THE INDIVISIBILITY OF STATE LEGISLATIVE POWER

B. M. O'BRIEN*

INTRODUCTION

In 1865 the Imperial Parliament passed the *Colonial Laws Validity Act*[1] which, as its preamble indicates, was designed to remove doubts "respecting the Validity of divers Laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty's colonies . . .". The origin of these doubts appears to have arisen from a series of decisions of the South Australian Supreme Court, and in particular the decisions of Boothby J. Although the South Australian Parliament had been established under a Constitution which supposedly had contained a grant of internal self-government, the validity of its enactments could easily be challenged as being repugnant to the laws of England. Boothby J. was prepared to give the repugnancy doctrine so extensive an operation that a valid enactment of the South Australian Parliament "would be the exception and not the rule".[2] The South Australian Chief Justice suggested, as a remedy, that the Imperial Parliament settle the question concerning these constitutional difficulties by enacting legislation setting out the exact position clearly and conclusively.

The scope of the repugnancy doctrine was, as a result of s. 2 of the *Colonial Laws Validity Act*, unquestionably confined to colonial laws inconsistent with the provisions of an Act of the Imperial Parliament or any order or regulation made thereunder. In an attempt to remove doubts as to the scope of the constituent powers of colonial legislatures s. 5 of the *Colonial Laws Validity Act* was enacted. The limited success of this provision is reflected in the number of leading authorities which have attempted to elucidate its proper meaning.[3] Not only has this provision failed to settle the limits of the constituent powers of the Parliaments of the Australian states, it has also given rise to serious speculation as to the

* LL.B. (Hons.) (Melb.), LL.M. (Mon.), Barrister and Solicitor (Vic.); Lecturer in Law, Melbourne University.

1 28 & 29 Vict., c. 63 (1865).

2 See E. Campbell, "Colonial Legislation and the Laws of England" (1964-67) 2 *University of Tasmania Law Review* 148, 173-4.

3 *Taylor* v. *Attorney-General for Queensland* (1917) 23 C.L.R. 457; *McCawley* v. *R.* [1920] A.C. 691; *Attorney-General for N.S.W.* v. *Trethowan* (1931) 44 C.L.R. 394; [1932] A.C. 526; *South-Eastern Drainage Board (S.A.)* v. *Bank of South Australia* (1939) 62 C.L.R. 603; *Clayton* v. *Heffron* (1960) 105 C.L.R. 214.

immutability of parliamentary sovereignty in Britain.[4] The issues to which s. 5 relates concern the most fundamental and complex questions affecting the Constitutions of the Australian states. Central to this discussion is the contest between two basic principles. On the one hand there is the question of parliamentary sovereignty and its supremacy, if not over the law, at least over its earlier enactments, and on the other hand there is the question of the constitutional ability of a state Parliament to bind its successors. I think these broader questions can be reduced to the simple issue of whether or not state legislative power is divisible or indivisible. It is my contention that state legislative power in Australia, as a matter of constitutional law, must reside in one institution and be exercised in accordance with one procedure. The purpose of this article is to attempt to establish this hypothesis.

The central question raised in this article is: by what authority do the courts arrive at the conclusion that a prior inconsistent state law can invalidate a subsequent state law, when both are enacted by the same Parliament which purportedly exercises the same constitutional power? In other words, how can the courts allow a state Parliament to deny to its successors a power which it freely exercises? The purpose of this article is to show that the analyses relied on by the courts to reach such a conclusion are insufficient to justify that conclusion. In reaching this conclusion the courts have created a situation where the politicians of the past can override the politicians of the present. In my opinion, before the courts could justify such an undemocratic result they would have to base that conclusion on the clear and compelling words of the appropriate constituent instrument. As we shall see, the language of the appropriate constituent instrument fails to clearly compel such a result. On the contrary, the relevant language tends to support the opposite conclusion.

It would be of assistance to the reader if I, at this stage, provided a short outline of the ideas I intend to develop in this article. First it is necessary to distinguish between four types of state legislatures. There is of course the ordinary legislature of a state. In contrast with this legislature there are two other legislatures whose position in the legislative hierarchy is equal to that of the ordinary legislature. These two bodies I call co-ordinate and alternate legislatures. A co-ordinate legislature is one which exercises all or some of the powers exercisable by the ordinary legislature, derives those powers from the same source or sources as does the ordinary legislature, and exercises those powers with the same authority. An alternate legislature is one which exercises a portion of the power formerly exercised

[4] *Attorney-General for N.S.W.* v. *Trethowan* (1931) 44 C.L.R. 394, 426; R. F. V. Heuston, *Essays in Constitutional Law* (London, Stevens & Sons, 1961) pp. 22-4; *Halsbury's Laws of England* 4th ed., Vol. 8, pp. 536-7; H. W. R. Wade, "The Basis of Legal Sovereignty" [1955] C.L.J. 172; F. A. Trindade, "Parliamentary Sovereignty and the Primacy of European Community Law" (1972) 35 *Mod. Law Review* 375.

by the ordinary legislature. This portion of power was taken from the ordinary legislature and was vested exclusively in the alternate legislature. An alternate legislature, like a co-ordinate one, derives its power from the same source as does the ordinary legislature and exercises it with the same authority.

If there is a legislature co-ordinate with the ordinary legislature then there exists the possibility that a law enacted by one would contradict a law enacted by the other. Thus there would be an inconsistency. Since each law derives its authority from the same source, and since each possess the same authority, I cannot conceive of a way in which that inconsistency could be removed. This fact, in conjunction with some other arguments which I will mention subsequently, lead me to the conclusion that state legislatures cannot create co-ordinate legislatures. Alternate legislatures are equally objectionable, in my view, if the power which is exercised by them and which was divested from the ordinary legislature forms any part of the power granted by s. 5 of the *Colonial Laws Validity Act* 1865. Creating an alternate legislature to exercise exclusively a portion of the power granted by s. 5 will, in effect, involve a reduction in the total amount of power given by s. 5 which can be exercised within that state jurisdiction. This point shall be explained in more detail subsequently. If a constitutional arrangement is established whereby the power exercisable within a state jurisdiction, granted by s. 5, is reduced, then that would contradict a clear implication derived from s. 5 that the power granted by it, to be exercised within a state jurisdiction, cannot be limited.

Finally there are subordinate legislatures, which are simply delegates of the ordinary legislature. The only difficulty which arises with respect to this type of legislature is if it receives a total, or at least a substantial, delegation of the legislative authority of the ordinary legislature. The Privy Council has suggested, on at least two occasions,[5] that such a delegation may well be invalid. I will argue in this article that that assumption overlooks the nature and extent of the legislative power granted to state legislatures, and that the assumption may therefore be wrong.

State legislative power can be divided either substantively or procedurally. That is to say, state legislative power can be distributed between two or more legislative institutions, or, alternatively, different segments of legislative power can be exercised in accordance with different modes of procedure. The objections which can be raised with respect to a substantive division of legislative power are different from those which relate to a procedural division of power. In this article I shall first consider the substantive questions, paying particular attention to the distinction between delegation and divestment.

[5] *Re The Initiative and Referendum Act* [1919] A.C. 935, and *Cobb & Co.* v. *Kropp* [1967] 1 A.C. 141.

