree'. Kennedy C.J. was also of the opinion that 'Every act whether legislation executive or judicial in order to be lawful under the Constitution must be capable of being justified under the authority thereby declined to be derived from God. ..If any legislation of the Oireachtas (including any purported amendment of the Constitution) were to offend against the acknowledged ultimate source from which the legislative authority has come through the people to the Oireachtas, as for instance if it were repugnant to the Natural Law, such legislation would be necessarily unconstitutional and invalid' (at pp.204-5)
The power to make the constitutional position of the states and the due process, and Bill of Rights clauses the subject

(contd.over..

authority to modify the means whereby it is distinguished as 'sovereign', provides a crucial example of the general difficulty. Prima facie the power to constitute and amend the powers of courts of law is an undoubted power, well within the competence of a body legislating to secure 'peace, order, and good government'[1] Even the total abolition of all courts of law would seem on the face of it to be possible. For 'there can be no doubt of the capacity of Parliament to legislate so as to destroy the jurisdiction of the courts.'[2] Yet it is also plain that, 'the sovereignty of Parliament is synonymous with the supremacy of the law'. And 'the supremacy of the law rests in practice on the power of the courts to investigate all questions where a party alleges that the law has been broken. Once their jurisdiction is gone, the supremacy of the law would be all shadow and no substance'.[3] 'An Act of Parliament can do no wrong' said Holt C.J. 'although it can do

(continuation of footnote 1 from page 334:-
of constitutional amendment in the United States has been questioned. See W. Marbury. 'The Limitations upon the Amending Power' 33 Harvard Law Review p.323ff.; and C.G. Haines. 'The Revival of Natural Law Concepts (1930) pp.336-339. On the question of restriction of the power of constitutional amendment in France see. Esmein 'Droit Constitutional' Vol.2 p.543 ff.

1. 'Among the powers which go to constitute self government, there are necessarily included powers to constitute the Law Courts, and to regulate their procedure, and to appoint their judges.' British Coal Corporation v. The King (1935) A.C. 500 at 520-1
2. Stephen's Commentaries on the Law of England (21st ed.1950) Vol.3. p.291
3. Ibid.

several things that look pretty odd.'[1] It is impossible to predict what judicial attitudes might emerge if (given a very different political situation) Parliament were to attempt by statute seriously to undermine the existing legal system or to forbid courts to grant remedies against unlawful claims to exercise authority. Statutes have to be interpreted - even statutes forbidding such interpretation.[2] 'If', it has been said, 'a statute forbade a court to interpret, it would be doing what Justinian tried in vain to do. The statutary provision would itself need interpretation. ..If a Parliament cannot act except by passing a law..it will have to submit itself to the statement of a court about the law'.[3] This is to say that a body exercising legal sovereignty is in a sense the servant as well as the master of the judiciary. It is by no means certain that the unqualified judicial adherence to the doctrine of Parliamentary supremacy as laid down by Dicey would survive unqualified through a continuous period

1. City of London v. Wood (1701) 12 Mod. 669 at 687
2. Just as statutory attempts to exclude judicial scrutiny of powers exercised under delegated authority were themselves subject to judicial scrutiny and interpretation. The right to 'impartial' adjudication can of course be modified or abolished by Parliament in particular spheres, but this process as an exercise of legal authority cannot establish itself as such independently of the courts.
3. Max Radin 'A Short Way with Statutes' 56 H.L.R. 388 at 393. c.f. Cardozo. 'Nature of the Judicial Process' pp.17-18.

of strain.[1]

Political action is, of course, both the most effective way of protecting the courts against the abuse of legislative power, and the most obvious way in which that abuse may take place. 'Packing the courts' is a more effective way of undermining an impartial judiciary than a frontal attack by statute. The opponents of the principle of the late President Roosevelt's Judiciary Re-organisation scheme were not entirely without foundation for their fears. Similar, and perhaps more justified, trepidation was aroused by the South African Appellate Division Amendment Bill of 1953. The threat to the independence of the judiciary in the Union is by no means a dead issue. A hint of the Government's attitude towards the Supreme Court was given in February 1954 by Dr. Malan, in discussing the legality of the establishment of a South African Republic by simple majority legislation. If, he said:-

> '..we were to form a Republic in a legal manner through a resolution of Parliament, supported by a majority of the people, and if the courts were then to declare that to be illegal...If that happens..if

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1.c.f. K.C. Wheare. 'The Statute of Westminster and Dominion Status (5th ed.) pp.155-6:- 'Parliamentary sovereignty is a result of the law declared by the courts..If it is asked why the courts did and do recognise Parliament as sovereign, the answer is that they did and do so as the result of a particular political situation. And if the particular political situation should warrant it in the future, there is no doubt that the courts could qualify or reject the sovereignty of the United Kingdom Parliament'.

> such a court adopts that attitude, it will have to be broken, and we shall ask the people to break the court, and I repeat that in that event I shall contribute my small share, in order to break the court'.[1]

The establishment of a Republic, unless authorised by the unicameral two thirds majority procedure, would of course, constitute an indirect infringement of the entrenched sections since it would amount to a claim to repeal every article of the existing constitution and promulgate a new one by a simple majority of each House of the Union legislature - the very claim which the Supreme Court has twice denied. It would seem that any conceivable legislative action, whether directed towards modification of the Constitution, of other legislation, or of the composition and powers of the law courts, which directly or indirectly implies a threat to the political purposes served by the entrenched sections, cannot, unless enacted in this manner, be regarded as an exercise of the legislative power by those elements competent to exercise it, or consequently as an Act of Parliament binding on the people of South Africa. The scope of this principle is difficult to delimit. Re-organisation of the Supreme Court (as envisaged by the Union Government) or even certain judicial appointments might, if regarded as indirect ways of circumventing the requirements of the constitution, be ruled invalid. How far the

1. House of Assembly 2nd Feb. 1954 col.47

scrutiny of political motives or the analysis of statutes having ulterior purposes will be carried in South Africa is clearly a difficult and at the present time an unanswerable question.

CHAPTER FOURTEEN

Flexibility and Re-definition=

What is 'Parliament'?

'The 'legal sovereign' may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself.'

SIR IVOR JENNINGS.
('The Law and the Constitution' p.143)

1

Judicial inquiry into the activities of a 'sovereign' legislature raises, as already remarked,[1] a family of inter-linked issues - Parliamentary privilege; the rules relating to the evidencing and interpretation of Statutes; and the distinction between the form and substance of enactment. A fourth set of questions concerns the judicial attitude towards, and application of, certain doctrines bound up with theoretical ideas of sovereignty, and in particular with the idea that sovereign bodies 'cannot bind themselves'. This must now be examined more closely.

1. p.306 above

The use of this latter principle as is now clear, will depend in large measure on whether a court has as its 'inarticulate' (or articulate) 'major premiss', an 'absolutist' or 'definitionalist' view of sovereignty. The recent implicit acquiescence in a 'definitional' approach, has, at least two consequences for the vocabulary of politics. Its effect in relation to the expressions 'judicial review' and, 'testing right' has already been pointed out. Equally significant is the way in which it cuts across the customary method of classifying constitutions. But the resulting changes in terminology are the academic symptoms of a severely practical issue, - namely the use which may be made of legislative power in effecting and restricting legal change. (This problem has already provided constitutional lawyers in the Commonwealth of Australia with headaches to which the Privy Council has refused to minister.)

Some paradoxical aspects of the doctrine of legal sovereignty in its English form were no doubt masked by the lack of uncertainty as to the location of the sovereign power, due to its association with the power and authority of the king. The 17th century struggle between King and Parliament, whatever its effect in replacing royal by Parliamentary authority, did not eradicate the formal theory that the will of the

monarch is enacted in Parliament. The formula which recites 'Be it enacted by the Queen's Most Excellent Majesty' echoes the doctrine of the Parliament men of 1642 that, 'The King's Supreme and Royal pleasure is exercised and declared' in his 'High Court of Law and Council' (albeit 'after a more evident and obligatory manner than it can be by any personal act or resolution of his own')[1]

But the concept of sovereignty as the exercise of a single univocal will is less appropriate where the legislative authority is an artifact. Where a system of authority is newly created, 'sovereignty' has to be distilled from the elements competent to make and amend the law and means of law-making within that system. Questions concerning the definition and location at any one time, of 'the sovereign', here assumes a new importance.

It can be easily seen that the view of constitutional provisions relating to the legislative body as defining rather than 'fettering' that body, upsets the simplicity of the traditional distinction between 'rigid' and 'flexible' constitutions. This distinction as originally made by Lord

1. Parliamentary declaration of 27th May 1642 following the King's Proclamation forbidding mustering of the Militia.

Bryce[1] and adopted by Dicey, separates out on the one hand legal systems in which there is a single legislative process by which it is possible to enact any provision, fundamental or otherwise, and on the other, legal systems in which fundamental legislation cannot be enacted by the 'normal legislative process'. Dicey equates Parliamentary sovereignty with the existence of a system of the first kind. Two points may perhaps be made about this distinction. First, as it stands,

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1. In his 'Studies in History and Jurisprudence' (1901) Bryce wrote (under the heading 'A proposed new classification of Constitutions'):- 'In a State possessing a constitution of the ..older type, all laws (excluding of course by-laws, municipal regulations, and so forth), are of the same rank and exert the same force. There is moreover, only one legislative authority competent to pass laws in all cases and for all purposes. But in a State whose constitution belonged to..the newer type, there are two kinds of laws, one kind higher than the other, and more universally potent, and there are likewise two legislative authorities, one superior and capable of legislating for all purposes whatsoever, the other inferior and capable of legislating only so far as the superior authority has given it the right and function to do so. ...Constitutions of the older type may be called Flexible, because they have elasticity, because they can be bent and altered in form while retaining their main features. Constitutions of the newer kind cannot, because their lines are hard and fixed. They may therefore receive the name of rigid Constitutions.' (Vol.1 pp.151, 154) Bryce's essay was first delivered in lecture form in 1884. It is interesting to note that whilst Dicey equated 'sovereignty' unmistakably with the 'flexible' constitution as described by Bryce, the description here given of the 'rigid' constitution could almost be substituted for that furnished by the Supreme Court in South Africa of the 'sovereign' Parliament of the Union.

it contains no reference to the difficulty[1] or otherwise of the process of enactment. Presumably, a system in which a two thirds majority (or even a unanimous vote) in the legislative body for every type of enactment would count as 'flexible' rather than 'rigid', since no distinction between fundamental and ordinary legislation would exist. (It is of course usually implied that the single legislative process incorporates simple majority voting.) Secondly, the distinction assumes that 'sovereignty' is indivisible in the sense of being possessed by a determinate body. But it lays down no criteria for what is to count as a determinate 'body', and assumes that the 'legislature' means (and only means) 'the legislators making law by the simplest permissible procedure'.

Similar assumptions are implied by the use of the terms 'controlled' and 'uncontrolled' constitution. Here, an identical distinction is advanced between 'constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and con-

1. Using the term 'difficulty' in a formal, not a practical sense - i.e. assuming that a two thirds majority requirement (for example) is 'more difficult' to obtain than a simple majority, although in any given case it may be that one is in practice as easy to obtain as the other. 'Flexibility' is sometimes used to indicate the ease or frequency with which the formal requirements for amendment, whatever they are, have in fact been complied with and used. Bryce's references to 'elasticity' and 'hard and fixed' lend themselves to ambiguity of this kind.

stitutions which can only be altered with some special formality, and in some cases by a specially convened assembly.'[1] The term 'uncontrolled' was applied in 1920 by Lord Birkenhead to the Constitution Act of Queensland, in rejecting a contention that an Inductrial Arbitration Act of 1916 could be held invalid as in conflict with the Constitution. The Legislature of Queensland was, it was held 'master of its own household' except in so far as its powers had in special cases been restricted. As a body 'sovereign within its powers'[2] it was not intended by the Imperial Legislature to

1. McCawley v. The King (1920) A.C.691 at 703
2. c.f. Lord Selborne's judgment in Reg. v. Burah (1878) 3 App.Cas.889 at 904-5. 'The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it. ..But when acting within those limits it..has, and was intended to have phenary powers of legislation as large and of the same nature as those of Parliament itself...If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category of course would be included any Act of the Imperial Parliament at variance with it) it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions or restrictions.'
   Also Hodge v. The Queen 9.App.Cas.117; and Powell v. Apollo Candle Co. Ltd. (1885) 10.App.Cas.282.

be 'shackled or controlled'.[1] It could therefore amend its constitution implicitly[2] by legislation inconsistent with it.

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1. In the Privy Council's early interpretation of the Australian Constitution the view was advanced that an Act of a state legislature could not be impugned as 'unconstitutional'. Lord Halsbury in Webb v. Outrim (1907) A.C.81 at 88-9 said:- 'Every Act of the Victoria Council and Assembly..when it is assented to, becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorised are different'. Apart from questions of repugnancy arising under the Colonial Laws Validity Act, '..no authority exists by which its validity can be questioned or impeached. ..In the British Constitution, though sometimes the phrase 'unconstitutional' is used to describe a statute which though within the legal powers of the legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such a law, still, notwithstanding such condemnation, the statute in question is the law and must be obeyed'. Webb v. Outrim came under the criticism of the Australian High Court (Baxter v. Commissioner of Taxation (1907) 4.C.L.R.1087)
The analogy provided by the Federal system in the U.S. was stronger than the doctrine laid down by Lord Halsbury. 'In our system the principle of Marbury v. Madison is accepted as axiomatic'. (Australian Communist Party v. Commonwealth (1951) 83 C.L.R. * at p.62).
Although state constitutions without specific restrictions on amendment have been regarded as 'uncontrolled' in being amenable to implicit amendment by subsequent legislation, they are of course 'controlled' by the Commonwealth Constitution.
2. It had been contended that the Constitution could not be altered 'merely by enacting legislation inconsistent with its articles, but only by an Act which in plain and unmistakable language refers to it, asserts the intention of the legislature to alter it, and consequently gives alteration to that intention by its operative provisions'. This, in Lord Birkenhead's opinion would have implied that the constitution was 'neither controlled nor uncontrolled'. In South Africa it was held in Krause v. Commissioners of Inland Revenue (1929) A.D. 286 that except in the case of the entrenched provisions, an Act of Parliament impliedly varied such part of the constitution as was inconsistent with it.

