The Union Parliament, the Supreme Court, and the "Entrenched Clauses" of the South Africa Act

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The current constitutional crisis in the Union of South Africa, which has seen the judges of the Appellate Division of the Supreme Court locked in combat with Prime Minister Malan and his Nationalist Party Government, has excited a good deal of attention throughout the world, because of the explosive nature of the legislative proposals from which the crisis has arisen. It has also certain special interests for Canadian constitutional lawyers.

In the first place, South Africa, from the time that it became one Union in 1909, has had the problem, like Canada, of the competition within its boundaries of two distinct, sometimes conflicting, and from the long-range viewpoint possibly irreconcilable, "living laws",[1] stemming from the two separate European races by whom the government of the country has been exercised.

Secondly, South Africa, like Canada in 1867, came into existence for international purposes as a self-governing Dominion within the then British Empire; and, with the progressive transformation of the British Empire into a British Commonwealth of Nations, and finally into an un-prefixed Commonwealth, South African jurisprudence has been troubled by those same problems of constitutional theory — revolving around such concepts as "Dominion status" and the "sovereignty of the Parliament at Westminster"— that have been vexing Canadian constitutional

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[1] See generally Ehrlich, Introduction to the Sociology of Law (1913).

lawyers. It is with this particular aspect of the current constitutional crisis in South Africa that the present paper is principally concerned.

As a third point, it might be observed that the conflict between court and legislature in South Africa today is over what amounts to an assertion of a power of judicial review in a country where that power has not generally been recognized to be part of the working institutions of government. This is, in fact, not the first time that direct judicial review has been attempted within the territorial limits of the present Union of South Africa. In the twilight years of the old South African Republic (The Transvaal), Chief Justice J. G. Kotzé of the High Court of the Republic had been engaged in a bitter controversy with the President of the Republic, Paul Kruger, the crisis coming to a head in 1897,[2] when Chief Justice Kotzé openly asserted the existence of a "testing-right" (judicial review) over laws and resolutions passed by the legislature (the Volksraad) of the Republic, and the right of the judges to strike down laws and resolutions as being in conflict with the constitution (the Grondwet). Kotzé had indeed some thirteen years before[3] categorically rejected the notion that any such "testing-right" existed in the judiciary, but relations between President Kruger and his Chief Justice had progressively deteriorated in the interim.[4] President Kruger, however, reacted promptly and decisively to Chief Justice Kotzé's volte-face in 1897, by arranging for the passage through the Volksraad of a law[5] which expressly denied the existence of any "testing-right" in the judiciary, and which went on to require an oath accepting that view from all persons who might be appointed to the bench in the future,[6] and also from all existing members of the bench.[7] Under this law, President Kruger proceeded to force Kotzé from his judi-

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[2] *Brown* v. *Leyds N.O.* (1897), 4 South African Republic, Official Reports, 17.

[3] *McCorkindale* v. *Bok N. O.* (1881-84), 1 South African Republic (Transvaal) Reports 202; but see also *Hess* v. *The State* (1895), 2 South African Republic, Official Reports, 112.

[4] In 1893, Chief Justice Kotzé went so far as to close the High Court altogether in protest against the Volksraad considering a petition of protest against members of the bench, but he reopened the court when the Volksraad on the same day passed resolutions meeting his objections: Note, What the Position of the Judges of the High Court of the South African Republic Should Be (1894), 11 Cape L.J. 176. In the following year, Kotzé went on a public lecture tour through the Transvaal to protest against an order promulgated from the office of the State Attorney, forbidding professional assistance to accused persons at their preliminary examinations: Note, The Chief Justice of the Transvaal and Liberty (1894), 11 Cape L.J. 269.

[5] Law No. 1 of 1897, s. 1.

[6] *Ibid.*, s. 3.

[7] *Ibid.*, s. 4.

cial office,[8] but not without an exchange of personalities between president and chief justice that deserves recording as an example of choice invective.[9] Within a year of Kotzé's humiliating removal from office, however, the causes of both president and ex-chief justice were consumed in the maelstrom of the Boer War (1899-1902), which sent the two Boer Republics in South Africa (The Transvaal and the Orange Free State) into a gallant but disastrous war against Britain.

II. *The South Africa Act, 1909*

The Treaty of Vereeniging, 1902, which marked the formal ending of the Boer War, contained an undertaking by the British government that the military administration of the two defeated Boer republics would be superseded by a civil administration as soon as possible, and that the civil administration would soon be followed by self-government. This was soon realized, and proposals were thereafter increasingly made for a union of the four South African colonies, the Cape Province, Natal, Transvaal and the Orange River. Following resolutions by the legislatures in each of the four colonies, delegates were selected by each colony and these met together in a national convention in 1908, where, after some three months deliberation, a draft constitution was drawn up that was eventually passed by the Parliament of the United Kingdom as the South Africa Act, 1909.[10] The most notable feature of the new constitution was the rejection of the idea of a federal union, which, remembering the form of government adopted for Canada in 1867, might have seemed to have a great deal to offer South Africa, given the presence within South Africa of the two

[8] Chief Justice Kotzé, no mean antagonist, countered the President's threat of dismissal by contending that Law No. 1 of 1897, under which the President purported to act in dismissing him, was invalid, and by announcing that the High Court was adjourned *sine die*. Had his brother justices and the bar stood solidly behind him, Kotzé might still have prevailed; but his colleague, Judge Gregorowski, had no hesitation in accepting the office of Acting Chief Justice created by Kotzé's dismissal, while the bar as a whole seems not to have complied with Kotzé's intimation that the court was adjourned *sine die*. The bar did, however, make a symbolic protest by means of a strongly-worded resolution denouncing the dismissal of the Chief Justice as illegal, Note (1898), 15 Cape L.J. 28.

[9] The Chief Justice publicly denounced the President as an "oily old Chadband"; the President for his part adorned his presidential address, at the swearing-in ceremony after his re-election, by declaring his late Chief Justice to be a lunatic, by suggesting that Kotzé should be captured and placed in a lunatic asylum for proper treatment, and that upon a cure being affected he (the President) would perhaps restore his patient to the Judicial Bench: Note (1898), 15 Cape L.J. 90. In a sublime understatement, it was observed at the time: "Beyond question, both parties, President and Chief Justice, have been guilty of indiscretion": Note (1898), 15 Cape L.J. 91.

[10] 9 Ed. VII, c. 9.

distinct European races (Boer and British), differing basically in language, religion and culture, and located in reasonably distinct geographical areas of the country.

In the end result, however, anxieties over the preservation of internal order against possible disturbances from the native populations, and the accompanying desire also for a single policy on native matters, seem to have weighed very strongly,[11] and the constitution, as finally adopted in the South Africa Act, was a unitary one. It is true that the South Africa Act provided for the creation of Provincial Councils, coinciding in their territorial jurisdiction with the old colonial boundaries;[12] but the powers of these provincial councils were substantially of a local character,[13] and ordinances made by them took effect only when approved by the Governor-General-in-Council,[14] and only in so far as not repugnant to acts of the central or Union Parliament.[15] Certain concessions were, however, made to the ethnic and political differences within the Union. The equality of the English and Dutch languages throughout the Union was specifically provided for.[16] Secondly, special concessions were made with regard to the franchise laws of the Cape Colony. In contrast to the two Boer republics, which had not conceded any right of franchise to the native population,[17] and even to British Natal, which possessed only a very limited native franchise,[18] the franchise laws of the Cape Colony allowed the vote to all male adults possessing certain limited property qualifications.[19] Under this law, a small but nevertheless significant number of native and coloured persons in the Cape Colony had been enabled to obtain suffrage rights. Possible alternatives facing the National Convention in 1908 were to adopt the Cape rule as a general rule for the franchise throughout the Union, or to adhere to the practice followed in the Transvaal and the Orange River, and limit the franchise to the European population. In the end result, and since the Cape Colony refused to surrender the

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[11] Kennedy and Schlosberg, The Law and Custom of the South African Constitution (1935) p. 60.

[12] South Africa Act, 1909, s. 70.

[13] *Ibid.*, s. 85.

[14] *Ibid.*, s. 90.

[15] *Ibid.*, s. 86.

[16] *Ibid.*, s. 137.

[17] Thus, the revised Grondwet of the Transvaal, Law No. 2 of 1896, s. 9: "The People will not permit any equalisation of coloured persons with white inhabitants".

[18] In terms of the Native Franchise Act, 1865, only those natives "exempted" from the operation of native custom and possessing an "exemption certificate" were entitled to vote.

[19] The Cape of Good Hope Constitution, s. 5., Ordinance No. 29 of 1852, as amended.

native franchise rights, an unusual compromise was worked out. The Cape franchise was allowed to remain so far as residents of the Cape were concerned, the settling of the qualifications of residents of the remaining provinces of the Union being left to be determined by the Union Parliament at a later date.[20]

As an additional safeguard to the Cape Province, this special provision on voting rights in that province was "entrenched" in the South Africa Act by section 35:

> (1) Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the Bill 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 Houses of Parliament.
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> (2) No person who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour.

