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Australian Contributions to the Evolution of
Parliamentary Government

BY

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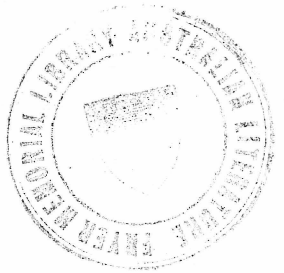
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BY DR. T. P. FRY

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AUSTRALIAN CONTRIBUTIONS TO THE EVOLUTION OF PARLIAMENTARY GOVERNMENT

(1) INTRODUCTION

Possibly the most significant features of government in any nation of the British Commonwealth of Nations are its Parliament and its Cabinet system of government, which latter in modern times has entwined Parliament to such an extent that the idea of "parliamentary government" (or, as it is sometimes called, "cabinet government" or "responsible government") really connotes government by a Cabinet responsible to Parliament.

This common factor leads, however, to a widespread popular impression that parliamentary government is identical in all its essential and incidental features in both the United Kingdom and Australia, and also elsewhere in the British Commonwealth. It is the purpose of this paper to point, so far as the United Kingdom and Australia are concerned, to some of the differences and divergences, either present or past. These have resulted partly from the intentional adaptation of English institutions to Australian circumstances, partly from recent changes made in them in the United Kingdom, and partly from incomplete understanding by some Australian parliamentarians of the actual structure of English institutions and the real uses to which they are put. Furthermore, the number of published works of Australian constitutional historians are pitifully inadequate¹ for the purpose of creating in the Australian community a consciousness of the present blending of English, American and indigenous Australian elements in our political institutions, and of the historical causes which evolved them.

The Imperial Parliament at Westminster, the Mother of Parliaments, is, for the purpose of the enactment of most kinds of legislation, a bicameral legislature consisting of the House of Commons and the House of Lords—and the Crown. Although it does not itself perform any administrative functions, the House of Commons, the so-called lower House of the Imperial Parliament, makes and unmakes the Ministry (of which the Cabinet is the powerful inner group), which consist of political leaders who are not only almost invariably members of either the House of Commons or the House of Lords, but are also collectively in administrative control of all departments of the Crown's United Kingdom government. Through the Ministry the Imperial Parliament controls the Crown's executive government. By means of its legislation it issues unchallenged commands to the courts and other tribunals. It can legislate on any subject. It can discuss any matter at all. So pervasive is its power that British constitutional law and the writings of British political scientists agree upon the absolute sovereignty of the Imperial Parliament at Westminster. The legal Doctrine of the Supremacy of Parliament recognises the legislative supremacy of the Imperial Parliament in respect of all subject matters and in respect of all other agencies of government within the British Commonwealth of Nations whether in the United Kingdom or abroad.

¹ This has become obvious during the preparation recently by me for the University of Queensland of a book on *The Crown, Cabinets and Parliaments in Australia*. Dr. G. Greenwood's *The Future of Australian Federalism* is a valuable recent exception, as it is primarily a history rather than a prophecy.

In the Australian Commonwealth, and in each of the Australian States, there is a Parliament, in which sit members of a Cabinet whose role very closely resembles that played in the Imperial Parliament by its Cabinet (and its larger Ministry). Such differences as are observable in the functioning of the Cabinet system in Australia compared with its functioning in the United Kingdom seem to be principally due to (i) the more highly-organised, and more disciplined, nature of Australian Labour parliamentary parties compared with parliamentary parties in the United Kingdom; (ii) the paucity of the number of members in the lower House in each Australian Parliament compared with the number of members of the House of Commons; and (iii) the fact that in respect of each Australian Parliament the functions of the Crown are usually performed not by His Majesty the King in person but by his various vice-regal representatives, whose tenures of office obviously differ from that of His Majesty.

An historic event which has caused parliamentary government in Australia to deviate somewhat from the Imperial model was the federation in 1901 of the former six Australian Colonies. No longer did any Australian Parliament after Federation (whether it be the newly-created Australian Commonwealth Parliament or the six State Parliaments into which the former six Colonial Parliaments were transformed) possess power to legislate on practically every subject. Federation divided, between the Australian Commonwealth Parliament on the one hand and the six State Parliaments on the other hand, all the possible subject-matters of legislation. This change in the powers of Australian Parliaments results in a difference between them and the Imperial Parliament which it is as necessary to point out as it is unnecessary to elaborate. Federation has, however, introduced into the rules of Australian constitutional law, into the writings of Australian political scientists and, more vaguely, into the minds of the Australian people as a whole, a doctrinal and psychological attitude towards Parliaments which is alien to the Doctrine of the Supremacy of Parliament that still holds sway in the United Kingdom² and alien to the Doctrine of the Supremacy of Parliaments that permeated law and political thought in nineteenth century Australia. This new attitude is formulated in legal form in what is usually known as the Doctrine of Judicial Review. This doctrine originally was adopted in the United States of America, where it was based upon the presumed necessities of the federal constitution of the United States of America, and usually it is contended that it is an inevitable concomitant of federalism. Whether this be so or not, its common acceptance by lawyers and by the general public in twentieth century Australia is a profound historical fact which does and will continue to differentiate Australian Parliaments of the twentieth century from Australian Parliaments of the nineteenth century and from the Imperial Parliament of these and earlier centuries. Gradually, Australians have become used to the idea that it is often the courts and not the Parliaments of Australia that possess the function of determining whether legislation is or is not to be operative.

Six of Australia's seven Parliaments are bicameral like the Imperial Parliament; one is unicameral. However, the upper House in each of the six which are bicameral differs from the House of Lords, not only in its composition but also in the manner of its election and, in details, in respect of its functions

² For an attempt to apply similar categories of thought to the constitutional law of the United Kingdom, see Dr. W. I. Jennings' *The Law and the Constitution*, Third Edition (Revised), Chapter IV. The classical Doctrine of the Supremacy of Parliament had, however, been reaffirmed in *Ellen Street Estates Ltd. v. Minister of Health* (1934), 1 K.B. 590.

and procedure. One historic decision, which was as pregnant with future possibilities as it was inevitable, was the rejection of William Charles Wentworth's plan for an hereditary upper House in the New South Wales Parliament. Since then, there has been no endeavour to constitute any Parliament in Australia in the same manner as the Imperial Parliament at Westminster is constituted, and Australians have confined themselves to copying in greater or less degree the manner in which and the purposes for which the Imperial Parliament functions.

The existence of one unicameral State legislature in Australia is of considerable constitutional significance. There are those who see, in the necessary delegation of very wide legislative powers to Cabinets and in the limitations, equally necessarily, placed upon the opportunities of debate available to His Majesty's Opposition in each lower House, a drift towards dictatorship. Those who are of that opinion claim that an essential safeguard against the eclipse of the present type of parliamentary government is the preservation of a bicameral form of legislature. It is an historical fact that Queensland has deviated from the Imperial model; but it will be for the future to say exactly what effect, if any, this deviation will have upon the essential nature of parliamentary government in Queensland.

In comparison with such major changes as have been mentioned, it may seem to indicate lack of a sense of proportion to draw attention to comparatively minor innovations which have been made in the procedure, practices, structure and functions of each Australian House of Parliament; but some of these innovations are fraught with great significance and may well be affecting the very nature of parliamentary government itself. One recent illustration is the wireless broadcasting of the proceedings of the Australian Commonwealth Parliament. To some this might seem merely a minor innovation, but I believe that it will have a profound effect upon the nature of parliamentary government, in that it will result in a closer and a different kind of relationship between Parliament and the people, and in drastic alterations being made in parliamentary procedure for the purpose of assimilating certain stages of the proceedings in Parliament to the methods of a broadcasting studio. Already there seems to have become observable a tendency to use Questions for propaganda purposes for which they were never intended, and to use parliamentary rules of procedure in a way designed to obtain for particular members the best of the broadcasting periods each sitting day.

