# South Africa's Constitutional Crisis

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THE legal phase of the constitutional struggle, which began in South Africa with the election of a Nationalist Government in 1948, has ended with the vindication of the Constitution. The political phase is now beginning with the Government seeking to evade the provisions of the Constitution or to nullify the decision of the Courts. To understand what is in issue we must glance back into South African history.

The present Union of South Africa comprises the old British Colonies of the Cape of Good Hope and Natal and the two Boer republics of the Transvaal and the Orange Free State. After the Anglo-Boer War of 1899-1902 these four units became provinces under the sovereignty of the British parliament. In 1908 a National Convention, composed of delegations from the four provincial legislatures, met to consider how a unified country should be constituted.

The decision was eventually made against a federal or confederal state and in favour of a unified government—provincial legislatures being left with separate jurisdiction over domestic matters, such as health, education, municipal affairs, etc.

But the decision depended upon two compromises of special importance. The one, upon which the provincial delegations unanimously agreed, declared English and Afrikaans as the two equal official languages of the Union. The second related to the franchise. Here, the delegations could not arrive at one solution for the whole country and the agreement was that each province should enter Union with the franchise already operated in that province.

These different franchises represent two radically opposed political traditions. In 1854 the Orange Free State conferred civic rights only on burghers who were "white persons." The Transvaal constitution of 1858 uncompromisingly stated: "The people desire to permit no equality between coloured people and the white inhabitants, either in Church or State." In the two republics, therefore, the franchise was exclusively white.

Natal in 1856 gave the vote to all Europeans and Coloureds[1] who fulfilled certain qualifications. Later, at the insistence of the British Government, a handful of Natives and Indians were added; but no more were allowed to register as voters after 1896 and Natal entered Union with a franchise virtually confined to Europeans and Coloureds, of whom there are very few in Natal.

The original Cape franchise of 1853 is the only one in South African history which contains no racial discrimination. The vote was given to all male adults, irrespective of race, who satisfied certain conditions. These, as amended in 1892, required a voter to have an income of £50 per annum *or* to own property worth £75 *and* to be able to write his full name and address. Thus, the Cape entered

Union with a not inconsiderable number of Coloured, Indian and Native voters registered and the lively possibility that more would qualify for registration as the years passed.

## II

THESE two decisions of the National Convention regarding language and voting rights were of such fundamental importance—indeed there would not have been Union in its present form, if at all, without them—that they were specially written into the Constitution. Section 35 of the Act of Union provides that no law shall disqualify any person in the Cape of Good Hope who under the Cape laws at the time of Union could be registered as a voter—or any person in another province already registered as a voter—from being so registered by reason of his race or colour alone, unless the disqualifying law be passed by a two-thirds majority of both Houses of Parliament sitting together. This section and another providing language equality were then "entrenched" in the Constitution by Section 152 which provides that the "Entrenched Clauses" themselves may only be altered by a two-thirds majority of both Houses sitting together.

The full decisions of the National Convention were first submitted to the four provincial legislatures and accepted by them. They were then embodied in the South African Act, which was passed by the British parliament in 1909. That Act, often called the Act of Union, is the present constitution of South Africa. It was an Act of the British parliament which, as the then sovereign legislative authority in the Union, alone could have passed it. But it expressed an agreement freely arrived at among South Africans, an agreement to which the British parliament added nothing, an agreement without which the Cape, among whose leaders were many Afrikaners, would not have agreed to Union. It was, therefore, not merely a legal contract, but a particularly solemn and binding compact.

An attempt was made in the 1951 debates by no less eminent speakers than the Prime Minister, Dr. Malan, and the Minister for the Interior, Dr. Donges, to suggest either that the Cape delegation to the National Convention did not, in their insistence on retaining the coloured franchise, truly represent the wishes of the European inhabitants of the Cape or that they only insisted under pressure from the British Government of the time. If there were any force in either of these suggestions, it is incredible that they should be made for the first time more than forty years after the event. Significantly, they were not made when General Smuts led a debate on the subject in 1948, but only after the death of this last and greatest of the architects of Union. Though he is no longer here to refute them personally, his papers will no doubt speak in due course. Meanwhile, the historian can only say that there is no evidence whatever for the suggestions and a great deal against them. In the light of recent events posterity will not find it hard to judge between Jan Hofmeyr, Paul Sauer, F. S. Malan, de Villiers, Merriman, Rose-Innes and Schreiner—the Cape leaders, who must have been liars or hypocrites if these suggestions are true—and their present traducers.

