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**Parliamentary Sovereignty and Written  
Constitutions in Comparative  
Perspective**



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## Introduction

Several chapters in this collection of essays to mark the 40<sup>th</sup> anniversary of the founding of the Republic of Sri Lanka examine the influence of the doctrine of parliamentary sovereignty on the substance of the Constitution of Sri Lanka of 1972 and the manner in which it was made.<sup>1</sup> This chapter places the Sri Lankan experience in comparative perspective. Many former colonies in the British Empire inherited both the culture and the conception of parliamentary sovereignty. All necessarily acquired written constitutions, at the time of independence if not before. The inevitable tension between written constitutions and parliamentary sovereignty had implications for the former while also prompting casuistic reformulation of the doctrine of parliamentary sovereignty itself. This chapter examines three states for the purposes of comparison with Sri Lanka: the United Kingdom, Australia and South Africa. The choice of the United Kingdom speaks for itself, as both the progenitor of parliamentary sovereignty and the site of significant contemporary challenges to it.<sup>2</sup> Australia and South Africa need more explanation. In both, as in Sri Lanka, parliamentary sovereignty left its mark on written constitutions. These two countries also provided the context for the two judicial decisions that, with the Sri Lankan case of *Ranasinghe*, provide the platform for the complex jurisprudence on the effect of constitutional entrenchment in politics that also aspire to parliamentary sovereignty.<sup>3</sup>

While the principal purpose of this chapter is to throw light on Sri Lankan constitutional experience, it serves other comparative purposes as well. It necessarily focuses attention on the distinctive features of parliamentary sovereignty as it is understood and practised in this tradition. To that extent it offers insights that may

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<sup>1</sup> See, in this volume, N. Jayawickrama, *Reflections on the Making and Content of the 1972 Constitution: An Insider's Perspective*; A. Welikala, *The Failure of Jennings' Constitutional Experiment in Ceylon: How "Procedural Entrenchment" led to Constitutional Revolution.*

<sup>2</sup> See also, in this volume, N. Walker, *Beyond the Unitary Conception of the United Kingdom.*

<sup>3</sup> *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394; *Harris v Minister of the Interior* 1952 (2) SA 428 (A); *Bribery Commissioner v Ranasinghe* (1965) AC 172.

be useful to all states in which parliamentary sovereignty has been influential including Australia, South Africa and the United Kingdom itself. In addition, examination of the application and evolution of parliamentary sovereignty for the purposes of this chapter demonstrates how abstract ideas operate differently and are altered by context as they move between jurisdictions, while retaining a degree of their original coherence. There is relatively little understanding of the processes and effects of the transplantation of constitutional concepts and this volume offers the opportunity to make a contribution to it.

The chapter begins by identifying the principal features of parliamentary sovereignty, with particular reference to its implications for the substance and status of constitutions, including the ways in which constitutions are made and changed. A second part explains the extent to which parliamentary sovereignty was absorbed into the colonies that constituted the British Empire and the challenges that it presented as the colonies achieved independence, with their own constitutions. This part provides the setting for the examination that follows of the interface between parliamentary sovereignty and post-independence constitutions in Australia, South Africa and Sri Lanka. The chronological ordering of these sections by reference to the dates of independence is designed to demonstrate the evolution of parliamentary sovereignty in response to successive constitutional conflicts in which it was implicated. A final part follows the evolution of parliamentary sovereignty through to recent debates in the United Kingdom. These show that parliamentary sovereignty is under pressure from contemporary constitutional developments even in its state of origin and in the absence of a written constitution.

## **Parliamentary Sovereignty**

The doctrine of parliamentary sovereignty as understood in the British constitutional tradition was articulated in authoritative form at the end of the 19<sup>th</sup> century by A.V. Dicey, although there

were earlier formulations of it to similar effect.<sup>4</sup> According to Dicey:

“The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”<sup>5</sup>

Several consequences followed from these two core features of the doctrine. The British Parliament could enact, amend or repeal any law that it wished.<sup>6</sup> No Parliament could bind its successors, to preclude them from passing particular laws. All Acts of Parliament had equal status; in particular, there was no difference between ‘constitutional’ and other laws. Judicial review of the validity of legislation was impossible.

Dicey’s parliamentary sovereignty operated in a particular institutional context, which mitigated its potential weaknesses. His elaboration of these identifies additional features of the doctrine that, with hindsight, are critical to it. First, while parliamentary sovereignty meant that, in theory, Parliament could enact any law, no matter how heinous, in practice it would not do so. Parliament was restrained by external pressures in the form of public opinion and, ultimately, the threat of civil disobedience.<sup>7</sup> There were internal constraints as well, which derived from the very character of the Parliament as the representative of the people.<sup>8</sup> Secondly, according to Dicey, there was no incompatibility between parliamentary sovereignty and the rule of law. Parliament made the law in the form of general rules. Once legislation was enacted, it was interpreted and applied by independent courts, imbued

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<sup>4</sup> In particular in W. Blackstone (2001) *Blackstone’s Commentaries on the Law of England* (W. Morrison, Ed) (London: Cavendish Publishing): pp.119-20.

<sup>5</sup> A.V. Dicey (1915) *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan): p.36.

<sup>6</sup> Ibid: pp.62, 65.

<sup>7</sup> Ibid: pp. 75-7.

<sup>8</sup> Ibid: pp. 77-9.

with an understanding of the common law.<sup>9</sup> The executive was bound to act within the limits of law, as determined and applied by the courts.<sup>10</sup> The common law developed and enforced through the courts provided adequate protection for rights.<sup>11</sup>

The doctrine of parliamentary sovereignty grew out of the particular historical experience of the United Kingdom. The British Constitution evolved organically over centuries as a series of interlocking institutions the operation of which was governed by a network of statutes, judicial decisions, constitutional conventions, practices and assumptions. By the 19<sup>th</sup> century it was widely admired for its relative protection of civil liberties and the economic prosperity with which it was associated. At the heart of the constitution lay the institution of Parliament comprising the House of Commons, the House of Lords and the Monarch, which combined to enact legislation, following procedures established by custom. Parliament itself was an ancient institution, which had evolved over time from the 13<sup>th</sup> century. Over the course of its history, the Parliament had become associated with the defeat of absolutism, limited government and ‘virtual’ representation that progressively became more real. As a body that was the product of evolution rather than deliberate design, it retained some properties of earlier times. The historical functions of the ‘High Court of Parliament’ were preserved until 2009 in the dual functions of the House of Lords, as both second chamber of the legislature and the highest appellate court.<sup>12</sup> Remnants of the mixed or balanced constitution of the 18<sup>th</sup> century continued to be reflected in the tripartite composition of the Parliament. The House of Commons gained ascendancy only gradually and there was sufficient ambiguity about the residual authority of the Monarch and the House of Lords to create an impression of the availability of checks on the excesses of exercise of majority power that itself constituted a form of restraint. Parliamentary sovereignty was the product of experience with this institution. It was not to be feared; its logic seemed to be reinforced by

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<sup>9</sup> Ibid: pp. 402-3.

<sup>10</sup> Ibid: pp. 405.

<sup>11</sup> Ibid: pp. 409.