It is time that I illustrated for you in greater detail some of the general ideas that I have so far expressed.

(2) THE CABINET SYSTEM.

Cabinet is the most vital element in the modern form of parliamentary government. In the United Kingdom, in the Australian Commonwealth, and in each of the Australian States, there is a Cabinet, each of which, within its own territorial limits, exercises administrative control over and is responsible for the policy of the King's executive government in respect of such territory. In addition to its supreme executive functions, it is also normally in control of the "lower House" of the legislature of its particular territorial unit. This is the result of a constitutional convention which requires the Crown to appoint as its Cabinet persons, usually members of Parliament, who can get "Government business" dealt with favourably by the lower House, either with or without the assistance of a general election. Cabinet is thus the pivot of an interlocking system, by means of which, in normal circumstances, both the King's executive Government and

the King's Parliament (whether it be in the United Kingdom, the Australian Commonwealth or an Australian State) come under unified direction from Cabinet. The relationships of Cabinet to the executive Government and to the Parliament, together constitute what is known as the system of Cabinet government, or responsible government, or parliamentary government.

In general principles this system is very similar in each Australian State, the Australian Commonwealth and the United Kingdom. This does not mean that no special problems arise from local circumstances.

For example, Dr. Evatt has suggested in his *The King and His Dominion Governors* that, whereas the King can, without putting his crown in hazard, dismiss an Imperial Government in the United Kingdom, his vice-regal representatives in Australia may in similar circumstances run the risk of having their appointments terminated should they "guess wrongly."

A fact which has been an historical cause of difference between certain aspects of the Cabinet systems of Australia and the United Kingdom, is the difference between the number of members in Australian Parliaments and in the Imperial Parliament respectively. In no House of any Australian Parliament are there as many as one-sixth the number of members of the House of Commons. In the United Kingdom there is a Cabinet consisting of Cabinet Ministers, the most important of the Ministers; a Ministry consisting of all Ministers, including Cabinet Ministers; and a large number of Parliamentary Under-Secretaries who may really be regarded as Assistant Ministers. From the Government party in the lower House of an Australian legislature it is not possible to obtain a sufficient number of suitable members to copy the United Kingdom model. It is seldom that any Government party numbers many more than twenty, thirty or forty members in any Australian lower House, the numbers varying as between the different Parliaments. So diverse are they in training, experience, and aptitudes that often it is with difficulty that six to fifteen (or nineteen, in the Australian Commonwealth Parliament at the present time) can be selected to perform with real distinction the functions of Ministers of the Crown. What is badly needed in Australia is an increase in the number of members of each lower House and the consequential subdivision of present electorates. Such an increase is particularly important in the House of Representatives in the Australian Commonwealth Parliament, but there is an unfortunate constitutional provision which requires that the membership of the Senate shall always be approximately half of that of the House of Representatives, and nobody favours any increase in the size of the membership of the Senate. Failure to increase the size of the membership of the House of Representatives will continue to result in less, and less efficient, Ministerial supervision of the permanent officials of the bureaucracy; and, to remedy this, the cost of additional salaries for additional members of Parliament would be cheap at the price.

The theory that strong and well-organised political parties are an essential characteristic of parliamentary government is so strongly held in Australia that, even during the recent war Mr. John Curtin, both when he was in Opposition and after he became Prime Minister, refused on behalf of his party to participate in an all-party "national government," giving as his reason that His Majesty's Opposition is a necessity even in wartime. Some constitutional lawyers and political scientists have, indeed, regarded His Majesty's Opposition as the keystone of the arch of modern parliamentary government. Considered from this aspect, modern parliamentary debates are regarded principally as a means of public discussion

of Cabinet's conduct of affairs, in order that the electors will be in a position to know whether to deprive the Cabinet of its parliamentary majority, and thus bring about the ultimate fall of the Cabinet, by means of votes cast at an election. Recognition of the constitutional importance of His Majesty's Opposition has led to legal recognition, in most Houses of Parliament in Australia, of the special position of His Majesty's Opposition. Several Australian Parliaments have of recent years broken with tradition and recognised in statutes and in their standing orders the existence of a Premier (or Prime Minister) and a Leader of the Opposition, as the holders of specific constitutional appointments. However, the price of liberty is eternal vigilance, which also is a condition of survival of any political institution; and just when the existence and functions of His Majesty's Opposition are receiving legal recognition, other developments have occurred which threaten its effectiveness as an institution.

The introduction of rules such as the "closure" and the "guillotine" (or "closure by departments") may be necessary to enable modern parliaments to transact their business, the more dilatory rules of the nineteenth and earlier centuries being suited only to the smaller volume of legislation that was enacted in earlier centuries. Nevertheless, there is a danger that it may become a means of "muzzling" the Opposition.

It is because a Cabinet is less likely to have a permanent majority in the upper House and therefore less likely to be in a position to destroy the character of Parliament by stifling parliamentary criticism, that some people regard the preservation of the bicameral type of parliament as an essential condition of the preservation of parliamentary institutions of the traditional kind, unless constitutions are made rigid as an alternative safeguard. One of the strongest reasons for the bitterness sometimes displayed by opponents of the modern practice of making grants of "subordinate" legislative powers to Cabinet³, is the desire to prevent the enactment by Cabinet of legislation embodying important but controversial principles, because the result of this is to prevent parliamentary criticism such as would ensue were the same principles embodied in a statute.

In respect of party control of Cabinet, the Cabinet system has during the twentieth century operated at various periods in various Australian Parliaments in a way somewhat different than in the Imperial Parliament.

It is significant of constitutional realities in at least some of the Australian Parliaments, particularly those in which there are or have been Australian Labour Party Cabinets, that a former Minister of the Crown of long experience, after reading something else I had written based upon classical modern writings about the Cabinet system, said that I had not sufficiently emphasised that Cabinet government in Australia goes very close to being caucus⁴ or party⁵ government. Few if any policy matters are decided by an Australian Labour Party Cabinet without reference to

³ Legislative powers are delegated by Parliament to the Governor-General in Council or to the Governor in Council, as the case may be, but the proceedings of the various Executive Councils are mere formalities. In each instance it is the Cabinet which really decides if and how the Executive Council is to exercise its delegated powers.

⁴ A party's parliamentary caucus is composed of those members of the upper and lower Houses of the Parliament who belong to the party. Non-parliamentarians are not members of caucus. It also should be noted that Cabinet is sometimes controlled both in Australia and in the United Kingdom, even on particular matters, by decisions made by the annual conventions and special conventions of the Government party as a whole, in which the parliamentarians are completely out-numbered.

the party's parliamentary caucus. Cabinet has therefore, in some Australian Parliaments become a committee by means of which the Government party's parliamentary caucus exercises control over the policies and major decisions of the executive government as well as of the Parliament. Probably, however, caucus control of the war-time Curtin Labour Party Cabinets in the Australian Commonwealth sphere was not as complete as it has been and is in some of the States where there are Labour Party Cabinets; probably it is not as complete in some of these States as in others. Nor does it mean that the initiative in policy matters passes out of the hands of the Cabinet. The practice is for Cabinet to make a decision and recommend that decision to caucus for acceptance. Caucus may either accept or reject it, but, if Cabinet is unanimous, its recommendation is usually accepted.

