*Conclusions*

The decision in *Conway* v. *Rimmer* vests in the courts the ultimate task of evaluating and weighing the merits of a claim of privilege — resolving the competition between two public interests, the efficient functioning of the public service on the one hand and administration of justice on the other.

In its more extreme application this result could cause calamity to State security and national safety — but the Law Lords themselves have laid down rules regulating this power. The courts should not order disclosure of Cabinet minutes,[52] policy-making documents,[53] documents relating to defence and security[54] and other documents on high State matters.[55] Nor will production be ordered where such action could be of the slightest use to criminals and the underworld[56] nor perhaps where the documents are merely statements by the parties to the action.[57] Their Lordships generally agreed that the claim of privilege ought to be refused if it is made *mala fide* or is actuated by irrelevant or improper considerations or is based on a "false premise".[58]

In New South Wales the safeguard is similarly entrenched, as even on the basis of *Tunstall's Case* the court should not go behind a Minister's Certificate relating to documents on matters of "defence, high policy, departmental minutes on matters of State, and the like".[59]

In conclusion it should be noted that in *Duncan* v. *Cammell Laird & Co. Ltd.*, Lord Simon stated:

> The judgment in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same.[60]

By restricting the "reserve" power of the court, the New South Wales Court of Appeal has perhaps negatived this principle. The position seems now to have been reached where the House of Lords has given more equitable rights to the individual litigant in a civil action than the New South Wales Court of Appeal will admit to a defendant in a criminal action prosecuted by the State.

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## LEGISLATIVE OVERRULING OF JUDICIAL DECISIONS: THE CONCEPT OF "LEGISLATIVE JUDGMENT"

### *CLYNE* v. *EAST*

The decision of the New South Wales Court of Appeal (Herron, C.J., Sugerman and Asprey, JJ.A.) in *Clyne* v. *East*[1] is of some interest in the field of constitutional law, at both State and federal levels. Explicitly at the former level, but potentially at the latter as well, the case raised basic

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[52] *Per* Lord Reid at 1015.
[53] *Ibid.*
[54] *Per* Lord Hodson at 1038.
[55] *Per* Lord Upjohn at 1050. *Cf.* the *dictum* in *Hazeltine Research Inc.* v. *Zenith Radio Corp.* (1965) 7 F.L.R. 339 at 340. But *quaere* whether applications for an import licence are really "high State" matters.
[56] *Per* Lord Upjohn at 1051.
[57] *Per* Kriewaldt, J. in *Christie* v. *Ford*, *supra* n.43 at 210.
[58] See Lord Hodson at 1037 and Lord Morris at 1019.
[59] *Supra* n.31.
[60] *Supra* n.5 at 633-4.
[1] (1967) 68 S.R. 385.

questions of the separation of powers, and in particular of the doctrine, propounded in the Ceylonese case of *R.* v. *Liyanage*,[2] that *ex post facto* legislation aimed at specific factual situations may amount to "legislative judgment", and hence to unconstitutional usurpation of judicial power. The decision turned on whether this latter doctrine has any application to the New South Wales Constitution.

The appellant lessor sought determination of fair rent by a Fair Rents Board under s. 21 of the Landlord and Tenant (Amendment) Act, 1948. His contention was that the Board was not limited in its determination to consideration of the capital value of the premises as at 31st August, 1939, but was entitled to take into account the capital value at the date of determination. In effect this meant that allowance could be made for inflationary trends affecting the community generally.

This view had been accepted by the High Court for variations of fair rents, and *semble* for determinations as well, in *Rathborne* v. *Abel*[3] in December, 1964, and had been applied by the Court of Appeal, despite a 1965 amendment to s. 21, in *Rathborne* v. *Hamill*[4] in June, 1966. As a result, a number of applications had been made by lessors to vary rents, and in some 592 cases substantial increases were in fact agreed to by the Board.

