IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of reference under *Article* 125 of the Constitution of the Republic.

Gardihewa Sarath C. Fonseka
No. 6, 37th Lane, Queens Road,
Colombo 03

SC REF No: 1/2010 **PETITIONER**
CA (Writ) Application No. 676/2010

Vs.

1. **Mr. Dhammika Kithulegoda**

   Secretary General of Parliament of the Democratic Socialist Republic of Sri Lanka.

2. **Mr. Dhammika Dassanayake**

   Deputy Secretary General of Parliament of the Democratic Socialist Republic of Sri Lanka.

3. **Mr. Dayananda Dissanayake**

   Commissioner of Elections, Elections Secretariat, Rajagiriya.

4. **Mr. J. Sylvester**

   The Returning Officer – Colombo District, District Secretariat, Colombo.

5. **Major General V.R. de Silva**

   The Commissioner General of Prisons, Prison Headquarters, Colombo 8.

6. **Lt. Gen. Jagath Jayasuriya**

   Commander of the Sri Lanka Army, Army Headquarters, Colombo 2

7. **Lakshman Nipunarachchi**

   No.7, Rajaye Niwasa, Bokundara, Piliyandala

8. **Hon. The Attorney General**

   Attorney General's Department, Colombo 12.

RESPONDENTS

Before: J.A.N. De Silva, CJ
Dr. Shirani A. Bandaranayake, J
R.A.N. Gamini Amaratunga, J
Saleem Marsoof, J
K. Sripavan, J

Counsel: Mr. Romesh De Silva PC, Mr. Saliya Peries, for the Petitioner.
Mr. Shibly Aziz PC with Mr. C. Warnasuriya for the 7th Respondent.

Attorney General Mr. Mohan Pieries PC with Deputy Solicitor Generals Mr. S. Rajaratnam and Mrs. S.W.F. Jameel, and Senior State Counsel Mr. A.N.R. Pulle for the Respondents.

Entertained Submissions in Open Courts on: 9-12-2010 and 13-12-2010

Written Submissions tendered on: 23-12-2010

Decided on: 10-01-2011

J.A.N. De Silva, CJ

The Court of Appeal has referred the following question to the Supreme Court:

> "Whether the words 'any court' referred to in Article 89(d) of the Constitution refer to the Supreme Court, Court of Appeal and the other Courts of First Instance, to the exclusion of tribunals and Institutions or whether the words 'any court' include a Court Martial".

The Court of Appeal referred to Articles 24(5), 105 and 13(4), of the Constitution, and to Section 2 of the Judicature Act No 2 of 1978, as amended.

The argument for the Petitioner is that:

1. 'any court' referred to in Article 89(d) does not include Courts Martial, as per Article 105 of the Constitution;
2. Judicial power of the People is exercised through courts, tribunals and institutions created and established, or recognised, by the Constitution *vide* Article 4 (c) of the Constitution and as such, not through Courts Martial that are convened by, consisting of, and confirmed by, the Executive;
3. Article 24 of the Constitution which deals with the language of the Courts, has in an inclusive application, included tribunals and other institutions within its limited purview, and, as such tribunals and other institutions are not "courts" with reference to the rest of the Constitution;

4 Courts Martial are *ad hoc* appointments and lack the permanency and other features of regular Courts;

5 Courts Martial are not bound by the Evidence Ordinance nor the Code of Criminal Procedure, and members of a Court Martial are not members of the Judiciary but are part of the Executive;

6 Courts Martial are limited to military matters;

7 Courts Martial do not observe principles of fair trial;

8 Article 13(4) does not confer to a Court Martial the 'dignity of a competent Court'. Courts Martial survive solely due to Article 16(1) which permitted their continuity under the new Constitution.

9 A Court Martial does not comprise judicial officers as in the interpretation clause of the Constitution with reference to Article 170; and

10 Equating a military tribunal to a High Court would harm the Courts and the judicial power of the people;

The Attorney General responds as follows:

1. The disqualification in Article 89(d) should be viewed from the context of its inclusion and not in a vacuum;
2. The vacancy of the Parliamentary seat occurs by operation of law in the event of the occurrence of a disqualification set out in Article 89(d);
3. On a moral basis, a person serving a term of imprisonment is disqualified from either being elected or continuing as a member of Parliament;
4. The convictions and sentence of Courts Martial are akin to those imposed by civil Courts, having regard to fundamental rules of procedure at the hearing;
5. A sentence of death or imprisonment can be imposed only by a competent court and the Court Martial being empowered to

impose such sentences in terms of Section 133 of the Army Act is therefore a competent Court in terms of Article 13(4) of the Constitution;