We may see future changes even in the Imperial Parliament now that a Labour Party Cabinet is in power there with an absolute majority in the House of Commons. In Australian Parliaments the approximation of Cabinet government to caucus government has been closest when Labour Party Cabinets were in power. The parliamentary caucuses of the anti-Labour Parties usually exercise far less control over details of the policies of an anti-Labour Party Cabinet, whether in the Australian Commonwealth Parliament or in a State Parliament, than does a Labour Party parliamentary caucus over a Labour Party Cabinet. This has sometimes been due to a persistence of *laissez-faire* philosophies and a belief in nineteenth century House of Commons methods. More often it has been due to the fact that many anti-Labour Cabinets in Australia have been coalition Cabinets, because of the fact that in several of the Australian States there have been two anti-Labour parties, neither of which normally has had a majority over the Labour Party in the lower House.

Australian Cabinets tend, whatever be the party in power, to identify themselves more closely with the bureaucracy than do Imperial Cabinets. In Australia there is a strong tendency for a Minister to identify himself in interest with the staff of his Department. Instead of being in fact the person to whom the people and the Parliament look to as guardian of the people's right to have efficient and enlightened administration within his Department, a Minister may very easily be led into being in effect the spokesman and defender of those persons who happen to be employed therein. Such a Minister hotly resents the slightest criticism of the work of the Department and of the permanent officials in it. This is, of course, not the attitude of all Ministers.

(3) THE DOCTRINE OF JUDICIAL REVIEW, AND THE DOCTRINE OF THE SUPREMACY OF PARLIAMENTS.

Perhaps the most distinctive feature of Australian constitutional development has been the application of the American Doctrine of Judicial Review to systems of parliamentary government.

In the constitutional law of the United Kingdom, the ultimate supremacy or sovereignty of the Parliament at Westminster over all other British governmental institutions is the most fundamental axiom of all. This Doctrine of the Supremacy of Parliament was stated as follows by Professor A. V. Dicey :

“ The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the British

constitution, the right to make or unmake any law whatever ; and, further, that no person or body is recognised by the law of the land as having a right to over-ride or set aside the legislation of Parliament."

Professor Dicey added that a corollary of this principle is that any later statute of the Imperial Parliament can repeal or amend any of its earlier statutes, even if, in any earlier statute, the Imperial Parliament had purported to deprive itself of future legislative power to repeal or amend any one or more of its earlier statutes.

In the sixteenth and seventeenth centuries unsuccessful endeavours were made both by the Crown and the law courts to impose limits upon the supremacy of the Parliament at Westminster. The rebellions against Charles I. and James II. stripped from the Crown all its pretensions in this direction ; and the victory of Parliament was also accepted by the courts, because the lawyers, who were supporting Parliament against the Crown, abandoned the incipient idea that in certain circumstances parliamentary statutes could be invalidated by the courts. No English court will to-day ignore or invalidate a statute of the Imperial Parliament. If a court does interpret a statute in a way which the Imperial Parliament thinks erroneous, that Parliament can, by enacting a further statute, over-rule the court's interpretation, and no court would presume to defy any unambiguous enactment of that nature.

After the American Colonies had successfully revolted from Great Britain, they formed a federal union. One striking feature of this federation was that the total field of legislative power was divided up between the central legislature, called Congress, and the various State Legislatures ; and no single legislature possessed supremacy over the others. Another striking feature of the federal union was the imposition upon all the various legislatures of prohibitions against the enactment of certain kinds of legislation, for example, any legislation which would have had the effect of depriving citizens of the Rights of Man (such as the preservation of life, liberty and property, ^{in the same way by} "due process of law," and the preservation of the "obligation of contracts"). Of course, if Congress, or if the State Legislatures, had been in the position of the Imperial Parliament, any one of them could have removed any of these limitations upon its legislative power by merely enacting a statute for that purpose ; and this would have defeated the intentions of those who drew up the United States Constitution. It was not long before the American courts asserted and established the right to invalidate statutes. The doctrine laid down in *Marbury v. Madison* in 1803, is that the constitution controls the legislatures and that no legislature can control the constitution. The courts, having established an exclusive right to interpret the constitutions of the United States and of each State, have invalidated, in whole or in part, thousands of the enactments of American legislatures. In the United States of America there is no legislature whose statutes the courts must invariably enforce, as the English courts must invariably enforce the statutes of the Imperial Parliament. It is sometimes asserted that this American doctrine, usually known as the American Doctrine of Judicial Review, does not result in judicial supremacy over the legislatures ; the contention being that the legislatures and the courts have co-ordinate powers but that "the Constitution" and "the law" are supreme over courts and legislatures alike. Even if this were admitted, however, it seems clear that the doctrine deprives American legislatures of the kind of supremacy over American courts that is possessed by the Imperial Parliament over English courts.

During the nineteenth century⁶ the British doctrine of parliamentary supremacy was acknowledged as the fundamental axiom of constitutional law in each of the six Australian colonies. The doctrine was adapted to the new constitutional device, that of colonial self-government, by interpreting it to mean that the colonial parliament in each self-governing colony was supreme in the affairs of its colony over all other colonial instrumentalities such as the courts and the executive governments therein, but inferior to the Imperial Parliament. That is, the doctrine was transformed from a Doctrine of the Supremacy of Parliament into a Doctrine of the Supremacy of Parliaments.⁷ Mr. Justice Dixon has pointed out that in Victoria in the nineteenth century "the notion of the supremacy of the Legislature over the law and over the courts appears to have been completely in the ascendancy." In the late nineteen-fifties and early nineteen-sixties, "the perverse ingenuity" of Mr. Justice Boothby, applying in an extreme form the Doctrine of Judicial Review to South Australian statutes, led him to invalidate several of them. The Imperial Parliament's reply was the *Colonial Laws Validity Act of 1865*, the aim of which was to amplify and strengthen the powers of colonial legislatures and re-establish the Doctrine of the Supremacy of Parliaments. In succeeding decades the Judicial Committee of the Privy Council, in many decisions, such as *Hodge v. R.* in 1883, in *Ashbury v. Ellis* in 1893, and as recently as *Croft v. Dumphy* in 1932, has also from time to time reaffirmed this doctrine; holding that power conferred upon colonial parliaments to legislate "for the peace order and good government" of a self-governing colony gives to a colonial parliament a supremacy over the governmental instrumentalities of the colony similar to the supremacy belonging to the Imperial Parliament itself.

The federation of the Australian colonies in 1901 created a new situation. Certain American features were thereby introduced into Australian constitutional law. For instance, legislative powers were divided between the Australian Commonwealth Parliament and the State Parliaments. The device of total prohibitions against legislation of certain kinds was also adopted from America, but to only a minor extent. The framers of the Australian Commonwealth Constitution were sufficiently steeped in the Doctrine of the Supremacy of Parliaments to eliminate those clauses of the United States Constitution which embodied the prohibitions known as the Rights of Man; but a limited number of prohibitions⁸ were inserted, for example, to ensure the freedom of interstate trade, and to protect from change by the Parliaments certain fundamental features of the constitutional system.

Soon after Federation it became obvious that difficulties would be experienced in maintaining in full force and effect the former supremacy of Australian Parliaments over Australian courts.

⁶ This is, of course, true of the second half of the nineteenth century, the era of colonial self-government in Australia. It is interesting to note, however, that, in the era before self-government had been granted to New South Wales, the Australian Courts Act, 1828, had directed that all laws and ordinances made by the Legislative Council of New South Wales were to be submitted at once to the Supreme Court, who could declare any such law or ordinance to be *ultra vires*. However, the Legislative Council was given power to over-rule any such opinion of the Supreme Court.