The power of a 'sovereign' legislature to repeal by implication, any previously existing legislation, has been strongly relied upon as establishing the proposition that the courts in this country will not inquire into the validity of Acts of Parliament, since the power of Parliament to amend both the substance of the law, and the manner of its making are (it is claimed) entirely uncircumscribed. 'The distinction' held Professor E.C.S. Wade, '..between the power of a Parliament to pass substantive law, and the power to prescribe how substantive law shall be enacted, is untenable. Both can be amended expressly or by implication by subsequent legislation of a sovereign Parliament'.[1] The significance of the power of implicit repeal may be illustrated by two cases decided on broadly similar facts during the 1930's. These are Vauxhall Estates v. Liverpool Corporation,[2] and Ellen Street Estates v. Minister of Health.[3] In the former case a contention was put forward that certain provisions for compensating the owners of land compulsorily acquired, which were contained in the Housing Act, 1925, could not take effect, because of the provisions of an earlier Act. This Act (The Acquisition of Land (Assessment of Compensation) Act,

1. Opinion. Para.13 (See Appendix)
2. (1932) 1 K.B. 733
3. (1934) 1 K.B. 590

1919) contained sections which were not merely inconsistent with the Act of 1925 (in providing more favourable terms of acquisition), but which also provided that compensation under Acts or orders acquiring land should take effect 'subject to this Act', and that 'so far as inconsistent with this Act, those provisions shall cease to have, or shall not have effect'.[1]

The contention was described by Humphreys J. as 'an astonishing proposition' which would 'mean that at no subsequent time was it competent for Parliament to alter the provisions of the law as there laid down' except by repealing or amending the earlier Act. 'For my own part', he continued:-

> 'I have failed to follow that argument. If it is once admitted that Parliament, in spite of those words, had power to provide inconsistent provisions in a later Act of Parliament, by repealing those provisions and enacting something different, or by amending those provisions for my own part, I fail to understand why Parliament should not have the other power which it possesses of repealing impliedly the provisions of this statute by the mere enactment of something completely inconsistent. ..Assuming for the purpose of argument in favour of the claimants that it (the section of the 1919 Act) does apply to future Acts of Parliament, then this seems to me a clear case in which Parliament has exercised its power of overriding the provisions of that section in the form of the provision of a totally inconsistent set of words contained in section 46'.[2]

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1. Section 7 (1)
2. (1932) 1 K.B. 733 at 746

Similar views were expressed in the Ellen Street Estates case by Maugham L.J. He referred to the 'constitutional position that Parliament can alter an Act previously passed and it can do so by repealing in terms the previous Act..and it can do it also in another way - namely by enacting a provision which is clearly inconsistent with the previous Act'.[1]

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1. (1934) 1 K.B. 590 at 597
The decision in McCawley's case was in effect an application of the principle of implicit repeal to the written constitutions of the Australian states where those constitutions provided for no special process of amendment. It had previously been held that in such cases the constitution could be amended only after explicit repeal. (see McCawley's case as decided in the High Court of Australia, and the authority there cited. (1918) 26 C.L.R. 9.) On appeal to the Privy Council the contrary view of the dissenting minority (Isaacs and Rich J.J.) was preferred, and Lord Birkenhead remarked in the course of his speech that:-
'Where the constitution is uncontrolled, the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. ..In the eye of the law, the legislative document or documents which defined it occupied precisely the same position as a Dog Act, or any other Act, however humble its subject matter ...When legislation within the British Empire which is inconsistent with constitutional instruments of the kind under discussion comes for examination before the Courts, it is unnecessary to consider whether those who were responsible for the later Act intended to repeal or modify the earlier Act. If they passed legislation which was inconsistent with the earlier, it must be assumed that they were aware of, and authorised such inconsistency' (1920) A.C.691 at p.704.
This passage provides an interesting example of the potential significance of the use in constitutional cases of the 'literalist' approach to statutary interpretation, and of its effect in such cases on the 'principle of sovereignty'. (C.f. Ch.VI)

Maugham L.J. concluded:-

> 'The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal. If in a subsequent Act, Parliament chooses to make it plain that the earlier Statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature'.1

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1. (1934) 1 K.B. 590 at 597
The doctrine that no form of legislative provision is immune from direct or implied repeal, is, it may be observed one which may be viewed as a proposition about the powers either of the earlier or of the later set of legislators. Viewed in the second way, it states what can be done. Viewed in the first way, it states as an exception (and a paradoxical one) what cannot be done by an omnipotent legislature.

Thus, in the well known words of Blackstone (Comm.1.90.) 'Acts of Parliament derogatory from the power of subsequent Parliaments bind not'. For, 'The Legislature being in truth the sovereign power, is always of equal always of absolute authority.) (Here is the paradox) And the Legislature 'acknowledges no superior upon earth, which the prior legislature must have been if its ordinances could bind a subsequent Parliament.'

As here phrased the doctrine seems to envisage a succession of sovereigns. On the other hand the sovereign is sometimes thought of as a single continuing entity. (e.g. 'The sovereign authority..will be deemed to survive intact the change in its membership, ..that abstraction the sovereign lives on with an undisturbed identity - in the world of ideas'. C.A.W. Manning. 'Austin Today' p.201) c.f. Swart and Nicol v. De Kock and Garner 1951 (3) S.A. 589 (A.D. at 621 per Van den Heever J.A.

It is for these reasons that questions about 'self binding' and 'binding future Parliaments' are best rephrased as questions about definition and re-definition of legislative processes. But whatever the approach, a rule governing the power of a body to bind itself is a 'second order' rule and logically prior to that body. c.f. R.T.E. Latham 'The mere assertion of the omnipotence of a sovereign leaves completely uncertain the fundamental question whether or not he can bind himself; but the addition of a ruling in either sense on this point makes the basic rule of the system something more than a mere designation of the sovereign' (The Law and the Commonwealth'. p.523)

The importance of the distinction between the form and substance of legislation is aptly brought out by a consideration of the power of implicit repeal. For there is an important difference between the repeal of law, and the repeal of 'law about law'. In a case of the first kind where statutary provisions relating to the same substantive matter are implicitly repealed by a later enactment, there is merely a constructive or 'short cut' use of the undoubted power of a properly constituted legislature to repeal legislation which it, or its properly constituted predecessor has made. No question of a breach in the 'rule of law', or of the improper use of authority arises. But the claim to a power of implicit repeal of law relating to the legislative process itself, raises questions of a more serious nature. If it is possible by law to redefine the process of law-making, either in general or for a particular class of subjects, it may become possible in certain circumstances to raise the question whether any given set of legislative elements is the legislature competent to exercise the power of implicit repeal or any other legislative power.[1] It is true that the distinction between sub-

1. c.f. Dixon J. in Trethowan's case, cited below. p.384 and H.R. Gray (10 Toronto Law Journal (1953) 54, 62) 'In the ordinary way Parliament may legally disregard all earlier enactments when passing legislation and leave it to the courts to reconcile the conflict between the earlier and the later legislation; but legislation prescribing Parliaments own constitution presents the subsequent Parliament with a state of affairs which although it may be repealed or altered cannot be disregarded'.

stantive law and provisions prescribing the form in which law is to be made is 'untenable' in one sense - namely that the manner and form of law-making may itself become the subject matter of legislation. And it is true that this is merely one subject upon which a 'sovereign' body is free to legislate. But this is not denied. The contention made is simply that in legislating upon this subject as upon any other, the rules which define the legislative body acting as an originator of law, must be followed. The distinction between the area open to legislation, and the conditions which must be complied with in order to legislate, is not really a novel distinction. It was, after all, implicitly drawn in Stockdale v. Hansard. The denial of any significance to the distinction, together with the assertion of an unrestricted power of implicit repeal amounts to the endorsement of a proposition which is crucial to the argument about sovereignty, and which may be formulated in three ways. The last formulation is that in which it is most familiar. The proposition is that:-

(1) A sovereign legislature cannot validly re-define itself as a law making body.

or (2) A sovereign legislature cannot make a partial abdication or transfer of its powers.

or (3) A sovereign legislature cannot bind itself as to the form of subsequent legislation.

In its traditional formulation (the third), and in the United Kingdom context, this proposition has enjoyed a large measure of support. But appraised in its first two formulations, the contention which it represents, appears in a more doubtful light.[1] That the three formulations are equivalent is clear, if one considers the type of situation in which Formula (3) has been, or may be invoked. There are two distinguishable forms of such situation. In one form, the problem concerns a division of modification of authority to provide for its future exercise in two (or more) geographically distinct areas; in the other it concersn the division or modification of authority within a single area. Examples of the first kind are the splits in the unity of British Imperial authority which occurred in 1783,[2] 1922,[3] 1931,[4] and 1947,[5] as the result of United Kingdom legislative action. Thus,

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1. c.f. Cowen 16. M.L.R. 291:- 'The proposition that a sovereign Parliament cannot bind itself or its successors requires far closer analysis than it has yet received.
2. Treaty of Versailles (recognition of the independence of the United States)
3. Irish Free State (Agreement) Act.
4. Statute of Westminster.
5. Indian, Burma, and Ceylon Independence Acts.

in 1931, the doctrine that the Imperial sovereign could not irrevocably fetter its legislative competence was invoked to support the contention that Section 4 of the Statute of Westminster purporting to terminate the authority of the United Kingdom Parliament to legislate for the Dominions without their request and consent, did not enact a proposition of strict law.[1] The contention here denied could equally well have been (in terms of Formulas (1) and (2) that the Imperial Parliament had re-defined the body competent to make law for the Commonwealth in certain matters, or alternatively that it had abdicated a portion of its sovereign authority and transferred it to another set of geographically distinct elements. Examples of abdication, transfer, or re-definition of sovereign legislative power within a single area are harder to come by, but the issue is not one which can be neglected in any satisfactory jurisprudence of the Commonwealth.

Total and complete abdication of power, or its once-and-for-all transference to another body or bodies was, it may be remembered, conceded by Dicey as the only manner in which a sovereign body could divest itself of power. 'Parlia-

1. See Chap. IV pp. 69-70

ment could extinguish itself by legally dissolving itself and leaving no means whereby a subsequent Parliament could be summoned. ..A sovereign again, may transfer sovereign authority to another person or body of persons.[1] The Supreme Court of South Africa has clearly indicated that it regards

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1. Law of the Constitution (9th ed.) p.69n. The footnote observes that:-

'The impossibility of placing a limit on the exercise of sovereignty does not in way prohibit either logically, or in matter of fact, the abdication of sovereignty. ..A strange dogma is sometimes put forward that a sovereign power such as the Parliament of the United Kingdom, can never, by its own act, divest itself of sovereignty. This position is however, clearly untenable. ..If the Czar can abdicate, so can a Parliament. To argue or imply that because sovereignty is not limitable (which is true) it cannot be surrendered (which is palpably untrue)..is like arguing that because no man can, while he lives, give up, do what he will, his freedom of volition, so no man can commit suicide'.

Francis Bacon used a similar argument in his remarks on the 'clausula derogatoria' (Maxims of the Law. Regula XIX. Collected Works Vol.4 (1824) pp.62-3):-

'It is in the power of a man to kill a man, but it is not in his power to save him alive, and to restrain him from breathing and feeling; so it is in the power of a Parliament to extinguish or transfer their own authority, but not whilst the authority remains entire to restrain the functions and exercises of the same authority.

..So if an Act of Parliament be made wherein there is a clause contained that it shall not be lawful for the king by authority of parliament, during the space of seven years to repeal and determine the same act, this is a void clause, and the same act may be repealed within the seven years; and yet if the parliament should enact in the nature of the ancient lex regia that there should be no more parliaments held, but that the king should have the authority of the parliament; this act were good in law, quia protestas suprema seipsum dissolvere potest, ligare non potest'.

the Statute of Westminster as just such an irrevocable abdication of authority.[1]

3

An interesting case of a dispute as to the effects of a purported abdication of authority is provided by the proposed scheme for the Government of Ireland debated in the House of Commons in 1886. The Bill before the House proposed that a separate Irish Parliament be set up with defined powers to replace the existing representation of Irish interests by members appointed to the Parliament at Westminster. Clause 39 of the measure proposed to enact, however, that:-

> 'This Act shall not, except such provisions thereof as are declared to be alterable by the Legislature of Ireland, be altered except by Act of the Imperial Parliament with the consent of the Irish Parliament testified by Address or by the Imperial Parliament to which the Irish members have been summoned'.

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1. Ndlwana v. Hofmeyr. (1937) A.D.229 at 237; Harris v. Donges (1952) 1 T.L.R. 1245 at 1261; Minister of the Interior v. Harris 1952 (4) S.A. 769 (A.D.) at 791. In terms of Formula (2) such an 'abdication' could be regarded either as a partial transfer of authority by a continuing sovereign, or as an extinction of the old sovereign and the reconstitution of a new and differently composed body. Similarly a transfer of power from two or more separate bodies to a single body may be regarded as a total extinction of the original bodies. Thus by the Act of Union between England and Scotland, two (some might say one and a half) sovereigns extinguished themselves, to make way for the creation of a third. (c.f. Dicey. p.69n.)

would such a provision have re-defined the sovereign authority for certain purposes? Or did it merely represent a 'compact' or 'statement of intention' on the part of the existing legislators? Opinion was sharply divided on this issue. The arguments advanced on either side are worth resurrecting from the columns of Hansard for their relevance to the general question posed.