The only other section of the South Africa Act that need concern us at this stage deals with the procedure for amendment of the Act. Section 152 provides that "Parliament may by law repeal or alter any of the provisions of this Act", but it contains an important proviso:

> No repeal or alteration of the provisions contained in this section... or in [section] thirty-five ... 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. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

III. *South Africa and the Evolution of Dominion Status*

In its historical origins the South African constitution resulted from the deliberations of the Convention of 1908, composed of delegates from each of the four colonies in South Africa. Juridically speaking, however, the South African constitution stems from an Act of the United Kingdom Parliament, the South Africa Act of 1909, thus calling attention to the fact that at least for certain purposes South Africa, as at 1909, was still something less than fully sovereign.

[20] South Africa Act, 1909, s. 35.

Thus, although the right of appeal, which had formerly existed to the Privy Council from the courts of the South African colonies, as it existed from all British colonies, was abolished under the South Africa Act,[21] the act nevertheless preserved the right of the Privy Council to grant special leave to appeal from decisions of the Appellate Division of the Supreme Court of South Africa.[22] The Privy Council, however, adopted the practice of granting leave to appeal from the Supreme Court of South Africa only in cases raising "serious" constitutional issues.[23] More important was the effect of the Colonial Laws Validity Act, 1865.[24] It is true that by the time of the passage of the South Africa Act the powers of the United Kingdom Parliament, under section 2 of the Colonial Laws Validity Act,[25] to pass laws extending to those of the self-governing colonies that had grown into the status of Dominions[26] had become largely of academic interest, in view of the rapidly developing practices (or "conventions" of the constitution, as Dicey called them[27]) governing the relations of the United Kingdom to the Dominions. But, in terms of formal juristic theory, since the constitutional instruments of all the self-governing Dominions originated in acts of the United Kingdom Parliament, the position and powers of the United Kingdom, in terms of section 2 of the Colonial Laws Validity Act, were clear and unqualified. Not without significance, too, was the "manner and form" limitation in section 5 of the Colonial Laws Validity Act,[28] as to the powers of colonial legislatures to repeal or amend their constitutional instruments.

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[21] South Africa Act, 1909, s. 106.

[22] This special provision has now itself been abolished by the Union Parliament: Privy Council Appeals Act, No. 16 of 1950. For a discussion of the future binding force of Privy Council decisions, now that the Privy Council Appeals Act has been passed, see Welsh, the Privy Council Appeals Act, 1950 (1950), 67 S.A.L.J. 227.

[23] *Whittaker* v. *Durban Corporation* (1921), 90 L.J.P.C. 119; *Beier* v. *Minister of Interior* (1948), 3 S.A.L.R. 430 (AD).

[24] 28 and 29 Vict., c. 63.

[25] Colonial Laws Validity Act, 1865, s. 2: "Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament [*i.e.*, the United Kingdom Parliament] extending to the colony to which such law may relate . . . shall be read subject to such Act and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative".

[26] Canada, Australia, New Zealand, South Africa.

[27] See generally, Dicey, Law of the Constitution (1st ed., 1885).

[28] Colonial Laws Validity Act, 1865, s. 5: "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 such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament [*i.e.*, the United Kingdom Parliament] . . . or colonial law for the time being in force in the said colony".

The marked changes that had in fact occurred in the relations of the United Kingdom to the self-governing Dominions, even since the passage of the South Africa Act, were recognized by the Imperial Conference of 1926, which in its report declared:[29]

> They [the Dominions] are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.... Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever.... Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our inter-Imperial relations.

The Imperial Conference of 1926 had recommended[30] that a committee representative of the United Kingdom and the Dominions should be set up to make recommendations on the relationship between the United Kingdom and the Dominions, and as a result of these and further inter-Dominion deliberations, the Statute of Westminster was passed by the United Kingdom Parliament in 1931.[31]

From the viewpoint of South Africa, the three significant features of the Statute of Westminster, in terms of formal juristic theory, were, first, the repeal of the Colonial Laws Validity Act, 1865, so far as the Dominions were concerned;[32] secondly, the provision that no laws passed by the Parliament of a Dominion should be void on the ground of repugnancy to the law of England, and that the powers of the Parliament of a Dominion should include the power to repeal or amend any act of the United Kingdom Parliament in so far as that act was part of the law of the Dominion;[33] and, thirdly, the absence of any provision safeguarding the constitution of South Africa against repeal, amendment or alteration otherwise than in accordance with the law existing before the commencement of the Statute of Westminster, in contrast

[29] Imperial Conference, 1926, Summary of Proceedings, pp. 14-15: Status of Great Britain and the Dominions.

[30] *Ibid.*, pp. 15-20: Relations between the Various Parts of the British Empire: Operation of Dominion Legislation.

[31] Statute of Westminster, 1931, 22 Geo. V, c. 4.

[32] *Ibid.*, s. 2(1): "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".

[33] *Ibid.*, s. 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 insofar as the same is part of the law of the Dominion".

to the special protection in this respect accorded under the statute to the constitutions of Canada, Australia and New Zealand.[34]

As to the first point, the repeal of the Colonial Laws Validity Act so far as the Dominions were concerned, this assumed especial importance for South Africa almost immediately, since the Privy Council, in a decision given barely a year after the passage of the Statute of Westminster, showed itself disposed to treat very strictly the requirement[35] that, in amending their constitutions, colonial legislatures should conform to the "manner and form" required by existing law in force in the colony.[36]

When the report of the 1929 committee of the Imperial Conference was discussed in the Union Parliament, it was stated from the government benches that the Union Parliament had a moral obligation to respect the "entrenched" clauses of the South Africa Act, and a resolution was passed by the House of Assembly[37] declaring that these clauses would be respected both in the spirit and in the letter of the South Africa Act as passed in 1909.

In 1934, the Union Parliament passed the Status of the Union Act, which, after reciting declarations made by the Imperial Conferences of 1926 and 1930, and also the passage by the United Kingdom Parliament of the Statute of Westminster in 1931, expressly declared[38] that "The Parliament of the Union shall be the sovereign legislative power in and over the Union". The Status of the Union Act then went on to re-enact the Statute of Westminster in the form of an act of the Union Parliament, to be construed accordingly.[39] It is of interest that, while the Status of the Union Bill was being discussed in the Union Parliament, the Speaker of the House took the opportunity of stating that any amendment of the "entrenched" clauses of the South Africa Act[40] would have to follow the procedure laid down in the South Africa Act. Although it is clear that the Speaker's rulings are not legally binding on himself or upon subsequent parliaments, an authoritative

[34] *Ibid.*, s. 7(1): "Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder".
Ibid., s. 8: "Nothing in this Act shall be deemed to confer any power to repeal or alter 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".

[35] Colonial Laws Validity Act, 1865, s. 5.

[36] *Attorney-General for New South Wales* v. *Trethowan*, [1932] A.C. 526.

[37] House of Assembly Debates, April 22nd, 1931. Cited in Kennedy and Schlosberg, The Law and Custom of the South African Constitution (1935) p. 103.

[38] Status of the Union Act, No. 69 of 1934, s. 2.

[39] *Ibid.*, s. 3.

[40] House of Assembly Debates, April 25th, 1934. Cited in Kennedy and Schlosberg, *op. cit.*, p. 103.

expression of opinion of this nature is important as evidence pointing to the development of a constitutional convention that the requirements for amendment of the South Africa Act contained in the "entrenched" clauses of the Act should be observed.

What was the effect of the Status of the Union Act, 1934, upon the relationship of South Africa to the United Kingdom? From the orthodox legal viewpoint, if the Statute of Westminster created Dominion status, that is, if it was in itself "constitutive" of a change in legal relationship between the United Kingdom and the Dominions, then clearly the Status of the Union Act, in so far as it sought to go beyond the Statute of Westminster,[41] would be invalid and ineffective. If, however, the Statute of Westminster was merely "declaratory" of fundamental changes that had already occurred in the relationship of the United Kingdom to the Dominions, especially since World War I[42] — that is to say, if it merely enacted into positive law form already existing "conventions" of inter-Dominion constitutional law — then the Status of the Union Act would amount to the effective establishment of a local root for South African law and jurisdiction, in place of the Imperial root, and, as a further consequence, by virtue of the Status of the Union Act's provisions, the equation of the Union Parliament with the sovereign, legally unlimited Parliament of the United Kingdom.[43]

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[41] Professor Berriedale Keith, for example (1934), 16 Journ. Comp. Leg. 290, seemed to think that the Status of the Union Act did seek to go beyond the Statute of Westminster.

[42] See van Themaat, The Equality of Status of the Dominions and the Sovereignty of the British Parliament (1933), 15 Journ. Comp. Leg. 47, at p. 53: "If . . . we do accept the principle that there are legal limitations to the power of the British Parliament, there is nothing startling in the clause [s. 4 of the Statute of Westminster]. The British Parliament then merely made a declaratory Act concerning the legal limitations to its own power."

