The Old Commonwealth Model of Constitutionalism

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Abstract: Comparative constitutional law is prone to two types of error. 'Thin' or overly formal accounts overlook important substantive dimensions of law and constitutions. 'Thicker' accounts often subsume the legal within politics or culture. Both types of error share a tendency towards presentism which stems, we argue, from insufficient consideration of the 'jurisprudential perspective' - the basic framework of legality which structures constitutional order and the 'internal point of view' that accompanies it, whereby actors within a legal order understand their association in terms of rights and duties. We turn to an older school of inquiry to see what such inquiry might entail. 'Commonwealth comparative constitutional law' explored questions of legality and sovereignty in the context of a collapsing British Empire. We assess the contribution of R.T.E. Latham, D.V. Cowen, Edward McWhinney and Geoffrey Marshall in the context of the Voters Rights legislation and litigation in 1950s South Africa in particular, and conclude by reflecting on the potential of this style of scholarship in our own era, where questions of sovereignty, exclusion and faux legality resurface in new and troubling forms.

Comparative constitutional law (CCL) is in a comparatively thriving condition. But even its more dogged advocates would accept that not all aspects of the constitution have been equally well served. Some institutions, notably courts and judicial review, receive considerably more attention than others, as do certain constitutional forms, notably the US model. More generally, the institutional side of the constitution - rules, concepts, substantive and adjectival law as well as institutional bodies - fares better than its structural side: that is, the 'frameworks of intangibles' within which political communities operate, especially their cognitive structures and epistemological foundations.[2]

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[2] Pierre Legrand, 'European Legal Systems are not Converging' (1996) 45 *International and Comparative Law Quarterly* 52, 60.

CCL critics regularly bemoan the prevalence of 'thin' over 'thick' description.[3] Their call for more contextual, idiographic knowledge reflects basic concerns with the state of the literature. One concern relates to the selection of objects of inquiry, especially the tendency to focus on surface matters, often formal legal phenomena, at the expense of more substantial (i.e. cultural) inquiry. Another concern relates to the inquiry itself, which is criticised for methodological glibness and analytical superficiality. 'Any attempt to portray the constitutional domain as predominantly legal, rather than imbued in the social or political arena', Ran Hirschl writes, 'is destined to yield thin, a-historical, overly doctrinal or formalistic accounts of the origins, nature and consequences of constitutional law.'[4] Günter Frankenberg goes further, deriding this work in its more active mode as conforming to an 'IKEA model' in which 'standardized constitutional items - grand designs as well as elementary particles of information - are stored and available, prêt-à-porter, for purchase and reassemblage by constitution makers around the world.'[5]

Animating these criticisms is an understanding, which we share, of constitutional orders as diachronic, moral and complex social structures.[6] Constitutions incorporate a domain of practice that almost always predates us and whose customs, habits, understandings and orientations are already established. We are familiar with the idea that constitutions so understood shape *political* character. The fact that we are having *this* conversation in *this* way is a large part of what determines the character of our association as citizens.[7] It is easier to overlook how constitutions also shape *ideational* character, providing 'modes of experiencing the world'[8] within which we construct, imagine and navigate political space.

[3] Clifford Geertz, 'Thick Description: Toward an Interpretive Theory of Culture' in *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973). The term derives from Gilbert Ryle, 'The Thinking of Thoughts: What is "Le Penseur" Doing?', in *Collected Papers, Volume 2* (London: Hutchinson, 1968). See also Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, Mass: Harvard University Press, 1983).

[4] Ran Hirschl, 'From comparative constitutional law to comparative constitutional studies' (2013) 11 I*nternational Journal of Constitutional Law* 1, 2.

[5] Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8 *International Journal of Constitutional Law* 563, 565.

[6] See e.g. Thomas Poole, 'Time and Timelessness in Constitutional Thought' (2020) 27 *Res Publica* 255.

[7] See e.g. Bernard Williams, *In the Beginning Was the Deed* (Princeton: Princeton University Press, 2009).

[8] Legrand, 'European Legal Systems are not Converging', 63.

Vicki Jackson, discussing general comparative constitutional law method, refers tongue-in-cheek to the twin risks of 'getting it wrong' and 'getting it too simple'.[9] In the same playful but constructive spirit, we argue that something similar applies more specifically to the place of law within comparative constitutional inquiry. Two distinguished scholars of CCL are exemplary. On the 'getting it too simple' side, we point to Stephen Gardbaum's 'new commonwealth model of judicial review'. What starts as an attempt to escape the grip of the US-model of rights protection ends up replicating the US obsession with courts and the counter-majoritarian difficulty. 'Getting it wrong' equates in this context to the tendency to reduce or dilute law to such an extent that it dissolves into or is swallowed up by 'politics' or 'culture'. As this danger is heightened by the turn towards comparative constitutional *studies*,[10] we focus on the work of the leading proponent of that move, Ran Hirschl. We find his deployment of sceptical political science in the context of a normative critique of rights constitutionalism unconvincing. The study purports to be a project of CCL, and as such to be studying what is distinctively *legal* in its subject matter, yet it rejects the 'internal' legal perspective without explaining why. It overlooks, as such, an important dimension of constitutional inquiry. What is, as far as participants in constitutional practice are concerned, at least partly a matter of right and duty appears only in the register of power and interest.

Fascinating, though, is what these two apparently different 'errors' have in common. Despite their general awareness of the importance of history, both Gardbaum and Hirschl are inattentive to the deeper historical roots of the institutions they study. Our conjecture is that downgrading history is of a piece with downgrading the jurisprudential. Both 'thin' formal-legal inquiries and somewhat 'thicker' political/cultural CCL studies, that is, exhibit a tendency towards presentism which arises in part from a lack of proper appreciation for the juridical qualities of law. The intuition is as follows. Constitutions do not just structure practices. They are understood by participants within them as carriers of normative information about how their political association ought to be arranged. Constitutions bank commitments. They turn practices and customs into questions of right and wrong. It would seem to follow, then, that jurisprudential reflection on constitutions presupposes historical inquiry.

[9] Vicki C. Jackson, 'Methodological Challenges in Comparative Constitutional Law' (2010) 28 *Penn State International Law Review* 319.

[10] See in particular Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014). See also Tom Ginsburg, 'How to Study Constitution-Making: Hirschl, Elster, and the Seventh-Inning Problem' (2016) 96 *Boston University Law Review* 1347.

We pursue this line of inquiry by focusing on the most foundational constitutional concept of all: *sovereignty*. Notoriously difficult to pin down conceptually, it is equally elusive to study in practice. It may be present always and in a sense everywhere, but it can be hard to see in action. It is all but invisible in the contemporary CCL literature. In search of inspiration, we turn instead to an older school of comparative inquiry, now almost entirely forgotten: 'Commonwealth comparative constitutional law'. The periods immediately before and after World War II witnessed an explosion in the comparative study of the constitutional law of the countries that made up the British Empire as they achieved Dominion status, that is, status as self-governing entities. We concentrate on the work of four Commonwealth CCL scholars - R.T.E. Latham, D.V. Cowen, Edward McWhinney and Geoffrey Marshall - focusing in particular on their various contributions to the Voters Rights litigation in South Africa in the 1950s.

As we show, this body of work engages with the question of sovereignty as it emerged in the context of the disintegrating empire. This genre of comparative analysis, requiring a jurisprudentially sophisticated understanding of the complexities of the relationship between sovereignty's legal and political dimensions, opens the way to an explication of the fundamental framework of legality that grounds and sustains constitutional order. While 'constitutionalism' was not a term of art at that time, the discussion of the idea of sovereignty as the ultimate legal authority within the legal order of the state is, as we will suggest, one about constitutionalism. Moreover, given that the litigation raised the issue of the role of power and race in the breakup of empire and the process of decolonisation, the scholars we focus on were alert to the relationship between this issue and the juridical and, in particular, to the way in which constitutionalism could respond to the political challenges of their time. These challenges sounded in the register of sovereignty and we hear their echoes in the political crises that beset our own era.

Getting it too Simple

The 'essential key' for unlocking a legal culture, Pierre Legrand writes, lies in 'an unravelling of the cognitive structure that characterises that culture.'[11] When it comes to the constitutions of states, the normal focus of comparative constitutional inquiry, sovereignty is unquestionably a primary ingredient

[11] Pierre Legrand, 'European Legal Systems are not Converging', 60.

of our collective understanding. Yet the concept is almost entirely missing from comparative constitutional scholarship. The chapter on 'Sovereignty' in the *Oxford Handbook on Comparative Constitutional Law*, for instance, is entirely conceptual and contains no comparative dimension.[12] The *Cambridge Companion to Comparative Constitutional Law* includes no mention of the term.[13] The closest CCL tends to get to the concept is in analysing 'unconstitutional constitutional amendments'[14] and reflections on 'post-sovereign constitution making'.[15] But even there, the treatment of sovereignty is mostly indirect and tangential.