<sup>12</sup> The judicial role of the House of Lords was systematised from 1876 in the Appellate Jurisdiction Act. Its judicial function ended in 2009, with the establishment of the United Kingdom Supreme Court.

democratisation; it worked in practice; and it was a convenient mechanism for governance of a large and widely dispersed empire.

The historical trajectory of the British Constitution set the British constitutional tradition apart as constitutionalism took hold elsewhere in the world. There was no need for a theory to justify the legitimacy of an ‘unwritten’ constitution that was the organic product of national experience. There was no need for a written constitution following the precedents set by the United States and France in the late 18<sup>th</sup> century. It followed that there was no need to explain the source of authority for a written constitution with superior status to ordinary law, to develop a distinctive process by which such a constitution might be made and changed, to identify a *pouvoir constituant*, or to distinguish it from a *pouvoir constitué*.<sup>13</sup> The shifting relationship of Monarch and Commons under the umbrella of Parliament blurred the loss of sovereignty by the Crown and caused its bifurcation between legal and political sovereignty lying, respectively, with the Parliament and the people. There was no occasion to reflect on the implications of what elsewhere was considered a defining event in the development of constitutionalism. There was no need to distinguish parliamentary sovereignty from the supremacy of Parliament under a written constitution.

### **Parliamentary Sovereignty in the Former British Colonies**

British institutions, laws and principles of a constitutional kind were introduced in varying degrees into all British colonies either during the colonial period or on independence. In some cases the transplant was deliberate. In others it was the result of instinctive emulation of British practice.

The culture and many of the features of parliamentary sovereignty were introduced too, as an assumed concomitant of

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<sup>13</sup> M. Loughlin, ‘*Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice*’ in M. Loughlin & N. Walker (Eds.) (2007) *The Paradox of Constitutionalism: Constituent Power and Constituent Form* (Oxford: OUP): Ch.2.

parliamentary and responsible government. In fact, however, parliamentary sovereignty was never enjoyed in the colonies, even after independence, in the form in which it was understood and practised in the United Kingdom. Before independence, the Parliament at Westminster remained sovereign and local self-governing institutions, including legislatures, were subordinate to it. From the time of self-government, each colony necessarily had a written constitutional instrument of some kind, to provide for the institutional infrastructure that self-government required. And a written Constitution remained necessary, if only for the same reasons, after independence brought release from the paramountcy of the British Parliament. Self-government and independence did not necessarily coincide. In some cases the latter was a drawn-out affair, retaining ultimate legal sovereignty for the British Parliament, to be exercised only with local consent.

Tensions centring on parliamentary sovereignty were inherent in these arrangements from the start. By definition, it was impossible to reconcile parliamentary sovereignty in its traditional form with the written constitutions that were indispensable in newly emerging states without established institutions of their own. Nor could the constitutional setting that moderated the operation of parliamentary sovereignty in the United Kingdom be instantly replicated in a post-colonial context. On the other hand, there was an obvious temptation to equate the attainment of the fullest possible measure of parliamentary sovereignty with complete independence, for genuine or political rhetorical purposes. In these circumstances, there was every incentive to minimise the status of local constitutions and the restraints they imposed. There was no developed, competing account within the dominant constitutional discourse to suggest any different course of action.<sup>14</sup>

On the contrary, the evolution of colonial constitutionalism tended to reinforce the trappings of parliamentary sovereignty. Early colonial constitutions typically emanated from the Imperial authorities or were acts of the local legislatures or both. The

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<sup>14</sup> Although of the interest in 'alternative sources of constitutionalism' by drafters of the Constitution of the Orange Free State in what now is South Africa in 1854: H. Klug (2010) *The Constitution of South Africa: A Contextual Analysis* (Oxford: Hart): p.10.

default assumption was that they could be amended by local legislation, enacted in the ordinary way. Special amending procedures were effective only if authorised by the sovereign British Parliament. The position was reinforced by the Colonial Laws Validity Act (CLVA), enacted by the British Parliament in 1865 to clarify the ambit of the authority of colonial legislatures to alter their own constituent legislation. Section 5 of the Act provided that: “Every colonial legislature shall have...full power to make laws respecting the constitution, powers, and procedure” of its legislature. This was, however, subject to a proviso that “such laws shall have been passed in such manner and form as shall from time to time be required by any Act of Parliament, letters patent, order in council, or colonial law...”. Under the CLVA also, therefore, the default position was flexibility, and entrenchment was effective only to the extent authorised by the Imperial Parliament.

The assumptions of parliamentary sovereignty underpinned the process by which the Dominions were released from the paramountcy of the British Parliament as they moved towards independence.<sup>15</sup> The Statute of Westminster 1931, enacted by the British Parliament following agreement by Dominion Governments,<sup>16</sup> lifted the CLVA in its application to Dominion Parliaments, provided that no Dominion law was to be void on the grounds of repugnancy to past or future Acts of the British Parliament and conferred on Dominion Parliaments authority to enact or repeal such legislation in its application to them.<sup>17</sup> The real possibility that this might undercut the supremacy of the federal Constitutions of Canada and Australia, which as a matter of law derived from enactment by the Imperial Parliament alone,

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<sup>15</sup> Ceylon, later to become Sri Lanka, was not a Dominion within the terms of the Statute of Westminster 1931. The Ceylon Independence Act 1947 (UK) mirrored the Statute of Westminster procedures in key respects, which will be described in the context of the discussion of parliamentary sovereignty in Sri Lanka, below.

<sup>16</sup> Key sections of the statute, including those discussed here, were expressed not to come into effect in Australia, New Zealand and Newfoundland unless adopted by the relevant Dominion Parliament. The adopting legislation was passed in Australia in 1942 with retrospective effect to 3<sup>rd</sup> September 1939: Statute of Westminster Adoption Act 1942 (Cth).

<sup>17</sup> Statute of Westminster 1931: s.2. Section 2 also applied to the Canadian provinces, but not to the Australian States: s.7(2).

was met by other sections that preserved their alteration procedures.<sup>18</sup> Ironically, therefore, the Imperial statute that provided the basis for Dominion independence was a continuing source of authority for the status of their entrenched constitutions.<sup>19</sup> The Statute also specifically preserved the alteration procedures for the Constitution Act of New Zealand, but not for the Constitution of the Dominion of South Africa, to which the Statute of Westminster also applied.<sup>20</sup>

The detail of the ways in which the tensions between parliamentary sovereignty and written constitutions played out in Australia, South Africa and Sri Lanka is examined in the following parts.

### **Parliamentary Sovereignty in Australia**

Australia was settled by the British as a series of six colonies from 1788. Over the course of the 19<sup>th</sup> century, each of the colonies acquired local self-government within the British Empire framed by constitutions enacted by their Parliaments pursuant to British authority. The terms of a federal constitution were negotiated and agreed between the colonies during the 1890s and came into effect as an Act of the British Parliament in 1901. The colonies became States of the Commonwealth of Australia. Their constitutions were ‘saved’ by section 106 of the Commonwealth Constitution, to the extent that they were not overridden by it, “until altered in accordance with the Constitution of the State.” In a remarkable example of incremental constitutional development, the Commonwealth and the States achieved independence from the United Kingdom separately over the

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<sup>18</sup> Statute of Westminster 1931: ss.7(1), 8.

