THE JUDICIAL ROLE

UNDER THE CONSTITUTIONS OF CEYLON / SRI LANKA

AN HISTORICAL AND COMPARATIVE STUDY

A DISSERTATION SUBMITTED TO
THE FACULTY OF LAWS
OF THE UNIVERSITY OF LONDON
IN CANDIDACY FOR THE INTERNAL DEGREE OF
DOCTOR OF PHILOSOPHY
BY

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SCHOOL OF ORIENTAL AND AFRICAN STUDIES
UNIVERSITY OF LONDON
LONDON

MAY 1979

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THE JUDICIAL ROLE UNDER THE CONSTITUTIONS OF CEYLON/SRI LANKA: AN HISTORICAL AND COMPARATIVE STUDY.

In this thesis the attention is mainly focussed on the 'judicial power cases' of the 1948-1972 period, which laid down that separation of powers and independence of the judiciary were fundamental features of the Soulbury Constitution of Ceylon. In Part I an attempt is made to find out the extent to which these principles found expression in the colonial constitutional structure from 1796 to 1948. It will be shown how during this period the courts of Ceylon gradually strengthened their independent position.

How the courts of Ceylon 'assumed' the power of judicial review of legislation and creatively interpreted the Constitution and so made law is discussed in Part II.

The adoption of the 'autochtho nous constitution' of 1972, its objects, and the role of the Constitutional Court which was given the power to review Bills, instead of the more familiar judicial review of legislation form the subject matter of Part III. It will be shown how that court interpreted the Constitution in such a manner so as to defeat the very purpose for which it had been adopted.

Chapters 3 and 9 deal with the judicial role during colonial rule and in independent Ceylon, respectively. The role of the Constitutional Court is assessed in Chapter 11.

The epilogue reviews the development of the judiciary and its role with hindsight, outlines the changes brought about by the 1978 Constitution and examines how far the independence of the judges is respected in Sri Lanka. An attempt is also made to study briefly the causes for rivalry or disharmony between the judiciary and the administration.

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PREFACE

Arthur C. Clarke, the man who forecast the space exploration programme with precision and set out the basic mathematics of communications satellites twenty years before they became a reality,[1] chooses in his latest work of science fiction, The Fountain of Paradise,[2] Adam's Peak, a holy mountain for Buddhists, Muslims and Christians, as the earth terminal for a bridge linking the earth with a man-made moon in space. Imaginary inter-planetary relations based in 'the Resplendent Island' apart, Sri Lanka has had maintained close trade and cultural links with a multitude of nations, some of whom have left behind distinctly identifiable traces. The recent past records the advent of the Portuguese (1505-1658), who left behind Catholicism, of the Dutch (1658-1796), who introduced the Roman-Dutch Law, the starting point of Sri Lanka's common law,[3] and of the British (1796-1948), who transplanted an administrative and judicial system known to them.

In our survey of the judicial role in Ceylon/Sri Lanka it is not necessary to travel beyond the time of British colonial rule since the present constitutional and

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1. Telegraph, Sunday Magazine, No. 122 of 1979, 'How the Man Found His Way to the Stars' (pp. 33-9).

2. Published by Victor Gollanz Ltd., (1979).

3. See Kodeeswaran v. The Attorney-General of Ceylon (1969) 72 N. L. R. 337, at p. 342 (P. C.).

judicial structure begins with their governance of Ceylon. Therefore, we have left out from the scope of this thesis the native judicial system, which was in force at the time of British occupation of Ceylon, nor have we delved into the developments that took place during the Portuguese and the Dutch periods.

One third of my time in London on my research was spent in the Official Archives. This, however, is barely adequate to do justice to the voluminous material that awaits to be analysed and put to proper use. Therefore, if there are imperfections the reader is kindly asked to forgive me. I earnestly believe that I have succeeded in selecting what is necessary for a proper understanding of the development of the judiciary with special reference to its relationship with the administration. God willing, I hope to engage in further research into the historical aspect in the near future.

It is inevitable that certain aspects of my thesis receive more detailed treatment than others. Similarly certain aspects which may be thought to be important are merely outlined. This is because I had to highlight some issues which I thought deserved detailed examination either because they have not previously been discussed in detail or because I had a contribution to make to what has already been said by others. I hope that the thesis nevertheless maintains a balanced flow.

It was Professor James S. Read, my thesis supervisor, who encouraged me to undertake historical research. The one full year that I spent in the Public Records Office has been the most challlenging and rewarding period of my research in London for just over three years. For his masterly guidance, unfailing assistance and friendly persuasion and encouragement I am greatly indebted to Professor Read.

Professor M. L. Marasinghe (Windsor, Canada) and Dr. Peter Slinn (SOAS, London) read and made valuable comments on some of the chapters. Mr Y. R. Vyas (Vikram University, India) kindly went through some of the original drafts. Professor Marasinghe also made certain documents and books available. To them I am sincerely thankful.

Professor G. L. Peiris (University of Colombo, Sri Lanka) has been a constant source of inspiration. To him and to Professor T. Nadaraja (Dean/Law, University of Colombo), who are genuinely interested in my welfare, I am more than thankful.

I wish to thank the Commonwealth Scholarships Commission in the U. K. for awarding me a scholarship. My thanks are especially due to Miss. Olivia Saldanha (British Council) and to Mr. L. C. C. Reynolds (Association of Commonwealth Universities).

Mrs. Farida Marasinghe typed the first two parts of my thesis with great dedication. It is due to certain mechanical problems of typewriters that the thesis is not as neat as I would have wished it to be. I must in any case thank Mrs. Marasinghe for her wonderful contribution.

Last but not least I must thank my wife for all her assistance especially at the last stages of my thesis. Many others have helped me in many ways. I thank them all.

Anton Cooray,
May 1979,
London.

ABBREVIATIONS

A. C.	Appeal Cases (House of Lords and Judicial Committee of the Privy Council).
ad. fin.	ad finem (towards the end).
A. I. R.	All India Reporter.
A. L. J.	The Australian Law Journal.
All E. R.	All England Reports.
B. M. Add. Mss.	British Museum Additional Manuscripts.
c.	circa (about).
C. J.	Chief Justice.
C. L. R.	Commonwealth Law Reports.
C. L. W.	Ceylon Law Weekly.
Cmd.	Command Papers.
C. O.	Colonial Office Section of Papers in the Public Record Office, London.
col.	column.
ed.	edited by or edition.
fn.	foot note.
ibid.	ibidem (in the same book, case etc.).
I. C. L. Q.	International and Comparative Law Quartely.
L. A. C.	A Collection of Legislative Acts of the Ceylon Government from 1796.
Legal System	Nadaraja, T., The Legal System of Ceylon in its Historical Setting.
L. E. C.	Legislative Enactments of Ceylon (except otherwise stated, the 1956 edition).
Mod. L. R.	Modern Law Review.
n.	note.
n. d.	no date.
N. L. R.	New Law Reports (Ceylon).
op. cit.	opere citato (in the work cited).
P. C.	The Judicial Committee of the Privy Council.
p., pp.	page, pages.

P. J.	Puisne Justice.
Reflections	L. J. M. Cooray, Reflections on the Constitution and the Constituent Assembly.
S. C.	Supreme Court
sec., secs.	section, sections.
Separation	C. F. Amerasinghe, The Doctrines of Separation of Powers and Sovereignty of Parliament in the Law of Ceylon.
S. P. J.	Senior Puisne Justice.
Sec. St.	Secretary of State.
U. S.	United States Reports.
vol.	volume.

PART I

BRITISH COLONIAL RULE 1796-1948

CHAPTER ONE

1796 to 1832 - PRELUDE TO THE BEGINNING OF THE MODERN SYSTEM OF ADMINISTRATION OF JUSTICE

This, the formative period of the modern system of courts, provides an interesting episode in the history of the judicial role in Sri Lanka. Through a series of clashes that occurred during this period between judicial and administrative officers, one discerns certain ideals which were cherished by the judges. These clashes and a number of other events will be discussed in this chapter in order to understand the attitude of both judicial and administrative officers towards an independent judiciary. The structural developments in the civil and judicial administration will be discussed only in outline and only to an extent strictly necessary for our purpose.[1]

Ceylon experienced three distinct systems of administration during the period under review. From the conquest of Ceylon in 1796 to 1798, the administration of Ceylon was in the hands of the British East India Company, whose forces were responsible for the conquest of Ceylon. The Commander of their forces in Ceylon headed the administration. In 1798 the administrative responsibility for Ceylon was transferred to the Crown, with certain powers over

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1. For a detailed account see Nadaraja, Legal System, Chapter II.

administration still left to the Madras-based British East India Company. This 'dual system of administration' came to an end when, in 1801, Ceylon became a Crown colony.

(1) 1796 to 1801

A period of uncertainty prevailed in Ceylon from 1796 to 1798. The root-cause of the uncertainty may be attributed to the then prevailing likelihood of restoring the British possessions in Ceylon to the Dutch. This uncertainty contributed in no small measure to the unwillingness or inability of the East India Company to introduce a well-organised administrative system together with a satisfactory system of courts and to the refusal of the Dutch inhabitants to co-operate with the British to establish and maintain Dutch courts of law.[1] Moreover, it appears that the primary, if not exclusive, concern of the British East India Company was to collect as much revenue as possible while it held the maritime provinces of Ceylon.[2] As a result, whatever judicial arrangements made during this period were inevitably temporary and not the result of serious deliberation.[3] It is, therefore, safe to conclude that they made little contribution to the development of the judiciary. In fact, when, in 1798, North

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1. In the opinion of the British East India Company: 'the precariousness of our position, the short period the whole of the Dutch settlements have been in our hands, the difficulty of obtaining information, the distrust of the natives, the indisposition of the Dutch were obstacles to a successful management'. Robert Hobart's minute of June 9, 1797. C. O. 55/2.

2. See generally, Colvin R. de Silva, Ceylon Under the British Occupation, (1953), chapter VII.

3. See Jackson to Stuart, April 28, 1796. C. O. 55/1; and, Colvin R. de Silva, op.cit., pp. 310-11.

came to Ceylon as the first civil Governor of Ceylon who was ever to be appointed by the Crown, he noticed a 'total suspension of every kind of criminal justice and indeed of civil'.[4]

The Royal Instructions issued to North emphasised the need to administer justice fairly:

> It being of the greatest importance that justice be everywhere speedily and duly administered, and that all disorders, delays and other undue practices in the Administration thereof be effectually prevented, we do particularly require you to take especial care, that in all courts . . . Justice be impartially administered, and that all Judges and other persons therein concerned do likewise perform their several Duties without delay or partiality.[5]

In order to realise such objectives he was instructed to establish the Dutch system of courts and to set up a court of appeal in civil cases of above a certain monetary value. An appeal lay from the appeal court to the Privy Council subject to a still higher monetary value requirement.[6]

In the beginning North failed to secure the co-operation of the Dutch inhabitants to set in motion the Dutch courts which were in abeyance. Moreover, he believed that the Dutch system of courts should not be adopted without major modifications. Negligence, uncertainty and corruption,

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4. North to Dundas, June 28, 1798. Wellesley Mss., B. M. Add. Mss. 13866 p. 37 a; North to Court of Directors, February 25, 1799. C. O. 54/1.

5. G. C. Mendis (ed.), The Colebrooke-Cameron Papers: Documents on British Colonial Policy in Ceylon 1796-1833, Vol. 2 pp. 70-79, at p. 76.

6. Ibid., at p. 72, 74-75.

he found, had been regular features of Dutch Courts. Fiscaals (court-officials with wide powers in civil and criminal cases), whose powers were extensive and dangerous, were not necessarily lawyers, nor was there legal representation before Dutch Courts.

> No viva voce evidence was insisted upon by the Court, and the Court itself was composed of two military and six civil servants of the /Dutch East India/ Company presided by the Chief Administrator or Head of the Revenue and Commerce. A Court composed of men entirely unlearned in the law without salary as judges, or even the obligation of hearing cases in open court, is not an establishment to which one can look for great attention.[7]

North was in favour of appointing lawyers as judges, legal representation, the separation of the judicial function from the collection of revenue and of the need to amply remunerate judges in order to secure an impartial system of administration of justice.[8]

Whatever his personal views, his reactions to them were ultimately conditioned by various considerations, mainly economic. Thus, after expressing those views and stating the refusal of the Dutch judges to cooperate, he goes on to say:

> It therefore became my duty to make such arrangements as with the smallest charge to your revenue would obtain most effectually under existing circumstances the substantial ends of justice.[9]

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7. North to Court of Directors, June 10, 1799. C. O. 54/1.

