CASE COMMENTS

CONSTITUTIONAL LAW — PARLIAMENTARY SOVEREIGNTY — CAN PARLIAMENT BIND ITS SUCCESSORS?

The recent decision of the Privy Council in *The Bribery Commissioner* v. *Ranasinghe*[1] povides new authority for those who challenge the orthodox view that Parliament cannot bind itself as to "manner and form" requirements. The problem is of topical interest in this country in view of two recent legislative forays by the Parliament of Canada. First, the Canadian Bill of Rights[2] purports to govern the construction and application of statutes enacted before *or after* the coming into force of the Bill of Rights.[3] The courts have not yet had occasion to consider a case in which a statute enacted since 1960 has been challenged on the ground of conflict with the provisions of the Bill of Rights. However, the view has been expressed in the Supreme Court of Canada that, in the case of irreconcilable conflict between another Act of Parliament and the Canadian Bill of Rights, the latter must prevail.[4] This opinion was stated in respect of a statute passed prior to the Bill of Rights; but if vindicated by the later course of decision it will, of course, directly raise the question of whether Parliament has effectively bound itself to the extent of requiring, as a condition of the validity of any post-1960 statutory provision in conflict with the terms of the Bill of Rights, that such statute contain an express declaration that it should operate notwithstanding the Bill of Rights.[5] The second item of federal legislation raising the problem at hand is section 115 of the recently enacted Canada Pension Plan.[6] Subsection (4) of that section provides, in effect, that future amendments concerning certain matters related to benefits, contributions, etc., shall not have any force and effect unless and until the Lieutenant-Governor in Council of each of at least two-thirds of the included provinces,[7] having in the aggregate not less than two-thirds of the population of all the included provinces, has signified the consent of such province thereto. This interesting product of co-operative federalism constitutes a somewhat closer analogy to the situation presented in the case under review.

The Bribery Commissioner v. *Ranasinghe*, on appeal from Ceylon, concerned the validity of a statute inconsistent with a term of the Constitution of Ceylon and passed without compliance with the requirements

1 [1964] 2 All E.R. 785.
2 (Can.) 1960, c. 44.
3 *Ibid.*, section 5(2). Section 2 provides that the Canadian Bill of Rights shall not apply to any such subsequently enacted statute which is "expressly declared by an Act of the Parliament of Canada that it shall operate nothwithstanding the Canadian Bill of Rights."
4 See the dissenting judgment of Cartwright, J., in *Robertson* v. *The Queen*, [1963] S.C.R. 651, 662; 41 D.L.R. (2d) 485, 489. The point was not discussed in the majority judgment.
5 See *ante*, n. 3.
6 (Can.) 1964-65 (designated Bill C-136 in the House of Commons).
7 "Included province" is defined in s.s. (1).

of the Constitution for amendments thereto. The powers of the Ceylon Parliament are set out in sections 18 and 29 of the Constitution as follows:

> 18. Save as otherwise provided in sub-section (4) of s. 29 any question proposed for decision by either Chamber shall be determined by a majority of votes of the senators or members, as the case may be, present and voting . . . .
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> 29. (1) Subject to the provisions of this order, Parliament shall have power to make laws for the peace, order and good government of the Island.

Sub-section (2) entrenches certain religious and racial rights, and sub-section (3) provides that laws contravening the former sub-section should be void. Sub-section (4) provides that:

> (4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this order . . . . Provided that no bill for the amendment or repeal of this order shall be presented for the royal assent until it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House . . . . Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any court of law.

In issue in the case was the validity of the Bribery Amendment Act, 1958, which created bribery tribunals for the trial of persons charged with that offence. Under the Act, the members of the tribunal were selected from a panel appointed by the Governor-General on the advice of the Minister of Justice. This enactment, it was held, was in violation of a stipulation in the Constitution providing that judicial officers be appointed by the Judicial Service Commission. The Act did not purport to have been passed pursuant to Section 29 (4) of the Constitution; but had been enacted as an ordinary statute, that is, by passage through both Houses and by receiving royal assent.