## III

THE next milestone in South African constitutional history is well known to Canadians—the Statute of Westminster of 1931, which created the present Commonwealth of independent, sovereign states. Section 2 (i) of the Statute repeals the Colonial Laws Validity Act of 1865[2] and provides that:

> The powers of the parliament of a Dominion shall include the power to repeal or amend any Act of the British parliament . . . in so far as the same is part of the law of the Dominion.

Canadians may remember that, as a result of the Imperial Conferences of 1926-30, it was agreed that the final Statute should contain certain express safeguards for the federal constitutions of Canada, Australia and New Zealand. In the case of South Africa the 1929 committee reported:

> Similar considerations do not arise in connection with the Constitutions of the Union of South Africa and the Irish

> Free States. The constitutions of both countries are framed on the unitary principle. Both include complete legal power of constitutional amendment. In the case of the Union of South Africa the exercise of these powers is conditioned only by the provisions of Section 152 of the South Africa Act of 1909.

Even so, the prescient mind of Smuts precisely foresaw how it might later be contended that Section 2 of the Statute had inadvertently abrogated the Union's constitution. He, therefore, proposed an amendment to the resolution of both Houses of the South African parliament approving the draft Statute, which inserted into that resolution the words:

> On the understanding that the proposed legislation will in no way derogate from the entrenched privisions of the South Africa Act . . .

Accepting this amendment General Hertzog, the Nationalist Prime Minister, said:

> I may say here that the Leader of the Opposition, General Smuts, came to see me this afternoon and asked how far, if it were passed, the so-called entrenched articles in our Act of Union would cease to be entrenched. I have gone into the matter, and it is very clear to me that it cannot affect the entrenched articles of the Constitution in the least. It is very clear, because all that will be done here, if the Act is passed by the British parliament, is that the British parliament will in future cease to be a legislative influence or authority in South Africa. It cannot affect our constitution in the least, one that was laid down some years ago.
>
> Let us repeat here and now, as man to man, that it is our view that the protection of Section 152 cannot be taken away.

General Smuts said:

> Still I think we ought to put it on solemn record that we adhere to the South Africa Act, the entrenched provisions of which are looked upon very seriously by the people of this country. We do not want to depart by an indirect method from the deliberate provisions laid down twenty years ago.

Smuts' amendment was duly written into the resolution passed by both Houses.

There was no suggestion in the 1931 debates that the South Africa Act should be in any way evaded, amended or set aside. Indeed, speaker after speaker reiterated the pledges given in the National Convention. Two of these speakers later became members of the present Nationalist cabinet. The late Dr. Stals said:

> I think that no one in the House or the Union doubts the moral obligation of the parliament and the people to respect the basic principle in our Constitution and therefore it appears to me to be unnecessary to include a provision (in the Statute) for securing it."

Dr. Stals did not live to see the present controversy, but Mr. Swart is the Minister of Justice. In 1931 he said:

> We feel that the entrenched clauses are a matter of good faith, and I cannot imagine that any government would alter them by a bare majority . . . I feel just as strongly as hon. members on the other side that the entrenchment of certain clauses is a matter of honour.

These remarks are typical of the tone of the debate.

In 1934 when the Status of the Union Act[3] was being debated, the Speaker of the Assembly—Dr. Jansen, the present Governor-General—said:

> I have come to the conclusion that the Statute of Westminster does not in any way derogate from the entrenched clauses of the South Africa Act . . . The whole existence of this parliament is based on the South Africa Act which is our constitution and, in my opinion, we are bound by the provisions of that constitution regarding the procedure to be followed in connection with the amendment or repeal of any of the entrenched clauses. Notwithstanding the provisions of the Statute of Westminster I am of the opinion that if we desire to amend or repeal any of the entrenched clauses, then we must follow the procedure laid down in the South Africa Act.

Other Speakers re-affirmed this conclusion in 1940 and 1945, the latter ruling being given on the specific question of amending the Coloured franchise.

