BOOK REVIEWS

The Constitutional Structure of the Commonwealth, by K. C. WHEARE, F.B.A., Rector of Exeter College, Oxford (Oxford University Press, London, 1960), pp. i-xiv, 7-201. Australian price £2 6s. 6d.

In 1939, the late R. T. E. Latham, in a combined review of the first edition of K. C. Wheare's *The Statute of Westminster and Dominion Status* and *Constitutional Laws of the British Empire* by W. I. Jennings and the late C. M. Young, wrote:

> It is odd that the scholarly austerity and relentless accuracy of the best legal textbooks should be lacking in the work of Dr Jennings and Miss Young, and notably present in that of Mr Wheare. . . . It is no less odd that the reviewer is forced to say of a scholar as mature as Dr Jennings has in other fields shown himself to be that his work shows the greater promise, and of Mr Wheare, who is still at the threshold of his career, that his is the more finished and the better book.[1]

Through five editions and more than twenty years of profound change in the relations between countries within the British Commonwealth, K. C. Wheare's book continued to deserve that description and that praise.

Time and change had made the title of his book no longer appropriate, however, and the author chose to write a new book about the Commonwealth rather than to produce a sixth edition of the old. This new book is a lineal successor of the old; and this is so in spite of the fact that the changes he has made go much further than the title, and much further than any mere revised edition of the old could be expected to bear. A student of the Commonwealth and its development would do well not to discard the five editions of the earlier book. The 'constitution' of the Commonwealth is a little like the 'constitution' of a primitive society. Its law is a little like primitive law. To understand what it is, it is necessary to understand what it has been. The changes made by the author through his seven[2] attempts to explain the Commonwealth reflect in a most illuminating way the nature of this peculiar international society and they go far to explain its apparent paradoxes.

A great part of this book is concerned with vocabulary. The first chapter is so concerned expressly, and is headed 'Vocabulary'. In addition, however, most of Chapters V, VI, and VII (headed 'Membership', 'Co-operation', and 'Symbols' respectively) are primarily concerned with vocabulary, though not expressly so. At times the reader may be forgiven for feeling a certain impatience that so much attention is given to arguments which are concerned merely with the use of words. Yet at the end he may well forget his impatience with the thought that he has been given as clear a picture of the Commonwealth as could be given; and also with the thought that, to describe the 'constitutional structure' of a society which has no constitution in the sense of a written document and perhaps has no constitutional structure in any sense, is almost impossible except by reference to the words which the society and its members themselves use in conducting their affairs and in report-

[1] (1939) 55 *Law Quarterly Review* 132—later, of course, the author was Gladstone Professor of Government and Public Administration, in the University of Oxford, and, since 1956, has been Rector of Exeter College in that University.

[2] *The Statute of Westminster 1931* (1933), the five editions of *The Statute of Westminster and Dominion Status,* and the present book.

ing what they do. And here it is suggested that the author gave too much away with his title and with his explanation of it (page 17). He chose not to call his book *The Constitution of the Commonwealth* because the word 'constitution' has come to mean in too many countries 'a specific legal document which contains a selection of the most important legal rules that govern the government and usually has some priority over other legal rules' (page 17). All societies have a structure, no doubt. All societies have constitutions in the simple sense of the word—*i.e.* the way they are constituted or made up. But not all societies have a constitutional 'structure'. And this book demonstrates that the Commonwealth lacks a constitutional 'structure'. It would have been better, it is suggested, to have taken less account of the special and sometimes misleading use of the word 'constitution' as applied to written documents. This may appear to be mere carping, but it serves to underline the difficulties which face anyone who attempts to discuss and explain the Commonwealth, particularly its constitutional aspects rather than its political or economic origins and characteristics.

Much of this book is not so directly concerned with the constitution of the Commonwealth, as with the changes towards, and the acquisition of, independence for the constitutions of its various members—particularly Chapters II, III, IV, and V (headed 'Equality', 'Economy', 'Autochthony', and 'Membership'). Those chapters present a greatly condensed and up-to-date version of the material used to support the conclusions reached in *The Statute of Westminster and Dominion Status.* They explain the slow severing of legal ties between the former self-governing British colonies and the United Kingdom and the effect upon those ties produced by the Statute of Westminster. The means by which the substance of national independence was translated into independence in law are made clear. In the course of that explanation the old problems arising out of the doctrine of parliamentary supremacy are analysed again. English lawyers have always found those problems hard to resolve.