<sup>19</sup> Ironically also, the doctrine of parliamentary sovereignty placed in question the capacity of the sovereign British Parliament to renounce authority over the Dominions in a way that bound future Parliaments. Ultimately, this unproductive conundrum is resolved by the realities of independent statehood. Whatever the constitutional position in the UK, the institutions of independent states would not accept the effect of British legislation in relation to them. In relation to Australia see *Sue v Hill* (1999) 199 CLR 462, 492, with reference to the implications of section 1 of the Australia Acts 1986.

<sup>20</sup> Statute of Westminster 1931: s.8.

course of the 20<sup>th</sup> century, in processes that arguably culminated for the Commonwealth in the Statute of Westminster 1931 (UK) and for the States in the Australia Acts 1986 (Cth and UK).<sup>21</sup>

On the face of it, parliamentary sovereignty has left a greater mark on the constitutions of the States than in the Commonwealth sphere. It has had subtle influence on the Commonwealth as well, however, in ways that are explained below.

All State Constitutions originated in Acts of the respective colonial Parliaments. All have subsequently been amended and most have been re-enacted by the Parliaments.<sup>22</sup> From the outset, these Constitution Acts could be changed in the same way as ordinary legislation, apart from what initially were only a few minor procedural restrictions on the alteration of particular sections that were imposed or authorised by Imperial legislation. It will be recalled that both the general power to amend and the obligation to comply with ‘manner and form’ requirements in passing legislation ‘respecting the constitution, powers, and procedures of the legislature’ were confirmed in 1865 by the CLVA.

Over the century and more that followed, the limited imperial authority to entrench particular parts of State Constitutions became the focal point of State constitutional law and practice. In place of reflection on whether and how the people of a polity can give themselves a constitution with the status of superior law attention was confined to the power to entrench, as if that were the sole indicator of constitutional character. The CLVA was assumed to mark out the boundaries of the power. And as it became used more extensively, questions were raised about exactly what kinds of changes fell within its ambit and whether the CLVA reference to alteration by a ‘legislature’ restricted the kinds of alteration procedures that could be imposed.

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<sup>21</sup> C. Saunders (2011) *The Constitution of Australia: A Contextual Analysis* (Oxford: Hart): pp.19-30.

<sup>22</sup> See now Constitution Act 1902 (NSW); Constitution of Queensland 2001; Constitution Act 1934 (SA); Constitution Act 1934 (Tas); Constitution Act 1975 (Vic); Constitution Act 1889 (WA).

Doubts about the efficacy of entrenchment by referendum were raised and resolved in 1930 in *Trethowan* when, relevantly for present purposes, Australia was not yet fully independent.<sup>23</sup> The context was a dispute over whether the Parliament of New South Wales could abolish its second Chamber, the Legislative Council, by ordinary legislation despite a provision in the constitution that required referendum approval for this purpose.<sup>24</sup> A majority of the High Court held, in effect, that the entrenching procedure must be followed, not on the grounds that this was a constitution with the status of superior law but because the Parliament of New South Wales was not fully sovereign and was subject to the CLVA.<sup>25</sup> A glimmer of a broader view appeared in the observation by Dixon J. that if a similar issue arose in the United Kingdom “the Courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside.”<sup>26</sup> That observation is now relevant to the important theoretical debate, drawing on the work of H.L.A. Hart, about whether sovereignty is ‘continuing’, thus precluding a Parliament from binding its successor or ‘self-embracing’, including even the power to limit itself.<sup>27</sup> It is a step on the way to the observation in *Ranasinghe*, 35 years later, that a “legislature has no power to ignore the conditions of law-making that are imposed by the instrument that itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign.”<sup>28</sup>

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In Australia, the question of the status of State Constitutions is complicated further still by the ambiguous provision in the Commonwealth Constitution ‘saving’ State Constitutions, which was quoted at the beginning of this part. In fact, however,

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<sup>23</sup> *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

<sup>24</sup> Constitution Act 1902 (NSW): s.7A. The entrenching provision was itself entrenched by referendum; a safeguard against evasion that is now normal practice.

<sup>25</sup> *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, 418 (Rich J), 425-6 (Dixon J).

<sup>26</sup> *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, 426, Dixon J.

<sup>27</sup> H.L.A. Hart (1961) *The Concept of Law* (Oxford: Clarendon Press): p.146.

<sup>28</sup> *Bribery Commissioner v Ranasinghe* (1965) AC 172, 197.

Australian discourse has shown little interest in theories of self-embracing sovereignty, *Ranasinghe* or even Section 106 as pathways to a more principled approach to State constitution-making. Instead, it has remained focussed to the point of obsession on the need for superior positive law to authorise entrenchment of State Constitutions. Thus, when State Parliaments finally were released from the paramountcy of United Kingdom legislation in 1986, the authority to entrench that the CLVA had provided was replaced by new authority with almost identical scope in Section 6 of the Australia Acts. And when the question of the scope of the power to entrench once again came before the High Court, admittedly obliquely, the court appeared to accept that the source of the power to entrench now lies in the Australia Acts and that State Parliaments otherwise have plenary power to alter their own constitutions.<sup>29</sup>

This is not a satisfactory outcome; and nor is it consistent with practice. Australian State Constitutions presently entrench a wide variety of matters that on any view exceed the authority provided by Section 6 of the Australia Acts.<sup>30</sup> Oddly, whether these efforts are effective has never finally been tested. A wide variety of special alteration procedures also are in use, ranging from special parliamentary majorities to referendum. Almost invariably, these are imposed by ordinary parliamentary majorities. Attitudes sourced in parliamentary sovereignty have wasted the opportunity to develop constitutionalism at the state level in Australia. The result is a series of somewhat dreary constitutional instruments, parts of which are entrenched, sometimes with questionable rationale or legal effect. Otherwise they have no special status.

By contrast, the national or Commonwealth Constitution is readily accepted as fundamental law that is subject to judicial review and can be changed only by double majorities at

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<sup>29</sup> *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 574; see also *McGinty v Western Australia* (1996) 186 CLR 140, 297 (Gummow J). The question is not finally settled, however: Saunders (2011): pp.50-58.

<sup>30</sup> See, for example, Constitution Act 1975 (Vic) s 18 (entrenching provisions relating to local government, the Supreme Court, the Auditor-General and the Ombudsman); Constitution of Queensland 2001: ss.77-78 and Constitution Act 1934 (SA): s.64A (entrenching provisions relating to local government).

referendum.<sup>31</sup> The Constitution was originally made by a process that involved representative constitutional conventions. Voters in each colony accepted the constitution by referendum, to signify their consent to join the federation. In Australia, as elsewhere, a written entrenched constitution was understood as the *sine qua non* of federation. For this purpose, the very different constitutional tradition of the United States was the model. The process by which the Commonwealth Constitution was made also drew on United States experience and broadly suited the significance of the occasion.