One reason for this neglect is that sovereignty is hard to study. But we think there may be a deeper cause in play, one connected to the limitations of CCL scholarship. A recurrent issue is an analytical orientation based on the preoccupations of US constitutional scholarship and its obsession with courts, judicial review and the 'counter-majoritarian difficulty'.[16] Not only does this often produce 'thin' and unsophisticated comparative analysis, but it also tends to be parochial, with scholars investigating other constitutional systems through what is in essence an American lens. As Ran Hirschl remarks in his book on method, this style of CCL analysis often proceeds 'as if there is no past, only present and future', the assumption that underlies it being that 'contemporary intellectual endeavours in the field constitute a necessary advance over previous ones', and '[w]hen the past *is* referenced, the focus is often on the introduction of the US Constitution or the constitutional aftermath of World War II.'[17]

Hirschl's comments seem right to us - though we argue later that a similar criticism applies to his own work. For now, we illustrate the point by turning to one of the most influential scholars in the field, Stephen Gardbaum. In 'The New Commonwealth Model of Constitutionalism', Gardbaum argued that CCL had been dominated by two narratives: one about the charters of rights adopted after World War II, the other about the profusion of dedicated constitutional courts in the 1990s in Central and

[12] Michel Troper, 'Sovereignty', in Michel Rosenfeld and Andras Sajo, eds., *The Oxford Handbook on Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 350.
[13] Roger Masterman and Robert Schütze, *Cambridge Companion to Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2019).
[14] See e.g. Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017).
[15] Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford: Oxford University Press, 2016).
[16] See e.g. the literature on 'weak-form' judicial review.
[17] Hirschl, *Comparative Matters*, 77.

Eastern Europe. In promoting these two narratives, he suggested, CCL assumed that there was no middle ground between, on the one hand, entrenching fundamental rights in charters and giving judges unreviewable power over their interpretation and, on the other, having the rights subject to the power of the legislative majority. As a result, CCL neglected the bills of rights adopted in the UK, Canada, and New Zealand between 1982 and 1998 in which judges had a guardianship role but the legislature retained the 'last word'.[18] This model, Gardbaum claimed, offered a 'radically direct' solution to the counter-majoritarian difficulty created by pitting unelected judges against democratic legislatures since it promised a 'genuine dialogue' and 'joint responsibility between courts and legislatures with respect to rights'.[19]

Again, Gardbaum's observations on the state of the field seem right to us. Mainstream CCL scholarship in the wake of the 1990s' wave in constitution writing did suffer from a blinkered approach. In this respect, Gardbaum specifically connects the two factors identified by Hirschl in the passage above: the general irrelevance of the past and the tendency, in those exceptional cases where the past is invoked, to focus on 'the introduction of the US Constitution or the constitutional aftermath of World War II.' US constitutional theory is obsessed with the counter-majoritarian difficulty which emerged through the development by the US Supreme Court of its 'last word' guardianship role over the interpretation of constitutional rights, a role which came to include the determination of whether the constitution contained rights that were not explicitly enumerated. And it is that guardianship role, as Gardbaum rightly claims, that has dominated CCL scholarship. Indeed, to suggest that the constitutional aftermath of World War II matters to contemporary CCL is itself something of an exaggeration. Scholarly attention tends to be directed to the constitutional experience of (West) Germany,[20] and particularly the introduction in 1949 of the Basic Law as a reaction to its immediate past. It is not surprising, against this background, to discover that the Commonwealth CCL of the 1950s does not figure in contemporary accounts of post-War constitutionalism.

[18] Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, 707-8.

[19] See also Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013).

[20] See e.g. Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge: Cambridge University Press, 2013).

If, as we argue, CCL is most interested in how various institutional configurations handle the counter-majoritarian question, it is unclear whether the introduction of the New Commonwealth Model did, or could have done, much to disturb the prevailing mindset. The problem is that Gardbaum himself seems to assume that the central question is whether the counter-majoritarian difficulty can be overcome. The New Commonwealth Model is adduced to show that rights can be protected by getting legislative majorities to take them seriously without the sword of judicial 'last word' review hanging over their heads. In other words, while analytically more subtle and less overtly US-centric than many working in the field, Gardbaum accepts the same basic reference points - that what is most important in constitutional design and most worthy of comparative study is the way in which the apex court intersects with the legislature. The standard criticism of this type of scholarship is that it seeks to isolate institutional or formal elements from the cultural context in which they are embedded (and does so with narrow, parochial concerns in mind).[21] Our criticism is more focused: it is that this approach misunderstands and reduces the nature of the 'legal' in constitutional law, which we regard as considerably thicker (and more 'cultural') than these studies assume.

Getting it Wrong

Our claim is that the problem with much CCL inquiry is that it pays inadequate attention to the 'jurisprudential perspective'. By this, we refer to two dimensions of that branch of philosophical inquiry. First, there is the dimension that animates the sort of questions which preoccupied H.L.A. Hart. What is law? What is legal order? What is sovereignty? What is the relationship between law, on one hand, and justice and morality on the other? Second, and related, there is the dimension of the perspective of actors in a legal order who take what Hart called 'the internal point of view'.[22] Such figures assume that law has authority and ask the question 'what does the law require in this particular matter?' Within such an inquiry, the role of judges looms large. In the modern legal state, they are the officials who have final authority to determine what the law is, even if their answer is that some other institution - e.g. the legislature or an administrative agency - has the last word.

[21] See e.g. Günther Frankenberg, 'Critical Comparisons: Rethinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411.
[22] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2nd ed., 1994), 89.

Though considerable debate surrounds these questions,[23] we do not need to attend to them here since our concern is to observe how the distinction between external and internal points of view plays out in CCL. We detect a division within the field between 'internalists' who take in some form the internal point of view of the jurist, and 'externalists' who take the external point of view. The latter adopt, for instance, the perspective of the social scientist primarily interested in explaining patterns of behaviour, a method of inquiry that leaves little room for considering the justifications the subjects themselves would offer for their actions.

Looking a little more closely at the literature indicates that externalists divide into two camps. The first tends to focus on the factors that led to a turn to written constitutions with entrenched bills of rights and dedicated constitutional courts. Certainly, this kind of study can illuminate aspects of the surge in constitutionalism. But given that its method cannot include any genuine consideration of normative dimensions of constitutional argument, it is hard to see how it can add anything substantial to the study of comparative constitutional *law* - though working in this register, it may contribute to comparative constitutional *studies* (CCS).

The second camp within externalism we may call 'sceptical political science', and is exemplified by Hirschl's critique of rights constitutionalism. At its strongest, that critique alleges that the turn to bills of rights and judicial review is to be understood as just one example of a power grab by a political elite - in this case a 'juristocracy' - in a bid to shore up the Western hegemon and its neoliberal regime, akin to the role that independent central banks play in the world's political economy.[24] Notice, though, that in taking this position, sceptical political science enters the normative terrain, claiming to unmask the jurisprudential perspective as seeking to legitimate the illegitimate. So understood, sceptical political science is vulnerable to the following challenge. If it claims to engage in the project of CCL - that is, to study what is distinctively *legal* in its subject matter - the onus is on its practitioners to offer a justification for rejecting the internal point of view. But we are given no reason why we should dismiss out of hand the justifications that actors in a practice give for their action in that practice.[25] As such,

[23] See e.g. Scott Shapiro, 'What is the Internal Point of View?' (2006) 75 *Fordham Law Review* 1157.
[24] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2004).
[25] Though one wonders whether it is possible, even from the 'external' perspective of a social scientist, coherently to identify the existence of a practice and the limits of its operation without paying proper attention to what the participants in that practice say about the practice.

its entry into normative terrain is not properly prepared since it rejects the jurisprudential perspective without engaging with it.[26]

By contrast, while 'internalist' CCL takes the perspective of judges seriously, it tends to neglect other aspects of the jurisprudential perspective. Work in this vein, including Gardbaum's, rarely addresses the philosophical questions listed above - other than, and then obliquely, the relationship between law on the one hand and justice and morality on the other.[27] A shared tendency to focus on the counter-majoritarian difficulty represents the main overlap between this body of work and sceptical political science. But whereas internalists typically see potential for reconciliation through 'dialogue'[28] or 'collaboration'[29] or 'law as a conversation between equals',[30] sceptical political science assumes that such reconciliation is not only impossible but itself represents an attempt to sustain judicial usurpation of political power. Thus, sceptical political science and internalism share an assumption that the matter of constitutionalism in CCL is almost exclusively about rights and courts. They differ only in that, for internalists, the issue is how judges can vindicate those rights in partnership with other institutions, while for sceptical political scientists guardianship of rights should be taken away from the courts and given back to the people, without necessarily inquiring all that deeply into who 'the people' are and how they should exercise their guardianship.

Excluding the Past

[26] For a similar point, see Ronald Dworkin's argument against 'external skepticism' in *Law's Empire* (London: Fontana, 1986), 78-86. Note that our criticism of sceptical political science does not target political science as such, only a position which dismisses the internal perspective without engaging with it.

[27] We would include Mark Tushnet, another towering figure in the field, in this category. His work seeks to debunk the work of judges by analysing their reasoning and only then arguing that their role in legal order be reduced by other means of ascertaining the content of constitutional law which give citizens and/or their elected representatives a greater role in constitutional interpretation: see *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225.

[28] See e.g. Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019).