⁷ The name of this Secondary Doctrine is coined, so far as I know, by myself; but it seems to express accurately the views of Australian constitutional lawyers of the second half of the nineteenth century.

⁸ The effects of some of these constitutional prohibitions upon the Australian Commonwealth's exercise of the defence power during the Second World War are considered by Dr. G. Greenwood in his *The Future of Australian Federalism*, at pp. 223-231. At pp. 132-157 he has dealt very fully with the effects of Section 92 in peace time.

Although one of the chief slogans in the campaigns for Federation was "Trust Parliament," it cannot be denied that the Australian Commonwealth Constitution has infringed the Doctrine of the Supremacy of Parliaments.

It is sometimes contended that the division of legislative power between the Australian Commonwealth Parliament and the State Parliaments is necessarily inconsistent with the supremacy of parliaments over courts, but this can only be in the sense that the High Court of Australia can, by means of judicial interpretation, assist one Parliament to increase its legislative power at the expense of another Parliament. This function of Australian courts in the twentieth century is not essentially different in nature from that performed by the Judicial Committee of the Privy Council and by Australian courts in the nineteenth century, before Federation, in deciding (at a time when the Doctrine of the Supremacy of Parliaments was regarded by lawyers and laymen as axiomatic) whether Australian statutes were or were not repugnant to Imperial statutes. Both before and after Federation it has been a function of Australian courts to decide disputes as to divisions of legislative power between Parliaments.

The Australian Commonwealth Constitution introduced an innovation, however. It imposed several "absolute prohibitions" and "safeguards" upon the Parliaments, such as that in Section 92. It has thereby conferred upon the High Court of Australia "an increase in authority which is not logically necessary for federalism," to quote Professor K. C. Wheare's recent book on *Federal Government*. Professor Wheare considers these provisions of the Australian Commonwealth Constitution to be "non-federal" in nature. It is primarily because of these non-federal features that Australian constitutional law has acquired in the twentieth century a Doctrine of Judicial Review which infringes the Doctrine of the Supremacy of Parliaments as understood in the nineteenth century.

It has been said by Professor D. W. Brogan in his *Politics and Law in the United States*, when speaking of the work of the United States Supreme Court in interpreting the absolute prohibitions and safeguards embodied in the Fifth and Fourteenth Amendments of the United States Constitution, that :

"Not only did it cripple both state and federal governments, but when it did permit them to exercise some of the attributes of sovereignty, it did so under the disguise of special and exceptional grants. . . . Nor was it a matter of dividing authority between state and union, for powers denied by one decision to the states might be denied by another to the Union and the United States left impotent to legislate either in their separate or united capacity."

It is in this sense, but to a far less extent, that the American Doctrine of Judicial Review has in the twentieth century been incorporated into Australian constitutional law; and, to the extent that it has been, the nineteenth century Australian Doctrine of the Supremacy of Parliaments has been infringed.

The result has been that Australian lawyers and judges have become familiar with the concepts of American constitutional law, and have grown accustomed to the idea that the validity of any statute can be challenged, possibly with success. Mr. Justice Dixon has indicated the importance of Federation in introducing into Australian constitutional law the American Doctrine of Judicial Review, as a result

of which "men quickly depart from the tacit assumption to which a unitary system is apt to lead that an Act of Parliament is from its very nature conclusive. They become accustomed to question the existence of power and to examine the legality of its exercise. Nothing has had so profound an influence upon legal ideas in this country as the establishment of the federal constitution." Nor, we might add, has anything had so profound an influence in altering the balance of power between parliaments and courts in Australia and thereby affecting the essential nature of parliamentary government.

Influenced by American constitutional doctrines, some Australian judges have shown a tendency to jettison the British constitutional doctrine of parliamentary supremacy, even in cases which do not involve the application of express absolute prohibitions such as that against interference with interstate commerce and intercourse embodied in Section 92. For example, Australian Courts have used Imperial statutory provisions which were intended to confer plenary legislative powers on Australian Parliaments within their allotted subject-matters (that is, the Colonial Laws Validity Act, and the "peace order and good government" formula that is to be found in all Australian constitutions), as limitations on the legislative powers of Australian Parliaments. Even the Judicial Committee of the Privy Council seems to have connived at this development in so far as the Colonial Laws Validity Act is concerned, but the Judicial Committee has so far not agreed with the view of the High Court of Australia that the "peace order and good government" formula constitutes a limitation upon legislative powers.⁹

In *Attorney General for New South Wales v. Trethowan* in 1932 (the year when fear of Mr. J. T. Lang was abroad in the land), the Colonial Laws Validity Act was interpreted in a way which allowed one New South Wales Parliament to bind its successors in respect of the existence and structure of the Legislative Council. "Perhaps the future may say," says Mr. Justice Dixon, "that the most important legal development of the time lies in the discovery of this means of making it impossible to alter a State constitution without a referendum."

In *Commissioner of Stamp Duties (N.S.W.) v. Millar*, which it is significant to notice was also decided in 1932, the High Court of Australia for the first time invalidated a statute in accordance with a doctrine that the "peace order and good government" formula may deprive the Parliaments of legislative power at the discretion of the courts. In other cases, also, there have been *obiter dicta* of High Court judges to the effect that the "peace order and good government" formula enables the courts to invalidate certain types of extra-territorial legislation or legislation delegating too-comprehensive subordinate legislative powers to the Cabinet and other agencies; and judges⁹ have occasionally discussed whether it is the function of the High Court to determine whether any particular statute is in its nature calculated to ensure "peace order and good government" or the reverse, a function which would enthrone the law courts in place of the Parliaments as final arbiters of public policies.

⁹ Possibly the most unequivocal opinion expressed in recent years in the High Court in favour of the Doctrine of the Supremacy of Parliaments, as interpreted by the Judicial Committee of the Privy Council in *Croft v. Dunphy* and earlier cases, was that of Sir John Latham, the Chief Justice, in *Attorney-General (Victoria) v. The Commonwealth* (1945), 71 C.L.R., at pp. 255-6: "The determination whether legislation with respect to any of the subject-matters mentioned in s. 51 is for the peace, order and good government of the Commonwealth is entirely a political matter, and not a matter for determination by any court."

To the extent that the High Court invalidates statutes on quasi-political grounds,¹⁰ then the political and constitutional views of the Justices of the High Court become of major importance. Mr. E. J. Ward, the present Minister for External Territories, has already publicly indicated his personal view that appointments to the High Court should be scrutinised closely to ensure that nobody is appointed who holds political views contrary to those of the Government of the day. To the extent that the High Court becomes bolder in invalidating statutes, there will multiply such demands as these for the appointment of High Court judges on the basis of their known views concerning the main political and social controversies of the day.

There are those who consider that the power of Australian courts over Australian parliaments has grown, is growing and ought to be abolished. There are others who welcome the fastening of judicial fetters upon the Australian Parliaments. Yet again, others are opposed to having judicial fetters fastened upon the Parliaments, but will say that such fetters are an inevitable concomitant of federalism, and see in unification the only means of giving Australia a form of parliamentary government more strictly equivalent to that in the United Kingdom. Perhaps it is possible for a modified Doctrine of the Supremacy of Parliaments to co-exist even under federalism with a modified Doctrine of Judicial Review which confined itself to saying merely whether this Parliament or that Parliament had the power to enact statutes on any particular subject; but, if so, it would be necessary for Australian constitutional law to be purged of all "absolute prohibitions" and "safeguards." In any event, it should be realised that the Australian Doctrine of Judicial Review is as yet merely an anaemic version of its American namesake, because the "absolute prohibitions" and "safeguards" that are to be found in Australian constitutions are fewer in number and narrower in scope than those to be found in American constitutions.