Even the Commonwealth Constitution, however, bears witness to the influence of parliamentary sovereignty. Historically, it became law as an Act of the then sovereign British Parliament, from which it derived its superior status. Even now, in outward form, it remains a section of the Commonwealth of Australia Constitution Act 1900 (Imp). The status of the Constitution as an Act of paramount force was expressly saved by the Statute of Westminster and the Australia Acts through which Australia achieved independence.<sup>32</sup> In consequence, it is still possible to trace the authority for the Constitution to the British Parliament, although popular sovereignty now offers an alternative and more palatable explanation, which also has the imprimatur of the High Court.<sup>33</sup> The dominant approach to constitutional interpretation was forged in 1920, building on the character of the constitution as a statute.<sup>34</sup> The high rate of rejection of proposals for constitutional change at referendum may be attributable to the failure of successive governments to divorce constitutional change sufficiently from day to day politics to create a constitutional moment in which the interests of the electorate are engaged.<sup>35</sup>

There is one further, significant respect in which Australian constitutionalism is influenced by the attitudes of parliamentary

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<sup>31</sup> Section 128 requires a referendum to be accepted by a national majority and by majorities in a majority of States.

<sup>32</sup> In ss. 8 and 5, respectively.

<sup>33</sup> *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 137-38 (Mason CJ).

<sup>34</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (Engineers' case) (1920) 28 CLR 129.

<sup>35</sup> Only 8 of a total of 44 referendums have been accepted since federation.

sovereignty. The Commonwealth Constitution deals almost exclusively with the institutional arrangements of federalism and separation of powers. The decision not to include a bill of rights in 1901 can be attributed to the assumption associated with parliamentary sovereignty that rights are adequately protected by Parliaments and the common law. Although the flaws in this assumption have been evidenced since, not least by the experiences of Australia's minority indigenous peoples and other minority groups, resistance to systemic legal rights protection has persisted. The introduction of legislative rights instruments in New Zealand and the United Kingdom in a form that was designed to preserve parliamentary sovereignty while enhancing rights protection attracted considerable attention in Australia.<sup>36</sup> These examples were emulated, with an even more cautious format, in two sub-national jurisdictions,<sup>37</sup> ironically with insufficient attention to the implications of the Australian constitutional framework, which has caused them to be interpreted more restrictively still.<sup>38</sup> But even this was a bridge too far for the Commonwealth. A 2009 recommendation for a legislative bill of rights by an advisory body appointed by the government<sup>39</sup> was rejected in favour of a parliamentary process to scrutinise all proposed legislation and regulations by reference to Australia's international human rights commitments.<sup>40</sup> The process is still too new to evaluate, although there are plenty of grounds for scepticism. In any event, this course of events offers ample evidence of the continuing influence of parliamentary sovereignty in Australia.

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<sup>36</sup> Bill of Rights Act 1990 (NZ); Human Rights Act 1998 (UK).

<sup>37</sup> Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic).

<sup>38</sup> *Momcilovic v The Queen* (2011) HCA 34.

<sup>39</sup> National Human Rights Consultation, *Report* (2009)

<http://www.humanrightsconsultation.gov.au/Report/Pages/National-Human-Rights-Consultation-Report---Contents.aspx>. (Last accessed, 13<sup>th</sup> August 2012)

<sup>40</sup> Attorney-General of Australia, National Human Rights Framework (2010), <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/default.aspx>, of which the centrepiece is the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth). (Last accessed, 13<sup>th</sup> August 2012).

## Parliamentary Sovereignty in South Africa

The territory of South Africa was colonised by both the Dutch and the British.<sup>41</sup> Its diverse population included a large African majority, descendants of the colonisers and immigrants from elsewhere. The four British colonies were united in a unitary Dominion by the South Africa Act 1909 (UK). The Act was passed by the British Parliament following a National Convention in South Africa and provided the South African Constitution until 1961. The institutional arrangements established by the South Africa Act were broadly modelled on those at Westminster and provided for parliamentary government, with the important exception of a racially discriminatory franchise. However, a compromise between the British and colonial politicians entrenched the pre-existing voting rights of non-white voters in the Cape of Good Hope.<sup>42</sup> Under Section 35, no person capable of being registered to vote in the Cape could be disqualified solely on the basis of race or colour, unless the legislation was passed by a two-thirds majority in a joint sitting of both Houses. Section 152 of the Act permitted the Parliament to amend or repeal any of its provisions. But it also required amendments to certain provisions, including Section 35 and Section 152, to be passed by a two-thirds majority, in the same way.

In the early 1950s, a National Party government sought to further restrict the participation of non-white South Africans in the political process. The Separate Representation of Voters Act 1951 provided for separate electoral rolls for European and non-European voters and limited the representation of the latter in the Parliament. As the government could not muster the requisite two-thirds majority the Separate Representation of Voters Act was enacted by ordinary legislation. The challenge to the legality of the legislation in *Harris v Minister for the Interior*<sup>43</sup> turned largely on the tension between parliamentary sovereignty and the

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<sup>41</sup> For earlier phases of historical development see Klug (2010): p.8.

<sup>42</sup> J. Dugard (1978) *Human Rights and the South African Legal Order* (Princeton, NJ: Princeton UP): p.26; I. Loveland (1999) *By Due Process of Law: Racial Discrimination and the Right to Vote in South Africa 1855-1960* (Oxford: Hart): pp.122-5.

<sup>43</sup> *Harris v Minister for the Interior* 1952 (2) SA 428 (A).

entrenched provisions of a constitution, which in this case had a protective purpose.

The government argued that because the South African Parliament was sovereign it was not bound by purported limitations on its authority and that courts could not set aside its laws.<sup>44</sup> To negate the legal effect of the constraints of the South Africa Act, the government pointed to Section 2(2) of the Statute of Westminster, which gave the Dominion Parliaments power to amend and repeal British legislation in its application to them and stipulated that Dominion laws would not be void for repugnancy with British legislation. It followed that the South African Parliament had become fully sovereign in 1931 and could legislate in the ordinary manner inconsistently with British legislation, including the entrenched provisions of the South Africa Act.<sup>45</sup>

The Supreme Court nevertheless held the Act invalid on the grounds that it had not been enacted with the necessary two-thirds majority required by the South Africa Act. The South Africa Act, and not the Statute of Westminster, established and defined the Parliament. As defined by the South Africa Act the Parliament normally was bicameral, except in situations such as that prescribed in Section 35, in which it was required to operate unicamerally with a two-thirds majority. Chief Justice Centlivres, for the Court, observed that: “one is doing no violence to language when one regards the word ‘Parliament’ as meaning Parliament sitting either bicamerally or unicamerally in accordance with the requirements of the South Africa Act.”<sup>46</sup> The Court in *Harris* thus characterised the procedural rules in the South Africa Act as part of the definition of Parliament.<sup>47</sup> The

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<sup>44</sup> *Harris* at 442-4. See also the summary of parliamentary debates, in G. Marshall (1957) *Parliamentary Sovereignty and the Commonwealth* (Oxford: Clarendon Press): pp.157-69.

<sup>45</sup> Marshall (1957): pp.140, 149, notes that this view was accepted by the great majority of constitutional authorities in South Africa and Britain and had received some judicial support in the case of *Ndlwana v Hofmeyer* (1937) AD 229, upholding the validity of legislation removing African voters from the roll.

<sup>46</sup> *Harris v Minister of the Interior* (No 1) 1952 (2) SA 428 (A), 463.

<sup>47</sup> In this the court’s reasoning was very similar to the argument made by Denis Cowan prior to the decision in *Harris*: D.V. Cowan (1951) *Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act* (Cape Town: Juta & Co).