[43] See especially Latham, The Law and the Commonwealth (published in Hancock, Survey of British Commonwealth Affairs, 1937, Vol. 1) p. 533. Much of the contemporary literature is cluttered with undertones of Austinian notions of sovereignty, *e.g.*, the assertion that since the constitutions of all the Dominions, juristically speaking, have their origins in acts of the United Kingdom Parliament, they could in theory be amended or abolished by a simple act of the United Kingdom Parliament. Thus Kennedy and Schlosberg, *op. cit.*, p. 94, though conceding that the "conventions" of inter-Dominion constitutional law would prevent any such enactment from being passed by the United Kingdom Parliament, nevertheless contend that "*legally* the British Parliament is supreme over the King's dominions and it cannot divest itself of that supremacy". Similiter, Pollak, The Legislative Competence of the Union Parliament (1931), 48 S.A.L.J. 269, at p. 286: ". . . legally the proposed statute [*i.e.*, the Statute of Westminster] is nugatory, for the British Parliament being a sovereign body cannot bind itself. There will in law be nothing to prevent the British Parliament from legislating for the Union without its consent in spite of the provisions of the proposed statute. A perusal of the first chapter of Dicey's famous book [Law of the Constitution] will convince everyone of the truth of this statement."

The general view of the text-writers[44] after the Statute of Westminster, 1931, and even before the Status of the Union Act, 1934, was that the Union Parliament was no longer subject to the restrictions contained in the "entrenched sections" of the South Africa Act. Thus Professor Wheare, writing in 1933, thought that with the repeal of the Colonial Laws Validity Act in so far as South Africa was concerned, it would be legally possible for the Union Parliament to repeal the South Africa Act as a whole and to replace it with an Act containing none of the entrenched clauses.[45]

Again, in 1935, Professor Berriedale Keith concluded that, since the Union Parliament was no longer subject to the restrictions of the Colonial Laws Validity Act, it might be held to be in the same position as the Imperial Parliament, so that the restrictions in the entrenched clauses had no legal effect.[46]

Writing in 1937, Professor Ivor Jennings and C. M. Young[47] expressed it as general opinion that the Union Parliament had power under section 2 of the Statute of Westminster to repeal section 152 of the South Africa Act, and also to amend any other provision of the South Africa Act, without following the special procedure laid down by section 152.[48] The authors' view was dependent substantially upon the absence for South Africa of any special provision in the Statute of Westminster safeguarding the South Africa Act from repeal or amendment by the Union Parlia-

[44] One of the more interesting features of South African constitutional jurisprudence, in comparison with that of the United Kingdom and the other Commonwealth countries, and even of the United States, is the degree of respect accorded by the judges to the views of the text-writers. See, for example, Chief Justice Kotzé's judgment in *McCorkindale* v. *Bok N. O.* (1881-84), 1 South African Republic (Transvaal) Reports 202; and also Chief Justice Centlivres' decision in 1952 in *Harris* v. *Minister of the Interior and Electoral Officer (Cape)* (*infra*), which considers, inter alia, the opinions of the text-writers here cited. No doubt the attention given to the text-writers is a result of the presence in South Africa of the Roman-Dutch civil law side by side with the English common law.

[45] K. C. Wheare, The Statute of Westminster, 1931, p. 108.

[46] Keith, Governments of the British Empire (1935) p. 47. See also, Pollak, *op. cit. supra*, p. 282: ". . . it is the existence of the Colonial Laws Validity Act which alone gives legal efficacy to the proviso contained in s. 152 of the South Africa Act. Once repeal the Colonial Laws Validity Act and the Union Parliament can, it is submitted, validly repeal or alter any of the entrenched clauses of the South Africa Act without observing the requirements of s. 152." See also Wade, Introduction to Dicey, Law of the Constitution (9th ed., 1939), pp. li-liii.

[47] Constitutional Laws of the British Empire (1937) p. 265.

[48] See also Jennings, The Statute of Westminster and Appeals to the Privy Council (1936), 52 L.Q. Rev. 173, at p. 187: "The entrenched clauses of the South Africa Act, 1909 . . . must be regarded as part of a 'gentlemen's agreement' and the Status of the Union Act, 1934, must be regarded as in all respects valid. Subject to s. 4 of the Statute of Westminster, the Oireachtas [the Irish Free State Legislature] and the Union Parliament are sovereign legislatures. They can even repeal the Statute of Westminster."

ment, in marked contrast to the special saving in sections 7 and 8 of the Statute of Westminster as to the constitutions of Canada, Australia and New Zealand.[49]

This was a view that was aided considerably by the decision of the Privy Council in 1935, in the case of *Moore* v. *Attorney-General for the Irish Free State*,[50] that the Irish Free State legislature could now amend the Irish constitution, since the position of the Irish Free State under the Statute of Westminster was identical with that of South Africa, in that there was no saving clause against repeal or amendment of the constitution.[51]

IV. *The Sovereignty of the Union Parliament*

In *Ndlwana* v. *Hofmeyr*,[52] in 1937, the question of the effect of the Statute of Westminster upon the entrenched sections of the South Africa Act was considered in the first instance by the Cape Provincial Division of the Supreme Court of South Africa, and then by the Appellate Division of the Supreme Court of South Africa, on appeal. Under the Representation of Natives Act,[53] it had been provided[54] that a register, to be called the Cape Native

[49] Compare also, Kennedy and Schlosberg, *op. cit.*, p. 100: "The effect of this enactment [the Statute of Westminster] appears to be that the Union parliament now possesses power to pass legislation which is in conflict with legislation of the British parliament applicable to the Union. If this is so, it means that 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 South African courts would no longer be able to declare such legislation invalid, that is, repugnant within the meaning of the Colonial Laws Validity Act, because that act would be no longer in force. The constitutions of the other dominions are clearly safeguarded, but the constitution of the Union appears to have been made as flexible, as uncontrolled, as easy to amend in every detail as the constitution of the United Kingdom."

[50] [1935] A.C. 484.

[51] The ratio of the decision in *Moore* v. *Attorney-General for the Irish Free State* is contained in the three propositions laid down by the Lord Chancellor, Viscount Sankey (at p. 498):

"1. The Treaty [*i.e.*, the Anglo-Irish Treaty of 1921] and the Constituent Act [of the Irish Parliament] respectively form parts of the statute law of the United Kingdon, each of them being parts of an Imperial Act.

"2. Before the passing of the Statute of Westminster, it was not competent for the Irish Free State Parliament to pass an Act abrogating the Treaty, because the Colonial Laws Validity Act forbade a Dominion Legislature to pass a law repugnant to an Imperial Act.

"3. The effect of the Statute of Westminster was to remove the fetter which lay upon the Irish Free State Legislature by reason of the Colonial Laws Validity Act. That Legislature can now pass acts repugnant to an Imperial Act. In this case they have done so."

For a further discussion as to the relevance of the decision in *Moore* v. *Attorney General for the Irish Free State*, for South African constitutional law, see *infra*.

[52] [1937] A.D. 229.

[53] Act No. 12, 1936.

[54] *Ibid.*, s. 7(1).

Voters' Roll, should be compiled which would include the names of natives then included in the lists of persons qualified to vote in the Cape Province at elections of members of the Union Parliament. The same act provided[55] that the names of all persons included in the Cape Native Voters' Roll should be removed from every other list of persons qualified to vote at elections of members of the Union Parliament or of a Provincial Council. The Representation of Natives Act was challenged on the interesting ground that, although it had been passed by a joint sitting of the two Houses of the Union Parliament in terms of section 35 of the South Africa Act, it was not such a law as is contemplated by section 35. In the Cape Provincial Division, speaking for a bench comprising Judges Sutton and Centlivres in addition to himself, Judge-President Van Zyl had little difficulty in disposing of this objection, it being clear[56] that the real object of the Act was to disqualify natives in the Cape Province from being in future included in the same voters lists with other voters and from exercising the franchise with other voters in the ordinary constituencies in the province. Judge-President Van Zyl, however, went beyond this narrower holding and contended that the effect of the passing of the Statute of Westminster had been to withdraw from the Union the sovereignty of the Parliament of the United Kingdom and to make the Union Parliament the sovereign legislature in the Union with power to repeal or amend any British Act in so far as it was part of the law of the Union. Quoting with approval the decision of the Privy Council in *Moore* v. *Attorney-General for the Irish Free State*,[57] the Judge-President went on to say that the sovereignty conferred on the Union Parliament by the Statute of Westminster had been accepted by it in the Status of the Union Act, 1934, under section 3 of which the relevant portions of the Statute of Westminster were now deemed to be an act of Parliament of the Union. Any fetters which by reason of the Colonial Laws Validity Act lay upon the power of the Union legislature to alter or to repeal any of the provisions of the South Africa Act had now been removed.[58] As to the entrenched provisions of the South Africa Act, these still remained on the statute book, and, as Judge-President Van Zyl felt, this might possibly be due to a realization of the moral obligations attached to the retention of these provisions, which were purely South African in character

[55] *Ibid.*, s. 7(4).
[56] [1937] A.D. 229, at p. 232.
[57] [1935] A.C. 484.
[58] [1937] A.D. 229, at p. 230.

and had had their origin in an agreement come to by the colonies now constituting the Union of South Africa.[59]

But upon the appeal to the Appellate Division of the Supreme Court from the decision of the Cape Provincial Division, Acting Chief Justice Stratford had no qualifications to make. In reply to the contention that the act of 1936, being passed by a joint sitting of the two houses, was not an act of Parliament,[60] he preferred to treat the question in the first instance as one of proof of an act of Parliament before a court of law:

> 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.[61] In the case of subordinate legislative bodies, Courts can of course be invoked to see that a particular enactment does not exceed the limited powers conferred. 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.

