Constitutional Validity of Sections 3 and 4 of the Public Order Regulations, 1970

On October 16, 1970, the Governor-General, acting on the advice of the federal cabinet, signed a proclamation declaring the existence of an apprehended insurrection in Canada. This had the effect of activating the powers delegated by Parliament to the federal executive, through section 3(1) of the *War Measures Act*,[1] to

> ...do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of... apprehended... insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada...

The Federal cabinet immediately enacted the *Public Order Regulations, 1970* pursuant to this delegated power.

There has been much discussion of the decision to invoke the *War Measures Act*. The purpose of this note is to assess the manner in which the emergency powers were exercised in terms of constitutional principles, in particular the rule of law. That is, did the *Public Order Regulations, 1970* in any important way violate the Canadian constitution?

Parliament itself has affirmed in the preamble to the *Canadian Bill of Rights*[2] that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values *and the rule of law*. The interruption by section 6 of the *War Measures Act* of the specific legal protections conferred by the *Bill of Rights*, in the face of a perceived threat to public order, neither alters our national commitment to the truth of the proposition so affirmed by the Canadian people through Parliament nor totally disarms the judiciary from responding to that commitment.

If we are committed by our constitution to the rule of law, then Parliament and the Federal executive are under the law, and the important question we now face is the extent to which the courts have a constitutional responsibility to police legislative and executive violations of the rule of law.

It has long been established that courts of law have the duty and the authority to give the final interpretation of the *British North America Act*. While this exclusive judicial function is especially

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[1] R.S.C. 1970, c. W-2.
[2] S.C. 1960, c. 44.

clear in relation to the federal distribution of legislative powers,[3] there are strong indications in our jurisprudence that when the political checks on arbitrary power break down in areas of decision for which the *British North America Act* makes provision, the judiciary stands as the last line of defence of the essential conditions of parliamentary democracy under the rule of law.

Perhaps the best-known example of this is the powerful *dictum* of Duff, C.J., in *Reference re Alberta Statutes*[4] describing the right of free public discussion of public affairs as the breath of life for parliamentary institutions and stating that any attempt to abrogate this right would be incompetent the provincial legislatures as repugnant to the provisions of the *British North America Act*, which established a federal system of parliamentary institutions. This *dictum* was concurred in by Davis, J., and Cannon, J. expressed a similar opinion in a separate judgment. This notion of a judicial duty to protect the basic institutional framework created by the *British North America Act* against legislative or executive erosion was picked up in a number of subsequent cases, the most important being *Saumur* v. *City of Quebec*,[5] *R.* v. *Hess (No. 2)*[6] and *Switzman* v. *Elbling*[7] where Abbott, J., expressed the view, *obiter*, that the *British North America Act* had secured the right of discussion and debate against encroachments by the Parliament of Canada, as well as against those of provincial legislatures.

Finally, and most relevant to the *Public Order Regulations, 1970*, sections 96, 99 and 100 of the *British North America Act* were described by the Privy Council in *Toronto* v. *York*[8] as "three principal pillars of the temple of justice" and Part VII "Judicature", of which they are part, has been judicially interpreted as reserving to those courts which are manned by a highly independent judiciary certain exclusive functions that are important to the rights of citizens and to the institutional integrity of the Canadian constitution. While the principal application of Part VII of the *British North America Act* has been to prevent provincial legislatures from substituting administrative tribunals for courts of law in relation to matters that are inherently the responsibility of the

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[3] *Ottawa Valley Power Co.* v. *H.E.P.C.*, [1936] 4 D.L.R. 594; *Beauharnois Light, Heat & Power Co.* v. *H.E.P.C.*, [1937] 3 D.L.R. 458; *B.C. Power Corporation* v. *Royal Trust Company*, [1962] S.C.R. 642.

[4] [1938] S.C.R. 100.

[5] [1953] 2 S.C.R. 299 (e.g., Rand, J., at pp. 330-333).

[6] (1949), 4 D.L.R. 199 (B.C. C.A., O'Halloran, J.A., at p. 208).

[7] [1957] S.C.R. 285.

[8] [1938] A.C. 415.

judicial institutions contemplated by Part VII, a broader interpretation of Part VII and the cases on it as entrusting certain kinds of questions to courts of law, manned by an independent judiciary, is found in Professor Lederman's historical analysis of the independence of the judiciary in Canada.[9] It is submitted that the various judicial decisions made in relation to Part VII of the *British North America Act*, over the years, on the "section 96 question", are explainable only in terms of Professor Lederman's analysis.

Part VII provides for a judicature in Canada, and under the system of parliamentary democracy, which it was the clear intention of the *British North America Act* to establish, a judicial system comes within the term "judicature" only if it is free from legislative and executive interference in performing the vital functions that only judges can be trusted to perform if the rule of law is to be maintained. Therefore, neither Parliament nor the provincial legislatures can, as long as Part VII remains in force, abolish the judicial system nor corrupt it by substituting its own judgment for that of independent judges learned in the law.

It is submitted that the *Public Order Regulations, 1970* substituted executive judgment for judicial decision in areas so basic to judicial duty as to threaten the integrity of our constitution.