Side by side with this great constitutional development, parliament had been much exercised with the "menace" to white civilization which the numerical preponderance of the coloured races was

thought to present.[4] The fear of being swamped by a black electorate has always been particularly strong among Afrikaners. Thus, when Hertzog's Nationalist Government enfranchised white women in 1930 and introduced universal white suffrage the next year, the old Cape qualifications were retained for Coloured, Indian and Native voters and no coloured women received the vote. The effect was greatly to reduce the proportion of the coloured vote in the total poll—and this was intentional.

## IV

IN 1936 both the major parties agreed to remove the Cape Natives from the common electoral roll and to give them three European representatives in the lower House and four in the Senate. Their representation was thus pegged, however many more Natives might qualify for the vote in the Cape. The Representation of Natives Act was duly passed by a two-thirds majority of both Houses of parliament sitting together, as provided by Section 35 of the Act of Union.

The debate on this Act, however, saw the first skirmish on the constitutional effects of the Statute of Westminster. Dr. Malan doubted if it was still necessary to observe the procedure laid down in the Constitution, but he was effectively answered by Mr. Pirow, then Minister of Defence, with arguments which foreshadowed the recent decision of the Courts. The significance of this preliminary skirmish lay in its effect upon the legal decision of the case which challenged the validity of the Act.

A Native, Ndlwana, took the case to the Cape Division of the Supreme Court, which held (1937) that, since the Act disqualified Natives from the common roll by virtue of their race or colour alone, it was correct for parliament to have followed the procedure of Section 35 of the Act of Union. The case was then taken to the Appellate Court.[5]

A full bench of four judges of the Appellate Court, presided over by Acting Chief Justice Stratford, declined to discuss the question of parliamentary procedure at all, but upheld the Supreme Court's verdict on grounds which were not fully argued by either party to the case:

> Parliament is now, since the passing of the Statute of Westminster, the supreme and sovereign law-making body in the Union . . . it is obviously senseless to speak of an Act of a sovereign law-making body as *ultra vires*. There can be no exceeding of a power when that power is limitless. . . Parliament's will, therefore, as expressed in an Act of parliament, cannot now in this country, as it cannot in England, be questioned in a court of law, whose function it is to enforce that law, not to question it. Parliament, composed of its three constituent elements, can adopt any procedure it thinks fit; the procedure expressed or implied in the South Africa Act is, so far as the courts of law are concerned, at the mercy of parliament, like everything else.

In view of what is to come, three points must be made about this judgment. First, the Court took it upon itself to raise the issue of sovereignty and counsel were not briefed to discuss it in detail. Secondly, the issue was raised in the form of whether or not the Court could declare an Act of a sovereign parliament *ultra vires* (i.e. beyond the power) of parliament. This, despite superficial resemblances, is not the form of the present controversy. Thirdly, the judgment caused no great excitement at the time outside academic legal circles. It merely admitted that parliament was master of its own procedure. Not only had parliament just chosen to abide by the provisions of the Constitution in passing the Representation of Natives Act, but the memory of the great debates of 1931 and 1934 and the manifest intention of all parties and members to respect the Constitution were fresh in every mind. Not for another eleven years did the question of using the judgment to evade the compact of Union become a burning issue.

The 1936 debates, the Act and the litigation were concerned only with the *Native* franchise. The Coloured franchise was not under discussion. In fact, the Nationalist tradition was to integrate the Coloured people gradually into the white

onnnity. In a famous speech at Smithfield in 1925 Hertzog had declared:

> The Cape Coloureds must economically, industrially and politically be classified with the Europeans . . . The time has arrived when the northern provinces also should recognise the Coloured's man's right to be represented in parliament.

In 1926 and 1929 Hertzog introduced Bills to extend to the Coloureds the full white franchise. Although pressure of other work prevented either Bill being enacted, Dr. Malan, who was a Minister in Hertzog's Nationalist government, defined the government's general policy as one by which "the political rights of the white man shall be given to the Coloured people," and added: "Personally, I should like to give the vote to the Coloured women."

In 1934 the Nationalist Party, led by Hertzog, and Smuts' South Africa Party coalesced to form the United Party. Dr. Malan and nineteen supporters hived off and went into opposition as the "purified" Nationalist Party. In 1937 a Government Commission of Enquiry unanimously recommended that "the franchise privileges held by the Coloured people in the Cape Province be extended to include Coloured people resident in other provinces." When Dr. Malan announced that his policy now was to withdraw the franchise from the Cape Coloureds and to abolish the three Native Representatives created in 1936, Hertzog again spoke at Smithfield in 1938:

> It seems as if purified policy has been deliberately conceived to evade the requirements of faith and honour and sincerity and that in giving practical effect to the Coloured and Native policy care should be taken that disloyalty and faithlessness shall be the guiding line of the white man in South Africa in determining and fulfilling his duties as guardian of the non-European.