The Bill was criticised in the course of the second reading debate by the Marquess of Hartington on the ground that it limited for the first time, the authority of Parliament:-

> 'Hitherto Parliament has been omnipotent perhaps the expression is somewhat too wide - but we have been accustomed to consider Parliament omnipotent; and I believe, subject to the laws of nature, and of its own will there has up to the present time, been no limitation upon the authority of Parliament. But this Bill, for the first time, will limit the authority of Parliament.'[1]

The provisions of the Bill, he continued, implied the existence of an area of legislative matters with which the Imperial Parliament would no longer be competent to deal, and in giving the Privy Council jurisdiction to decide which matters, if disputed, lay within the competence of the Irish legislature it set up for the first time a judicial authority having power to take cognizance of, and pronounce an

1. 305 H.C. Deb. col.614 (10th May 1886)

opinion on, the limits of Parliamentary authority.

Sir Henry James expressed similar views. He believed that:-

> 'When this Bill comes into effect, you will be giving up sovereignty in this respect - that the British Parliament will be unable of itself to alter its own constitution. ..In order to exercise its full sovereign rights it will have to call back a certain number of its members, and so become a different body. ..The British Parliament cannot alter its own constitution if this Bill becomes law, without recalling the Irish members.'

It might be that whatever they did, with or without the Irish members, judges sitting in England or Scotland would have to obey them. But:-

> '..If we took that course, the effect of it.. would probably have to be determined in Ireland by an Irish judge who would not be answerable to this Parliament, but only to Ireland, and would say - 'You have unconstitutionally repealed the Act which constituted the Irish Parliament; the Irish Parliament is passing good laws for Ireland; I will obey those laws, and you have no right to take away the powers of the Irish Parliament in the absence of their member'. .. - and I see much reason for contending that the Irish judge would be in the right, and that we should be in the wrong.'[1]

Mr. Campbell Bannerman, and Mr. Bryce[2] (as they then were) took the view, on the other hand, that the Bill did not derogate in any way from the sovereignty of Parliament.

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1. 305 H.C.Deb. cols.923-4
2. Lord Bryce was then Under Secretary of State for Foreign Affairs in Gladstone's third ministry.

The government's legal advisers had assured them, said Mr. Campbell Bannerman, that the proposed division of legislative arrangements would not deprive Parliament of its supreme power. 'There is' he declared, 'a quart of wine somewhere, and it is going to be put into two bottles; and in the two bottles, there must be all that there was in the original bottle'.[1] Bryce put the Government view in the following terms:-

> 'We shall retain as a matter of pure right the power to legislate for Ireland, for all purposes whatsoever, for the simple reason that we cannot divest ourselves of it. There is no principle more universally admitted by constitutional jurists than the absolute omnipotence of Parliament. This omnipotence exists because there is nothing beyond Parliament, or behind Parliament. ..There is one limitation and one only upon our omnipotence and that is that we cannot bind our successors. If we pass a statute purporting to extinguish our right to legislate on any given subject, or over any given district, it may be repudiated and repealed by any following Parliament - aye even by this present Parliament on any later day.[2]

The clause which declared that the Act should be altered only with the presence of the recalled Irish members, was:-

> '..a Parliamentary compact..an engagement made by a statute, which although it cannot legally bind a succeeding Parliament, or even the existing Parliament, has the effect of imposing a moral obligation not to act contrary to the statute.

1. At col.935
2. At col.1218-9. C.f. Bryce's 'Studies in History and Jurisprudence' (Vol.1) p.248

> ..We shall have given an undertaking (he continued) that when we wish to alter this Act..we will summon back the Irish members, in order to take council together upon the subject.
>
> The imposition of such a moral obligation as this is not a change which will alter the general character of the Constitution. It will leave the sovereignty of Parliament and the consequent flexibility of the Constitution as they were before.' 1

The similarity of the view here put forward by Lord Bryce to that advanced by Dr. Donges as to the legal standing of the South Africa Act, is noteworthy. And perhaps equally remarkable is the fact that Bryce's view was opposed on grounds basically similar to those put forward in 1950 by the Supreme Court of South Africa. Bryce's statement that there is nothing 'beyond or behind' Parliament, is really the crux of the argument about the implications of legal supremacy. In an essay on John Austin written some years ago, the question was posed, 'How except <u>under</u> a constitution can a sovereign, or any other number, act in its collective capacity? How..did Austin's sovereign number proceed to establish those criteria..by which the membership and mode of functioning of the sovereign itself were from then on to be determined'.[2] There is certainly one thing 'beyond or behind' Parliament, and that is a set of criteria which enable the

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1. At cols.1220-1
2. C.A.W. Manning. 'Austin Today: Or 'The Province of Jurisprudence' Re-examined' (In 'Modern Theories of Law' Ed. Jennings 1933)

question to be answered, 'What in law, at any one time, is 'Parliament'?' It may be that the answer is, on a neo-Austinian view, always the same; but it is at least a question which has to be asked. At least one person in the debate of 1886 was aware of this, and put his point acutely. Sir Robert Finlay had expressed the view that the effect of the Bill would be to 'destroy the Imperial Parliament as it now existed', and to create out of the materials thus provided, two Parliaments'.[1] The implications of this were aptly elaborated by Mr. McIver. He said:-

> 'My hon. Friend the Under Secretary of State for Foreign Affairs lays down certain constitutional propositions. ..He says we cannot divest ourselves of the supremacy, and we cannot bind our successors. All that is true, but it is beside the point; for it is true of this Parliament which will cease to exist if this Bill becomes law. The Act of Union created the Parliament of which these propositions are true and christened it in the third Article of Union, 'The Parliament of the United Kingdom of Great Britain and Ireland'. This Repeal Bill substitutes for that body a new British Parliament, which in its third clause it christens the 'Imperial Parliament'. Viewed in this light, none of the arguments of these hon. gentlemen apply.
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> ...'Parliament cannot divest itself of certain powers'. Then Parliament cannot pass this Bill. 'We cannot bind our successors'. Sir, we shall have no successors. This Bill not only proposes felo de se, but infanticide. This Parliament will have no legitimate successors, but only the bastard 'Imperial Parliament', which does 'not succeed to the title'.[2]

1. At col.1680. Dicey took a similar view, and disagreed with Bryce on this issue. See his 'England's Case against Home Rule' (1886) pp.242ff. C.f. Cowen. 16.M.L.R. at pp.292-7
2. At col.1720

Here is the crux of the matter. Any redefinition of the legislative elements may be regarded as a transfer of power, or as an extinction of one authority followed by the re-constitution of another. Lord Bryce, although denying that Parliament could relinquish its authority to legislate for Ireland, did admit that in certain circumstances a general abdication and re-constitution of authority was possible. In discussing a proposal to turn the United Kingdom into a Federation[1] (a scheme which would 'destroy the present Flexible British Constitution and substitute a Rigid one for it') he remarked that 'care would have to be taken to use proper legal means of extinguishing the general sovereign authority of the present Parliament, as for instance by directing the elections for the new Federal Legislature to be held in such a way as to effect a breach of continuity between it and the old Imperial Parliament'.[2] And 'Parliament could, if so disposed divest itself of its present authority by a sort of suicide i.e. by repealing all the statutes under which it is now summoned, and abolishing the common law right of the Crown to summon it, and thereupon causing itself to be forthwith dissolved. ..There would then be no legal means

1. 'Studies in History and Jurisprudence'. Vol.1 p.248
2. Op.cit. p.248

of summoning another Parliament of the old kind, and the new constitution, whatever it was, would therefore not be liable to be altered save in such manner as its own terms provided.'[1]

But even without such elaborate and formal methods of renunciation, a 'transfer' of legislative power may be regarded as extinguishing the body which previously exercised it. Dicey it will be remembered, considered that there were two ways in which sovereign power could be relinquished - by self-extinction and by transfer. But his example of a transfer is an example of an extinction. The Parliaments of England and Scotland, at the Union of 1707, 'each transfered sovereign power to a new sovereign body, namely the Parliament of Great Britain'[2] ; and the Parliaments which had existed hitherto 'both came to a similar end.'[3]

Thus the problem of defining 'the legislature' or 'the body' whose exercise of authority is in question presents a common difficulty for all formulations of the doctrine that a sovereign 'cannot be bound'. 'The immediate author of a law..or <u>any of the sovereign successors</u> to that immediate

1. Op.cit. p.207n.
2. 'Law of the Constitution' p.69n.
3. Dicey and Rait. 'Thoughts on the Scottish Union' (1920) pp.8-9.

author may aborgate the law at pleasure'.[1] 'A sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment'.[2] 'It is in the power of a parliament to..transfer their own authority, but not whilst the authority remains entire to restrain the functions and exercises of the same authority'.[3] But what are to count as 'sovereign successors'? What are its 'own' powers? And what are the criteria of 'the same authority'? These are the difficulties which arise when the problem of sovereignty is regarded as a set of questions about 'real essences' rather than as a set of questions about the rules applied to the definition and re-definition of legislative power. Here the influence on the Courts of theoretical doctrines about the nature of sovereignty may be important. The theory of law as command, for example, is at least emotively connected with the contention that a sovereign cannot bind himself. A natural person cannot order himself about in any normal sense of 'order'. Thus a command binding oneself becomes not really a command at all. The analogies relating to human activities of 'binding' and promising, which are often

1. John Austin. 'The Province of Jurisprudence Determined' Lecture VI p. 255
2. Dicey p.68n.
3. Bacon 'Maxims of the Law' Loc.cit.

used (e.g. in the passages cited from Dicey and Bacon) work in the same direction. An attempt to bind the future, said Bacon, is idle 'because it doth deprive men of that which of all other things is most incident to human condition, and that is alteration or repentence'.[1]

But Courts of law do not normally approach their task by putting to themselves propositions of this type. That is why, as was emphasised by Sir John Salmond,[2] there is no logical or notional difficulty about a legal enactment which places a restriction - even a permanent restriction - on the legislative process itself. Such provisions are indeed a normal feature of many constitutional instruments. Where such a formal constitutional instrument exists, the definition of the legislative power which is to be inferred from its terms is naturally that which will guide the courts.[3] But the question 'In what elements does legislative authority reside?' is, as we have seen, a general one which the courts may be called upon to answer with or without the help of a

1. Bacon. Loc.cit.
2. Jurisprudence (10th ed.) p.496
3. Though they may well differ as to which of the rules which relate to the legislative process are to be regarded as constituent or definitive of the legislating body. The difference between regarding such rules as 'definitions' or as 'fetters' is one which Harris's case has made plain. It cannot now be asserted with confidence that (to cite Sir Ivor Jennings) 'Every constitutional provision relating to an institution is a fetter upon its action whether it prescribes its membership or its procedure'. ('Some Characteristics of the Indian Constitution' (1953) p.15)

constitutional document. Thus it has been suggested that the answer which the courts in Great Britain would give if confronted with attempts to modify or re-model the legislative process is not necessarily different from that which (for example) Commonwealth courts have given, merely because of the lack of a formal constitution in the United Kingdom. This suggestion was made in 1931 when Trethowan's case came before the High Court of Australia. The unquestioned supremacy over the law which was acknowledged to inhere in the Imperial Parliament raised, as it appeared, some difficulty for that view. But in the light of the doctrine of Parliamentary sovereignty which may now fairly be regarded as a part of the constitutional doctrine of the Commonwealth the authority of the views expressed in Trethowan's case may well be enhanced (just as the principles laid down in Ndobe's case (1930) took on a new significance as the result of the litigation of 1952).

4

Trethowan's case raised the issue of what may now be described as a re-definition of legislative authority within a single area (or as a 'functional' rather than a 'geographical' transfer). In the traditional vocabulary, the question

raised in 1931 was whether an existing Parliament could 'bind' its successors to a particular form of law-making by instituting a referendum provision to be complied with as a condition of the validity of future legislation of certain kinds.