Sections 3 and 4 of the *Public Order Regulations, 1970* provided as follows:

> 3. The group of persons or association known as *Le Front de Libération du Québec* and any scucessor group or successor association of the said *Le Front de Libération du Québec* or any group of persons or association that advocates the use of force or the commission of crime as a means of or as an aid in accomplishing governmental change within Canada is declared to be an unlawful association.
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> 4. A person who
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> (a) is or professes to be a member of the unlawful association,
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> (b) acts or professes to act as an officer of the unlawful association,
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> (c) communicates statements on behalf of or as a representative or professed representative of the unlawful association,
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> (d) advocates or promotes the unlawful acts, aims, principles or policies of the unlawful association,
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> (e) contributes anything as dues or otherwise to the unlawful association or to anyone for the benefit of the unlawful association,
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> (f) solicits subscriptions or contributions for the unlawful association, or

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[9] W. R. Lederman, *The Independence of the Judiciary*, (1956) 34 Can. Bar Rev., at p. 769 and p. 1139.

(g) advocates, promotes or engages in the use of force or the commission of criminal offences as a means of accomplishing a governmental change within Canada

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

In order to understand what these two sections seek to accomplish, one must lay them alongside sections 60 and 62 of the *Criminal Code*, an Act of the Parliament of Canada:

60. (1) Seditious words are words that express a seditious intention.

(2) A seditious libel is a libel that expresses a seditious intention.

(3) A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention.

(4) Without limiting the generality of the meaning of the expression "seditious intention", every one shall be presumed to have a seditious intention who

(a) teaches or advocates, or

(b) publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada.

62. Every one who

(a) speaks seditious words,

(b) publishes a seditious libel, or

(c) is a party to a seditious conspiracy is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Parliament has thus made it a crime for two or more persons to agree to teach or advocate the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada. Enforcement of this prohibition is carried out through criminal prosecutions in courts of law, subject to all the procedural safeguards that have been evolved over several centuries. This is part of the administration of justice, a function performed or supervised by the independent judges ensured by the *British North America Act* in sections 96 to 100.

Moreover, Parliament has provided generally for situations where responsibility for a criminal act may be diffuse by enacting a concept of parties to an offence. Section 21 of the *Criminal Code* provides that

21. (1) Every one is a party to an offence who

(a) actually commits it,

(b) does or omits to do anything for the purpose of aiding any person to commit it, or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein

> and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

Let us return to the *Public Order Regulations, 1970.* Section 3 enacted, in effect, that the F.L.Q. was an association that advocated the use of force or the commission of crime as a means of or as an aid in accomplishing government change within Canada. This was a judgment that the F.L.Q. was guilty of seditious conspiracy, made not by a judge or a jury in a court of law but made by the Federal executive. Section 4 then made it an indictable offence to be a member of the F.L.Q. or to assist it in any way in carrying out its seditious conspiracy. What this really meant was that any person who belonged to or assisted the F.L.Q. was judged, by executive decree, to be a party to the seditious conspiracy the federal executive had found to exist, and the Crown was enabled to secure convictions by proving that a person attended a meeting of the F.L.Q., advocated the F.L.Q. in public, or communicated statements for it, for section 8 provided that:

> 8. In any prosecution for an offence under these Regulations, evidence that any person
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> (a) attended any meeting of the unlawful association,
>
> (b) spoke publicly in advocacy for the unlawful association,
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> or
>
> (c) communicated statements of the unlawful association as a representative or professed representative of the unlawful association
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> is, in the absence of evidence to the contrary, proof that he is a member of the unlawful association.

This was nothing more than a criminal class action, decreeing that any person who did any of the acts described in section 8, none of which is criminal *per se,* was a party to a seditious conspiracy and liable to five years' imprisonment. The judiciary was reduced to the role of timekeeper, keeping track of who attended what meetings and spoke or communicated what statements on behalf of an association. Criminal guilt was determined by executive decree.

In November 1970, Parliament enacted the *Public Order (Temporary Measures) Act, 1970* [10] to replace the *Public Order Regulations, 1970.* The successor Act gave Parliamentary approval to what had already been done, and continued sections 3, 4 and 8 of the *Regu-*

[10] Bill C-181, 19 Eliz. II, third sess., 28th Parl. (1 Dec. 1970).

lations, with minor alterations that do not affect the constitutional objections here being made to them.

Thus, we have in the enactments in question, first, an executive exercise of a judicial function in sections 3 and 4 of the *Regulations,* and, second, a legislative adoption by Parliament, in the equivalent sections of the Act, of the judgment of the executive. Two questions arise:

1. is this repugnant to the fundamental principles of our constitution?
2. if so, do courts of law have authority to judge these acts *ultra vires* and void?