## V

WE come now to the 1948 election. Dr. Malan's appeal to the colour consciousness of the Afrikaners had gradually gained him strength. When Hertzog and Smuts divided over war or neutrality in 1939, Malan's Nationalist Party was the natural refuge for the dissident Hertzogites, though a few preferred the "fellow-travelling" Afrikaner Party. For the 1948 election these two parties made an electoral pact and won the election by a majority of seven in the Assembly (153 seats in total) and two in the Senate (60 seats).[6] The Government majority was conditional on the eight Afrikaner Party members in the Assembly.

The election manifesto of the Nationalist Party had stated:

> The Coloured people must be given special representation by one Government-nominated Senator and three M.P.'s chosen by the Coloured Advisory Council (which the nationalists proposed to set up).

Now it was obvious that the Nationalists, not nearly having a two-thirds majority of the two Houses, could not proceed with this constitutionally. As their election manifesto had nothing to say about abrogating the Entrenched Clauses, Smuts asked in parliament for a definite declaration of the Government's intentions in this respect. As a result of the debate, the Government consulted their law advisers who, basing their advice on the *Ndlwana* decision, advised that the South Africa Act was no longer of legal force and that, therefore, the Coloureds could be disfranchised by a bare majority in each House sitting separately.

No question of bad faith enters into the juridical argument. There clearly was doubt as to whether or not the Constitution was still *legally* effective. Many eminent jurists could be cited on either side, and the *Ndlwana* decision seemed to tip the balance of opinion. But what should never have been in doubt at all was the *moral* obligation of parliament to respect the Constitution. The cumulative effect of the original solemn compact, of the pledges given by all parties in the 1931 and 1934 debates, and of the Speakers' rulings in 1934, 1940 and 1945 should have put it beyond all possible doubt that parliament's honour and good faith were entirely committed to behaving constitutionally, even in the absence of any legal obligation.

WE have, therefore, to seek for powerful motives impelling the Government to disregard these moral obligations. First, there was the practical consideration that it had nowhere near a two-thirds majority, even when in September 1950—just before Smuts died—it won all six seats in South-West Africa.[7] The only effect of this was to make the Government independent of the Afrikaner Party for its bare majority.[8] Secondly, the Nationalist doctrine of the *baasskap*—the preservation of the Master-servant relationship between the white and coloured peoples—makes it repugnant to Nationalist ideology that any non-Europeans should have equal political rights with the Europeans and, even more so, that they might be able to decide the result of an election. Thirdly, most observers (and many Nationalists) regard the 1948 result as the high-water mark of likely Nationalist achievement under the present constitution. Now, the Cape Coloureds have about 50,000 voters registered in fifty-five constituencies. In twenty of these they number over 1,000 (i.e. above 10 per cent of the registered voters), although in only one (Cape Flats 26.7 per cent) do they constitute a quarter of the voters and their general average throughout the province is 8.28 per cent of the roll. But in between five and ten seats (probably six) they are thought to hold the balance of power between the two chief parties—and Nationalist racial policy being what it is, Coloureds naturally do not vote for it. If, therefore, they were removed from the common roll, the Nationalists would expect to win at least six more seats from the United Party—a swing of twelve. The United Party might expect to win the four Coloured seats, which the Government finally decided to create. But the net gain to the Nationalists would not be less than eight seats and this is a powerful political advantage when the parties are so evenly balanced.

## VI

AFTER the South-West Africa results and the surrender of the Afrikaner Party's constitutional and ethnical conscience, the Government in January, 1951, tabled a Bill to remove the Cape Coloureds from the common roll and to give them four (European) elected representatives in the Assembly and one nominated Senator. The legal issues were argued in parliament throughout March and Speaker Conradie gave his fifty-three minute ruling on April 11th. Following generally the *Ndlwana* judgment, he decided that parliament was complete master of its procedure and no longer bound by the Entrenched Clauses. He further argued that the 1931 resolution of both Houses had no legal force because it could be annulled at any time by a later resolution. He considered that a Speaker was normally bound by his predecessors' decisions, but found that he had discretion to depart from existing practice and establish a new precedent. "Changing circumstances and advancing time demand adjustment of approach and ideas."