The gravity of the constitutional questions which might arise from provisions for various forms of direct legislation was not perhaps entirely unsuspected in its relation to the activities of subordinate Parliaments within the Commonwealth. The Privy Council indeed remarked upon it in 1919, when considering the validity of an Initiative and Referendum Act passed by the Legislature of Manitoba. Such legislation raises the question of the meaning to be attached in law to the phrases 'the Legislature' and, 'passed by the Legislature', since an additional procedure or element is incorporated in the legislative process. Although the Manitoba statute was declared ultra vires on other grounds, their Lordships referred to the argument that had been advanced to the effect that the legislative power in a province was entrusted to and must be exercised by the Legislature and by the Legislature only. On this point Lord Haldane remarked that although within the limits of area and subjects laid down in the British North America Act 1867, the Provincial Legislature

was to be regarded as supreme and as having 'such powers as the Imperial Parliament possessed in the plenitude of its own freedom, before it handed them over to the Dominion and the Provinces'; and although it could delegate authority, and 'seek the assistance of subordinate agencies'[1]; it did not follow that it could 'create and endow with its own capacity, a new legislative power not created by the act to which it owes its own existence'.[2]

Three years later an appeal again came to the Privy Council from the Supreme Court of Canada[3] in which it was argued that a statute passed after initiative and referendum proceedings had taken place was not 'exclusively made' by the Legislature (in this case of Alberta). The view taken of this contention by the Board was, as stated by Lord Sumner, that 'the word 'exclusively' in S.92 of the British North America Act, means exclusively of any other legislature, and not exclusively of any other volition than that of the provincial legislature itself'. 'It is impossible to say' Lord Sumner continued ' that it was not an Act of the Legislature, and it is none the less a Statute because it was the statutory duty of the Legislature to pass it. ...Unless the Direct Legisla-

1. Hodge v. The Queen 9 App. Cas.117
2. In Re the Initiative and Referendum Act (1919) A.C. 935 at p.945
3. The King v. Nat Bell Liquors Ltd. (1922) 2 A.C. 128

tion Act can be shown..to interfere in some way, formally with the discharge of the functions of the Legislature and of its component parts, the Liquor Act 1916, being in truth an Act duly passed by the Legislature of Alberta and no other is one which must be enforced, unless its scope and provisions can themselves be shown to be ultra vires'.[1]

Here it would seem that the 'passage' of the Act takes place when the matters submitted to referendum receive the assent of the Houses and of the representative of the Crown. Such an Act is not 'passed' or 'made' in part by the people The 'manner and form' of law-making is not altered. An extra element is not incorporated in the Legislature process. But each of these propositions was to be put to the Privy Council in 1952 though only the second, can be said to have received an answer. The 'manner and form' of law-making, said Lord Sankey, in Attorney General for New South Wales v. Trethowan,[2] was a reference to 'the entire process of turning a proposed law into a legislative enactment, and was intended to enjoin fulfilment of every condition and compliance with every requirement which existing legislation imposed upon the process of

1. At pp.134, 135
2. (1932) A.C.526

law making'.[1] Here the Privy Council upheld the validity of an Act incorporating a referendum provision as part of the law relating to the manner and form of legislation in New South Wales. The decision was based upon a construction of Section 5 of the Colonial Laws Validity Act[2] which requires law to be passed 'in such manner and form' as may be laid down by existing law in the colony. As the conclusion reached on this point was considered to suffice for the dismissal of the appeal, no firm answers can be considered to have been given to a number of questions of wider theoretical significance. In particular, the general problem of the power to re-define the process of law-making for the future as exercised by an existing legislative body was not considered. The Australian High Court, however, in its three concurring and two dissenting judgments produced a symposium on the nature of legal supremacy which merits the closest attention.

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1. At p.541. In the High Court of Australia Gavan Duffy C.J. had suggested that an antithesis existed between the words 'make' and 'pass'. 'When the Imperial Statute deals with the making of a law as a whole, it uses the word 'make' or 'enact', but when it deals with any integral part of the making, it uses an expression appropriate to that integral part, such as 'passed', 'presented to the Governor', 'assented to by the Governor'...' (1931) 44 C.L.R. 394 at 413.
2. The Australian states were not removed from the ambit of the Colonial Laws Validity Act as were the Canadian provinces (by s.7 (2) of the Statute of Westminster). That Act, therefore, still forms part of the constitutional law of the states.

The issue raised by Trethowan's case was, as formulated in 1931, whether it was competent for the Legislature of New South Wales to disregard any constitutional restrictions placed on the legislative process by its predecessors. Shortly put, the facts were as follows.

In 1929, the Parliament of New South Wales passed into law an Act[1] which provided that the Upper House of the Legislature (the Legislative Council) should not be abolished, nor its constitution or powers be altered, except after the approval of the proposed change by a referendum of the electorate. The Government which sponsored the legislation was a right-wing one, and its object (in the phrase applied to the South African Constitution) was to 'entrench' the position

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1. The Constitution (Legislative Council) Amendment Act.1929. The Act inserted after Section 7 of the Constitution Act 1902 as amended, an additional section, 7 A. This section provided that:- (1) The Legislative Council shall not be abolished, nor, subject to the provisions of sub-section six of this section shall its constitution or powers be altered, except in the manner provided in this section.
(2) A Bill for any purpose within sub-section one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.
Sub-section six read:-
(6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section

of the Upper House - a nominee body which the Labour Party had declared its intention of abolishing. The method employed was not, as in the case of the franchise and language 'entrenchment' in the Union, a requirement of a joint sitting and special majority, but that of a reference to the electorate as a condition of the validity of the legislation in question. Moreover, in order to prevent the repeal of the referendum requirement by an ordinary act, and the abolition of the Upper House in two stages,[1] it was further provided that the referendum requirement should apply also to any legislation repealing that requirement itself. This device,[2] if regarded as validly redefining the elements competent to make law in a

1. c.f. Bryce. 'Studies in History and Jurisprudence' Vol.1 pp.175 -6. 'Those who have suggested that the United Kingdom ought to embody certain parts of what we call the British Constitution in a Fundamental Statute (or Statutes) and to declare such a statute unchangeable by Parliament, or by Parliament acting under its ordinary forms seem to forget that the Act declaring the Fundamental Statute to be fundamental and unchangeable by Parliament would itself be an Act like any other Act, and could be repealed by another ordinary statute in the ordinary way. All that this contrivance would obtain would be to impose an additional stage in the process of abolition or amendment.' (italics supplied) This passage was cited with approval by Mc.Tiernan J. in the High Court of Australia. (44 C.L.R.394 at 437)
2. Suggested by a passage in Sir A.B. Keith's 'Imperial Unity and the Dominions' pp.389, 390 (See G. Sawer in 'The Commonwealth of Australia': Development of its Laws and Constitutions' (1952) p.43n.; and Starke J. (1931) 44 C.L.R.394 at 424)

particular sphere would have effectively prevented any legislation in that sphere except by 'the legislature' as redefined - i.e. as making law with the assent of four, rather then three elements.

In 1930, however, a new Parliament was elected and an attempt was made to do both the things which the legislation of 1929 had forbidden (or purported to forbid). Two Bills were passed through both Houses enacting (or purporting to enact) the repeal of the referendum provision, and the abolition of the Upper House. Neither Bill was submitted to the electors as required by Section 7A of the Constitution Amendment Act. Two members of the threatened Legislative Council thereupon sought an injunction to restrain the President of the Council and the Ministers of the Crown for New South Wales from presenting the Bills to the Governor for the Royal Assent, as being made in contravention of the terms of the Constitution Act. The Supreme Court of New South Wales granted the injunction,[1] and appeal was taken to the High Court of Australia.

Here a number of arguments was advanced by the appellants seeking to show that under a 'flexible' constitution no author-

1. Trethowan v. Peden (1930) 31 S.R. (N.S.W.) 183

ity existed by which an existing or future Parliament could be shackled or controlled. Parliament could not denude itself of the power to amend its own or earlier legislation, or to give expression to any change of mind or change of intention which might take place. The Parliament of New South Wales had powers as plenary as those possessed in this respect by the Imperial Parliament. No authority had been produced to show that either the Imperial Parliament or a Dominion legislature had ever made a successful attempt to limit its own inherent powers of repeal. (Gavan Duffy C.J. here interjected 'I appreciate the fact that there may not have been a successful attempt to do this; but has there been an unsuccessful attempt?'[1] The requirement of a referendum destroyed the volition and independence of Parliament by subordinating its volition to a third body, namely the electors, a body whom Parliament could not control; and this was a matter not of manner and form, but of substance. The Legislature was the same body both before and after the referendum legislation. The referendum did not create a new constituent part of the Legislature. The suggestion that the law could be repealed only in a certain way was in conflict with the theory that a sovereign body cannot limit its powers to legislate, either in part or completely. The crux of the matter

1. (1931) 44 C.L.R. 394 at 401

was: Could the Legislature deprive itself of the right to alter its mind?[1]

The respondents also appealed to the principle that the Parliament of New South Wales possessed a plenitude of powers. But the question, they urged, was to be viewed as one of the powers of the 1929 Parliament rather than of the powers of the 1930 Parliament. Thus the problem was: Could the (1929) Parliament of New South Wales embody the compulsory referendum in its constitution? The answer was that it could, since its plenary powers implied the power to mould its constitution in any way it wished, and to turn its flexible constitution into a rigid constitution if it so desired. In this case that had been done. Although a Parliament could not make a law which was unrepealable, it could tie the hands of its successors by defining the manner and form by which a law must be repealed, or alternatively, by altering the constitution so as to transfer the law-making power to a different group of bodies, or to a group of bodies differently constituted. In the present case, Parliament had altered the constitution of the legislature by incorporating the electors as part of the law-making machine.[2]

1. At pp.400-405
2. At pp.405-411

Judgment was given on March 16th 1931 for the respondents, Gavan Duffy C.J. and Mc.Tiernan J. dissenting. The Chief Justice, in a relatively brief opinion, took the view that Section 7A of the Constitution Amendment Act was not legislation as to the 'manner and form'[1] in which a law should be passed, but legislation with respect to the 'powers' of the legislature. Such legislation was within the powers of the 1929 legislature, but did not affect the constitution of the legislature, which remained the same body as before the passing of the section. No alteration in the constitution of Parliament or of the manner and form of legislation could be inferred from 'an act required to be done by some person or persons outside the legislative body as a condition precedent to any act of the legislative body'. The question therefore arose whether the same authority which imposed the condition of approval by the electors could now alter the law and remove such condition. There was no doubt that it could.[2]

1. S.5 of the Colonial Laws Validity Act provides that '... Every representative legislature shall, in respect to the Colony under its jurisdiction have, and be deemed at all times to have had full power to make laws respecting the constitution, powers and procedure of such legislature; provided that <u>such laws shall have been passed in such manner and form as may from time to time be required by any</u> Act of Parliament, letters patent, order in council or <u>colonial law for the time being in force</u> in the said colony.' (italics supplied)
2. (1931) 44 C.L.R. 394 at 411-14

Mc.Tiernan J. in a more elaborately argued opinion, also dissented from the majority decision. If, he held, the power contended for were effective, the Parliament of New South Wales would be capable of doing what the Imperial Parliament could not accomplish without surrendering its sovereignty to another body. 'One thing no Parliament can do: the omnipotence of Parliament is available for change, but cannot stereotype rule or practice. Its power is a present power, and cannot be projected into the future, so as to bind the same Parliament on a future day, or a future Parliament' (Anson, Law and Custom of the Constitution, 5th ed., vol.1 pp.7-8). Counsel for the respondents had contended that Section 5 of the Colonial Laws Validity Act empowered the Parliament of New South Wales to turn the constitution into a controlled or rigid constitution. It 'extended' the power of the Legislature, so that it became competent to bind itself and its successors by a law requiring that the 'manner' therein prescribed for the repeal or amendment of an Act of the Legislature should be observed by itself and its successors. If that view were correct, the Legislature might, whenever it pleased:-

> 'become a Constitutional Convention and make a fundamental law, and after it has done so, the powers of the Legislature and its successors to repeal or amend this

> law suffer a serious contraction, and the Legislature becomes legally subordinate to the law.'[1]

The material question, therefore, was whether Section 7A were a rigid part of the constitution or a mere ineffective 'contrivance'. Here, Mc.Tiernan J. cited the dictum of Lord Birkenhead, in McCawley v. The King, that where a constitution was uncontrolled 'the consequences of its freedom admit of no qualification whatsoever'[2] He was of the opinion that the proviso that amendment of the referendum provision should require the assent of the electors, constituted in effect a qualification of the plenary powers of the legislature.

> 'Sub-section 6 of Section 7A is not in substance, a law dictating 'manner': it is in substance a law depriving the Legislature of power...It renders the King, the Legislative Council, and the Legislative Assembly assembled in Parliament powerless to repeal the section unless an external body intervenes and approves of the repeal'.[3]

The label 'manner' did not conlcude the matter. The true nature ofalaw might be disguised. No power to enact a law prescribing the 'manner and form' of legislation could be so exercised as to destroy the plenary powers of the Legislature. Section 5 of the Colonial Laws Validity Act was an overriding charter which kept the legislature continuously supplied with plenary power to make laws respecting its constitution, powers,

1.At p.437
2.(1920) A.C. 691 at 704
3.(1931) 44C.L.R. 394 at 442

and procedure, and no Act of the legislature could destroy or permanently diminish the authority which it derived from that charter. The Legislature, consisting of its three constituent elements in Parliament assembled, might therefore resume at will the power to repeal Section 7A. The submission of such a repealing Act to the electors would be necessary only if the electorate had been made a part of a Legislature, which thereupon became the only authority competent to repeal Section 7A. Section 7A did not have that result. The respondents 'submission was that by enacting Section 7A the Legislature transferred its powers to repeal or amend that section to another Legislature which was thereby constituted ad hoc. But, Mc.Tiernan J. continued,

> 'There can only be one Legislature in New South Wales. Any authority which the Legislature creates and vests with legislative power is subordinate to it, unless the Legislature has validly transferred its powers as the Legislature to that body.
> ...In my opinion, however, the Legislature has not assumed by Section 7A to create a new body answering to the description of a legislature. I do not think that the electors who would vote on the day appointed would be members of a quasi-primary assembly, which with the King, the Legislative Council and the Legislative Assembly would constitute a tricameral Legislature.
> ..In my opinion, the function of assent advice, and authority has not been vested in the 'qualified electors'. In approving or rejecting a Bill submitted to them they would not discharge the function which is enjoyed by the Legislative Council when it agrees or fails to agree to a Bill passed by the Legislative Assembly, or by the Crown, when as a part of the Legis-

> lature it assents or declines to assent to a Bill passed by the Legislative Council and the Legislative Assembly. ..No semblance of any link between the electors and the Crown is established by Section 7A. In my opinion, if the electors voted under this section, they would vote as members of a primary Constitutional Convention without legislative authority upon a proposal submitted to them by the two Houses of the Legislature.'[1]

The majority of the Court, however, took a different view, both of the contention that the referendum proviso constituted legislation as to the 'manner and form' of law-making, and of the suggestion that 'the Legislature' might thereby be considered to be re-defined. On the latter topic Rich. J. remarked that it was conceded that Parliament had power if it wished to establish a thid Chamber whose assent would be required to complete any legislative act. If that were so:-

> 'It could not be denied that if a Third Chamber could be introduced, a body of persons of another character might also be created a constituent element of the legislature.[2]

It had been said that the expression 'the Legislature' must be confined to the authority competent to make Laws for the Colony upoh general matters.[3] But no reason appeared to exist

1. At pp.448-9
2. At p.419
3. Section 1 of the Colonial Laws Validity Act contains the provision that '...The terms 'Legislature' and 'Colonial Legislature' shall severally signify the Authority, other than the Imperial Parliament, or Her Majesty in Council competent to make laws for any colony.'

for applying the definition in such a manner.