A preliminary question presented for consideration was whether the court, when faced with an official copy of an Act of Parliament, could enquire into the procedure leading up to enactment; and, specifically, whether it could examine the original bill to see if the speaker's certificate required by section 29 (4) was endorsed thereon. Lord Pearce, delivering the reasons of the Judicial Committee, dismissed the oft-quoted observation of Lord Campbell in *Edinburgh and Dalkeith Railway Co.* v. *Wauchope* that "All that a court of justice can do is to look to the Parliamentary roll"[8] with the comment that the problem raised in the instant case could not arise in the United Kingdom, where there is no governing instrument which prescribes the law-making powers and the forms essential to the exercise of those powers. He added that:

> When the Constitution lays down that the Speaker's certificate shall be conclusive for all purposes and shall not be questioned in any court of law, it is clearly intending that courts of law shall look to the certificate but shall look no further. The courts therefore have a duty to look for the certificate in order to ascertain whether the Constitution has been validly amended. Where the certificate is not apparent, there is lacking an essential part of the process necessary for amendment.[9]

The substantial question, however, was whether a bill passed by a sovereign Parliament (and the Judicial Committee treated the Parliament

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8 (1842), 8 Cl. and Fin. 710, 725; 8 E.R. 279, 285. As to the "Parliamentary roll," see Heuston, *Essays in Constitutional Law* 18 (2nd ed. 1964).

9 [1964] 2 All E. R. 785, 790-91. It may be noted, in passing, that, whereas section 29(4) of the Ceylon Constitution requires proof of the required two-thirds majority in the form of a speaker's certificate endorsed on the amending bill, s. 115 of the Canada Pension Plan, *ante*, n. 6, is silent as to the manner in which the consent of each Province's Lieutenant-Governor in Council is to be shown.

of Ceylon as sovereign[10]) must be regarded as a valid Act, though a procedural defect had occured in the course of the legislative process, or whether the Act was invalid. The Privy Council held the latter view to be correct:

> . . . 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. This restriction exists independently of the question whether the legislature is sovereign, as in the legislature of Ceylon, or whether the constitution is 'uncontrolled', as the Board held the constitution of Queensland to be [in *McCawley* v. *The King*[11]]. Such a constitution can indeed be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. The proposition which is not acceptable 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 by a different legislative process. This is the proposition which is in reality involved in the argument.[12]

The approach taken in the instant case, as Lord Pearce noted, was consistent with that adopted by the Appellate Division of the Supreme Court in the South African case of *Harris* v. *Minister of the Interior.*[13] His reasons strongly suggest, moreover, that *Trethowan's* case,[14] decided in the Privy Council on the basis of section 5 of the Colonial Laws Validity Act,[15] would have been decided the same way apart from the terms of the latter statute and despite the fact that the New South Wales legislature, unlike those of Ceylon and South Africa, was not a sovereign legislature.

There is, therefore, not inconsiderable authority for the proposition that a Parliament may not evade the requirements of a special legislative process prescribed for laws relating to an entrenched subject-matter simply by purporting to legislate according to the procedure followed for enactment of ordinary legislation. What, then, is the effect of a provision such as section 115 (4) of the Canadan Pension Plan?[16] The proceedings in Parliament clearly indicate that the government took the view that section 115 (4) has no legal effect whatsoever in binding a future Parliament and that this opinion flowed from the premise that Parliament labors under an inherent incapacity which prevents any Parliament from binding a later Parliament.[17] It is extraordinary to find Parliament enacting a provision apparently intended to be a legal sham; it would be

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10 The Parliament of Ceylon was sovereign in the sense that no legislative authority outside the country had power to legislate for Ceylon. With respect to another sense in which "sovereignty" is sometimes used, Lord Pearce observed that, so far as invalidity of an Act not in compliance with section 29(4) was concerned, "No question of sovereignty arises. 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": *ante*, n. 1, at 793.

11 [1920] A.C. 691 (P.C.).

12 [1964] 2 All E.R. 785, 792.

13 [1952] 2 S.A. 428.

