COMMENT

CONSTITUTIONAL CRISIS AND BASIC NORM IN SOUTH AFRICA

I.

In Bloemfontein on March 20, 1952, the Appellate Division of the Supreme Court of South Africa held invalid the Separate Representation of Voters Act 1951.[1] In its judgment[2] the court concluded that the Union Parliament is still bound by the provisions of ss. 35 and 153[3] of the South Africa Act of 1909.[4] It is not proposed to consider the judgment here except as incidental to the special purposes of this note.[5]

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[1] Act No. 46 of 1951 (referred to in this Note as "the Apartheid Act").

[2] References in this note are to the judgment of the Appellate Division taken from the pamphlet publication of the judgment by *The Friend Newspapers Ltd.*, Bloemfontein, 1952, the official report not having been available.

[3] The entrenched clauses of the South Africa Act are ss. 33, 34, 35, 137 and 152. Sections 33 and 34 have expired. Section 137 is designed to maintain the equality of status of the official languages in the Union. For the substance of ss. 35 and 137 see *infra* n. 18.

[4] 9 Edw. VII, c. 9.

[5] The best short analysis of the court's judgment is that by E. N. Griswold, "The 'Coloured Vote Case' in South Africa" (1952), 65 *Harv. L. Rev.* 1361. See also E. McWhinney, "The Union Parliament, the Supreme Court, and the 'Entrenched Clauses' of the South Africa Act" (1952), 30 *Can. Bar. Rev.* 692; D. V. Cowen, "Legislature and Judiciary" (1952), 15 *Mod. L. Rev.* 282; and Z. Cowen, "Parliamentary Sovereignty and the Limits of Legal Change" (1952), 26 *A.L.J.* 237.

For the legal position prior to the decision, see the Note (1951) 33 *Comp. Leg. and Int. Law* (3 series) 88 citing at 90; W. P. M. Kennedy and H. J. Schlosberg, *The Law and Custom of the South African Constitution* (1935), 100-101; W. I. Jennings and C. M. Young, *The Constitutional Laws of the British Empire* (1937) 265; G. G. P., Note (1932) 43 *Law Q. Rev.* 456; K. C. Wheare, *The Statute of Westminster and Dominion Status* (4 ed.) 249-251 and 330, esp. n. 2 and 3; H. J. May, *The South African Constitution* (1949) 26; Welsh in *The Commercial Law Reporter*, Nov. 1948, 659ff., esp. 666-667; *The Annual Survey of South Africn Law 1948*, 9; A. B. Keith, *The Dominions as Sovereign States* (1938), 177; D. V. Cowen in *The Commercial Law Reporter*, June 1949, 359.

And see now especially D. V. Cowen, *Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act*, 1951 (the work referred to hereafter).

For a note on the later decision concerning the High Court of Parliament Act see *infra* p. 113.

The purpose of this note is to examine the Apartheid decision for any light it may throw on what might be called, in "Kelsenite" terms,[6] the basic norm of South African law. This is an aspect of judicial decision which can rarely arise in practice; but when it arises, it should have attention. It involves the question, in brief, of how far the South African Court, in ruling on the invalidity of the Apartheid Act, was confronted with the necessity of determining what is today the ultimate formal source or "basic norm" of the South African system of law. The possibility of this issue actually arising in South Africa was predicted as early as 1937 by the late R. T. E. Latham in a brilliant essay on Commonwealth Law.[7] Almost prophetically, Latham pointed out that a consideration of the continued efficacy of the entrenched clauses since the Statute of Westminster,[8] and the Status of the Union Act,[9] might involve a consideration of the basic norm of South African law. He also correctly emphasised that the investigation of the basic norm was not a legal task, but in Kelsen's terminology a "meta-legal" task which would involve political and social considerations and not legal considerations.[10]

The Apartheid Case is therefore worthy of consideration insofar as it may illustrate what was hitherto indisputable in theory, namely, that a change in the basic norm is not a *legal* change and cannot be effected by *legal* action. In the last resort the issue is a "meta-legal" or "political" one. The decision may also offer practical support for academic criticism of Kelsen's theory on the ground that the "pure" theory of law is inapplicable to any actual legal problem until the meta-legal question of the basic norm is determined.[11]