> 'If the legislative body consists of different elements for the purpose of legislation upon different subjects, the natural method of applying the definition would be to consider what was the subject upon which the particular exercise of power was proposed, and to treat Section 5 as conferring upon the body constituted to deal with that subject, authority to pass the law.'1

The similarity of the exposition here undertaken by Rich. J. to that of Centlivres C.J. in Harris v. Donges is evident. Each was contesting the view that plenary powers of legislation must be lodged in a single body, defined in a single way. Each was asserting that the legislative power may be divided and alternatively defined for different purposes. Each, moreover, was upholding in the face of the combined doctrines of 'absolutist sovereignty' and Parliamentary privilege, a right of judicial review, not as an exercise of a 'testing right' as against the legislature, but as a special case of the judicial duty to discriminate between law and not-law. On the view endorsed in Harris's case there appears no incompatibility between such division of authority between two (or more) legislative bodies (whether consisting of the same elements acting differently, or incorporating additional elements) and the doctrine of Parliamentary sovereignty. Nor is there any reason to say that the creation of such a situa-

1. At pp.419-420

tion by law turns a flexible and 'uncontrolled' constitution into a rigid and 'controlled' one.[1] For 'Parliament' (rightly defined) is no more 'controlled' after than before, and retains an unlimited area of 'sovereign' legislative authority. The suggestion that a law prescribing a manner and form of legislating may have the effect of altering the constitution of the legislature, is it may be noted, an argument of wider application than those contentions based upon the construction of Section 5 of the Colonial Laws Validity which the High Court (and the Privy Council) held to be sufficient grounds for deciding the issues raised in 1931. The answer to the problem phrased in this way does not in any way depend upon the existence of a formal constitutional document conferring and conditioning legislative powers. Thus the supposition that the power to lay down binding forms of constitutional amendment would disappear if the Colonial Laws Validity Act ceased to apply to the states of the Commonwealth (as it does not apply to the Canadian Provinces) is not necessarily justified. The Imperial Parliament itself, it was suggested by Dixon J., may be able by a re-definition of the legislative elements

1. Both counsel for the respondents and the majority of the High Court in Trethowan's case regarded the referendum provision as a valid exercise of authority but one which would destroy the existing 'flexibility' of the constitution, in favour of a 'controlled' constitution. The decision in Trethowan's case is still commonly regarded in this light. See e.g. G. Sawer 'The Commonwealth of Australia: The Development of its Laws and Constitution' (1952) p.41-3

similar to that effected in New South Wales effectively to provide a manner and form of legislation binding upon future legislators. Dixon J. was of the opinion that Section 7A validly prescribed a manner and form of legislating as provided for by Section 5 of the Colonial Laws Validity Act.[1] Since it was the law derived from the Imperial Parliament which gave the legislature of New South Wales its powers, the question posed must be answered by considering the meaning and effect of the written instruments embodying that law. But, he went on to say, the answer might not necessarily be different if the full doctrine of Parliamentary[2] supremacy could be invoked. Here, it might be thought, Dixon J. revealed a certain ambivalence in his attitude towards the doctrine of sovereignty as claimed by the Imperial Parliament - a wavering almost, between two approaches, one 'absolutist', the other 'definitionalist'.

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1. 'Section 5...authorizes a representative legislature to make laws respecting its own constitution, its own powers and its own procedure. ..The power to make laws respecting its own constitution enables the legislature to deal with its own nature and composition. The power to make laws respecting its own procedure enables it to prescribe rules which have the force of law for its own conduct. ..There is no logical reason why the authority conferred over its own powers should not include a capacity to diminish or restrain that very authority.' Dixon J. at pp.429-430. Rich and Starke J.J. reached similar conclusions.
2. If on the absolutist view no effective re-definition of the manner and form of law making is possible, the 'full doctrine of sovereignty' in the United Kingdom would seem to forbid legislation altering the 'nature and composition' of Parliament - for example an abolition of the House of Lords or its replacement by a differently constituted body.

For, he declared:-

> 'The difficulty of the supreme Legislature lessening its own powers does not arise from the flexibility of the constitution. On the contrary, it may be said that it is precisely the point at which the flexibility of the British Constitution ceases to be absolute. Because it rests upon the supremacy over the law, some changes which detract from that supremacy cannot be made by law effectively'.[1]

Nevertheless:-

> 'An Act of the British Parliament which contained a provision that no Bill repealing any part of the Act including the part so restraining its own repeal should be presented for the royal assent unless the Bill were first approved by the electors would have the force of law, until the Sovereign actually did assent to a Bill for its repeal. In strictness it would be an unlawful proceeding to present such a Bill for the royal assent before it had been approved by the electors. If, before the Bill received the assent of the Crown, it was found possible, as appears to have been done in this appeal, to raise for judicial decision the question whether it was lawful to present the Bill for that assent, the Courts would be bound to pronounce it unlawful to do so. Moreover, if it happened that, notwithstanding the statutory inhibition, the Bill did receive the royal assent although it was not submitted to the electors, the Courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside.'[2]

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1. At p.427
This passage provides a good example of the paradox which is generated by the traditional reference to sovereign 'bodies'. One sovereign 'body' whose legal competence is 'unrestricted' has to be regarded as in one instance 'restricted' since future 'bodies' which are, in a sense the same 'body' are equally 'unrestricted' (and 'restricted') For the same reason text-book writers treat the statement that Parliament cannot bind its successors both as an exemplification of and as an exception to the principle of 'unlimited' Parliamentary authority.

CHAPTER FIFTEEN

The Commonwealth and the Language of Sovereignty

'It is not at all impossible that the law of a Dominion should come to regard the Imperial Parliament's legislative power within the borders of the Dominion as now derivative..if only it can explain how its former supremacy was terminated.'

R.T.E. LATHAM
'The Law and the Commonwealth'

1

It should now be possible tentatively to assess the impact of the developments here discussed on the concept of Parliamentary sovereignty in the British Commonwealth. That concept is plainly undergoing a process of change as its application to bodies different in origin and structure from the United Kingdom Parliament becomes the subject of closer analysis. One way in which the results of such analysis might be applied is to the relief of that academic discomfort which must accompany any attempt to fit within a single system of consistent assumptions, both an Imperial

sovereign as described in the traditional language,[1] and a community of nation-states in no way subordinate one to another either in political fact or in 'strict law'. It was the avowed aim of the makers of the Statute of Westminster to bring law and fact into harmony. Without a change in the 'language of sovereignty' that could not and cannot be done. Such a change is no longer the subject of a domestic dispute between two schools of jurisprudence. It is one which Commonwealth constitutional experience has forced into the sphere of politics and popular editorials. The reason is not difficult to discern. For - to summarize what has already been said - whilst the question of parliamentary sovereignty related solely to the United Kingdom Parliament (a body whose composition and manner of functioning had long been stabilized) it was fairly natural to see the problem in terms of a single juristic will, standing in the place of the will of a personal, readily identifiable and unchanging sovereign. The questions asked about such a body will be questions about its capacities and about possible limitations on its capacities -

1. Such a sovereign..'must claim universality. It cannot admit an empty space. If a state, claiming to be sovereign refrains from ordering all human relations everywhere, if it allows matters to be left without regulation or to be regulated by another State, this means merely that for technical reasons or lack of power, it does not actively exercise its right of sovereignty, not that it ceases to claim sovereignty' (W. Friedmann. 'Legal Theory' (3rded) 1953 p.421)

the questions in fact which have been inherited from the traditional political philsophers' discussions of 'sovereign political power'.

But the dividing up of Imperial sovereignty, and the attempted application of the English doctrine to specially created law-making bodies in the Commonwealth have exposed the existent elements of paradox in the theory of legal absolutism, and suggest a number of new and puzzling questions. The makers of such legislative bodies may wish to provide for modes of constitutional development differing from those of the Imperial Parliament. They may wish to provide for the re-definition of the legislative process, either generally or in certain spheres (for example by referendum, initiative, or special majority provisions). These elements of complexity and potential change in the process by which legislative power is exercised throw into relief questions of status and legal definition whose answers have been taken for granted where the process is simple, familiar, and relatively stable. Unaccustomed questions arise for judicial decision. What, at any one time constitutes a valid exercise of the legislative power? What rules, therefore provide a sufficient definition of 'Parliament' or 'the Legislature' for purposes of applying the law? To what extent may courts interfere with or scrutin-

ize Parliamentary proceedings in upholding 'constitutional' provisions? The language which courts use to ask and answer questions of this kind is a language which is radically infected by the conclusions of jurisprudence, and the customary distinctions of political scientists. The traditional 'essentialist' questions, for example, asked about the Parliamentary 'sovereign' have been, What can it do? What limits can be placed up on its action? Can it bind itself or its successors? And the answers have been that the sovereign body is legally illimitable; that it 'cannot'[1] be bound; that it 'cannot' place limits on its own or future action. But

1. Much could be written about the confusion of logical and empirical elements in some traditional treatments of 'limitations' on sovereign authority. Dicey, for example ('Law of the Constitution' p.69n.) speaks of Parliament as having 'failed in its endeavours' to limit itself, and adds that 'every attempt to tie the hands of such a body necessarily breaks down' on a 'logical and practical impossibility' since 'limited sovereignty is a 'contradiction in terms'. But this is to talk as if 'the limitation of sovereignty' were both a contradictory use of words, and an especially difficult task which might be attempted, though without much hope. There can be neither attempts nor failures to overcome logical impossibilities, and efforts if they are efforts do not break down on logical barriers.

   A related source of confusion is the failure to clarify the use of expressions such as 'subject' 'bind', 'oblige' etc. which may result in discussions of the type: Are sovereigns subject to law? Is sovereignty indivisible and perpetual? being carried on partly in an a priori, partly in an empirical way. c.f. for example the relationship between the statements (a) 'Supreme power is indivisible' and (b) The governmental functions in the United States are constitutionally separate.

suppose we ask, What are the legal rules which define 'the Legislature'? or, 'What are the rules for the re-definition of these rules?' (the answers to which need not be influenced by any theory about the nature or powers of sovereign 'bodies' or legal entities)[1] An insistence on these questions put in this way may have different results. A court of law, by pressing its inquiry into one frame of language rather than

1. A similar attitude has recently been suggested by Professor H.L.A. Hart to the traditional questions about the nature of corporate bodies (70 Law Quarterly Review 37 (1954) Questions it is urged such as 'Can a Limited Company commit a crime involving knowledge and intention?' should be answered, not by asking 'What is a corporation?', or by invoking theories of corporate personality (which suggest and lend themselves to particular answers) but merely by asking without reference to such theories, under what conditions the law does or should provide for liability in such situations. Professor Hart's article, which is entitled 'Definition and Theory in Jurisprudence' (a reprint of his inaugural lecture) is a clear sign of the influence on juristic theory of the examination by philosophers of various kinds of linguistic usage - most relevantly that of the logical status of 'rules', 'laws', 'Commands' etc and of the uses of 'definition'. (Professor Hart remarks that'..It is only since the beneficial turn of philosophical attention towards language that the general features have emerged of that whole style of human thought and discourse which is concerned with rules and their application to language'. (at p.60). Weapons from the same armoury were used by Professor Glanville Williams in his 'International Law and the Controversy concerning the word Law' (British Year Book of International Law 1945. p.146) and in his articles in the Law Quarterly Review in the same year on 'Language and the Law'. The term 'Sovereignty' is an eminently suitable candidate for a program aimed at substituting questions about the uses of expressions and rules, for questions of the form, 'What is an X?'

another may easily find its way to significantly different conclusions. This is well illustrated by the divergence of the decisions reached by the Supreme Court of South Africa in 1937 and by its successor in 1952.