Parliament that held the sovereign power for which the government contended was the Parliament as defined by the South Africa Act.<sup>48</sup>

The outcome of *Harris* was similar to that in *Trethowan* insofar as the Parliament was required to comply with pre-existing procedural requirements. The bases for the two decisions were different, however. *Trethowan* was decided on the basis of the continued application of the terms of the CLVA. When *Harris* was decided, neither the CLVA nor the doctrine of paramountcy of British law still applied in South Africa. The Court in *Harris* did not characterise the requirements of the South Africa Act as ‘manner and form’ provisions. Rather, its decision drew on the idea that a parliament might be reconstituted in various ways, leaving parliamentary sovereignty intact. This convenient exercise in sophistry has become a familiar means of reconciling parliamentary sovereignty with constitutional alteration procedures that differ from those for ordinary law.

The government was not persuaded. In pursuit of the unrestricted authority of the Parliament as normally constituted, Prime Minister Malan argued that it was “imperative that the legislative sovereignty of Parliament should be placed beyond any doubt, in order to ensure order and certainty.”<sup>49</sup> Drawing on another strand of the ancient history of the institution of Parliament, legislation was passed to create the ‘High Court of Parliament’ as a ‘court of law,’ comprising members of the lower house of the Parliament, charged with reviewing all judgments of the Supreme Court which declared legislative provisions invalid.<sup>50</sup> This legislation was itself struck down by the Supreme Court, on the basis that the entrenched provisions of the South Africa Act envisaged judicial protection, which could not be provided by a body that in effect was the Parliament functioning under another name.<sup>51</sup> The government finally achieved its voting laws in 1956

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<sup>48</sup> Marshall (1957): p.175.

<sup>49</sup> Quoted in E.N. Griswold, ‘*The Demise of the High Court of Parliament in South Africa*’ (1952-53) 66 *Harvard Law Review* 864, 870.

<sup>50</sup> High Court of Parliament Act 1952.

<sup>51</sup> *Harris v Minister of the Interior* (No 2) 1952 (4) SA 769 (A).

after making changes to the composition of the second Chamber to ensure the two-thirds majority that it needed.<sup>52</sup>

Political rhetoric about parliamentary sovereignty in South Africa was intertwined with independence and republicanism. The government repeatedly argued that the South African Parliament must be able to function in the same way as the British Parliament if South Africa was a truly sovereign state.<sup>53</sup> While the Court in *Harris* made the obvious point that many fully independent states, including the United States, did not have sovereign legislatures in the Diceyan sense,<sup>54</sup> parliamentary sovereignty remained a fixation. The rhetoric of independence was fuelled by the source of the restrictions in British legislation.

These, at least, were severed by the republican Constitution of 1961, pursuant to which the sovereignty of the Parliament was almost, if not quite, complete, in Diceyan terms. A majority of 52% of predominantly white voters agreed to the establishment of a republic but the constitution itself was enacted by a simple majority in the Parliament and there was no distinctive constitution-making process.<sup>55</sup> The entrenchment of official languages in the South Africa Act was repeated in the 1961 Constitution and explained in terms that recalled the reconstitution rationale in *Harris*:

“...the entrenchment was written into the South Africa Act by an ordinary majority of the British Parliament, which was the creator of the South Africa Act. In the same way it is possible for this Parliament, which is the creator of the

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<sup>52</sup> South Africa Act Amendment Act 1956. This legislation was challenged but upheld on the basis that the Senate had been validly reconstituted and the South Africa Amendment Act 1956 properly passed according to the entrenched procedures: *Collins v Minister of the Interior* 1957 (1) SA 552 (A). See further: Marshall (1957): pp.230-48.

<sup>53</sup> Parliamentary debates extracted in Marshall (1957): p.192; D.V. Cowan, ‘Legislature and Judiciary: Reflections on the Constitutional Issues in South Africa’ (1952) 15 *Modern Law Review* 282, 293.

<sup>54</sup> *Harris v Minister of the Interior* (No 1) 1952 (2) SA 428 (A), 468.

<sup>55</sup> E. Kahn, ‘The New Constitution’ (1961) 78 *South Africa Law Journal* 244, 255.

succeeding Parliament, to bind that Parliament by an entrenchment like this.”<sup>56</sup>

Other entrenched provisions were simply repealed. The effectiveness of doing so without a two-thirds majority was never tested. The new constitution expressly precluded judicial review of the validity of legislation except on the grounds of infringement of the provisions relating to official languages.<sup>57</sup>

The parliamentary sovereignty thus secured led to the disaster of apartheid. The South African case is distinctive in the sense that the Parliament effectively represented only the white minority. At the very least, however, it demonstrates that parliamentary majorities will not necessarily act in the interests of minorities or those who are not represented at all. The South African experience from 1961 is a continuing reminder of the limitations of parliamentary sovereignty in its unrestricted form without appropriate constitutional safeguards enforced through judicial review.<sup>58</sup>

When apartheid finally collapsed in the early 1990s parliamentary sovereignty was deliberately and comprehensively repudiated. The new Constitution of 1996 was enacted by special majorities in a Constitutional Assembly that also functioned as a Parliament, elected by universal suffrage. An imaginative constitution-making process that still provides a world benchmark encouraged public participation and sought popular support for the new regime.<sup>59</sup> The new constitution was carefully designed to balance effective with limited government and included a wide-ranging bill of rights enforced by a system of judicial review with a new, independent Constitutional Court at its apex. In the words of former Chief Justice Ismail Mahomed:

“The causes of the previous pathology were identified as the awesome sterility of the doctrine of parliamentary sovereignty and the arbitrary denial of the right of suffrage

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<sup>56</sup> Ibid: p. 274.

<sup>57</sup> Republic of South Africa Constitution Act 1961: s.59.

<sup>58</sup> Dugard,(1978): p.36; Loveland (1999): pp.403-4.

<sup>59</sup> V. Hart, ‘*Democratic Constitution Making*’ (2003) *Special Report 107*, (Washington: United States Institute of Peace): pp.78.

to a minority defined on the grounds of colour. The result had been a demeaning constitutional and political impotence, in preventing the enactment of manifestly unjust laws. An omnipotent Parliament, determined to enact such laws, had been freed by its unrestrained sovereignty from the constitutional discipline of effective judicially enforceable checks and from the political discipline of subjecting itself to the risk of being voted out of office by an electorate universally franchised. The new Constitution sought to remedy both these causes, politically by extending the power of the vote to all adult citizens and constitutionally by entrenching within its structures the fundamental rights which no government however popular, however mighty, or however bona fide, would be entitled to transgress.”<sup>60</sup>

In the context of this chapter, South Africa exemplifies not only the excesses of parliamentary sovereignty but also the constitutional alternatives to it.

### **Parliamentary Sovereignty in Sri Lanka**

Sri Lanka was the British colony of Ceylon from 1815 to 1948. Its population comprised a Buddhist Sinhalese majority and a Tamil minority, together with smaller proportions of the descendants of immigrants from elsewhere. In complex ways, British colonial rule contributed to tensions between the Sinhalese and Tamil peoples, which worsened over time to the point of civil war, which formally ended in 2009. The potential for constitutional solutions to secure peaceful co-existence was complicated by attitudes borne of parliamentary sovereignty and remains complicated still.