At the same time I do not wish to exaggerate the importance of the distinction between substantive and procedural divisions of power. The central thesis of this article is that there is one objection which will apply equally to either form of division. That objection is based on the language used in granting a constituent power under the respective Constitutions of N.S.W., Victoria, Queensland and Western Australia.[6] Both ss. 4 of the Constitution statutes of N.S.W. and Victoria provide a good example. There it is stated that the constituent power shall, subject to certain immaterial exceptions, be exercised "in the same manner" as the ordinary powers of legislation. The very clear implication to be drawn from this provision is that the constituent and ordinary powers of legislation should not be divided either procedurally or substantively. This principle unfortunately has no application to either South Australia or Tasmania owing to the absence of an equivalent provision to s. 4 in their Constitutions.

The principle of indivisibility casts serious doubts on the correctness of the decisions of the High Court and Privy Council in *Attorney-General for N.S.W.* v. *Trethowan.* It is my intention in this article both to criticise those decisions and, at the same time, to explore its relevance in light of the recent decision of the Queensland Supreme Court in *Commonwealth Aluminium Corporation Ltd* v. *Attorney-General.*

PROCEDURAL AND SUBSTANTIVE DIVISIONS OF LEGISLATIVE POWER

Before embarking on a discussion of the major issues raised in this article an explanation of the distinction between procedural and substantive modes of dividing state legislative power should first be undertaken. An alteration of the substantive division of legislative power involves the addition or subtraction of one of the elements in the legislative process, whereas an alteration in the procedure governing the exercise of legislative power involves the addition or subtraction of manner and form requirements which regulate the exercise of legislative power by the existing elements in the legislative process. Thus, for instance, the requirement in s. 60 of the Victorian Constitution that laws altering the constitution of the Legislative Assembly or Legislative Council must be passed by an absolute majority in both Houses before being presented to the Governor for his assent, is a purely procedural requirement. Such a requirement does not contemplate any change in the elements of the legislative process; it merely regulates the manner in which those elements are to act. On the other hand, a scheme such as the one embodied in the Queensland *Parliamentary Bills Referendum Act* of 1908,[7] involving the substitution of the Legislative Council with the

[6] N.S.W.: (1855) 18 & 19 Vict. c. 54, s. 4; Vic.: (1855) 18 & 19 Vict. c. 55, s. 4; Qld.: (1857-61) cl. 22, Order in Council (1859), *British Parliamentary Papers*; W.A.: (1890) 53 & 54 Vict. c. 26, s. 5.

[7] The validity of this legislation was considered in *Taylor* v. *Attorney-General for Queensland* (1917) 23 C.L.R. 457.

electorate voting at a referendum, could not be described as merely procedural. Where one element in the legislative process is removed and replaced by another, it would clearly involve a substantive division of legislative power.

These two examples are clear-cut, leaving no scope for controversy. However there exist situations in which a restructuring in the distribution of legislative power assumes a form which could be described as either procedural or substantive. Take for instance the case of a joint sitting of both Houses of Parliament which may be convened for special purposes. One may view that as being either procedural or substantive. It may be thought that such a scheme envisages two of the elements in the legislative process acting concurrently in accordance with a special procedure, with each element preserving throughout its separate identity. In *Harris* v. *Minister of the Interior*[8] the South African Supreme Court viewed a joint sitting of both Houses of the South African Parliament as merely a procedure by which each of those two elements could act when legislating on specific topics.[9] Alternatively it would seem quite reasonable to regard a joint sitting as involving a fusion, whereby two of the elements in the legislative process are merged into one. Viewed in that light a joint sitting would be substantive in its operation.

A similar situation arises when the electorate, voting at a referendum, is added to the legislative process, while at the same time retaining the existing elements which ordinarily act in that process. Section 7A of the N.S.W. *Constitution Act* of 1902, which was considered in *Attorney-General for N.S.W.* v. *Trethowan*,[10] involved such a situation. That particular scheme could be viewed as introducing a condition precedent, namely the approval of the Bill by the electorate voting at a referendum, as an essential requirement before the Bill could be presented for the Governor's assent. Examined in that perspective the existing elements in the legislative process would remain unchanged. Indeed that view of s. 7A was the view adopted by both the majority of the High Court and the Privy Council. On the other hand, s. 7A could also be seen as performing a substantive role by adding the electorate as an extra element in the legislative process with respect to the enactment of particular statutes. Rich J. in *Trethowan's* case regarded the legislative provision as performing not only a procedural role but also a substantive one.[11]

In addition to these considerations one further point should be made. In some instances it is not only difficult to distinguish between procedural and substantive rules, but in addition difficulties arise in identifying whether a rule is procedural or whether it is, say, a rule of construction. In *South-*

[8] [1952] (2) S.A. 428.
[9] Ibid. 464.
[10] (1931) 44 C.L.R. 394.
[11] Ibid. 419-20.

Eastern Drainage Board (S.A.) v. *Savings Bank of South Australia*,[12] the High Court considered the effect of s. 6 of the *Real Property Act* 1886 of South Australia which provided:

> "No law so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act, nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply notwithstanding the provisions of *The Real Property Act* 1886."

It was held in that case that s. 6 did not enact a procedural rule, but rather a rule of statutory construction.[13] Therefore any question of that provision operating as a manner and form requirement within the meaning of the proviso to s. 5 of the *Colonial Laws Validity Act* 1865 was automatically precluded, once it was characterized as an interpretive provision.[14]

DELEGATION AND DIVESTMENT

In understanding the complexities concerning the reconstruction of state legislatures, one must keep in mind the distinction between delegation and divestment as it operates within the constitutional framework of the Australian states. The Imperial Parliament, through the enactment of the various Constitutions of the Australian colonies, and also through the enactment of the *Colonial Laws Validity Act*, delegated legislative authority to the Parliaments established under those Constitutions. The legislative authority granted to those Parliaments has been described "as plenary and as ample within the limits prescribed . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow".[15] On the basis of this principle the Privy Council has held on three occasions[16] during the last century that colonial legislatures ought not be regarded as delegates with respect to the application of the maxim *delegatus non potest delegare*. In other words such legislatures are not restrained in their ability to delegate the legislative power which has been conferred on them.

In the decision of *Re The Initiative and Referendum Act*,[17] it was suggested by the Privy Council that whilst it was clearly permissible for the Provincial legislatures of Canada to delegate a portion of their legislative power, there nevertheless existed limitations on the extent of the power of delegation. Their Lordships stated:

> "No doubt a body, with a power of legislation on the subject entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada,

[12] (1939) 62 C.L.R. 603.
[13] Ibid. 618 per Latham C.J., 625 per Dixon J.
[14] See J. I. Fajgenbaum and P. Hanks, *Australian Constitutional Law* (Sydney, Butterworths, 1972) p. 286.
[15] *Hodge* v. *R.* (1883) 9 App. Cas. 117, 132.
[16] Ibid. See also *R.* v. *Burah* (1878) 3 App. Cas. 889; *Powell* v. *Apollo Candle Co.* (1885) 10 App. Cas. 282.
[17] [1919] A.C. 935.

could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as has been done when in *Hodge* v. *R.*, the Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act[18] to which it owes its own existence."[19]

In that case the Privy Council was concerned with the validity of legislation enacted by the Provincial legislature of Manitoba. The legislation enabled 8 per cent of the electors of Manitoba to petition the legislature to enact laws. If the legislature declined, then the proposed law was to be submitted by the Lieutenant-Governor of the Province to a referendum and if passed became a law in the same manner as ordinary legislation enacted by the Provincial legislature. A slightly different procedure was provided with respect to the repeal of Provincial legislation. The scope of the legislative authority granted to the people by this procedure was as comprehensive as that possessed by the Provincial legislature. Thus the scheme set out in this legislation did, very clearly, "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence". However whilst this consideration raised grave constitutional questions, their Lordships did not definitely determine that such a consideration would have been fatal to the legislation. Rather, they based their conclusion of invalidity on another ground which is not material to the discussion.