[29] See e.g. Eoin Carolan, 'Dialogue Isn't Working: The Case for Collaboration as a Model of Legislative–Judicial Relations' (2016) 36 *Legal Studies* 209.

30 See e.g. Roberto Gargarella, *Law as a Conversation among Equals* (Cambridge: Cambridge University Press, 2022).

To the extent that CCL tends towards the thinly functional and institutional, it is not surprising that it excludes serious historical inquiry. This presentism has not gone unobserved by internal critics, with Hirschl noting, as we have seen, how so much CCL analysis proceeds 'as if there is no past, only present and future'. What is perhaps more surprising is how thicker, more substantive comparative inquiries often exhibit the same failing. Our conjecture is that this stems ultimately from the same source. The failure to incorporate the jurisprudential perspective excludes reflection on how authority might be generated over time through politico-jural resources, leaving the inquirer to proceed with too thin a conception of 'the legal'. The resulting presentism manifests itself in various ways, including a tendency to exclude both older comparative constitutional phenomena and older inquiries into such phenomena from the scholarly frame of reference.

Despite his strictures against presentism, Hirschl is himself a case in point, though not an uncomplicated one. Aware perhaps of the absence of a historical dimension in his earlier work, *Comparative Matters*, his book on CCL method, contains two chapters on history. However, these chapters present what will look to any historian of ideas like a whistle stop tour of authors, topics and themes, some of them rather eclectic (e.g. medieval constitutionalism and pre-modern Jewish law). No clear explanation is given as to why these stops are chosen and there is a tendency, when seeking to connect present and past, to describe the stops in rather anachronistic terms ('[f]ast forwarding to today'[31]). For example, talking about Bodin's proposal for exemption from liability in respect of accusations made in the legislative assembly, Hirschl observes: 'This is an early precursor of the "fire alarm" logic of regulatory oversight (as we would call it today), stunningly identified and recommended by Bodin more than four centuries ago.'[32]

Our point is not to reveal a strong social scientist's limitations as a historian of political thought but to show how even a leading CCL scholar, sensitive to the problems of presentism that characterise the field, nonetheless struggles to introduce a credible historical dimension to his work. Rather than being an exception to the general rule, Hirschl's struggles with history exemplify it. It is not just the thinner style of CCL analysis, then, which encounters problems with including the past in its frame of reference. The same problem affects thicker styles of analysis. This exclusionary tendency when it

[31] Hirschl, *Comparative Matters*, 92.

[32] Ibid, 119. On the pitfalls in this kind of account, see William Partlett, 'Historiography and Constitutional Adjudication' (2022) 85 *Modern Law Review* (forthcoming).

comes to the past may be due to a number of factors, including lack of genuine interest or the requisite skills. But we suggest that there is also a structural or methodological factor in play - that relegating the past is a function of failing properly to account for the jurisprudential, as we have defined it. Our task in the remainder of the article is less critical and more constructive, as we begin to address how one might incorporate the jurisprudential perspective into CCL inquiry through the example of the scholars who did exactly that.

The Sovereignty Gap

Taking CCL seriously, Tom Ginsburg argues, 'requires us to start at the very beginning: the very foundations of constitutional order', something he sees as largely absent from existing literature.[33] The concept of sovereignty should thus figure prominently in any inquiry into fundamental juristic questions of authority and the roots of normative ordering. Sovereignty is perhaps best approached as a nodal or 'cluster' concept, uniting under one head various important ideas. The concept helps us to capture the idea of an autonomous space of action under public law, distinct from other forms of power, and by extension the unity and exclusiveness of the legal order.[34] It offers a juristic means of mapping the most basic flows of power and authority within a political order,[35] those that lie at the intersection of law and politics, and it facilitates a distinction between the constitution of the state and the institutions of government.[36]

But, despite increasing attention to the phenomenon of 'democratic backsliding' and the role of faux legality in this process - for example, through the study of 'abusive constitutionalism'[37] - sovereignty has very rarely been a focus of CCL scholarship,[38] at least in part because the field is driven by its

[33] Tom Ginsburg, 'How to Study Constitution-Making: Hirschl, Elster, and the Seventh Inning Problem' (2016) 96 *Boston University Law Review* 1347, 1351.

[34] Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 186.

[35] See e.g. Pierre Bourdieu, *On the State* (Cambridge: Polity Press, ed. Partrick Champagne, Remi Lenoir, Franck Poupeau and Marie-Christine Rivière, trans. David Fernbach, 2014), 33.

[36] See e.g. Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2016).

[37] David Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189; Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 78; Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545.

[38] An exception is Andrew Arato's *Post Sovereign Constitution Making*. There has also been some comparative analysis of the exercise of constituent power: see e.g. Ulrich Preuss, 'The Exercise of Constituent Power in Central and Eastern Europe'

substantive focus on rights and courts. It is tempting to argue that the gap is unproblematic. In constitutional law, the question of sovereignty pertains to where ultimate political authority resides in the modern legal state: which institution speaks for 'we, the people', or which institution should have 'the last word' when high constitutional matters are at stake. However, it is plausible to regard this question as misleading because in the modern legal state typically there is no single institution that has this role. Authority tends not to belong to any institution in particular because it is the product of a complex of institutions with different legal competences. Most prominently, Hans Kelsen in his 1920 book on sovereignty argued that at most 'sovereign' is the title we bestow on the legal order of the modern state and those who wield the concept in debate are usually nationalistic sorts who wish to deny the authority of not only public international law but also domestic constitutional law. He concluded that the concept of sovereignty should be 'radically suppressed'.[39]

However, as Hermann Heller pointed out in his own 1927 work on sovereignty, written in part as a response to Kelsen, one cannot rid either political or legal debate of the idea of sovereignty.[40] Heller thought it was important to make explicit the political value of the 'legal idea' of sovereignty in order to oppose Carl Schmitt's 'political idea', indicated in Schmitt's polemical claim that 'Sovereign is he who decides in the state of exception' as well as his subsequent argument that it is the executive who best speaks for 'we, the people' and is thus the ultimate decider in moments when high constitutional matters are at stake, a position Heller called 'organ sovereignty'.[41] These terms, we should note, are slightly awkward. Schmitt's 'political' idea of sovereignty has legal commitments: for example, his argument that in Weimar Germany the President was the 'guardian of the constitution' and so had ultimate authority to decide high constitutional matters.[42] Heller's counter-argument was that this position sought to use law as a mere instrument of political will in order to undermine the institutional design of a rule of law-abiding democracy. That is to say, he saw Schmitt's political and legal theory, in terms familiar to present constitutional debate, as nothing more than an elaborate exercise in faux

in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2007) and Joel Colon Rios, *Constituent Power and the Law* (Oxford: Oxford University Press, 2020).

[39] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu Einer Reinen Rechtslehre* (Aalen: Scientia Verlag, 1981), 320. For another important attempt at sovereignty denial in the same period see Léon Duguit, *Law in the Modern State* (New York: B.W. Huebsch, intro. Harold J. Laski, 1919).

[40] Herman Heller, *Sovereignty: A Contribution to the Theory of Public and International Law* (Oxford: Oxford University Press, 2019; David Dyzenhaus, ed., Belinda Cooper, trans.).

[41] Ibid, 103-4. See Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Mass.: MIT Press, trans. George Schwab, 1988), 5 and his essays in Lars Vinx (ed.), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015).

[42] See e.g. Carl Schmitt, *Legality and Legitimacy* (Durham, NC: Duke University Press, trans. Jeffrey Seitzer, 2004).

legality. But that counter-argument, while premised on the legal idea of sovereignty, has its own political commitments, principally the commitment towards the conduct of politics within a legal, constitutionalist framework.

While theoretical debate over sovereignty quickly becomes immensely complex, its continued importance is undeniable. As Dieter Grimm, no devotee of the concept, concedes, 'sovereignty continues to play an important role in domestic and international legal documents as well as in international relations', and this resilience means that it 'should not be ignored in scholarly works.'[43] In many real-world debates, particularly those in which faux legality is alleged, the complexity will rise to the surface in legal argument about what is constitutionally required. You can try to repress sovereignty talk - by ignoring the concept or, as Kelsen did, by trying to dissolve it within a purely formal structure in which the normative order of the state is presumed to be coextensive with the normative order of the legal system - but it will inevitably pop up.[44] Indeed, since the framework of legality is more fundamental than that of rights, it is no surprise that in our time, when the question of sovereignty is again being asked, it is because exercises of faux legality are legal arguments aimed primarily at subverting that framework. As such they must be met on the same terrain, by juridical arguments.

Commonwealth CCL

Though sovereignty can be difficult to study from a CCL angle, that does not mean that it is impossible, nor that it has not been done before.[45] A very good illustration is provided by a set of CCL studies from the 1930s and 1950s occasioned by the evolving nature of the British Commonwealth during the period of decolonisation. Contemporary CCL seems unaware of this older body of work and the issues on which it focused. We discuss four such studies: R.T.E. Latham's *The Law and the*

[43] Dieter Grimm, *Sovereignty* (New York: Columbia University Press, trans. Belinda Cooper, 2015), 102.
[44] David Dyzenhaus, 'Positivism and the Pesky Sovereign' (2011) 22 *European Journal of International Law* 363.
[45] See, for instance, the I-CON symposium on New Dominion constitutionalism, to which one of us contributed, especially its concluding article: Mara Malagodi, Luke McDonagh and Thomas Poole, 'The New Dominion Model of Transitional Constitutionalism' (2019) 17 *International Journal of Constitutional Law* 1283. See also Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self-Determination* (Princeton: Princeton University Press, 2019), which examines the decolonisation process in terms of an attempt to reshape international juridical, political and economic order on the part of those asserting self-determination.