8. Also see North to Camden, March 1, 1805. C. O. 54/17.

9. North to Court of Directors, June 10, 1799. C. O. 54/1.

North was able to resuscitate the Dutch system of courts when the Dutch judicial officers changed their minds and extended their cooperation to the new rulers. Replacing the three Raden van Justitie, North introduced a Supreme Court of Criminal Justice consisting of the Governor as president, Commander in Chief, Chief Secretary, Commandant of Trincomalee, Commercial Resident and James Dunkin, a Barrister. (This court had an exclusive jurisdiction in criminal matters except the jurisdiction given to fiscals in respect of minor offences). In fact, North had requested in the above quoted despatch that a lawyer be sent from India 'till it may please His Majesty to make such appointments on the island, as may either alleviate my judicial labours, or relieve me from them altogether'.[10]

North re-established the Dutch civil courts (Landraden and Civiele Raden), providing an appeal to the greater or the lesser court of appeal depending on the value of the subject matter and a further appeal to the Privy Council. Realising that fiscals' courts had functioned satisfactorily, their criminal jurisdiction was enhanced by North twice before the introduction of the Charter of Justice, 1801. A member of one such fiscal's court was found to be 'a gentleman bred to the law'.[11]

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10. Ibid.

11. North to Court of Directors, January 30, 1800. C. O. 54/2.

The attitude shown by North during this period (1797-1801) towards the judiciary is noteworthy. In a statement of the administration of Ceylon, while referring to the Supreme Criminal Court he says:

> Though subject to the disadvantages a court not consisting of lawyers and without legal representation would labour, the court seems to have won confidence.[12]

He had earlier hoped that time was not far 'when the state of this colony will allow of the establishment of a more regular system for the administration of criminal justice'.[13] North, who continued in the office of Governor until 1804, did not change his views favourable to a properly constituted judiciary, even faced with intense enmity between the judiciary and the military officers which will be discussed shortly in this chapter.

(2) 1801-1832: Structural Developments

The close of the 'dual system of administration' saw the beginning of a new era in the British administration of Ceylon, when in 1801 Ceylon became a Crown Colony and thus directly under the control of the Imperial Government.

As before 1801, the Governor was, under the new Commission and Instructions issued to him in 1801, the sole repository of all powers of government 'as well Civil as Military'. He was, however, instructed to form a Council which he could consult with on 'all great and important

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12. Ibid.

13. North to Court of Directors, October 5, 1799. C. O. 54/1.

occasions', but which was not to have any share of the legislative or executive authority. In fact it was intended for the sake of 'more solemnity'.[1] The formation of this advisory council is significant, however, to the extent that it recognised, at least in theory, of the need to provide some check on the Governor in whom was vested a wide variety of powers. North, who was instructed to appoint to the Council the Chief Justice, the Commander-in-Chief, the Chief Secretary, and two others in the Governor's discretion, chose to appoint the three named officials only.

The Charter of Justice of 1801, which drew freely on the measures that had provisionally been adopted by North,[2] established a Supreme Court of Judicature, composed of a Chief Justice and a Puisne Justice who were to be Barristers, in England or Ireland, of not less than five years standing, and who were to be nominated and appointed by His Majesty. Thus, just under five years of the British occupation of Ceylon, a court consisting of professional lawyers who did not owe the tenure of their office to the local executive came into being.

The Supreme Court was given a criminal jurisdiction extending throughout the British possessions in Ceylon and a civil jurisdiction limited to the town and fort of Colombo and over all Europeans. Criminal jurisdiction in respect of lesser offences continued to be exercised by Magistrates, Justices of the Peace and Fiscals' Courts (renamed courts of the Justices of the Peace in 1802) appointed, and acting

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1. Instructions from Dundas, President of the Board of Control, to Governor North, March 13, 1801. Mendis, op.cit., Vol. II, pp. 107-137, at p. 108.

2. Ibid., at p. 110.

according to the regulations issued, by the Governor, but over whom the Supreme Court exercised a general supervision. (As we shall see later, this general supervision by the Supreme Court was resented by succeeding Governors).[3] Outside the Colombo fort and town limits civil jurisdiction was to be exercised by Landraden and Civiele Raden.

A High Court of Appeal was introduced by the Charter, replacing the Greater and Lesser Courts of Appeal then in existence, to hear appeals from Landraden and Civiele Raden. Its members were the Governor, the Chief Secretary and the two judges of the Supreme Court. One of the two judges of the Supreme Court was required to be present whenever the High Court of Appeal assembled. Any two members of the Court constituted a competent court. These provisions ensured that much of the actual work could be carried out by the two judges, 'while the attention of the natives /was/ still preserved to the Governor, as the President of these salutary tribunals; as the immediate representative of His Majesty and the source of redress in civil as of mercy in criminal cases'.[4]

The provisions relating to the High Court of Appeal, thus, enabled a willing executive to leave judicial functions in appeal cases exclusively to the two judicial officers. In the Supreme Court of Judicature, the only power the Governor had was to decide finally a criminal case where the two judges could not reach consensus.

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3. See, infra , p. 23-26.

4. Instructions from Henry Dundas, President of the Board of Control, to Governor North, 13 March 1801. Mendis, op.cit., Vol. II, p. 111.

No major changes were made in the judicial structure introduced in 1801 until 1810. Maitland, North's successor, sent the Puisne Justice, Alexander Johnstone to England, in 1809, to present a case for judicial reforms. What Maitland wanted most was the introduction of a jury system in order to ensure that the Supreme Court judges, who were aliens to the native society, had the indispensable assistance of local inhabitants as jurors. By this time Maitland had come to resent certain acts of the Chief Justice calculated to demonstrate the independence and the authority of the Supreme Court. These events which will be discussed in the next part of this chapter prompted Maitland to seek reforms in the judicial system tending to avert such unpleasant incidents. Unfortunately for him, Johnstone proved to be an ardent supporter of an independent and authoritative judiciary.

The Charter of Justice of 9th August, 1810,[5] based on the recommendations of Johnston, P. J., extended the jurisdiction of the Supreme Court so that now it had both civil and criminal jurisdiction over the whole of the British possessions in Ceylon and over persons of every nationality residing within that territory. The Provincial Courts, which had taken the place of Landraden, were abolished in view of the extended civil jurisdiction of the Supreme Court. Landraden were to be restored instead, in such districts and under such modifications as the Chief Justice might deem expedient. The Chief Justice was given the further powers, with the concurrence of the Governor, of making rules of proceeding

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5. Mendis, op.cit., Vol II, pp. 170-199.

and tables of fees, and of appointing secretaries and other necessary officers of Landraden. The appointment of the members of such courts was, however, left to the sole discretion of the Governor as before.

It was provided that the Supreme Court should usually sit in two divisions: the Chief Justice holding the first of such two divisions of the Supreme Court in Colombo and making circuits in the western and southern provinces and the Puisne Justice holding the second division in Jaffna and going on circuits in the northern and eastern provinces. The Chief Justice was authorised, however, to convene a full court in his discretion.

Introducing trial by jury, the Charter left it to the Chief Justice to specify the qualifications of jurors. Further, both judges sitting together or either of them sitting in division could direct that the jury be made up of members of a particular community alone, in order to ensure impartiality.

The Charter increased the salaries payable to the two judges of the Supreme Court and directed that they be made payable in Madras and not as previously in Ceylon.

The Governor was empowered to make provision or regulation in order to give effect to the Charter but only at the instance of the Chief Justice stating the need for such arrangement.

The instructions accompanying the Charter of Justice of 1810[6] placed the judicial department directly under the 'Controul and Management' of the Chief Justice, and directed

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6. Mendis, op.cit., Vol. II, pp. 208-213.

that all orders for this department and all correspondence with it should pass through him. The Chief Justice was directed to submit half-yearly reports on the state of his department to the Governor in Council, which in turn were to be forwarded to the Secretary of State.

In the Council, too, the powers of the Chief Justice were enhanced. He was designated as the President of the Council, and to him was entrusted the Great Seal of the British Settlements of Ceylon, which had previously been placed in the custody of the Governor. Now, the Governor was to be considered as the Representative of the Crown, in an attempt to equate the Council to the Privy Council in England. All legislative Acts of the Governor and Council were to be sealed with the Great Seal, and all grants of lands, which were required to be made by the Governor in Council under the Great Seal, had also to be signed by the President and one other member of the Council. The Governor was given the power to appoint members of all the inferior courts under that Seal.

The Charter of Justice, 1810, which was proclaimed in Ceylon on November 7, 1811, had the effect of elevating the office of the Chief Justice to a position of considerable importance and power. In fact, Maitland, who had to abruptly leave his office and Ceylon due to ill-health, on July 18, 1811, protested that Alexander Johnston, who became the Chief Justice in early 1810, had acted through greed for more power.[7] Maitland maintained that Johnston was sent to England to request for trial by jury, but not the conferment on the

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7. Maitland to Peal, August 30, 1811, C. O. 54/41.

Chief Justice of powers 'of a novel and extended nature'. The abolition of the provincial courts, he observed, would handicap the collection of revenue, and, speaking from his previous experience, the Governor was the best judge of the need to establish courts in any particular area, as he was well familiar with the state of revenue collection. The authority of the Chief Justice over the judicial department was objected to on the ground that it constituted a rival to the authority of the Governor over the Civil Service. The provisions affecting the authority of the Governor in Council with diminished powers in respect of the judicial department, Maitland concluded, tended to lower the position of the Governor before the natives.[8]

A new Charter was issued, as a result of the representations made by Maitland, on 30th October 1811, correcting the objectionable provisions of the Charter of 1810,[9] which virtually restored the status quo,[10] except for allowing the continuation of trial by jury which Maitland himself supported. The jurisdiction of the Supreme Courts was confined to its original limits, and the Governor was empowered to put an end to the division of that court. The power of regulating the qualifications of jurors was to be shared by the Chief Justice with the Puisne Justice. In the event of a disagreement among them, the Governor had the final decision.

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8. Ibid.

9. See Instructions accompanying the Charter of Justice, 1811. Mendis, op.cit., Vol. II, p. 219.

10. Nadaraja, Legal System., p. 63.

Provincial Courts which existed prior to the Charter of 1810 were revived, with the sole discretion given to the Governor of establishing any Landraden. The control over the proceedings in the minor courts reverted to the Governor.

The Governor was no longer required to act on the advice of the Chief Justice in making arrangements to overcome doubts or difficulties arising from the operation of the Charter, nor was the Chief Justice to continue as the President of the Council, having the custody of the Great Seal and the authority to sign grants of land. Although the increase in the salary of the two judges of the Supreme Court was unaffected, it was directed that the salaries be paid in Colombo as it had previously been.

In effect, the only change brought about by the short-lived Charter of Justice of 1811 was to introduce trial by jury, and the judicial system introduced by the Charter of Justice, 1801, remained in force in the maritime provinces of Ceylon for all practical purposes, with the improvements made on it, until 1832.

(3) 1801-1832: The Judiciary v. The Administration

The above outline of the major structural developments in the judicial system provides the appropriate setting to examine the all too frequent disputes the judiciary had, during this period, with either civil or military authorities.

The first series of such disputes took place during the Governorship of North between the Supreme Court and the Military.[1] Its origin may be traced to a strong protest made

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1. North to Hobart, October 5, 1804. C. O. 54/14.

by Colonel Baillie, Commandant of Colombo, against the imposition of disproportionately severe punishments on two soldiers by the Sitting Magistrate in the Pettah.[2] When Lushington, P. J., came to know of this, he not only shared the view of the Sitting Magistrate that Baillie's conduct was nothing less than a threat to the safety of the Magistrate and thus tantamount to a breach of the peace, but went a step further placing the matter before the Supreme Court. Meanwhile, the matter was taken up by North who thought that Baillie's action was not subversive. Baillie, who was summoned before the Supreme Court, was acquitted.