To the fifth edition of *The Statute of Westminster and Dominion Status,* Professor Wheare (as he then was) appended a graceful admission of error. In the light of the South African cases *Harris v. Minister of the Interior*[3] and *Minister of the Interior v. Harris*[4] he resiled from the view expressed in earlier editions that after South Africa obtained sovereign independence from the United Kingdom, the South African Legislature could amend the South African constitution by simple legislative act without following the procedure prescribed by the so-called 'entrenched' clauses of the South Africa Act.

His error had been an understandable and excusable one. It was supported by the South African case of *Ndlwana v. Hofmeyr*[5] and by most English constitutional writers. That it was error is shown not only by the authority of the later *Harris* cases[6] but by a clear logic which admits of but one satisfactory answer. As the author himself now says of the entrenched clauses: 'Their priority depends not upon origin but upon logic' (page 81). It seems odd, after such a demonstration of the logic concerned, and after so much careful writing on the point from so many sources, that many English constitutional lawyers still resist the application of what is essentially the same logic to the constitutional situation in their own country.

[3] [1952] 2 S.A. 428 A.D.; *sub. nom. Harris v. Dönges* [1952] 1 T.L.R. 1245.
[4] [1952] 2 S.A. 769 A.D. [5] [1937] S.A. 229 A.D. [6] *Supra.*

Even the author, who accepts that logic unreservedly as applied to South Africa, or New Zealand, or Ghana, is so sensitive to the known views of English lawyers that he restricts himself to the following comment about the English situation: 'And it is clear that some most interesting issues arise about the meaning of the historic concept of the sovereignty of the Parliament of the United Kingdom' (page 88). And yet it ought by now to be clear that any proposition about the supremacy of Parliament, if it is to be applied by the courts, whether written into a fundamental constitutional document or not, is a legal proposition; and that in certain circumstances it cannot be applied without establishing subsidiary legal propositions about what Parliament is and about the means by which Parliament may make its voice heard. In the words of Sir Owen Dixon:[7]

> It is therefore enough to say that the qualification upon the doctrine of the parliamentary supremacy of the law concerns the identification of the source of a purported enactment with the body established by law as the supreme legislature and the fulfilment of the conditions prescribed by the law for the time being in force for the authentic expression of the supreme will.[8]

A nice example of the resistance shown by the English legal mind to the logic accepted by K. C. Wheare is to be found in a recent article by H. W. R. Wade: 'The Basis of Legal Sovereignty'.[9] In effect Mr Wade concluded that every time the elements in which the supreme legislative power resides are changed—even by an apparently effective exercise of the supreme legislative power itself—what has occurred is a legal revolution. This is an ingenious attempt to provide an alternate resolution of the problem. Mr Wade accepts the notion that the ultimate legal proposition is one of the common law and is in the care of the courts, and in the course of his able argument he brings out some basic points with useful clarity. But his conclusion is an unnecessary hankering after paradox. Further, it rests at the outset upon an overbold use of existing English authority; for the cases[10] upon which Mr Wade relies will not bear the burden of authority which he puts upon them.

It is perhaps sufficient to illustrate the basic point by reference to one of the clearest uses of sovereign power which has yet occurred: the granting of independence to Burma outside the Commonwealth.[11] The Burma Independence Act did not 'entrench' itself with any 'Trethowan-like' devices. It is therefore theoretically possible for the Legislature which passed it, to repeal it. If it were now repealed the English courts would perhaps be able to find no way to avoid recognizing the repeal. The courts in Burma would certainly not recognize the repeal. Where there had been one legal system there would seem to be now two. Would that

[7] Chief Justice of the High Court of Australia.

[8] 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240, 244—and *cf.* the much quoted dictum from the judgment of Dixon J. (as he then was) in *Attorney-General (New South Wales) v. Trethowan* (1931) 44 C.L.R. 394, 426, 'the courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside.'

[9] (1955) 13 *Cambridge Law Journal* 172—an article described by Sir Owen Dixon as 'powerful', *op. cit.* 242, as indeed it is.