Acting Chief Justice Stratford continued:

> The question then 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:[62] 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.[63]

V. *The Current Crisis — The Harris Case Decision*

The current crisis in South Africa arose from the introduction by the Malan government, and the subsequent passage by the Union Parliament, of the Separate Representation of Voters Act, 1951.

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[59] *Ibid.*, pp. 230-1.

[60] *Ibid.*, p. 237.

[61] In effect, Acting Chief Justice Stratford treated the case as one appropriate for the application of the rule, stemming from *Pylkington's* case (Y.B. 33 Hen. VI 17 pl. 8) that an Act, approved by King, Lords and Commons, and duly enrolled, is conclusive upon the courts. Compare the operation in the United States of the "enrolled bill rule", in effect making judicially noncognisable constitutional provisions regulating legislative mechanics.

See especially Lloyd, Pylkington's Case and its Successors (1920), 69 U. of Pa. L. Rev. 20; Dodd, Judicially Non-Enforcible Provisions of Constitutions (1931), 80 U. of Pa. L. Rev. 54.

[62] The emphasis placed by Stratford A.C.J. upon the three constituent elements of Parliament was apparently necessary to enable him to distinguish the instance quoted by Dicey (Dicey, The Law of the Constitution (9th ed.) p. 56) of a resolution passed by only one of the Houses of Parliament, which, in Dicey's opinion, would not be binding on the courts.

[63] [1937] A.D. 229, at p. 238.

The object of this act, as its preamble declared, was, *inter alia*, "To make provision for the separate representation in Parliament and in the Provincial Council of the Province of the Cape of Good Hope of 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".[64] The actual plan of the bill, as introduced by the Minister of the Interior, was to remove the coloured voters from the normal electoral rolls in the Cape Province, to place them on a separate roll, and to allow them to vote for four special representatives.[65]

When the bill was sought to be introduced into the House on March 8th, 1951, the Nationalist Government proceeded on the basis that it could become law in the same way as any ordinary statute, that is to say, by passage by a simple majority in both Houses of Parliament, sitting separately. The leader of the Opposition, Hon. J. G. N. Strauss, leader of the United Party, thereupon raised as a point of order for Mr. Speaker's decision:

> Whether the proposed Bill does not in terms of S.35 and/or S. 152 of the South Africa Act, require to be passed by a Joint Sitting of both Houses of Parliament . . . in that it embodies as a principle thereof, provisions which—
>
> (i) Seek to disqualify persons in the Province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of

[64] As the Minister for the Interior, Dr. the Hon. T. E. Dönges, acknowledged in introducing the bill in Parliament, the bill constituted part of the government's apartheid policy. There were 9,000,000 natives in South Africa; 1,000,000 coloured (persons of mixed blood); 300,000 Indians; and about 2,275,000 whites. Ever since the introduction of representative government in South Africa, the Minister continued, the fear of political domination by the non-Europeans had hung like a dark cloud over the country. Efforts had been made by responsible persons to tone down that danger in a direct fashion, as in the Orange Free State and the Transvaal. The coloured vote in the Cape, in the Minister's opinion, had always been a sham and fraud. During election time their vote had been canvassed in an improper manner and promises were made which, after the elections, were completely forgotten. (32 Journal of the Parliaments of the Commonwealth 601, October, 1951).

[65] The ratio between European and coloured representatives in the House of Assembly would thereby have become 150 to 4. Although, as an opposition member, Mr. Davis pointed out in the House, it was true that of the 1,030,000 coloured persons in South Africa, only about 50,000 had a vote, nevertheless, because of their concentration in the Cape Colony, the coloured voters were able to take part in the election of some 55 members to the House, and indeed in 25 constituencies their vote enabled them to have a substantial say in the final outcome (*ibid.*, p. 607). In a narrowly divided House, and with constituencies returning members by only small majorities, the position was such that the coloured voters in the Cape Province could effectively be the arbiters between the Nationalist Government and the Opposition (United) Party, a fact which Minister of the Interior Dönges expressly recognized in the debate in the House of Assembly (*ibid.*, p. 602). Indeed, the Nationalist Government could reasonably expect to stabilise its small majority in the lower House, if the coloured voters could be removed from the normal electoral rolls, since it seems agreed that the coloured vote overwhelmingly favoured the Opposition (United) Party.

Good Hope at the establishment of the Union are or may become capable of being registered as voters from being so registered in the Province of the Cape of Good Hope by reason of their race and colour only.

(ii) Seek to remove from the Register persons registered as voters in the Cape of Good Hope and Natal by reason only of a disqualification based on race or colour, thereby infringing the provisions of Sub-section (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.[66]

This point of order was, however, rejected by the Speaker of the House of Assembly[67] on the score that "any doubts as to Parliament being unfettered in its procedure" had been finally dispelled by the judgment of the Appellate Division of the Supreme Court in 1937.[68]

The bill thereupon was quickly passed by both houses of the Union Parliament, and was at once challenged in the Supreme Court of South Africa. The decision of the Appellate Division of the Supreme Court[69] was given by Chief Justice Centlivres. He had been a member of the Cape Provincial Division of the Supreme Court at the time of *Ndlwana's* case in 1937, when he concurred in the opinion handed down by Judge-President Van Zyl of the Cape Provincial Division, which later was confirmed on appeal by the Appellate Division of the Supreme Court of South Africa.

The central question which Chief Justice Centlivres felt it necessary to consider in the present case was the effect of the Statute of Westminster upon the "entrenched provisions" of the

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[66] 32 Journal of the Parliaments of the Commonwealth, pp. 341-2, July, 1951. The leader of the opposition in fact submitted that the principle was common to both English and Roman-Dutch Law that no Parliament created by a written instrument could legislate "in a manner contrary to its own provisions, its fundamental law". In effect, the leader of the opposition conceded, South Africa was a sovereign independent state, the Union Parliament was a sovereign Parliament, and the entrenched sections of the South Africa Act could be repealed by Parliament, but only, he contended, "when the constituent elements are assembled for that purpose in accordance with the procedure prescribed". (*ibid.*, p. 344)

[67] Hon. J. H. Conradie, Afrikaner Party, 32 Journal of the Parliaments of the Commonwealth, p. 347, July, 1951.

[68] *Ndlwana* v. *Hofmeyr*, [1937] A.D. 229.

[69] *Harris* v. *Minister of the Interior and Electoral Officer (Cape)*, [1952] A.D. I am indebted to the South African Embassy, Washington, D.C., for supplying me with a copy of the judgment in *Harris* v. *Minister of the Interior and Electoral Officer (Cape)*. At the time of going to press, the judgment has not yet been published in the South African Law Reports; but it has recently appeared in the Times Law Reports, as *Harris and Others* v. *Dönges and Another*, [1952] 1 T.L.R. 1245.

South Africa Act. It will be remembered that section 2(2) of the Statute of Westminster had provided that no law made by the "Parliament of a Dominion" should be void or inoperative on the ground of repugnancy to the provisions of any act of the Parliament of the United Kingdom, and further that the powers of the "Parliament of a Dominion" should include the power to repeal or amend any act of the United Kingdom Parliament in so far as it was part of the law of the Dominion. Since the South Africa Act itself was an act of the United Kingdom Parliament that was part of the law of the Dominion of South Africa, did section 2(2) of the Statute of Westminster allow the Union Parliament to pass an Act repugnant to sections 35 and 152, or even directly to repeal or amend sections 35 and 152? Answering this question, the Chief Justice was not disposed to think that section 2(2) of the Statute of Westminster had resulted in any modification whatever of sections 35 and 152 of the South Africa Act. The words "Parliament of a Dominion" in the Statute of Westminster, in his view, must be read for the Union of South Africa in the light of the South Africa Act, as meaning *Parliament sitting either bicamerally or unicamerally in accordance with the requirements of the South Africa Act.*