A clear affirmative answer to both of these questions comes from the recent decision of the Privy Council in *Liyanage* v. *The Queen.*[11] The facts of the case are remarkably similar to those surrounding the enactment of the provisions here in question, but two important differences should be noted. First, the *Liyanage* case arose from an actual attempt at a *coup d'état* in Ceylon in 1962. Second, the Parliament of Ceylon did not try to enact a judgment of criminal guilt through legislation, as did the Canadian executive and Parliament in 1970, but merely amended the criminal law and procedure to legalize *ex post facto* the detention of 60 suspected persons and to facilitate their conviction in a court of law. The Privy Council rejected the argument that the legislative amendments were contrary to the principles of fundamental justice, but then found that the enactment of specially tailored provisions directed at particular persons involved a usurpation and infringement by the legislature of judicial powers, inconsistent with the written Constitution of Ceylon, which is contained in a British Order in Council of 1946.[12]

In deciding that the courts of Ceylon have an exclusive function that is constitutionally defined, the Privy Council relied on Part VI of the Constitution of Ceylon entitled "The Judicature", which provides for appointment of Supreme Court judges by the Governor-General and of judicial officers by a Judicial Service Commission free from political interference, and secures Supreme Court judges' independence by making them removable only by the Governor General on an address of both Houses.

While Part VI of the Constitution of Ceylon, like Part VII of the *British North America Act,* does not say in so many many

[11] [1967] 1 A.C. 259.

[12] *The Ceylon (Constitution) Order in Council, 1946.*

words that judicial power shall be vested exclusively in these independent judges, the Privy Council inferred that such was the fundamental purpose of the document. Lord Pearce, speaking for the Committee, stated:

> These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by the executive or the legislature.
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> During the argument analogies were naturally sought to be drawn from the British Constitution. But any analogy must be very indirect, and provides no helpful guidance. The British Constitution is unwritten whereas in the case of Ceylon their Lordships have to interpret a written document from which alone the legislature derives its legislative power.[13]

Thus the Privy Council inferred from Part VI of the Ceylon Constitution an established constitutional value in having the rights and obligations of citizens, including criminal guilt, determined according to established procedures in courts of law by judges secured from political pressure.

To assess the relevance of *Liyanage* to Canadian law, one must compare the relevant provisions of the two constitutions in relation to the judicature.

Part VI Ceylon (Constitution) Order in Council, 1946	*Part VII, British North America Act, 1867*
52. (1) The Chief Justice and Puisne Judges of the Supreme Court and Commissioners of Assize shall be appointed by the Governor-General.	96. The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.
(2) Every Judge of the Supreme Court shall hold office during good behaviour and shall not be removable except by the Governor-General on an address of the Senate and the House of Representatives.	99. (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons.

[13] [1967] 1 A.C. 259, at p. 287.

(3) The age for the retirement of judges of the Supreme Court shall be sixty-two years:

Provided that the Governor-General may permit a Judge of the Supreme Court who has reached the age of sixty-two years to continue in office for a period not exceeding twelve months.

(4) The salaries of the Judges of the Supreme Court shall be determined by Parliament and shall be charged on the Consolidated Fund.

(5) Every Judge of the Supreme Court appointed before the date on which this Part of this Order comes into operation and in office on that date shall continue in office as if he had been appointed under this Part of this Order.

(6) The salary payable to any such Judge shall not be diminished during his term of office.

(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

While Part VII of the *British North America Act* is not identical to Part VI of the Constitution of Ceylon, the same fundamental rule-of-law value is to be inferred from section 99, which makes Canadian judges also removable only by the Governor-General on address of both Houses. For, what point is there in securing judges from political interference if they can be by-passed by executive decree or legislative judgment whenever a government finds the criminal law process inexpedient for its purposes?

It follows that sections 3 and 4 of both the *Public Order Regulations, 1970* and the *Public Order (Temporary Measures) Act, 1970,* were attempts to exercise judicial power which the *British North America Act* reserves exclusively to the judicature, and are therefore *ultra vires* the Parliament of Canada and, *a priori, ultra vires* the Federal executive acting pursuant to powers delegated by Parliament.

There is no doubt that the existence of an emergency creates a need for broader powers in the Federal executive and also enlarges the potential scope of the legislative power of Parliament.

This has been made clear in numerous wartime decisions in relation to the *War Measures Act* and federal regulations enacted pursuant to that Act. But it does not follow that judicial powers are curtailed. Indeed, it is in times of crisis when judicial checks on excesses and abuses of power become most important, for the temptations to excess and abuse are greatly increased among officials who are pressed by an anxious public to deal with the crisis.

It is no doubt appropriate for the judiciary to defer to the executive and legislative branches of government on questions of policy and to do so increasingly in times of crisis. However, it is quite another matter for judges to identify themselves with government policy on questions of legality, and increasingly dangerous for them to do so in times of crisis when governments are tempted to ignore legality. It is submitted that under the *British North America Act* the choice of process for determining criminal responsibility is not a policy matter to be decided in relation to the crisis but is a matter of legality to be decided by judicial interpretation of that legal document, which establishes the various institutions of government and allocates functions and powers to them.

It is submitted that the principles applied in *Liyanage* are equally applicable to sections 3 and 4 of the *Public Order Regulations, 1970,* and point to the conclusion that those sections are beyond the powers conferred on the Parliament of Canada by the *British North America Act.*

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