The Apartheid Case is also important for the light it throws on the nature of a basic norm itself.[12] In particular it illustrates that the basic norm not only regulates the persons *to whom* the power of creating legal norms has been granted, and sometimes the content of valid norms, but also the procedure to be followed in the creating of such norms.[13] So, in delivering the judgment of the court, Centlivres C.J. pointed out[14] that the continuing validity of the entrenched clauses did not derogate from the sovereignty of the Union Parliament, thus

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[6] See generally for brief accounts H. Kelsen, *The Pure Theory of Law and Analytical Jurisprudence* (1941) 55 *Harv. L. Rev.* 44; W. I. Jennings (ed.) *Modern Theories of Law* (1933) 105; J. Stone, *Province and Function of Law* (1946) c. iv.

[7] R. T. E. Latham, "The Law and the Commonwealth" in W. K. Hancock, *Survey of British Commonwealth Affairs*, vol. i (1937) 523.

[8] 22 Geo. V, c. 4.

[9] Act No. 69 of 1934 (South Africa).

[10] *Op. cit.* 533.

[11] J. Stone, *op. cit.* 96, 106; N. S. Timasheff, *Sociology of Law* (1939) 293-96.

[12] See H. Kelsen *op. cit.* 61-2; J. Stone *op. cit.* 96-7.

[13] For procedural content in the basic norms of Federal States see the comments of E. N. Griswold, article cited at 1368-9. For procedural content of the basic norm of the United Kingdom, see E. C. S. Wade, *Introduction to Dicey's Law of the Constitution* (8 ed.) xxxviii; R. T. E. Latham, *op. cit.* at 523 n. 3; J. C. Gray, *The Nature and Sources of Law* (2 ed.) 76. The Parliament Acts 1911 (1 and 2 Geo. V, c. 13) and 1949 (12, 13 and 14 Geo. VI, c. 103) affect the procedural content. It is submitted that in a democratic State the basic norm will almost invariably be not merely in the form that the will of Parliament ought to be obeyed, but will add a proviso that the will must be expressed in a particular manner and form. Cf. J. Stone, *op. cit.* 96-97.

[14] The Chief Justice's actual view is that legal sovereignty in the Union is "divided between Parliament as ordinarily constituted and Parliament as constituted under Section 63 and the proviso to Section 152". This is similar to Mr. Cowen's argument that there are in fact two Union "Parliaments". It is submitted with deference that the more satisfactory approach is to regard the entrenched sections as being merely procedural content of the basic norm, though that writer

lending strong support to the view that the correct approach to these sections is that they merely constitute certain procedural requirements of the basic norm.

II.

There have been a number of important legislative enactments affecting the constitutional law of the Union of South Africa in which the changing basic norm of South African law is reflected.

The first was the Colonial Laws Validity Act, 1865,[15] and it has indeed been argued with some cogency that the entrenched sections of the South Africa Act 1909 depended for their efficacy solely on the Colonial Laws Validity Act and fell away with the repeal of that Act.[16] The next step was the enactment of the South Africa Act, 1909.[17] This was an Imperial act, and delegated the norm-making power of the United Kingdom Parliament in respect of South African law to the newly created Union Parliament, but in so doing it ensured that the existing franchise provisions in the Cape Province were protected by including Sections 35 and 152.[18]

Then, in 1931, the United Kingdom Parliament enacted the Statute of Westminster.[19] It is clear that before this Act the basic norm of South African law attributed legal power in South Africa to the United Kingdom Parliament, but after the Statute of Westminster it was certainly arguable that this basic norm had changed. It was precisely to support this latter contention that the Union Parliament passed the Status of the Union Act, 1934,[20] which primarily adopted the Statute of Westminster, but which, as Mr. Latham has pointed out, had also a far more significant meaning, for by its whole tenor it offered "an invitation to the South African courts to assert a local root for South African law and jurisdiction in place of the Imperial one."[21]