14 *A.-G. for New South Wales* v. *Trethowan*, [1932] A.C. 526.

15 (Imp.) 28 & 29 Vict., c. 76.

16 See *ante*, n. 6, and accompanying text.

17 See the comments of the Minister of National Health and Welfare in *Hansard* for March 4, 1965, p. 12009; and the testimony of the Assistant Deputy Minister, Department of Justice, before the Special Joint Committee of the Senate and House of Commons appointed to consider Bill C-136, an Act to establish a comprehensive program of old age pensions [& etc.], December 11, 1964, pp. 446-449. Cf. the view expressed by Premier Robarts in a statement in the Ontario legislature on January 21, 1965, and set out in the proceedings of the Special Joint Committee, February 1, 1965, at 1786.

more intriguing still if it were found that Parliament had in fact bound itself without really trying!

In fact, Parliament has not bound itself in any real sense by the entrenching clause embodied in section 115(4), not because of any inherent incapacity to do so, but simply because that clause is not itself protected from repeal by the requirement of consents of the Provinces. In that essential respect it differs from the entrenched clauses in question in the *Trethowan*,[18] *Harris*,[19] and *Briberby Commissioner*[20] cases and presents a problem more analogous to that in *McCawley's* case.[21] There is nothing in section 115(4) to prevent its repeal by ordinary legislation, following which amendments to the Canada Pension Plan could be made at will.

If section 115 itself had been entrenched so as to require, by its terms, consents of the Provinces to its repeal, it would have directly raised the interesting question as to whether the principle of the *Bribery Commissioner* case would have been applicable so as to require the conclusion that Parliament had in fact bound itself. Even before the last-mentioned decision, the view that Parliament can bind itself as to manner and form had won a considerable degree of acceptance among constitutional lawyers.[22] One feature which, at first glance, appears to set section 115 of the Canada Pension Plan apart from the entrenched clauses considered in the *Bribery Commissioner*, *Harris*, and *Trethowan* cases is that the provisions in question in the three latter cases were contained in the constitutions of Ceylon, South Africa, and New South Wales respectively. Obviously, a provision in the Canada Pension Plan is not constitutional in the sense of being contained in this country's constituent instrument; nor is it constitutional in the sense in which Canadians are accustomed to regard law as constitutional—i.e. as pertaining to distribution of power. But it may well be that the definition of constitutional law which is relevant to the present context is simply that which Dicey described in the following terms:

> Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state. Hence it includes (among other things) *all rules which define the members of the sovereign power*, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority.[23]

By section 91(1) of the B.N.A. Act Parliament may amend the Constitution of Canada in this sense, and there would seem to be no particular reason why such amendment could not be contained in the Canada Pension Plan or in any other ordinary statute.

The above considerations are not irrelevant to the effect of the Canadian Bill of Rights[24] as against subsequent legislation; and it is to be hoped that, when the question eventually comes before the courts, the

18 *A.-G. for New South Wales* v. *Trethowan*, [1932] A.C. 526.

19 [1952] 2 S.A. 428.

20 [1964] 2 All E.R. 785.

21 [1920] A.C. 691 (P.C.).

22 See Heuston, *Essays in Constitutional Law*, Ch. 1 (2nd ed. 1964); Jennings, *The Law and The Constitution*, Ch. 4 (5th ed. 1959); W. Friedmann, *Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change* (1950), 24 Aust. L.J. 103; J. D. B. Mitchell, *Sovereignty of Parliament—Yet Again* (1963), 79 L.Q.R. 196.

23 Dicey, *The Law of the Constitution* 23 (10th ed. Wade 1959). Italics supplied.

24 See *ante*, notes 2 and 3, and accompanying text.

temptation will be resisted to apply, without a careful re-assessment of their merits, the judicial observations made in the two English cases[25] commonly cited for the proposition that such clauses are of no effect.

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[25] *Vauxhall Estate Ltd.* v. *Liverpool Corporation*, [1932] 1 K.B. 733, and *Ellen Street Estates Ltd.* v. *Minister of Health*, [1934] 1 K.B. 590.

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