The Separation of Powers in New Dress

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Mention the theory of separation of powers to an English constitutional lawyer, and he will forthwith put on parade the Lord Chancellor, the Law Lords, the parliamentary executive, delegated legislation and administrative adjudication and shift the conversation to more significant topics. He tends to regard the theory as a somewhat tiresome talking-point, appropriate for political philosophers and inquisitive experts on comparative government, but an irrelevant distraction for the English law student and his teachers. He will be aware that the theory has manifested itself in a number of different constitutional forms and institutions, that it means one thing for the Americans and another thing for the French, that it has caused a spot of bother in Australia and has some importance in Ceylon; but in a system uncomplicated by judicial review of the constitutionality of legislation it does not have to be taken too seriously.

Canadian constitutional lawyers to-day can hardly afford to view the theory with an easy nonchalance. The disquiet caused by some of the very broad interpretations given to section 96 of the British North America Act (which suggested that a province could not vest strictly judicial functions in a board or tribunal established under its own laws [1]) was partly allayed by the Privy Council's decision in the *John East* case;[2] and it had never been held that the Federal Parliament's power to allocate judicial functions or any other class of function within its general sphere of competence was circumscribed by implied constitutional prohibitions. On the other hand, the Privy Council's decision in the *Boilermakers'* case

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[1] See esp. *Toronto Corporation* v. *York Corporation* [1938] A.C. 415; Willis in (1939) 53 *Harv. L. Rev.* 251 at 261-271, (1940) 18 *Can. Bar Rev.* 517.

[2] *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* [1949] A.C. 134; Shumiatcher in (1949) 27 *Can. Bar Rev.* 131. But see *Toronto* v. *Olympia Edward Recreation Club Ltd.* [1955] S.C.R. 454; Laskin in (1955) 33 *Can. Bar Rev.* 993 and *Canadian Constitutional Law* (3rd ed.) at 809-813.

[3] *Att.-Gen. for Australia* v. *R. and the Boilermakers' Society of Australia* [1957] A.C. 288.

(1957),[3] an appeal from Australia, indicated that, despite the differences in the structure and wording of the two constitutions, new implications restricting legislative freedom in relation to courts and the judicial power might still be discoverable within the interstices of the 1867 Act. The enterprising constitutional prospector may well be encouraged in his efforts when he attempts to place the recent decision of the Privy Council in *Liyanage* v. *R.*[4] in a Canadian setting.

Liyanage's case is possibly the most remarkable exercise in judicial activism ever performed by the Privy Council. It is all the more noteworthy because the Board has never shown a conspicuous zeal for reading far-reaching implications into constitutions — its rejection of the doctrine of the implied immunity of instrumentalities in federations was particularly brusque[5] — and because the abolition of the appeal from several Commonwealth countries has given it the air of a senescent constitutional court. But appearances have been deceptive. The profoundly interesting opinion of the Board in *Bribery Commissioner* v. *Ranasinghe*[6] hinted at a new sophistication in its approach to constitutional problems. *Liyanage's* case, also an appeal from Ceylon, is already assured of an honourable mention in every respectable casebook on constitutional law in the common-law world.

The facts were as follows. In January 1962 an abortive *coup d'état* took place in Ceylon. In February 1962 the Ceylon Government issued a White Paper naming thirty alleged conspirators (including the appellants) and asserting that "a deterrent punishment of a severe character" had to be imposed on the guilty persons. In March 1962 the Ceylon Parliament passed an Act which was clearly directed against the participants in the *coup*. It created a new criminal offence *ex post facto* and provided for a minimum sentence of ten years' imprisonment and mandatory forfeiture of property upon conviction. It validated the detention (without production before a magistrate) of persons alleged to have committed an offence against the State at the time of the *coup*; it empowered the Minister of Justice to direct that a person accused of such an offence be tried by three judges without a jury, and to nominate the judges for this purpose; it altered the rules of evidence relating to offences against the State so as to derogate from the legal protection afforded to accused persons. All these provisions were given retroactive effect;

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[4] [1967] A.C. 259.

[5] *Bank of Toronto* v. *Lambe* (1887) 12 App. Cas. 575; *Webb* v. *Outrim* [1907] A.C. 81.

[6] [1965] A.C. 172. See Gray in (1964) 27 *Mod. L. Rev.* 705; de Smith in *Annual Survey of Commonwealth Law*, 1965 (ed. Wade), 9-11.

most of them were to expire at the conclusion of legal proceedings instituted in connection with the *coup*.

