Parliamentary Sovereignty: A Recent Development

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The Privy Council decision in *Bribery Commissioner* v. *Ranasinghe* ** can fairly be added to *Trethowan's* [1] case and *Harris* v. *Minister of the Interior* [2] as being one of a handful of decisions which have helped to make clearer what was left obscure in Dicey's exposition of Parliamentary sovereignty. Three particular questions raised by the plenary power of a legislature to make law are: first, to what extent is such power compatible with those who exercise it being bound to follow a particular manner and form of legislation ? Secondly, to what extent will courts of law examine the way in which legislation has been passed and what took place inside the legislative chambers ? Thirdly, will the Royal assent be held to validate any earlier procedural irregularities ? All of these questions were posed in *Ranasinghe's* case.

Ranasinghe was prosecuted for a bribery offence before a tribunal set up under the Bribery Amendment Act 1958. The Ceylon Supreme Court quashed the conviction on the ground that the 1958 Act provided for a method of appointing members to the tribunal which was inconsistent with the constitutional provision regulating the appointment of judicial officers laid down in the Constitution Order in Council of 1946.[3] For the Bribery Commissioner it was argued that, if such inconsistency existed, the Sovereign Parliament of Ceylon must be held to have amended the constitution by passing the 1958 Act. It was conceded that the Constitution order provided that any such constitutional amendment should require a two-thirds majority of the total membership of the House of Representatives certified by the Speaker. The 1958 Act had not been passed by a two-thirds majority and did not have a Speaker's certificate. It was contended nevertheless that the official copy of the Act must be regarded by the courts as conclusive of its validity.

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** [1964] 2 W.L.R. 1301, [1964] 2 All E.R. 785.

[1] *Attorney General for New South Wales* v. *Trethowan* [1932] A.C. 526.

[2] [1952] 2 S.A.L.R. 428.

[3] S. 55 of the Constitution Order in Council vested the appointment of judicial officers in the Judicial Service Commission.

This argument was rejected both by the Supreme Court of Ceylon and by the Privy Council. The latter's judgment was delivered by Lord Pearce. It was true, he suggested, that the English authorities had taken a narrow view of the courts' powers to look behind an authoritative copy of the Act ("All that a court of justice can do is to look to the Parliamentary roll"[4]). But that dictum was laid down in a situation where no governing instrument prescribed the law-making powers and the forms essential to them. Where such forms are laid down "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law".[5] The conclusion was that "the Speaker's certificate is a necessary part of the legislative process and any bill which does not comply with the condition precedent of the proviso, is and remains, even though it receives the Royal Assent, invalid and *ultra vires*".[6]

Lord Pearce cited *Trethowan's* case as supporting the Board's conclusion that "where a legislative power is given subject to certain manner and form that power does not exist unless and until the manner and form is complied with".[7] A difficulty often expressed about the *Trethowan* decision is that it was not clear how far the propositions laid down were conditioned by the fact that the legislature in question was a subordinate legislature, subject to the provisions of the Colonial Laws Validity Act. In the High Court of Australia it had been suggested by Dixon, J., that the conclusion was a more general one which might conceivably apply to the sovereign Imperial legislature. A manner and form provision enacted in a United Kingdom Statute might, he thought, in certain circumstances compel the courts to consider whether the supreme legislative power had been exercised in the manner required for its authentic expression.[8] Lord Pearce in *Ranasinghe* seemed to imply equally that both non-sovereigu and sovereigu legislatures may be made subject to procedural rules entrenching parts of the law from simple majority repeal. "[T]he proposition which is not acceptable," he said, "is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or

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[4] *Edinburgh Railway Co.* v. *Wauchope* (1842) 8 Cl. & F. 710, 725.

[5] *Bribery Commissioner* v. *Ranasinghe* [1964] 2 W.L.R. 1301 at 1310.

[6] *Ibid.* at 1312.

[7] *Ibid.*

[8] (1931) 44 C.L.R. 394, 426.

by a different legislative process."[9] "This restriction exists independently of the question whether the legislature is sovereign as is the legislation of Ceylon or whether the constitution is 'uncontrolled' as the Board held [10] the Constitution of Queensland to be".[10a]

This and a further passage, of some interest, suggest that the Privy Council decision may be seen as giving support to a general proposition that a legislature is not fettered in its sovereignty when a simple majority is restrained from enacting its will into law:

> A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself, which can always, whenever it chooses, pass the amendment with the requisite majority.[11]

It would seem to follow from this that a Parliament which by its own act imposes procedural conditions upon the legislative process is no more limited, bound, fettered, or non-sovereign than a legislature which has such conditions bequeathed to it in a constitutional instrument. Those who argue that Parliament cannot lay such conditions upon itself on the ground that Parliament cannot limit or bind itself are thereby deprived of an argument. If such conditions are not limitations on sovereignty, it cannot be the impossibility of limiting sovereignty which in itself makes entrenchment legally impossible to a sovereign legislator.