In the recent decision of *Cobb & Co.* v. *Kropp*,[20] the Privy Council was concerned with a challenge to the validity of the Queensland *Transport Acts* which had delegated wide powers to the Commissioner of Transport. In passing their Lordships noted:

"Nor did the Queensland legislature 'create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence' (see *In re The Initiative and Referendum Act* . . .)."[21]

Once again the Privy Council merely raised the suggestion that a wholesale delegation by a state legislature would be *ultra vires*. As I shall presently show, if that suggestion is correct, then it will raise a serious question as to the correctness of the decision of the High Court in *Taylor* v. *Attorney-General for Queensland*.[22]

In that case the High Court was concerned with the validity of the Queensland *Parliamentary Bills Referendum Act* 1908. The legislation provided a method to resolve deadlocks between the two Houses of the Queensland Parliament. If a Bill had been passed by the Legislative Assembly

18 The Act in question is the *British North America Act* (1867).
19 [1919] A.C. 935, 945.
20 [1967] 1 A.C. 141.
21 Ibid. 157.
22 (1917) 23 C.L.R. 457.

in two successive sessions and had been twice rejected by the Legislative Council, then the Bill could be submitted to the electors at a referendum. If the Bill was passed by a majority of the voters and if it obtained the assent of the Governor, then it became the equivalent of an Act of Parliament. The legislation had close similarities with the Manitoban *Initiative and Referendum Act*. This was particularly true when it is realized that legislation enacted through the deadlock-resolving procedure could encompass the same range of topics as could form the subject of legislation enacted by the Queensland Parliament. This included the Parliament's power of constituent alteration.

In 1916 a Bill was passed in two successive sessions of the Legislative Assembly to abolish the Legislative Council. Not surprisingly the Bill was twice rejected by the Legislative Council. The Bill was then submitted to a referendum. At that stage the validity of the *Parliamentary Bills Referendum Act* was challenged. The High Court unanimously held that the legislation was valid, being authorized under s. 5 of the *Colonial Laws Validity Act*.

When the *Parliamentary Bills Referendum Act (P.B.R.A.)* was passed there existed two separate legislatures within Queensland. The first legislature consisted of the Governor, the Legislative Assembly and the Legislative Council. The second consisted of the Governor, the Legislative Assembly and the people voting at a referendum. Furthermore the legislative power of each of the two legislatures was identical. The only area of uncertainty was the relationship which existed between the two legislatures. Were they two co-ordinate legislatures of equal status or was one subordinate to the other? If the legislature created by the *P.B.R.A.* was subordinate to the Queensland Parliament then it must be regarded as a delegate which had been created and endowed with the full capacity of its parent legislature, in which case the legislation was very arguably invalid for the reasons suggested by the Privy Council in *Re The Initiative and Referendum Act*.

If, on the other hand, it was a co-ordinate legislature, enjoying the same status and being on the same level as that of the Queensland Parliament, then the legislative power it exercised was derived directly and immediately from the Imperial Parliament. The *P.B.R.A.* therefore created a legislative institution, defined its procedure, but did not give it legislative power. Once the Queensland Parliament had created that legislative institution it received its legislative power from an Act of the Imperial Parliament. It was a "representative legislature" within the meaning of s. 5 of the *Colonial Laws Validity Act* and thus it enjoyed the powers granted to all representative legislatures under that section. It was also a "legislature" within the meaning of the definition of legislature used in the Queensland Constitution. The term "legislature", as used in the Queensland Constitution, includes not

only the legislature created by the Constitution but also any future legislature which may be established in the exercise of powers granted by that Constitution. It could be argued that this was a future legislature and therefore it enjoyed the legislative powers granted by that Constitution to the legislatures established under it. It therefore enjoyed the power of constituent alteration granted by the Constitution. The constituent power enabled the legislature to repeal or alter all or any of the provisions of the Constitution, subject to exceptions which here are not material. Such a power would authorize the repeal of those provisions establishing the Legislative Council.

While it is theoretically possible to conceive of two co-ordinate legislatures, their existence raises serious constitutional difficulties. If there existed in Queensland between 1908 and 1917 two co-ordinate legislatures each exercising the same quantum of legislative power with respect to the same territorial jurisdiction, then how does one resolve conflicts which may arise as between two separate pieces of legislation, each having been enacted by the two respective legislatures? If the two legislatures were co-ordinate neither could repeal nor amend the other's legislation. There would exist no mechanism for resolving inconsistencies between different enactments of the different legislatures. It would seem that this consideration alone would indicate that it is beyond the constitutional competence of state legislatures to create a legislature co-ordinate with themselves, unless the Constitutions of those legislatures clearly authorize that possibility. A power to repeal or alter the provisions of a Constitution does not spell out a clear intention to allow for the creation of co-ordinate legislatures. Therefore the power to do so was arguably not granted within the scope of the constituent power contained within the Queensland Constitution. What about s. 5 of the *Colonial Laws Validity Act?*

The relevant language in that section is: "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". The power to make laws with respect to its own constitution, powers, and procedure does not give a legislature the power to create a co-ordinate legislature. Such an enactment would not relate to the constitution, powers, and procedure of that legislature. Thus prima facie the position is that neither under the constituent power granted by the Queensland Constitution nor under s. 5 of the *Colonial Laws Validity Act* was it possible for the Queensland Parliament to create a legislature co-ordinate with itself. As I shall demonstrate subsequently there are further and more compelling reasons which reinforce this prima facie conclusion. Hence the legislature established under the *P.B.R.A.* must be regarded as a subordinate and therefore exercising its powers as a delegate of the Queensland Parliament.

If that is so what about the two obiter statements appearing in the two Privy Council decisions to which I have already referred? Those statements may be interpreted as referring to the creation of a co-ordinate legislature rather than a subordinate one. If that is so then they are perfectly consistent with the propositions I have advanced above. On the other hand they may concern the question of a wholesale delegation. If that is the case and if they correctly state the law then the *P.B.R.A.* was invalid. I think the resolution of this problem can best be attained by returning to basic principles.

If I may recall the statement which I have already quoted from *Hodge* v. *R.*, it was said of the legislative power of colonial legislatures that it was "as plenary and as ample within the limits prescribed . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow". If the Imperial Parliament can bestow on a colonial legislature limited legislative power of exactly the same nature as the Imperial Parliament possesses, then it would seem to follow that that colonial legislature could bestow that same limited legislative power on a subordinate of itself in the same way as the Imperial Parliament bestowed that power on it. Certainly if that possibility does exist, and there seems no reason in principle why it should not exist, then the decision in *Taylor* v. *Attorney-General for Queensland* can be explained on that basis. Admittedly if that is so, then the subordinate in the exercise of its delegated authority was able to abolish the legislature, being in this case the Queensland Parliament, whence it derived that delegated authority. It is also worth noting that at the same time the delegate abolished itself. The explanation for such a paradoxical result lies in the fact that the Queensland Parliament delegated to this subordinate, *inter alia*, the power of divestment.