Commonwealth, first published in 1937 in the *Survey of British Commonwealth Affairs*;[46] D.V. Cowen's *Parliamentary Sovereignty and the Entrenched Provisions of the South Africa Act* (1951);[47] Edward McWhinney's *Judicial Review in the English-Speaking World* (1956);[48] and Geoffrey Marshall's *Parliamentary Sovereignty and the Commonwealth* (1957).[49] Latham, though largely forgotten today even in his native Australia, exercised immense influence on post-war Commonwealth CCL,[50] his reach even extending to the pages of the most important work in the philosophy of law published in English in that period, Hart's *The Concept of Law*.[51] His absence from contemporary CCL may owe something to his untimely death, aged 30 in 1943, when the RAF aircraft in which he was an observer went missing over the Norwegian coast. But Cowen (1918-2007), Marshall (1929-2003) and McWhinney (1924-2015) had long and illustrious careers and their present obscurity is most likely an illustration of the failing already alluded to - that the past does not generally matter to contemporary CCL, the main exceptions being the scholarly literature about the US constitution and then the German Basic Law in the aftermath of World War II.

The central problematic of this work was how to understand sovereignty in the context of a British empire in which some entities were already on the path to full independence while others were intent on that same end. It became clear that what was happening in general terms - at various speeds, in various ways - was that apparent 'devolution of authority from the Imperial Crown in Parliament' was being followed, more often than not, 'by revolution within the new states of the Commonwealth.'[52] A variety of patterns of similarity and difference were to be discerned within this general movement which provided, as Marshall observed, 'a number of controlled experiments which impact on legal theory in a matter of considerable interest to both lawyers and political scientists.'[53] Not only did this make the period both rich and dynamic from the perspective of the legal scientist, but it was also one of considerable political significance in which, unusually in the British colonial and imperial context,

[46] R.T.E. Latham, *The Law and the Commonwealth* (London: Oxford University Press, 1949).
[47] D.V. Cowen, *Parliamentary Sovereignty and the Entrenched Provisions of the South Africa Act* (Cape Town: Juta and Co., 1951.)
[48] Edward McWhinney, *Judicial Review in the English-Speaking World* (Toronto: University of Toronto Press, 1960, 2nd edition).
[49] Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth* (Oxford: Clarendon Press, 1957).
[50] For an excellent account of Latham's life and work, see Peter Oliver, 'Law, Politics, the Commonwealth and the Constitution: Remembering R.T.E. Latham, 1909-43' (2000) 11 *Kings College Law Journal* 153.
[51] Hart, *The Concept of Law*, 120-22 & 296-7 (citing Latham, Marshall, Wheare). Hart was troubled by how to make sense of the issues which these scholars addressed. See Dyzenhaus, *The Long Arc of Legality*, 305-7.
[52] John Finnis, 'Revolutions and Continuity of Law' [1971] in *Philosophy of Law: Collected Essays Vol. IV* (Oxford: Oxford University Press, 2011), 407.
[53] Marshall, *Parliamentary Sovereignty*, 1.

legal questions were to the fore. The complexity of the legal questions thrown up by divergent comparative experience lent itself to - even necessitated - jurisprudential reflection. As Latham observed, the legal inquiry 'lies rather on the periphery of municipal law, where it marches with politics, with "constitutional convention", and with international law. Questions on the margin of a subject necessarily stir more extraneous issues than do points which lie comfortably in the centre of established doctrine; in such frontier regions to require self-sufficiency of legal scholarship is to ensure not its chastity but its sterility.'[54]

Chief among the problems that preoccupied these scholars was the question of sovereignty because they were trying to make sense of the evolving nature of the Commonwealth, i.e, the disintegration of the British Empire. While the UK constitution had given few opportunities for students of constitutional theory to examine the limits of legal authority, the evolution of Commonwealth constitutions opened up a fresh field of study.[55] But it was far from their sole focus. As they rightly saw, the question of sovereignty arises at the intersection of the 'legal' and the 'political' and implicates, as such, not only the question 'what is law?', but also other legal philosophical issues. Asking questions about sovereignty in this space involved consideration of the fundamental preconditions of constitutional order: the framework of legality which makes rights and their protection possible. As such, not only do they put the narrow concerns of much contemporary CCL into sharp relief. They also reveal a more widespread neglect of the colonial and imperial dimensions of the Western constitutional project.[56]

To explore the field in more depth, we propose to focus on one central episode - the constitutional drama that played out in South Africa in the 1950s and particularly the trilogy of 'Voters Rights' cases. Marshall devoted the last long chapter of his book to it and it was one of the factors that prompted McWhinney to bring out a second edition of his. We focus here on why it figured so large in Commonwealth CCL, why, as Marshall put it at the beginning of his chapter, this was a 'history of conflict between two irreconcilable views as to the nature and limits of parliamentary sovereignty' and why, as he also claimed, the 'dialectic of this struggle is one which deserves detailed examination, both

[54] Latham, *The Law of the Commonwealth*, 521.
[55] Marshall, *Parliamentary Sovereignty*, 1.
[56] On which see e.g. Thomas Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge: Cambridge University Press, 2005).

as a chapter in the development of a Commonwealth system of government and for the juristic importance of the questions which it has made explicit'.[57] The story begins with an account of the jurisprudential perspective Marshall, McKinney and Cowen adopted from Latham's pioneering short prewar monograph and which Cowen deployed in his own work of 1951 which, as we will see, played an important role in the drama.

Latham on Sovereignty

Latham had gone a long way in his monograph to answering the question of sovereignty in addressing the issues that set the stage for the drama that unfolded in the 'Voters Rights Cases' in which the Appellate Division, South Africa's apex court, faced off against the first apartheid government. It was clear when Latham wrote that a South African government would one day assert South Africa's full independence as a sovereign state. The ground had already been prepared by the Statute of Westminster, a 1931 enactment of the British Parliament, which 'irrevocably transformed the existing legal rules for the exercise of legislative authority in the Commonwealth'[58] by providing that no future Acts of the Parliament would apply as part of the law of the Dominions - the self-governing entities within the Commonwealth - without their consent.[59] But the Statute did not make clear how the legislatures of the various entities were to exercise their sovereign authority. That left unresolved the issue at the centre of the drama, one which applied to all of the Dominions on the path to fully independent or sovereign status: how, if at all, could an entity which derived its legal status from its place in the unified legal system of the Empire break free of it by non-revolutionary or legal means? This, for Latham, raised the question whether there was an imperial legal system and the answer to it would, he said, lead him reluctantly to discussions that 'trespass upon philosophy on the one hand and politics on the other'.[60]

In a section titled 'Formal Unity', Latham observed that in every community there are competing sources of legal authority. It is of 'primary importance' that the citizen should not be faced with

[57] Marshall, *Parliamentary Sovereignty*, 138.

[58] Marshall, *Parliamentary Sovereignty*, 76.

[59] For analysis of the Statute of Westminster in the history of Dominion constitutions see Peter Oliver, 'Dominion Status: History, Framework & Context' (2019) 17 *International Journal of Constitutional Law* 1173.

[60] Latham, *The Law of the Commonwealth*, 521.

contradictory legal requirements, and the only way to avoid this is for provision to be made for 'resolving apparent conflicts'; only in that case does an 'agglomeration of laws become a *system* of law'.[61] He then set out Hans Kelsen's account of legal order as a hierarchy of norms, with norms at a lower level tracing their validity to higher order norms until one reaches the *Grundnorm* or basic norm, the ultimate norm of the system 'whose validity depends on non-legal considerations'.[62] In Latham's view, Kelsen's *Grundnorm* contained the key to answering the question of sovereignty. Though noting that he did not subscribe to an over-emphasis on the purely formal elements in law at the expense of non-legal considerations including ethics, religion, political principle and tradition,[63] Kelsen's jurisprudence offered Latham a way of circumventing the then dominant Austinian 'command' theory of sovereignty, in which the sovereign is the legally unlimited entity at the apex of a legal system which is habitually obeyed by all its other members. As Latham noted, on the face of things this theory might seem to fit well the British constitution with its doctrine of parliamentary supremacy, but in fact it did not accurately describe even that model. His argument on this point was of considerable importance for subsequent Commonwealth CCL scholars.