Such an approach to problems of 'sovereign' authority is quite different from and may be set in contrast to the kind of protest which the Austinian doctrine has always evoked, and which has taken the form of direct rebuttals of the principle that a sovereign body was in essence illimitable.[1] When in 1931 the Imperial Parliament by Section 4 of the Statute of Westminster declared its intention to relinquish its power to legislate for the Dominions except at their request and consent, section 4 was debated as an attempt at self-binding by the Imperial Parliament the section being in

1. The principle has been denied on historical, logical, legal, and ethical grounds. With the protests against a particular theory of the state (e.g. by Laski and the pluralists) - which are perhaps misleadingly classified as attacks on 'sovereignty' we are not here concerned. But the principle of legal illimitability is one which has been subject to continuous denial and attempted reformulation. e.g.:-
Bryce. 'Studies in History and Jurisprudence' Vol.2. pp.51ff
Salmond. 'Jurisprudence' (Appendix II)
Jennings. 'The Law and the Constitution' (3rd ed.) pp.143-6.
W.J. Rees. 'The Theory of Sovereignty Re-stated'. Mind. Oct. 1950, pp.495ff.
K.W.B. Middleton. 'Sovereignty in Theory and Practice' 64 Juridical Review (1952).
H.L. van Themaat. 'Equality of Status of the Dominions and the Sovereignty of the British Parliament'. XV J.C.L. 47 (1933)
C.H. McIlwain. 'Constitutionalism and the Changing World' (1939)

the opinion of some 'nugatory',[1] and in the opinion of others, one which might be enforced in Dominion if not in United Kingdom courts. But Sir Ivor Jennings, who took the latter view,[2] also made a suggestion directed to the same point[3] but of rather different theoretical import. This was to the effect that 'Parliament' might be thought to have been re-defined as a legislative body by section 4. If valid a suggestion of this kind implies a different sort of reply to the question, 'Is the legislative action of Parliament bound or fettered by such legislation?' The assertion now is that 'Parliament' by the passage into law of provisions of the kind exemplified in section 4 may be alternatively defined for different classes of legislation.[4] For legislation affecting the Dominions

1. Sir A.B. Keith XIII J.C.L. (1931) p.28, and XIV J.C.L. (1932) p.101 c.f. Sir Owen Dixon. 'The Law and the Constitution' 51 L.Q.R. (1935) 590 at 611: 'Supremacy over the law is a thing which from its very nature the law itself cannot restrict.' And Latham Op.cit. p.530. 'Established constitutional doctrine held that it was in strict law impossible for the Imperial Parliament to put it beyond its own power to repeal any of its own Acts..Nothing that Westminster could do would remove this taint from its gifts'
2. c.f. Jennings and Young. 'Constitutional Laws of the Commonwealth' (1952) p.124: 'Parliament could in 1931 legislate for the Dominions Could it be deprived of that power by legal means? Dicey was quite certain that it could not, because he imported the political notion of sovereignty into the law. A sovereign remains a sovereign It can therefore do anything, even to the extent of denying its own words and of repealing laws which pretended to limit its own power. The case law, which is the only definite and final criterion does not prove any such proposition.'
3. The Law and the Constitution' pp.145-6
4. c.f. Keir and Lawson. 'Cases in Constitutional Law' (3rd ed. pp.526-7)

'Parliament' means the elements legislating at Westminster plus the legislative assents of the Dominions as interpreted by the courts under section 4. In so far as this body is bound or fettered at all it is 'bound' only in a logical sense by the rules which define it. This is merely to say that no combination of elements which operates otherwise than in accordance with these rules has the right to call itself 'Parliament'. But when acting in accordance with them, its legally expressed will is sovereign and unbound. This interpretation which rests on the distinction between what may be done by legislation, and what must be done by a sovereign legislature in order to legislate derives a considerable measure of support from the decisions in Trethowan's case, Ndobe's case and Harris's case, and from the constitutional attitude generally adopted by Commonwealth courts and text-book writers.[1]

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1. The short but academically suggestive essay by the late R.T.E. Latham, 'The Law and the Commonwealth' written in 1937 deserves mention here. Great importance must also attach to the work of Professor D.V. Cowen of the University of Cape Town whose essay and articles (M.L.R. 1952-3 and S.A.L.J. 1953) have already been cited. With which c.f. W. Friedmann. 'Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change' (24 Australian Law Journal (1950) 103)

On this view of 'legal supremacy', a similar analysis of the exercise of legislative power may be applied to each at the separate constitutional systems within the Commonwealth. The United Kingdom loses its unique and anomalous position as the legislative source of Commonwealth constitutional authority and as the possessor of a constitution different not merely in degree and kind but in status from that existing elsewhere. The rules governing the working of the Queen-in-Parliament in the United Kingdom differ, it is true, from those defining the operation of almost every other legislative body. But the extent of the powers exercised in the process of law-making is as wide as it is because the rules are what they are. For certain purposes (legislation extending to the Commonwealth, and legislation enacted under the Parliament Acts) the rules have by the process provided under them been amended. Thus Legislative power in Great Britain may be exercised in at least three[1] different forms and there is reason to hold that certain re-definitions of the manner and form of legislating

1. A fourth variant has been asserted as a result of dicta in MacCormick v. Lord Advocate (1953) S.L.T. 255 at 262, 263 - namely that for the alteration of certain fundamental matters touching the Union of England and Scotland, the sovereignty of Parliament must reside 'in some body, indeterminate at present, capable of giving equal effect to the general will of Scotland and England'. See T.B.Smith 69 L.Q.R. (1953) pp.512, 516.

would retain a status of logical and legal priority over the institutions defined by them, in no way different in kind from the rules defining alternative modes of exercising 'sovereign' power laid down for example in the constitution of South Africa.

3

The power to re-define the legislative process for the future was, it may be noted, explicitly provided for in the Indian Independence Act of 1947. Section 6 (6) of the Act (applying also to Pakistan) laid down that the legislative powers exercised were to extend to 'the making of laws limiting for the future the powers of the legislature of the Dominion'. On the view here discussed, the power in question exists apart from explicit provision. Nor in all cases would it necessarily be accurate to call the exercise of the power, the imposition of a 'limitation'. The outright prohibition of certain kinds of legislation by the enactment of a 'Bill of Rights' is certainly a fetter or limitation since it restricts the policy of the Legislature, but a re-definition of the manner and form of legislation is distinguishable from a bar on policy - although it may further some of the purposes of a Bill of Rights if it incorporates certain procedures in-

to the law-making process in the same way that the entrenched provisions in South Africa Act as a constitutional protection of certain 'rights'). It has been suggested that the insertion of the provision referred to in the Indian Independence Act and its omission from the Ceylon Independence Act of 1947 carried the implication that the latter and not the former conferred sovereignty in the sense in which that term is applied to the United Kingdom Parliament.[1] But (confining the argument to this point alone) such a contention is only plausible if the distinction between the scope of legislation and its manner and form is ignored, and an 'absolutist' attitude adopted. The Constitution of Ceylon provides, as it happens, an instance of the difference in vocabulary which may result from the adoption of 'absolutist' and 'definitionalist' attitudes. For amendments to the constitution, power must be exercised by a special legislative majority, certified by the Speaker. Sir Ivor Jennings has regarded this as depriving the Legislature of the title 'sovereign' as applied in the United Kingdom sense. At the same time, however, he concedes that such conditions may be regarded not as limitations on power but as rules for the manner of its exercise.[2]

1. K.C. Wheare. 'The Statute of Westminster and Dominion Status' (5th ed.) p.237
2. 'The Constitution of Ceylon' (1949) p.56

The exercise of sovereignty in the Union of South Africa can certainly be said to be regarded in this light. Here one consequence of the doctrine that the Constitution provides alternative definitions of legislative power for different purposes may be noted. The expressions customarily applied to constitutions - 'amendable by special process' and 'amendable by the normal legislative process'-become redundant. This point has been already made in the discussion of 'flexibility' and 'rigidity'. The view that the Houses legislating by simple majorities with the assent of the Crown constituted the 'normal legislature' and that requirements of two thirds majorities and joint sessions were 'special processes' which 'fettered' the 'normal legislature', and which it could throw off at will has been judicially rejected in the clearest terms. None of the processes (whatever the relative frequencies of their employment) is in a constitutional sense any more 'special' than the others. The legislators are not 'fettered' by the two thirds majority procedure. That procedure merely represents the manner in which 'Parliament' is defined for the class of legislation which involves constitutional amendment. Whether a similar process of argument would be applied in South Africa if it were proposed to incorporate the referendum

into the legislative process as an alternative form of constitutional guarantee to that provided by majority and procedural conditions, is uncertain. In neither Great Britain nor South Africa does the referendum play any part in the constitutional process. But if the arguments approved by the High Court of Australia in Trethowan's case have any validity, the reasoning of Harris v. Donges applies with equal force to the adoption of such a device. A combination of the conclusions in the two cases reinforces the argument that the right to 'unfettered decision' of a sovereign Parliament cannot be invoked to render ineffectual the use of such a constitutional 'safeguard' anywhere in the Commonwealth.

5

The referendum is, of course, used in the Commonwealth of Australia as part of the machinery of constitutional amendment. It is provided by Section 128 of the Commonwealth Constitution that such amendment shall be effected by laws passed with the assent of majorities of the total membership of both Houses, and of the electorate (a majority in a majority of states and a majority in all the States together being required). If the same view is taken of this provision as of the provisions for amendment of the South African Con-

stitution laid down in Section 152 of the South Africa Act, it would follow that these referendum and majority requirements are not limitations on legislative power, but rules defining the exercise of power. They are, in other words, part of the definition of 'the Commonwealth Parliament'.[1] The 'unlimited' sovereign authority in Australia, as in South Africa, is apportioned between variously defined sets of legislative elements. For some purposes of constitutional amendment, the appropriate set of elements may (on one view) include the signified assent of the legislative elements sitting at Westminster.[2]

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1. If this view be correct, the saving section in the Statute of Westminster (Section 8) intended to prevent the powers conferred on the Commonwealth Parliament being used to amend the constitution otherwise than in accordance with the existing law, was unnecessary. c.f. the remarks of Centlivres C.J. in Harris's case to the effect that the saving sections were inserted ex majori cautela (1952) 1 T.L.R. 1245 at 1260)
   This is the conclusion reached by Professor Cowen in his essay on the 'entrenched sections' of the South Africa Act (at pp.32-3) 'The efficacy of Section 128 would remain unimpaired. Section 128 prescribes a particular 'manner and form' of making laws to amend the Constitution and so is part of the functional concept of the Commonwealth Parliament. Accordingly, were the provisions of Section 128 to be ignored, it could properly be said that the Commonwealth Parliament had not legislated at all' (italics supplied)
2. ie. for an amendment repugnant to the provisions of the first 8sections of the Constitution Act 1900 - for example revising Federal basis of the Commonwealth. This view has however been disputed (see Royal Commission on the Constitution 1929. Report Appendix F).
   Legislative action at Westminster is also possible with the request and consent of the Commonwealth elements as contemplated in the proviso to S.4 of the Statute of Westminster

The power to re-define the manner and form of law making may in certain circumstances, as Australian experience has shown, be used as a powerful political weapon. It is one therefore whose use confronts the judiciary with a task of great delicacy - namely that of rendering judgment according to law without bringing to that task assumptions grounded in any particular political or social philosophy. This is an old dilemma implicit in some degree in all statutory interpretation by courts of law, of legislative intention; but it arises here rather differently. Discussing the power of the legislature to alter the manner and form of constitutional amendment Rich J. said in his concurring judgment in Trethowan's case:-

> 'There is no reason why a Parliament representing the people should be powerless to determine whether the constitutional salvation of the State is to be reached by cautious and well considered steps rather than by rash and ill considered measures'.[1]

Whether any given change is 'rash' or 'ill considered', and whether any particular safeguard would be 'well considered' are, of course matters which it might persuasively be urged are more appropriate to political than to judicial decision. Here the dilemma is plain. On the one hand, it is no part of the judicial function to make policy. On the other hand every

1. (1931) 44C.L.R.394 at 420

enforcement of legal rules regulating the use of authority is an interference with the exercise of free discretion. But the power to create rules governing the exercise of authority may in certain limiting cases be used so as to bring into conflict the principle that a sovereign authority is uncircumscribed as to the area of what it may do by legislation, and the principle that the rules governing the manner and form of legislation must be followed. For:-

> 'Suppose that an exuberant Parliament exploits an overwhelming majority in both Houses to pass an Act that no change in the existing powers and structure of the upper House shall be made unless eighty per cent of all voters agree in a referendum. It would be safe to say that such a provision would make any constitutional alteration of the functions of the upper House virtually impossible.' [1]

Such legislation if valid would, without forbidding change or imposing a condition of unanimous approval for change, have the same effect, namely that of making a law unrepealable in practice, and restricting the area of policy open to the legislature. It would 'under the guise of manner and form' really be legislation as to substance.[2]

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1. W. Friedmann 24 A.L.J. (1950) p.105
2. ibid. c.f. the opinion of McTiernan J (1931) 44 C.L.R. 394 at 442) cited above (p.378) that the referendum involving a simple majority of the electorate was 'not in substance a law dictating 'manner and form'' but '..in substance a law depriving the Legislature of power'

It has been suggested that a 'pith and substance test' be adopted,[1] which would place upon the judiciary the duty of deciding whether a law purporting to relate to the manner and form of legislation, had as its substantial purpose not a regulation of procedure but a bar on future policy. Such a test would not in some cases be easy to apply;[2] but the more ex-

1. Loc.cit. p.106.
2. Friedmann regarded the provision of a referendum deciding by simple majority as within the ambit of the description 'law relating to manner and form'. But the border line between 'manner and form' and substance was impossible to specify 'No conceivable formula could lay down satisfactorily when the exercise of a legislative power becomes an abuse' Would provision for a two thirds majority, for example, come into the category of a fetter on 'the essential functions of legal change through the Parliamentary process'.? (loc.cit. p.106) But in the interpretation of statutes purporting to relate, for example, to inter-state commerce or banking the High Court of Australia had employed various tests aimed at discovering the true purport of legislation. 'What the Statute in any case may be called is of little moment, the label may not correctly describe the goods' (Huddart Parker Ltd. v. Commonwealth (1931) 44 C.L.R.492 at 528) Whatever the value of such expressions as 'pith and substance', 'real purpose', 'main effect' etc. in these cases there was no reason to suppose that some such judicial test should not be applied to the constitutional process itself. (ibid)

Friedmann asserts however that, 'Any change in the legislative process itself must be effected in the manner and form of existing provisions. That a Parliament cannot fetter its successors is true only in the sense that it cannot tell them what policy to pursue in regard to any specific subject matter'. '..The ability of a particular Parliament to exploit a perhaps very transitory sweeping majority to perpetuate the privileged position of an Upper House by a simple piece of legislation can create extremely irritating and even dangerous situations, but in the absence of a written constitution, and subject to certain limitations' (referred to above)..'there is no other check on such procedure except public opinion or a revolution, whether the Parliament concerned be sovereign or non-sovereign' (pp.104, 105)

treme cases in which it might seem to be necessary, come fortunately (as does for example the contingency that a Parliament may use its power to perpetuate its own existence) into the category of legislative conduct for which political discouragement rather than judicial action is appropriate.