It should be remembered that state legislative power was never given to one institution or legislative structure but rather it was given to a class of institutions or structures. That class consists of the initial institution or structure established under the colonial Constitution and those successive institutions or structures which have been established by the legislature preceding them in accordance with the Constitution. Thus the concept of a state legislature is really twofold. It can refer to the particular institution which, for the time being, exercises state legislative power, and it may also refer to that group of successive institutions which between them exclusively exercise state legislative power. It should also be remembered that it is the state legislature for the time being that chooses its successor in the exercise of a power granted by the Constitution of the state. If we examine the definition of the term "legislature" as used in s. 6 of the Victorian Constitution this point is demonstrated quite clearly.

> " 'Legislature' shall include as well as the Legislature to be constituted under the said reserved Bill and this Act, as any future Legislature which

may be established in the said Colony under the Powers in the said reserved Bill and this Act contained."

If a wholesale delegation is permissible then I would suggest that it is also permissible to delegate the authority of choosing a successive legislature, and if that is so then it is possible for a subordinate to abolish its parent legislature. However it ought to be remembered that when the subordinate abolishes its superior, it must, at the same time, choose a successor to that superior, so that the subordinate is at all times under the supervision of a state legislature.

PARTIAL DIVESTMENT AND ALTERNATE LEGISLATURES

Given that a state legislature is capable of completely divesting itself of its legislative authority and reposing that authority in a successor, is it possible for a state legislature to divest itself of only part of its authority and repose that part in an alternate legislature? On the basis of authority the answer to this question is yes. The authority is the case of the *Attorney-General for N.S.W.* v. *Trethowan* which involved exactly that situation. By an amendment to its Constitution the Parliament of New South Wales divested itself, in s. 7A, of the authority to abolish the Legislative Council of N.S.W. and it vested that same authority in an alternate legislature, being, in this case, the two Houses of Parliament, the Governor and the people at a referendum. It should be pointed out that the existence of two or more alternate legislatures does not raise the same objection that arises with respect to the existence of co-ordinate legislatures. Co-ordinate legislatures exercise as between themselves the same legislative authority and thus it is possible for each to act inconsistently with the other and thereby create a conflict that cannot be resolved, whereas alternate legislatures exercise mutually exclusive authority and thus are unable to create conflicts as between themselves. Therefore the objections to the creation of alternate legislatures are not so obvious as those which relate to the creation of co-ordinate legislatures.

It is therefore not surprising to find that Rich J. found no difficulty in *Trethowan's* case[23] in conceding the possibility of a state legislature divesting itself of part of its authority and conferring that authority on an alternate legislature.

"It was said, however, that the definition of 'colonial legislature' in sec. 1 of the *Colonial Laws Validity Act* confines the signification of that term to the authority competent to make laws for the Colony upon general matters, and that if upon matters in general the two Houses with the assent of the Sovereign could legislate, sec. 5 gave them the power of constitutional amendment in spite of the attempt to incorporate the electorate in the legislative system for the purpose of particular legislation. But no reason appears to exist for applying the definition of

[23] (1931) 44 C.L.R. 394.

> colonial legislature in such a manner. If the legislative body consists of different elements for the purpose of legislation upon different subjects, the natural method of applying the definition would be to consider what was the subject upon which the particular exercise of power was proposed, and to treat sec. 5 as conferring upon the body constituted to deal with that subject authority to pass the law although it related to the powers of the legislature."[24]

The s. 5 referred to, of course, is s. 5 of the *Colonial Laws Validity Act*. As can be seen from the passage appearing at the end of that quotation his Honour alludes to one of the major difficulties concerning the creation of alternate legislatures. If a legislature divests itself of a portion of the power granted to it by s. 5 of the *Colonial Laws Validity Act* and reposes that power in an alternate legislature, then that legislature can only exercise that constituent power to the extent to which it will affect itself. An alternate legislature, like a co-ordinate legislature, does not receive its power or authority from the state legislature creating it. If it did, it would not be either an alternate or co-ordinate legislature, but rather it would be a subordinate one. Instead an alternate legislature receives its power and authority direct from an Imperial statute. In other words, the state legislature in creating an alternate legislature creates at the same time a "representative legislature" within the meaning of that term as used in s. 5 of the *Colonial Laws Validity Act*, in which case its authority is confined to enacting laws respecting its own constitution, powers and procedure. Thus it was possible for the alternate legislature in *Trethowan's* case to abolish the Legislative Council, since that institution was a constituent element of that legislature.[25] However the power it derived from s. 5 permitted it to abolish the Legislative Council only in so far as it was a constituent element of the alternate legislature. That section did not permit the alternate legislature to abolish the Legislative Council for all purposes, that is, the provision did not authorize the abolition of the Legislative Council by the alternate legislature in so far as the Legislative Council constituted one of the elements in the structure of the ordinary legislature of N.S.W. A similar point was raised in *Clayton* v. *Heffron*.[26]

In that case the High Court examined the validity of s. 5B of the N.S.W. *Constitution Act*. That provision provided for the resolution of deadlocks between the N.S.W. Legislative Assembly and Legislative Council. Although the procedure contemplated under s. 5B was quite complex it, in essence, involved legislation which, having been twice passed by the Legislative Assembly and twice rejected by the Legislative Council, was to be submitted to a referendum. If approved by the electors at a referendum the proposed law needed only the assent of the Governor to become an Act of the N.S.W.

[24] Ibid. 419-20.
[25] It should be recalled that the alternate legislature consisted of the Crown, both Houses of Parliament and the people.
[26] (1960) 105 C.L.R. 214.

Parliament. The question before the High Court was whether a Bill for the abolition of the Legislative Council, having substantially complied with the procedure set out in s. 5B, could be submitted to a referendum. One of the arguments raised as to why the Bill should not be allowed to go to a referendum was that to give the legislature, created under s. 5B, the constitutional capacity to abolish the Legislative Council for all purposes amounted to giving that legislature the power not only "to make laws respecting the constitution, powers, and procedure of such legislature"; but also the constituent power to make laws respecting the constitution, powers, and procedure of the ordinary legislature of N.S.W. Thus s. 5B purported to exercise a constituent power beyond that which had been granted under s. 5 of the *Colonial Laws Validity Act* and hence was invalid.

In the joint judgment of Dixon C.J., McTiernan, Taylor and Windeyer JJ., their Honours stated:

> "The reason for the doubt is that s. 5B leaves the legislature as it is and yet makes special provision on occasion for one House with the approval of the electors at a referendum exercising a full legislative power, including indeed a constituent legislative power, without the consent of the other House. It may be said that to do this goes beyond the literal meaning of the words 'constitution powers and procedure of such legislature'. But be that as it may, s. 5 of the *Constitution Act*, 1902-1956 appears on consideration to contain a sufficient power not only to change the bicameral system into a unicameral system but also to enable the resolution of disagreements between the two Houses. . . ."[27]

Whilst their Honours did not express a conclusive view of the strength of the argument, they appear nevertheless to have been sufficiently convinced of its merits to concentrate exclusively on s. 5 of the *Constitution Act* as providing a sufficient basis for the validity of s. 5B. Furthermore, the Court did not provide any reason as to why the argument should be considered wrong. It would therefore seem reasonable to assume that the argument is in fact sound.