The close proximity in which judicial and military authorities were stationed in the Fort of Colombo should mainly account for the occurrence of the early disputes between the two authorities. Within a few weeks after the above incident, the Supreme Court ordered corporal punishment to be inflicted on an offender, on the military parade ground situated in front of the court-house. Although the sentry stood by while the sentence was carried out, a strong protest was made to the Fiscal by the Town Major. The Supreme Court, after its own inquiries, came to the conclusion that although the parade ground had been exclusively given to the military, no 'regular grant' had been made and that the military had, in fact, 'illegally monopolized' the particular piece of land. Baillie was summoned before the Supreme Court and asked to revoke the standing garrison order made three years previously which authorised the use of the particular area as a parade ground. Upon his refusal to do so without the approval of

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2. Ibid.

the Governor or General Wemyss, the Commander, he was ordered to enter into a bond to keep the peace. The Governor, on hearing this, made a proclamation in Council prohibiting the infliction of any punishment not of a military nature on the parade ground. To appease the judges the sentries were withdrawn. However, the judges were not too happy about the settlement.[3]

General Wemyss at Chilaw, provoked by the attitude of the judges, ordered Baillie to close the gates of the Fort of Colombo from 8 a.m. till mid-day, on the pretext that spies entered the Fort in the morning and stayed in till noon. On the 24th of September, the judges of the Supreme Court,who could not enter the Fort as Wemyss's order, which had clearly been intended to prevent the functioning of the Supreme Court in the Fort, had been given effect to, sought the intervention of the Governor. North annulled the order and permitted the gates to be open, but only till the following day when Wemyss's notification of the order reached North. In order to safeguard the interests of Baillie, North authorised the closure of the gates as ordered by Wemyss. The Supreme Court Judges were, therefore, left with Hobson's choice; to enter the Fort before 8 a.m. and leave after 12 noon. They, in return, compelled Wemyss to appear before the Supreme Court, notwithstanding his urgent commitments in the operations against the Kandyans, and to enter into a bond for 100,000 rix-dollars to keep the peace for a year.

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3. Ibid.

North moved the Supreme Court from the Fort of Colombo on the ground that the court-house, which North had always intended to hand over to the military as an armoury, was needed for expected reinforcements.

Humiliated as they were by this turn of events, the Supreme Court Judges took strong objection to a letter addressed to North by Wemyss abusing judicial officers. The Advocate-Fiscal allegedly challenged Wemyss to a duel as a result of what was contained in that letter. The Supreme Court decided that no challenge had been intended, reprimanded the Advocate-Fiscal and ordered him to apologise to Wemyss. Later judicial proceedings were instituted against Wemyss, though unsuccessfully, for allegedly ordering his servants to collect firewood from private lands without permission.

The enmity between the judges of the Supreme Court and General Wemyss reached such proportions that they no longer recognised each other on private occasions. Of this series of disputes North remarked thus: 'A storm has just blown over which I feared might have nearly shipwrecked our small colony'.[4]

North attributed the cause for these unpleasant incidents to the lack of clear demarcation between political, military and judicial functions. Further, it was incompatible to have two 'commanding officers', namely the Commandant and the Chief Justice, within the Fort of Colombo. Although he found the course of events unsatisfactory, North appreciated

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4. Ibid.

the need to 'repel in an open and unqualified manner the implied disrespect' to the Court caused by the closure of the fort-entrances.[5] In these events is discernible a strong commitment by the Supreme Court to assert its independence, in spite of the fact that a clash of personalities is also detected.

A few months after the arrival, on July 18, 1807, of North's successor, Maitland, Lushington, P.J., was appointed the Chief Justice with Alexander Johnston, till then the Advocate-Fiscal, as the Puisne Justice. The attempt by Johnston to secure a high degree of independence and authority for the Supreme Court and more particularly to the Chief Justice leading to the Charters of 1810 and 1811 has already been referred to. Certain disputes between Lushington, C.J., and Maitland remain to be mentioned.

Immediately after his return from England, with his new appointment as the Chief Justice, Lushington tried unsuccessfully to rule that courts-martial could not exercise a criminal jurisdiction in minor offences concurrently with the courts of law.[6] His next attempt to negate the legality of the table of fees in the High Court, too, failed.[7] Another example of the peculiarity of the decisions given by Lushington, much to the annoyance of Maitland, may be mentioned. Maitland granted a pardon to a prisoner, on Lushington's recommendation, countersigned by the Deputy Secretary in the

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5. Ibid.

6. Maitland to Castlereagh, September 30 and December 1, 1807. C. O. 54/26.

7. See the papers in C. O. 54/32.

absence of the Chief Secretary, who, according to the Royal Instructions, had the authority to do so. In spite of his own advice to the Governor that the Deputy Secretary's signature was sufficient, Lushington declared from the Bench that the pardon had not validly been issued. Maitland legislated validating pardons issued with the Deputy Secretary's signature. Lushington refused to reply to Maitland's correspondence on this matter on the ground that it related to a judicial decision.[8]

Maitland reacted by removing Lushington from the Council, bringing in the Puisne Justice instead, and shortly afterwards, following the decision of the Governor in Council to suspend him, Lushington resigned.[9]

In 1818, the Puisne Justice, in a case dealing with the legality of pressing coolies for the army, declared from the Bench that such action could be valid only if the officer concerned had been issued a commission, and that in the case of a fugitive coolie only if a warrant of arrest had been issued by a Magistrate. He suggested to Brownrigg, the Governor, that his ruling should be given effect to by a regulation. Brownrigg was, however, inclined to accept the advice of the Collectors that in view of the service land tenures prevalent in the country and the scarcity of Magistrates, no restrictions ought to be placed on administrative officers in respect of pressing for labour. Accordingly, he passed a regulation to declare valid the existing practices, thereby nullifying the ruling of the Supreme Court.[10]

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8. Maitland to Castlereagh, August 18, 1808. C. O. 54/28.

9. See papers in C. O. 54/32.

10. Brownrigg to Bathurst, July 17, 1818. C. O. 54/71.

Soon afterwards, the Supreme Court decided that a person of low caste had been wrongly convicted by a Collector for using a palanquin. There was no regulation which authorised such punishment (flogging) and it was improper to foster caste distinctions, the Supreme Court held. Although Barnes, who had by now succeeded Brownrigg as Governor, saw the evil in perpetuating caste distinction, he thought it imprudent to offend the higher classes of natives for the time being. A regulation was then enacted sanctioning the punishment of those of a low caste for such offences.[11]

One of the most important disputes between the Judiciary and the Governor arose in early 1824 regarding the power of the Supreme Court to issue the writ of Habeas Corpus. Sir James Campbell, who acted temporarily as the Governor until Barnes was reappointed later that year, had directed the Sitting Magistrate in Colombo to arrest a certain deserter and to hold him in custody. Shortly after his arrest, an application for a writ of habeas corpus was made before the Supreme Court, which directed the prisoner to be brought before it with the authority on which he was detained. Meanwhile the Governor passed a regulation legalising the arrest and detention of any person under the authority of the Governor. According to that regulation the production of the order of the Governor barred any further legal proceedings.[12] Bound by the new regulation, the Supreme Court had no option but to dismiss the case observing that 'this Court is reduced to the heart-breaking necessity of saying that His Majesty's writ of habeas corpus is of no effect'.[13]

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11. Barnes to Bathurst, March 11, 1821. C. O. 54/79.
12. Regulation 11, February 5, 1821. C. O. 54/79.
13. Hansard's Parliamentary Debates, Vol. XXIV, p. 1158.

The Governor thought that in the interest of the State he should posses certain powers of arrest and detention not subject to judicial scrutiny.[14] On the other hand, the Chief Justice recorded that the vesting of such wide powers in the Governor eroded the freedom of the subject. The Secretary of State responded by ordering the substitution of the regulation with another which gave limited powers to the Governor in respect of political prisoners.

An examination of the incidents outlined above indicates a distinct difference in the attitudes held by the judges of the Supreme Court and the administration. The Judges of the Supreme Court, who did not owe their tenure of office to the Governor, were able to take an independent stand in matters where the interests of the state and the individual or those of the state and the courts were in conflict. In each of the above incidents the Supreme Court seems to have acted in defence of the freedom of the individual or the independence of the judiciary. The Governor, and his subordinate civil servants, on the other hand, were committed to upholding the security of the state, maintaining a steady revenue and ensuring an efficient civil and military administration.

The assertion by the Supreme Court of its independence and authority was resented by the Governor to the extent that it undermined his own authority. For instance, Brownrigg felt that the insistence of the Supreme Court on the need for the continuation of it being escorted by musicians and lascoreens was explicable only on the ground that judges wanted

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14. Campbell to Bathurst, January 14, 1824. C. O. 54/86.

to publicly demonstrate its high position. In recommending that all unnecessary expenses incurred in respect of such ceremonies ought to be brought to an end, Brownrigg indicated how the elevation of the Supreme Court to a position equal to that held by the Governor, at least in outward appearance, tended to diminish his authority before the natives.[15] On the other hand, the Judges of the Supreme Court contended that it would detract from the respect which was paid to the Court, if such an escort did not attend to it.[16] This struggle for power and dignity is clearly brought out by the rival claims of the Supreme Court and the Governor over the control and supervision of the members of the inferior courts.

(4) 1801-1832: Inferior Courts

Two conflicting views competed for recognition during this period. The first highlighted the advantages of a separate and independent judiciary. As North recorded:

> The wise and humane establishment of Adawlats in Bengal has sufficiently declared to the world your /Court of Directors'/ opinion of the necessity of separating the judicial powers from the collection of the revenue. I need not therefore, I presume, state at length the inconvenience which naturally results from their union in the Collector's Cutchery or the advantage which of course would arise from the re-establishment of distinct and independent Courts of Law.[1]

Such salutary views, however, had to give way to views that resulted from considerations of practical government.

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15. Brownrigg to Bathurst, March 13, 1817. C. O. 54/65.
16. See the note by judges in the above dispatch.

1. North to Court of Directors, June 10, 1799. C. O. 54/1.

Emphasising the need to entrust revenue collectors with judicial powers Maitland pointed out that it was not the name of the collector and not the instructions of Government that enabled him to collect the revenue, 'but the conviction in the minds of the natives that he has power to enforce such collection'.

> /A/nd whenever they are persuaded that he has either no power or that they can go to any quarter where the effects of such power may be counteracted, from that moment there is an end of all hopes of the Collector being able to execute the functions of his office.[2]

Maitland, however, clearly indicated that the exercise of judicial function was not to be considered a primary function of collectors, and that judicial function ought to be exercised only when necessity demanded it, for instance, when a judge was not easily available.[3]

The members of Dutch Courts, which were later abolished, and of the new courts established in their place, owed their tenure of office to the Governor. This ensured that they acted in a manner consistent with the policies and the needs of the government.

An acute disagreement occurred between the Supreme Court and the Governor in respect of the manner in which the inferior judges were directed and controlled. We have already noted the short lived attempt by Johnston to secure to the Supreme Court a tighter control over inferior judicial officers

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2. Memorandum, August 30, 1811. C. O. 54/41.

3. Instructions to Collectors of Jaffna and Matara, n. d. 1806. C. O. 54/25.

and how Maitland vehemently objected to such a scheme resulting in the proclamation of the Charter of Justice, 1811. Here, it is proposed to deal with difficulties arising from the supervisory control the Supreme Court assumed over the inferior courts.

The Charter of Justice, 1801 granted to the Supreme Court 'a general Superintendence and Controul over all and every the Advocates Fiscal, Justices of the Peace, Fiscals, and Peace Officers', and such officers were declared to be 'subject to the Order and Controul' of the Supreme Court 'in the exercise of their Functions'.[4] On the other hand it was left to the Governor to lay down rules of procedure and issue a wide variety of instructions either as legislative enactments or executive directions in order to regulate proceedings before inferior courts. The Supreme Court, in the exercise of its powers, used to, while on circuit, to examine the diaries and records of magistrates and Justices of the Peace and instruct them, and to inquire into the conduct of headmen as peace officers. A common practice grew after 1812 for the Supreme Court Judges to send in reports, usually after making circuits, to the Governor on the state of the law together with their recommendations and stating their opinion on the inferior judges and peace officers. Both Brownrigg[5] and Maitland[6] resented the extent to which the Supreme Court went in the exercise of such control.

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4. Charter of Justice, 1801, Mendis, op.cit., Vol. II, p. 193-94.