The three judges who had been nominated by the Minister upheld a preliminary objection to their own jurisdiction. Executive nomination of the membership of a court was, so they held, an unconstitutional encroachment on the judicial power of the State which was reposed in the judicature alone.[7]

The Act was then amended to vest the power of nomination in the Chief Justice. The court was reconstituted and the trial proceeded. Thirteen of the accused were acquitted. Eleven others were convicted [8] and appealed to the Privy Council on the grounds, *inter alia*, that the powers of the Ceylon Parliament did not include power to make laws contrary to fundamental principles of justice and that the legislative scheme involved either an unconstitutional assumption of judicial power or an unconstitutional interference with the judicial power on the part of the legislature. The Privy Council, in an opinion delivered by Lord Pearce, rejected the first ground for challenge but allowed the appeal on the basis that the impugned legislation usurped the judicial power which was exercisable by the judicature alone. The Acts were manifestly designed to procure the conviction of particular individuals and to enhance their punishment by *ex post facto* legislation; they were tantamount to a legislative judgment.[9] Moreover, they deprived the courts of judicial discretion in the imposition of sentences. Not all legislation *ad hominem* was unconstitutional even if given retroactive effect. But if "such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges." [10] An erosion of the judicial power was inconsistent with the clear intention of the Constitution.

The decision was founded entirely on constitutional implications drawn from a version of the separation of powers doctrine.[10a] The Constitution of Ceylon has no comprehensive bill of rights;[11] it does

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[7] *R.* v. *Liyanage* (1963) 64 New L.R. 313.

[8] *R.* v. *Liyanage* (1965) 67 New L.R. 193. The judgment ran to over 200 pages.

[9] [1967] A.C. 259 at 290-291. "The fact that the learned judges declined to convict some of the prisoners" was not, in the opinion of the Board, "to the point" (*ibid.* at 289); *sed quaere.*

[10] *Ibid.* at 291.

[10a] Somewhat similar implications have been read into the Constitution of the Republic of Ireland: i.e. *Buckley* v. *Att.-Gen.* [1950] I.R. 67 and *Deaton* v. *Att.-Gen.* [1963] I.R. 170. Neither of these decisions was cited in the Ceylon case.

[11] Though section 29 guarantees religious freedom and prohibits communal and religious discrimination; cf. *Pillai* v. *Mudanayake* [1953] A.C. 514.

not in terms prohibit *ex post facto* penal legislation. The Privy Council thought it significant that the Constitution was divided into Parts, one of which was entitled "The Legislature", another "The Executive" and another "The Judicature". Yet the Constitution, unlike the constitutions of the United States and the Commonwealth of Australia, does not explicitly vest the legislative power in the legislature or the judicial power in the courts or judicature. This distinction is perhaps indecisive, for in the United States and Australia the federal courts in which the judicial power was to be initially reposed were themselves created by the Constitution, whereas in Ceylon a system of courts had exercised judicial power since early colonial days and it was therefore unnecessary for the Constitution expressly to endow the courts with judicial power. "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." But does it follow that the silence of the Constitution on this matter "is not consistent with any intention that henceforth it should pass to *or be shared by*, the executive or the legislature"?[12] Again, although the provisions of the Constitution relating to the appointment of judicial officers by a judicial body and protecting superior judges from arbitrary dismissal doubtless evince "an intention to secure in the judiciary a freedom from political, legislative and executive control",[13] does it follow that they are appropriate *only* for a Constitution which intends judicial power to be exercised by the judicature and the judicature *alone* ? The more closely the argument of the Board is examined, the more sweeping appear the inferences supporting its conclusions. This is not to say that the decision in the instant case is to be deprecated, but rather that the necessity of the implications on which it rests ought to be viewed with a wary scepticism.

Canadians may recall the Privy Council's observation in the *Toronto* v. *York* case that the "three principal pillars in the temple of justice" (sections 96, 99 and 100 of the British North America Act) were "not to be undermined."[14] The Constitution of Ceylon has broadly similar provisions. It would not be difficult for a Canadian court to hold invalid either federal or provincial legislation framed in terms analogous to the legislation successfully impugned in both the first and second *Liyanage* cases.[14a] These cases, it should be em-

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[12] [1967] A.C. 259 at 287-288.

[13] *Ibid.*

[14] [1938] A.C. 415 at 426.