Interesting too was his handling of the repeal by section 2(1) of the Statute of Westminster, so far as Parliaments of the Dominions were concerned, of the Colonial Laws Validity Act, 1865. With regard to section 2 of the Colonial Laws Validity Act and its striking down of colonial laws on the score of repugnancy to United Kingdom Acts, he pointed out that since any repeal or alteration of the South Africa Act by the Union Parliament in terms of section 152 of that act was necessarily itself repugnant to the provisions so repealed or altered and since such repugnancy was specifically authorised by the South Africa Act (itself an act of the United Kingdom Parliament), section 2 of the Colonial Laws Validity Act had therefore never had any application to a repeal or alteration of the South Africa Act. As to section 5 of the Colonial Laws Validity Act, Chief Justice Centlivres dismissed this as no more than "power given to the Union Parliament to bind a subsequent Union Parliament to follow a prescribed procedure in amending specified provisions of the Union Constitution", a power, as he asserted, that was never exercised by the Union Parliament before the Statute of Westminster. But section 5 of the Colonial Laws Validity Act concedes to representative colonial legislatures "full power respecting the constitution, powers, and procedure of such legislature", provided only that any

laws on these subjects be passed in such "manner and form" as may from time to time be required by any act of Parliament, United Kingdom or colonial, in force in the colony. The Privy Council decision in *Attorney-General for New South Wales* v. *Trethowan*[70] established that where the Colonial Laws Validity Act was still in force for a particular colony, the "manner and form" requirement would be applied most vigorously by the judges to measures passed to amend or repeal the constitution of that colony. It might be argued, and this indeed seems to have been the general opinion of the text-writers,[71] that if the "manner and form" requirement is binding in the case of those colonial legislatures with respect to whom the Colonial Laws Validity Act is still in force, it no longer applies to those legislatures[72] with respect to whom the Colonial Laws Validity Act has now been abolished by the Statute of Westminster. But the Chief Justice did not find it necessary to consider this argument.[73]

Chief Justice Centlivres also felt little difficulty in distinguishing *Moore* v. *Attorney-General for the Irish Free State*.[74] Before the Statute of Westminster, he contended, the Irish Parliament's powers of amendment of the constitution, though internally unlimited, were limited by the terms of the Anglo-Irish Treaty of 1921, which had the force of law under the two United Kingdom acts of 1922. That was an external limitation resting only upon the inviolability of United Kingdom statutes at the hands of colonial legislatures, and it disappeared when that inviolability was

[70] [1932] A.C. 526.

[71] *Supra.*

[72] That is, the Parliaments of the Dominions.

[73] The decision in *Trethowan's* case itself has been subject to very strong criticism for its necessary consequence that a transient legislative majority can bind its successor (see Friedmann, Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change (1950), 24 Aust. L.J. 103). In *Trethowan's* case, a retiring Conservative government in the State of New South Wales, to protect permanently its majority in a nominee upper house, passed (by a simple Act of Parliament, as was all that was then necessary) a constitutional amendment to the effect that no measure to abolish the upper house should become law until it was submitted to and approved by a popular referendum, and that the same proviso should apply to any measure designed to repeal this provision itself. The referendum proviso was upheld by the High Court of Australia (1931), 44 C.L.R. 394, and by the Privy Council on appeal from the High Court, [1932] A.C. 526, as a "manner and form" requirement binding upon any future attempt at constitutional amendment on this point. Mr. Justice McTiernan of the High Court of Australia, in dissenting from the judgment given by the High Court majority, drew a distinction between a requirement as to "manner and form", which, in his view, must be followed by the legislature, and a requirement as to substance, to which no legislative majority could bind its successors. Friedmann, *op. cit.*, in criticising the High Court and Privy Council's holding, prefers the McTiernan test as a necessary distinction to be made by the courts, though disagreeing with McTiernan over its application in the instant case.

[74] [1935] A.C. 484.

removed in the case of the Dominions by the Statute of Westminster. The Chief Justice did not think that *Moore's* case added anything so far as South Africa was concerned, since the Union Parliament's powers to amend the South Africa Act had never been limited externally by the Colonial Laws Validity Act, but only internally by the necessity of conforming to any requirements imposed by sections 35 and 152. In effect, then, as the basis of his distinguishing of the *Moore* case, he limited its significance to the narrow holding that by the passage of the Statute of Westminster the United Kingdom Parliament had removed certain external limitations to the Irish Parliament's amending of the constitution. In the same vein, he now directed his attention to the question of the efficacy of the declaration in the Status of the Union Act, 1934,[75] as passed by the Union Parliament, that "the Parliament of the Union shall be the sovereign legislative power in and over the Union". Since the Statute of Westminster did not itself provide for any repeal or modification of the entrenched clauses of the South Africa Act, the Chief Justice thought, then those provisions clearly remained intact after the statute was passed, and the Union Parliament could not by means of an act like the Status of the Union Act, passed bicamerally, repeal or modify the entrenched clauses.

When Chief Justice Centlivres came to a consideration of the saving clauses in sections 7 and 8 of the Statute of Westminster, safeguarding the constitutions of Canada, Australia and New Zealand from repeal, amendment or alteration otherwise than in accordance with the law existing before the Statute of Westminster, the question for decision was whether the absence of such a saving clause for the Union of South Africa meant that the Union Parliament was now no longer limited in its powers of repealing or amending the South Africa Act. But such clauses as sections 7 and 8 of the Statute of Westminster, Centlivres suggested, were sometimes inserted *ex majori cautela;* it was often necessary to quiet any fear there might be that the language used by the legislature might be misconstrued. This, he implied, was in fact the case for sections 7 and 8 of the Statute of Westminster; and it followed, therefore, that there was no significance in the absence of just such a provision for South Africa.

The Supreme Court of South Africa's decision in *Ndlwana's* case was, however, in his considered view, a major hurdle to be overcome by the present court in arriving at its decision. Indeed, the Chief Justice felt it necessary to preface his opinion with a

[75] Status of the Union Act, 1934, s. 2.

lengthy consideration of the South African court's attitude towards its previous decisions, and in particular the question whether the court was governed by the rule of stare decisis.

The rule that the House of Lords, the highest appellate court in England, is bound by its own decisions, laid down in the *London Tramways* case,[76] has always been somewhat formal in nature, because of the widespread practice of the House of Lords in distinguishing (as distinct from over-ruling) previous cases. Nevertheless, Chief Justice Centlivres approached the whole question somewhat cautiously. "It is true", as Judge Watermeyer had said in *Rex* v. *Nxumalo*,[77] "that as a general rule this Court [that is, the Supreme Court of South Africa] is bound to follow its own decisions. But to that rule there are certain recognised exceptions." On surveying the whole body of previous decisions of the Supreme Court[78] the Chief Justice concluded that the Supreme Court of South Africa may depart from a previous decision of its own "when it is clear that the decision is wrong";[79] or where a decision has been arrived at "on some manifest oversight or misunderstanding, that is, that there has been something in the nature of a palpable mistake".[80] In *Rex* v. *Faithfull and Gray*[81] Judge Solomon had been satisfied that the principle of stare decisis was no more than "a good rule to follow", and that "in ordinary circumstances"; in particular Judge Solomon had thought that "where a court is satisfied that its previous decision was wrong, and more particularly where the point was not argued", it should over-rule that decision.

Having thus disposed to his own satisfaction of the question whether the court was bound by its own decisions, Chief Justice Centlivres now turned back to *Ndlwana's* case. In *Ndlwana's* case, the court had observed,[82] "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

[76] *London Street Tramways Company* v. *London County Council*, [1898] A.C. 375.

[77] [1939] A.D. 580, at p. 586.

[78] Somewhat ironically, also, Chief Justice Centlivres fell back upon ex-Chief Justice Kotzé (Sir John Kotzé, Judicial Precedent (1917), 34 S.A.L.J. 280., as authority for the proposition that the practice of Roman-Dutch law was far removed from the House of Lords rule of the binding force of stare decisis. Kotzé himself, it will be remembered, had brought on the Transvaal judicial crisis of the 1890's by directly over-ruling his own previous decision that there was no "testing power" in the judges of the Transvaal.

[79] *Collett* v. *Priest*, [1931] A.D. 290.

[80] *Bloemfontein Town Council* v. *Richter*, [1938] A.D. 195, at p. 232.

[81] [1907] T.S. 1077.

[82] [1937] A.D. 229, at p. 237.

by a Court of law." The Chief Justice assumed that no exception could be taken to this statement of the law as regards what purported to be acts of the British Parliament, that is, acts which purported to have been enacted by the King by and with the advice and consent of the Lords and Commons. Had the act in the present case 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 might be, he thought, that courts of law would have been precluded from inquiring whether the statement was correct;[83] but the act stated 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 the Supreme Court, bore the certificate of the President of the Senate and the Speaker of the House of Assembly. This clearly showed that the act was not passed by the two Houses of Parliament sitting together, as required by sections 35 and 152 of the South Africa Act.

The Chief Justice then dealt with the further discussion in *Ndlwana's* case whether a court of law could declare that a sovereign parliament could not validly pronounce its will unless it adopted a certain procedure. The court had stated in *Ndlwana's* case:[84] "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 like anything else".