In line with its general policy of keeping rents at a low level, the New South Wales Parliament intervened on the lessees' behalf and enacted the Landlord and Tenant (Amendment) Act, 1966. Section 3 amended ss. 20 and 21 of the principal Act to eliminate "the broad judicial approaches seen in *Rathborne* v. *Hamill*. . . . This section effectively established legislative policy as to rents generally, . . . (preventing) Boards from making allowances for economic increases."[5]

The Act was also intended to assist those 592 lessees who had experienced increases in rent as a result of the *Hamill* decision. Section 5 applied to all variations made after 16th June, 1966, except in relation to the Naremburn premises which were the subject of *Rathborne* v. *Hamill*. It conferred the right on the lessee to apply within three months to the Board or a Controller for a further variation. By sub-s. 4, on such a variation, if the Board or Controller is satisfied that the premises are subject to a determination as defined and that such included an allowance by reason of any change in economic conditions affecting the community or a substantial part thereof, the Board or Controller "shall vary the fair rent . . . by reducing it by the amount that, in its or his opinion, was included by way of the allowance".

Sub-s. 5 deemed a variation of the fair rent under sub-s. 4 to have come into effect from the date of the determination pursuant to *Rathborne* v. *Hamill*. Any rent paid by the lessee since that date in excess of the fair rent as varied by sub-s. 4 was to be recoverable in an action for debt in a court of competent jurisdiction or could be offset by the lessee against any rent payable by him to the lessor in respect of the subject premises. The intention behind the section was clear: namely, to give the act a retrospective operation so as to assist the lessees prejudiced by the *Hamill* decision.

The case was referred to the Court of Appeal by O'Brien, J. on a case stated by a stipendiary magistrate pursuant to the Justices Act, 1902-1965. The appellant lessor argued that s. 5 of the Act was constitutionally invalid as it amounted to a legislative judgment usurping the power or trespassing on the independence of the judiciary. In support of this argument, reliance was placed upon the *Liyanage* decision. In order to make out his contention, the lessor set himself the difficult task of proving three propositions:

[2] (1967) 1 A.C. 259.
[3] (1964) 38 A.L.J.R. 293.
[4] (1967) 1 N.S.W.R. 225.
[5] (1967) 68 S.R. at 393 (Herron, C.J.).

(1) That the *Liyanage* doctrine applied in New South Wales and accordingly restricted the legislative powers of the New South Wales Parliament. This first necessitated proof that the doctrine of separation of powers existed in the New South Wales Constitution, at least to the extent of applying as between legislature and judiciary.

(2) That Fair Rents Boards were judicial tribunals in this context.[6]

(3) That s. 5 of the Landlord and Tenant (Amendment) Act 1966 did in fact constitute a "legislative judgment", within the meaning of that conception as used in *Liyanage*.

In the *Liyanage Case*,[7] 24 persons were charged with grave criminal offences, following upon an abortive coup in Ceylon in 1962. They were named in a White Paper which called for heavy penalties as a deterrent for all intending offenders. The Criminal Law (Special Provisions) Act, 1962, was given retrospective effect but was limited in operation to those accused of offences about January, 1962. The Act legalised the arrest of the accused without a warrant and their subsequent detention while awaiting trial. The minimum penalty was increased to ten years with forfeiture of property. Evidence otherwise inadmissible could be used against the accused. An entirely new offence was created to meet the circumstances of the coup. Section 9 of the Act extended the operation of s. 440A of the Criminal Procedure Code so as to apply to proceedings brought under the Act. This meant that the accused could be tried by three judges without a jury. The appellant was convicted and sentenced to ten years' imprisonment but appealed on the ground that the Criminal Law (Special Provisions) Act was constitutionally invalid.

The Privy Council decided that the impugned legislation was not concerned with criminal offences or rules of evidence of a general nature. It was aimed at particular known individuals who had been participants in the "January Coup", that is to say, they were laws aimed at specific and identifiable persons charged with particular offences on a particular occasion. The legislative plan in pith and substance was thus *ad hominem* legislation, its purpose being to secure the conviction and enhance the punishment of known individuals. The Act altered fundamental rules of evidence so as to facilitate conviction, and altered *ex post facto* the punishment to be imposed. The Judicial Committee found that the Act amounted to a legislative judgment usurping the power and trespassing on the independence of the court.