IN the debate which followed the question was whether parliament, being free, *ought* to choose to do what it was *able* to do. Apart from the suggestions, already discussed, that the Cape delegation to the National Convention did not mean what it said, the chief Government argument was that it was neither an injustice nor a "deprivation" (within the meaning of Section 35 of the Act of Union) to place the Coloureds on a separate roll: they retained their right to vote and "had four certain winners instead of fifty-five 'also rans'." It was, however, conceded that the Coloured vote would *relatively* count for less and that it would no longer hold the balance between the two major parties. The Government's case, moreover, took no account of Coloured opinion, since the Nationalists will not negotiate with or consult non-Europeans. That the real concern was with expediency rather than propriety is repeatedly evident in the Nationalist speeches:

> The fear that the non-whites would achieve political supremacy has hovered like a black cloud from the beginning of representative government in South Africa.
>
> The Constitution is a monument to white civilization in South Africa, but it was a mistake to have allowed the non-

> Europeans to be involved in the Constitution.
>
> This legislation is the key to race purity[9], racial peace and white supremacy.

The Opposition asked how, if this "monument" could be so lightly razed, could anyone put faith in any political assurance again and, in particular, of what value were the Government's promises that the equality of English and Afrikaans "was entrenched in the national will"? Many speakers repeated the moral and practical reasons for maintaining and even extending the Coloured franchise, in order to prevent the million Coloureds being added to the already discernible non-European front[10]. But the United Party's chief argument was summarised by Mr. Lawrence, a member of Smuts' last cabinet:

> Our fight is a fight for the Constitution. It is the Coloured vote that is at stake to-day, but in five or ten years it will be another aspect of the Constitution. And the pledged word given by the Prime Minister, or any other member of the Government side of the House, will not be worth the breath expended upon it.

In this connection there was one sinister episode in the debate. It has long been a cardinal point of Nationalist policy to abolish the three Native Representatives created in 1936, because they have, not unnaturally, consistently opposed a party committed to racial dominance. Dr. Donges was provoked by Mrs. Ballinger (Native Representative) into saying that, if the new Coloured Representatives adopted the same attitude, the Government would regard them in the same way. His later attempts to explain that he did not mean to threaten to abolish the Coloured Representatives as well, did not carry conviction; and in any case the Opposition queried the value of any such undertaking from such a source.

## VII

THE Separate Representation of Voters Act was passed in each House by a small majority in June, 1951, and became law in July. A few months later four Coloured voters lodged their appeal in the Cape Division of the Supreme Court, which found itself estopped by the 1937 decision of a higher Court from considering the merits of the case. The case was then taken on appeal to the Appellate Court, where arguments were heard for a week from February 20th to 27th. On March 20th, 1952, a full bench of five judges delivered the most momentous decision in South African legal history.

The Court began by considering its power to depart from a previous decision. While admitting the general soundness of the principle of *stare decisis* (allowing decisions to stand), it asserted the right, and indeed the necessity, of the highest Court in the land being free to alter an earlier decision if it felt that later argument proved it wrong, particularly in a case like this where the original decision created no new rights or vested interests but rather took some away.

The judgment then summarily dismissed the Government argument that the Coloureds were not being "deprived" of rights under Section 35 of the South Africa Act. Not merely did the Voters Act disqualify them on the grounds of their race or colour, but "Section 35 contains a guarantee of defined rights, not of their equivalents."

The Court then said that it was common ground between the parties that, prior to the Statute of Westminster, the Voters Act would have been invalid under Sections 35 and 152 of the South Africa Act. It was also clear that parliament had not intended in 1931 that the Statute should repeal or amend the Constitution —very much the reverse. The most that could, therefore, be contended was that the Statute had implicitly done so.

The Court then pointed out that the South Africa Act of 1909 which gave the Union parliament power to amend its own constitution by following a certain procedure, already conflicted in that respect with the Colonial Laws Validity Act of 1865 and that, where such a conflict occurred, the later Act must be held to overrule the earlier. The repeal of the 1865 Act by Section 2 (1) of the Statute of Westminster, therefore, did not affect the provisions of the South Africa Act. Nor, once it was understood that the Union parliament was not a bicameral

parliament like the British parliament but for certain purposes had to act unicamerally, did Section 2 (2) of the Statute advance the matter. "Once it is clear that Parliament means parliament functioning in accordance with the South Africa Act, the concluding words of the sub-section carry the matter no further."