6. Article 16 of the Constitution has kept the Court Martial's power of imposing death sentences and sentences of imprisonment alive;
7. A Court Martial administers justice and is also a Court in terms of Article 16 and as such comes under Article 4 (c) of the Constitution;
8. Section 2(1) of the Evidence Ordinance presumes a Court Martial to be a Court and the rules of evidence applicable in a civil Court also apply to Courts Martial (vide Section 81 of the Army Act);
9. The confirming authority's role of giving "validity" to the conviction and sentence passed by the Court Martial, is a protective measure for the benefit of the accused, and cannot be seen as a factor of bias or partiality;
10. The words "any Court" in Article 89(d) must be considered from the point of view of the intention of the Legislature; and
11. If the contention of the Petitioner be valid then it would lead to an absurd situation where persons convicted of criminal offences and sentenced to imprisonment by a Court Martial may continue to sit and vote in Parliament, but not so a civilian similarly convicted and sentenced by a civil Court.

Having regard to the parameters of the question referred and the plurality of arguments presented it is best that the question and all the arguments be considered as a whole and not piecemeal. The argument of the Petitioner in its broadest sense would be that the disqualification process that would be set in motion by a relevant conviction and sentence handed down by a competent court as contemplated in Article 89(d) of the Constitution would not be so set in motion by a conviction and sentence by a Court Martial, the same not being a court in terms of

the Constitution. So also that the Court Martial is convened by, and comprises, the Executive.

The Petitioner relies on Articles 105, 4(c), 24 and 170 of the Constitution and on the provisions of the Evidence Ordinance which have excluded its application to Courts Martial, and *ad hoc* nature and the differences in procedure between regular courts and Courts Martial including an inherent denial of a fair trial in Courts Martial.

The Attorney General's response is that Article 89(d) should not be taken out of context and in isolation and that it seeks to prevent persons convicted and serving sentences from occupying seats in Parliament. He also forwards an observation of an anomalous situation where a person sentenced to death by a Court Martial would continue to occupy his seat in Parliament whereas a person sentenced to death by a court of civil jurisdiction would be disqualified by reason of the conviction and sentence. The Attorney General relies on Article 13(4) to substantiate his argument in that in terms of Article 13(4) only a competent Court can impose a sentence of death or imprisonment and the Court Martial being empowered to impose such sentences it is a competent court in terms of that Article.

The Attorney General has countered the argument of the Petitioner that the Court Martial has been kept alive by Article 16 in contravention of Article 13(4) with the statement that Article 16 and 105(2) have kept all laws existing at the time of the Constitution alive and as such the Court Martial under the Army Act continues validly and comfortably with the Constitution.

The Attorney General also points out that in terms of Article 16 the provisions of Article 4(c) of the Constitution are satisfied in that a Court Martial has been recognised as a court administering justice.

He further submits that the role of the Chief Executive in certifying the verdict and sentence is merely to give effect to the findings of the Court

Martial and does not interfere with the judicial character of the hearing.

Before examining the relevant Constitutional provisions I would prefer to examine the relevant decisions of the Privy Council and the Supreme Court that touch upon the subject matter as tendered by the respective parties to this action.

Now, I will consider the relevant decisions that have a bearing on the issue, as cited by parties, namely, *Bribery Commissioner v Ranasinghe, Privy Council*[1], *Walker Sons & Co. Ltd. and Others v Fry*[2], *Liyanage and Others v The Queen*[3], *Panagoda v Budinis Singho*[4], *and Gunaseela v Udugama (Major General and Commander of the Army)*[5].

In *Bribery Commissioner v Ranasinghe (see fn 3)*, Privy Council, the Respondent was convicted and sentenced by the Bribery Tribunal which was created by the Bribery Amendment Act 1958. The members of each Tribunal were drawn from a panel of members appointed by the Governor General on the advice of the Minister of Justice. In appeal the Supreme Court declared the conviction void in that the appointment of members to the Panel from which the Tribunal was drawn was unconstitutional as per the Ceylon (Constitution) Order in Council 1946 and 1947 whose general conception was similar to the British parliamentary democracy.