Their Lordships decided that the Ceylonese Constitution embodied the doctrine of separation of powers, at least to the extent that judicial power could only be exercised by the judicature. The result logically flowing from this finding was that the legislature could not pass a law which usurped the judicial power of the Judicature. It was true that the legislature could itself amend the Constitution, but only with a certificate of the Speaker as to voting majorities; and there was here no such certificate. As a result, the Criminal Law (Special Provisions) Act was held to be *ultra vires*.

In *Clyne* v. *East* Herron, C.J. and Sugerman, J. held that the doctrine of separation of powers had no application to the New South Wales Constitution, so that the *Liyanage* doctrine could never be invoked. The Chief Justice said:[8]

In New South Wales the legislature has power to make laws for the

[6] *Sed. qu.* whether this was really necessary to his case. It is arguable that the *Liyanage* holding is concerned with legislative encroachment not upon judicial power as actually vested in some specific tribunal, but only upon "judicial power" as a general functional or conceptual field. Even if the fettering of a particular tribunal's decisions is required, it might plausibly be argued that this tribunal was the Court of Appeal itself.

[7] *Supra* n. 2.

[8] (1967) 68 S.R. at 395.

> peace, welfare and good government of New South Wales in all cases whatsoever: Constitution Act, 1902 . . . s. 5. This plenary power is complete and unrestricted subject to a territorial limitation: *The Bribery Commissioner* v. *Ranasinghe*.[9] There is no limitation of subject matter: *McCawley* v. *R.*;[10] *Clayton* v. *Heffron*.[11]

The main judgment in this regard was given by Sugerman, J., who decided that the structure and provisions of the Constitution Act, 1902, provided no ground for importing the principle into the New South Wales Constitution.

In *Liyanage*, the Privy Council found as a matter of construction of a written constitution that the principle did apply in Ceylon. The judicial system in Ceylon was established by the Charter of Justice in 1833, and continued unaffected by the new Constitution of 1946. Clause 4 of the Charter vested "the entire administration of justice" in the courts, and expressly declared that

> it is not, and shall not be competent to the Governor of Our said Island by any Law or Ordinance to be by him made, with the advice of the Legislative Council thereof or otherwise howsoever, to constitute or establish any court for the administration of justice in any case civil or criminal, save as hereinafter is expressly saved and provided.

The Constitution was divided into parts: "Part 3: the Legislature, Part 5: the Executive, Part 6: the Judiciary." Their Lordships attached the same significance to this fact as the Privy Council had done in the *Boilermakers' Case*[12] in relation to the Australian Constitution. They said:

> 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.[13]

Sugerman, J. made a similar examination of the structure of the New South Wales Constitution. Setting aside the "general speculative reasoning supported by . . . the writings of political philosophers and others",[14] to which he had been referred by the appellant, he had little doubt on all the evidence that the New South Wales Constitution did not require judicial power to be vested exclusively in the judiciary. In this regard, the decision is really only declaratory of existing law, as it has long been recognised that the doctrine of separation of powers could not be applied in New South Wales.

But even if it had been held that the doctrine did apply, the difficulty would still have remained that the New South Wales Constitution is a flexible or uncontrolled Constitution. With the exception of certain sections which do not concern us here, the Constitution will be impliedly amended by any later statute which is inconsistent with it. This flows from the fact that the Constitution is itself only an Act of the New South Wales Parliament, and can therefore be amended or repealed by a normal statute passed in the normal manner.[15] To achieve a contrary result, the Constitution would have to be entrenched and the provisions embodying the control, for instance ss. 5A, 7B and 24A, would themselves have to be entrenched.

By contrast, the Ceylonese Constitution is contained in an Order-in-Council of 1946; and s. 29(4) provides that the Constitution can only be

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[9] (1965) A.C. 172.
[10] (1920) A.C. 691; (1920) 28 C.L.R. 106.
[11] (1960) 105 C.L.R. 214.
[12] *A.-G. for Commonwealth of Australia* v. *R.* (1957) A.C. 288; (1957) 95 C.L.R. 529.
[13] (1967) 1 A.C. at 287. They relied also on other provisions, e.g., that judicial appointments be made by a Judicial Service Commission composed solely of present or former judges, and "which shall not contain a member of either House".
[14] (1967) 68 S.R. at 396.
[15] See Colonial Laws Validity Act, 1865, s. 5; *McCawley* v. *R.*, *supra* n. 10.

amended by a two-thirds majority, certified by the Speaker.[16] Section 29(4) is itself entrenched because it is part of the Constitution. In the *Liyanage Case,* as we have seen, the Criminal Law (Special Provisions) Act of 1962 lacked the Speaker's certificate. The Privy Council left open the question of the validity of the Act if it had been passed with a two-thirds majority. But in such a case, there would clearly have been a valid amendment to the Constitution and the Act could not have been impugned.