What can be inferred from *Ranasinghe* is that a legislature whose constitutional instrument places *procedural* restraints upon the forms of lawmaking may not ignore them simply because it is sovereign in the sense of having plenary power to make laws for the peace, order and good government of the territory. If its constitutional instrument contains no such procedural provisions on the form of law-making, it, or a simple majority of its members, may legislate so as to repeal by implication limitations on substantive matters laid down in its constitution (according to the doctrine laid down in *McCawley's* case). This is in truth a re-interpretation of the *McCawley* decision. On that occasion in 1920, Lord Birkenhead thought it an "elementary commonplace" that a colonial legislature with plenary

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[9] [1964] 2 W.L.R. 1301, 1311.

[10] In *McCawley* v. *The King* [1920] A.C. 691.

[10a] [1964] 2 W.L.R. 1301, 1310.

[11] *Ibid.*, at 1312-3.

powers could treat the constitutional document which defined its powers as if it were "A Dog Act or any other Act whatever its subject matter".[12] This proposition must now be restricted to substantive matters in constitutional instruments. Where definitions of procedure or special majority provisions are laid down they cannot be treated as provisions in a Dog Act might be.

It may be said that *Ranasinghe's* case leaves untouched the question whether a legislature whose original constituent instrument contains no provisions about the mode of law-making (or which like the Queen in Parliament in the United Kingdom has no constituent instrument) may impose such conditions on itself. Whilst *Ranasinghe* does not positively suggest that it may, it does however suggest that some reasons hitherto given for supposing that it may not are without force. It gives judicial backing to the distinction between procedural and substantive limitations on the legislative process which has been at the centre of recent academic discussion of the doctrine of legislative sovereignty. It helps to confirm what some commentators have suggested — namely that the existing English authority about the inability of Parliament to fetter its future action is inconclusive as to the possibility of the Queen in Parliament legislating so as to provide a special manner and form for specified types of future action. The British "grundnorm" considered as a rule that the courts must give effect to Acts of Parliament is indeterminate as between the rule that the meaning of "Act of Parliament" can be altered by legislation and the rule that it can not. In the terminology of Professor Hart's *Concept of Law* [13] — if the "rule of recognition" in the British legal system is the former rule, Parliament is sovereign in a "self-embracing" sense; if it is the latter rule, a simple majority of legislators is sovereign in a "continuing" sense. Professor H. W. R. Wade[14] has argued that English authority provides no evidence for the view that the courts recognise Parliament to be sovereign in the former sense. The trouble is that such authority as exists is insufficient to establish either view; but there is some indication that the Privy Council at least is edging a little in the direction of "self-embracing" sovereignty.

Note

Ceylon's constitution provides an interesting model since it contains both a procedural entrenchment and substantive limitations on legislative power. Section 29(2) of the Constitution Order in Coun-

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[12] [1920] A.C. 691, 703, 704.

[13] *The Concept of Law*, pp. 145-7.

[14] In "The Basis of Legal Sovereignty", (1955) *Cambridge Law Journal* 172.

cil declares that no law shall prohibit or restrict the free exercise of religion or provide for privileges or disabilities which are discriminatory as between different communities or religions. Section 3 enacts that any law made in contravention of these provisions shall be void.

Though the point was not in issue in *Ranasinghe*, the Privy Council appeared to regard these substantive restrictions as unamendable. They were described by Lord Pearce as "matters which shall not be the subject of legislation" and "unalterable under the constitution" as representing "the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the constitution". If these words state the case accurately it is not clear why the legislature of Ceylon is also said by Lord Pearce to be sovereign. The adjective would be justifiable if, contrary to the impression given by the phrases "fundamental conditions" and "unalterability under the constitution", the guarantees in question were in fact open to infringement or repeal by the two-thirds majority procedure laid down for constitutional amendments. There is some difficulty in knowing whether this is so or not. S. 29(4) — the amendment clause — provides that by two thirds majority certified by the Speaker, Parliament may "in the exercise of its powers under this section" amend or repeal *any section* of the constitution. If it had been intended to exclude the religious guarantees from this power of amendment, the obvious way to do it would have been to add to the amendment provision the words "except for the matters included in S. 29(2)". But no such words appear.

It has been argued [15] that the words "in the exercise of its powers under this section" operate so as to restrict the amendment power by implying that it is only open to Parliament to legislate in the capacity set out in section 29 as it stands and not to enlarge that capacity. This seems implausible, since the powers of Parliament "under this section" include, if the whole section is referred to, the powers, whatever they are, which are given in the amending clause and until some meaning is given to that clause it cannot be clear that action "in the exercise of its powers" does not comprehend Parliamentary amendment by the appropriate majority of all provisions in the constitution including the religious guarantees. It would be necessary to take this view in order accurately to describe Ceylon's Parliament as enjoying sovereignty.

[15] See C.F. Amerasinghe, "The Legal Sovereignty of the Ceylon Parliament", [1966] *Public Law* 65, 74.