For clarity, I will reproduce below, Sections 53(1) and 55(1), of the Ceylon (Constitution) Order in Council 1946:

> 53(1) There shall be a Judicial Service Commission which shall consist of the Chief Justice, who shall be the Chairman, a Judge of the Supreme Court, and one other

[1](1964) 66 NLR 73
[2] (1965) 68 NLR 73,
[3] (1965) 68 NLR 265
[4] (1966) July 22nd 68 NLR 490
[5] (1966) July 22nd 69 NLR 193

> person who shall be, or shall have been, a Judge of the Supreme Court. The members of the Commission, other than the Chairman, shall be appointed by the Governor General.
>
> 55(1) The appointment, transfer and dismissal and disciplinary control of judicial officers is hereby vested in the Judicial Service Commission.
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> 3(1) of the Order in Council sets out the interpretation of "judicial office" as any paid judicial office and Section 55(5) defines "judicial officer" as the holder of any judicial office but does not include the Supreme Court or Commissioners of Assize.

The issues before the Privy Council were whether the statutory provisions for the appointment of the members of the Panel of the Bribery Tribunal otherwise than by the Judicial Service Commission was in conflict with Section 55 of the Constitution. The Privy Council held that it was invalid for the reasons that the Tribunal performed judicial functions and as such Section 41 which provided for the appointment of the panel was in conflict with Section 55 of the Ceylon (Constitution) Order in Council. It held further that the relevant provisions amounted to an amendment to the Constitution and there was no certificate from the Speaker that the Act had passed with a two third majority which was necessary in terms of Section 29(4) of the Order in Council. The Privy Council accordingly declared that the persons composing the Bribery Tribunal which tried the respondent were not lawfully appointed and the appeal (by the Bribery Commissioner) was dismissed. This judgment was delivered in 1964.

The Privy Council also observed that the Constitution did not deal specifically with the judicial system and as such "…the power and

jurisdiction of the Courts are therefore not expressly protected by the Constitution.[6]

Dr Lakshman Marasinghe[7], in his work *The Evolution of Constitutional Governance in Sri Lanka,* summarizes *Bribery Commissioner v Ranasinghe* in the following terms:

> "The basic issue before the Privy Council was whether the Bribery Amendment Act- which was passed by a simple majority- was constitutional and was therefore valid, in the light of Articles 53 and 55 of the Constitution.[8] …..To that question the Privy Council gave a negative answer. They found the provisions of the Act to be in conflict with Articles 53 and 55 of the Constitution."[9]

Then came the decision in *Walker Sons & Co and Others vs. Fry*[10]*.* This was a consolidated appeal heard by a Full Bench headed by Sansoni C.J. Six cases were heard together by a reference under Section 51 of the Courts Ordinance. The question was whether the tribunals should have been appointed by the Judicial Service Commission since they had purported to exercise judicial power. In two the Tribunals concerned were Labour Tribunals, in one the Tribunal was an arbitrator to whom a dispute was referred by the Minister of Labour under Section 4 (1) of the Act, in two more the Tribunal was an Industrial Court of one person to whom the dispute was referred by the Minister under Section 4 (2) of the Act, and the last Tribunal was an arbitrator to whom the dispute was referred by the Commissioner of Labour under Section 3 (1) of the Act.

Sansoni C.J. observed that the Industrial Disputes Act No 43 of 1950, Part III provided for collective agreements, and settlements by conciliation and arbitration and Part IV for the constitution Industrial

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[6] At pg 74
[7] Emeritus Professor of Law, University of Windsor, Canada
[8] At pg 120
[9] At pg 121
[10] (1965) 68 NLR 73

Courts, from a panel appointed by the Governor General, to whom such disputes might be referred for settlement. It also provided for the reference of disputes for settlement by arbitration.[11]

Tracing its history, his Lordship noted that Act No 62 of 1957 amended the original Act and introduced Labour Tribunals in Part IV A, and particularly section 31B, which conferred "power which it has been argued, amounts to judicial power. By the same Act, labour Tribunals were included among those to whom disputes could be referred for arbitration but that amendment merely added one more kind of arbitrator to those already in existence."[12]

In a majority decision Court held

> "that a Labour Tribunal exercises judicial power when it acts under Part IV A, particularly Section 31B, of the Industrial Disputes Act (as emended by Act No 62 of 1957). Therefore, as it is also a holder of a public office, it is a 'judicial officer' within the meaning of Section 55 of the Ceylon (Constitution) Order in Council, 1946, and has no jurisdiction to exercise judicial power unless it has been appointed by the Judicial Service Commission."
>
> With reference to disputes referred by the Commissioner or the Minister for settlement by conciliation or by arbitration or by an Industrial Court in Part II, the findings of Sansoni C.J. were that the tribunals need not be appointed by the Judicial Service Commission since the offices were arbitral in nature, but that they had by an excess of jurisdiction, exercised judicial power. These were referred to a bench of two judges for determination regarding the issuance of writs.