> There is nothing in the Statute of Westminster, said Chief Justice Centlivres, which in any way suggests that a Dominion parliament should be regarded as if it were in the same position as the British parliament. Indeed, it would be surprising if the British parliament in enacting the Statute of Westminster, which was agreed to by all the Dominions, had gone out of its way to change the Constitution of a Dominion without a request from that Dominion to do so.
>
> I have looked in vain at the official reports of the Imperial Conferences which led up to the passing of the Statute for any request by the Union for an alteration of its Constitution. On the contrary, the authoritative voice of the Union, as embodied in the joint resolution of the two Houses of Parliament, made it abundantly clear that the Union did not desire any amendment of its Constitution. It emphasises that the proposed Statute of Westminster should in no way derogate from the entrenched provisions of the South Africa Act.

The Court went on to dismiss the contention that, if the entrenched clauses were still valid, the Union was not a sovereign state. It pointed out that, since the Statute of Westminster, the Union parliament alone could legislate for South Africa.

> The Union is an autonomous state in no way subordinate to any other country in the world. To say that the Union is not a Sovereign State simply because its parliament, functioning bicamerally, has not the power to amend certain provisions of the South Africa Act, is to state a manifest absurdity.

All that could be said was that, like most other democratic countries,[11] legal sovereignty is divided between parliament functioning bicamerally and parliament functioning unicamerally.

Finally, the Court turned to the *Ndlwana* decision. In that case the previous Court had made no distinction between parliament sitting bicamerally or unicamerally. In fact, it had given no reasons for its decision. The present Court felt obliged to dissent from a decision which had apparently been reached on a misunderstanding of the nature of parliament. In the present case the Court did not have to decide whether the Voters Act was *ultra vires* of parliament; but that, in passing it, parliament did not behave in the manner prescribed by the South Africa Act. Parliament, for the purposes of the Voters Act, was not, therefore, parliament; and the Act was for that reason "invalid, null and void and of no legal effect and force."[12]

The names of the judges, who concurred unanimously with the Chief Justice, were Justices van den Heever, Hoexter, Schreiner and Greenberg.

## VIII

ON the day this judgment was announced, Dr. Malan made a truculent statement in parliament. He said that the constitutional situation "created" (?re-affirmed) by the judgment was "intolerable" and "unacceptable." "It created uncertainty and chaos where certainty and order should exist" because there were now two conflicting decisions of the Court.[13] The Court, said Dr. Malan, might again change its mind, if the Bench were "packed." He promised to introduce early legislation to assert the legislative sovereignty of parliament. A few days later it was announced that this meant retrospective legislation to deprive the Courts of their testing right—possibly by the creation of a new super-Court composed of members of parliament—and to validate the Voters Act.

Other ways of evading the decision of the Court or lessening its effect have been suggested, such as creating forty extra senators to give the Government its two-thirds majority or lowering the *white* franchise age limit from twenty-one to eighteen. One cannot presume to foresee all the legal and political consequences of such actions. Three things must, however, be said in all seriousness.

First, that it is a well-established legal principle that the Courts will not allow a

man to do indirectly what he may not do directly. The avowed intention of all these suggested courses is to diminish or abolish the Coloured vote, which is entrenched in the Constitution. There is, therefore, a real possibility that all or any of them, if passed by a bare majority in parliament, may also ultimately be declared invalid.

Secondly, non-European opinion in South Africa, already aroused and resentful of what has been said and done in the last twelve months, would regard it as the final breach of the white man's good faith, if the decision of the Court, which is always upheld when it is against coloured interests, is evaded or nullified when it is in their favour. The possibility of racial compromise, so greatly reduced already by this Government's policies, would probably finally disappear.

Thirdly, the decision to try and evade the judgment involves a direct attack on the Constitution and the rejection of the rule of law. The Afrikaans press has stated that parliament has "the authority of abolition over the Courts" and has called upon the Government to rely upon the "National nation" in pressing forward the struggle for the "freedom of the Afrikaner."[14] It has spoken of the Coloured vote as being the "last vestige of the Cape-British liberalism" and deplored the invalidation of its abolition "purely on the grounds that the wrong procedure was followed in passing it." Cabinet ministers have said: "If the judgment remains, the people of South Africa are not free."[15] They have referred to the precedent of Paul Kruger dismissing judges of the Transvaal republic and have refused to accept "the constitutional enslavement of South Africa to the legislation of a superior British parliament." They see in the judgment of the Court, none of whose members are of British extraction, "a revival of the attacks of imperialism on nationalism."