The conclusion is inescapable that, if the Ceylonese Criminal Law (Special Provisions) Act (1962) had been passed by the New South Wales Parliament, then that statute would have been valid and entitled to enforcement in the courts of this State. The only restraints on such an enactment would be political or moral. Reliance can only be placed on the good sense of the legislature and public pressure to ensure that a similar Bill is never entered on the statute books of New South Wales. Some comfort can be derived at least from the fact that our legislative history is singularly free from such enactments. But it should still be borne in mind that the present situation could be the subject of abuse. The position under the British Constitution, both before and after *Liyanage's Case,* is very much the same. As the editor of the *Law Quarterly Review* sums it up, "the Queen in Parliament is supreme. . . . It can, therefore, not only create new law in the ordinary form of legislation, but it could, if it wished, act both as judge and as executive."[17]

*Clyne* v. *East* is also an important decision in relation to the federal Constitution because of the light it throws on the meaning of the phrase "legislative judgment". The *Boilermakers'* decision makes it quite clear that the Commonwealth Constitution does embody a separation of powers, at least to the extent of separating judicial from other powers. The judicial power of the Commonwealth can only be vested in courts properly constituted under ss. 71 and 72 of the Constitution. No other person or body can exercise federal judicial power. As a result, the *Liyanage* doctrine will presumably apply to any enactment of the Commonwealth Parliament. In this regard, it is also important to bear in mind that the Commonwealth Constitution is entrenched, in so far as it can only be amended by the procedure set out in s. 128. There will not be an implied amendment just because a later statute is inconsistent with the Constitution, unless that procedure is complied with.

If the *Liyanage* doctrine is applicable to the Commonwealth Constitution, it becomes important to determine what exactly will amount to usurpation or infringement of judicial power by the legislature. On this point, the Privy Council was not very explicit, preferring to leave the task of definition to a later case.[18]

> A lack of generality in criminal legislation need not, of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as *ad hominem* and *ex post facto* must inevitably usurp or infringe the judicial power. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the

[16] On the effect of this requirement see *Bribery Commissioner* v. *Ranasinghe, supra* n. 9.

[17] Note (1966) 82 *L.Q.R.* 289 at 290.

[18] The phrase "legislative judgment" is borrowed from the opinion of Chase, J. in *Calder* v. *Bull* 3 U.S. (3 Dall) 386 (1798). In that context it refers only to the *ex post facto* laws prohibited by the U.S. Constitution, Art I, s. 9, para. 3 and s. 10, para. 1. *Calder* v. *Bull* itself is authority for the view, now well settled, that those clauses are applicable only in the field of criminal law.

> legislation, the situation to which it was directed, the existence (where several enactments are concerned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion of the judiciary in specific proceedings.[19]

A. E. W. Park has suggested that the true test is whether the impugned act amounts to an interference with the function of the judiciary,[20] but this would appear to beg the question. The Privy Council's advice in *Kariapper* v. *Wijesinha*,[21] delivered by Sir Douglas Menzies, appears to focus on specific functions of the judiciary, notably the determination of questions of guilt or innocence, and the imposition of punishment,[22] the implication being that so long as the legislature takes to itself no such specific functions, "usurpation" is not involved. In that case, the impugned statute imposed disabilities (including vacation of parliamentary seats) upon Members of Parliament against whom allegations of bribery had been proved before a commission of inquiry independently constituted. The statute itself made no findings of guilt, its application being expressly predicated upon the findings of the commission. Nor did the disabilities imposed amount to punishment. "It is, of course, important that the disabilities are not linked with conduct for which they might be regarded as punishment but more importantly the principal purpose which they serve is clearly enough not to punish but to keep public life clean for the public good."[23]

