THE RESERVED PROVISIONS OF THE ELECTORAL ACT

J. B. Robertson, B.A.

The legal force and effect of s.189 of the New Zealand Electoral Act 1956 has created a considerable amount of discussion. Opinion has been strongly divided as to whether or not a Parliament would be required to fulfil the provisions therein contained if it were amending or repealing any of the reserved sections of that Act. Subsection (2) of s.189 reads:

> No reserved provision shall be repealed or amended unless the proposal for amendment or repeal—
> (a) Is passed by a majority of seventy-five per cent of all the members of the House of Representatives; or
> (b) Has been carried by a majority of the valid votes cast at a poll of the electors of the European and Maori electoral districts . . .

It is important to note immediately that s.189(1) which lists the reserved provisions does not include s.189 itself and therefore this section could be amended or repealed at any time by a simple majority and thereafter the formerly reserved provisions could likewise be altered by a simple majority.

When the legislation was discussed in the House of Representatives, the members who spoke laid great weight on the fact that what was being enacted was only of moral force. The Rt. Hon. J. R. Marshall the then Attorney-General who introduced the legislation into the House commented:[1]

> What we are doing has a moral sanction rather than a legal one, but to the extent that these provisions are unanimously supported by both sides of the House, and to the extent that they will be universally accepted by the people, they acquire a force which subsequent Parliaments will, I believe, respect and which subsequent Parliaments will attempt to repeal or amend at their peril against the will of the people.

It is submitted with respect, that it is not clear whether the Attorney-General was referring to the fact that s.189 was not itself entrenched and therefore there was only a moral sanction on its repeal or whether he was asserting that the entrenchment provisions themselves were only of moral effect. It has been contended[2] that in fact the latter interpretation is what was intended and subsequent remarks in the same speech of the then Attorney-General would tend to substantiate this.[3]

> Under our constitution Parliament cannot bind successive Parliament and each successive Parliament may amend any law passed by a previous Parliament.

However some doubt is cast upon this by the attitude adopted by the National Government in 1966, with regard to the Electoral Bill of that year, which it failed to proceed with upon a realization that the view of the Opposition would prevent the necessary majority in the House to amend s.99 (which is a reserved provision) to enable minors serving with New Zealand Forces in active combat to vote.[4]

What in fact has Parliament purported to do in s.189? Basically it has laid down certain conditions which must be fulfilled before any

alteration, amendment or repeal can be effected to the sections enumerated; it does not involve questions of limiting the sovereign powers of the House of Representatives, or circumscribing its legislative competence. It creates only a situation similar to that which was before the House of Lords in the *Attorney-General* v. *Prince Ernest Augustus*.[5] In 1609 the United Kingdom Parliament had passed an Act which imposed *inter alia* a condition that nobody could be naturalized as an English subject unless they had taken the oath of allegiance within one month of the second reading of the Naturalization Bill in Parliament. When it was desired in 1705 to naturalise the Electress Sophia of Hanover who was not in England, two Acts were passed by Parliament. The first authorised the introduction of a Naturalization Bill that did not comply with the requirements of the 1609 Act and a subsequent Act naturalized the Electress Sophia. Viscount Simonds stated in *Attorney-General* v. *Prince Ernest Augustus*[6]

> It was the existence of the (1609) Act, whose purpose was plain upon its face that made it necessary to pass an Act preliminary . . .

It is submitted that this is an analogous situation to that which would exist should a Government in New Zealand wish to amend or repeal a section entrenched under s.189 of the Electoral Act knowing that it would be unable to gain the requisite two-thirds majority in the House of Representatives. There is nothing apart from the very real moral sanctions to prevent any Government repealing s.189 itself by a simple majority and thus leaving the way clear for alteration to any of the previously entrenched provisions by simple majority. However until the section is removed it is submitted that its requirements cannot be ignored or avoided. This is surely the logical and reasonable construction which must be placed upon these provisions of the Electoral Act. If an Act were passed without fulfilling the provisions of s.189 and the legislation were challenged in our Courts then it is submitted that it would not be upheld. As pointed out by Professor H. R. Gray[7]

> Where a document purporting to be an Act of Parliament dealing with a subject matter which is required to be passed by a procedure or bear a prescribed earmark, comes before the Court, the Court is bound to inquire whether it really is an Act of Parliament.

The Court could only test the validity of the procedure by reference to the existing law as contained in statutes and judicial precedents. The basic question which therefore must be answered is what is an Act of Parliament and it is submitted that the answer by Professor Gray is correct.[8]

> An Act of Parliament is a law enacted by Parliament in a particular form which may be prescribed by common law or by an earlier Act of Parliament.

In other words not any resolution of the House of Representatives in any form at all will be an Act of Parliament.