Latham argued that whenever the purported sovereign is anything other than a single actual person, the designation of that body as sovereign must include a statement of rules for the ascertainment of its will, and these rules, since their observance is a condition of the validity of the sovereign's legislation, are rules of law logically prior to the sovereign. Further, he remarked, 'the mere assertion of the omnipotence of a sovereign leaves completely uncertain the fundamental question whether or not he can bind himself; but the addition of a ruling in either sense on this point makes the basic rule of the system something more than a mere designation of the sovereign.'[64] Even if for argument's sake we accept that Austinian theory might be 'approximately true' for countries with a unitary constitution, it cannot apply to a federal constitution or one with entrenched constitutional provisions. Clearly, in those cases, sovereignty is 'prior to and superior to the legislature and is daily so treated by the courts.' What the theory of the *Grundnorm* supplies - and not just for those cases, Latham believed - is 'a general scheme or calculus of the formal validity of law, a scheme, moreover, which follows from the nature

[61] Ibid, 522, his emphasis.

[62] Ibid, 522-23.

[63] Ibid, fn 2 on 522.

[64] Ibid, 523. See also Peter Oliver, 'R.T.E. Latham and Change in the Ultimate Rules of a Legal System' (2021) 52 *University of Connecticut Law Review* 1453.

of law itself.'[65] Sovereignty, properly understood, is not 'supreme power' unrestrained by law. It is rather, as Marshall was later to remark, 'a legal competence to change the rules of a system of law'.[66]

Latham sought to apply the general Kelsenian scheme to the decomposing Empire, asking himself the specific question whether a *Grundnorm* could be found for Commonwealth law, notably in the ultimate authority of the Imperial Parliament. He noticed in so doing that, if Parliament were the ultimate and legally unlimited authority, a juridical problem arose. No Dominion could by its own act sever its legal ties from Britain as any attempt to do this could be overturned at the Imperial Parliament's whim.[67] Indeed, given the logic of the doctrine of parliamentary supremacy, the problem was more intractable. Even if the Imperial Parliament purported to make an irrevocable grant of its authority to a Dominion, 'established constitutional doctrine held that it was in strict law impossible for the Imperial Parliament to put it beyond its own power to repeal any of its own Acts'.[68]

Latham thought that South Africa was likely to prove the test case given the probability of what he called the 'white South African nation' attempting to secede either by a political act of rupture or by some 'legal' device, that is, an attempt to cover the political fact of secession by an act of faux legality. And he thought the latter more likely in a 'nation of jurists', and saw evidence of this in the Status of Union Act of 1934,[69] a South African statute which for the most part re-enacted provisions of the Statute of Westminster. That would have seemed redundant but for the obvious intention behind it: to give the South African constitution a 'local root' in an ordinary statute, thus making its provisions susceptible to override by a further ordinary statute. This raised the question 'will the courts comply?', the answer to which Latham found difficult to predict. The courts are 'not the blind servants of the legislature; they are the servants of the law'. But even if they chose to persist with the Imperial *Grundnorm*, 'public opinion, the wish of the legislature, and local loyalty will tell in the opposite

[65] Latham, *The Law of the Commonwealth*, 523-24.

[66] Marshall, *Parliamentary Sovereignty*, 10.

[67] In this respect, Latham drew on the work of his older colleague University of London colleague Sir Ivor Jennings, with whom he had taught a Master's course on Imperial and Commonwealth Law, and specifically his anti-Diceyan 'new view' of parliamentary sovereignty: *The Law and the Constitution* (London: University of London Press, 1st ed., 1933). On the relationship between the two men see Peter Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005), 80-87.

[68] Latham, *The Law of the Commonwealth*, 530.

[69] Ibid, 533.

direction'. He predicted that the legislature 'might indirectly assist that tendency by requiring an oath of unequivocal allegiance from newly appointed judges'.[70] As we now show, although the drama did not involve secession and no oath of allegiance was required, his analysis and his prediction were remarkably prescient.

The Voters Rights Cases

In 1948 the National Party narrowly won a national election and set about turning the existing system of white supremacy into the version it named 'apartheid'. A priority was to remove those 'Coloureds' - mixed-race South Africans - who still had the vote from the common electoral roll. In 1909 the British Parliament had enacted the South Africa Act which put in place the Constitution of the Union of South Africa. Section 152 of the Act required that certain of its provisions could be changed only by a two-thirds vote of both houses of the South African Parliament - the House of Assembly and the Senate - sitting together. One such provision was Section 35, which protected the right to vote of all those entitled to vote under 'laws existing in the Colony of the Cape of Good Hope at the establishment of the Union' and precluded their disqualification from being registered as voters 'by reason of … race or colour only' unless the special procedure was followed. The provision was designed to protect the male Coloured and African voters of the Cape Province and was anathema to any government intent on ensuring a more complete white domination.[71] The provisions of the Act had been negotiated at a National Convention by thirty white delegates of the four South African colonies, who decided to maintain in the Constitution the franchise rules of each colony, which ranged from not permitting any non-white participation in the franchise to permitting a limited participation.[72] Only Coloured voters were in issue after 1948 because in 1937 the Parliament, using the special unicameral procedure, enacted the Representation of Natives Act to remove protected black voters from the common roll and give them separate representation. In 1951, the National Party government brought about the enactment of the Separate Representation of Voters Act, providing that Coloured voters who were on the common roll be represented separately from whites. The government could not muster the required two-thirds majority of both houses of Parliament, so passed the statute using

[70] Ibid, 534.

[71] At that time, the franchise was limited to men.

[72] See Ian Loveland, *By Due Process of Law: Racial Discrimination and the Right to Vote in South Africa, 1855-1960* (Hart Publishing: Oxford, 1999).

the bicameral procedure for ordinary legislation, a simple majority in separate sittings of the two houses. The Appellate Division was then charged with deciding a challenge to the validity of the statute.

In *Harris v Minister of the Interior*,[73] the Appellate Division declared the statute invalid. Chief Justice Centlivres, giving the unanimous judgment of the court, held that, while it was correct to assert that the Parliament was a supreme and sovereign law-making body, the fact that it could validly enact certain laws only when sitting unicamerally did not affect its sovereign status. This, he claimed, was a result reached in a completely ordinary process of statutory interpretation:

> The Court in declaring that such a Statute is invalid is exercising a duty which it owes to persons whose rights are entrenched by Statute. Its duty is simply to declare and apply the law and it would be inaccurate to say that the Court in discharging that duty is controlling the Legislature. It is hardly necessary to add that Courts of law are not concerned with the question whether an Act of Parliament is reasonable or unreasonable, politic or impolitic.[74]

This bald proposition concealed not only the high political stakes, but also the deeper jurisprudential considerations that formed the basis of the decision. (The Court also developed an interesting line of comparative analysis in rejecting the argument that the competence of the British and South African Parliaments were equivalent, something Cowen was to discuss in a two-part case note for the *Modern Law Review*.[75]) In fact, the Court implicitly adopted Cowen's argument in the 50-page monograph he had published in 1951 in anticipation of this matter reaching the courts.[76] And in adopting Cowen's argument, it adopted by implication Latham's Kelsenian idea of legal sovereignty.

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[73] *Harris v Minister of the Interior* 1952 (2) SA 428 (A).

[74] Ibid, 456.

[75] D.V. Cowen, 'Legislature and Judiciary. Reflections on the Constitutional Issues in South Africa: Part I' (1952) 15 *Modern Law Review* 282, 286-7.

[76] Counsel for Harris, one of the affected voters, relied extensively on Cowen's text in their argument to the Court and also acknowledged the passage from Latham from which Cowen launched his argument. See *Harris v. Minister of the Interior* 430, 431, 432, 436, 437. The government lawyers ignored Cowen altogether, but did make one reference to Latham, who had suggested in a note at 529 of *The Law of the Commonwealth* that a statute of the Union Parliament - the Status of the Union Act of 1934 - had removed the entrenched clauses from the 'fundamental law of the Union'. But they did not address the argument Latham made about sovereignty on which Cowen, and later Marshall and McKinney, relied.

Cowen was at the time Professor of Comparative Law at the University of Cape Town and while the title of the work in question, *Parliamentary Sovereignty and the Entrenched Provisions of the South Africa Act,* accurately indicates his focus, it is also somewhat deceptive. In a relatively short text, Cowen managed to cover the relevant constitutional jurisprudence of Australia, Canada, New Zealand and the Irish Free State. Drawing heavily on Latham, Cowen distinguished between a 'static' and a 'dynamic' conception of parliament, with the former focusing on elements which constitute parliament, for example, the King, the Senate and the House of Assembly, and the latter on those 'elements functioning as a law-making body'. He argued that it was a fundamental legal principle that in all cases where legislative power is vested not in one person, but in a number of persons, that number must combine for action in accordance with certain rules prescribing the manner in which their will is to be ascertained. This principle applied even to sovereign law-making bodies.[77] It followed from this juridical idea of parliamentary sovereignty that one should distinguish between what parliament may do by legislation and what the constituent elements of parliament must do in order to legislate:

> The doctrine of Parliamentary Sovereignty merely emphasizes the unlimited scope of what Parliament may do by legislation. It does not bear on what must be done by the constituent elements of Parliament in order to legislate. This distinction, so far from being incompatible with the doctrine of Parliamentary Sovereignty, actually points to a reconciliation of two great principles: the supremacy of Parliament and the supremacy of the law; for these two concepts are not antithetical. Parliament is sovereign but the concept of Parliament is itself defined by law.[78]

Cowen conceded that the British Parliament no longer had power to make new laws for South Africa and that the South Africa Act was a British Act. But, he claimed, it could 'not be seriously contended that the provisions of the South Africa Act which define what is the Union Parliament are no longer law in South Africa'.[79] He regarded this conclusion as consistent with accepted canons of interpretation of the South African Act considered as 'being no more than an Act of the United Kingdom Parliament.' But he also thought that the same conclusion could be reached on the basis that the South Africa Act is a fundamental declaration of the will of the South African people. That

[77] Cowen, *Parliamentary Sovereignty and the Entrenched Provisions of the South Africa Act*, 5-6, quoting from Latham, *The Law of the Commonwealth*, 523.
[78] Cowen, *Parliamentary Sovereignty and the Entrenched Provisions of the South Africa Act*, 10.