It was also held that,

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[11] Pg 76
[12] Walker Sons & Co., Ltd v Fry, (1965) 68 NLR 73 at 76

> "The jurisdiction of Labour Tribunals set out in Part IV A of the Industrial Disputes Act is not the only power given to them. The Act, in Sections 3(1)*d) and 4(1), contemplates a Labour Tribunal acting as an arbitrator. A Labour Tribunal need not be appointed by the Judicial Service Commission if it performs only arbitral functions."[13]

Four of the six cases in *Fry* were referred to a Bench of two judges for determination regarding the issue of writs. In the hearing into these four cases T.S. Fernando J., and Sri Skanda Raja J., being unable to agree on the nature of the order to be made, referred the issue to the Chief Justice who in turn directed that the applications be heard before a Bench of five judges, whose Order it is that is under consideration now. These cases were reported under *Moosajees Ltd., v Fernando and others*[14] which will be considered next. It must be remembered here that *Moosajees* came after the Privy Council decision in *Liyanage and others v The Queen*[15].

As mentioned earlier, this case emerged due to the reference of four matters that came up in *Fry*[16] before a Bench of two judges to determine the matter of the issue of writs. Between the cases of *Fry* (30th November 1965) and *Moosajees Ltd v Fernando* 16th May 1966) came the judgment above discussed- *Liyanage and Others v The Queen* (2nd December 1965) which was decided by the Privy Council. *Liyanage* will be considered after this- but the pivot on which *Moosajees* was decided by the Bench of five judges was the decision in *Liyanage.*

In *Moosajee* the Court held, following the decision of the Privy Council in *Liyanage and others v The Queen*[17], that if the respective tribunals had exercised judicial power, as found by the previous Collective Bench, and

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[13] At pg 73
[14] (1966) 68 NLR 414
[15] (1962) 64 NLR 313
[16] above
[17] (1965) 68 NLR 265

also found by itself, then the appointments must be made by the Judicial Service Commission, and as such the awards were quashed. The main judgment is that of T.S. Fernando J.[18] Now I will go into *Liyanage v The Queen* on which *Moosajees* was based.

The Trial at Bar of the case of *Queen v Liyanage* and others has seen a chequered career- in the first instance, in *Queen v Liyanage*[19] the Trial-at-Bar was convened by the Minister of Justice from Judges of the Supreme Court. The issue taken up as a preliminary objection by the accused was the "unconstitutionality of certain provisions of the Criminal Law (Special Provisions) Act[20]" designed "to obtain from this Court a declaration that Sections 8 and 9 of that Act which relate to the power of the Minister of Justice to issue respectively a direction that persons accused of certain offences be tried before the Supreme Court at Bar by three Judges without a jury and to nominate those three Judges are *ultra vires* the powers of the Legislature as granted by the Ceylon (Constitution) Order in Council, 1946."[21]

Section 8 of the Act provided that "any direction issued by the Minister of Justice under Section 440A of the Criminal procedure Code shall be final and conclusive, and shall not be called in question in any Court, whether by way of Writ or otherwise" This provision was held to be *intra vires* the Legislature.[22]

Section 9 provided that,

"Where the Minister of Justice issues a direction under Section 440A of the Criminal Procedure Code that the trial of any offence shall be held before the Supreme Court at Bar by three Judges without a jury, the three Judges shall be nominated by the Minister of Justice….."

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[18] *Moosajees, at page 420*
[19] (1962) 64 NLR 313
[20] Act No 1 of 1962
[21] At pg 343
[22] At pg 347

The Supreme Court at Bar held, “that Section 9 of the Criminal Law (Special Provisions) Act is *ultra vires* the Constitution because (a) the power of nomination conferred on the Minister is an interference with the exercise by the Judges of the Supreme Court of the strict judicial power of the State vested in them by virtue of their appointment in terms of Section 52 of the Ceylon (Constitution) Order in Council, 1946 or is in derogation thereof, and (b) the power of nomination is one which has hitherto been invariably exercised by the Judicature as being part of the exercise of the judicial power of the State, and cannot be reposed in anyone outside the Judicature.”

The decision in *The Queen v Liyanage,* above, was not challenged by an appeal to the Privy Council. Instead the Criminal Law Act No 31 of 1962 was passed substituting the Chief Justice for Minister of Justice as being empowered to nominate the Bench of the Supreme Court at Bar. Most of the other provisions of the original Act were preserved which included a restricted admissibility of confessions made to police officers, statements made in the course of investigation and such other provisions and in effect struck down many protections that the general law offered to the accused. The appellants were convicted and sentenced by the Supreme Court at Bar.