The recent examples provided by the courts in South Africa, do, however, demonstrate that there are situations where the willingness to adopt or reject a 'literalist' attitude to statutory interpretation may be of decisive importance. It was said (by Hoexter J.A.) in Minister of the Interior v. Harris that the duty of the Court was 'to penetrate the form of the Act in order to ascertain its substance'[1] and (by Van den Heever J.A.) that, 'A Court would not be doing its duty if by mechanical adherence to words, it allowed the patent intention of the constituent Legislature to be defeated and the rights to be prescribed'.[2] This readiness not to regard the mere words of an enactment as conclusive guides to the effect and intention of the statute and to range more widely in search of legislative intent stands in sharp contrast to the 'plain meaning' 'analytic' or 'pseudo-logical'[3]

1. 1952 (4) S.A. 769 (A.D.) at 796
2. ibid at 794
3. See W. Friedmann 'Statute Law and its Interpretation in the Modern State' (26 C.B.R. 1277)

approach which courts in the United Kingdom and elsewhere have so often been accused of adopting. It demonstrates once more the impossibility of applying that approach in the interpretation of instruments of wide constitutional importance. This is plainly recognised in relation to the Statute of Westminster and the South Africa Act in the first Harris case. In both this and the second Harris case the question of applying the intention of the constituent legislature, and examining the intention of the contemporary legislative elements was complicated by the unresolved question as to the meaning of 'the Legislature'. Thus in going behind the words of the High Court Act to discover its purpose and in subsequently invalidating the measure the Court might claim that far from preventing the carrying out of legislative intention it was ensuring that that intention should be rightly expressed. It was ensuring that no other intent than that of the competent unicamerally constituted legislature should be put into effect. In all this, some might find support for the contention that such enterprise on the part of the Court amounted to a 'naked usurpation of the legislative function under the thin disguise of interpretation'.[1] The line be-

1. A phrase used by Lord Simonds in Magor and St. Mellons R.D.C. v Newport Corporation (1952) A.C. 189 at 191

tween all judicial construction of statutes, and judicial legislation is, of course always controversial. But here the accusation has a particular point and flavour. For it illumines the paradox implicit in the contrast between the judicial task as guardian of existing procedure, and the judicial duty to eschew invasion of the policy sphere. It is not merely procedure made designedly impossible of compliance which 'thwarts' the making of policy. The recognition of and obedience to any set of legal rules constitutes a policy. This policy is one which normally goes unheralded in a constitutional state, but it is nevertheless a policy involving a set of value judgments which the judiciary is constantly applying. If a government or political party has as part of its policy the belief that existing legal rules are not binding, it is easy to see how the courts become ex officio opponents of such a policy and are exposed to the charge of usurping the function of political decision. The charges made by the Nationalist Party in South Africa against the courts provide an illustration.

6

The adoption of a 'definitionalist' view of sovereign authority here and elsewhere, emphasises the Janus-like charac-

ter of the expression 'legally sovereign'. It contains two elements:- (1) the notion of unrestricted political change, and (2) the notion of legality or the 'rule of law'. These principles as Dicey held, reinforce each other. A study of the conditions under which legislative power is exercised in the Commonwealth of Nations has the undoubted advantage of revealing that in itself the term 'sovereignty' is almost empty of factual content. At bottom there may be derived from it the tautology that the source of authority in any legal system is the source of authority - that the 'grundnorm' is the 'grundnorm'. Such a proposition says nothing whatever about the nature of the elements which exercise the unrestricted power of legal change, or about the rules governing the manner in which they exercise it. These rules may be, and in the Commonwealth they are, extremely varied and themselves variable through time. That the power of legal change should be wielded by a single process, by a single set of elements and in a particular geographical area is in no sense a necessary consequence of a theory of sovereignty formulated in this way. It is a mere special case - a local accident. Constituent or sovereign legislative power is wielded in the Commonwealth by a variety of sets of elements, some relatively simple, some relatively more complex. It may be apportioned

between assemblies convened and acting in different ways, or between elected assemblies and electors expressing their assent in the manner provided for by law. It may still (though as an exception to the general rule of territorial autonomy - for example, for some purposes of constitutional reorganisation affecting Canada[1] and Australia) be divided geographically between elements acting in the Commonwealth countries and elements acting at Westminster. In such cases the Westminster elements act in effect as an appendage to, and at the request of the Commonwealth Parliaments as defined by their constitutional instuments. For one purpose (legislation affecting the single common formal element, the Crown)[2] authority is shared between legislatures in the United Kingdom, Canada, the Commonwealth of Australia, the Union of South Africa, the Dominions of New Zealand, Ceylon and Pakistan and the Republic of India.

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1. British North America (No.2) Act (1949)
2. The requirement that alteration in the law touching the succession to its Throne or the Royal Style and Titles shall require the assent of all Dominion Parliaments, and of the Parliament of the United Kingdom was declared to be 'in accord with the established constitutional position' in the Preamble to the Statute of Westminster. It was not enacted.

The 'root principle of equality governing the free association of the members of the British Commonwealth of Nations'[1] has commonly been regarded as meeting with an insuperable juristic barrier in the Imperial 'mystery' of sovereignty. There has been remarked 'a conflict between academic logic and political reality'.[2] But if the foregoing analysis be valid, it may be urged that the conflict was in large measure a consequence of the traditional linguistic garb in which the theory has been clothed. Reanalysis of the 'language of sovereignty', and the unwillingness of Commonwealth courts to be overawed by the dogma have successfully re-clothed it in less frightening apparel, compatible with the existence of 'autonomous communities, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs'.[3]

1. Report of the Conference on the Operation of Dominion Legislatio (1929) Para.58 (Cmd.3479)
2. MacCormick v. Lord Advocate (1953) S.L.T.255, 263
3. Report of the Inter-Imperial Relations Committee, Imperial Conference 1926 (Cmd.2768)

POSTSCRIPT ON THE WORD 'SOVEREIGNTY'

1. It may be asked whether analysis of the term 'sovereignty' leaves it (and the term 'sovereign') as a useful part of the vocabulary of political studies. The foregoing discussion, it must be emphasised, has been concerned with the use of the word 'sovereign' in the context of British and Commonwealth institutions and constitutional law. The upshot of this discussion is that reference to a sovereign in the sense of a single source of 'will' or 'command' is both unnecessary and misleading. What Austin called 'the sovereign in his collegiate and collective capacity',[1] can be represented (though the metaphor is now palpable) as a being having many different guises. We have examined at some length one of these guises - namely the particular form (in South Africa) in which a sovereign legislative structure may be organised. But the idea of variable structure has implications for the way in which legislative elements may exercise the power to make law in the other Commonwealth countries. Each of these is a special case with its own problems of constitutional change,

1. 'The Province of Jurisprudence Defined' (ed.H.L.A. Hart 1954) pp.253ff.

which demand separate studies. What we have attempted is to map the general re-interpretation (which now seems necessary) of such devices as special majorities, referenda and the like, and to show how these forms of legislative action have had their significance determined by theoretical ideas about 'authority', 'freedom' and 'limitation'. Given such a revised constitutional map, the political scientist's traditional game of 'Hunt the Sovereign' loses its point. 'Legislative sovereignty' is compatible with almost any form of constitutional structure which admits the postulate of legal change. It might be claimed that the words 'sovereign' and 'non-sovereign' (as well as the terms 'rigid', 'flexible', 'controlled', 'uncontrolled' etc) were at least useful labels for classificatory purposes. In this connection two points may be made. First: the labels are such that they cannot be unambiguously applied to mark the admitted differences between constitutional systems. The apparent simplicity of the distinction between the terms 'rigid' and 'flexible' is dependent upon their association with the Austinian theory. Secondly: the logical function of labels may be misapprehended. Classificatory labels should not pre-determine conclusions. This has sometimes happened. The labels have been treated

as if they contained ready-made in themselves the answers to constitutional problems.

If these conclusions are accepted, it follows that there are positive advantages to be gained by urging students of government and comparative institutions to discuss questions of legislative and judicial authority without reference to the term 'sovereignty'.

2. There are, however, two spheres in which the word may remain (with reservations) a useful tool. First that of the political philosopher. Here the remark that 'sovereignty' tends to be used merely as a complimentary expression, is not necessarily fatal. If political philosophers, or writers of letters to newspapers, wish to characterise by 'sovereignty' a different kind of ultimacy from that inhering in rules of law,[1] it is probably mistaken to demand from them a precisely defined scheme or set of rules covering any individual situation in which questions of obligation arise. The emptiness of the term here resembles that of 'good' or 'right'. But its <u>function</u> like that of these words, is perfectly precise. Though expressions in which 'sovereignty' occurs might well be rephrased in terms of the moral duties of politicians and citizens, the feeling

1. The discussions about 'sovereignty' which are associated with Laski and the pluralists come, I think, under this rubric.

may well be warranted that something can be said here with the aid of the term which could not be said so swiftly (or understandably, or emotively) without.

3. In International law, the freedom of action or autonomy of a state in relation to other states is an idea for which the word 'sovereignty' has traditionally stood, and may still stand. Its continued utility depends partly on empirical factors such as the outcome of experiments in international organisation, and partly on philosophical commitments to particular theories about the nature of 'states' and 'law'. With these questions we have not been concerned. It must suffice to point out that questions about the sense in which treaty obligations, or deference to legal rules 'fetter' the free action of states involve the same linguistic moves as questions about 'self limitation' by constitutional rules of the members of legislative bodies. From the point of view of constitutional law rather than of legal philosophy, however, the time may not be far distant when a further problem in the definition of legislative structure is provided by transfers of authority for special purposes to international bodies. This, in effect adds an extra dimension to the problems involved in the transformation of authority from one set of insti-

tutions to another within a single 'national' system. It implies indeed a prospective ambiguity in the term 'national' exactly analogous to that indicated in the word 'sovereign'.

APPENDICES

CHRONOLOGY OF EVENTS IN THE UNION OF SOUTH AFRICA SINCE 1948

26th May 1948.	General Election. National Party returned.
10th April 1951.	Speaker of House of Assembly ruled bicameral passage of Separate Representation Bill in order.
15th June 1951.	Separate Representation of Voters Act received Royal Assent.
29th August 1951	Cape voters filed application for review in Provincial Division of Supreme Court.
26th October 1951.	Application dismissed by Provincial Division.
20th March 1952.	Separate Representation of Voters Act invalidated on appeal to Appellate Division (Harris v. Donges)
24th March 1952.	Opinion of Professor E.C.S. Wade, supporting its legal position made public by Union Government.
3rd June 1952.	High Court of Parliament Act received Royal Assent.
11th June 1952.	Cape voters applied in Provincial Division for orders restraining application of separate representation provisions.
21st-23rd July 1952.	Sitting of Judicial Committee of the High Court of Parliament.
12th August 1952.	Cape voters applied for order declaring High Court of Parliament Act invalid.

28th August 1952.	High Court of Parliament set aside the Supreme Court's order invalidating the Separate Representation of Voters Act.
29th August 1952.	Cape Provincial Division of Supreme Court invalidated High Court of Parliament Act.
11th November 1952.	Invalidation upheld on appeal by Appellate Division. (Minister of Interior v. Harris).
15th April 1953.	General Election. Increased Nationalist majority.
13th July - 16th September 1953	First Joint Sitting of Senate and House of Assembly. Bill to validate Separate Representation of Voters Act failed to pass by two thirds majority.
22nd September 1953.	Appellate Division Amendment Bill published.
1st October - 2nd December 1953.	Second Joint Sitting. Bill failed to pass by two thirds majority.
October 1953 - May 1954	Joint Select Committee - Commission sat and reported.
June 1954	Third Joint Sitting. Bill failed to pass by two thirds majority.

OPINION SOUGHT BY THE UNION GOVERNMENT FROM PROFESSOR E.C.S. WADE

I am asked primarily to answer two questions:-

1. (A) To what extent is there English authority for the rule that the will of Parliament as expressed in an Act of Parliament cannot be questioned in a court of law? What is the origin basis and extent of the rule?

(B) Why has the repeal of the Colonial Laws Validity Act, 1865, had the effect of rendering the entrenched sections (Ss.35, 137, 152) of the South Africa Act ineffectual?

2. (A) The question relates not only to the power to legislate, but to the manner and form of the enactment of such legislation. If it can be shown that no court in the United Kingdom can question the validity of an Act of Parliament does that exclusion of jurisdiction relate also to excluding review of the process of enactment?

Historically the concept of Parliamentary sovereignty is traceable to the alliance effected in the 17th century between Parliament and the common lawyers. But it is not derived from statute or any formal constitutional enactment. It was necessary to subordinate the royal power to the law as declared by Parliament. To achieve this the common lawyers had to abandon reluctantly the claim that Parliament could not legislate in derogation of the principles of the common law. Since Parliament established that the King as the head of the Executive was not able to challenge the validity of what the King-in-Parliament enacted, it had to follow that his subjects were equally so bound. Therefore it came about that - no one could ask a court to annul or otherwise challenge an Act of Parliament. An early instance which shows that the courts know nothing of the legislative process is to be found in the famous Case of Shipmoney, or Hampden's Case, 1637 3 St.Tr.825. In this case the so called Statutum de Tallagio non concedendo was accepted as an Act of Parliament, because it appears

on the Parliament Roll; it was however never passed by a Parliament.