Sri Lanka’s pathway to independence differed from those of Australia and South Africa. The Statute of Westminster did not apply to Ceylon. Rather after agitating for independence over many years, it was granted Dominion status by Britain in 1946.

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<sup>60</sup> I. Mahomed, ‘*Constitutional Court of South Africa*’ in C. Saunders (Ed.) (1996) *Courts of Final Jurisdiction: The Mason Court in Australia* (Annandale: The Federation Press): p.168.

The Constitution of 1946 was an Order-in-Council made by the King. In 1947, British legislation removed the power of the United Kingdom Parliament to legislate for Ceylon except at its request; freed the Parliament of Ceylon from the paramountcy of British law; and amended the Constitution to permit Ceylon make laws in the areas of defence, security and foreign affairs, which initially had been reserved to Britain.<sup>61</sup> The Constitution of 1946 as amended in 1947 was substantially based on a draft prepared in Ceylon.<sup>62</sup> It established a Westminster style parliamentary system of government, with a bicameral parliament comprising the King, a House of Representatives and a Senate. Section 29 dealt with legislative power, including the power of constitutional amendment. Plenary power was conferred in Section 29(1) to make laws for ‘the peace, order and good government’ of Ceylon. But subsections 29(2) and (3) rendered void laws that prohibited or restricted the free exercise of any religion, or that imposed liabilities or conferred privileges on persons of a particular community or religion. And subsection 29(4) provided that any Bill to amend or repeal any provisions of the constitution must be certified by the Speaker of the House of Representatives to have been supported by two-thirds of the whole number of the members of the House.

The effect of these substantive and procedural restrictions on parliamentary sovereignty became the subject of legal and political debate. Ivor Jennings observed that, in common with most parliaments governed by a written constitution, the powers of the Parliament of Ceylon under the 1946 Constitution were “not that of a sovereign legislature,” using the term in the Diceyan sense. Jennings explained the minority protections as a limitation that Ceylon chose “to impose on her legislature in the interest of her own people” which could be altered, and even abolished, by the Parliament following the procedures set out in Section 29(4).<sup>63</sup> Other scholars took a different view of the authority of the Parliament, arguing that Section 29(2) imposed an absolute limitation on the powers of the Parliament that could not be

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<sup>61</sup> Ceylon Independence Act 1947 (UK); Ceylon (Independence) Order in Council of 1947.

<sup>62</sup> Jayawickrama (2012).

<sup>63</sup> W.I. Jennings (1953) *The Constitution of Ceylon* (3<sup>rd</sup> Ed.) (Oxford: OUP): p.201.

amended, even through the procedure in Section 29(4). While this argument is redolent of contemporary debates on unconstitutional constitutional amendment of which the Indian ‘basic structure’ doctrine is a variant,<sup>64</sup> at the time it turned on a point of textual interpretation. The power to amend the constitution in Section 29(4) commenced with the words “In the exercise of its powers under this section, Parliament may amend or repeal and of the provisions of this [Constitution].” By framing the Parliament’s power to amend the constitution in this way, it was argued that any amendments to the constitution were subject to the limitations set out in Section 29(2), so that Section 29(2) could not itself be amended following the procedure in Section 29(4).<sup>65</sup> On this view, Section 29(2) was a permanent limitation on the legislative power of the Parliament within the confines of the 1946 Constitution.

This issue was never directly determined by a court. Instead, the leading case on Section 29 arose in the context of constitutional provisions dealing with the composition of the judiciary. *Bribery Commissioner v Ranasinghe* concerned the validity of legislation that established a tribunal to hear charges of bribery, the members of which were appointed by the Minister of Justice. Mr Ranasinghe was convicted by the tribunal, but appealed on the grounds that the legislation and therefore the tribunal constituted by it contravened provisions of the constitution dealing with appointments to the judiciary. The argument was upheld by the Supreme Court. Because the Bribery (Amendment) Act was not certified to have been passed by a two-thirds majority as required by Section 29(4), the relevant provisions of the constitution applied and the law was void. On appeal to the Privy Council, the government argued, *inter alia*, that the Parliament was sovereign subject only to the limitations in Section 29(2) and (3). Apart from these, it claimed, the Constitution of 1946 was ordinary legislation and could be amended or repealed by later inconsistent legislation,

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<sup>64</sup> *Kesavananda v Kerala* (1973) SCR 1461.

<sup>65</sup> C.F. Amerasinghe, ‘*The Legal Sovereignty of the Ceylon Parliament*’ (1966) *Public Law* 65, 74; M.L. Marasinghe, ‘*Ceylon: A Conflict of Constitutions*’ (1971) 20 *International and Comparative Law Quarterly* 645, 647. For a response to this argument, see L.J.M. Cooray (1971) *Reflections on the Constitution and the Constituent Assembly* (Colombo: Hansa Publishers): pp.65-68; Welikala (2012b).

even by implication.<sup>66</sup> In rejecting the argument on appeal, the Privy Council affirmed that the requirements of s 29(4) were binding because ‘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 laws’.<sup>67</sup> The Privy Council also made some observations about the implications for parliamentary sovereignty of ‘manner and form’ provisions of this kind under a written constitution:

“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... The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.”<sup>68</sup>

The reasoning in *Ranasinghe* built on the jurisprudence in *Trethowan* and *Harris*. Together these cases came to represent a rationalisation of parliamentary sovereignty under a written constitution where special alteration procedures applied. A sovereign parliament is free to make laws on any matter whatsoever even if it is constrained by rules about how the parliament is constituted for particular purposes and the procedures that it must follow to enact legislation. The Privy Council’s decision in *Ranasinghe* is significant for the width of the proposition that a parliament must comply with the procedural rules set out in the constitution or “instrument which regulates its power to make laws” irrespective of “the question whether the legislature is sovereign.”<sup>69</sup>

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<sup>66</sup> *Bribery Commissioner v Ranasinghe* (1965) AC 172, 181-2.

<sup>67</sup> *Ibid*: p.197.

<sup>68</sup> *Ibid*: p.200.

<sup>69</sup> *Ibid*: p.197.

This aspect of *Ranasinghe* was not the immediate source of controversy in Sri Lanka. Attention focused instead on an observation by Lord Pearce that Section 29(2) represented “the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted the Constitution; and these are therefore unalterable under the Constitution.”<sup>70</sup> Together with a remark in an earlier Privy Council decision that Section 29(2) specified “fundamental reservations”<sup>71</sup> this was taken to support the view that Section 29 in its entirety was beyond the reach of the Parliament, however constituted.

Reaction to this possibility fed into the political debate about constitutional reform in connection with the establishment of a Sri Lankan republic.<sup>72</sup> Parliamentary sovereignty featured strongly in discussion of a new constitution, and came to influence both its substance and the process by which it was made. On the assumption that the Parliament was unable to amend the constitution to remove the restrictions in Section 29(2), but wanted to do so, only two options presented themselves: the British Parliament could be invited to enact a new constitution for Sri Lanka, or Sri Lanka could make a new ‘revolutionary’ constitution for itself.<sup>73</sup> The former was not a palatable choice for an independent Sri Lanka. Following victory in the 1970 general election, the incoming United Front government chose the latter. A Constituent Assembly was established, comprising all the members of the House of Representatives, to “draft, adopt and operate a new Constitution.”<sup>74</sup>

As in South Africa, parliamentary sovereignty was intertwined with considerations of independence. The new constitution was to derive its authority “from the people of Sri Lanka and not from

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<sup>70</sup> Ibid, pp.193-194.