This reasoning, however, seemed to the Chief Justice to suggest that, although it was implicit in the South Africa Act that Parliament should, save in exceptional cases, sit bi-camerally and that each House should pass a bill separately, both Houses of Parliament might sit together to pass any kind of legislation, whether there was a deadlock between the two Houses or not — that, in effect, to take an analogy from the British Parliament, a government in a minority in the House of Commons could, by advising the King to convene a joint sitting of the House of Lords and House of Commons, swamp the majority in the Commons by the votes of the Lords. Here the Chief Justice fell back on the decision in *Rex* v. *Ndobe*[85] in 1930,[86] as authority for the proposi-

[83] This of course would amount to an adherence to the "enrolled bill rule" in its strictest form. See *ante* footnote 61.

[84] [1937] A.D. 229, at p. 238. [85] [1930] A.D. 484.

[86] Though of course the decision of the Supreme Court of South Africa in

tion that, while under the South Africa Act [87] each House of Parliament was free to prescribe its own rules for the order and conduct of its business and proceedings, and that into the due observance of such rules the Supreme Court was not competent to inquire, the court was nevertheless competent to inquire whether, regard being had to the provisions of section 35, an act of Parliament had been validly passed. To hold otherwise, the Chief Justice thought, would mean that courts of law would be powerless to protect the rights of individuals which were specially provided for in the constitution of the country.[88]

Rather humorous was the criterion that Chief Justice Centlivres finally applied to determine whether or not to over-rule *Ndlwana's* case. The Chief Justice observed that he had not been able to find anything in the judgment in *Ndlwana's* case to suggest that the Supreme Court applied its mind to the question whether the Statute of Westminster impliedly repealed the entrenched provisions of sections 35 and 152. Indeed, it seemed to him to be a fair inference that there was no argument at the hearing in *Ndlwana's* case upon the point whether the Statute of Westminster had any effect upon the entrenched clauses of the South Africa Act; with the result that the Supreme Court in *Ndlwana's* case had, *per incuriam*, pronounced a decision on a question of vital constitutional importance without hearing argument for and against the main conclusion at which it arrived. Even if the court did hear any argument on this vital question, that argument lasted a very short time. The records of the court showed that counsel for the appellant argued from 10.05 a.m. to 11 a.m., that counsel for the respondent argued from 11 a.m. to 11.25 a.m.; that the court had then adjourned for thirty-five minutes and, on re-assembling at noon, announced that the appeal was dismissed and that reasons

Rex v. *Ndobe* was given before the passage of the Statute of Westminster. *Semble*, it would here have been open to Centlivres C.J. to rule, consistently with the dictum in *Ndlwana's* case, that while the Union Parliament may adopt any procedure it thinks fit, the mode of action followed by the Union Parliament in the present case amounted to a change of substance (not procedure) and was therefore subject to court review.

And the "enrolled bill rule" itself (*ante*, footnote 61), even in its strongest application, protects only the mechanics of the legislative process from the operation of judicial review. Thus, in *Field* v. *Clark* (1892), 143 U.S. 649, the United States Supreme Court, though adopting the enrolled bill rule, nevertheless ruled that in view of the express requirements of the Constitution there was "no authority in the presiding officers of the House of Representatives and the Senate to attest their signatures, nor in the President to approve, nor in the Secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress".

[87] South Africa Act, s. 58.

[88] As a judicial dictum, of course, this is somewhat circular. The question *whether* those rights were *specially protected* in the South Africa Act was in fact the issue in the present case.

would be handed down later. The short argument in the *Ndlwana* case, in the Chief Justice's opinion, contrasted strangely with the argument in the case he was now deciding, which lasted six days: in addition, the Chief Justice stated, he had carefully examined the record which was before the court when it heard *Ndlwana's* case, and it was clear that there was not before the court on that occasion the mass of material which counsel on both sides placed before it in the present case. Thus, by the authority of the stop-watch and the weight of the record, *Ndlwana's* case was finally overruled.

VI. *Critique of the Harris Case: Judicial Positivism versus Policy Interpretation*

As a general criticism of Chief Justice Centlivres' decision, it might, at the outset, be observed that he is the victim of his own self-imposed limitations. In the full tradition of the legal positivists, he sees the judicial function as the purely mechanical one of applying a known legal rule to the facts of the instant case. As he observes at the outset in the present case, the court's duty is "simply to declare and apply the law and it would be inaccurate to say that the Court, in discharging its duty is controlling the legislature. . . . It is hardly necessary to add that courts of law are not concerned with the question whether an Act of Parliament is unreasonable, politic, or impolitic."

As a conception of the nature and scope of the judge's office, this statement is not so novel in itself. Thus, Mr. Justice Roberts observed, in *U.S.* v. *Butler:*[89]

> The judicial branch of the Government has only one duty — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. . . . This court neither approves or condemns any legislative policy.

Yet there is this basic difference between Chief Justice Centlivres' position and the position of the judges of the United States Supreme Court — that whereas the United States Supreme Court judges, operating as they do within the framework of a written and rigid federal constitution, containing also a defined bill of rights, can hardly avoid, in arriving at their day-to-day decisions, the direct pressure of considerations of social and economic policy (even though at times this pressure may be veiled, as in Mr. Just-

[89] *U.S.* v. *Butler* (1936), 297 U.S. 1.

ice Roberts' dictum, and we may have to look elsewhere for[90] the "inarticulate major premise" from which the court's decision stems), nevertheless a bench like the Supreme Court of South Africa, operating under a unitary constitution that lacks any defined bill of rights, and having also a docket in which constitutional cases are few and far between, may be not at all conscious that it is exercising a policy-making rôle. In such a case, though we continue to have judicial policy-making, it is policy-making in the dark, without full and informed canvassing, on the part of the court, of the different policy alternatives that are open to it.

This is particularly well illustrated by Chief Justice Centlivres' approach to the question whether the Supreme Court of South Africa is bound by the rule of stare decisis. All the judicial pronouncements quoted by the Chief Justice have one element in common. Though establishing that the Supreme Court of South Africa will, in certain circumstances, depart from its previous decisions, they do not further enlighten us on what those circumstances are, or provide us with any definite criteria for determining their existence in future cases. The nearest we have to a precise and definite test is Judge Solomon's reference[91] to the absence of argument on a particular point: this latter, indeed, was a principle which Chief Justice Centlivres used to some advantage in the *Harris* case when he finally decided to over-rule *Ndlwana's* case. But in the final result these tests are hopelessly circular, and therefore of no use in predicting *when* the court will over-rule a previous decision.[92] Again, in approaching the interpretation of the Statute of Westminster, to determine its effect upon the South Africa Act, the Chief Justice proceeded to treat the question as a simple one of statutory construction, and to apply to the interpretation of the Statute of Westminster the celebrated rule in *Heydon's* case, as he might indeed in the case of any normal statute.[93] Now the rule in *Heydon's* case, in so far as it allows the court expressly to consider the "mischief" for which the law, before the statute in

[90] In Holmes' phrase, *Lochner* v. *New York* (1905), 198 U.S. 45.

[91] *Rex* v. *Faithfull and Gray*, [1907] T.S. 1077.

[92] Stone, The Province and Function of Law (1946), has called tests such as these Fallacies of the Logical Form, Categories of Meaningless Reference, concealing the exercise of a value judgment, conscious or unconscious, by the court. Compare the rule of the High Court of Australia that the High Court will only over-rule its previous decisions when these are *manifestly* wrong, *Rex* v. *Commonwealth Court of Conciliation and Arbitration* (1914), 18 C.L.R. 54.

[93] One of the curiosities, indeed, in connection with the operation of judicial review in the Commonwealth countries as a whole has been the disposition of the courts to treat Constitutional instruments as "ordinary" statutes (as distinct from "constitutional" statutes) and therefore subject to the "ordinary" (restrictive) rules of statutory construction.

question, did not provide, and also the true reason of the remedy appointed by Parliament to cure the "mischief", could open the way to a full-blooded consideration of policy questions.[94] But Chief Justice Centlivres, though concluding (in terms of the declaration made by the Imperial Conference of 1926) that the "mischief" before the Statute of Westminster was that the Dominions were *not*, in the eyes of the law, "autonomous communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs", then in effect equated this "mischief" with the legal supremacy of the Parliament of the United Kingdom and the inability of the Dominion Parliaments to make laws having extra-territorial operation, and went on to limit the "remedy" of the Statute of Westminster to the removal of these two particular disabilities. Thus having opened the door to the opportunity of a frank consideration of the new rôle and status of the Dominions, the Chief Justice promptly closed it upon any comprehensive consideration of the powers and functions appropriate to the Dominions in their new condition.

By and large, Chief Justice Centlivres is a positivist in the best Austinian sense. In his view, the United Kingdom Parliament, juridically speaking, is sovereign: the Dominions were created by the United Kingdom Parliament in the sense that their constitutional instruments had their source in, and derived their authority from, acts of the United Kingdom Parliament: any changes in the status and powers of the Dominions, therefore, to be effective, must proceed in the same way. It is this positivist strain that makes him unable to concede that the Union Parliament can have any other authority than can be derived from the strict letter of the Statute of Westminster, and leads him, for example, to refuse to see the explosive political changes in Ireland as amounting finally to anything more significant than the ultimate removal by the United Kingdom Parliament (in the Statute of Westminster) of external limitations on the Irish legislature's amending of the Irish Free State Constitution — the view in fact taken by the Privy Council in *Moore* v. *Attorney-General for the Irish Free State*.[95] Yet the view of Irish jurists before 1931 was that Ireland became an independent republic in 1919; that in 1921 its independence was recognized by the British government; that the validity of the Irish Free State Constitution rested upon the

[94] As to the rule in *Heydon's* case and inter-Dominion constitutional law interpretation, see also Jennings, The Statute of Westminster and Appeals to the Privy Council (1936), 52 L. Q. Rev. 173, at p. 175.

