LEGAL LANDMARKS

CONSTITUTIONAL AND ADMINISTRATIVE LAW

Parliamentary sovereignty—manner and form of legislation

The case of *Bribery Commissioner v. Ranasinghe*[1] is indicative of the increasing recognition by English judges of the principle developed by dominion courts in cases such as *Harris v. Minister of Interior*[2] and *Attorney-General for New South Wales v. Trethowan*[3] that a legislature whether it be "sovereign" or subject to a controlled constitution must adhere to those rules which define the process of law-making.

Under the Ceylon (Constitution) Order in Council, power was given to the Parliament of Ceylon to make laws for the peace, order and good government of the Island. A major limitation imposed on the exercise of the power was contained in section 29 which provided that "no Bill for the amendment or repeal of any of the provisions of the Order shall be presented for the Royal Assent unless it has endorsed in 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."

In the instant cases the provisions of a Bribery Act were challenged on the ground that in purporting to amend section 55 of the Ceylon (Constitution) Order in Council they were not passed in the manner and form laid down in section 29. The challenged provisions purported to confer judicial tenure on certain officials in a manner contrary to section 55 of the Constitution which prescribed the mode of appointment of judicial officers. Although the 1958 Act had received the Royal Assent, the Bill prior to that Assent did not have endorsed on it a certificate of the Speaker that it had been passed with a two-thirds majority.

It was argued for the appellant that the Parliament of Ceylon, being a sovereign legislature, could amend the Constitution in the ordinary manner and that once a Bill passed by Parliament had received the royal assent, no enquiry could be entered into as to whether any particular manner and form had been observed. In rejecting this argument, Lord Pearce, delivering the judgment of the Judicial Committee of the Privy Council, stated—

> "Once it is shown that an Act conflicts with a provision in the Constitution, the certificate [of the Speaker] is an essential part of the legislative process. The court has a duty

1. [1964] 2 W.L.R. 1301.
2. [1952] 2 S.A.L.R. 428.
3. [1932] A.C. 526.

> to see that the Constitution is not infringed and to preserve it inviolate. Unless, therefore, there is some very urgent reason for doing so, the court must not decline to open its eyes to the truth. Their Lordships were informed by counsel that there were two duplicate original bills, and that after the Royal Assent was added an original was filed in the Registry where it was available to the Court. It was therefore easy for the Court, without seeking to invade the mysteries of parliamentary practice, to ascertain that the bill was not endorsed with the Speaker's certificate."[4]

The appellant's argument that the Act was a valid one (although affected by a procedural defect in the course of passage) was based on the case of *McCawley v. The King*[5] in which it was held that the Queensland Parliament could amend provisions of its Constitution relating to judicial tenure without recourse to any express formal amendment or specific manner and form. But in *McCawley's Case,* the Privy Council, in asserting that the Queensland Parliament was "master of its own household" had expressly excepted from its dictum the cases in which special procedures for amendment had been laid down.[6] And it was this type of procedure which was in issue in the present case. The Court could not accept the proposition "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 constitutional instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process."[7] In the end result, therefore, the absence of the Speaker's certificate meant that an essential part of the legislative process for amending the provisions relating to judicial tenure had not been complied with and that the challenged provisions of the 1958 Act were invalid.

It is interesting to compare the decision of the Privy Council in this case with the recent Australian case of *Clayton v. Heffron*[8] where the power of prescribing a manner and form of legislating which differed from the ordinary form was recognized as being within the general legislative power of Australian State Parliaments.

In *Clayton v. Heffron* the majority in the High Court considered that a provision which required a conference between representatives of the two Houses of the New South Wales Legislature to thrash out differences on a deadlocked bill was a directory

4. [1964] 2 W.L.R. at p. 1308.
5. [1920] A.C. 691.
6. *Ibid.*, at p. 714.
7. [1964] 2 W.L.R. at p. 1311.
8. [1960] 105 C.L.R. 214.

and not a mandatory provision. The consequence was that a failure to hold such a conference would not be regarded as fatal to the validity of any Bill which was eventually passed without observing this requirement.[9] The vital difference, however, between this type of provision and the two-thirds majority requirement is that the latter is part and parcel of the legislative procedure for enacting the bill while the former is to be regarded as a conciliation procedure between the Houses which precedes enactment but is not a part of the enactment procedure. However, there are dicta in *Clayton v. Heffron* which suggest that a court will not enquire into matters of internal parliamentary procedure in order to determine the validity of an Act.[10] How does this attitude conform to the decision in the instant case? It seems to follow from the judgment of the Privy Council that if there had not been a provision requiring that a Speaker's certificate be endorsed on a Bill, then the Court could not declare on the validity of the Bill, as the only way of determining whether the Bill had been passed with the required majority would have been to enquire into parliamentary debates and proceedings preceding the enactment. This would seem to be beyond the province of the Court.

It is clear, therefore, that in order to make effective an "entrenched" procedure which is based on prescribed steps to be taken by a parliamentary body, a draftsman would be well-advised to make provision for a public method for authenticating the compliance of such a body with its constituent instrument: the certificate of the Speaker or other appropriate parliamentary officer will be the normal means of achieving this end.

Nature of the appeal to the Privy Council

In an earlier case on appeal from Ceylon, the Judicial Committee examined the nature of the appeal to the Privy Council: *Ibralebbe v. The Queen.*[1] The Chief Justice of Ceylon had expressed the opinion that the continuance of the right of appeal to the Judicial Committee of the Privy Council was inconsistent with the status of Ceylon as an independent country and that the procedure by which the decision of the Judicial Committee was given effect to—by Order in Council in England—derogated from the full sovereign authority attaching to the organs of government in Ceylon. In rejecting this opinion the Judicial Committee re-affirmed the traditional interpretation of the nature of the Privy Council Appeal. Its conclusions may be formulated as follows:—

9. *Ibid.*, at pp. 246-8.
10. *Ibid.*, at p. 235.
1. [1964] 2 W.L.R. 76.