[14a] For possible constitutional implications of the cases for Australia, see Nettheim in (1966) 40 *A.L.J.* at 228-231.

phasised, presuppose the existence of a central core of activity for the judiciary and the judiciary alone, immune from legislative or executive interference. It does not follow that in no circumstances can judicial power be vested in a body constituted otherwise than as a court;[15] but given the major premise that (irrespective of section 96) an exclusive domain is reserved to the judiciary by the Constitution, tendencies to take a restrictive view of legislative power to vest judicial functions in bodies other than courts or judges[16] will surely be reinforced. The *Liyanage* decisions may well have further implications. That the Canadian courts cannot validly be deprived by ordinary legislation of their jurisdiction to determine questions of constitutionality may readily be conceded.[17] But in Canada the broader view that the superior courts have a central core of supervisory (and possibly appellate) jurisdiction, deducible from the constitutional role assigned to the judiciary and untouchable by privative clauses, appears to have been entertained only by a few constitutional lawyers.[18] This minority will take heart from the

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[15] See notes 1 and 2, *ante*.

[16] In Ceylon the Constitution (s. 55) requires that "judicial officers" be appointed by the Judicial Service Commission (a judicial body) and not by the executive; hence executive appointments of officers to adjudicate as members of judicial tribunals are unconstitutional: *Jailabadeen* v. *Danina Umma* (1963) 64 New L.R. 419; *Ranasinghe* v. *Bribery Commissioner, ibid.*, 449 (affd. *sub. nom. Bribery Commissioner* v. *Ranasinghe* [1965] A.C. 172). Cf. *United Engineering Workers Union* v. *Devanayagam* [1967] 2 All E.R. 367 (P.C.). But the term "judicial officer" does not include a superior judge. Superior judges are appointed by the Governor-General on ministerial advice (ss. 4(2), 52(1)). Lord Pearce's observation [1967] A.C. 259 at 287) that judges are appointed by the Judicial Service Commission is to that extent incorrect. It does not seem that this apparent misconception materially influenced the decision, since the connection between the *ratio decidendi* and the literal text of the Constitution was somewhat tenuous.

[17] For a recent illustration of this principle in a Nigerian context, see *Balewa* v. *Doherty* [1963] 1 W.L.R. 949 (P.C.).

[18] See, e.g., *Alliance des Professeurs Catholiques* v. *Labour Relations Board of Quebec* [1953] 2 S.C.R. 140 at 155-156, per Rinfret, C.J.; Lederman in (1956) 34 *Can. Bar Rev.* 1139 at 1175 f. We now have the authority of the Canadian Supreme Court for the proposition that provincial legislation purporting to immunise the decisions of a Board from judicial review does not render such a board a s. 96 court (*Farrell* v. *Workmen's Compensation Board* [1962] S.C.R. 48); but this would not necessarily preclude the Supreme Court from holding privative clauses to be wholly or partly ineffectual by reference to a more general separation of powers doctrine. For conflicting views on the competence of Canadian legislatures to determine the result of litigation in an individual case by retroactive legislation, compare the *Beauharnois* case [1937] O.R. 796 with the *Western Minerals* case [1953] 1 S.C.R. at 365 f.; see also Laskin, *Canadian Constitutional Law* (3rd ed.), 195-196.

amplitude of the propositions advanced by the Privy Council in the second *Liyanage* case.

Finally, if the camel is swallowed it will be unseemly to strain at a gnat. In both the United States and Australia it has been held that the allocation of the federal judicial power to federal courts has negative implications, including the principle that powers of an essentially non-judicial character may not be vested in the courts established by the Constitution unless they are merely ancillary to the judicial.[19] The structure of the Canadian Constitution is, of course, different; but so is that of Ceylon,[20] and if they are to be read as importing aspects of the separation of powers doctrine for the purpose of insulating the judiciary from extraneous pollution, it will hardly be a daring innovation to hold that the judges cannot be required to perform duties incompatible with their traditional functions.

It is hard to escape the conclusion that Canadian judges may now be faced with the prospect of being asked to ride an unrulier horse than public policy. Through the medium of the Privy Council, Ceylon has already served to mould the content of English administrative law (to the discomfiture of textile dealers and university teachers); [21] now, through the same medium, it may be about to disturb the serenity of Canadian constitutional jurisprudence.

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[19] For the United States, see, *e.g.*, *Federal Radio Commission* v. *General Electric Co.* 281 U.S. 464 (1930); for Australia, see the *Boilermakers'* case [1957] A.C. 288. In the United States the concept of "legislative courts" which are entitled to exercise non-judicial powers has mitigated the rigour of this doctrine.

[20] The gulf between Canada and Ceylon is narrow compared with the gulfs between Ceylon and Australia on the one hand, and Canada and Australia on the other.

[21] *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66; *Vidyodaya University Council* v. *Silva* [1965] 1 W.L.R. 77; though see now *Shareef* v. *Commissioner for Registration of Indian and Pakistani Residents* [1966] A.C. 47; *Maradana Mosque Trustees* v. *Mahmud* [1967] A.C. 13; *Durayappah* v. *Fernando* [1967] 2 All E.R. 152, for a significant shift of emphasis.