3. This early precedent shows that an Act which appears on the Roll of Parliament is good law, whatever the method adopted for its passage. It does not prove that if a special method of enactment is prescribed by an earlier Act, the provisions of a later Act, which has been enacted without following that method must prevail. It is, however worth remembering that the idea that a court of law can determine the legality of legislation comes not from any English or Scotch court, but from the United States. There the Supreme Court assumed the power of disallowing the validity of Acts of Congress because they did not conform with the Federal Constitution. It is only in the States with a Federal type of Constitution that this function is assumed by, or in modern times given to, the courts (the Republic of Ireland is an exception). It is the case that in most countries with a unitary constitution the powers of the legislature are limited, but it does not follow that it is the prerogative of the courts to override legislation. Excess of legislative authority is, after all, a matter between the legislature and the electors. The Union of South Africa has a unitary constitution on the United Kingdom model. The fact that the constitution is contained in a single Act does not mean that the courts of the Union can challenge the validity of legislation enacted by the legislature set up by that Act, unless the Act so provides. Part VI of the South Africa Act makes no such provision, though it enables the validity of provincial ordinances to be challenged (S.98). It is, however the case that the validity of enactments has been challenged in the South African High Court. It is therefore unlikely that this point could be raised with much hope of its being accepted.

4. There is some modern English authority in support of the following propositions:-

(i) That the court cannot take any note of the procedure in Parliament whereby a Bill came to be enacted.

(ii) That the court will not allow judicial process

to be used in a sphere where Parliament and not the courts has jurisdiction.

(iii) That Parliament cannot bind itself as to the form of subsequent legislation, and therefore, the provisions of a later Act, so far as they are inconsistent with an earlier Act must prevail.

5. In support of the first proposition, in a case where it was alleged that Parliament had been induced by fraud to pass an enactment, the Court of Common Pleas constituted by three judges as in the present day Divisional Court, refused to take any note of the procedure in Parliament whereby a Bill came to be enacted.
....(Lee v. Bude and Torrington Junction Railway Company (1871) L.R. 6. C.P. 576 at p.582)

.....The control of the procedure for enactment rests with the two Houses of Parliament as matters of privilege which each House asserts separately to the exclusion of the courts.

6. ....Edinburgh and Dalkeith Railway Company v. Wauchope (1842) 8 Cl and F. 710 at p.725 ; 8 E.R. 285

.....It follows, in my submission that any attempt to challenge in the courts whether, in the enactment of a Bill, either House of Parliament has followed the procedure prescribed by itself in Standing Orders, or by both Houses acting together, must be unssuccessful. No such attempt has apparently ever been made.

7. (ii) That judicial process will not lie in a sphere where Parliament has exclusive jurisdiction.
(Bilston Corporation v. Wolverhampton Corporation (1942) Ch.391)

.....It would be an infringement of the jurisdiction of Parliament for the courts to make any order which relates directly to proceedings in Parliament; so exclusive is the jurisdiction of Parliament in matters relating to its own procedure that the court will leave it to Parliament to determine whether an existing statutory obligation should or should not be enforced.

8. It is relevant to note that the Parliament Act 1911 adopted this view of the exclusive right of Parliament in matters relating to procedure. Section 2 entrusts to the Speaker the duty of certifying a Bill to be a Money Bill ie. one which cannot be delayed in its passage by the House of Lords. Such certificate is conclusive and may not be questioned in any court. In as much as the Act lays down special procedure for the enactment of financial legislation, it bears close comparison with S.152 of the South Africa Act, 1909.

9. The third proposition is .. illustrated .. by Vauxhall Estates and Ellen Street Estates cases.
(In the latter case it was said by Maugham L.J. (1934) 1 K.B. 590 at p.597)

'The Legislature cannot according to our constitution bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier Statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature!

The case is thus direct authority for the repeal by implication by a later Act of the provisions of an earlier Act.

10. Labrador Company v. The Queen (1893) A.C. 103 and the Maori Land Board Case (1941) in which it was followed, - Where a mistake is made in an enactment, the Legislature alone can correct it - ...'illustrate the proposition that all that a court of law can do with an Act of Parliament is to apply it, i.e. to obey and give effect to it.

11. (B) (Colonial Laws Validity Act and Entrenched Sections)

(- Professor Cowen's Essay cited for the contention that the South Africa Act and not the Colonial Laws Validity Act safeguarded these sections formerly and that in South Africa, unlike England, constitutional law prescribed a special manner and

form for certain legislation.)

The answer to the argument with which Professor Cowen supports his contention is, in my opinion, that the Union Parliament could not by the ordinary bicameral procedure amend the rules for legislating unicamerally so long as the Colonial Laws Validity Act applied to the Union, because S.152 of the South Africa Act was contained in a Statute of the United Kingdom Parliament, and the amending Act of the Union Parliament would necessarily have been repugnant to that section. In view of what has been said in the earlier part of this opinion about the conclusive character of an Act of Parliament, no court, it is submitted could refuse to recognise any enactment which was certified to be an Act of the Union Parliament; having recognised the Act, the doctrine of repugnancy would have come into operation, so long as the Colonial Laws Validity Act applied to the Union.

12. Statute of Westminster

Section 2 (1) is intended to remove altogether the doctrine of repugnancy and 2 (2) makes it clear that the old doctrine of repugnancy to the common law is not revived. The power given in the latter portion of the subsection to repeal Imperial Acts in their application to the Union is not 'mere surplusage' but necessary to safeguard the freedom of Dominion Parliaments since S4 provides for future legislation of the United Kingdom to apply to a Dominion at its request and consent (and, despite the view expressed in Ndlwana's case that freedom once conferred cannot be revoked, it 'remains theoretically true that the United Kingdom Parliament could pass legislation for a Dominion (British Coal Corporation v. The King)

13. For the foregoing reasons I am of opinion that the Union Parliament has enjoyed since 1931 complete power to amend S 152 of the South Africa Act. It is clear that no express amendment has been enacted to remove the requirement of unicameral procedure. The question, therefore, is limited to whether Act No. 46 of 1951 is to be interpreted as amending that procedure by necessary implication. In this connection, the English decisions cited in paragraph 9 of this Opinion establish that Parliament cannot bind itself as to the form of subse-

quent legislation and therefore the provisions of a later Act so far as they are inconsistent with those of an earlier Act, must prevail; see especially Ellen Street Estates Company v. Minister of Health (1934) 1.K.B.590. It seems to me that the distinction which is stressed by Professor Cowen between the power of a Parliament to pass substantive law, and the power to prescribe how substantive law shall be enacted is untenable; both can be amended expressly or by implication by subsequent legislation of a sovereign Parliament. The Parliament Act 1949 which amends the process of enactment of ordinary Bills prescribed by the Parliament Act 1911 is an instance of the exercise by the United Kingdom Parliament of the power to amend expressly the law relating to the procedure for legislating in Parliament.

14. It may be argued that the South Africa Act, 1909, since it contains the Constitution of the Union, should be interpreted differently from other Acts, in the same way the legislation enacting federal constitutions has sometimes in the past been interpreted in such a way as to reject as unconstitutional, laws which would be valid if the enactments had been interpreted in accordance with ordinary principles. This method of interpretation was, however, rejected as far back as 1920 by the High Court of Australia in the well known Engineers' Case - Associated Society of Engineers v. Adelaide Steamship Company Limited (1920) 28 C.L.R. 129. It could not in any case be invoked to justify departure from the ordinary principles of interpretation of an Act of the United Kingdom Parliament simply because it contains a unitary constitution.

Again it may be said that precedents from the English courts are inapplicable in construing an enacted constitution because the United Kingdom has no such document. But parts of the Constitution of the United Kingdom have been enacted, and I know of no authority to support the proposition that such enactments can be interpreted differently from any other Acts of Parliament. If a later Act is inconsistent or in conflict with an earlier Act which it does not expressly repeal, the repeal is necessarily implied, even if the Act relates to a matter of constitutional importance. Indeed, the cases cited earlier in this Opinion relate to the

important constitutional principle of compensation for private property compulsorily acquired by the State.

The second proposition which was accepted as law by Wessels J.A. in Krause v. Commissioner of Inland Revenue (1929) A.D. 286 at p. 290 is directly in point if the Statute of Westminster has made it lawful to remove the entrenched provisions in S.152 of the South Africa Act. 'If a later Act of Parliament is inconsistent with the South Africa Act, the court may hold that the later Act impliedly varies such part of the South Africa Act as is inconsistent with the later Act. The Court cannot say that Acts of Parliament must be so interpreted as to conform to the South Africa Act, and that no other interpretation is admissible'.

15. ....It is admitted by the applicants that an Act of the Union Parliament would, under the Statute of Westminster, no longer be ultra vires on the ground of repugnancy to an Act of the United Kingdom Parliament. .... It is also admitted that the Statute of Westminster gave power to the Union Parliament to amend or to repeal any Act of the United Kingdom Parliament in so far as it is part of the law of South Africa. The applicants cannot therefore successfully contend that this power to amend or to repeal is subject to an implied limitation, namely that the Union Parliament cannot alter the rules governing the exercise of legislative power by itself as laid down by the United Kingdom Parliament. On the other hand, it may be urged that the absence in the Statute of Westminster of any express reservations relating to the entrenched sections of the South Africa Act, in contradistinction to the detailed reservations enacted at the request of the three other member states of the Commonwealth, negatives any intention to limit the scope of legislation by the Union Parliament. It was because it was not desired in 1931 to confer any new power to alter e.g. the constitution of New Zealand, which is also a unitary state like South Africa, that Section 8 was included in the Statute of Westminster. There is, of course, no corresponding reservation in the case of South Africa; accordingly the Union Parliament can legislate without restriction on its powers.

16. As to the argument .. that S.2 (2) of the Statute of Westminster did not expressly repeal S.152 of the South Africa Act, it may be conceded that equally the sub-section did not impliedly repeal the latter section. But S.2 (2) enabled the Union Parliament to repeal or to amend by its own Act, any and every Act of the United Kingdom Parliament which then applied and thereafter might be extended to the Union. On this view it is necessary to establish that the amendment of S.152 of the South Africa Act has been made only by implication (see hereon my answer to question B, in paragraphs 12 and 13 above). It is said that the history of the South Africa Act makes it improbable that the United Kingdom Parliament in 1931 intended to upset the basic law of the Union as it was in 1909. The answer to this is that in April 1931, the South African House of Assembly by the express terms of its motion which adopted the clauses proposed for the Statute of Westminster Bill which were subsequently enacted, show that it was fully alive to the fact, as later did the Senate, that as a matter of law the proposed legislation would derogate from the entrenched sections. The word used in the motion which was passed by the House of Assembly on 22nd April, 1931 is 'derogate', and not the technical expressions 'amend' or 'repeal'. This may be regarded as confirming the view that the Statute of Westminster did not change the South Africa Act, but that it made the change possible on the initiative of the Union Parliament acting as a sovereign legislature. If then, Act 46 of 1951 is inconsistent with either S.35 or S.152 of the South Africa Act, 1909, then Act 46 must prevail.

17. ....The Status of the Union Act .. simply declares what has been the law of South Africa since the passing of the Statute of Westminster, although it had not previously been enacted on the South African Statute Book. It is, of course, always possible to argue that the word 'sovereign' in S.2 of the Status Act is an ambiguous term. But the answer to this is that in a court of law there is no ambiguity; it means that whatever Parliament enacts must be accepted as law, and therefore a later enactment, if in conflict with an earlier one, must prevail. It has already been shown by precedents from the United Kingdom that this rule applies whether the law enacted is substantive or procedural.

18. Of the further heads of arguments put forward by the Respondents, it seems to me that the first is a particularly powerful one; namely that Act 46 of 1951 does not disqualify a coloured person from being registered as a voter at an election for members of the House of Assembly. Perhaps the argument could be presented in this form; that Act 46 merely provides for the use of the existing register to secure elections being held for the new constituencies for coloured voters; that there is nothing in the South Africa Act which today entrenches the law relating to electoral divisions, even if S.152 is held to remain in full force; which divisions are therefore alterable by the normal bicameral procedure in the Union Parliament; that Act 46 does not exclude any qualified person who is now on the Register, or to prevent any person who qualifies in future under the existing law from being put on the register; it merely allocates him, as hitherto to a certain division of a single register of voters, as it does the European voters.

19. ....

20. (Reference had been made in the Provincial Division to 'the meaning of Parliament, and whether it can be defined with its functions excluded')

.... In my view the meaning of Parliament in a unitary state in the Commonwealth is the same in South Africa as it is in the United Kingdom. It is sometimes overlooked that the sole concern of the Statute of Westminster was to equate the legislative power of the various States who were parties to the Statute with that exercised by the Parliament at Westminster. Subject to the reservations requested by Canada, Australia, and New Zealand, the Statute placed the member States of the British Commonwealth on an equality as legislating bodies i.e. in the same position as is the United Kingdom Parliament. The fact that these reservations related exclusively to constitutional matters is immaterial. Had they been requested for other matters the position would be the same. So far from defining Parliament with functions excluded, these functions of the Union Parliament though not expressly defined by the Statute of Westminster in the case of that or any other Parliament are confirmed

as being on the same footing as those of the United Kingdom Parliament by S.2. of the Status of the Union Act 1934. No court can query how the United Kingdom Parliament functions, even in the case of the special machinery laid down by the Parliament Act, 1919 and 1949. Thus .. the Union Parliament is only bound by the Sections of the South Africa Act so long as it does not change them, and that it can do by express enactment or necessary implication. ....The Union Parliament cannot ignore the relevant provisions for its procedure as a legislature, but it can repeal them at its will. So far as the entrenched sections are concerned, they ceased to be entrenched so soon as the Union Parliament acquired in 1931 equal powers with the United Kingdom Parliament.

(Paragraph 20 is comment on questions raised by Steyn J. during the hearing of Harris v. Minister of the Interior in the Provincial Division of the Supreme Court)

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3. 'Sovereignty' and the Commonwealth

In addition to Professor D.V. Cowen's pamphlet 'Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act' (Juta. Cape Town 1951) - which deserves priority of mention, summaries of the issues in South Africa have appeared in the Harvard Law Review and the Canadian Bar Review:-

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