[10] *Vauxhall Estates Ltd v. Liverpool Corp.* [1932] 1 K.B. 733; *Ellen Street Estates Ltd v. Minister of Health* [1934] 1 K.B. 590 and *British Coal Corp. v. The King* [1935] A.C. 500.

[11] Burma Independence Act 1947.

mean legal revolution? If so, at what point of time did the revolution take place?

Surely the true description is to say that the creation of two separate legal systems by the Supreme Legislature in 1947 was legal and effective; that Burma became *vis-à-vis* England in much the same situation as, say, France is; that if a repealing Act would be law in England then English domestic law would be, not for the first time, in conflict with what would be recognized as lawful internationally; that the English Supreme Legislature had acted foolishly and without regard to the facts of life or its predecessor's appreciation of them.

If, on the other hand, the Burma Independence Act had 'entrenched' itself so as to include the Legislature of Burma in the definition of the Supreme Legislature which alone could amend or repeal the Act in the future, then even the English courts would have adequate grounds to refuse recognition to a simple Act of the Parliament at Westminster which purported to repeal the Burma Independence Act. It must be admitted, however, in the light of the current English literature on the subject, that it would be well to have a very strong bar and a very strong bench, prepared to rethink this problem from the beginning, if error were to be avoided in the event of such a matter being brought before the courts in England.[12]

As the author makes so admirably clear, however, there has been a need for legal revolution in the development of the Commonwealth which is indeed revolution, however much desired by all parties. This need has arisen from the deep-seated emotional desires of the newly independent countries to feel that they have not only autonomy but also an existence and a life which does not depend on the United Kingdom, even in legal theory. Thus:

> They assert not the principle of autonomy only: they assert also a principle of something stronger, of self-sufficiency, of constitutional autarky or, to use a less familiar[13] but accurate word, a principle of constitutional *autochthony,* of being constitutionally rooted in their own native soil (page 89).

And from this need sprang both the contentious legal revolution which severed the last thin constitutional ties between Eire and the United Kingdom (pages 90-94), and the carefully designed legal revolu-

[12] It is perhaps especially interesting to note how this apparently academic and theoretical question has in this century been forced upon a variety of courts as affecting real and important cases, and that, even if in a somewhat fringe way, even the English courts or rather the courts of the United Kingdom have encountered it. In addition to the cases already referred to, see: *MacCormick v. Lord Advocate* 1953] S.C. 396; *Taylor v. Attorney-General (Queensland)* [1917] Q.S.R. 208; *McDonald v. Cain* [1953] V.L.R. 411; *Attorney-General v. Prince Earnest Augustus of Hanover* 1957] A.C. 436, 464, *per* Viscount Simonds; *Moore v. Attorney-General for Irish Free State* [1935] I.R. 472; [1935] A.C. 484. It should be noted, of course, that the question whether or not courts may interfere in the Legislative process, when it is seen that a bill is on the way to becoming an Act which will be invalid as not passed by a competent Legislature, is a completely separate question—see, in addition to cases already cited which are concerned with this question as well as the more fundamental one, the following cases: *Hughes and Vale v. Gair* (1954) 90 C.L.R. 203; *Clayton v. Heffron* (1960) 34 A.L.J.R. 378, and in particular the article already referred to by Sir Owen Dixon—'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240.

[13] Less familiar to lawyers perhaps, at least before it was used by Sir Owen Dixon in the *Boilermaker's Case* (1956) 94 C.L.R. 254, 268; and, in consequence of that use, by Professor Zelman Cowen in his *Federal Jurisdiction in Australia* (1959) chapter 1—but familiar nonetheless for a long time to geologists and anthropologists.

tions which worked such a severance for India and Pakistan. In recent years Australia and New Zealand have not been so affected by this desire for autochthony, as have to a greater or lesser extent all the other members and ex-members of the Commonwealth. So far as Australia is concerned, it is suggested that this has not been because of any less determination to be Australian rather than English. It has been because of a greater contentment with the substance of independence and autonomy and a less concern with the form—combined perhaps with a more widespread individual sentiment in favour of things English than could be expected in many other Commonwealth countries.

