

I

PRINCIPLES UNDERLYING THE ENGLISH CONSTITUTION

According to Dicey there are three principles which distinguish the English Constitution from the Constitution of other countries. These principles are :—

- (1) The legislative supremacy of Parliament.
- (2) The prevalence of the rule of law.
- (3) The dependence of the Constitution on the conventions.

Two comments may be legitimately made on the assertion that these principles form distinguishing characteristics of the English Constitution. In the sense that they are not to be found in other Constitutions. One is this. That some of these characteristics have ceased to be true at any rate, to the extent they were true when Dicey wrote. For instance the legislative supremacy of Parliament is to some extent modified and circumscribed by the Statute of Westminster passed in the year 1930. The second comment that must be made that these characteristics, especially the prevalence of the rule of law and the dependence of the Constitution on conventions are not special to the English Constitution. Conventions are a feature of all Constitutions and the rule of law, in one of its senses at any rate, obtains in the United States. All the same it is Constitution in principles form a feature of the English Constitution in a manner and to an extent unknown in other Constitutions. And understood in that sense they no doubt serve to distinguish the English Constitution from other Constitutions.

(1) LEGISLATIVE SUPREMACY OF PARLIAMENT

One of the first and foremost of foreign Commentators on the English Constitution Hontessquie came to the conclusion as a result of his study that the English Constitution exhibited a feature which was absent from the Constitution of France as it existed at the time when he wrote. He found that under the English Constitution the three organs of the State, namely, the legislative, the executive and the judiciary were distinct and were separated from one another in their composition as well as their functions. Each was limited to its own sphere of activity and was not permitted to invade the dominion of another. Whatever liberty the Englishman had in the days when he was writing and which his countrymen did not possess, was attributed by him to this feature of the English Constitution. So convinced was he of the virtue of this principle of the English Constitution that he propounded it as a vital principle of political organization and recommended it to his countrymen for adoption in their own Constitution. This doctrine of separation of powers of Hontessquie has been laid at the base of every new Constitution made thereafter. This is an interesting illustration of how countries have been misled by the wrong conclusions of a student of politics, for there is no doubt about it that Hontessquie misunderstood the English Constitution. The English Constitution certainly does not recognize the principle of the separation of powers. The King is a part of the legislature, the head of the judiciary and the supreme executive authority in the land. The Ministry which carries on the executive Government of the country in the name of the King are members of Parliament. There is, therefore, no separation between the executive and the legislature. The Lord Chancellor is the working head of the Judicature. He is also a member of the Cabinet. There is, therefore, no separation between the executive and the judiciary. Not only is there no separation between the three organs of the State, but there is no foundation for the statement that their authority is limited by the Constitution for the simple fact that there is no Constitution in the American sense of the

word which allocates the functions of the different organs of the State and delimits their authority. Under the English Constitution there is one supreme authority under the law, and that is Parliament. If the functions of the executive and the judiciary are limited, it does not follow that the functions of Parliament are limited. It only means that Parliament has for the time being allotted certain functions to be discharged by certain bodies, in a certain manner. The limitations of the judiciary and the executive do not result in putting consequential limitation. On the other hand as the limitations proceed from the authority of Parliament, Parliament retains the authority to widen them or to curtail them.

MEANING OF THE LEGISLATIVE SUPREMACY OF PARLIAMENT

A complete idea of the legislative supremacy of Parliament must involve a grasp of the two parts which it must include. The first is that Parliament has, under the English Constitution, the right to make or unmake any law whatsoever. Secondly, no person or a body of persons is recognized by the law of England as having a right to override or set aside the law made by Parliament. It is unnecessary to recall that the words Parliament and law must be understood in their strictly legal sense. Parliament means as has been already explained, the King, the Lords and the Commons, and that none of them individually exercised the authority, belonged to them jointly, so as to make it an Act of Parliament. The term law again must be understood in the strictly legal sense. It means only such rules as are enforced by the Courts. Having stated what is involved in the notion of the legislative supremacy of Parliament, we may next ask what is the proof of this legislative supremacy of Parliament ?

The doctrine of legislative supremacy is accepted by all the lawyers who have written about the English Constitution. Sir Edward Coke, peaking of the power and jurisdiction of Parliament, agreed that it was so transcendent and absolute that it cannot be confined either for causes or persons, within any bounds.

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Blackstone the author of the celebrated commentaries agrees that, "Parliament has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations ecclesiastical or temporal, civil, military, maritime or criminal. This being the place where that absolute despotic power, which must in all Governments must reside somewhere, is entrusted by the Constitution of those Kingdoms. All mischiefs and grievances, operations and remedies that transcend the ordinary course of laws are within the reach of this extra-ordinary tribunal. It can regulate the succession to the crown, as was done in the reign of Henry VIII and William III. It can alter the established religion of the land, as was done in a variety of instances in the reigns of Henry VIII and his three children. True it is that "what the Parliament doth no authority upon earth can do."