When all this is said, however, it still seems important to point out that, whether you like it or not, and whether you think it is or is not an inevitable concomitant of federalism, the application of the Doctrine of Judicial Review by Australian courts has had very important evolutionary effects upon the nature of parliamentary government, and upon the dogmas of political faith, in Australia in this twentieth century. Gradually, Australians have become used to the idea that it is often the courts and not the Parliaments of Australia that possess the final function of determining whether legislation is or is not to become operative. "A single decision may decide the fate of a great body of legislation. . . . Moreover, the discouragement of legislative effort through an adverse decision and a general weakening of the sense of legislative responsibility, are influences not measurable by statistics."¹¹

¹⁰ It is now generally admitted that judges exercise a judicial discretion in interpreting many of the provisions of the Australian Constitution. In his *Federal Government*, Professor Wheare speaks (at p. 237) as follows of the powers and functions of the Justices of the High Court of Australia in respect of the Australian Commonwealth Constitution: "They have it in their power in many cases to adapt the Constitution to the changing needs of the time. They can do this without violating their oath to the Constitution. The words they have to interpret are flexible; there is a wealth of judicial precedents upon which they can fall back; and they are none of them bound irrevocably by their previous decisions. They can over-rule themselves." Also relevant to this point is Dr. G. Greenwood's *The Future of Australian Federalism*, especially at pp. 59-60, and 65.

¹¹ Felix Frankfurter, *The Public and Its Government*, p. 48.

When in 1942 Dr. H. V. Evatt, as Attorney-General of the Australian Commonwealth, drafted a Bill designed to alter the Australian Commonwealth Constitution in a way which would give the Australian Commonwealth Parliament extensive additional powers to deal with the problems of post-war reconstruction, his Bill prescribed that the Australian Commonwealth Parliament's declared opinion as to what might "tend to achieve economic security and social justice" could not be challenged by the High Court. As a distinguished former Justice of the High Court of Australia (who had resigned to become a member of the House of Representatives), Dr. Evatt was fully conscious of the difference which the Doctrine of Judicial Review had made in the nature of parliamentary government in Australia. As a Minister of State he attempted to put back the hands of the clock, but his Bill met with opposition on this point and he had to abandon the attempt.

That there had grown up in our twentieth century community a body of public opinion and legal opinion in favour of judicial review as a constitutional safeguard of Australia's existing form of government was evidenced by the objections which were advanced against his proposal. As a consequence, Dr. Evatt announced to the Constitutional Convention of Australian Commonwealth and State Parliamentarians held at Canberra in November and December, 1942, that this proposal would be eliminated¹² from the draft Bill, and he made the following comment:

"Whilst there is nothing inherently objectionable in conferring legislative powers which are not subject to judicial review—that is the position both in the United Kingdom and in New Zealand—we agree that the proposal is out of harmony with the essential principle that the High Court should be charged with interpreting the grant of power to the Commonwealth Parliament. . . . The powers as we re-define them will still leave the High Court charged with the function of interpreting their scope and purport."

(4) THE AUSTRALIAN LOAN COUNCIL.

The establishment and operation of the Australian Loan Council by the Financial Agreement Act, 1928, enacted pursuant to Section 105A of the Australian Commonwealth Constitution, has further restricted the extent of the modern applicability of the Doctrine of the Supremacy of Parliaments.

The Loan Council is a body representative of the Australian Commonwealth and of each of the States. It has plenary powers, subject to the terms of the Financial Agreement, to regulate the governmental borrowings of all the Australian Governments. It is, therefore, "a new unit of government," a constitutional authority which is, as Dr. Forgan Smith pointed out in 1933, when Premier of Queensland, "not responsible to any one Parliament." During the Economic Depression of the early 1930's it was clearly shown, at the expense of a recalcitrant New South Wales Legislative Assembly and Government, led by Mr. J. T. Lang, that the machinery of the Loan Council and the Financial Agreement could lawfully be used to impose on a minority of States the financial policies of a majority of the Governments represented on the Loan Council.

¹² Dr. Evatt then went even further the other way, by inserting proposals for new constitutional prohibitions designed to prevent any Parliament in Australia abridging freedom of religion or freedom of speech or of expression. For a short account of the history of the 1942 Constitutional Alteration Referendum, see Dr. G. Greenwood, *The Future of Australian Federalism*, pp. 259-278.

At the Premiers' Conference on Constitutional Matters, which was held in February, 1934, Dr. Forgan Smith explained as follows the way in which the Financial Agreement infringed the Doctrine of the Supremacy of Parliaments :

" A parliament which ceases to exercise control over its own financial policy ceases to be a parliament in reality, and becomes a mere shadow of what it formerly was. The operation of the Financial Agreement is rapidly tending to have that effect. Treasurers representing the various governments may arrive at a uniform agreement, which is binding on all governments in Australia. The Parliaments cannot alter that agreement. If they are aggrieved at it, or opposed to it, the utmost they can do is to pass something in the nature of a vote of censure on the Treasurer who signed it. For the time being at least the agreement itself would stand."

(5) THE EXERCISE OF AUSTRALIAN COMMONWEALTH LEGISLATIVE POWERS BY STATE PREMIERS.

Under the Australian Commonwealth Parliament's National Security Act there were delegated to the Premiers of the various States during the Second World War some of the emergency powers which properly belonged to the Australian Commonwealth. In this way the federal system of government affected in a strange way the Cabinet system in the various Australian States ; and, although the effect was of a temporary nature, its intrinsic significance may be such as to merit our attention.

The sub-delegation of part of the legislative and administrative powers of the Australian Commonwealth that was made by Regulation 35A of the National Security (General) Regulations to the Premier of each Australian State, was a novelty in Australian constitutional law. Regulation 35A empowered each State Premier to make by Order " such provision as he deems necessary " to protect the persons and property of the civil population, maintain civil morale, prevent prejudicial affection of the morale or discipline of the armed forces, or achieve certain other purposes specified in Regulation 35A. As any such Order became, if valid, a law of the Australian Commonwealth although made by the Premier of an Australian State, it rendered inoperative (by virtue of Section 109 of the Australian Commonwealth Constitution) any law of the Premier's State to the extent that his Order was inconsistent with such State law. Yet, a Premier who issued the Orders (although under the necessity of consulting with military and home-security authorities before making them, and although subject to powers of disallowance possessed by each House of the Australian Commonwealth Parliament, by the Prime Minister and by the Attorney-General of the Australian Commonwealth) was subject to no State control or veto in respect of them. That the impact of the Orders of a State Premier upon the laws of his State had appreciable effects may be realised from the fact that Orders actually made under Regulation 35A dealt with not only air-raid precautions, but also disorderly houses, agricultural elections, intoxicating liquor, second-hand fruit cases, private street construction, offensive trades, attendance at school, land valuation, the admission of children to entertainments, depositions of witnesses, and the registration of deeds ; which, comments a writer in Volume 18 of the *Australian Law Journal*, are " all matters which ordinarily are the subject of legislative regulation and control by the Parliaments of the States."