5. Brownrigg to Liverpool, January 21, 1813. C. O. 54/46.

6. Memorandum of Maitland, August 30, 1811. C. O. 54/41.

Brownrigg particularly opposed the attempts by the Supreme Court to issue instructions regarding the procedure in the lower courts. He pointed out rather strongly that the 'province of the Court is certainly to control the power exercised by all inferior magistrates to correct illegal or erroneous proceedings and to furnish all wilful violations of their official duties. Those duties are not formed or measured by the orders of the Court but by the law of the country'.[7] Such encroachments by the Supreme Court on the legislative and executive functions adversely affected the manner in which administration was carried out through Headmen and Collectors.[8]

In 1825, the Colonial Office finally decided, after years of hesitation, in favour of the Governors by laying down that the Supreme Court had exceeded its powers when it tried to frame rules for the regulation of the police in the Colony.[9]

To illustrate the difficulties resulting from this dual control, one of many incidents may be cited. In 1818, a Mudalyar (a native officer) took away forcibly a servant of a Burgher[10] family. The magistrate, upon complaint, committed the accused before the Supreme Court for trial, and the Advocate-Fiscal approved his order. An objection was raised by the Collector of Colombo on the ground that the Mudalyar had acted on his orders. The Commissioner of Revenue viewed

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7. Brownrigg to Bathurst, July 9, 1817. C. O. 54/66.
8. Ibid.
9. Bathurst to Barnes, September 12, 1825. C. O. 55/69.
10. 'A person descended from an European by a Native'. Proclamation of January 22, 1801, art. 33.

the action of the Magistrate as an attempt to set up his authority against that of the Collector. In his opinion, the Magistrate should have referred the matter to him instead of committing the Mudalyar before the Supreme Court for trial. The Deputy Secretary held that by acting in disregard of the convenience and the interests of the Government, the Magistrate had committed a contempt of authority of the Collector. He was dismissed.[11]

The above instance amply demonstrates the rivalry between the Supreme Court and the administration to control the inferior judicial officers. Due to its authoritative position the administration seems to have had the last word nearly always in such disputes.

(5) Concluding Remarks

The major features of the judicial system of the period under review are the existence of a relatively independent Supreme Court, inferior courts largely under the control of the administration and a rivalry between the Supreme Court and the administration for both power and prestige.

The judicial arrangements made for the Kandyan provinces which came under British occupation in 1815, too, gave rise to an acute disagreement between the Supreme Court and the administration. First, the judicial arrangements made in the Kandyan provinces may be outlined.

The fall of the Kandyan Kingdom was occasioned in the main by the defection from the Kandyan king of a faction of his chiefs. Therefore, whatever arrangements the British introduced

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11. See Deane to Boyd, April 14, 1818; Boyd to Rodney, April 16, 1818; and Lusignam to Tranchell, April 18, 1818. C. O. 54/71.

in the Kandyan Kingdom, administrative or judicial, were fashioned to accord with the wishes of the Kandyan chiefs and people. Thus the executive and judicial system introduced in 1815 was a mere super-imposition, on the ancient organs of administration, of a means of directive European control.[1] The Governor, as the representative of the Sovereign of the British Empire, replaced the former Kandyan king, and exercised his authority through the Resident of Kandy, the Chief European officer in the Kandyan provinces. The repository of all administrative and judicial powers, the Resident exercised an exclusive criminal jurisdiction in capital offences. Otherwise, criminal and civil jurisdiction in respect of Kandyans was permitted to be where it had lain during the time of the Sinhalese Kings.[2]

The unsuccessful rebellion of 1817-1818 afforded a good opportunity for Brownrigg to drastically diminish the powers of the native chiefs on the grounds that since they had rebelled and violated the Convention of 1815 made between them and the British, the Convention was not completely binding on him. In addition to the exercise of judicial powers by the Judicial Commissioner, one of the three members of the newly created Board of Commissioners,[3] the accredited agents of government were also vested with judicial powers. The Proclamation of November 21, 1818 took away the judicial powers exercised by native chiefs almost entirely, leaving only a limited criminal jurisdiction in respect of petty offences.

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1. Colvin R. de Silva, Ceylon under the British Occupation, 1795-1833, p. 299.

2. See for the system of administration of justice during the time of the Kandyan Kings, Colvin R. de Silva, op.cit., pp. 292-96.

3. It was set up with effect from October 1, 1816. See, Ceylon Government Gazette, September 11, 1816.

The space does not permit an exhaustive examination of the powers and functions of the Agents and the Judicial Commissioner. It may, however, be noted that in actual practice they functioned nearly in the manner the courts did in the maritime provinces.

A serious claim was made, meanwhile, by the judges of the Supreme Court and the Advocate-Fiscal, that the jurisdiction of the Supreme Court should extend to the Kandyan provinces. The Advocate-Fiscal maintained that the judicial arrangements made for those provinces were contrary to the Charter of Justice, 1801, and that every person residing in those provinces should be subject to the jurisdiction of the Supreme Court.[4] Slightly modest in his claim, the Chief Justice argued that all non-Kandyans, according to the Charter, came within the jurisdiction of the Supreme Court.[5] Brownrigg was of the opinion that the introduction of a judicial system, which till then had been competing with the executive for power and prestige, was inadvisable.[6] Further, until more information could be obtained no major changes ought to be made.[7]

It was not until the proclamation of the Charter of Justice, 1833 that the judicial arrangements made by the local executive and much objected to by the Supreme Court were swept away, bringing the whole island under the jurisdiction of a uniform system of judicial administration.

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4. H. Giffard to Brownrigg, March 11, 1815. C. O. 54/55.

5. See Brownrigg to Bathurst, November 17, 1815. C. O. 54/57.

6. Brownrigg to Bathurst, March 15, 1818. C. O. 54/55.

7. Ibid.

CHAPTER 2

THE CHARTER OF JUSTICE 1833 AND THE MODERN JUDICIAL SYSTEM

The Charter of Justice, 1833 has rightly been considered to be the 'foundation of our judicial system and the parent of the Administration of Justice Ordinance 1868 and of the present Courts Ordinance, 1889'.[1] It is proposed in this chapter to examine the recommendations of the Colebrooke-Cameron Commission which provided the 'general basis and design' as well as 'all /the/ valuable details'[2] of the Charter of Justice, 1833, followed by an outline of the judicial system introduced by it. The major developments in that judicial system culminating in the Courts Ordinance, 1889 will then be examined in order to provide the necessary background to the discussion, in the next chapter, of the relationship between the judiciary and the administration during the period 1833-1948.

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1. Per De Sampayo, A.J. in Application for a Writ of Prohibition directed to the members of a Field General Martial (1915) 18 N.L.R. 334, at p. 338. The Courts Ordinance of 1889, was repealed by the Administration of Justice Law of 1973.

2. Instructions accompanying the Charter from Viscount Goderich, Secretary of State to Governor Horton, March 23, 1833. Mendis, The Colebrooke-Cameron Papers, Vol. I, p. 350-373, at 350.

The extent to which the defects of the judicial system in operation prior to 1833 were sought to be remedied by improving upon the provisions relating to the constitution and the working of the judiciary forms the essential theme of this chapter. What in fact happened in practice will further be discussed in the next chapter.

(1) Judicial Reforms Recommended by the Colebrooke-Cameron Commission*

Colebrooke made four reports on the administration of Government, on revenue, on compulsory services to which the native Ceylonese were subject and on the establishments and expenditure in Ceylon, while Cameron contributed one lengthy report on the judicial establishments and procedure. It is this last report that we will discuss here. For the present, it is sufficient to note that Colebrooke recommended the introduction of a uniform system of government, with a Legislative Council and an Executive Council intended to operate as a check on the wide powers of the Governor. (The constitutional developments during the period under review are outlined in Chapter 3).

Cameron started from the premise that the duty of the government towards the natives was the provision of cheap and accessible courts and, at the same time, the prevention of the use of vexatious litigation as a means of oppression. In the absence of adequate moral restraints, an efficient system of courts alone could, in Ceylon, protect the rights of the individual. Moreover, the protection of law should be

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*For a thorough account of the background to the appointment of, and a scholarly assessment of the contribution made by, the Commission, see Samaraweera, V. K. The Commission of Eastern Inquiry in Ceylon, 1822-1837 (Oxford, D.Phil, 1969).

gratuitous so that justice was not denied to the natives who were generally poor. Thus, he recommended the establishment of a sufficient number of courts--courts so constituted as to deliver correct judgments--within the easy reach of people.[1]

The members of the then existing courts of original jurisdiction, Cameron found, had no legal qualifications. They owed their tenure of office to the Governor, and depended on the medium of government to apply to the Advocate-Fiscal for advice in case of any doubts relating to their powers and functions[2] and the procedure to be adopted in their courts. As we have already seen in Chapter 1, the Governor and high ranking government officials exercised a high degree of control over the lower courts. In the Kandyan provinces the administration of justice was virtually in the hands of the executive. Cameron recommended that the control over inferior judges should be transferred to the judge's of the superior court.

That the local civil courts had no jurisdiction in any case involving a subject matter of above a certain monetary value and where the defendant was a European appeared to Cameron to be a serious defect. Since both the Supreme Court and the provincial courts applied the same substantive law, he thought, there was no justification for drawing a distinction between Europeans and natives in deciding the jurisdiction of a court. He successfully advocated the elimination of such distinction.[3]

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1. Mendis, The Colebrooke Cameron Papers, Vol. I, p. 121-22.

2. Ibid., p. 125.

3. Ibid., p. 135.

In spite of the fact that Cameron advocated the abolition of the judicial arrangements that had been made in the Kandyan provinces, he recommended that the system of assessors employed there should be adopted along with the existing jury system.[4]

Since the only legally qualified persons in the then existing appeal courts (Minor Courts of Appeal and the High Court of Appeal) were the two judges of the Supreme Court in the High Court of Appeal, the same objections raised against the poor quality of the judgments delivered by local courts could be levelled against those of the appeal courts too.[5] Cameron recommended the introduction of a Supreme Court of appellate jurisdiction, with a limited original jurisdiction in respect of serious offences, centrally located in Colombo, but expected to make circuits in different parts of the country. Such a court would preserve the uniformity of judicial decision particularly through a thorough supervision of the local courts while on circuit, thereby also making the appellate court easily accessible to residents of places far off from Colombo.[6]

To summarize Cameron's recommendations, he advocated a uniform system of administration of justice abandoning the two different systems prevailing in the maritime provinces and the Kandyan provinces, a simple system of a set of original courts and a central appeal-court, ensuring cheap and accessible courts protected from undue interferences from the administration. It is interesting to note that the Charter

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4. Ibid., pp. 126, 167 and 184.
5. Ibid., 139-44.
6. Ibid., pp. 183-84.

of Justice, 1810, the brain-child of Alexander Johnston, P.J., (as he was then), unsuccessfully attempted to introduce many of the features that Cameron recommended. Most of the recommendations contained in Cameron's report were adopted in drafting the Charter of Justice, 1833, which will be discussed now.

(2) The Salient Features of the Charter of Justice, 1833

The Charter of Justice, 1833 which marks the beginning of 'a new and important era in the history of the administration of justice' in Ceylon[1] is undoubtedly the most important constitutional document in Nineteenth-Century Ceylon.

It repealed all the previous Charters[2] and introduced a system of courts consisting of District Courts and a Supreme Court, and prohibited the introduction of any other courts by the Governor with the advice of the Legislative Council.[3] The jurisdiction of admiralty courts[4] and Gansabes (Village Councils) was, however, left unaffected.[5]

For the purposes of judicial administration Ceylon was divided into the district of Colombo and three circuits whose boundaries were specified in the Charter.[6] Any changes in such divisions could be effected by the Governor, but only at the request of the Supreme Court.[7] The Governor was authorised to sub-divide each of the three circuits into districts, with the concurrence of the Judges of the Supreme Court.[8]

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1. Chief Justice Sir Charles Marshall in Colombo Journal 1833, p. 558.
2. Ibid., p. 321.
3. Ibid., p. 323.
4. Ibid.
5. Ibid.
6. Ibid., p. 327.
7. Ibid., p. 328.
8. Ibid.

Within each district was directed to be a District Court to be held before a District Judge and three assessors. District Judges were to be appointed by letters patent issued by the Governor in pursuance of warrants addressed to him by the Crown and to hold office during His Majesty's pleasure.[9] The selection of assessors was to be according to the qualifications laid down by rules of court in addition to the criteria laid down by the Charter itself.[10] District Courts were given an unlimited civil jurisdiction together with a criminal jurisdiction exclusive except for the denial of jurisdiction in respect of graver offences.[11] District Courts were given the care and custody of the person and property of those of unsound mind, and the authority to administer testate or intestate properties.[12]

Every sentence or judgment of the District Court was to be pronounced by the judge in open court, after consulting the assessors. The judge was bound to state before the assessors all the questions of law and fact in issue together with his opinion on each such question. Every assessor then declared his opinion on each issue. In the event of a difference of opinion between the judge and the assessors on any issue before the court the opinion of the judge prevailed. In such event, a record had to be kept in the court of the vote of the judge and of every assessor in respect of each of the issues decided by the court.[13] This method ensured that the judge while having the assistance of local inhabitants

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9. Ibid., p. 328-29.
10. Ibid., p. 329.
11. Ibid., p. 331.
12. Ibid.
13. Ibid., p. 333.

in arriving at a correct decision, could ultimately uphold his own opinion: a safeguard against any unfounded decision of a District Judge existed in that such a decision could later be challenged before the Supreme Court, which had the advantage of examining the detailed account of the disagreement between the judge and the assessors as recorded by the District Court.