Such misleading and often irrelevant assertions might seem to herald an appeal to the country by a general election, in which the Nationalists would exploit to the full the emotional issues of the "black menace" and "British imperialism." But, so far, it appears to be the Government's intention to push through their validating legislation this year and ask the country next year, when their five year term expires in any case, to approve of what they have done. Since the validity of the Constitution has never been an election issue, the democratic course would have been to seek a mandate *before* legislation was introduced to circumvent the Courts and abrogate the Entrenched Clauses. The only possible motive for declining this otherwise obvious course must be the Nationalists' conviction that they would lose such an election, unless they have first obtained the swing of ten to twenty Cape seats (less the four Coloured Representatives) which they expect as the result of eliminating the Coloureds from the common roll. Their present reactions, therefore, lend support to the contention that the whole controversy has been precipitated for "the sordid and squalid reason" of gaining an electoral advantage—that the Entrenched Clauses are being attacked in order to entrench the Nationalist parliamentary majority. Whether parliamentary government can continue, when political and moral conventions are so cheaply held, remains to be seen. Mr. Strydom, the Minister of Lands, has already said that "one generation or parliament cannot bind future generations or parliaments." But democratic government does depend on good faith and the honouring of promises, as well as a respect for law until that law is constitutionally amended. One must doubt that the statement of a Nationalist Senator that "the country must be kept White *at all costs*," is consistent with the requisite standards of political decency.

IN a recent article in PUBLIC AFFAIRS I said that Smuts would yet for a few more years dominate the South African scene through his great instrument, the Act of Union. This is his hour. But the counsels of his party sadly lack his character, vision and eloquence—and the principled integrity of his liberal lieutenant, J. H. Hofmeyr, upon the anniversary of whose birthday the historic judgment was pronounced. With what ringing phrases

might they not have roused the country today! The fight is left in the hands of willing but uninspired men, still searching for the principles and personalities to set their cause alight. But they are aided by a popular movement, the War Veterans' Torch Commando, which originated among a small group of ex-servicemen after the Voters Act was passed. In less than a year it has become an impressive witness to the strength and extent of the opposition to an attack on the Constitution. On it must be placed the chief hopes of those who hope to see the law-abiding elements of the country rallied to the defence of legal and moral obligations, solemnly contracted and repeatedly reaffirmed.

## POSTSCRIPT

SINCE this article was completed, events in South Africa have moved dangerously towards civil war. The Government has passed an Act creating a High Court of Parliament to sit in appeal on constitutional decisions of the Appellate Division of the Supreme Court. In July or August this "High Court" will revalidate the Voters Act (1951) by the simple parliamentary majority which cannot legally enact it. Meanwhile the High Court Act itself will be under appeal in the Supreme Court. If the Court rules the High Court Act valid, the Opposition is committed to accepting its decision. It will then carry the fight to the polls against a measure which it has described as "a fraud on the Constitution," an immoral secession from the compact of Union. If, however, the Court finds the Act invalid—and this is a lively possibility—it does not appear probable that the Government will accept that decision and the final rejection of the Voters Act. A Cabinet Minister has said: "The Afrikaner people will never be satisfied to accept the shameful position that parliament can be dictated to by a Court of five paid officials." A Nationalist M.P. has said: "The present struggle can rightly be considered as the Third South African War for Freedom"—the first two being the Anglo-Boer Wars of 1880 and 1899. Dr. Malan has said: "We are going ahead with our plans to protect the sovereignty of parliament, *no matter what happens.*" And he has consistently refused to say whether he will abide by the decision of the Supreme Court as to the legality of his High Court.

It is possible that, if it is held to be illegal, Dr. Malan will go to the country. Some say that moderate opinion in his own party will oblige him to do so. But there is no external evidence of any moderating body of opinion in the Nationalist party and the Government seems too deeply committed to turn back. It is, therefore, rather more likely that it will again try to evade or nullify the decision of the Supreme Court. However it attempts this, it will involve imposing illegal measures by force and in these circumstances the Opposition has promised to meet force with force. Natal has already made it plain that it will not be party to the abrogation of the Constitution which the High Court Act involves and that, if that Act is held to be legal, Natal will consider itself absolved from the compact of Union.