One of the very few remaining qualifications upon complete autonomy in substance enjoyed by Australia and New Zealand[14] is the appeal to the Judicial Committee of the Privy Council. The author discusses the questions raised by the existence and abolition of that appeal in his chapter headed 'Equality' (pages 45-54).

Various reasons have moved many of the Commonwealth countries to establish their own ultimate appellate courts. Most of those reasons had strong emotional origins, and the abolition of appeals to the Judicial Committee was linked closely with the general drive for political and constitutional independence. There is little doubt that Australia and New Zealand will soon be the only members of the Commonwealth still permitting the appeal.[15] So far as Australia is concerned, the emotional drive for independence achieved its objects without bringing about the abolition of the appeal. It was the intention of most of the delegates to the constitution conventions of the 1890's to bring about abolition at the time of federation; but this was frustrated by resistance in London and an uneasy compromise resulted.[16] Since that time public debate on the question has been comparatively slight and has turned mainly upon sentiment for and against this tie with the United Kingdom, without much analysis of the real factors involved. The main factors discussed from time to time in legal writing have been the desirability of maintaining uniformity in the common law, on the one hand, and the burden of expense involved in appeals to the Judicial Committee, on the other.[17]

Without discussing those factors, or the historical or emotional pressures either for abolition or retention of the appeal, one factor not discussed at all by the author should be mentioned. Let it be assumed that it is important to seek uniformity in the common law wherever it manifests itself.[18] Let it also be assumed, against most of the evidence, that to tie the judicial system of one country to the authority of the highest courts of another does not seriously offend principles of 'equality', 'autonomy', and 'autochthony' as discussed in this book. Still it is essential to ask: what courts have the authority to declare the uniform common law, and what is the quality of their work?

[14] And also Ceylon and Ghana—the appeal to the Judicial Committee of Privy Council exists for Malaya, but the provisions for it are so designed that it cannot be described as qualifying that Federation's autonomy. The Privy Council really operates as a Malayan court—see pages 53-54.

[15] But the special position of Malaya should be remembered.

[16] Alfred Deakin, *The Federal Story* (1944).

[17] See Dr E. G. Coppel, 'Appeals to the Judicial Committee—A Reply' (1958) 1 *M.U.L.R.* 76; and F. R. Beasley, 'Appeals to the Judicial Committee: The Case for Abolition' (1957) 7 *Res Judicatae* 399.

[18] This in spite of the fact that that uniformity has already been shattered rather decisively and that there are at least 51 separate common law systems currently recognized in the United States of America.

In the last resort, uniformity is produced by the exercise of authority and by the acceptance of it. So long at least as there are appeals to the Judicial Committee, all Australian courts will be bound by the decisions of that body. Further, the decisions of the House of Lords have been treated as binding, whatever strict theory might someday permit, and the decisions of the Court of Appeal and of the Court of Criminal Appeal have been followed—not slavishly but loyally unless a strong reason indeed against doing so has been seen to exist.[19]

Of recent years, however (particularly since 1945), the quality of the work of the highest English courts has declined in comparison with that of the highest Australian courts. When this decline is considered, together with the fact that there is still too much of a one-way traffic in the use of authoritative materials,[20] it should be realized that the uniformity of the common law in general and the appeal to the Judicial Committee in particular is threatened from a professional direction not adverted to by the author or by other commentators.

This is not the place to support that assertion with a full examination of the judicial record over the relevant period. Suffice it to say that decisions like the following—*Director of Public Prosecutions v. Smith*,[21] *Attorney-General for South Australia v. Brown*,[22] *London Graving Dock v. Horton*,[23] *Errington v. Errington*,[24] *Bendall v. McWhirter*[25] and *Lee v. Lee*[26]—do not increase the confidence of the profession in Australia that the ultimate virtue upon which a uniform common law should rely resides only in the highest appellate tribunals in England. In this regard it is perhaps unnecessary to say that the ultimate disposal of a case is not all important. Many right results have been supported by judgments which reveal wrong or insufficient reasons. But it is those judgments which other courts are asked to treat as authoritative material. Not merely high skill to reach the right results, but also high standards of legal scholarship and great care in the preparation of judgments to be reported, are required of courts if their authoritative pronouncements are to provide the basis for a uniform but developing common law.

