

## Is the Parliament Act Ultra Vires?

By GRAHAM ZELICK

HOW can an Act of Parliament be ultra vires? The answer is by not being an Act at all, and there is a tenable argument that the Parliament Act 1949 is indeed no more a statute than is this article.<sup>1</sup>

In the context of the clash between the Government and the House of Lords over the House of Commons (Redistribution of Seats) (No.2) Bill, and the possibility of new threats sharply to curb the powers of the Upper House, the validity or otherwise of the Parliament Act 1949 is of crucial importance, since, if it is invalid, any 'legislation' enacted under its provisions will be invalid also. So a Bill to curtail the powers of the Lords, passed pursuant to the Act of 1949, would give rise to complete uncertainty over precisely what powers the House of Lords still possessed, which only the courts could resolve. The Act of 1949 has never before been put to the test, because on no occasion has it been invoked. But if the Government attempts to pass its Redistribution of Seats Bill without the Lords' consent, the question arises: what is the period of delay before it becomes law: is it roughly 24 months, as under the Parliament Act 1911, or approximately 12 months, as under the Act of 1949? With a general election at most about twenty-two months away, this is of vital importance.

The dispute turns on the rules descriptive of Parliament. The common law recognises the supremacy (or sovereignty) of Parliament, so that legislation whatever its content will be complied with and applied by the courts. But this cardinal principle of the British Constitution begs one basic question: What is Parliament? Who is invested with the primary law-making powers? The answer which the law unhesitatingly gives to this is that Parliament consists of the Queen, the Lords Spiritual and Temporal, and the Commons, together termed the Queen-in-Parliament.

Mere resolutions of Parliament do not make law, unless it is so provided by statute, as with the Murder (Abolition of Death Penalty) Act 1965, under which the Homicide Act 1957 will automatically revive after July 31, 1970, unless both Houses pass affirmative resolutions to the contrary. It is clear, however, that the courts will not concern themselves with the procedure of Parliament and inquire, for instance, whether an Act has received the appropriate number of readings before being given the royal assent. But *The Prince's Case* (1606) 8 Co. Rep. 1a, (decided by Lord Ellesmere C.J., Coke C.J., Fleming C.B. and Williams J.) is good authority for the proposition that what purports to be a statute is in fact no such thing, if it is stated to have been passed by the King with the assent of just one House. Note the enacting formula under the Parliament Acts: 'Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the Parliament Acts 1911 and 1949, and by authority of the same . . .'. No statutes have been passed under the provisions of the Parliament Acts 1911-1949 and only three were passed under the Act of 1911 alone, one of which was the Act of 1949 itself. The other two—the Government of Ireland Act 1914 and the Welsh Church Act 1914—suffer from no legal defect.

The courts say they will apply whatever Parliament enacts; so although Parliament may be able to alter its own structure—though even this is denied by some authorities—it must do so in the manner prescribed at that time. Undoubtedly the Queen, Lords and Commons compose

---

<sup>1</sup> See letters in *The Times* from Professor O. Hood Phillips (July 15, 1968). and Col. G. I. A. D. Draper (July 14, 1969).

Parliament in 1969, and it is necessary for all three to signify their consent and for that to be found in the enacting formula of the Act. But of course, Parliament can authorise other bodies to legislate and more legislation today is the product of powers delegated by Parliament than of Parliament itself. And this is what the Parliament Act 1911 does<sup>2</sup>: it says that in certain circumstances a body consisting of Queen and Commons alone may legislate, and may legislate on any topic, except the duration of Parliament (s.2(1)), only after the Lords have rejected the Bill. What is then enacted is in fact a species of delegated legislation.

But there is one further limitation, it is submitted, implicit in the Act of 1911. If the legislative body under the Act of a body distinct and subordinate, it can have no power to amend its constituent instrument, the Act of 1911, unless that Act itself expressly provides for it, which it does not. Amendment of the parent Act, then, can be accomplished only by the delegating authority, the Queen-in-Parliament.

Thus, any statute passed according to the provisions of the Act of 1911 is as good as any statute receiving the assent of the Queen, Lords and Commons, unless it purports either to amend the Act of 1911, or to extend the length of Parliament. Since the Act of 1949 attempts to do the former, it has attempted the impossible, and is, therefore, no statute at all, for it has exceeded the powers conferred on the law-making body. Nor can the Speaker's certificate under s.3 be considered conclusive in this case.

A variety of problems arise when it comes actually to challenging a 'statute' in the courts, but they are not problems which have been ignored by constitutional lawyers in their seemingly endless discussion of parliamentary sovereignty?<sup>3</sup> All that is attempted here is to set out the argument that the Parliament Act 1949 is no Act at all and is entirely invalid and that any 'statute' passed under it would be similarly invalid and might be set aside by the courts.

---

<sup>2</sup> See Hood Phillips, *Constitutional and Administrative Law* (4th edn., 1967), pp. 75-76.

<sup>3</sup> See, e.g., Heuston, *Essays in Constitutional Law*, (2nd edn., 1964), ch. 1; Jennings; *The Law and the Constitution* (5th edn; 1959), ch. IV and App. III; and Wade, 'The Legal Basis of Sovereignty' [1955] C.L.J. 172.