In England, the courts held as early as 1606 in *The Prince's Case*[9] that unless it was actually recorded that the Queen, the Lords Spiritual and Temporal and the Commons, had all assented, a resolution of those constitutent bodies would not be an Act of Parliament even though it was duly enrolled on the Roll of Parliament. Therefore for any Act of Parliament certain requirements must be satisfied in our system of law and although there is prima facie evidence of a legal enactment the courts will enquire and ascertain that all the formal requirements have

been adhered to. In 1954, the New Zealand Court of Appeal in *Simpson* v. *Attorney-General*[10] alluded to the proposition that it would not be competent for the Court to question the validity of documents printed as Acts of Parliament despite the fact that there may be some patent error on the face of the document. This reasoning developed to its logical conclusion would mean that a Cabinet could have provisions printed as an Act of Parliament and the courts would uphold its validity. Far from this being the case it is not even the law that provided all the constitutent elements of Parliament concur, Parliament may adopt any procedure it thinks fit to pass an Act, regardless of legislation prescribing the manner and form. As Gray says[11] "if Parliament does disregard these requirements the result is not an Act of Parliament."

Any suggestion that Parliament was unfettered in the form of legislation it passes and that Courts are unable to enquire whether Parliament sat in separate session or as a joint assembly was rejected in 1952 by the Appellate Division in South Africa in *Harris* v. *Donges*[12] and it was held that it was not open to Parliament to ignore legislation which had not been repealed. Here the Separate Representation of Voters Act 1951 (S.Af.) which fell within the sphere of s.35 and s.152 of the 1909 South Africa Act (U.K.) had not been passed as those sections required "by both Houses of Parliament sitting together and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses". The legislation had been enacted by simple majorities in both Houses of Parliament separately and the Court held it to be null and void.

Such a decision would it is true be of no binding authority in our courts, but a similar situation has been considered by the Judicial Committee of the Privy Council in *Bribery Commissioner* v. *Ranasinghe*[13] on appeal from the Supreme Court of Ceylon. The Constitution of Ceylon was contained in a British Order in Council of 1946 and by s.29(4) its provisions could be amended or repealed provided that they were not presented for Royal assent unless a certificate signed by the Speaker was thereon endorsed certifying that the votes cast in its favour had been equal to at least two-thirds of the total number of members in the House of Representatives. In Ceylon the Bribery Amendment Bill of 1958 had been passed without the requisite majority, and although assent had been given despite the absence of the Speaker's certificate, the Privy Council held that the enactment was null and void, and went on to say,[14]

> A legislature has no power to ignore the conditions of law making of the instrument which itself regulates its ability to make law.

The Judicial Committee further held[15]

> 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.

It is submitted that this decision is of vital importance when considering the effect of s.189 of the Electoral Act 1956. Here the Legislature has enacted that these particular provisions shall not be altered by the normal simple majority but by one of two special procedures. Should a Government at any time ignore these, then it is submitted that our

Courts would be bound by the decision in *Ranasinghe's* case[16] and would hold that the subsequent enactment was null and void.

Much of the argument against such provision having legal force and effect emenates first from analogy with the fact that one Parliament is not able to pass legislation which is unalterable, and secondly, by the introduction of considerations of sovereignty. The truth of the first contention is dramatically illustrated by the fact that it was provided in both the Act of Union with Scotland in 1706 and the Act of Union with Ireland of 1800, that certain aspects[17] were to last "for ever" and yet these have in fact been repealed. The ability of each Parliament to legislate upon any matter is not in question, for it is a long established part of our system of government that one Parliament cannot enact legislation which is unalterable. As was noted as early as 1686 by Herbert C.J.[18]

> If an Act of Parliament had a clause in it that it should never be repealed, yet without question, the same power that made it may repeal it.

This proposition is further illustrated by two more recent English cases[19] where it was held that the provisions of an Act which were to apply despite contrary provisions in a subsequent Act were of no effect if a subsequent Act either expressly or impliedly repealed the previous legislation. However this is not the type of situation created by s.189 of the New Zealand Act. Parliament has not attempted to take away the ability of a subsequent Parliament to legislate upon any matters, but has only laid down certain procedural requirements which must be satisfied before there can be amendment, alteration or repeal. Procedural requirements must be satisfied in any law-making process and the requirements entrenched by s.189 are no different in principle.

The considerations of Parliamentary sovereignty are integrally related to this first point, and again it must be noted that s.189 does not limit the sovereignty of subsequent Parliaments or circumscribe their legislating ability. In this situation no question of sovereignty arises. As has been stated,[20]

> A Parliament does not cease to be sovereign whenever its competent members fail to produce among themselves a competent 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 limitation thus imposed on some lesser majority does not limit the sovereign powers of Parliament itself which can always whenever it chooses pass the amendment with the requisite majority.