Finally, in considering the relevant statutory enactments, it should be noted that the protected franchise provisions have been amended from time to time;[22] the most important amendment being the 1936 Act which was passed in accordance with s. 35 of the South Africa Act, and removed "native" voters from the common role. The Apartheid Act attempted to remove all other "non-Europeans" from the common roll, and the instant case arose because, not having been passed

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seeks support in R. T. E. Latham *op. cit.* 523, Sir Owen Dixon in (1935) *Law Q. Rev.* 603, W. I. Jennings, *The Law and the Constitution* (3 ed.) 139-140, and *Attorney-General for New South Wales v Trethowan* (1931) 44 C.L.R. 394, (1932) A.C. 526.

[15] 28 and 29 Vict., c. 63. Section 2 provides that any colonial law repugnant to an imperial act is void to the extent of that repugnancy; s. 5 empowers colonial legislation to bind subsequent colonial parliaments to follow a particular procedure. See *Trethowan's Case*, cited *supra*.

[16] See W. Pollak in 48 *South African Law Journal* 269 in support of this argument, and D. V. Cowen *op. cit. contra.*

[17] Cited *supra* n. 4.

[18] Section 35 prohibited Parliament from enacting a law disqualifying any person in the Cape Province who was or could have been registered as a voter in that Province from being so registered by reason of his race or colour only unless the Bill is passed by both Houses of Parliament sitting together and at the third reading is 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 is to be taken as duly passed by both Houses. Section 152 provides a similar limitation on bills repealing or altering ss. 35, 137 and 152.

[19] Cited *supra* n. 8.

[20] Cited *supra* n. 9. At the time the Bill for this Act was before it, the Union Parliament passed a resolution that the Bill was being agreed to on the understanding that it would in no way derogate from the entrenched sections of the South Africa Act.

[21] *Op. cit.* at 533.

[22] Acts No. 18 of 1930, No. 41 of 1931, No. 12 of 1936, and No. 46 of 1946.

in the manner required by s. 35 of the South Africa Act, it was accordingly challenged in the courts.

In considering the validity of the Apartheid Act, the Appellate Division departed from its previous decision in *Ndlwana v. Hofmeyr*[23] and held that the Statute of Westminster did not repeal or modify the entrenched sections of the South Africa Act, which therefore remained in force. The present purpose is to consider if this decision raised issues that would compel the court to decide what was the basic norm of South African law.

III.

Two conditions must exist to compel a court to decide on the basic norm of a particular legal system. The first is that there must be at least two possible basic norms from which the court can be compelled to choose in arriving at its decision. In South Africa there were clearly at least two such possible norms, one of which would attribute ultimate legal power in South Africa to the Queen in Parliament at Westminster, whereas the other would on the contrary grant such power directly to the Union Parliament.

The second essential condition is that there must be an inescapable conflict for the particular case between the manner in which each basic norm delimits the norms derivable from it so that a law passed in accordance with the provisions of one basic norm will not have been passed in accordance with the requirements of the other norm. Such a conflict may conceivably take any of three forms:

(1) There may in the first place be a conflict regarding the choice of the person or persons to whom the power of creating legal norms has been granted. No such conflict arose in *The Apartheid Case* because, whatever the basic norm might be, the court was not compelled to go behind the undisputed norm-making power of the Union Parliament and consider whether that power was primary or only delegated. Such a conflict would arise, to take a hypothetical illustration, if the Imperial Parliament amended the South Africa Act by vesting legislative power for the Union solely in the House of Assembly so that one possible basic norm purported to vest power in one body, whereas the alternative basic norm granted such power to a different body, as constituted by the two Houses of Parliament together, with the assent of the Governor-General to any law so created. A challenge to a subsequent Act purporting to have been passed in accordance with the amended provisions of the South Africa Act would then raise the necessary conflict for judicial decision, because it would have been passed in accordance with the requirements of one norm and not in accordance with the requirements of the other.