This writer graphically explains the constitutional novelty, " redolent of strange constitutional and political implications," of Regulation 35A :

“ It was clear that the Premiers in the making of Orders acted purely as Commonwealth agents, and as such were not subject to normal constitutional control by their respective Parliaments. Any attack in a State Parliament upon the policy of Orders issued by a Premier could be met by the answer that the constitutional doctrine of the responsibility of Ministers to Parliament was inapplicable for the reasons that the policy under fire was not that of the Government but of the Premier alone, and that the Premier himself could not be impugned by a State Parliament for his actions under an authority, and in pursuance of a discretion, which was entrusted to him not by that Parliament but by regulations under the canopy of the Defence power of the Commonwealth. . . . How far the Premiers by the promulgation of Orders might nullify the powers of State Parliaments was well illustrated by the various Liquor Control Orders restricting and controlling the sale and supply of intoxicating liquors. These Orders quite clearly abrogated provisions in the existing liquor laws of the States. No matter how much a State Parliament disapproved the alterations made by a Premier to its liquor legislation, it was powerless to control them. Any subsequent legislation passed by the State Parliament inconsistent with the Premier's Order would, by virtue of Section 109 of the Commonwealth Constitution, be invalid to that extent. The control of liquor legislation had passed from the Parliaments of the States to the Premiers of the States. Nor was there any real Parliamentary responsibility imposed on Premiers in the Commonwealth sphere. . . . The normal sanction . . . could not, of course, in the Commonwealth Parliament be directed against the Premier of a State. It is true that . . . either House of the Commonwealth Parliament could disallow a Premier's Order in the same way as it might disallow a regulation. But the likelihood of the Commonwealth Parliament taking action in respect of any Order, affecting only the people of one State, was remote. Politically, then, the effect of Regulation 35A was to enable each of the Premiers of the States to establish a species of ‘ imperium in imperio. ’ ”

Concerning this commentary, it should be pointed out that a Premier could ultimately be held responsible by the lower House of his State Parliament for any Orders he might make under Regulation 35A; and that the real constitutional significance of Regulation 35A in respect of the States is that it enabled a Premier with a friendly lower House to circumvent an unfriendly upper House in his State Parliament.

Some of these Orders were invalidated, others were upheld, by the courts. The spate of Premiers' Orders, as the writer in the *Australian Law Journal* has pointed out, lessened with the passage of time. The Premiers “ gradually reverted to their normal activities ” and relinquished “ the expansive prospect of power originally held out to the Premiers by their Commonwealth mentors. ” After the end of the war these Orders were repealed.

(6) BICAMERAL AND UNICAMERAL LEGISLATURES.

Australia has been a laboratory of experiments in the field of bicameral legislatures. Martin Wight in a splendid little book recently published concerning *The Development of the Legislative Council* has pointed out that all the Australian colonies achieved self-government during a period when the Imperial Parliament and Government made it obligatory that colonial parliaments should be bicameral :

“ The grant of responsible government with a single wholly elected chamber . . . was in the nineteenth century still too great a break with

tradition to be countenanced by the home government. The Australian Colonies Government Bill, which gave constituent powers to the colonial legislatures that it set up, originally conferred power 'to vary in any manner the constitution of the colonies,' but this was amended by the House of Lords so as to preclude the establishment of a single purely elective chamber. But it was demanded by the democratic temper of several of the new colonies, and conceded by the British statesmen, that in a bicameral legislature the upper House as well as the lower might be elected. An elective upper House was an American, not a British feature; it had been unknown in the British possessions since the abrogation of the Massachusetts constitution by Parliament in 1774; and it seemed hard to reconcile with a system of Cabinet responsibility. It first appeared in the colonies of the new empire in the Cape constitution of 1853, and was adopted by Tasmania and Victoria in 1855, and by South Australia in 1856."

To-day there are bicameral legislatures in the Australian Commonwealth and in each of the Australian States except Queensland. The "lower House" in each of these legislatures (which is the only House in Queensland) is a democratic elected representative assembly which resembles in many respects the House of Commons in the Imperial Parliament.

It is in their upper Houses that Australian Parliaments diverge most widely from the structure of the Imperial Parliament. Divergence is inevitable in view of the absence of an order of nobility in Australia, and of any desire to institute such an order here. Those Australians who have believed in the superiority of a bicameral over a unicameral legislature have found it difficult to find a suitable alternative plan in accordance with which to construct upper Houses to play the role in Australia that the House of Lords plays in the United Kingdom.

In four of the six Australian States the interests of land owners and tenants are entrenched as a result of the simple device of making the upper House elective but elective by persons possessing landed interests. In these four States it is as though the State legislatures were made up of two Houses of Commons; one like the House of Commons elected three-quarters of a century ago on a property franchise and the other like the House of Commons of to-day elected by universal adult suffrage. One argument that has been used in favour of referenda designed to give to the Australian Commonwealth Parliament increased legislative powers concerning social services is that in the upper Houses in certain of the States, so it is alleged, there are entrenched the representatives of sectional interests that are opposed to the desires of a majority of the population for an expansion of social services.

Until 1922 in Queensland and 1934 in New South Wales the upper House in each of these two States was constituted of members appointed for life. Each new Cabinet usually appointed a number of its supporters to the upper House, this being possible because there was no fixed limit to the number of its members, although the Governor usually exercised a restraining influence. In many ways these nominated Legislative Councils bore more resemblance to the House of Lords than did any other Australian upper Houses.

To-day, there is no nominated upper House in Australia. A Queensland Cabinet appointed to the Queensland Legislative Council a large number of new members pledged to vote for its abolition, and in 1922 it consequently consented to its own abolition. In New South Wales the same objective was attempted by means of the same device some years later, but was prevented by a trick of

draughtsmanship which had made it necessary for the consent of the people voting at a referendum to be obtained as a condition precedent to the abolition or reform of the New South Wales Legislative Council. Soon after this unsuccessful attempt to abolish it, it was "reformed" with the approval of the electors voting at a referendum, and is now composed of members selected by means of a system of indirect election at joint sessions of the Legislative Assembly and the Legislative Council. Its members now have long tenure but not life tenure, whilst another device designed to make it a conservative House (that is, representative to at least some extent of the political thought of the previous twelve years), is the periodical retirement of part, but only part, of its total membership.

The Senate in the Australian Commonwealth Parliament is unlike either the House of Lords or the upper Houses of the various State Parliaments, and has closest affinity to the Senate of the United States of America. Both the House of Representatives and the Senate are democratic elected representative assemblies, both are elected by the same electors, on universal adult suffrage without property qualifications. To some extent the House of Representatives is more sensitive to changes in the political opinions of the electors, and it does tend to represent minorities more adequately, than the Senate. The whole House of Representatives must face an election each three years, and may have to do so at even shorter intervals. Except in the extremely rare circumstances of a "double dissolution," the Senate always contains some senators elected at least three, four or five years previously, because the term of every senator is six years and half of them retire every three years. As important, however, as its "conservative" feature is its non-proportional feature. All the lower Houses in Australia are elected by electorates most of which contain approximately the same number of electors, but the Senate is deliberately designed to give a small electorate, such as Tasmania, as many senators as other electorates containing five to ten times the number of electors, such as New South Wales. The choice of electorates for this purpose has been based on an historical principle, the continued grouping of the electors of each of the Australian Colonies which federated to form the Australian Commonwealth.

In his recently-published *Inside Parliament*, Mr. Warren Denning voices a preference for the Senate of the Australian Commonwealth compared with the Legislative Councils which exist in five of the States, regarding the former as more widely divergent from the House of Lords pattern, and therefore more democratic.