To return to the situation in *Trethowan's* case, it will be recalled that the Legislative Council, as an element of the ordinary legislature, could not be abolished by either the alternate legislature or the ordinary legislature. In short the device adopted in s. 7A of the N.S.W. Constitution managed *to eliminate a segment of the power* granted by s. 5 of the *Colonial Laws Validity Act* to be exercised within that jurisdiction. One may regard s. 5 as expressing an intention that the power exercisable within a jurisdiction cannot be reduced or eliminated.

The judgment of Dixon J. in *Trethowan's* case indicates clearly that such a result would be unconstitutional.

> "The extent is limited to which such a law may qualify or control the power to make laws respecting the constitution, powers and procedure

[27] Ibid. 250.

> of the Legislature. It cannot do more than prescribe the mode in which laws respecting these matters must be made. To be valid, a law respecting the powers of the legislature must 'have been passed in such manner and form as may, from time to time be required by any . . . colonial law' (*sc.*, a law of that legislature) 'for the time being in force.' Its validity cannot otherwise be affected by a prior law of that legislature. In other words no degree of rigidity greater than this can be given by the legislature to the constitution."[28]

A law which imposes a procedural restraint on the exercise of the power granted by s. 5 would be permissible. However a colonial law which went further and attempted to eliminate some of that power would fail as being inconsistent with a provision of an Imperial statute, namely in this case, s. 5 of the *Colonial Laws Validity Act*. I would therefore suggest that to create an alternate legislature designed to exercise a portion of the power granted in s. 5, accompanied by a corresponding divestment of power from the ordinary legislature, is an exercise fraught with grave constitutional difficulties and should therefore fail.

MANNER AND FORM

Was *Trethowan's* case nonetheless correctly decided on the basis that s. 7A represented a permissible procedural limitation to the exercise of the power granted by s. 5 of the *Colonial Laws Validity Act*? I would also answer that question in the negative. Section 5 of the *Colonial Laws Validity Act*, in so far as it relates to N.S.W., covers exactly the same ground as is covered by s. 4 of the *Constitution Act*[29] of N.S.W. That provision states:

> "It shall be lawful for the Legislature of *New South Wales* to make Laws altering or repealing all or any of the Provisions of the said reserved Bill,[30] *in the same Manner*[31] as any other Laws for the good Government of the said Colony. . . ."

The section then goes on to refer to certain special procedural requirements imposed in the reserved Bill with respect to the alteration of some of its provisions. In other words what the section is saying is that the legislature shall enjoy a constituent power and that power shall be exercised in accordance with the procedure which applies to ordinary legislation, subject only to those special procedural requirements laid down by the Imperial Parliament. The section, therefore, stipulates that the exercise of the constituent power contained therein shall not be subject to any special procedural requirements other than those contained within the reserved Bill. Thus, a colonial law, which attempted to create a special procedural requirement and which was to be applicable to laws repealing or altering the N.S.W.

[28] (1931) 44 C.L.R. 394, 431.
[29] 18 & 19 Vict. c. 54.
[30] The Constitution of N.S.W. appears as a schedule to the Imperial Act.
[31] Emphasis added.

Constitution, would be inconsistent with s. 4 of the Imperial statute, and therefore would be void and inoperative to the extent of the repugnancy.[32]

It was, however, held in *Trethowan's* case that s. 5 of the *Colonial Laws Validity Act* enabled colonial legislatures to enact special procedural restraints controlling the exercise of the power of constitutional alteration. The basis of the decision rested on the operation of the proviso to s. 5:

> ". . . and 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, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony."

As Isaacs J. observed in *Taylor* v. *Attorney-General for Queensland* the words of clause 22 (the Queensland equivalent of s. 4 of the *Constitution Act* of N.S.W.) "are certainly not narrower—and are possibly even broader —than those of s. 5 of the *Colonial Laws Validity Act* 1865".[33] In other words s. 5, as it applies in each jurisdiction, covers the same field and applies to exactly the same subject-matter as does s. 4. Therefore a law which came within the proviso to s. 5 and which sought to control the exercise of the constituent power granted by s. 5 must, at the same time, control the exercise of the constituent power granted under s. 4. Since what is granted under s. 5 is identical to that which is granted under s. 4, a limitation imposed on the former must also be a limitation imposed on the latter. In fact I think one can go further: the constituent powers granted under ss. 4 and 5 respectively are not only identical but are in fact the same thing. If two legislative provisions, both enacted by the Imperial Parliament, give to the same legislature power to change the same set of things to the same extent, then I think one can say that this is not a case of granting two identical powers, but rather a case of granting the one power twice. It may be thought that because of the proviso to s. 5 the power granted by it is not given to the same extent as the power granted by s. 4. I hope to demonstrate that, appearances to the contrary notwithstanding, the power given by each provision is granted to the same extent. Alternatively, even if you were to assume that the two powers are distinguishable, the power granted by s. 4, at least, covers the same field covered by s. 5, and thus a limitation imposed on the power granted by s. 5 must also operate as a limitation on the power given by s. 4.

Although s. 5 confers a constituent power which is equivalent to the power granted by s. 4, it then goes on to qualify that power in a way which s. 4 does not. In the proviso, it contemplates that the power may be limited by "Manner and Form" requirements enacted in a colonial law.

[32] See s. 2 of the *Colonial Laws Validity Act* 1865.
[33] (1917) 23 C.L.R. 457, 476.

It would therefore seem reasonable to regard s. 5 as authorizing a colonial Parliament to enact special procedural limitations restraining the exercise of its power of constitutional alteration. Indeed that view was endorsed in *Trethowan's* case both in the High Court and Privy Council decisions.[34] In addition both the High Court and the Privy Council considered whether s. 4 was still operative given that the N.S.W. Parliament in 1902 completely repealed the reserved Bill and replaced it with a *Constitution Act*. The power granted in s. 4 may well be considered spent as a result.[35] However, even if one were to regard that power as having been exhausted by the *Constitution Act* 1902, that does not imply that prohibitions expressed within that section are thereby negated.

The view that "s. 5 enables the legislature of New South Wales to fetter, restrain, or condition the exercise of its power of constitutional alteration"[36] overlooks one basic objection. Section 4, as I have already indicated, contains a prohibition on the enactment, by the N.S.W. legislature, of special procedural requirements limiting the exercise of its constituent power. A N.S.W. law which attempted to enact any such special procedural stipulation would be void and inoperative, being repugnant to a provision of an Imperial statute. A law of N.S.W. which was void for repugnancy could not be "a colonial law" within the meaning of that expression as used in the proviso to s. 5. Surely the legislative instruments referred to in the proviso must necessarily be valid laws. Unless one were to regard s. 5 as implicitly repealing the prohibition contained within s. 4, then there can be no way one can escape the result stated immediately above.