Delome, a French lawyer agrees with Coke and with Blackstone. He observes, "that Parliament can do everything but make a woman a man and a man a woman".

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This legislative supremacy of Parliament which is acknowledged by all lawyers can be proved by reference to a large number of instances drawn from the history of the British Parliament. But the following may suffice.

(1) *Parliamentary sovereignty and the Acts of Union*.—The Acts of Union with Scotland and Ireland are in the nature of treaties and contain certain clauses which were then regarded as fundamental and essential conditions of Union and which were understood as not being liable to abrogation by the Parliament of Great Britain. The Act of Union with Scotland stipulated that every professor of a Scotch University shall acknowledge and confess and subscribe the confession of faith as his profession of faith. This was regarded as a fundamental condition of the treaty

* Reproduced as per original, page 36 could not be found—ed.

of Union with Scotland. But this very provision has been repeated by the Universities Scotland Act, 1853, which relieves most professors in Scotch Universities from the necessity of subscribing the confession of faith. The Act of Union with Ireland stipulated “that the Churches of England and Ireland as now by law established, be united into one Protestant Episcopal Church, to be called the United Church of England and Ireland, and that the doctrine, worship, discipline and the Government of the said United Church shall be and shall remain in full force forever as the same are now by law established for the Church of England and that the continuance and preservation of the said United Church, as the established Church of England and Ireland shall be deemed and be taken to be an essential and fundamental part of the Union”. There is no doubt that from the language of the clause that it was intended to limit the legislative supremacy of Parliament and yet Parliament by the Irish Church Act of 1869 disestablished the Church in Ireland and its legislative competency to enact such a measure was not questioned.

II

The Septennial Act of 1707 is another illustration of the legislative supremacy of Parliament. Under the Act of 1694, the duration of Parliament was limited to 3 years. In the year 1716 a new election was due. But both the King and the Ministry were convinced that under the political circumstances of the day, a new election would be disastrous to the ministry and to the state and ministry of the day persuaded Parliament to pass an Act extending the duration of Parliament from 3 years to 7 years. The House of Commons was accused by the critics of a breach of trust, as representatives of the electors and even the peers joined in the protest on the ground that this Act deprived the people of their remedy against their MP's, who had failed to do their duty. In the wake of political criticism against the Act, the legal connotation was missed altogether. Whether such an Act was proper or improper was one thing. Whether Parliament could alter the law governing its life was another question. It should be noted that while the Act was attacked from the first point of view it was never questioned from the second. Indeed it was taken

or granted that the Septennial Act was within the legislative competence of Parliament.

There is another feature of the Septennial Act which should be noted because it helps to explain the extent of the legislative supremacy of Parliament. Parliament could have passed a law extending the life of Parliament and probably no question would have been raised if the Act was made applicable to future Parliaments. But the Septennial Act not only extended the life of all future Parliaments, but it also enlarged the terms of the very Parliament which passed the Act. It was undoubtedly an Act of usurpation of political power not contemplated and not given by law to the Parliament which passed the Act and yet such an Act of usurpation was a legal Act. It is unnecessary to go back so far in the past to cite an authority of the Legislative supremacy of Parliament, as the Septennial Act. A similar exercise of the legislative supremacy was resorted to by Parliament during the late war when the sitting Parliament in 1914 instead of dissolving itself passed an Act extending its own life.

Acts of Indemnity are examples which constantly occur and which serve as sharp reminders of the legislative supremacy of Parliament. An Act of Indemnity is a statute the object of which is to free individuals from penalties imposed upon them by law. This is the highest proof of the legislative supremacy of Parliament, for it imports the legalization of an illegality. legalization of an illegality.

INTERFERENCE WITH PRIVATE RIGHTS

Most legislative assemblies confine their legislative powers to the regulation of the rights of the public in general. Private rights and domestic rights are deemed either to be too particular and too sacred to be interfered with by Parliament. But the British Parliament has never accepted these limitations upon its legislative authority. In the case of the lives of the Duke of Clarence and Clocester, Parliament passed an Act declaring that their daughters and wives should inherit their property although they were alive. In the case of the Duke of Buckingham, he was an infant but Parliament passed an Act declaring that he should be

treated as a major for all legal purposes. Sir Robert Playfinston was dead yet long after his death, Parliament passed an Act holding him guilty of treason. The case of the Marquis of Winchester is an illustration in which Parliament by law declared a legitimate child to be illegitimate. A contrary illustration in which illegitimate children born before marriage were declared legitimate, is supplied by the law passed by Parliament in respect of the issues born to Catherine Swinford by John of Gaunt, the Duke of Lancaster. Catherine had, before marriage from the Duke four illegitimate children, Henry, John, Thomas and a daughter, Joan. The King by an Act of Parliament in the form of charter legitimised these children. These illustrations that Parliament cannot only regulate by law the affairs of a single individual but it may also alter the course of general law.