In composition the Senate certainly is more democratic than are the other upper Houses in either Australia or the United Kingdom. "The Commonwealth Parliament was not Australia's first experiment in parliament-making. The State systems were, and still are, much more closely allied to the English system. . . . In England the hereditary lords persist, and in five¹³ of the Australian States the Legislative Councils also persist on one kind or another of a restrictive franchise, but both chambers of the Commonwealth Parliament are elective on a universal franchise."

However, from a consideration of the relationship of upper Houses to lower Houses as to their respective legislative powers, it becomes apparent that whilst the Senate is probably in a weaker position than are the Legislative Councils of the five States, it has at the present day a stronger constitutional position than

¹³ In one of these five States, namely, in New South Wales, the method of election is an indirect one, by both Houses sitting together.

has the House of Lords. At the time when the Australian Commonwealth Parliament was established, the rules which had been embodied in the Australian Commonwealth Constitution to regulate the relationship between the Senate and the House of Representatives as to their respective legislative powers were more "democratic" than those which at that time governed the relations of upper Houses to lower Houses either in the United Kingdom or in any of the six Australian Colonies. But a change subsequently occurred in the relationship of the House of Commons to the House of Lords, and since 1911 the constitutional relationship which has existed between the two Houses of the Imperial Parliament would seem to be more "democratic" than that which existed in 1900 and continues to exist to-day between upper and lower Houses in Australia. Mr. Denning implicitly recognises that this is so: "The Constitution adopted for the Commonwealth in 1900 was far in advance of the stage of evolution which the English Parliament had reached at that time. The last of the great struggles between Commons and Lords, over the right of the Lords to control the public purse by retaining the power to amend money bills, took place in 1900 and 1911. It led to the Parliament Act which effectively retained control of the Treasury in the Commons." The Australian Senate still retains the power of rejecting money bills, whereas the House of Lords has now lost this power. However, should the Australian Senate happen to reject a money bill, it would, in the opinion of Mr. Denning, "bring about a crisis out of which the House of Representatives would be certain to emerge victoriously," so that, "by and large the control of finance rests with our House of Representatives." Neither the House of Lords nor the Australian Senate has a right to amend any money bill.

Australian upper Houses are not the only examples that are available for study, but they do nevertheless provide a fund of experience upon which the Mother of Parliaments might draw if in the future it decides to amend its own structure by abolishing, replacing or reforming the House of Lords.

Only in Queensland is there a unicameral legislature at the present day. As it is the essence of modern parliamentary government that the Cabinet which controls the executive government of a State must have the confidence of, and therefore be able to pass such legislation as it chooses through, the lower House, it would seem axiomatic that in a unicameral legislature there can never be a system of checks and balances such as sometimes operates in a bicameral legislature, in which the upper House may sometimes be at variance with the Government of the day.

Normally, Regulations made by Cabinet in its formal role as King in Council, Governor-General in Council, or Governor in Council (as the case may be), are invalid to the extent that they purport to amend or repeal statutes. However, some Queensland statutes, even in peacetime, went so far as to give the Governor in Council power to enact Regulations which could validly amend (or even repeal) any statute. The legal result of such a grant of power is that statutes must not be clearly inconsistent with or definitely repugnant to delegated legislation enacted by the Governor in Council in pursuance of any such statutory powers. In England the Select Committee on Ministers' Powers reported uncompromisingly some years ago concerning certain English statutes which granted this type of delegated legislative power to the King in Council: "It cannot but be regarded as inconsistent with the principles of parliamentary government that the subordinate law-making authority should be given by the superior law-making authority power to amend a statute, which has been passed by the superior authority."

(7) THE FUNCTIONS, STRUCTURE, PROCEDURE, PRACTICES AND PRIVILEGES OF AUSTRALIAN PARLIAMENTS.

The aspects of parliamentary government which I have so far discussed may seem of such comparative importance that divergences between the functions performed by and the procedures followed in, respectively, Australian Parliaments and the Imperial Parliament, should be summarily dismissed. Differences in details are so numerous that it is neither possible nor important that they should all be mentioned, but some of them should be.

Legislation has become the chief business of Australian Parliaments, as of the Imperial Parliament. That this development had commenced at least a century ago is evidenced by the fact that in most Australian States the Houses are called by the name of "Legislative Assembly" or "Legislative Council," as the case may be. (This nomenclature is not applicable to the South Australian House of Assembly, or the Tasmanian House of Assembly, to either House of the Australian Commonwealth Parliament or of the Imperial Parliament itself; but this does not in any way indicate that their legislative functions are any the less important or less numerous on that account.)

The other main function of all Parliaments, that of serving as "the Grand Inquest of the Nation," the forum in which each and every matter of public importance can be discussed for the purpose of securing legislation or executive action to remedy injustice and inefficiency, belongs to Australian Parliaments as well as the Parliament at Westminster.

However, they differ in respect of their judicial powers; although the difference, it must be admitted, is greater in form than in substance. Australian Houses, as well as the House of Commons and the House of Lords, perform such quasi-judicial functions as: the determination, in some circumstances, of questions concerning rights to membership of the House, the enforcing of disciplinary rules upon its members, the punishment of non-members for contempt and breach of privilege, and the determination of whether to present an Address for the removal of certain Crown Servants. On the other hand, the following are Imperial instances of judicial functions which in Australia belong to the law courts or else are obsolete or inapplicable to Australian conditions: (i) The right of the House of Lords to try peers charged with treason or felony. (ii) The functions of the House of Lords (which, however, in fact if not in theory means its Law Lords) as final court of appeal from decisions of other courts in the United Kingdom. (iii) The traditional power (which is obsolete even in the United Kingdom) of the House of Lords and the House of Commons acting together to punish persons by attainder or impeachment. The upper Houses in Australia have in most respects inherited the powers and functions of the House of Commons rather than the House of Lords, and the non-existence in Australia of any House of peers almost automatically deprives them of any claim to exercise the judicial powers of the House of Lords.

In the United Kingdom the courts give effect to the Doctrine of the Supremacy of Parliament. The final court of appeal is the House of Lords. Even though, in its capacity as the final court of judicial appeal, the House of Lords is constituted solely of Law Lords, their dual roles as legislators and judges assists in the preservation of a psychological bond between Parliament and the Courts which is advantageous to the nation. In Australia, on the other hand, there is no such bond, and it is difficult to see how it could be forged. Most Australians would consider it a retrograde step to attempt to imitate the United Kingdom in this

matter. It is at least important to notice that the Imperial parliamentary pattern is in this respect different from the Australian.

The privileges and the procedures of each House of each Australian Parliament are in their main outlines, and in most of their details, substantially those of the House of Commons. One interesting divergence is noticeable, however. The procedure of the House of Commons is, even to-day, based principally upon ancient practice (most often to be found in the rulings of Speakers), the best guide to which is May's *Parliamentary Practice*. Innovations in the procedure of the House of Commons are embodied by it in its Standing Orders, which supplement and in some instances amend the ancient procedure. Each Australian House has adopted the ancient procedure of the House of Commons, to supplement its own Standing Orders. There are, however, divergences between the Standing Orders of Australian Houses and those of the House of Commons. (i) Many modern amendments of House of Commons procedure (for example, concerning the introduction of Bills without leave) have not been copied in the Standing Orders of various Australian Houses, whilst (ii) each Australian House has felt free to adapt to local conditions such of the Standing Orders of the House of Commons as it has copied. Furthermore, there is noticeable (iii) a tendency for Australian Houses to endeavour to bring about a partial codification of rules of procedure, by incorporating in their Standing Orders their own interpretations of those practices of the House of Commons which the latter has not yet attempted to embody in its own Standing Orders. That is, although the Standing Orders of an Australian House do not constitute a complete code of procedure, there is in Australia a tendency to include most rules of procedure in Standing Orders. Thus, each House of the Australian Commonwealth Parliament has four times as great a number of Standing Orders as the House of Commons; and a similar situation exists in respect of State Houses. This is probably due to some lack of knowledge concerning English parliamentary procedure among most Australian parliamentarians, making it necessary to substitute a compact set of rules for the voluminous May.