THE INDIVISIBILITY OF LEGISLATIVE POWER

The prohibition stated in s. 4 of the Constitution statute of N.S.W. expresses a fundamental principle underpinning the uncontrolled nature of the unitary Constitution of N.S.W. That principle is that the legislative power conferred directly by the Imperial Parliament and to be exercised within N.S.W. is indivisible. That is, that power must be exercised in its entirety by one legislative institution in accordance with only one procedural format, subject only to those procedural exceptions authorized by the Imperial Parliament and contained within the reserved Bill. It is in the very nature of an uncontrolled unitary Constitution that the legislative power granted by it be not divided, at its source, as between either different institutions or different sets of procedure. The principle that Parliament cannot bind its successors depends, in terms of its effectiveness, on the principle of the indivisibility of legislative power. Once that power is constitutionally capable of being shared amongst different legislatures or

[34] (1931) 44 C.L.R. 394, 418, 430, 431 per Rich and Dixon JJ.; [1932] A.C. 526, 540.
[35] (1931) 44 C.L.R. 394, 416, 428, 429 per Rich and Dixon JJ.; [1932] A.C. 526, 539.
[36] (1931) 44 C.L.R. 394, 418 per Rich J.

procedural formats then Parliament can bind its successors. This fundamental point was expressed with clarity and forcefulness in the judgment of Lord Birkenhead L.C. in *McCawley* v. *R.*[37]

In that case their Lordships were considering the validity of the Queensland *Industrial Arbitration Act* of 1916 which enabled the Governor-in-Council to appoint persons who were judges of the Court of Industrial Arbitration as justices of the Supreme Court. They were thus able to hold office as a Supreme Court judge only so long as they were judges of the Industrial Court. Judges of the Industrial Court were appointed for seven years and therefore they did not enjoy the same period of judicial tenure as that which had been guaranteed for Supreme Court judges under the Queensland Constitution. The *Industrial Arbitration Act* was therefore inconsistent with the Queensland Constitution. It was held by a majority of 3 to 2 in the High Court that before legislation could be enacted inconsistent with the Constitution, the Constitution had to be amended by legislation enacted for that express purpose. Legislation of the Queensland Parliament which was merely inconsistent with the Constitution and which did not express a deliberate intent to amend the Constitution was invalid. The *Industrial Arbitration Act* fell into that category.

In overruling the decision of the High Court the Judicial Committee made it plain that the Constitutions of the Australian states could be amended or altered as easily as any other Act. There existed no formal requirements necessary to bring about an alteration of their Constitutions other than the formal requirements necessary for the enactment of ordinary legislation. In short, legislation inconsistent with the Constitution thereby altered that Constitution to the extent of the inconsistency. Their Lordships regarded this as the case prior to the enactment of the *Colonial Laws Validity Act*, and hence they viewed the enactment of that piece of legislation as merely "explanatory" of the position that existed prior to its enactment.[38] The reason for that legislation in their Lordships' opinion was, as is stated in its preamble, to remove doubts which had been seriously entertained by colonial judges.

McCawley's case is important for two reasons. First, it holds, within the context of the issue that arose in that case, that the principle of indivisibility of legislative power operates and has always operated within the Australian colonies, ever since the enactment of their respective Constitutions. Secondly it holds that the *Colonial Laws Validity Act* is primarily declaratory in nature and was designed to affirm, with even greater clarity, that the Constitutions of the Australian colonies were uncontrolled.

It is therefore surprising to find in the judgment of Dixon J. in *Trethowan's* case the following statement:

[37] [1920] A.C. 691.
[38] Ibid. 709, 710.

"Upon the subjects with which it deals, the statement of law contained in the *Colonial Laws Validity Act* was meant to be definitive, and a subject with which it deals is the constituent power of such legislatures and the manner in which that power shall be exercised."[39]

The Privy Council in *Trethowan's* case described s. 5 as the "master section" when referring to the relationship between it and s. 4.[40] If these judicial pronouncements are designed to suggest that s. 5 is to be read without reference to s. 4, and that any superficial inconsistencies which arise as between the two are to be regarded as a case of the latter repealing the former, then such an approach would not only ignore the historical background to the *Colonial Laws Validity Act*, but it would also ignore the effect of the decision in *McCawley's* case. The effect of that decision was to require one to read s. 5 in the light of the principles expressed in s. 4, unless s. 5 contained language that negated those principles. With respect to the principle of the indivisibility of legislative power there is nothing expressed in s. 5 which would have the effect of overriding that principle. Once it is accepted that a colonial law which contravenes that principle would, as a result, be void for repugnancy, and therefore would not operate as a colonial law within the meaning of the proviso, the two sections are perfectly compatible.

If I am correct in the view just expressed, one may wonder why, in the proviso to s. 5, any reference was made to manner and form requirements enacted in colonial law if colonial laws of that type would have been inevitably invalid. The short answer to such a question is that those special procedural requirements, laid down in the Constitutions of the Australian states by the Imperial Parliament, could well appear in a colonial law if the colonial legislatures had re-enacted their Constitutions into colonial law. The colonial Parliaments clearly possessed the power to re-enact the Constitutions enacted for them by the Imperial Parliament. If they enacted those special procedural requirements, laid down in their original Constitutions by the Imperial Parliament, they, of course, would not be acting inconsistently with the Imperial statute. Such would not be a case of repugnancy. If the proviso to s. 5 failed to make reference to manner and form requirements which had been re-enacted as a colonial law, then, by virtue of the power granted in that section, those manner and form requirements could well have been ignored.

It is also worth mentioning that once it is accepted that the principle of indivisibility of legislative power is contained and entrenched in provisions like s. 4 of the Constitution statute of N.S.W., an end would be put to any speculation as to the constitutional ability of state Parliaments to create co-ordinate or alternate legislatures. The creation of legislatures of that type, for the reasons explained earlier, clearly involves dividing legislative

[39] (1931) 44 C.L.R. 394, 429.
[40] [1932] A.C. 526, 539.

power at its source. Similarly, the principle of indivisibility prevents state legislatures from adopting such entrenching devices as that suggested by Dixon J. in *Trethowan's* case.

In that case his Honour stated:

> "An Act of the British Parliament which contained a provision that no Bill repealing any part of the Act including the part so restraining its own repeal should be presented for the royal assent unless the Bill were first approved by the electors, would have the force of law until the Sovereign actually did assent to a Bill for its repeal. . . . If, before the Bill received the assent of the Crown, it was found possible, as appears to have been done in this appeal, to raise for judicial decision the question whether it was lawful to present the Bill for that assent, the Courts would be bound to pronounce it unlawful to do so. Moreover if it happened that, notwithstanding the statutory inhibition, the Bill did receive the royal assent although it was not submitted to the electors, the Courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside."[41]

This passage has assumed significance amongst some constitutional lawyers.[42] It is regarded as authority for the general proposition that, if a legislature should enact into law a certain procedure which must be complied with before that legislature can validly exercise all or part of its legislative power, then that procedural requirement will be effective in restraining the exercise of that legislative power. It is not my purpose to discuss whether this proposition has merit as a general principle. For my purposes it is sufficient to say that this proposition has no application to those special procedural requirements, such as s. 7A of the N.S.W. Constitution, which are designed to impose a different manner than that applicable to the passage of ordinary legislation, when in doing so it would offend the prohibition expressed in such sections as s. 4 of the N.S.W. Constitution statute. In short where the principle of indivisibility of legislative power has been constitutionally entrenched it is quite obvious that a device such as the one suggested by Dixon J. in *Trethowan* will clearly fail.