<sup>71</sup> *Ibralebbe v The Queen* (1964) AC 900, 923, Viscount Radcliffe.

<sup>72</sup> Parliament of Ceylon, House of Representatives, *Parliamentary Debates*, 16<sup>th</sup> August 1969: Col.1158.

<sup>73</sup> Welikala (2012b).

<sup>74</sup> Election manifesto of the United Front party for the 1970 general election, quoted in M.J.A. Cooray (1982) *Judicial Role under the Constitutions of Ceylon/Sri Lanka: An Historical and Comparative Study* (Colombo: Lake House): p.218.

the power and authority assumed and exercised by the British Crown and Parliament in establishing the present Constitution they gave us.”<sup>75</sup> The constraints on the powers of the Parliament to amend the constitution in Section 29 fed the perception that Ceylon was less than completely independent under the Constitution of 1946 and that, lacking parliamentary sovereignty of the kind enjoyed by the United Kingdom, Ceylon itself was not a sovereign nation.<sup>76</sup> By contrast, the republican Constitution of 1972 would be an autochthonous constitution, representing a complete break with the Constitution of 1946 and the severance of all ties to the United Kingdom.

As a product of revolution rather than legal continuity, the new constitution needed a story to explain its legitimacy and justify its status as binding law. Since the revolutions of the late 18<sup>th</sup> century, this problem generally had been resolved by recourse to the authority of the people acting collectively, manifested in the decisions of a specially constituted Constituent Assembly, or in approval of the new constitution by referendum, or both.<sup>77</sup> Sri Lanka ostensibly opted for a Constituent Assembly. On closer examination, however, the process had all the hallmarks of parliamentary, not popular, sovereignty. The mandate for the Constituent Assembly derived from the election manifesto of the United Front Party. Moreover, while the Assembly met in the Navarangahala<sup>78</sup> rather than in the Parliament building, it was otherwise indistinguishable from the Parliament, constituted by the same members, sitting in the same formation. The majority United Front party controlled the agenda and maintained strict party discipline. Proposals from the opposition and minor parties were rejected, to the point where some voted against the draft constitution and others boycotted the proceedings.<sup>79</sup> The Constituent Assembly was, in effect, the Parliament rebadged.

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<sup>75</sup> Prime Minister Sirimavo Bandaranaike, Speech to the meeting of the members of the House of Representatives at Navarangahala, Colombo, 19<sup>th</sup> July 1970, quoted in M.J.A. Cooray (1982): p.219.

<sup>76</sup> Welikala (2012b).

<sup>77</sup> A. Arato, ‘*Forms of Constitution Making and Theories of Democracy*’ (1995) 17 *Cardozo Law Review* 191.

<sup>78</sup> At the time, a relatively new theatre in Colombo.

<sup>79</sup> Jayawickrama (2012).

The consequence of this affirmation of the constituent power of the Parliament was an arrogation of substantive power to it. As Jayawickrama shows in his chapter in this volume, the institution that assumed the authority to draft and adopt the new constitution also benefited from it, in confirmation of Jon Elster's theory about the effects of institutional self-interest in constitution-making.<sup>80</sup> The Constitution of 1972 reflected the interests and preferences of the current parliamentary majority. It would not survive the next change of government in 1977.

The 1972 Constitution retained many features of its predecessor, including a Westminster-style parliamentary system of government and a non-executive head of state. In a key point of difference, however, the new constitution minimised the fetters on legislative power to move the Parliament as close as possible to sovereignty in the British sense.<sup>81</sup> The constitution claimed to rest on "the Sovereignty of the People... exercised through a National State Assembly of elected representatives of the People" which is "the supreme instrument of State power of the Republic" exercising the "legislative power of the people"; "the executive power of the people" and "the judicial power of the People through courts and other institutions created by law."<sup>82</sup> The new constitution placed minimal restrictions on the legislative powers of the Parliament. The protections for minority interests in Section 29 were removed, although manner and form procedures for the alteration of the constitution were retained. Acting with the support of a two-thirds majority, the Parliament could amend or repeal the constitution in whole or in part and could enact a new constitution. Judicial review of the validity of legislation also was precluded, on the grounds of inconsistency with parliamentary sovereignty.<sup>83</sup>

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<sup>80</sup> J. Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Review* 364, 380-2.

<sup>81</sup> M.J.A. Cooray (1982): pp. 236-7.

<sup>82</sup> Constitution of Sri Lanka (1972): ss.4, 5.

<sup>83</sup> Constitution of Sri Lanka (1972): s.48(2). In relation to judicial review, Dr Colvin de Silva stated: "Whether we have faith in the Supreme Court is not the issue. Do we want a legislature that is sovereign or do we not? That is the true question. If you say that the validity of a law has to be determined by anybody outside the law-making body, then you are to that extent saying that your law-making body is not completely the law-making body": Speech to the United

The parliamentary system itself did not last long. Following a change of government in 1977, a new constitution was enacted by a two-thirds majority of the Parliament. The 1978 Constitution, which remains the Constitution of Sri Lanka, established a strong semi-presidential form of government. The President is directly elected, as both the head of state and the head of the government and the presidency is a powerful institution. The constitution confers power on the President to appoint the Prime Minister and other Ministers, to appoint judges and to declare a state of emergency during which the President may override any law passed by the Parliament and make regulations, subject to subsequent parliamentary approval.<sup>84</sup> Constitutional amendments made in 2010 gave the President further authority over all appointments to the civil service, judiciary and police, and removed the bar on the president serving more than two terms.<sup>85</sup>

On the face of it, the doctrine of parliamentary sovereignty was finally overtaken by the Constitution of 1978. The people had been formally acknowledged as sovereign since 1972. Not only was a two-thirds majority now required for constitutional alteration but some changes required approval at referendum as well.<sup>86</sup> The authority of the Parliament was severely weakened by the creation of a powerful executive presidency with a claim to electoral legitimacy of its own.

But attitudes and practices consistent with parliamentary sovereignty remain. The 1978 Constitution was enacted by the Parliament, now described as also comprising the people in the case of changes requiring approval at referendum.<sup>87</sup> The

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Nations Association of Ceylon, Seminar on 'Fundamental Rights in the Ceylon Constitution', Royal College Hall, 26<sup>th</sup> June 1968, quoted in Jayawickrama (2012). See also M.J.A. Cooray (1982): p. 224, quoting proceedings of the Constituent Assembly.

<sup>84</sup> Constitution of the Democratic Socialist Republic of Sri Lanka (1978): Arts.43, 44, 107, 155, as amended.

<sup>85</sup> Eighteenth Amendment to the Constitution (2010).

<sup>86</sup> Constitution of the Democratic Socialist Republic of Sri Lanka (1978): Arts.82(5), 83. In addition, in terms of Art.154G(2), amendments to the constitutional framework of devolution under the Thirteenth Amendment to the Constitution (1987) entail a role for the Provincial Councils in addition to Parliament.

<sup>87</sup> Ibid: Art.4(a).