The Supreme Court was to consist of a Chief Justice and two Puisne Justices appointed by Letters Patent issued by the Governor in pursuance of warrants addressed to him by the Crown and holding office during His Majesty's pleasure.[14] The Governor could provisionally suspend a Judge of the Supreme Court from the exercise of his functions with 'the advice and consent' of the Executive Council 'upon proof of misconduct or incapacity' and 'upon the most evident necessity and after the most mature deliberation', provided that (i) the Secretary of State was immediately informed of the grounds and causes of such suspension and (ii) the suspended judge was supplied with a full copy of the minutes of the Council meeting and of evidence on which it acted.[15] Such a suspension was subject to confirmation or disallowance by the Crown.[16] A Judge of the Supreme Court vacated his seat ipso facto if he accepted any other office or place of profit within the island.[17]

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14. Ibid., p. 323.
15. Ibid., pp. 324-25.
16. Ibid., p. 325.
17. Ibid., p. 326.

An exclusive criminal jurisdiction was vested in the Supreme Court in respect of offences punishable with death, or transportation, or banishment, or imprisonment for more than twelve calender months, or by whipping exceeding 100 lashes, or by fine exceeding ten pounds.[18] The Supreme Court was also given a criminal jurisdiction concurrent with that of the District Court, thereby qualifying the recommendations of Cameron,[19] so that cases, though of a trifling nature, involving questions 'of great difficulty or of peculiar importance' could be transferred from a District Court to the Supreme Court.[20] Its original criminal jurisdiction was required to be exercised before a Judge of the Supreme Court and a jury of thirteen men.[21]

It was essentially as a court of appeal that the Supreme Court was intended. All appeals from the decisions of the District Courts in both civil and criminal cases were to be determined by it. In civil appeals it was assisted by three assessors. In the event of a difference of opinion between the assessors and the Judge, the Judge's opinion prevailed, as in the case of District Courts.[22] The Supreme Court could affirm, reverse, correct, alter or vary any judgment, sentence decree or order appealed from and admit new evidence or in the case of a civil appeal remand to the District Court for a further hearing, or for the admission of any further evidence. It could also transfer a civil or

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18. Ibid., p. 331.
19. Instructions Accompanying the Charter, ibid., p. 352.
20. Ibid.
21. Ibid., p. 335.
22. Ibid., p. 336.

criminal case to be decided by another District Court within the same circuit. Full power and authority was granted to the Supreme Court so that it could issue mandates, in the nature of writs of mandamus, procedendo and prohibition against any District Court.[23]

The sessions of the Supreme Court were to be held in Colombo and on circuit. Ceylon was divided into the District of Colombo and three circuits. A number of District Courts were established within each such circuit and the District of Colombo. (In a practical sense the District of Colombo constituted a fourth circuit).[24] Sessions of the Supreme Court held by one judge of the Supreme Court were required to be conducted in each of the three circuits twice a year, arranged in such a manner that all the judges of the Supreme Court would not at the same time be absent from Colombo and that all such judges would be resident in Colombo not less than one month twice a year.[25]

At criminal sessions held on circuit, the Judge who had the authority to decide any questions of law arising for determination, could nevertheless reserve such question for the decision of the three Judges of the Supreme Court collectively assembled.[26] In the same manner, any questions of law, pleading, evidence or practice arising for adjudication

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23. Ibid.

24. See the suggestion made by Carr. J., that the Charter ought to be amended to specify four circuits, instead of the three circuits it mentioned, the fourth being the Home (Colombo) Circuit. Draft Ordinance for better and more effectual administration of Justice with comments by the Supreme Court Judges. C. O. 54/202.

25. Mendis, op.cit., Vol. I, p. 334-35.

26. Ibid., p. 339.

at any civil or criminal session on circuit could be referred for decision to a collective session of the Supreme Court.[27] The Supreme Court Judge holding a session on circuit was required to 'inspect and examine the records of the different District Courts' in search of contradictory or inconsistent decisions on matters of law, evidence, pleading or practice and to report any such contradictions or inconsistencies at a general session. It then became the duty of the Supreme Court to draft a declaratory law to be transmitted to the Governor to be laid before the Legislative Council for its consideration.[28] The Supreme Court could also make general rules and orders of court for the removal of doubts respecting any questions or inconsistent decisions referred to it in the manner above mentioned.[29] Provision was also made for any appeal to be heard in a summary manner at the instance of and by the Collective Court in Colombo (instead of by a single judge on circuit) with the consent of the litigant parties.[30]

Admitting that regulations respecting 'the course and manner of proceeding' to be observed by the Supreme Court and the District Courts which were needed for carrying into effect the various provisions of the Charter and for 'the more prompt and effectual administration of justice' cannot properly be made except by the Judges of the Supreme Court, the Charter of Justice, 1833 authorised the Supreme Court at any general session to make general rules and orders relating to a variety of matters connected with court proceedings. Any such

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27. Ibid., p. 340.
28. Ibid., p. 340-1.
29. Ibid., p. 341.
30. Ibid., p. 342.

regulations were required not to be repugnant to the Charter, and the powers of approbation and disallowance were reserved to the Crown to whom such regulations had to be transmitted forthwith.[31]

An appeal was allowed from any final decision of the Supreme Court to the Privy Council,[32] which had been recognized as the ultimate appeal court since the Charter of Justice, 1801.[33] As before, the Chief Justice was authorised with the approval of the Governor to appoint any additional ministerial officers needed for the Supreme Court.[34] Deviating from the power previously enjoyed by the Supreme Court to admit persons qualified according to the rules of court to act 'both as advocates and proctors',[35] it could now enrol 'as advocates or proctors' persons of good repute and of competent knowledge.[36]

With this outline of the Charter of Justice, 1833 in mind, we may now proceed to examine the changes which were made in the judicial structure upto 1889.

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31. Ibid., p. 343-44.
32. Ibid., p. 344.
33. Mendis, op.cit., Vol. II, p. 197-98.
34. Ibid., p. 326. cf. The Charter of Justice, 1801, sec. xxii.
35. The Charter of Justice, 1801, sec. xxiv.
36. Mendis, op.cit., Vol. I, p. 327.

(3) Developments in the Judicial Structure during 1833-1889

In spite of 'the solidity and comprehensiveness of the general principles' forming the foundation of the Cameron reforms,[1] the Charter, in its practical application, evinced serious defects. Perhaps, the major cause of such defects in the Charter, the general scheme of which had found support in 'an almost unbroken current of judicial and legal testimony at Ceylon', might have been the 'Asiatic character and customs of Ceylon' which neither the Commissioners nor the draftsmen adequately understood.[2]

Governor Campbell complained that the administration of justice in Ceylon was not by any means 'in a credible, useful or economical condition'.[3] 'The delays and practical denial of justice' both in civil and criminal matters, he said, were unparalleled in any country.[4] Even in the Supreme Court and the District Court the prevailing view appears to have been that the judicial system needed improving,[5] although the general consensus was against a repeal of the Charter; in fact, the Supreme Court Judges strongly believed that they could bring about necessary changes by way of judicial interpretation alone.[6]

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1. The Instructions accompanying the Charter of Justice, 1833, Mendis, op.cit., Vol. I, p. 370.

2. Secretary of State Stanley to Governor Campbell, February 26, 1842. C. O. 54/191.

3. Governor Campbell to Secretary of State Lord Stanley, November 11, 1841. C. O. 54/191.

4. Campbell to Lord Stanley, April 18, 1842. C. O. 54/196.

5. See, dispatch No. 91 of May 30, 1839. C. O. 54/170; No. 94 of December 13, 1841. C. O. 54/196; and the observations of District Judges on the Charter enclosed towards the end in C. O. 54/202.

6. See the observations of the Governor on the reports of the Judges of the Supreme Court on the Charter. Dispatch No. 91 of May 30, 1839. C. O. 54/170.

The mass of reports exposing the defects in the judicial administration in Ceylon, which had caused much embarrassment in the Colonial Office,[7] primarily complained of the lack of inferior courts which could summarily dispose of petty offences.[8] This caused an overburdening of the District Courts, and opened the way for proctors to exploit poverty stricken natives with their excessive fees.[9] Governor Mackenzie had pointed out in 1838 that under the authority of the Supreme Court, District Courts conducted preliminary examinations for the information of the Queen's Advocate, in cases which were ultimately to be tried before the Supreme Court. It was his firm view that the District Courts should be relieved from this rather ministerial function, by transfering it to some other authority.[10]

In 1843 five Ordinances were passed locally which were confirmed by the Crown in order to remedy 'the evils which arise under the Charter'.[11] (It must be noted here that the local legislature had by this time been granted the power to legislate notwithstanding anything contained in the Charter subject to the confirmation or disallowance by the Crown in the event such enactment did not receive the unanimous approval of the Legislative Council and the Judges of the Supreme Court. As will be seen in the next chapter, by 1847

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7. Governor Campbell to Lord Stanley, dispatch No. 3 of November 22, 1841. C. O. 54/191.

8. Governor Campbell to Lord Stanley, dispatch No. 56 of April 18, 1842. C. O. 54/196.

9. Ibid.

10. Governor Mackenzie to Lord Glenely, dispatch No. 95 of June 27, 1838. C. O. 54/163.

11. See Governor Campbell to Lord Stanley, dispatch No. 56 of April 18, 1842. C. O. 54/196.

the local legislature had been given the power to pass laws affecting the administration of justice to operate from the date of promulgation in Ceylon by the Governor). Ordinance No. 10 of 1843 established Courts of Requests which were empowered to 'determine in a summary way and according to equity and good conscience' all civil cases, except those specified by the Ordinance, where the subject matter involved did not exceed £5 in value.[12] Inferior courts of criminal jurisdiction called Police Courts were introduced by Ordinance No. 11 of 1843. They were authorised to determine in a summary way all charges of crimes except those punishable by imprisonment for a period of more than three months, or by fine exceeding £5 or by whipping exceeding twenty lashes.[13]

No legal representation was allowed either in the Courts of Requests or Police Courts, except in certain stated circumstances.[14] Although there was no right of appeal from the decision of either of these courts, an aggrieved party could petition the Supreme Court to review the proceedings on any of the stated grounds such as 'gross irregularity in the proceedings' or 'the admission of illegal or incompetent evidence'.[15] The creation of these inferior courts had the

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12. See section 5 of Ordinance No. 10 of 1843.

13. See section 5 of Ordinance No. 11 of 1843.

14. Ordinance No. 10 of 1843, sec. 13 (Courts of Requests) and Ordinance No. 11 of 1843, sec. 16.

15. Ordinance No. 10 of 1843, sec. 22; Ordinance No. 11 of 1843, sec. 14.

effect of relieving the District Courts of their overload, securing at the same time speedy and inexpensive judicial process in respect of trivial matters both civil and criminal.[15a]

Ordinance No. 15 of 1843, intended to provide 'in certain respects for more efficient Administration of Justice in Criminal Cases', had the effect of relieving the District Court of its duty to conduct preliminary examinations into charges of offences which were ultimately to be tried before the Supreme Court. Ordinance No. 6 and Ordinance No. 13 of the same year made provision for the maintenance of public peace and the apprehension of persons suspected of having committed criminal offences.

A serious criticism had been made regarding the manner in which the Supreme Court exercised its appellate jurisdiction.[16] (As has been noted above appeals were heard by a single judge on circuit). J. de Livera, District Judge of Matara, complained of 'inconsistent and contradictory expositions of law and practice' arising from appeal cases. The only procedure that existed of eliminating such inconsistencies, namely reference of any question of law for the collective court at the sole discretion of the Supreme Court Judge, did not prove very effective.[17] This was

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15a. That the creation of inferior courts was primarily intended to ease the work-load of the District Court is clearly brought out by the fact that in certain thinly populated outposts one person was appointed to act as District Judge, Commissioner of Requests and Police Magistrate. See Governor MacCarthy to Newcastle, April 23, 1862. C. O. 54/369.