MEANWHILE the Natives and Indians have formed a united non-European front and have called for a million shilling fund and 10,000 volunteers to begin passive resistance to discriminatory laws. It is only a question of time before the Coloureds join this front. The Government has responded by proscribing most of the Native and Indian leaders under the Suppression of Communism Act (1950) which allows the accused no redress in the Courts. European Trade Union leaders hostile to the Government's racial ideology have also been proscribed and imprisoned.

Democracy has never been at a lower ebb in South Africa since Union. While the country hovers on the brink of civil war between its Europeans, the birth of the movement which may ultimately compel their evacuation of South Africa is taking place before their uncomprehending eyes and is receiving just that stimulus of persecution which brings the unity of a common hatred to the most diverse elements—at least until the cause of the hatred is elim-

inated. The basic motive behind all Dr. Malan's stratagems is the desire to maintain "the European dominance over the overwhelming majority of non-Europeans", which only his own party can be trusted to preserve. But it is precisely this—the continuance of white leadership—which he is making finally impossible, since it can never be maintained by force against the wishes of over four-fifths of the population once these have become politically articulate.

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[1]Wherever Coloureds are spelt with a capital C, the reference is to the half-caste community which is recognised as one of the four racial groups of the Union. Coloured with a small c means any non-European.

[2]This declared void and inoperative any legislation by a colonial government repugnant to an Act of a British parliament.

[3]This completed the sovereign independence of the Union in certain technical details.

[4]The 1951 figures for the Union's population were: —2,588,933 Europeans (20.8 per cent); 1,078,621 Coloureds (8.7 per cent); 358,738 Asiatics (2.9 per cent); 8,410,935 Natives (67.6 per cent). 90 per cent of the Coloureds live in the Cape and 80 per cent of the Asiatics in Natal.

[5]The Appellate Court is the highest judicial authority in the country. Despite its name, the Supreme Court is not supreme.

[6]The United Party-Labour Party coalition actually received 55 per cent of the total vote. But the 15 per cent 'loading' in favour of the rural constituencies, where the main Nationalist strength is, was decisive.

[7]With a total of some 13,000 votes against the U.P.'s 10,000.

[8]Very soon afterwards, Mr. Havenga, the A.P. leader, abandoned his stand against depriving the Coloureds of the vote and even agreed to push the legislation through in defiance of the Constitution—thus finally betraying the heritage of his late leader, General Hertzog.

[9]Even if the connection between the suffrage and sexual intimacy might seem tenuous to outsiders, this appeal to emotional prejudice is a certain electoral winner with the majority of Afrikaners, despite their own polyglot origins. These include strong elements of Dutch, German and Huguenot ancestry, and even British and Irish blood. The rest of the South African "whites" comprise the unassimilated British, Jews, Greeks, Syrians and other Levantines (among them Vic Toweel, the world bantam-weight champion). Many "white" families have Bantu and Asiatic blood in their veins, and the Coloureds derive from miscegenation between Europeans, Bantu and Malay slaves.

[10]The African National Congress and the South African Indian Congress have jointly appealed to the Prime Minister to withdraw various discriminatory laws. Otherwise they threaten to stage a series of protest strikes on Van Riebeeck Day (April 6th) and thereafter to proceed to a campaign of passive resistance.

[11]Only the British and New Zealand parliaments can pass *any* legislation by a bare majority.

[12]The judgment does not detract from the sovereignty of parliament. It merely affirms that parliament is not Parliament unless it conducts itself in the manner laid down in the South Africa Act, from which it derives its existence and authority.

[13]In fact, there is only one. The latest one overrules the earlier.

[14]All but a handful of Nationalists are Afrikaners, but about one-third of the Afrikaners are not Nationalists.

[15]Canadians and Americans will be interested to learn that by implication they are in a state of servility.

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## *You'll Get Used To It!*

There is only one cure of the evils which newly-acquired freedom produces; and that cure is FREEDOM. When a prisoner first leaves his cell, he cannot bear the light of day, he is unable to discriminate colors, or recognize faces. But the remedy is, not to remand him to his dungeon, but to accustom him to the rays of the sun.

EDMUND BURKE.