(2) The second possible conflict-situation would be a conflict between prohibitions placed by each basic norm respectively on the content of valid norms under it. Such a conflict did not arise in *The Apartheid Case* because neither norm contained any such limitations on content. If, however, for example the United Kingdom Parliament re-enacted the Colonial Laws Validity Act, and the South African courts had to consider the validity of a subsequent act of the Union Parliament, which was repugnant *in content* to an Imperial act extending to the Union, then such a situation would again compel the court to choose the basic norm, because one norm would then contain a prohibition on content and the other would not.

(3) A third type of conceivable conflict would occur between competing basic norms prescribing different procedures for the creation of valid norms. This is the type of conflict which almost arose in *The Apartheid Case*, involving as it did procedural limitations on the functioning of the Union Parliament. Actually, however, it did not arise; the Appellate Division still was not compelled

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[23] (1937) A.D. 229 (S.A.).

to choose the basic norm, since it was able to hold that each competing basic norm prescribed the identical procedure.

On the one hand the court could hold the Apartheid Act invalid and support the continued efficacy of the entrenched sections of the South Africa Act without of necessity choosing between the competing basic norms. For in such a case the court could, adopting the conservative view, consider the basic norm as still conferring sovereign legislative power in South Africa on the United Kingdom Parliament, that Parliament delegating such power to the Union Parliament in the manner provided by the South Africa Act. The entrenched sections would then still be considered valid by dint of the interpretation that the Statute of Westminster did not amend or repeal the South Africa Act.[24] Yet the court could also reach this conclusion by adopting the radical view that the basic norm attributed legal power to the Union Parliament in the first instance. This decision would be based on the ground that the South Africa Act was "a fundamental declaration of the will of the South African people",[25] embodied in the basic norm; and therefore that the entrenched sections, being part of that declaration, are still procedural limitations on the norm-making power of the Union Parliament.

On the other hand, the court could also have held the Apartheid Act valid and still have avoided a decision founded on a choice of the basic norm. Here on the conservative approach the basic norm could still be regarded as vesting legal authority in the United Kingdom Parliament, but delegated by that body to the Union Parliament, and the entrenched sections would be interpreted (adopting the argument of the respondents) as having fallen away with the enactment of the Statute of Westminster. On the radical approach the Act could also be held valid by holding that the basic norm vested power in the Union Parliament by the Status of the Union Act, this latter act replacing the Statute of Westminster as the source of legal power in the Union.[26] The Statute of Westminster would therefore have been an irrevocable abdication of power by the Imperial Parliament, and the power thereby granted to the Union Parliament would be regarded as including a power to repeal the entrenched clauses by *ordinary* existing parliamentary procedure.

The apparent conflict of procedural requirements of the competing basic norms as applied to the issues in the *Apartheid Case* therefore proved illusory. It was in this sense that Mr. Latham pointed out that the issue cannot arise "until South African and British legislation clearly conflict on a practical point."[27] Such a position could be imagined if, for instance, the Imperial Parliament passed an Act providing that notwithstanding anything contained in the Statute of Westminster, the Union Parliament could not amend the entrenched clauses except by a three-quarters majority (as distinct from the present two-thirds majority) obtained at the third reading in a unicameral sitting. If subsequently the Union Parliament re-enacted the Apartheid Act and obtained the requisite two-thirds majority and fulfilled the remaining conditions, but not a three-quarters majority, then in such a situation a conflict between the procedures prescribed by the restrictive basic norms would have arisen which the court could not avoid resolving. And resolution would involve a choice between the competing basic norms.

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[24] See the comment of Centlivres J. that the Statute of Westminster did not expressly or impliedly repeal or amend the South Africa Act.

[25] D. V. Cowen, *op. cit.* 49, who suggests this as an alternative view.

[26] Alternative arguments summarized by R. T. E. Latham are that the Balfour Report of 1926 was valid in constitutional law or that the Statute of Westminster legalized the principles enumerated in that Report.

[27] *Op. cit.* 533.