Moreover, this attention to specific functions had a twofold application. Their Lordships held not only that no specific judicial functions were usurped, but that specific legislative functions had been exercised. In particular, the statute had purported to change the law, "providing in terms that in the event of inconsistency with existing law the Act shall prevail".[24]

In *Clyne* v. *East*, Asprey, J.A. confined himself to the question whether there had been a "legislative judgment", and was able to dispose of the appeal by holding that there was not. "Legislative judgment", he thought, could be defined as

> the enactment by the legislature of a statute in a form which so exercises judicial power that the powers of the judicial tribunal, to which the enactment is directed, to arrive at a judgment by the essential procedures of true judicial process in a case coming before it are wholly absorbed by the legislative act, thus leaving the tribunal nothing to do but to put its judicial stamp on the case in the terms of the judgment already formulated by the provisions of the statute.[25]

He pointed out that s. 5 (unlike the *Liyanage* legislation) affected no pending litigation. It merely conferred a right upon certain lessees to approach a Fair Rents Board at their option to obtain a variation in rent. Before they could obtain such a variation it was for them to show that all the elements of s. 5(4) were satisfied—to establish jurisdiction, the existence of the ground for reduction, and the quantum thereof. "All these matters . . . are facts to be determined by the judicial process and are not pre-determined by the section." The normal powers of the tribunal in matters of evidence, proof and admissibility remained. In all, there was "a considerable area for the

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[19] (1967) 1 A.C. at 289.
[20] "Legislature and Judiciary in Ceylon" (1966) 29 *Mod. L.R.* 420.
[21] (1967) 3 W.L.R. 1460.
[22] Cases involving Parliament's power to commit for contempt cannot be regarded as general authorities. It has frequently been held that this power is a unique one, attached to the legislature for its own protection as an incident of the legislative function: *R.* v. *Richards; ex p. Fitzpatrick & Browne* (1955) 92 C.L.R. 167. But see *Kielly* v. *Carson* (1842) 4 Moo P.C. 63.
[23] (1967) 3 W.L.R. at 1468.
[24] *Id.* 1470.
[25] (1967) 68 S.R. at 403.

operation of judicial function".[26] Admittedly, if the applicant lessee could bring himself within the provisions of s. 5, he would be entitled to a variation as of right:

> But the law contains many examples of instances where, if a litigant brings himself within the provisions of a statute, the tribunal entrusted with a power is under a duty to exercise it in the litigant's favour whether the power is conferred upon the tribunal in terms which are permissive or mandatory (*cf. Sheffield Corporation* v. *Luxford*).[27] The judicial function is performed before the impact of the statutory duty or imperative and is not extinguished by the statute. The fact that s. 5 confers benefits upon a particular class of citizens or that it has a retrospective operation cannot assist the appellant's argument where no other assistance is forthcoming.[28]

Herron, C.J. and Sugerman, J.A. thought it was enough that the act was a "general legislative measure for the amendment of the general law". Section 5 was not directed to an application by particular or known lessees: it was of general application to all rents falling within a definition. It was in this sense an improvement in the general law as to rents, although it excluded the specific premises which had been dealt with in *Rathborne* v. *Hamill*. It did not matter that the section was given a certain degree of retrospectivity or that it was to a certain extent legislation *ad hominem*.

It is difficult to make generalizations and each case will certainly depend on its own facts. The question is really one of degree. But it is clear that there will be no legislative judgment if the judicial discretion is given sufficient room to operate freely. This will be so even if a statute retrospectively confers a right *ex debito justitiae* on a particular class of persons, provided that there is an opportunity for the court to determine freely whether the applicant comes within the terms of the statute conferring the right. One must, of course, add the proviso that, if the statute offends English ideas of fundamental justice, there will be a greater tendency for the court to find that the statute in question falls on the wrong side of the line. But the question remains substantially one of determining the precise nature of the court's function under the statute. Does it amount to submission to a legislative direction to convict named persons, or is there room for the operation of judicial discretion? This is not to suggest that the exact scope of the *Liyanage* doctrine is not capable of more precise definition; but this can only await future judicial examination.

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[26] *Id.* 405.
[27] (1929) 2 K.B. 180.
[28] (1967) 68 S.R. at 405-6.