[79] Ibid, 12.

'Act was forged after much travail at a National Convention. At the request of the four self-governing colonies, it embodied the essential terms of a contract entered into between them to unite for the purposes of government. Accordingly, it would not be a contention without force that the South Africa Act is a British Act in form only, but in substance a constitution created by the will of the South African people.'[80] He added that such 'a contention would … raise difficult legal problems. Jurisprudentially, the ultimate nature of what Kelsen would call the *Grundnorm* of the South African legal system is involved'.[81] Cowen relied on Latham's more extensive discussion of Kelsen. But in connecting the *Grundnorm* to a more substantive conception of the constitution, he went beyond Kelsen's understanding of the norm as a formal hypothesis, a position which Cowen thought raised 'difficult legal problems'.[82]

Cowen's insight was immediately illustrated by the next two Voters Rights cases. The National government reacted to *Harris v Minister of the Interior* with fury. In a speech to the House of Assembly, the Prime Minister, Dr Malan, said that he was not prepared to acquiesce to the denial of the 'legal sovereignty of the lawfully and democratically elected representatives of the people' and promised to place the legislative sovereignty of Parliament beyond any doubt.[83] Dr Dönges, the Minister of the Interior, who was guiding the process, asked in the debates, 'Who is to have the final say as to the validity or otherwise of Acts? This Parliament which represents the people or the courts which are appointed to interpret the laws?'[84] Despite the vehemence of these parliamentary debates, the quality of legal and jurisprudential argument about sovereignty was high, deeply informed by a knowledge of both classic works such as Dicey's *Law of the Constitution*[85] and also contemporary academic writings, including opinions solicited from prominent British constitutional lawyers.

The Union Parliament enacted the High Court of Parliament Act of 1952, again by the bicameral ordinary procedure, which provided the Parliament would be the final court of appeal when the

[80] Ibid, 49.

[81] Ibid.

[82] Ibid.

[83] Excerpted from Marshall, *Parliamentary Sovereignty*, 185.

[84] Ibid, 196.

[85] A.V. Dicey, *The Law of the Constitution* (Oxford: Oxford University Press, 2013, John Allison, ed.).

Appellate Division declared a statute invalid. The Appellate Division again held the statute *ultra vires,* Centlivres reasoning that the Parliament was not a 'Court of law' and rejecting the government's 'startling proposition' that the statute affected only unentrenched 'procedural law' and not the entrenched 'substantive right'.[86] The government responded by persuading Parliament to pass the Senate Act of 1955, providing for the reconstitution of the Senate in such a way that the government secured the two thirds majority it needed in a unicameral session. It then disenfranchised the Coloureds. In addition, the Appellate Division Quorum Act of 1955 enlarged the Court from six to eleven judges and provided that all eleven had to sit in cases to determine the validity of a statute. In defending the Senate Act in debate, the Minister of Justice said that by it the government intended to 'reinstate the sovereignty of Parliament'.[87]

The Senate Act was challenged in *Collins v Minister of the Interior*, the final case in our sequence.[88] Centlivres held that the purpose of the Senate Act was plain but irrelevant, as Parliament sitting bicamerally had 'plenary power to reconstitute the Senate'.[89] He recognised that the Act rendered the rights protected by the Constitution 'nugatory' in the same way as the High Court of Parliament Act had done. But he reasoned that the Senate Act did not affect protected rights since a further legislative step was required in order to do so, and that the reconstituted Senate was a 'senate' while the High Court of Parliament had not been a 'Court of Law'.[90] Eight of the judges concurred, including all of the judges from the old bench, save for Justice Schreiner.

In his dissent, Schreiner focused on what he called the 'proviso' to Section 152 of the Constitution: that a statute amending the section has to be 'passed by a two thirds of the total number of members of both Houses … at [a] joint sitting'. For the purposes of the proviso, he reasoned, the Senate was the body as contemplated by the Constitution, even if the Parliament could for other purposes constitute the Senate in any way it liked. The Parliament, he reasoned, could no more use the two-step

[86] *Minister of the Interior v Harris* 1952 (4) SA 769 (A), 780-1.

[87] 1955 House of Assembly Debates, columns 4425–7.

[88] *Collins v Minister of the Interior* (1957) (1) A 552 (A).

[89] Ibid, 565.

[90] Ibid, 568-9.

process than it could if, acting bicamerally, it first set out an education requirement for the franchise, and second, prohibited persons of a particular race from attaining that qualification. There are, he said, 'only two separate fields if they are really kept separate, not if they are only separate as a matter of form. Once legislation in the one field is used as a stage preparatory to legislation in the other, there ceases to be real separation and in substance they become one field'.[91] In response to the argument that purpose was irrelevant, he reasoned that if a 'legislative plan to do indirectly what the Legislature has no power to do directly' is in issue, then 'the purpose may be crucial to validity'.[92]

As Marshall pointed out, Schreiner's dissent remained true to the logic of the first decision in the trilogy.[93] But, rather like Centlivres's judgment in that first case, it relies at least on the surface on 'accepted canons of statutory interpretation'. As such it may seem something of a puzzle why more recent commentators often regard it with some veneration. Edwin Cameron, for instance, one of South Africa's leading jurists and a former justice of the post-apartheid Constitutional Court, claims that it left a moral and political legacy. 'Schreiner's stand', he writes, 'laid a paving stone that would eventually open a path to a constitutional future. The appeal court's decisions striking down apartheid legislation, and [his] … dissent …, showed what principled judges might achieve if they remained true to legal values. They can provide a bulwark for legal rights and liberties, even when powerful lawmakers try to undercut them.[94]

If we are to validate Cameron's claim, we should first notice that in the second case, Schreiner's concurring judgment expressed a concern that Centlivres's reasoning would open the way for Parliament bicamerally to nominate a magistrate's court, for instance, as the final court in constitutional cases. That would be a court, but would nevertheless represent 'a radical departure from the judicial hierarchy set up in the Constitution and a grave impairment of the protective system implicit in sec. 152'.[95] In Schreiner's view, an 'entirely sufficient and convincing reason … for holding

[91] Ibid, 575.

[92] Ibid.

[93] Marshall, *Parliamentary Sovereignty,* 248.

[94] Edwin Cameron, *Justice: A Personal Account* (Cape Town: Tafelberg, 2014), 20.

[95] *Minister of the Interior v Harris,* 788.

that the High Court of Parliament Act is invalid' was that 'implicit' in the Constitution was 'a protective judicial system … with the Appellate Division set up at the apex'.[96] And that realisation, as we will now argue, provides the basis for understanding Cowen's suggestion, following Latham, that at stake in all three cases was 'jurisprudentially, the ultimate nature of what Kelsen would call the *Grundnorm* of the South African legal system'.[97]

The Will of the People: The 'Legal' and the 'Political'

We saw earlier that Cowen, in connecting the idea of the *Grundnorm* to a rather substantive conception of the constitution and the 'will of the people', went beyond Kelsen's understanding of the norm as a formal hypothesis. In this section, we attempt to answer two questions raised by this connection. First, there is the more 'legal' question: how crucial was the fact that the rights at stake were protected by an entrenched, rights-protecting constitutional provision that required a special procedure for its amendment? Second, there is the more 'political' question: what exactly was the will of the South African people in 1909 - or, indeed, who *were* the South African 'people'? As we will see, any attempt to answer these questions must contend with a third: the extent to which either answer is subject to power politics.

In regard to the first question, Marshall suggested that the issue raised in the third Voters Rights case was of 'great importance for all constitutions which contain provisions for legislative action by a specified majority procedure' and that, if Schreiner's dissent were not correct in law, then, quoting from *Marbury v Madison*, entrenched provisions were only 'absurd attempts, on the part of the people, to limit a power in its own nature illimitable'.[98] If that were the main or only issue, then this drama would at most be another story to be added to the stock of CCL accounts of judges, the protection of entrenched rights and the counter-majoritarian difficulty, though with the twist that, in this context,

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[96] Ibid, 788-9.

[97] Cowen, *Parliamentary Sovereignty and the Entrenched Provisions of the South Africa Act*, 49, note 125.