16. Observations of District Judges on the Charter of Justice, 1833, enclosed in the latter part of C. O. 54/202.

17. Ibid.

particularly because a decision of the collective court did not, in strict law, bind the individual judges. Livera, D.J., pointed out that the diversity of laws prevalent in Ceylon left 'sufficient latitude' to each judge to 'act upon his favourite system uncontrouled by the opinion of his colleagues'. To remedy this situation and to achieve uniformity of law as declared by the Supreme Court, Livera, J., suggested that an appeal should be allowed to the collective court from the decision of a single judge.[18]

Not long after did these suggestions find legislative recognition. Ordinance No. 11 of 1845 provided that appeals could be heard, with the consent of the parties, by a single judge in Colombo instead of on circuit (sec.1). It also provided a further appeal from the decision of a single judge to the collective court on points of law (sec.3). Except in cases appealable to the Privy Council, the judgment of the collective court was final (sec.5). On the recommendations of the Finance Committee of the Executive Council of Ceylon submitted in 1849,[19] it was enacted in 1852 that the appellate jurisdiction of the Supreme Court should be exercised in Colombo by two judges sitting together, except when, in the opinion of the court, it was necessary for a single judge to go on circuit to take new evidence.[20]

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18. Ibid.

19. Report on the Fixed Establishments, submitted on December 13, 1849. British Parliamentary Papers, House of Commons, 1852 (568) xxxvi pp. 36-40.

20. Ordinance No. 20 of 1852, sec. 9.

Ordinance No. 20 of 1852 too was, undoubtedly, devised in furtherance of the object of preserving a central appeal court capable of maintaining uniformity of law, taking, at the same time, full advantage accruing from the circuit system.

Another defect in the judicial system established by the Charter of Justice, 1833 was in respect of execution of sentences. According to the Charter no appeal from a judgment given by a District Court had the effect of staying the execution of any such sentence or judgment pronounced by such District Court, except when the District Judge made an order, in his discretion, for the stay of such execution pending such appeal.[21] Instances where the Supreme Court reversed a District Court decision imposing corporal punishment which had already been executed, such as that mentioned in 'Kaloo Appu's compensation petition',[22] may not have been hard to find. In fact, a member of the Legislative Council pointed out in 1843 that corporal punishment should be deferred until the decision of the appeal.[23] Even the report

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21. Mendis, Colebrooke-Cameron Papers, Vol. I, p. 337.

22. See Governor Campbell to Lord Stanley, April 19, 1844. C. O. 54/211. Kaloo Appu had been sentenced to twelve months imprisonment and fifty lashes, which were immediately inflicted on him, inspite of the appeal to the Supreme Court, which reversed the decision of the District Court. Kaloo Appu's petition claiming compensation for the infliction of corporal punishment which had been proved to be untenable in law did not succeed. The dismissal of the petition by the Governor was approved by the Secretary of State. See Lord Stanley to Campbell, June 20, 1844. C. O. 54/211.

23. See C. O. 54/202. Entry made on January 19, 1843.

of Empson, who was appointed by the Secretary of State to inquire into the reports emanating from Ceylon on the Charter of Justice, 1833,[24] held the same view.[25] The Draft Ordinance of 1843 providing for better administration of justice, which could not be enacted due to lack of unanimity of Judges of the Supreme Court and the Legislative Council, made provision to give effect to this view.[26]

Later, Ordinance No. 7 of 1854 provided that the execution of corporal punishment imposed by a Police Court should be stayed pending appeal (sec.10). Ordinance No. 13 of 1861 which consolidated the law relating to Police Courts retained that provision (sec.24). The Criminal Procedure Code, Ordinance No. 15 of 1898 brought forth the final solution in section 316(1).

> 316(1) When the accused is sentenced to whipping /by any court/, the sentence shall not be carried out until after the expiration of ten days from the date of the pronouncement thereof, or (if an appeal is presented within that time) until the order of the Supreme Court shall have been notified to the accused, and the execution of the sentence shall be subject to the terms of that order.[27]

In 1852 it was enacted that the Supreme Court should hear appeals sitting without assessors,[28] and that District Courts should sit without assessors except when the Judge

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24. Lord Stanley to Governor Campbell, dispatch No. 66 of February 26, 1842. C. O. 54/191.

25. See the entry cited in note 23 above.

26. See sec. 38 of the Draft Ordinance enclosed in C. O. 54/202.

27. Administration of Justice Law, No. 44 of 1973 which replaced the Criminal Procedure Code, 1898, makes similar provision (sec.271). The Criminal Courts Commission (Sessional Paper XIII-1953) recommended the abolition of whipping except by the Supreme Court. (para. 126).

28. Ordinance No. 20 of 1852.

thought it necessary to require their presence.[29] Attempts were made to consolidate the law relating to the Courts of Requests in 1859 (Ordinance No. 8), to the Police Courts in 1861 (Ordinance No. 13) and to the Justices of the Peace in 1864 (Ordinance No. 1) culminating in Ordinance No. 11 of 1868.

The way was prepared for the Courts Ordinance of 1889, by the enactment of the Penal Code,[30] Criminal Procedure Code[31] and the Civil Procedure Code.[32]

(4) The Courts Ordinance of 1889

Consolidating the various past enactments, subject to many amendments, the Courts Ordinance of 1889 set forth the major provisions relating to the judicial system of Ceylon, which survived a number of amendments in essentials until the enactment of the Administration of Justice Law in 1973.

The judicial structure established by the Courts Ordinance consisted of one superior court, the Supreme Court, and three sets of inferior courts, namely District Courts, Courts of Requests and Police Courts.[1] The Ordinance, however, permitted the continuance of admiralty courts and of 'the jurisdiction of village tribunals, committees or councils,

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29. Ordinance No. 21 of 1852.
30. Ordinance No. 2 of 1883.
31. Ordinance No.. 3 of 1883.
32. Ordinance No. 2 of 1889.

1. The Courts Ordinance No. 1 of 1889, L.E.C., cap. 6, sec. 3. (Hereinafter reference will be made to the sections of the Courts Ordinance as appears in the Legislative Enactments of Ceylon, 1956 except when it is necessary to refer to any section of the original enactment).

or of any municipal magistrate, or of any special officer or tribunal legally constituted for any special purpose or to try any special case or class of cases'.[2] It may be mentioned here that in the course of time certain additions were made to the judicial system established by the Courts Ordinance of 1889. For instance Juvenile Courts were created by Ordinance No. 48 of 1939, Rural Courts replacing village councils or committees, by Ordinances Nos. 12 and 13 of 1945, and a Court of Criminal Appeal, by Ordinance No. 23 of 1938. It is useful to outline the powers and functions of these courts, particularly of the Supreme Court.

Before we proceed to examine the powers and functions of the courts of law, reference must be made, though briefly, to how the country was divided for the purposes of the administration of justice. Ceylon was divided into five circuits each of which was divided into districts and divisions.[3] In each district was to be established at least one District Court and in each division, at least one Court of Requests and one Magistrate's Court.[4] The original criminal jurisdiction of the Supreme Court was to be exercised at criminal sessions held for each of the circuits.

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2. Ibid.
3. Ibid., sec. 4.
4. Ibid., sec. 52.

The Supreme Court consisted of four judges, one of whom was designated the Chief Justice.[5] No such judge was permitted to accept any other office or place of profit.[6] 'An original jurisdiction for the inquiry into all crimes and offences committed throughout Ceylon'[7] and 'an appellate jurisdiction for the correction of all errors . . . committed by any original court'[8] were vested in the Supreme Court. These and the various other powers of the Supreme Court could be exercised 'in different matters at the same time by the several Judges of the /Supreme/ Court sitting apart'.[9]

The unlimited original criminal jurisdiction of the Supreme Court was, however, in practice exercised only in respect of serious offences which were beyond the competence of any other court.[10] Generally, a trial before the Supreme Court was preceded by a non-summary proceeding or preliminary inquiry in a Magistrates Court[11] and the accused was tried on indictment[12] before a single judge and a jury on circuit.[13]

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5. Ibid., sec. 7 of the original Ordinance. In 1921 the number was increased to five (sec. 4 of Ordinance No. 36 of 1921) and in 1937 to nine (sec. 5 of Ordinance No. 18 of 1937). In 1962 the number was increased to one Chief Justice and ten Puisne Justices (Act No. 1 of 1962, sec. 17) and in 1973 the newly constituted Supreme Court was to consist of the Chief Justice and not less than ten and not more than twenty Puisne Justices. (See Administration of Justice Law, No. 44 of 1973, sec. 8).

6. Ibid., sec. 12.

7. Ibid., sec. 19(a).

8. Ibid., sec. 19(b).

9. Ibid., sec. 21.

10. Nadaraja, Legal System, at p. 125.

11. Criminal Procedure Code, L.E.C., cap. 20, sec. 155.

12. Ibid., sec. 218.

13. Courts Ordinance, L.E.C., cap. 6, sec. 29; and Criminal Procedure Code, L.E.C., cap. 20, sec. 216.

The exceptions to this general rule were: (i) the Chief Justice could order a Trial-at-Bar held at Colombo before 3 Judges and a jury;[14] (ii) the Minister of Justice could in certain circumstances order such a Trial-at-Bar, but without a jury;[15] and (iii) the requirement of a preliminary inquiry was dispensed with in cases where the accused had been committed for trial before the Supreme Court at Bar without a jury on information exhibited to the Court by the Attorney-General.[16]

The appellate jurisdiction of the Supreme Court was to be 'ordinarily exercised only at Colombo'.[17] An appeal from the decision of any District Court either in a civil or a criminal case was to be heard by two Judges at least, whereas an appeal from the decision of any other inferior court could be heard by a single Judge.[18] It may be noted here that there was no appeal from a decision of the Supreme Court in criminal cases (either by a single Judge or three Judges) except by special leave to the Privy Council[19] until the creation of the Court of Criminal Appeal in 1940[20] to fill this lacuna. (The Court of Criminal Appeal consisted of all the Judges of the Supreme Court, and appeals were heard by an uneven number. An appeal lay from the decision of the Court to the Privy Council).[21]

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14. Ibid. 15. Ibid., sec. 440 A.

16. Ibid., sec. 440 A(2); and Act No. 31 of 1962, sec. 3(3). See infra p. 276.

17. Courts Ordinance, sec. 36.

18. Ibid., sec. 38.

19. Privy Council Appeals, L.E.C., cap. 100, Schedule, Rule 1(b).

20. Court of Criminal Appeal Ordinance, L.E.C., cap. 7.

21. Ibid., sec. 2.

In the exercise of its appellate jurisdiction, the Supreme Court could correct all errors in law or in fact committed by any inferior court in 'any order having the effect of a final judgment'.[22] It could 'affirm, reverse, correct or modify' any such order or judgment, or give directions to the court below, or order a new trial.[23] In the event the Supreme Court decided that it ought to receive and admit further evidence, it could order that it should be done by a single Judge on circuit,[24] and the decision of such Judge was declared to be final. If such an order had been made in an appeal from the decision of a District Court, a further appeal lay to a Bench of two or more Judges of the Supreme Court.[25] This provision ensured that the full benefit of the circuit system was taken without infringing upon the provisions of the Ordinance which required the presence on appeal of at least two Judges in certain circumstances.

Provision was made in the Courts Ordinance for the reference of a matter before one or more Judges of the Supreme Court to a larger Bench. For instance section 38 provided that a single Judge sitting alone in appeal could reserve the matter for the decision of more than one Judge of that Court.

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22. Courts Ordinance, sec. 36. Appeals were allowed to the Supreme Court from a number of statutory bodies, such as, Bribery Tribunals, Quazis and Co-operative arbitrators, all of which will be discussed in Chapters 5 and 6.

23. Ibid., sec. 37.

24. Ibid., Proviso to sec. 37.

25. Ibid.

It was the duty of the Chief Justice, then, to appoint such a Divisional Bench.[26] Section 51 provided that the Chief Justice could order that any case before the Supreme Court by way of appeal, review or revision should be heard by and before all the Judges of the Supreme Court or at least five such Judges including the Chief Justice.