The appeal from this to the Privy Council gave rise to an observation by Lord Pearce, who also decided *Bribery Commissioner v Ranasinghe,* that after independence the Courts continued without change under the Charter of Justice, 1833 even up to the time of *Liyanage v The Queen.* As such, no specific reference was made to the judicial power of the Courts when the change of sovereignty occurred. But Lord Pearce referred to his own judgment in *Bribery Commissioner* and reiterated that the framers of the Constitution had given thought to and made provision for the independence of the judiciary with special reference to the establishment of the Judicial Service Commission which managed the appointment of Judges and which was also composed of members of

the Judiciary or past members. These observations culminated in the following formulation by Lord Pearce:

> "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. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to, or be shared by, the executive or the legislature."[23]

The impugned Acts were held to be *ultra vires* and invalid in so far as they constituted a grave and deliberate interference with the judicial power of the judicature.

Bearing all these matters in mind, let us now see what happened in *Panagoda v Budinis Singho*[24] which added a new element to the issue: The question in this case was whether the offices of Commissioner of Workmen's Compensation, Deputy and Assistant, could lawfully be appointed only by the Judicial Service Commission. H.N.G. Fernando, S.P.J., observed that the Workmen's Compensation Ordinance was enacted in 1934, prior to the Ceylon (Constitution) Order in Council, 1946. Commenting on *Moosajee*, his Lordship noted that the decision did not deal with whether the Industrial Court or an arbitrator comprised a "judicial office" as contemplated in Section 55 of the Constitution and that Section 55 concerned itself only with judicial offices. So also, his Lordship observed that *Moosajee* had not

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[23] *Liyanage and Others v The Queen ,(1965) 68 NLR 265 at 282*

[24] ((1966)68 NLR 490

considered the position of the effect of Section 55 of the Order in Council on legislation enacted prior to Section 55.

"On the other hand the reference to the Privy Council judgment, as also in an earlier judgment (*Bribery Commissioner v Ranasinghe*) to the danger that an Act of Parliament would result in an erosion of judicial power if it was lawful for such Acts to confer judicial power on any authority not forming part of the Judicature duly constituted under the Constitution, is an indication that their Lordships were concerned primarily with the validity of legislation enacted subsequently to the Constitution itself."[25]

The vein of the judgment is that if the Constitution intended to strike down previous legislation it would have done so in express terms.[26] His Lordship held that the impugned offices need not be appointed by the Judicial Service Commission even though they may exercise judicial functions.

The reasoning behind this decision is reflected in the case of *Gunaseela v Udugama (Major General and Commanded of the Army),* cited by the Attorney General, where the main argument of the Petitioner was, quote:

> "..there was an exercise of judicial power by the officers constituting the Court Martial, who were person not appointed thereto by the Judicial Service Commission, and that such exercise conflicts with the principle of Separation of Powers, which principle has been declared in the recent judgment of the Privy Council in *Liyanage v the Queen*[27] to be embodied in our Constitution. [28]

[25] At pg 493-494
[26] See pg 495
[27] (1965) 68 NLR 265
[28] At pg 194 above

> "the Crown has not contended, on the one hand, that the Court Martial has not exercised judicial power; nor on the other hand has it been seriously argued on behalf of the Petitioners that membership of a Court Martial is "paid judicial office" within the meaning of Section 55 of the Constitution. A Court Martial is not a paid office; it is a body consisting of Service Officers convened *ad hoc* for the trial of particular cases, and the duty to serve as a member of such a Court is only one of the several kinds of duties which a Service Officer can under the relevant Statutes be called upon to perform…A Court martial bears no resemblance to a Labour Tribunal established under the Industrial Disputes Act.".[29]

H.N.G. Fernando, S.P.J., goes on to observe that the Army Act was enacted after the then Constitution came into operation. The Constitution "has had not the effect of invalidating any pre existing Statute in virtue of which judicial power was exercisable by a person not holding a paid judicial office, These reasons apply equally to a case where an Act of Parliament merely re-enacts pre-existing law." Here Fernando, S.P.J., has taken his reasoning in *Panagoda* a step further and applied it to re-enaction of pre-existing legislation.