[98] Marshall, *Parliamentary* Sovereignty, 248. Erwin Griswold, one of the most influential US constitutional lawyers of his day, and at this time Dean of Harvard Law, published in 1952 and 1953 in the *Harvard Law Review* laudatory notes on the first two decisions: Erwin N. Griswold, 'The "Coloured Vote Case" in South Africa' (1952) 65 *Harvard Law Review* 1361, 'The Demise of the High Court of Parliament in South Africa' (1953) 66 *Harvard Law Review* 864. In the latter, he suggested at 871 that the main lesson of the decisions was for jurisdictions which entrenched rights in a written constitution and that it might not apply in 'countries whose parliaments are subject to no legal limitations'.

the majority was a representative of a minority group intent on rationalising a system of white supremacy.

In regard to the second question, we might recall Latham's assumption that at stake in the South African debates was only the fate of the 'white nation', when in fact the issue was the entrenched rights of the Coloured voters in the Cape Province which, while this protection lasted, was a major obstacle to an apartheid ideology which required expunging the 'other' from the political community. His assumption may be the product of a blinkered approach of his day to what kinds of people counted in the political community, despite the fact that he was a socialist and deeply concerned about injustice, a concern which extended to driving a lorry in Spain to help groups on the Republican side of the civil war and trying in tangible ways to provide assistance to German Jews.[99] In the 1950s a different sensibility was emerging, the product of both the experience of the War and, even more important, of the gathering strength of black and brown skinned nationalists in the British empire. The latter prompted British Prime Minister Harold Macmillan's tour of parts of Africa in 1960, culminating in his address to the South African Parliament in which he urged in vain the National Party to take heed of the 'wind of change … blowing through this continent' and that 'whether we like it or not, this growth of national consciousness is a political fact. And we must all accept it as a fact, and our national policies must take account of it.'[100]

In regard to the third question, we can begin by observing how McWhinney, in a penetrating analysis of the Voters Rights trilogy, observed that the National Party had been re-elected in 1953 with a greatly increased majority, though one not large enough to exploit the unicameral procedure. Generalising the point, he suggested that in 'none of the crisis situations in the great English-speaking countries where courts have been involved in power conflicts with executive or legislative authority, have the courts for any considerable length of time withstood a co-ordinate authority that has a substantiality

[99] See Oliver, 'Law, Politics, the Commonwealth and the Constitution', 155, 162-66, 168.

[100] For the full text, see https://www.speech.almeida.co.uk/harold-macmillan. Note that Macmillan pitched his appeal to the white nationalists as a concern about the new nationalists looking to the Soviet Union and China for their inspiration rather than to the West. But he did say, very politely: 'As a fellow member of the Commonwealth we always try I think and perhaps succeeded in giving to South Africa our full support and encouragement, but I hope you won't mind my saying frankly that there are some aspects of your policies which make it impossible for us to do this without being false to our own deep convictions about the political destinies of free men to which in our own territories we are trying to give effect. I think therefore that we ought, as friends, to face together, without seeking I trust to apportion credit or blame, the fact that in the world of the day, today, this difference of outlook lies between us.'

of public opinion behind it'.[101] Despite his pessimistic assessment, McWhinney did not endorse the court's reasoning in the third Voters Rights case. He argued instead that the positivistic mode of reasoning resorted to by Centlivres and most of the judges in the vain hope that it would help them to avoid a confrontation with the government made it extremely difficult in the end for them to identify adequate legal resources with which to continue their resistance. In relying on what Centlivres in a 1955 lecture called a 'strict and complete legalism'[102] - very formal modes of reasoning which left the substantive issues of principle buried below the surface - the judges put themselves in a position which the government could exploit by manipulating form.

This analysis helps to clarify Schreiner's disagreement with Centlivres in the second Voters Rights case. Locating the rationale in 'the judicial hierarchy set up in the Constitution', implicit in the rights-protecting section, gave Schreiner the resources to dissent in the third case. He connected form and substance in a way that permitted him to keep substance in place as the basis for repudiating future manipulations of form. As Lorraine Weinrib observes, this perspective enabled Schreiner to persist longer in the attempt to keep government within 'the higher law strictures of the South Africa Act, understood, to the extent possible, as the framework of a polity of free and equal citizens'.[103] A constituted organ ought not to be able to claim constituent authority, especially where the intention is to take away fundamental rights.

But note Weinrib's significant qualification 'to the extent possible'. As McWhinney had pointed out, a truly 'activist' judicial approach would ultimately have had to consider 'principles of political representation going beyond the 50,000 "coloured" voters affected by the Separate Representation of Voters Act of 1951', above all 'the general principle of political *non*-representation of the non-

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[101] McWhinney, *Judicial Review in the English-Speaking World,* 195-6. There is no reference to Latham in this book. But the understanding of sovereignty is clearly his and first developed by McWhinney with explicit reliance on Latham in 'The Union Parliament, the Supreme Court, and the "Entrenched Clauses" of the South Africa Act' (1952) 30 *Canadian Bar Review* 692 and '"Sovereignty" in the United Kingdom and the Commonwealth Countries at the Present Day' (1953) 68 *Political Science Quarterly* 511.

[102] See Albert van de Sandt Centlivres, 'The Constitution of the Union of South Africa and the Rule of Law' in Arthur E. Sutherland (ed.), *Government Under Law* (Cambridge, Mass: Harvard University Press, 1956) 423, at 427. The phrase 'a strict and complete legalism' had recently been used by Sir Owen Dixon in his address given on becoming Chief Justice of the High Court of Australia: 'Address upon Taking the Oath of Office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952' in Judge Woinarski (ed.), *Jesting Pilate and other Papers and Addresses* (Melbourne: Law Book Co., 1965), 247.

[103] Lorraine E. Weinrib, 'Constitutionalism in the Age of Rights - A Prolegomenon' (2004) 121 *South African Law Journal* 278, at 283.

European majorities in the Union of South Africa'.[104] McWhinney drew attention to a mode of judicial action different from 'direct judicial review' or the power to annul or override statutes, 'a form of indirect judicial review frequently referred to as "judicial braking"', in which the court in effect says 'that the legislature may or may not have the claimed legislative power, but it has not, in the language it has used in the enactment now in question, employed that power'.[105] He did not see these two modes as two competing models but rather as modes of interpretation to be found in all the constitutional orders of the 'English-speaking world', including the United States. These orders, he suggested, shared an understanding of constitutionalism as committed to the protection of rights and liberties, including what he called 'a postulate of political democracy - the full realisation of the Benthamite principle of every man to count for one'. And despite the ultimate outcome of the Voters Rights drama, he remarked that 'the courts in South Africa have been tending towards bringing their country into line ultimately with such a principle, in the face of a most complex racial situation hardly paralleled elsewhere in the Commonwealth'.[106]

McWhinney diagnosed as the 'major vice' of the Commonwealth courts in constitutional matters the problem we have already identified in Centlivres's reasoning: 'their incurable positivism, which has obscured the process of analysis of the conflicting interests involved in the cases before the courts and thereby prevented any very conscious, intelligent balancing of those interests to arrive at the end decision'. If constitutionalism was to be preserved, one should see that the 'choice' is not, as positivists would have it, 'between judicial policy-making and absence of judicial policy-making; but between policy-making based on a full and open canvassing of alternative lines of action and policy-making in the dark'.[107] In one major respect, this diagnosis agrees with Hart's thought that judges should make the values explicit that underpin their choices so that we are aware that such cases 'must' be decided 'rationally by reference to social aims'.[108] But Hart would of course have rejected any suggestion of blame on legal positivism's part. That tradition, on his understanding, requires us to realise that judicial

[104] McWhinney, *Judicial Review in the English-Speaking World*, 197. Emphasis added.

[105] Ibid, 13.

[106] Ibid, 25.

[107] Ibid, 29-30.

[108] H.L.A Hart, 'Positivism and the Separation of Law and Morals', in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 49, 62-72.

decision-making in controversial cases can only be discretionary, that is, a legislative, extra-legal and hence political choice.

Marshall anticipated this view of judicial discretion in responding to the same claim made by H.W.R. Wade in 1955 in a seminal article 'The Basis of Legal Sovereignty'.[109] The article begins by retreading the path Latham had set in arguing that 'the rule enjoining judicial obedience to statutes is one of the fundamental rules upon which the legal system depends', but also that 'no statute could alter that rule'.[110] 'It is the ultimate political fact upon which the whole system of legislation hangs'; hence, 'legislation owes its authority to the rule: the rule does not owe its authority to legislation'.[111] '[T]his law itself in unalterable by any legal authority.'[112] But Wade also said of the first Voters Rights decision that 'the whole case was argued as if there was a right or wrong legal answer. In fact … there was no such necessary legal answer: the court had reached the ultimate boundary of the legal system and had in substance to make a political decision'.[113] His argument was that, in order to reach its conclusion, the court had disregarded the 'manifest will of the "sovereign legislature"'.[114] Marshall pointed out, though, that whether the decision did so 'turned in fact on the very question in issue'.[115] Though we might describe as 'political' any important decision which involves an obvious choice between competing lines of argument, such a decision may yet 'also embody a legal principle'.[116] As Marshall, Cowen and McWhinney saw, the very nature of the contestation was not only about the voting rights

[109] H.W.R. Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172.

[110] Ibid, 187, note 45.