The decision in *Trethowan* can and has been justified in three ways. First, s. 7A represented a manner and form requirement which took effect under the proviso to s. 5 of the *Colonial Laws Validity Act*, and thus represented a valid and effective procedural restraint on the exercise of the constituent power, to the extent that that power could authorize an abolition of the Legislative Council or a repeal of s. 7A. Secondly, s. 7A reconstructed the legislature of N.S.W. by creating two alternate legislatures, one being the general legislature empowered to exercise the full extent of the legislative

[41] (1931) 44 C.L.R. 394, 426.
[42] See R. F. V. Heuston loc. cit.; *Halsbury's Laws of England* loc. cit.

authority exercisable within N.S.W., subject to the exception that that legislature was unable either to abolish the Legislative Council or to repeal s. 7A, the other being a special legislature being authorized only to abolish the Legislative Council and to repeal s. 7A. Thirdly, the decision could be justified on the basis that s. 7A simply enacted a procedural restraint on the exercise of a portion of the constituent power, and that that procedural restraint took effect quite independently of the proviso to s. 5 of the *Colonial Laws Validity Act.*

Once it is conceded that the principle of the indivisibility of legislative power is recognized and entrenched in provisions like s. 4 of the N.S.W. Constitution; and further it is acknowledged that that principle has remained unaffected by subsequent Imperial legislation, then all those three analyses, advanced above, supporting the decision in *Trethowan*, are no longer correct. Once it is accepted that the principle of the indivisibility of legislative power applies, then reconstruction of state legislatures comprehends nothing more than the simple proposition that a legislature of a state may divest itself of all its legislative authority and may reconstitute that same authority in a new legislature. However if a legislature should do so it must ensure that both the constituent powers of legislation and the ordinary powers of legislation are inseparably combined in the same institution and are exercisable in accordance with only one procedure.

PARLIAMENTARY SOVEREIGNTY AND THE INDIVISIBILITY PRINCIPLE

Questions concerning the indivisibility of state legislative power raise more than an interesting academic issue; they concern a fundamental principle relating to the continued vitality of democratic government. In a simple form the question can be put as to whether "the dead hand of the past" will be allowed to rule the present? Whether one generation of politicians is to be allowed to prevent future generations from having the opportunity of reversing their decisions? Whether the democratic choice of the electorate as between political parties and policies can be negated by the constitutional entrenchment of a contrary policy at the instance of the opposing party?

To deny successive generations of politicians the opportunity of exercising legislative power on certain topics is commonplace in a federal Constitution where the anticipation of such limitations on legislative power proved an essential pre-condition to federation. It is also commonplace where the object is to protect basic human rights from legislative interference. However it would seem quite unjustified in the case of a unitary Constitution which was established in the absence of any such limitations on future legislative action. Furthermore, it ought to be remembered that these devices invoke the judiciary to act as an umpire in a contest between the politicians of the present and those of the past. It shifts a political question

into the arena of the courts. In the words of Lord Porter in *Commonwealth* v. *Bank of N.S.W.*, "It is vain to invoke the voice of Parliament".[43]

Admittedly the importance of such considerations depends, to a large extent, on making certain value judgments which are made in a context that excites not only controversy but also emotion. Such fundamental questions cannot be resolved simply by resorting to dispassionate analysis. As a matter of constitutional law, the choice between competing values of that nature involves an historical inquiry. The question is not what choice ought to be made, but rather what choice has in fact been made. The answer to that question is fairly simple. The Imperial Parliament, in establishing most of the Constitutions of the Australian states, implanted in them provisions similar or identical to s. 4 of the N.S.W. Constitution statute. That provision, as has already been observed, introduced the concept that the constituent power should be exercised in the same manner as the power to enact ordinary legislation. It therefore required that both the ordinary and the constituent powers of legislation had to be exercised by the same legislature in accordance with the same procedure, which effectively prevented Parliament from binding its successors. It is only when the total quantum of both constituent and ordinary legislative power can be divided between different legislatures or different modes of procedure that it is possible to entrench legislative determinations.

As I have already shown, not only was the principle of the indivisibility of legislative power adopted in the Constitutions of the Australian states, but it remained logically unaffected by the *Colonial Laws Validity Act*, despite the decisions of the High Court and the Privy Council in *Attorney-General of N.S.W.* v. *Trethowan*. Although it may seem somewhat irreverent to so confidently treat those decisions as being wrong in principle, it should be observed that what is at issue concerns the most fundamental characteristic of state Constitutions. It seems to me somewhat amazing to suggest that legislation which was meant to be declaratory of the pre-existing situation, nevertheless granted, in ambiguous language, a power to the colonial legislatures of Australia to destroy that fundamental principle.

RECENT DEVELOPMENTS

The relevance of this question today is demonstrated in the recent case in the Queensland Supreme Court of *Commonwealth Aluminium Corporation Ltd* v. *Attorney-General*.[44] In that case the court examined the effectiveness of s. 4 of the Queensland *Commonwealth Aluminium Corporation Pty. Limited Agreement Act* 1957 in preventing the Queensland Parliament from repealing or amending the provisions of that Act. Section 4 of the Act stated:

[43] [1950] A.C. 235, 310.
[44] [1976] Qd. R. 231.

> "The Agreement may be varied pursuant to agreement between the Minister for the time being administering this Act and the Company with the approval of the Governor in Council by Order in Council and no provision of the Agreement shall be varied nor the powers and rights of the Company under the Agreement be derogated from except in such manner.
>
> Any purported alteration of the Agreement not made and approved in such manner shall be void of no legal effect whatsoever."

In 1974 the Queensland Parliament enacted the *Mining Royalties Act* under which regulations were made which raised the royalties payable by Comalco under the agreement. Comalco sought a declaration that the 1974 Act was invalid; the Queensland Government demurred to the statement of claim. The court had to consider three questions of constitutional importance. First, were either the 1957 or 1974 Acts laws with respect to the constitution, powers and procedure of the Queensland Parliament? Secondly, did s. 4 of the 1957 Act introduce a manner and form requirement within the meaning of the proviso to s. 5 of the *Colonial Laws Validity Act*? Thirdly, if s. 4 did prevent the Queensland Parliament from repealing or altering the 1957 Act, was it invalid as being repugnant to s. 5 of the *Colonial Laws Validity Act*? The court held that s. 4 was not effective in preventing the subsequent repeal or alteration of the 1957 Act.

His Honour Wanstall S.P.J. held that whilst s. 4 of the 1957 Act "may be an exercise of the other power given by s. 5, that of legislating respecting its powers",[45] it was not a manner and form requirement within the meaning of the proviso to s. 5 of the *Colonial Laws Validity Act*. His Honour Dunn J. simply held that s. 4 was not a law respecting the constitution, powers and procedure of the Queensland Parliament. This conclusion rested upon the construction he placed on s. 4:

> "When the structure of the Agreement and the scope and purpose of the Act are understood, the provisions of s. 4 enabling variation of the Agreement and prohibiting variation except as provided for by the section, are to be understood as a legislative command directed to the Executive and the plaintiff, and not as a restraint upon legislative power self-imposed by the Legislature."[46]

Having come to that conclusion it was unnecessary for his Honour to consider whether s. 4 introduced a manner and form requirement.