Constitution of Sri Lanka continues to concentrate public power, albeit now in the office of the President. Proposals for effective devolution have never managed to overcome the claims of a unitary state on Sri Lankan constitutional imagination. Judicial review of legislation post-enactment is proscribed and pre-enactment review is limited.<sup>88</sup> Judicial power continues to be described as “exercised by Parliament through courts.”<sup>89</sup> Sri Lanka is no longer a state where parliamentary sovereignty applies but its continuing influence is unmistakable.

## **Conclusion**

The doctrine of parliamentary sovereignty was a product of British historical constitutional experience. It was, and to some extent is still, the central principle in a tradition that relies on the subtle interplay of largely uncodified norms and practices. In Britain itself, it provided the institutional umbrella for the transition from monarchy to democracy. It facilitated effective government over a long period of time during which Britain also managed a large and sprawling empire. It co-existed with a relatively high level of respect for civil liberties and with maintenance of the rule of law, understood in accordance with the tenets of the same tradition.

Few constitutional phenomena are transplanted from one context to another without change, in operation if not in form. Parliamentary sovereignty became a feature of many of the constitutional systems of countries in the British Empire where the context in which it operated was entirely different. The peoples were diverse and sometimes deeply divided. The institutions of parliamentary government were less familiar. The Parliaments themselves were constituted differently and lacked the gravitas bestowed by history. And the institutions were established by written constitutions. Typically, these constitutions were authorised by the sovereign British Parliament, giving them the properties of paramount law, in whole or in part. This imperial

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<sup>88</sup> Constitution of the Democratic Socialist Republic of Sri Lanka (1978): Arts.80(3), 120-125.

<sup>89</sup> Ibid: Art.4(c).

practice in turn encouraged a dynamic that equated independence with the achievement of a full measure of parliamentary sovereignty, distracting attention from building constitutions that derived legitimacy from their people.

As articulated by Dicey, parliamentary sovereignty allowed for no distinction between constitutions and other laws. In any event, parliamentary sovereignty and written constitutions are inextricably in tension if the latter are understood in the sense that now has become the norm: as supreme law, subject to a special alteration procedure, enforced through judicial review and justified by reference to popular sovereignty. This chapter has examined the manner in which this tension played out in Australia, South Africa and Sri Lanka. In none was a full measure of parliamentary sovereignty achieved. In all, however, the allure of parliamentary sovereignty weakened the capacity of the written constitutions to engender a culture of constitutionalism. Efforts to rationalise the two through redefining Parliament or the concept of sovereignty itself can be traced through these cases. Such efforts have been successful to the extent that they continue to frame the contemporary debate on the meaning and operation of parliamentary sovereignty. But they have also impeded the perception and acceptance of constitutions as different from ordinary law.<sup>90</sup> Of these three cases, only South Africa has fully embraced the possibilities of popular sovereignty and pursued them to a logical conclusion.

More recent experience in the United Kingdom suggests that parliamentary sovereignty as articulated by Dicey was a product of time as well as place. Even as Dicey wrote, House of Lords Reform in the Parliament Act of 1911, subsequently modified in 1949, reconstituted the Parliament for certain purposes. The implications of this development for parliamentary sovereignty were not finally explored until 2006, in a challenge to the validity of the Hunting Act 2004, which had been passed in reliance on the 1949 procedure. In upholding the validity of the Act, the House of Lords necessarily lent weight to the possibility that successive Parliaments may be bound by previous legislation

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<sup>90</sup> Joel Colon-Rios characterises this as ‘weak constitutionalism’: J. Colon-Rios (2012) *Weak Constitutionalism* (Oxford: Routledge).

regarding the composition and procedures of the Parliament.<sup>91</sup> Several members of the court went further, suggesting that manner and form provisions that require a higher parliamentary majority or support at a referendum might be binding.<sup>92</sup>

British membership of the European Union has presented a greater challenge still to the original doctrine of parliamentary sovereignty. Membership necessarily requires European law to take precedence over local legislation. The European Communities Act 1972 (UK) through which membership is given effect has been interpreted by the House of Lords to permit the 'disapplication' of legislation, albeit formally leaving its validity undisturbed.<sup>93</sup> The European Convention on Human Rights was incorporated into British domestic law in a form that discourages direct recourse to the European Court of Human Rights at Strasbourg while formally maintaining parliamentary sovereignty only by other forms of circumlocution that encourage creative judicial interpretation of legislation and rely on non-binding judicial 'declarations of incompatibility' when the device of interpretation fails.<sup>94</sup> One scholar has argued that in the wake of this development sovereignty effectively is shared between the parliament and the courts.<sup>95</sup> Others have questioned the source of the authority for parliamentary sovereignty, the implication being that if it is sourced in the common law it could be modified by courts should a sufficiently grave situation arise.<sup>96</sup> The ferment of ideas engendered by these developments may have contributed to the finding in *Thoburn* that the European Communities Act is one

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<sup>91</sup> *Jackson v Attorney General* (2006) 1 AC 262.

<sup>92</sup> *Jackson v Attorney General* (2006) 1 AC 262: Lord Steyn at 81; Baroness Hale at 163. Lord Hope expressly rejected that manner and form provisions could bind future Parliaments (at 113) while other judges did not express a view on the issue. For a critique, see I. Loveland (2009) *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (5<sup>th</sup> Ed.) (Oxford: OUP): pp.192-197.

<sup>93</sup> *R v Secretary of State for Transport, ex parte Factortame Ltd* (No 2) (1991) AC 603.

<sup>94</sup> Human Rights Act 1998 (UK): ss.3, 4.

<sup>95</sup> A. L. Young (2009) *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart): p.11.

<sup>96</sup> T.R.S. Allan, 'Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism' (2011) 9 *International Journal of Constitutional Law* 155.

of a number of ‘constitutional statutes’ to which the feature of parliamentary sovereignty that accepts the possibility of implied repeal of an earlier inconsistent statute does not apply.<sup>97</sup>

The loss of the doctrine of implied repeal is a relatively mild consequence of the emergence of a category of constitutional statutes. So far, there are no others; but circumstance may force further change. By way of example, effective devolution to Scotland, Wales and Northern Ireland is compatible with parliamentary sovereignty only as long as constitutional convention restrains the UK government and Parliament from exceeding the bounds that have been agreed. If a greater measure of devolution is required, to respond to pressures for Scottish independence, enforceable legal constraints may be sought. If for this or other causes the United Kingdom moves down the path towards a written constitution, reconciliation of some kind with parliamentary sovereignty will be required. It is unlikely that this would be the end of the story of the evolution of parliamentary sovereignty. It would be the start of a new phase, however, to which the experience of other states that have long wrestled with this problem would have a contribution to make.

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<sup>97</sup> *Thoburn v Sunderland City Council* (2003) 1 QB 151, [62]-[63], Laws LJ. For an overview of different interpretations of the implications of the Factortame decision for parliamentary sovereignty in the United Kingdom, see N. Bamforth, ‘Courts in a Multi-Layered Constitution’ in N. Bamforth & P. Leyland (Eds.) (2003) *Public Law in a Multi-Layered Constitution* (Oxford: Hart): p.279; N.W. Barber, ‘The Afterlife of Parliamentary Sovereignty’ (2011) 9 *International Journal of Constitutional Law* 144.