In the exercise of its revisionary as distinguished from appellate powers, the Supreme Court or any Judge thereof could, 'at Colombo or elsewhere', 'inspect and examine the records of any court' and 'grant and issue, according to law, mandates in the nature of writs of mandamus, quo warranto, certiorari, procedendo, and prohibition, against any District Judge, Commissioner, Magistrate or any other person or tribunal'.[27] Although there was generally a reluctance on the part of the Supreme Court to exercise its revisionary powers, particularly when some other remedy such as a right of appeal was available,[28] even an instance where it intervened to correct a decision it had given on appeal has been reported.[29] The Supreme Court could also transfer a case from one court to another.[30]

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26. Sec. 48 a.

27. Ibid., sec. 42.

28. See for instance Attorney-General v. Podisingho (1950) 51 N.L.R. 385, at p. 390 per Dias, S.P.J., affirming the opinion of Akbar, J., in I. P. Awissawella v. Fernando (1929) 30 N.L.R. 482 at p. 483.

29. See Potman v. I. P. Dodangoda (1971) 74 N.L.R. 115.

30. Courts Ordinance, sec. 42.

Among its general powers were the power to punish for contempt of its authority or the authority of any other court, which lacked jurisdiction to try offences of contempt committed against its authority,[31] power to frame rules for regulating a variety of matters relating particularly to court proceedings, subject to the disapproval of the Legislature,[32] and the authority to issue writs of Habeas Corpus.[33] It also could admit as Advocates or Proctors 'persons of good repute and of competent knowledge and ability'.[34]

The inferior courts may now briefly be looked at. Rural Courts which could be regarded as the lowest courts of law had both a civil and a criminal jurisdiction of a very limited character.[35] No legal representation was permitted before these courts,[36] which were required to 'endeavour to bring the parties to an amicable settlement'.[37] From the final order of a Rural Court an appeal lay to the District Court.[38]

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31. Ibid., sec. 47.
32. Ibid., sec. 49.
33. Ibid., sec. 45.
34. Ibid., sec. 16.
35. See Rural Courts Ordinance, No. 12 of 1945, L.E.C., cap. 8, specially sec. 9.
36. Ibid., sec. 21.
37. Ibid., sec. 23.
38. Ibid., secs. 41 and 42.

Courts of Requests were given an original civil jurisdiction subject to certain monetary limits,[39] and certain matters such as certain matrimonial matters, which were within the exclusive jurisdiction of the District Courts, were specifically excluded from their jurisdiction.[40] It had been endowed with certain types of original jurisdiction and with an appellate jurisdiction in respect of decisions of certain statutory bodies.[41] An appeal from the decision of a Court of Requests could be taken to the Supreme Court.[42]

Magistrate's Courts were intended primarily as inferior courts of criminal jurisdiction, although they also came to be vested with powers under the Maintenance Ordinance No. 19 of 1889--powers which are partially civil. In addition to its criminal proceedings conducted in a summary way, Magistrate's Court conducted non-summary proceedings in respect of offences, which were ultimately to be tried by either the District Court or the Supreme Court. What offences could summarily be tried before a Magistrate's Court was determined by the Criminal Procedure Code.[43] An appeal lay from the decision of a Magistrate's Court to the Supreme Court, except in certain specified circumstances.[44]

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39. See Courts of Requests (Special Provisions) Act No. 5 of 1964. Sec. 3, the latest relegant enactment.

40. Courts Ordinance, sec. 75.

41. See Nadaraja, Legal System, p. 122.

42. Courts Ordinance, secs. 36 and 78.

43. See Nadaraja, Legal System, note 131 at p. 156.

44. See Courts Ordinance, sec. 39; and Criminal Procedure Code, secs. 335-337.

District Courts which ranked immediately below the Supreme Court enjoyed an original jurisdiction, both civil and criminal, and an appellate jurisdiction in respect of the decisions of the Rural Courts and certain statutory bodies.[45] The criminal proceedings in a District Court were usually preceded by a preliminary inquiry held by a Magistrate's Court. What were specified by the Criminal Procedure Court to be indictable offences[46] were within the jurisdiction only of the District Court and the Supreme Court except the graver offences which had been placed exclusively within the jurisdiction of the Supreme Court.[47] The District Courts had also been granted an unlimited original jurisdiction in civil matters. It was also given testamentary, matrimonial and insolvency jurisdiction.[48] A jurisdiction in respect of persons and property of persons of unsound mind and minors was enjoyed by the District Courts, among others.[49]

In both civil cases and, subject to certain restrictions, in criminal cases there was a right of appeal to the Supreme Court.[50]

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45. See Nadaraja, Legal System, note 131 at p. 156.

46. Criminal Procedure Code, sec. 2.

47. Such as murder and offences against the State.

48. See Courts Ordinance, secs. 67 and 62.

49. Ibid., sec. 69; see also sec. 62.

50. Courts Ordinance secs. 36 and 73, read with Criminal Procedure Code secs. 335 and 336.

The primary purpose of this chapter has been to outline the changes introduced by the Charter of Justice, 1833 followed by subsequent amendments in order to understand the extent to which the recommendations of Cameron remained acceptable in a country which was gradually moving towards self-government. Only the structural developments have been noted here which demonstrate that the basic principles on which the Charter had been founded were not abandoned at any stage. It is, however, safe to conclude that the later changes made in the judicial structure of 1833 tended to detract from its simplicity. In the next chapter it is proposed to outline the constitutional changes paying special attention to evidence of the assertion of judicial independence.

CHAPTER 3

THE CONSTITUTIONAL DEVELOPMENTS IN CEYLON WITH SPECIAL REFERENCE TO THE RELATIONSHIP BETWEEN THE JUDICIARY AND THE ADMINISTRATION: 1833-1948

In this chapter is told the story of the struggles through which the judiciary emerged as an independent and powerful institution of government destined to contribute in no small measure to the direction of constitutional development in the post-independence period. Part One of this chapter which outlines the constitutional developments in Ceylon during the period under review provides, together with the contents of the previous chapter, the institutional background to Part Two of this chapter on the relationship between the judiciary and the administration. An attempt is made in Part Three of this chapter to evaluate the major trends in the relationship between the judiciary and the administration and to arrive at some conclusions regarding the judicial role during the period under review.

(1) Constitutional Developments: 1833-1948

The Colebrooke-Cameron reforms not only introduced a scheme of administering justice which at least 'contained a great amount of practical good sense as well as profound and subtle speculation',[1] but also laid the foundation stone

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1. The Minute prepared by J. Stephen (Under Secretary of State) appended to dispatch No. 66 of February 26, 1842 from Lord Stanley (Secretary of State) to Governor Campbell. C. O. 54/191.

for what later became parliamentary government--an institution Sri Lanka has proudly retained, the unfortunate events of April 1971 notwithstanding.[2] We may begin our discussion with a brief account of the constitutional reforms based on the recommendations of Colebrooke.

(i) Colebrooke-Cameron Reforms

Colebrooke, in his report on the administration, advocated a uniform system of government for the whole of Ceylon, with the institution of an Executive Council and a Legislative Council in order to provide a check on any arbitrary exercise of authority by the Governor. The Executive Council was proposed primarily as an advisory body to the Governor.[1] In order to protect the rights of the people by means of providing a forum to freely express their opinions, a Legislative Council, in whose deliberations the Governor was not to have any part, was recommended. The Council was to consist of a fair number of principal civil and military officers and of respectable inhabitants, European or native.[2]

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2. The insurrection of April 1971. See the bibliography compiled by H. A. I. Goonetilleke on the insurrection, which is given in the bibliography, infra. The J. V. P.,(People's Liberation Front) which was responsible for the insurrection has now changed its attitude and believes in parliamentary democracy. See Ceylon Daily News of March 27, 1979 for an account of the J. V. P.'s interest in contesting local government elections.

1. Report of Colebrooke upon the Administration of Government of Ceylon, Mendis, The Colebrooke-Cameron Papers, Vol. I, pp. 9-76, at p. 53.

2. Ibid., p. 56.

Legislative measures might either be proposed for consideration by any member of the Legislative Council or recommended for consideration by the Governor.[3] When any such measure had been approved, law-officers would draft a Bill based on it to be printed for general information.[4] The Council was to inquire into any petitions and information reaching it as a result of such publication. Any Bill passed by the Legislative Council had to be submitted to the Judges of the Supreme Court. No Bill could be confirmed by the Governor unless the judges certified that it did not contain any provision inconsistent with any Act of Parliament or any Order of His Majesty in Council.[5] Laws were generally to take effect when passed by the Governor subject to the right of disallowance reserved to the Sovereign.

If the Governor and the Legislative Council disagreed on the propriety of a Bill, such Bill was to be submitted to the Sovereign for His approval or disallowance. Likewise, any Bill which the Judges of the Supreme Court refused to certify had to be transmitted to the Sovereign for His pleasure to be known.[6]

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3. Ibid.

4. Ibid., pp. 56-57.

5. Ibid., p. 57. This proposal, which was not found acceptable, did in fact devise what could have been the first 'Constitutional Court' in the history of Sri Lanka, in the sense in which that term is used in the Republican Constitution of Sri Lanka of 1972.

6. Ibid., pp. 57-58.

The proposal of such a Council, which,as Colebrooke conceded, would prove inadequate 'at a more advanced stage of [the country's] progress', but which would 'tend, however, to remove some of the obstacles which have retarded the improvement of a settlement possessed of great natural resourses' was far ahead of its time. When the Royal Instructions to Governor Horton,[7] by which the reforms were introduced, came to be drawn, therefore, Colebrooke's recommendations were watered down so as to leave the authority of the Governor largely intact. As we shall see, any control over the authority of the Governor that the Legislative Council would have been granted was more illusory than real.

The Royal Instructions directed Governor Horton to constitute an Executive Council consisting of (i) the senior officer in command of the British forces in Ceylon, (ii) the Colonial Secretary, (iii) the King's Advocate,[8] (iv) the Government Agent for the Central Province and (v) the Colonial Treasurer.[9] Generally, the Governor was required to consult with the Executive Council in the execution of his powers and authorities. In unimportant or urgent matters he could act on his own discretion, provided that as soon as practicable he informed the Executive Council of the measures that he so adopted with the reasons thereof.[10] In 1865, the Governor was authorised to act on his own discretion in circumstances

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7. The King's Additional Instructions to Governor Horton, March 20, 1833. Mendis, op. cit., Vol. 1, 305-19.

8. The lineal ancestor of the Attorney-General.

9. Mendis, op. cit., Vol. 1, p. 316.

10. Ibid.

where in his opinion it would be materially prejudicial to the interest of the government to have consulted the Executive Council.[11] The Governor was authorised, moreover, to act in opposition to the advice which might have been given by the Council, provided that at the first convenient opportunity he made a full report to the Secretary of State.[12]

The Legislative Council was to consist of nine official members and six unofficial members. The official members were to be (i) the Chief Justice, (ii) the Senior Officer in command of the British forces in Ceylon, (iii) the Colonial Secretary, (iv) the Auditor-General, (v) the Colonial Treasurer, (vi) the Government-Agent for the Western Province, (vii) the Government-Agent for the Central Province, (viii) the Surveyor-General, and (ix) the Collector of Customs at the Port of Colombo. Six persons were to be appointed by the Governor out of 'the Chief landed proprietors and principal merchants of [Ceylon], who have been actually resident for a period of not less than two years in [Ceylon]' as the first unofficial members of the Legislative Council.[13]

Contrary to Colebrooke's recommendation, the Governor was to preside at the meetings and in his absence the most senior member present presided. (Official members took precedence over unofficial members, and among themselves the official members took precedence in the order in which their offices have been enumerated above).[14]

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11. See Mills, Ceylon under British Rule: 1795-1932, 1933, at p. 105; and C. O. 381/28 despatch of March 4, 1865.

12. Mendis, op. cit., Vol. 1, 316-7.

13. Ibid., p. 308. 14. Ibid., p. 309.

Only the Governor was authorized to propose the enactment of laws and to initiate debate on any question at the Legislative Council. It was, however, open for any member to inform the Governor in writing of the need to pass any law or to debate any question and enter a copy of such communication on the minutes of the Council. A full and exact copy of the minutes of the Council had to be transmitted to the Secretary of State twice in each year.[15]

The authority that had been bestowed on the Governor previously by the King's Commission[16] to enact laws 'for the peace, order and good government' of Ceylon now became subject to the provisions relating to the two Councils. The Governor was not authorized to propose or assent to certain specified categories of laws such as a law (i) which violated his Commission, an Act of Parliament or an Order of His Majesty in Council, (ii) which related to certain revenue and monetary matters or (iii) which imposed restrictions on non-Europeans to which Europeans were not subjected.