[95] [1935] A.C. 484.

sovereignty of the Irish people. In this view, the British Parliament enacted the Irish Free State (Constitution) Act, 1922, because it was necessary to bring the law of Great Britain into accord with the facts; but that had nothing to do with Ireland, which had already, by revolution, taken itself out of the United Kingdom.[96] The fact that the Privy Council might disagree with these arguments[97] would be irrelevant; since it could be contended in reply that the Privy Council did not have any right to rule on these points, and that its decision, anyway, was not binding on the Irish courts.[98] In fact, when *Moore* v. *Attorney-General for the Irish Free State* came to the Privy Council, the Irish Free State government declined to recognize the Privy Council's jurisdiction and it was not even represented by counsel at the argument. It would, indeed, necessarily follow from the contentions advanced by the Irish jurists that probably by 1922, and certainly by 1926, the United Kingdom Parliament had ceased to be competent to legislate for the Irish Free State; so that the Statute of Westminster could not apply to the Irish Free State.[99] The power of the Irish Free State legislature to amend its constitution must therefore, on this argument, flow from some source other than the Statute of Westminster.[100]

On the one view (the view of the Privy Council in *Moore* v. *Attorney-General for the Irish Free State*), the foundation of the Irish Free State is regarded simply as an instance of extreme devolution of power by the United Kingdom Parliament, and the Statute of Westminster is viewed as itself "constitutive" of changes in the relationship of the United Kingdom to the self-governing Dominions, including the Irish Free State. On the other view, the foundation of the Irish Free State is necessarily a revolutionary

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[96] Jennings, The Statute of Westminster and Appeals to the Privy Council (1936), 52 L. Q. Rev. 173, at p. 183.

[97] See, for example, the Privy Council decision in *Performing Right Society* v. *Bray U. D. C.*, [1930] A.C. 377.

[98] Jennings, *op. cit.*, p. 184.

[99] *Ibid.*

[100] The Constitution of the Irish Free State (Saorstat Eireann) of 1922 had provided (article 2): "All powers of government and all authority legislative, executive, and judicial in Ireland, are derived from the people of Ireland and the same shall be exercised in the Irish Free State (Saorstat Eireann) through the organisations established by or under, and in accord with, this Constitution".

Kohn, The Constitution of the Irish Free State (1932), p. 90, in discussing the legal origin of the Constitution of 1922, contended: "On the whole the legal evidence . . . would seem to favour an interpretation in conformity with the Irish contention that the Constitution derived its authority essentially from the enactment of the Irish Constituent Assembly. Its constituent power was formally asserted in the Preamble to the Constituent Act, and implicitly acknowledged by the British Parliament when it re-embodied the latter in its Act of Confirmation."

act — "revolution coupled with reconciliation on a contractual basis" [101] — and the Statute of Westminster is no more than "declaratory" of fundamental changes that have already taken place (in varying degrees, no doubt) in the relationship of the United Kingdom to each of the Dominions.[102] We must therefore look elsewhere than the Statute of Westminster to ascertain the status and powers of each of the Dominions. In this respect, the Irish Parliament's power to amend the Irish Free State Constitution would stem, not from the removal by the Statute of Westminster of any external limitations upon such power of amendment, but from the Irish Free State's attainment of sovereign status internationally,[103] and its necessary consequence that the Constitution of 1922 became the source of constitutional law in the Irish Free State, including that law governing the amendment of the Constitution Act itself by the Irish Parliament.[104]

In the same light, too, the passing by the South African Parliament of the Status of the Union Act, 1934, would effectively amount (contrary to Chief Justice Centlivres' view) to the "enactment of sovereign independence . . . an invitation to the South African courts to assert a local root for South African law and jurisdiction in place of the Imperial one".[105]

The point is, of course, that, as a strict exercise in legal logic, neither one of these views is any more necessary and inevitable than the other. It is simply Chief Justice Centlivres' incurable positivism that leads him automatically to prefer the one view to the other, without any direct adverting to policy considerations.

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[101] Latham, *op. cit.*, p. 540.

[102] See van Themaat, *op. cit.*

[103] The declaration that the people of Ireland are the source of all legislative authority in Ireland, contained in article 2 of the Constitution of 1922, is preceded by the declaration in article 1 of the Constitution that "the Irish Free State . . . is a co-equal member of the Community of Nations forming the British Commonwealth of Nations".

Kohn, *op. cit.*, at p. 113, in commenting upon the effect of articles 1 and 2 of the Constitution of 1922, concludes that article 1 "formed the logical preliminary to the subsequent proclamation of popular sovereignty. It was because Ireland was free that her people was sovereign."

[104] Constitution of the Irish Free State (Saorstat Eireann) of 1922, article 50.

[105] Latham, *op. cit.*, p. 533. Latham himself, though seeing a future reenactment by the Union Parliament of the South Africa Act as an act of the Union Parliament as the logical sequel to its enactment of the Status of the Union Act, 1934, could not agree that the Status of the Union Act had any legal efficacy so far as South Africa was concerned. Thus Latham, *op. cit.*, p. 540, describes the action of the Union Parliament in passing the Status of the Union Act, as having, in contrast to the actions of the Irish Free State legislature, "set up retrospectively by enacted fiction a catastrophe which never took place — to claim to have effected a revolution by due process of law". But then Latham was writing in 1937, and it may be that the events in South Africa since that time would have induced him to write a postscript.

Yet, at the same time, Centlivres is not always consistent in his approach to questions of interpretation. Thus, his assumption that "Parliament of a Dominion" in section 2(2) of the Statute of Westminster, means, in relation to the Union of South Africa, Parliament sitting either bicamerally or unicamerally in accordance with the requirements of the South Africa Act, is as facile as it is unwarranted according to the "ordinary" rules of construction. For the Statute of Westminster, in speaking of the "Parliament of a Dominion" mentions nothing at all of any special provision, in the case of South Africa, that this shall mean Parliament sitting in accordance with sections 35 and 152 of the South Africa Act. The use of the phrase "Parliament of a Dominion" in the Statute of Westminster is not subject to any such limitation. Not merely does the Chief Justice thus qualify the unqualified. He proceeds to cover up this sleight-of-hand when he suggests that there is no justification for reading "Parliament of a Dominion" in the Statute of Westminster as meaning "Parliament functioning only bicamerally"; for this suggestion of his is, in effect, neatly to turn the tables by asserting that the unqualified meaning of "Parliament of a Dominion" is itself a qualification.

Without doubt, his interpretation of the phrase "Parliament of a Dominion" is a policy interpretation, a fact to which his reference in the same breath to "Constitutional safeguards solemnly enacted" lends point. And when, at the close of his opinion, he observes: "the decision [in *Ndlwana's* case] if correct, enabled Parliament to deprive by a *bare majority* in each House sitting separately individuals of rights which were solemnly safe-guarded in the Constitution of the country. This is a *potent reason* why this Court, on being satisfied that its previous decision was wrong, should not hesitate in declaring the error of that decision," [106] — the policy considerations are expressed openly for the first time; and the "inarticulate major premise" on which he has been proceeding all along in giving his decision is fully revealed.

VII. *A Local Source for South African Constitutional Law?*

Was Chief Justice Centlivres' labyrinthine journey in and out of the decided cases necessary in order to justify his ultimate preferred conclusion? Certainly, at times he gives indications of a more fundamental approach. Thus, he does refer, in passing, to the preamble to the South Africa Act, and to its recital that the terms and conditions of that act had been agreed to by the re-

[106] The italics are mine.

spective parliaments of the four original colonies in South Africa—but he mentions it only to pass on. Yet, if the South Africa Act was in a real sense the product of the deliberations of the representatives of the four colonies, then the South Africa Act itself may be more than just a statute passed by the Parliament at Westminster, something also in the nature of a fundamental agreement between the four colonies. It is clear from the debates in the House of Commons at the time of the passage of the South Africa Act in 1909[107] that the responsibility for including the special provisions on franchise in the South Africa Act rested upon the four South African colonies. These provisions were in fact, during the debate in the House of Commons, bitterly opposed by rank-and-file members because of the substantial exclusion of the native and coloured populations from the franchise;[108] and the Liberal government of the day was at pains to emphasize that it was only because the South African delegates had insisted upon the inclusion of the special franchise provisions, and because there was a real possibility that the union of the four South African colonies would otherwise be endangered, that the British government had finally consented to the bill going forward in that form.[109] Indeed, the British Prime Minister, Mr. Asquith,[110] went so far as to express a

[107] Parliamentary Debates (United Kingdom) New Series, Vol. 9. Period August 9th, 1909, to August 27th, 1909.