[111] Ibid, 188.

[112] Ibid, 189.

[113] Ibid, 192.

[114] Ibid.

[115] Cowen had already made a similar observation: see 'Legislature and Judiciary. Reflections on the Constitutional Issues in South Africa: Part II' (1953) 16 *Modern Law Review* 273, 297.

[116] Marshall, *Parliamentary Sovereignty*, 45. Hart's view of the same decision is subject to the same critique. See Hart, *The Concept of Law*, 94-5, 122-23, and for extensive discussion, see David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge: Cambridge University Press, 2022), chapter 5. Hart's account of the Voters Rights trilogy is confused despite the fact that he relied on Cowen, Latham, Marshall and Wade in developing his own account of the fundamental rule of legal order in his idea of the 'rule of recognition', a rule which offers at best an impoverished account of the fundamental norm of a legal order in which there is parliamentary supremacy.

protected by Section 152 but also about the nature of sovereignty and legal order.[117] The government's win in the third case, in which it perpetrated what Cameron called a 'fraud' on legal order[118] at the same time as stacking the court, was not the triumph of a conception of government under law or of a legal idea of sovereignty. Rather, it was the victory of a political idea of sovereignty in which law is merely one instrument of the possessor of legally unlimited political authority.

This was still not a total victory. It did not spell the demise of the rule of law and constitutionalism in South Africa. But from that point on, the only bulwark against the entirely instrumental abuse of law for political ends was what we saw McWhinney describe as 'indirect judicial review' or 'judicial braking'. To this extent, apartheid South Africa remained on what we might call the 'continuum of legality' in that it remained a rule-of-law order, if a highly problematic one. This entailed a commitment to constitutionalism and thus to rule by 'we, the people' just in virtue of the preservation, at many times precarious, of the legal idea of sovereignty.[119] The framework of legality maintained during the struggle against apartheid became the basis for rights-based constitutionalism in post-apartheid South Africa. It is significant that the roots of such struggle go back to the turn of the last century, to the commitment to an ideal of constitutionalism which profoundly informed the practice of the founders of South Africa's main liberation movement, the African National Congress.[120] Most of these founders had become lawyers despite the formidable obstacles placed in their way. They turned to law because they saw in the framework of law established by the Imperial Parliament a promise of formal equality that was in some tension with the many substantive inequalities perpetrated under the authority of the same Parliament by their local legislatures. And following in their footsteps, the human rights lawyers

[117] In *The Constitution of Independence*, Peter Oliver follows in Marshall's footsteps by examining the 'quiet' legal revolutions in the 'well-behaved' Dominions. But he departs from Marshall in that he abandons Latham's Kelsenian idea of legal sovereignty for Hart's and conducts his analysis using Hart's distinction between 'continuing' and 'self-embracing' sovereignty, a distinction which perpetuates the view that the British Parliament could not bind itself into the future whereas the Dominion Parliaments would continue to be bound by enactments of the British Parliament because they enjoyed only 'self-embracing' sovereignty. (See Hart, *The Concept of Law*, 148-54.) Oliver's fine book also does not seem to have attracted notice in contemporary CCL

[118] Cameron, *Justice: A Personal Account*, 20.

[119] See David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford: Oxford University Press, 2nd ed., 2010); *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford, Hart Publishing, 1998).

[120] See David Dyzenhaus, 'The African National Congress and the Birth of Constitutionalism' (2020) 18 *International Journal of Constitutional Law* 284, reviewing Tembeka Ngcukaitobi, *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (Cape Town: Penguin, 2018) and Bongani Ngqulunga, *The Man Who Founded the ANC: A Biography of Pixley ka Isaka Seme* (Cape Town: Penguin, 2017).

of the apartheid era maintained the idea that the law embodied an ideal of the unity of the people that transcended the political divisions of the day, and which was worth struggling for against the odds.

Conclusion

Working through a combination of empirical analysis and theoretical reflection, Commonwealth CCL scholars sought to infuse the *Grundnorm* with a more substantive idea of the will of a democratic people. The attempt required a conception of the *Grundnorm* not as a mere epistemological or logical requirement of understanding legal order as a unity but as both assumption and achievement, the product of dynamic juridical activity. This idea is substantially similar to the one which animated the founders of the African National Congress as they fought, for the most part in vain, to persuade elites at home and in London to acknowledge what these lawyers saw as the constitutional commitments entailed by formal commitment to government within the framework of the law. As they and Latham and the scholars he inspired saw, it is only within such a framework that rights of the sort that were entrenched in the 1990s rights surge can properly be contested. The issue here is beautifully articulated in the last lines of a recent book on Indian constitutionalism:

> The global unraveling of constitutional democracy risks feeding nicely into the political ontology of the age of colonialism, where individual actors are defined in specific ways and they are somewhat condemned to the terms of their shared experience. Such a narrative would be not only tragic but also perilous. For freedom, whether at the end of the British empire or now, has been endangered not only by extremism but perhaps even more so by cynicism.[121]

Nearly all readers will have noticed that the Commonwealth CCL scholars we have discussed studied for the most part the law of the 'well-behaved' Dominions,[122] that is, the former colonies in which white settlers had become the majority. In part this can be explained by the fact that, other than South Africa, where the white domination of a minority seemed assured, the other parts of the British empire achieved Dominion status at a later stage. But it is of course no accident that peoples in their 'nonage', to quote John Stuart Mill, an official of the East India Company for 35 years, were thought fit to be

[121] Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Cambridge, Mass.: Harvard University Press, 2020), 160.
[122] See for this term, Oliver, *The Constitution of Independence*, 11.

subject to what he in *On Liberty* called an 'enlightened despotism', one which subsequent scholarship has shown to be often better described as cruel and arbitrary.[123] Moreover, it may not be entirely unfair to suggest that until the rise of 'abusive constitutionalism', CCL for the most part continued to focus on those jurisdictions considered to be well-behaved, even if some had only recently emerged from their 'immaturity'.

The phenomenon of abusive constitutionalism forces constitutional theorists in general, not just the practitioners of CCL, to take heed of the fact that 'the political ontology of the age of colonialism' can take root in even the most well-behaved jurisdictions.[124] With the gaze of the colonial and imperial imaginary turned inward on the presence of the 'other' within the Western nation state, it may be worthwhile to return to the work of an earlier generation of CCL scholars and their confrontation with the question of sovereignty. It would, we venture, be especially worth investigating an insight they shared, one articulated by McWhinney when he suggested that even in 1950s apartheid South Africa a commitment to legal order implied a commitment to 'a postulate of political democracy - the full realisation of the Benthamite principle of every man to count for one' and Cowen's rather casual equation of the 'will of the South African people' with Kelsen's *Grundnorm*. It is beyond the scope of this paper to investigate the extent to which either the establishment of the bare framework of legal order tends towards this postulate of political democracy or to which such a framework is resilient to exercises in faux legality.[125]

But if we are right in taking that framework of legality as more fundamental than the rights it protects, it would be no surprise that in our time, when the question of sovereignty is again being asked, that despite the evident differences in political context, exercises of faux legality are aimed primarily at subverting that framework. When these exercises are undertaken, they are proposed (at least in part)

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[123] John Stuart Mill, John Stuart Mill, *On Liberty*, in *John Stuart Mill, Three Essays: On Liberty, Representative Government, The Subjection of Women* (Oxford: Oxford University Press, 1984) 5, 15. For an overly dramatic account of the cruelty and arbitrariness, see *Catherine Elkins, Legacy of Violence: A History of the British* Empire (New York: Alfred A. Knopf, 2022). For more nuanced accounts, see Ngcukaitobi, *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* Ngqulunga, *The Man Who Founded the ANC: A Biography of Pixley ka Isaka Seme*, Michael Lobban, *Imperial Incarceration: Detention without Trial in the Making of British Colonial* Africa (Cambridge: Cambridge University Press, 2021).
[124] Mill, ironically, was well aware of the potential to bring despotism home, as can be seen by his leadership of the Jamaica Committee. See Rande Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005); David Dyzenhaus, 'The Puzzle of Martial Law' (2009) 59 *University of Toronto Law Journal* 1; Poole, *Reason of State*, 196-206.
[125] We also cannot deal with the intriguing prospect, raised by Latham and by Oliver's *The Constitution of Independence*, that an exercise in faux legality may conduce to upholding the rule of law and constitutionalism.

as legal arguments even as one suspects that they are premised on a political rather than legal understanding of sovereignty. As such they must be met on the same terrain, with arguments from the internal point of view. Our central claim in this paper is that contemporary CCL may be ill-equipped to map and analyze this terrain. There is a certain irony in the way its leading practitioners take as canonical a body of literature about rights and which institution should be their ultimate guardian which regards the US constitutional order as not only exceptional but also the only one worth studying.

In an era in which the issue of the constitutional concept of sovereignty is again at the fore, attention to the forgotten generation of Commonwealth CCL scholars would, we suggest, be rewarding. They were keenly aware that fundamental questions about the relationship between law and political power can only be properly formulated by attention to the jurisprudential perspective, which seeks to make explicit what constitutional actors presuppose as they struggle to shape the destiny of their political orders.