> "The Army Act, 1881, of the United Kingdom was, like many other British enactments, part of the law of Ceylon long before the Independence of Ceylon."[30] "For a long period therefore the law of Ceylon provided for the trial by Courts Martial of certain offences committed by 'persons subject to military law'……These Courts were convened under the Army Act, 1881, which, in Section 55 provided for the confirmation by a Colonial Governor of sentences imposed by such Courts, and in Section 122 provided for the issue of Warrants by a Colonial Governor for convening Courts Martial. Indeed the law of Ceylon continued to be the same

[29] At pg 194
[30] At pg 194

> even after Independence, until the Army Act of the United Kingdom ceased to be in force with the enactment of our Army Act (Cap 357). The constitution, powers and functions of Courts Martial under the present law are not substantially different from those of the Courts Martial constituted in Ceylon under British rule."[31]

Fernando S.P.J., was of the view that the Courts Martial of Ceylon could exist independently of the judicature as in American and Australian systems. But the issue in the present case is whether the Courts Martial can exist within the present Constitution. In the cases studied, the issues revolved around the Ceylon (Constitution) Order in Council, 1946 and the establishment of the Judicial Service Commission therein. But, as pointed out in *Panagoda* and developed in *Udugama* one must also bear in mind the effect of succeeding Constitutions on existing legislation. In summary, *Bribery Commissioner v Ranasinghe*, *Fry,* and *Moosajee* all revolved around the Judicial Service Commission as established by the Order in Council, 1946 and the boundaries of judicial power in terms of office. On the other hand *Budenis* and *Udugama* went a step further and introduced a new element: the effect of succeeding Constitutions on existing legislation or the consequences of re enactment of existing legislation after a new Constitution. When considering the history of political affairs of this nation one must be mindful that it has seen successive Constitutions as well as numerous Constitutional amendments.

In the Republican Constitution of 1972 Article 12 provided for the continuance of existing written and unwritten law unless specifically excluded by the Constitution. The only laws that were declared to cease were the Ceylon (Constitution and Independence) Orders in Council,

[31] At pg 195

1946 and 1947, the Royal Titles Act, and certain provisions of the Royal Executive Powers and Seals Act.[32]

In the present Constitution Articles 16, 105(2) and 168 (1) kept all existing laws in force as well as all courts tribunals and institution created for the administration of justice except the Supreme Court. It may be relevant to quote the observations made by Justice Mark Fernando in the reference of *Ratnasiri Perera v Dissanayake, Assistant Commissioner of Co-operative Development and Others*[33] as follows:

> "After the Privy Council decision in *Liyanage v The Queen*, he modified this view (see *Moosajees v Fernando*) in relation to post-Constitution legislation – holding that there could be no erosion of judicial power. But he maintained this view in regard to pre-Constitution legislation, holding in *Panagoda v Budinis Singho*, that where "the holder of some office established mainly for administrative purposes was entrusted also with judicial power necessary for effectively securing the purpose of the establishment of the office", such officer could validly exercise judicial power despite want of appointment by the J.S.C. Thus the office of Commissioner for Workmen's Compensation, established prior to the Constitution, was an administrative tribunal, a small part of its functions being judicial, and was not a judicial office. Dealing with a similar question in regard to powers exercised by officers administering the income tax laws in *Xavier v Wijeyekoon*[34], he held that the Commissioner of Inland Revenue, in imposing a penalty for making an incorrect return, does not exercise judicial power; such a penalty is a civil, rather than a criminal sanction, and is intended to protect the revenue against loss and expense arising from the taxpayer's fraud. In approving that decision, the Privy

[32] The Constitution of Sri Lanka, 1972, Article 12
[33] (1992) 1 SLR 301
[34] (1966) 69 NLR 197

> Council in *Ranaweera v Wickramasinghe*[35], held that although such public officers have to act judicially, they are not holders of judicial office; "where the resolution of disputes by some Executive Officer can properly be regarded as being part of the execution of some wider administrative function entrusted to him, then he should be regarded as still acting in an administrative capacity, and not as performing some different and judicial function". In this background, it may well be that Article 170 does not permit an erosion of existing jurisdictions; nor the mala fide entrustment of judicial power to pubic officers, in order to achieve indirectly a result which cannot be achieved directly; and only allows the conferment of some judicial power or function which can properly be regarded as being ancillary to some wider administrative function entrusted to an executive officer."