The legal force of the entrenching clauses does not detract from the sovereign supremacy of the New Zealand House of Representatives.

> The existence of a procedural restriction prescribing the manner and form of legislation or of certain kinds of legislation is not incompatible with legislative sovereignty. There is no magic about a bare majority as such.[21]

If one seeks to resolve the effect of the reserved provisions by reference to concepts of sovereignty, inescapable complications are created. If Parliament A is sovereign (meaning without limits or restraints of any sort) it is competent to enact any legislation in any form and to have any effect. However subsequent Parliament B is also sovereign and thus it can likewise legislate. Therefore it is conceivable that there will be laws at variance on the same matter and yet both are the resolutions of respective sovereign bodies. Theoretical considerations of sovereignty

lead only to a dichotomy which is irreconcilable and of no assistance in the resolution of the divergence of opinion. A sovereign body being procedurally fettered is not illogical or a contradiction in terms.[22]

> Parliament is still legally sovereign because no body can dictate to Parliament and because it cannot pass any Act which it cannot subsequently repeal.

It may therefore be concluded that as s.189 is not itself entrenched there is only a moral or political sanction against any Parliament repealing that section and thus leaving Parliament competent to alter or amend the sections enumerated in s.189(1) by the normal procedure of a simple majority. However until this preliminary step is taken a Parliament cannot ignore the procedural requirements for they form part of our law and thus should the validity of an enactment which had ignored the requirements be challenged in our courts, it would not be upheld.[23]

It is submitted that *Ranasinghe's* case[24] removes much of the controversy in this subject but still it may be argued that the decision of the Judicial Committee could be distinguished in that the procedural requirement in that case was contained in a written unified Constitution. It is submitted nonetheless that no valid logical distinction can be made. While it is true that New Zealand has no single constitutional document, this does not detract from the constitutional provisions which exist. The 1852 Constitution Act of the Imperial Parliament which granted a "Representative Constitution to the Colony of New Zealand" was itself only normal legislation but the sections of it which have not been repealed or amended still set out certain procedures which remain law. Our "Constitution" (although not the deliberation of a special constituent power as distinct from a legislative assembly) is to be found where all other laws of this country are found:—in statutes of the British Parliament (this is subject to the processes related to the Statute of Westminster and our adoption of it); in statutes of the New Zealand Parliament; in instruments issued under Letters Patent and otherwise under the Royal Preogative, and in decisions of the courts. It is submitted that the fact that the various constitutional provisions are thus scattered, would not be sufficient to allow a court to distinguish a case arising from reserved provisions of the 1956 Electoral Act being ignored, from the decision of the Privy Council.[25] Thus s.189 stands as law with full force and effect, binding upon any Parliament until removed by the proper legislative processes.

1 New Zealand Parliamentary Debates Volume 310, at 2852.
2 K. J. Scott, *The New Zealand Constitution,* 1st ed. (1962). 10.
3 *op. cit.* 2839.
4 The Bill to make this amendment was introduced by The Hon. J. R. Hanan but was not proceeded with.
5 [1957] A.C.436.
6 *supra,* 459.
7 "The Sovereignty of Parliament and The Entrenchment of Legislative Process", (1964) 27 M.L.R. 705 at 708.
8 "The Sovereignty of Parliament Today" (1953) 10 Toronto L.J. 54 at 58.
9 (1606) 77 E.R. 481.
10 [1955] N.Z.L.R.271.
11 "The Sovereignty of Parliament and the Entrenchment of Legislative Process", *op. cit.* 708.

12 [1952] 1 T.L.R.1245.
13 [1965] A.C.172.
14 *ibid,* 187.
15 *ibid,* 198.
16 *supra*
17 *Inter alia* the Act of Union with Scotland (1706) provided that professors of Scottish Universities should subscribe to a religious test but this was repealed by the Universities (Scotland) Act 1853. The Act of Union with Ireland (1800) deemed that continuance of "The United Church of England and Ireland" an essential and fundamental part of the union but, the Church of Ireland was dis-established by the Irish Church Act 1869.
18 *Godden* v. *Hales* (1686) 11 St. Tr. 1166, 1197.
19 *Ellen Street Estates, Ltd.* v. *Minister of Health* [1934] 1 K.B. 590; *Vauxhall Estates Ltd.* v. *Liverpool Corporation* [1932] 1 K.B. 733.
20 *Bribery Commissioner* v. *Ranasinghe, supra,* 200.
21 Gray, *op.cit.* 708.
22 see Gray, "The Sovereignty of Parliament Today", *op. cit.* 71.
23 see *Bribery Commissioner* v. *Ranasinghe, supra.*
24 *ibid.*
25 *ibid.*