[108] *Ibid.* See especially the speeches by Sir C. W. Dilke (pp. 973 et seq., 1566 et seq.); Keir Hardie (pp. 987 et seq., 1571 et seq.); Ramsay MacDonald (pp. 1592 et seq., 1624 et seq.).

[109] *Ibid.* See the speech by the Prime Minister, Mr. Asquith (pp. 1008 et seq., 1560 et seq.). The Under-Secretary of State for the Colonies, Colonel Seely, during the debate in the House of Commons, tabled a letter (dated August 17th, 1909) addressed to him by the Chairman of the Delegation from the South African Colonies (pp. 1601):

"Dear Colonel Seely,

"After listening to the views expressed by many speakers in yesterday's Debate to the effect that the omission of the provision affecting natives would not endanger the passing of the South Africa Act, I thought it desirable to ascertain the views of my colleagues on the Delegation who are in London. They desire me to reiterate their opinions, with which you are doubtless already familiar, and which I may briefly summarize as follows:

"1. The Delegation has no power, express or implied, to accept any Amendment of the nature referred to which would destroy a compromise that was arrived at after prolonged discussion.

2. Any Amendment affecting important principles would have to be remitted to the several Legislatures in several of which the acception [sic] of the alteration proposed would be more than doubtful.

"3. As you are aware, the Act was submitted to referendum in Natal, and any alteration would have to undergo a similar ordeal. It is probable that in a matter affecting the very foundations of social relations in South Africa other Parliaments would insist on a similar course of procedure.

"4. Under the most favourable conditions great delay would ensue, and the accomplishment of union would be postponed for a very considerable time if not entirely ended."

[110] *Ibid.*, pp. 1656 *et seq.*

strong hope that with the passage of the South Africa Act an extension of the franchise to the non-European population throughout the Union would soon be forthcoming.[111]

The safeguards against repeal or alteration of the limited franchise in fact conceded to non-European voters in the Cape Province under section 35 of the South Africa Act, contained in sections 35 and 152 of that Act, while an integral part of the whole South Africa Act, are also an integral part of the agreement between the four colonies, which gave birth to that act and therefore to the Union of South Africa. Is this not, then, a substantial, local root and justification for the "entrenched provisions" of the South Africa Act, supplementary to, but nevertheless independent of, whatever formal sanction they may have as part of an enactment of the United Kingdom Parliament? Why not a South African *Grundnorm* in place of the juridical "sovereignty" of the United Kingdom Parliament, as the source of South African constitutional law?[112]

Austin's "sovereign", indeed, has been the cause of a good deal of cloudy thinking in South Africa.[113] Thus it was suggested as a universal proposition during the argument in the *Harris* case that there was no such thing as a sovereign state which did not have also a sovereign legislature. In fact (as Chief Justice Centlivres himself pointed out), there is no necessary connection between the two concepts. The question of whether or not the legislature of a particular community is sovereign, in the sense that there is no law that it cannot make or amend, must depend on the terms of the basic or organic law ordering the internal arrangements of that community. Though, for example, the United States is a sovereign state for international purposes, Congress is nevertheless not a sovereign legislature, since its powers are strictly defined and limited under the constitution. In the case of South

[111] It is clear that strong pressure had been brought to bear by Lord Selborne, the then British High Commissioner, upon J. H. De Villiers, the president of the National Convention of the four South African colonies, which drafted the Constitution, with a view to a general native and coloured franchise in the Union of South Africa, based upon a "civilisation" test. See Walker, Lord de Villiers and his Times (1925), p. 446.

[112] See generally Latham, *op. cit.* Latham's criticisms, however, are based on the attempted use of the Status of the Union Act, 1934, as a source of South African constitutional law: he did not advert to the possibility of regarding the agreement between the four colonies in 1908 as an indigenous source of South African law anterior to the actual enactment by the British Parliament of the South Africa Act, 1909.

[113] The Union Parliament attempted in 1925 to provide an ingenious way out of the confusion by amending the South Africa Act to provide that "The people of the Union acknowledge the sovereignty and guidance of Almighty God": South Africa Act, 1909, s. 1, as amended by Act No. 9 of 1925. *Quem dis vult perdere, prius dementat.*

Africa, although the Union, on all views, had become a sovereign state for international purposes by 1931 at least, the question of whether or not the Union Parliament is a sovereign legislature is still not beyond controversy, as the present case clearly indicates.

There is, however, this relationship between South Africa's status, internationally, and the legislative competence of the Union Parliament. If we conclude that, with the progress of South Africa from a position of subordination to the United Kingdom Parliament to a position of full, sovereign status internationally, acts of the United Kingdom Parliament are no longer a "higher law" in South Africa, then the efficacy of the South Africa Act as organic law for the Union must be derived from the agreement of 1908 between the four colonies. Otherwise we are left without any organic law for South Africa and the Union Parliament is now a sovereign legislature in the same way as the United Kingdom Parliament, in the sense that there is no law that Parliament cannot make, amend or repeal in the ordinary way.

One of the more ironic features of the current crisis in South Africa is that the principle of parliamentary sovereignty which, in the great English constitutional struggles of the 17th century, was the battle-cry of those who fought against arbitrary executive government, and which has its philosophic justification at the present day in the concept of Parliament as the embodiment of the popular will, should now be invoked by a legislature which is itself not fully representative, and in an endeavour to abridge representation still further. Even without the present attempts to cut down the voting rights of non-Europeans in the Cape Province, the franchise in South Africa excludes large and significant sections of the population altogether. This is substantially the type of situation in which Mr. Justice Stone thought that the United States Supreme Court was bound to apply a more exacting judicial scrutiny, to prevent a restriction of the political processes.[114] For legislative action that cuts down or inhibits admission to the power process runs counter to that principle of shared power that is a postulate of the free democratic society of today.

Chief Justice Centlivres, for his part, as we have said, eschews policy considerations such as these, and purports to base his decision on technical grounds alone. No doubt his caution is dictated by a real anxiety to avoid exacerbating still further an already tense political situation in South Africa. In this he has not been successful.[115] And, in the end result, his judgment is no stronger,

[114] *United States* v. *Carolene Products* (1938), 304 U.S. 144.

[115] As an immediate aftermath to the *Harris* case, the Malan government

politically, than the body of doctrine that it invokes — doctrine which a considerable body of South African, and also Commonwealth, opinion would regard as having been rendered invalid with the transition of the countries of the Commonwealth from a position of legal subordination to the United Kingdom Parliament to full, sovereign status internationally.

Nowhere

They lyve together lovinglye. For no magistrate is eyther hawte or fearfull. Fathers they be called, and lyke fathers they use themselves. The citezens (as it is their dewtie) willynglye exhibite unto them dew honour without any compulsion. Nor the prince himselfe is not knowen from the other by princely apparell, or a robe of state, nor by a crown or diademe roial, or cap of maintenaunce, but by a litle sheffe of corne caried before him. And so a taper of wax is borne before the bishop, whereby onely he is knowen. They have but few lawes. For to people so instructe and institute very fewe do suffice. Yea this thing they chiefely reprove among other nations, that innumerable bokes of lawes and expositions upon the same be not sufficient. But they think it against all right and justice that men shoulde be bound to those lawes, which either be in number mo then be hable to be read, or els blinder and darker, then that anye man can well understande them. Furthermore they utterlie exclude and banishe all attorneis, proctours, and sergeauntes at the lawe; which craftelye handell matters, and subtelly dispute of the lawes. For they thinke it moste meete, that every man should pleade his own matter, and tel the same tale before the judge that he wold tell to his man of law. So shal there be lesse circumstaunce of wordes, and the trueth shal soner come to light, whiles the judge with a discrete judgement doethe waye the woordes of him whom no lawyer hath instructe with deceit, and whiles he helpeth and beareth out simple wittes against the false and malicious circumventions of craftie children. This is harde to be observed in other countreis, in so infinite a number of blinde and intricate lawes. But in Utopia every man is a cunning lawier. For (as I said) they have very few lawes; and the plainer and grosser that anye interpretation is, that they allowe as most juste. For all lawes (saie they) be made and publyshed onely to the intente that by them every man shoulde be put in remembraunce of his dewtie. But the craftye and subtill interpretation of them (forasmuche as few can atteyne thereto) canne put verye fewe in that remembraunce, where as the simple, the plaine and grosse meaninge of the lawes is open to everye man. (Sir Thomas More: Utopia (1515). Raphe Robynson's translation)

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has introduced a measure designed to take away from the Supreme Court of South Africa any right to pass on the constitutionality of statutes, and to replace the court in this respect by a new "High Court of Parliament". It is understood that this new measure is now being taken to the Supreme Court; and accordingly the battle for supremacy between court and legislature may well be fought out all over again, unless the general election announced for next year should in the meantime effect a solution in the political arena.