Now, I will examine the legal provisions that touch upon this issue:

At the outset I observe that Article 16, 105(2) and 168 (1) have preserved the validity of all existing laws at the time of the enactment of the Constitution and the jurisdiction of the Supreme Court in terms of Article 125 is limited to the interpretation of the Constitution. The Supreme Court has no power to strike down existing legislation. Accordingly, Courts Martial in terms of the Army Act are valid and operative and at no stage of these hearings did the Petitioner attempt to challenge the validity of Courts Martial in concept. Indeed it was the contention of the Counsel for the Petitioners that the concept of Court Martial is valid and that they would not be challenging its conceptual reality. So, it is clear that on both sides there is consensus that the concept of the Court Martial is valid and operative in the present context. I am also in agreement with this resolution and hold that the concept of the Court Martial is valid under this Constitution.

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[35] (1961) 72 NLR 553

As pointed out by the Attorney General, interpretation of a constitutional provision cannot be made in a vacuum- such interpretation should coincide and be comfortable with the rest of the Constitution. For this purpose it is necessary to examine the intention of the Legislature when it comes to interpretation.

The Petitioner argues that the Court Martial is not a 'court' within the meaning of the Constitution for the reason that it is convened by and comprises the Executive, requires certification by the convener for validity, does not follow set procedures as a civil court, is not manned by a judicial officer as per Article 170, is not subject to the Evidence Ordinance, does not come within the provisions of Article 105(1), 4 (c), lacks permanency of regular courts, is limited to military matters, consist of *ad hoc* appointments, does not adhere to the principles of fair trial, and is in conflict with Article 13(4) of the Constitution by virtue of Article 16.

Shortly stated, it is the contention of the Petitioner that the Court Martial lacks the features of the court of civil judicature and is not covered by Article 105 of the Constitution as a court and contravenes Article 4(c).

Let us now consider whether these submissions withstand scrutiny on a broader wavelength i.e. the concept of Courts Martial and its bearing on the issue, its power to impose death sentences and sentences of imprisonment, and the object of the disqualification in Article 89(d) which is in question.

As I have held earlier, the concept of Court Martial is a valid and operative part of the law and the Supreme Court cannot strike down existing legislation. It is undisputed that the Court Martial is empowered to impose sentences of death and/or imprisonment. Then it follows that a sentence of death or imprisonment handed down by a Court Martial is valid until and unless overturned by a Court of competent jurisdiction.

Now, the Petitioner's contention is that he cannot be unseated by a conviction and sentence of a Court Martial: or, in positive terms, he is entitled to sit and vote in Parliament in spite of the fact that he is under a sentence of imprisonment by a Court Martial.

Then, as observed by the Attorney General, is it then, the contention of the Petitioner that any person under sentence of death or imprisonment by a Court Martial, which sentence is valid and operative, still entitled to hold his seat in Parliament and be part of the Legislature of this nation?

If that be the case, then the argument, if pursued to its logical conclusion, amounts to a statement that the Legislature may comprise of persons actively serving prison sentences or/and languishing in death row awaiting execution at the instance of the Executive of the State.

Let us now consider the submissions of the Attorney General and see whether this logical absurdity can be avoided. He submits that Article 16 and 105(2) keep the Army Act- and, as such, the Court Martial, is alive and operative. He further contends that in terms of Section 133 of the Army Act the Court Martial is empowered to impose sentences of death and/or imprisonment. He states that in terms of Article 13(4), only a competent court can impose any sentence of imprisonment or death. Accordingly, he submits that the Court Martial, being empowered to impose sentences of imprisonment and/or death, is a competent court in terms of Article 13(4), and as such, attracts the provisions of Article 89(d) of the Constitution.

To my mind, this argument appears to be sensible up to this point.

But one must now consider the Petitioner's argument that in terms of Article 105, a Court Martial is not recognised as a court and what Article 89(d) demands is a conviction by a court and nothing less. So also, in Article 4(c) it is provided that the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions, and so on, but Courts Martial are not referred to. Hence, the Petitioner

contends that the Court Martial is not a 'court' in terms of the Constitution.

When taken in isolation, or as the Attorney General puts it, in a vacuum, this argument has merit. I will now proceed to examine whether the argument fits in with the rest of the Constitution, because, as I have earlier expressed, a Constitutional interpretation must withstand the Constitution as a whole and not merely parts of it.

Let us consider Article 4(c) and its implications on the matter in issue here and its relationship to Article 105(1) and (2) which appear to be the main Constitutional combatants in this most intriguing issue and their relationship to the relevant provisions of the Army Act as canvassed by the parties. A reproduction of Article 4(c) would be as follows:

> 4(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law.
>
> 105(1) Subject to the provisions of the Constitution, the institutions for the administration of justice which protect, vindicate and enforce the rights of the People shall be-
>
> (a) The Supreme Court of the Republic of Sri Lanka,
> (b) The Court of Appeal of the Republic of Sri Lanka,
> (c) The High Court of the Republic of Sri Lanka and other Courts of First Instance, tribunals or such institutions as Parliament may from time to time ordain and establish.