In 1939 the late R. T. E. Latham wrote: 'It was the authors' misfortune to publish at the moment when the Irish Free State was palpably nearing extinction, but Eire was not yet born.' It is now the author's misfortune to have published at the moment when South Africa's position in the Commonwealth was palpably in the balance, but when decisions as to that troubled country's membership had not yet been decided. Further, it was his misfortune to publish just before the admission of Cyprus as a new member of the Commonwealth.

At the time of writing it may be possible to say that the admission of Cyprus marks the end of a very troubled chapter in British colonial history, but it is not possible to draw firm conclusions about the effect of South Africa's withdrawal from the Commonwealth upon K. C. Wheare's text. It seems clear that the Commonwealth members had agreed, consistently with their previous recognition of changes in India, Pakistan and Ceylon, that South Africa as a republic would be accepted as a

[19] See *Piro v. W. Foster & Co. Ltd* (1943) 68 C.L.R. 313, 320, 326, 327, 336, 341-342.

[20] *I.e.* that the Australian courts and profession use all English sources, but the English courts and profession remain ignorant of most Australian materials.

[21] [1960] 3 All E.R. 161 (H.L.)

[22] [1960] 2 W.L.R. 588; [1960] 1 All E.R. 734 (P.C.), and see the note on this case by P. Brett (1960) 23 *Modern Law Review* 545. [23] [1951] A.C. 737.

[24] [1952] 1 K.B. 290. [25] [1952] 2 Q.B. 466. [26] [1952] 2 Q.B. 489 (n).

member of the Commonwealth. It also seems clear enough that it was not intended that the general repudiation of South Africa's *apartheid* policies would lead to her expulsion—but merely to a statement repudiating those policies.

The present position seems to be that recent events confirm the author's conclusion that each member has a unilateral right to secede from the Commonwealth (page 125). And they do nothing to disturb his discussion of the right of expulsion of a member which might be exercised by all the other members (page 127). What effects South Africa's withdrawal will have upon her 'co-operation' with other members of the Commonwealth, whether through the few institutions established by members of the Commonwealth as such (page 133), or otherwise, remains to be seen. Clearly the Prime Minister of South Africa will no longer appear at Commonwealth Prime Ministers' meetings. But will such consultations as South Africa has accorded to other Commonwealth members, and the methods employed for representation between them, be changed directly as a result of her withdrawal from membership? Will there be an immediate change in the existing reciprocal citizenship arrangements? The answers to questions such as these are not yet clear, but they will probably turn upon individual rather than agreed and collective actions, to be taken by South Africa on the one hand and by each of the other members on the other.

After the dust has settled, the issues which may well prove to be the key ones are: whether and to what extent the members of the Commonwealth may discuss, and purport to interfere in, the internal affairs of any other members and, just what matters ought be considered to be internal for this purpose. There can be little doubt that in the eyes of almost all the world the Commonwealth has gained in strength and standing by the withdrawal of South Africa for the reasons which led to the withdrawal. The rapidity of change in the world today, however, is such and the differences in conditions and views between members of the Commonwealth are so great, that it would be too much to hope that similarly difficult issues will not be presented to the remaining members in the future.[27]

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Lord Eldon's Anecdote Book, edited by ANTHONY L. J. LINCOLN, of Lincoln's Inn, Barrister-at-Law, and ROBERT LINDLEY MCEWEN, of the Inner Temple, Barrister-at-Law (Stevens and Sons Ltd, London, 1960), pp. i-xix, 1-201. Australian price £1 14s. 6d.

In celebration of their one hundred and fiftieth anniversary as a publishing house, Messrs Stevens and Sons Ltd have, with the consent of the present Lord Eldon (who possesses the original manuscript), produced this handsome volume. It is a reproduction of the Anecdote Book which the great Lord Chancellor kept at the request of his grandson, beginning it in 1824 and completing it in 1827. Although some of the anecdotes have previously been printed, this is the first occasion on which the whole

[27] So far as form and publication are concerned this book is a satisfactory production. There are some blemishes—*e.g.* the misplacement and duplication of a line in the second paragraph on page 106, and the rather inadequate index supplied.

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