His Honour Hoare J., in his dissenting judgment, held that both the 1957 and 1974 Acts were laws respecting the constitution, powers and procedure of the Queensland Parliament and that s. 4 constituted a valid manner and form requirement within the meaning of the proviso to s. 5 of the *Colonial Laws Validity Act*.[47]

[45] Ibid. 236.
[46] Ibid. 260.
[47] Ibid. 248.

Admittedly the device adopted in s. 4 of the 1957 Act did not attempt to entrench the provisions of that Act in the most effective manner possible. On the assumption that a state government is prepared to bind its successors with respect to the unilateral variation of a franchise agreement, what possibilities are open to it in accomplishing such a purpose?

The most effective possibility would be to include a provision which introduces a very clear manner and form requirement, modelled along the lines of s. 7A of the N.S.W. Constitution. However one cannot simply rely, in terms of its effectiveness, on the decisions of the High Court and the Privy Council in *Trethowan*. In that case s. 7A restricted the ability of the N.S.W. legislature to abolish the Legislative Council and to repeal s. 7A itself, both of which were clearly matters which came within the ambit of the N.S.W. Constitution and legislative procedure. Any subsequent Act which sought to accomplish either of those objectives, in disregard of the restrictions imposed by s. 7A, would relate to matters concerning the constitution and procedure of the N.S.W. Parliament, and would thus come within the scope of the power granted by s. 5 of the *Colonial Laws Validity Act* and would thereby be subject to the limitations imposed by the proviso. On the other hand, a law imposing a manner and form requirement restricting the ability of the legislature to repeal or alter a franchise Act could not be easily characterized as a law limiting the ability of the legislature to make laws relating to its constitution, powers and procedure. Such manner and form requirements would be more properly regarded as limiting the legislature's capacity to exercise its powers to enact ordinary legislation. Thus the manner and form requirement would not take effect under the proviso to s. 5, and therefore the authority of *Trethowan* would not directly support its efficacy as an entrenchment device.

It has been argued by Professor Lumb[48] that the ability to entrench state legislation by the use of manner and form requirements is limited to the case of legislation which relates to the constitution, powers and procedure of such legislature, in which case the manner and form requirement would take effect under the proviso to s. 5. In the *Comalco* case Wanstall S.P.J. took a similar view. His Honour held that to entrench state legislation required the use of a manner and form requirement which came within the proviso to s. 5 of the *Colonial Laws Validity Act*.[49]

Such a conclusion overlooks the judgment of Dixon J. in *Trethowan*, wherein his Honour took the view that any manner and form requirement, irrespective of whether or not it came within the proviso to s. 5, may be effective to invalidate any subsequent legislation which failed to comply with that manner and form requirement. His Honour stated that in such a

[48] R. D. Lumb, *The Constitutions of the Australian States* (4th ed., Brisbane, University of Queensland Press, 1977) p. 100.
[49] [1976] Qd. R. 231, 236, 237.

case "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".[50]

It has been suggested that the Privy Council decision in *Bribery Commissioner* v. *Ranasinghe*[51] supports the general proposition suggested by Dixon J. In that case it was said that "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law".[52] It is a matter of conjecture whether the Privy Council did in fact approve the view that conditions imposed by the legislature itself can effectively regulate that legislature's future exercise of law-making power. The judgment may have been limited to the simple assertion that conditions contained within the constituent instrument, under which a legislature is created, bind that legislature in the exercise of the law-making power which is derived from that instrument.

If it is assumed that state legislatures possess a power to validly create a special mode of procedure governing the exercise of a certain category of legislative power,[53] then presumably that mode of procedure must be complied with so long as it is validly in force. Thus, it would follow that if a subsequent Act was at variance with a Franchise Act, and that Franchise Act contained a manner and form requirement with which the subsequent Act failed to comply, then it would be invalid. A valid exercise of legislative power pre-supposes the concurrence of the requisite elements in the legislative process acting in accordance with the prescribed procedure. Once it is conceded, as it was in *Trethowan*, that different modes of procedure can be lawfully created with respect to the exercise of different segments of legislative power, then the validity of a law will depend on whether it was passed in accordance with the mode of procedure governing the exercise of legislative power of that description. Thus it would appear impossible to logically fault the suggestion raised by Dixon J. in *Trethowan.*

It may be supposed that such difficulties could be overcome by removing, in the subsequent Act, that manner and form requirement. However it should be observed that any attempt to remove that procedural requirement would involve an exercise of the power conferred in s. 5 of the *Colonial Laws Validity Act.* The purported removal would involve making a law with respect to the procedure of the legislature. If that manner and form requirement was doubly entrenched it could not be removed on the authority of *Trethowan,* unless the legislature first complied with that

[50] (1931) 44 C.L.R. 394, 426.
[51] [1965] A.C. 172. See E. Campbell, Comment (1977) 1 *Australian Mining and Petroleum Law Journal* 53, 55.
[52] [1965] A.C. 172, 197 per Lord Pearce.
[53] To make such an assumption would involve rejecting the view that state legislative power was indivisible, a view which was admittedly rejected in *Trethowan.*

manner and form requirement. Thus, on the basis of two implications which can be drawn from *Trethowan*, a doubly entrenched manner and form requirement, governing the exercise of the ordinary powers of legislation, can be just as effective as one which governs the constituent powers of legislation.

CONCLUSION

Whether this method will ultimately accomplish its purpose will depend on more than an assessment of its constitutional merits. Clearly, the decision of the courts would turn on fundamental considerations touching such questions as the sovereign nature of Parliament. No doubt some members of the judiciary would be influenced, as was Hoare J. in the *Comalco* case,[54] by the exigencies of corporate planning with respect to the making of large capital investments in long term economic ventures. Alternatively other members of the judiciary may well regard such considerations to be of secondary importance to the need to preserve the sovereign authority of Parliament. It will ultimately depend on how the courts perceive their role in this area of constitutional law.

Traditionally the existence of constitutional principles controlling legislative action involves vesting the judiciary with the power of veto over certain classes of legislation. In exercising this quasi-political power the courts are in theory adjusting the balance of power either between central and regional government, between the government and the judiciary or between the state and the individual. With respect to this particular question the courts are invited to adjust the balance of power between the past and the present. Only by abandoning the power of veto in this area are the courts able to protect the freedom of the present generation to reverse the decisions of the past. Where the courts have been accustomed to exercising this power of veto they will be inclined, as was evidenced in *Trethowan*, to extend the exercise of that power into new areas of constitutional review.[55] It is therefore not difficult to imagine the judiciary being prepared to protect a constitutionally entrenched legislative determination of the past from later legislation seeking to reverse it. In resistance to this tendency stand the principles of parliamentary sovereignty which admittedly form part of our borrowed English heritage and which are now expected to survive and flourish in an alien legal culture characterized by the supremacy of the Constitution over Parliament.

[54] [1974] Qd. R. 231, 249. See also K. D. MacDonald, "The Negotiation and Enforcement of Agreements with State Governments Relating to the Development of Mineral Ventures" (1977) 1 *Australian Mining and Petroleum Law Journal* 29, 46-7.

[55] O. Dixon, *Jesting Pilate* (Melbourne, Law Book Co., 1965) p. 51.