105(2) All courts, tribunals and institutions created and established by existing written law for the administration of justice and for the adjudication of settlement of industrial and other disputes, other than the Supreme Court, shall be deemed to be courts, tribunals and institutions created and established by Parliament. Parliament may replace or abolish, or, amend the powers, duties, jurisdiction and procedure of such courts, tribunals and institutions.

Let us now set down the relevant provision of the Army Act:

46(1) A general court martial may be convened by the President or such officer not below that of a field officer as may be authorized by the President.

(3) The president of a general court martial shall be appointed by the authority convening such court martial, and shall not be that authority or an officer of a rank below that of a field officer...*proviso*

63(1) ……the conviction of and sentence passed on, an accused by a court martial shall not be valid until confirmed by the authority having power under s 64 to confirm such conviction and sentence.

64. The authority who shall have the power to confirm the conviction of an accused, and the sentence passed on him, by a court martial shall,

(a) if that court martial is a general court martial, be the President or such officer of a rank not below that of field officer as may be authorized by the President, or

(b)

65. (powers of confirming authority)

Now, it seems that there is no contest between parties that a court martial, in trying a case, acts judicially. The Petitioner complains this is an instance where judicial power is exercised by the Executive and as such causes a disruption in the separation of powers and offends Article 4(c) of the Constitution.

It is relevant at this point to set out Article 16 of the Constitution which reads:

16(1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.

(2) The subjection of any person on the order of a competent court to any form of punishment recognised by any existing law shall not be a contravention of the provisions of this Chapter.

(The said Chapter III refers to Fundamental Rights)

Let us now join Article 105(2) to Article 16:

105(2) All courts, tribunals and institutions created and established by existing written law for the administration of justice and for the adjudication of settlement of industrial and other disputes, other than the Supreme Court, shall be deemed to be courts, tribunals and institutions created and established by Parliament. Parliament may replace or abolish, or, amend the powers, duties, jurisdiction and procedure of such courts, tribunals and institutions.

The position would be that all courts institutions and tribunals except the Supreme Court existing at the time of the promulgation of this Constitution and the existing related laws continue so under this Constitution. So, the Army Act has been recognised under this Constitution. It follows then that the concept of the court martial which is part and parcel of the Army Act, and its competency to convict and impose punishment as according to the Army Act, is also recognised by this Constitution. Further support for this conclusion is added by Article 142:

> 142. The Court of Appeal may direct-
>
> (i) that a prisoner detained in any prison be brought before a court martial or…for trial…;

Here again one finds support for a contention that the court martial is recognised by the Constitution- in direct and unequivocal terms.

So, considering Article 4(c) in relation with Articles 105(2), 16, and 142, one is driven to the conclusion that the court martial is an entity exercising judicial power and recognised by the Constitution as such in terms of the second limb to Article 4(c).

Now, as I have pointed out earlier, there is no contest that the concept of the Court Martial is a reality and that it has the power to hear and try cases, act judicially, and impose valid sentences including imprisonment and/or death. The only quarrel here is whether the Court Martial is “any Court” in terms of Article 89 of the Constitution. The validity of the concept of Court Martial in itself and its power to determine cases and impose sentences of imprisonment and/or death not being contested, and, the only contest being its status in the hierarchy of institutions dispensing justice, Article 13(4) of the Constitution brings it within the description of not only a “court” but a “competent court”, since, in terms of Article 13(4), only a “competent Court” can impose sentences of death or imprisonment.

Accordingly, having regard to the manifest intention of Article 91(a) read with 89(d) to safeguard the integrity of Parliament, the recognition of Courts Martial in Article 4(c) of the Constitution as well as in the direct reference to Courts Martial in Article 142, the recognition of legislation inclusive of the Army Act and Courts Martial therein existing at the time of coming into force of the Constitution in terms of Article 16(2) and 105(2), the power of Courts Martial to impose sentences of death and imprisonment in terms of Section 133 of the Army Act read with Article 13(4) of the Constitution wherein it provides that such sentences may be imposed only by competent courts, I hold that the Court Martial in terms of the Army Act is a "court" in terms of Article 89(d) of the Constitution.

Chief Justice

Dr. Bandaranayake J
I agree

Judge of the Supreme Court

Amaratunga J
I agree

Judge of the Supreme Court

Sripavan J
I agree

Judge of the Supreme Court