A central figure in respect of parliamentary procedure is the Speaker, or the President, as the case may be; and, as it is he who symbolises the House as a whole, in contrast to the Prime Minister or Premier or other Leader of the House who leads the Government party in it, anything that affects his status and functions may be significant of changes in the very nature of parliamentary government itself. The Speaker (or the President) fills two main roles. He is the House's spokesman in its dealings with the Crown and other persons and bodies outside, and he is its principal presiding officer. In the exercise of these functions he should be impartial. He is not a Minister of State or a Minister of the Crown, and is, to a great extent, as a result of a century or more of tradition in the House of Commons and in the Australian Houses, regarded as above all questions of party politics, despite the fact that he usually is the nominee of the majority party. All political parties in Australia as well as in the United Kingdom recognise that the Speaker (or the President) is not subject to discipline by his own party for his actions in the chair, as he exercises whilst there a quasi-judicial function in enforcing and interpreting the Standing Orders. If he is not in the chair, however, the Australian practice sometimes differs from that in the House of Commons; because in an Australian House, where the number of members is so small that every vote counts, his party expects him to vote with them.

It was because Sir Littleton Groom maintained that he as Speaker should not vote "in committee" in the crucial division which defeated the Bruce-Page

Government in the Australian House of Representatives in 1929 that he was in the ensuing election opposed and defeated in his electorate by his own party. Another divergence between practice in Australia and in the United Kingdom is that whereas in the United Kingdom in modern times a former Minister does not become a Speaker and a Speaker does not become a Minister, it is not unusual in Australia for a former Minister to become Speaker (as Sir Littleton Groom did) or for a Speaker to become a Minister and even Prime Minister or Premier (as Mr. W. McCormack did in the Queensland Legislative Assembly about twenty years ago). Outside Parliament, the Speaker of a lower House in Australia is often associated closely with his political party, whereas the Speaker of the House of Commons is not; which is natural if, as is the case in Australia, the normal goal of a Speaker is to gain promotion to a Cabinet post, perhaps even to the office of Prime Minister or Premier. In the United Kingdom the Speaker refrains from party politics inside and outside the House, and is usually re-elected in his constituency without any contest. He certainly does not assist other members of his party in their campaigns for re-election. In Australia the picture is a different one. In Australia, a Speaker has to stand for re-election like every other member of the House, and often has to wage a bitter political fight in his electorate. It is also normal practice for him to speak in support of other members of his party in their respective electorates. At least one Speaker even performed the duties of campaign director for his party at a by-election. It would seem that one factor which has contributed to this divergence between practice in Australia and the United Kingdom is the small number of members in each of our Australian Houses.

It is impracticable, nor would you want me, to discuss the very numerous detailed differences that exist between Houses in Australia and in the United Kingdom in respect of procedure. It is, however, probably necessary to mention the failure of Australian Parliaments to use standing committees and select committees as advantageously or as regularly as they are used to facilitate the detailed consideration of Bills in their passage through the House of Commons and, to a much greater extent still, in the Congress of the United States of America. In the House of Commons it is usual to appoint few Committees of the Whole House, except the Committee of Supply and the Committee of Ways and Means. Instead, most Bills after having been read a second time go to one of several Standing Committees consisting of 15 to 60 members for that detailed consideration which in an Australian Parliament they receive from a Committee of the Whole House. In Sir A. P. Herbert's *The Ayes Have It* there is a bright account of the proceedings of such a Standing Committee. Its present practice has only become usual in the House of Commons since 1907. The present procedure in Australian Houses has therefore developed from House of Commons procedure in the nineteenth century, before the modern innovation was made. That it is still appropriate to Australian conditions is because Australian Houses are all almost small enough to be reasonably efficient in Committee of the Whole House, whereas the greater size of the House of Commons makes it impracticable to use it as a means of checking and correcting minutiae. In addition, there is still time available to enable Australian Houses to consider Bills consecutively, whereas the pressure on House of Commons time is so great as to make concurrent consideration of Bills imperative. Again, party control of the House of Commons is comparatively less stringent than in Australian Houses, where there is not the same insistent demand by private members for an individual examination by a House of each Bill in the light of testimony from experts and interested parties. For these reasons, it is not usual in Australia (except

Standing Committees to investigate, respectively, wireless broadcasting and proposals for public works) for Standing Committees or Select Committees to be appointed to investigate proposed legislation. Probably the most serious disadvantage which Australian Parliaments suffer as a consequence is the absence of opportunities for members to hear and question expert witnesses, because in Standing Committees and in Select Committees (as in non-parliamentary Royal Commissions of Inquiry) the procedure in England to some extent resembles that of a law court, in that members put questions to non-members for the purpose of obtaining information, and do not indulge in public debate among themselves, as is the practice in a Committee of the Whole House. As a consequence, the influence which in Australia permanent officials of the bureaucracy have upon legislation is enhanced.

In many matters connected with parliamentary elections, Australia has taken the initiative in instituting reforms which subsequently were adopted in the United Kingdom. This was so in respect of the secret ballot, universal adult suffrage¹⁴, and a number of other important changes of a similar nature. In many other matters, too, there has been cross-fertilisation.

(8) CONCLUSION.

The results of constitutional experiments conducted in the parliamentary laboratories of Australia have sometimes been used to good effect in the United Kingdom. This should not blind us to the numerous and important lessons that our Australian Parliaments have learnt and can continue to learn from the Mother of Parliaments.

The more highly-organised nature of political parties in Australia, Federation in Australia, the legalism (introduced by Federation) which has almost succeeded in the twentieth century in banishing from Australian constitutional and political thought the halo of sanctity which in nineteenth century Australia surrounded the Doctrine of the Supremacy of Parliaments, the local historical causes which have resulted in one unicameral ^{leg}legislation and a variety of bicameral legislatures in Australia to-day, are a few of the more important factors which give to Australian Parliaments a character, or more correctly, characters which differentiate them from the Mother of Parliaments. However, there is no substantial political demand either in the United Kingdom or anywhere in Australia for any institutional changes which would destroy the essential nature of the modern system of parliamentary government. In its essentials that system is the same in the United Kingdom and in Australia; and in each of these territorial units it keeps alive the democratic governmental institutions therein.

Enough has probably been said to indicate that the Australian Parliaments are rich mines which will yield great rewards to any delving that may be done by political scientists, constitutional historians and constitutional lawyers.

¹⁴ In his *Inside Parliament*, Mr. W. Denning writes: "The franchise for women came in Australia long before it was granted in England; women in Australia were voting a decade before the suffragettes began throwing themselves under Derby fields and smashing the windows of London mansions. The long struggle in England to widen the franchise, so that every man of whatever station in life might have his say in the election of his Parliament—a struggle spread over hundreds of years of meagre and grudging 'reform' before universal franchise was achieved—never had to take place in the making of the Commonwealth Parliament; the franchise was universal for males from the beginning." A struggle had taken place in each Australian Colony before Federation, but in each Colony had been successful long before it was successful in the United Kingdom.