All laws enacted by the Legislative Council were to be styled 'Ordinances enacted by the Governor of Ceylon, with the advice and consent of the Legislative Council thereof'. Every enactment had to be submitted to the Sovereign for 'assent, disallowance or other direction thereupon'.[17] A copy of every law passed by the Governor had to be transmitted to the Supreme Court to be enrolled in that court.[18]

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15. Ibid., pp. 310-311.

16. See Letters Patent commissioning Governor Horton and setting up Council of Government for Ceylon (April 23, 1831), Mendis, op.cit., Vol. II, p. 138, specially at 139.

17. Mendis, op.cit., Vol. I, p.

18. Ibid.

Between 1834 and 1910 no significant changes took place in the constitutional structure. In 1889 the number of unofficial members was increased to eight, and their appointments were prescribed to be for a term of five years.[19] In 1859 an unofficial member was allowed for the first time to introduce a Bill in the Legislative Council.[20] A certain degree of control over financial matters was ceded to the Legislative Council in 1867 after a long struggle.[21]

In 1910 was introduced the principle of elective representation,[22] whereas previously all the unofficial members had been nominated by the Governor representing various racial communities and commercial interests. The Legislative Council as constituted in 1910 consisted of eleven official and ten unofficial members. Out of the ten unofficial members four were to be elected representing the European Urban, the European Rural, the Ceylonese and the Burgher communities. The rest were to be nominated by the Governor.

The unofficial members were given a majority in the Legislative Council in 1920,[23] in response to the nationalist demands. The Legislative Council now consisted of fourteen

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19. Ceylon: Report of the Special Commission on the Constitution (1928), Cmd. 3131. pp. 12-13.

20. Governor Word to the Duke of Newcastle, October 24, 1859. C. O. 54/346.

21. See A. J. Wilson, The Manning Constitution of Ceylon 1924-1931 (Ph.D. 1956), p. 103.

22. The Royal Instructions of November 24, 1910. See the report cited in fn. 19 above, at p. 13.

23. Ibid., citing the Order in Council of August 13, 1920.

official and twenty-three unofficial members. Of the unofficial members eleven were to be elected on a territorial basis of communal representation and the rest nominated by the Governor. In order to overcome situations where the unofficial members opposed any legislative measure, the Governor was empowered to pass any Ordinance with the votes of the official members alone if, in his opinion, the passing of that legislative measure was of paramount importance to the public interest. He could also stop the proceedings in the Council which in his opinion affected the safety or tranquillity in Ceylon.[24] In addition to the two most outstanding changes made in 1920 namely, the unofficial majority in the Legislative Council and the introduction of territorially based elections, the addition of three unofficial members for the first time into the Executive Council is noteworthy. Agitation for reform continued notwithstanding these changes which were thought by the Ceylonese to be totally inadequate.

The Ceylon (Legislative Council) Order in Council, 1923 enlarged the membership of the Legislative Council to consist of twelve official members and thirty seven unofficial members. Of the unofficial members twenty-three were to represent territorial constituencies, eleven to be communally elected and three to be nominated by the Governor. The Governor continued to be the President of the Council, but

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24. Ibid., p. 14.

in his absence the Vice-President, elected by the Council, presided in the Council. In matters of paramount importance to the public interest, the Governor could pass any Ordinance with the votes only of the official members. But, whenever he invoked this power he had to make a report to the Secretary of State. The Executive Council continued to be constituted of both official and unofficial members.[25]

The Donoughmore Commission, appointed in 1927, found that under the then existing constitutional system the principle of representative government had been conceded, without at the same time making the elected members responsible in any degree for the conduct of the Government.[26] In order to 'transfer to the elected representatives of the people complete control over the internal affairs of the Island, subject only to provisions which will ensure that they are helped by the advice of experienced officials and to the exercise by the Governor of certain safeguarding powers',[27] the Commissioners suggested the establishment of a State Council replacing the two Councils then in existence.

The State Council, as recommended by the Commission, consisted of sixty-five members elected territorially, three executive members and nominated members not exceeding twelve in number. Communal representation and franchise qualifications based on income, property and literacy were to be abandoned completely. In the marked absence of political

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25. Ibid., p. 16.
26. Ibid., p. 18-19.
27. Ibid., p. 149.

parties in Ceylon, the Commission thought that a device of seven Executive Committees should be introduced in order that all members of the State Council would gain some experience of and some share in administration. The State Council was to be divided into seven executive committees, each selecting its own chairman. These seven chairmen would form a Board of Ministers, together with the Chief Secretary, the Treasurer and the Attorney-General. Owing to the expansion of the power granted to the elected and nominated representatives in the State Council the Governor was given enlarged powers. The Governor was, however, not to preside at the meetings any longer.

When the recommendations of the Commissioners were given effect to under the Ceylon (State Council) Order in Council, 1931, the total membership of the State Council was reduced to sixty one (fifty elected, eight nominated and three Officers of State). The system of government introduced by the Donoughmore Commission was subjected to constant and vigorous criticism, and the popular objective of self government was ultimately realized when the Ceylon (Constitution) Order in Council, 1946, as amended in 1947, began the era of parliamentary democracy in Ceylon.

(2) The Relationship between the Judiciary and the Administration

In Chapter 1 we noted that the upper most consideration in the minds of the administration during the period 1796-1833 was the collection of revenue and preservation of the British authority in Ceylon--a position which did not materially change during the entire period of the British occupation.[1] As a result a stable government directed to achieving such object inevitably gained top priority. Within such a plan an independent judiciary, which would uphold the rights and freedoms of the individual even in blatant disregard of governmental policy, would not readily be accepted. But, the fact remains that the Judges of the Supreme Court, starting from 1801 up to the close of the colonial era in Ceylon, consistently acted upon the rules and principles that had been evolved by judges through the centuries in England as suited to the conditions of Ceylon, not infrequently asserting their independent position to the manifest disadvantage of the Government. However, as we shall see later in this Chapter, the Governors of Ceylon often resorted to legislative measures, as they did before 1833, in response to unacceptable decisions of the Judges of the Supreme Court. In any event, as will be demonstrated in the second half of this Part, the major development in respect

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1. For instance, one of the significant factors that moved the colonial rulers to transfer judicial posts from the civil service to members of the local Bar was that the salaries attached to such posts could be significantly reduced.

of the judicial officers was that directed towards the establishment of a Judicial Service protected to a remarkable extent from any undue interferences on the part of either the Legislature or the Executive.

(i) Some Aspects of the Relationship between the Judiciary and the Government

One of the earliest developments during the period under review is the transfer to the local legislature of the power to amend or repeal the Charter of Justice, 1833, which until then resided exclusively in the Sovereign. When, as we have already seen, defects began to show in the judicial system established by the Charter of Justice, 1833, another crucial question surfaced: should the local legislature have the power to pass laws affecting the administration of justice, as on any ordinary subject?

Governor McKenzie wrote in 1838 that he was handicapped by his inability to decide conclusively many important questions touching the interpretation of the Charter: certain interpretations that the Supreme Court had placed on the provisions of the Charter, he contented, were 'at variance equally with the spirit and letter of that document'.[2] Four years later, Governor Campbell drawing the attention of the Secretary of State to the inability of the local government to 'remedy evils which arise under the Charter', suggested that 'a simple and general' Charter should be issued 'leaving all details and the power of making whatever enactments required to ensure the prompt and impartial

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2. McKenzie to Glenely, June 27, 1838. C. O. 54/163.

administration of justice to the Legislative Council, subject of course, to the confirmation by Her Majesty's Government'.[3]

The Secretary of State unhesitatingly approved the views expressed by the Governors.[4] Laws relating to the administration of justice had been kept outside the province of the legislative competence of the local government in order 'to protect the tribunals of Ceylon from the encroachments of the executive authorities of the Island'. However, as Lord Stanley remarked, the Charters of Justice had failed to ensure that the administrative and the judicial bodies maintained their independence on each other and cooperated harmoniously in the public service. Moreover, in none of the colonies where the courts existed by virtue of local enactments 'discords as to the relative powers of the government and the judges /were/ of frequent recurrence'. The Secretary of State concluded that the 'spirit of competition and jealousy' which was kindled by Charters of Justice of English origin would be allayed in proportion as the local government was enabled to regard the courts as established 'by their own deliberate choice and unconstrained will'.[5] Granting of such power, it was pointed out, would not bring in calamity:

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3. Campbell to Lord Stanley, April 18, 1842. C. O. 54/196.

4. Secretary of State, Lord Stanley to Governor Campbell, February 26, 1842. C. O. 54/191.

5. An interesting analogy may be made here to the arguments raised on similar lines in favour of 'autochthonous' constitutions.

> With a large body of unofficial members in the Legislative Council,--a rapidly increasing population--and a press enjoying the utmost latitude of free discussion, no Governor of Ceylon could accomplish or would seriously contemplate the subjugation of the courts to his own authority or influence.[6]

In any event, the Sovereign could always disallow any enactment which either improperly undermined the authority of the court or involved such expenditure as would far exceed the normally acceptable limits.[7]

It was, however, not until a year later, in 1843, that any step was taken to give effect to the views of the Secretary of State. Letters Patent of January 28, 1843[8] empowered the Governor to enact any Ordinance 'to make provision for the better administration of justice', notwithstanding any inconsistency with the Charter of Justice, 1833, and to become effective immediately upon promulgation by the Governor, provided (a) that the vote was passed unanimously by the Legislative Council and (b) that the Judges of the Supreme Court unanimously certified that the Ordinance should take immediate effect. Five Ordinances were then passed by the Legislative Council, on the lines of a previous draft Ordinance[9] which had received the unanimous approval of the Supreme Court, but the Judges of the Supreme Court changed their minds and raised objections to some of the provisions contained in the five Ordinances. Complaining that the Judges of the Supreme Court had availed themselves of the

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6. Lord Stanley to Governor Campbell, cited in note 4 above.

7. Ibid.

8. L.A.C., Vol. II (1854), p. 142.

9. Enclosed in C. O. 54/202 (end of the Volume).

Letters Patent to obstruct legislation, the Governor submitted the Ordinances for the approval of the Sovereign.[10] These were duly confirmed by the Sovereign.[11] The Letters Patent of July 2, 1844[12] revoked the Letters Patent of January 28, 1843 and laid down that the Governor could with the advice and consent of the Legislative Council enact laws repealing the Charter of Justice, 1833, in whole or in part, to become effective when confirmed by the Sovereign.[13] Finally, in 1847 the power was granted to the Governor to pass Ordinances on all subjects with the advice and consent of the Legislative Council to become effective from the date of promulgation.[14] It may be noted parenthetically that the Judges of the Supreme Court do not seem to have raised any objection to the transfer of such powers to the local government.

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10. Governor Campbell to Lord Stanley, November 23, 1843, C. O. 54/206.

11. Lord Stanley to Governor Campbell, April 2 and July 4, 1844. C. O. 55/85.

12. L.A.C., Vol. II (1854), p. 164.

13. Two Ordinances which were not confirmed by the Sovereign may be given as examples: Ordinance No. 2 of 1845 for removing certain doubts respecting the jurisdiction of criminal courts and of Justices of Peace and Ordinance 4 of 1846 for determining and declaring the rank and precedence of the Bishop of Colombo on the Chief Justice. See L.A.C., Vol. II (1854), pp. 225-226 and 282-283.

14. Governor Torrington's address to the Legislative Council, August 30, 1847. Addresses delivered in the Legislative Council of Ceylon by the Governors of the Colony, Vol. I (1876) pp. 205-206.

The authority possessed by the Judges of the Supreme Court under the Charter of Justice, 1833 to make rules and Orders for court proceedings and related matters was an issue on which the judiciary and the administration could not see eye to eye. In 1825, Governor Barnes had suggested the inclusion in any future Charter of Justice of a provision to the effect that rules and orders drafted by the Supreme Court would take effect only when approved by the Governor[15]-- a suggestion which passed unheaded. Immediately after the Charter of Justice, 1833 came into operation, the Judges of the Supreme Court drafted rules and orders regulating the practice of District Courts. The Chief Justice and the second Puisne Justice were of the opinion that since certain parts of such rules and orders seemed to lie beyond their competence, the rules and orders must be presented in their entirety before the Legislative Council so that they could be incorporated in an Ordinance thereby curing any technical defect. Rough, S.P.J., however, thought that the judiciary could enact rules of a legislative nature without invoking the assistance of the Legislature. These rules were laid before the Legislative Council by the Governor and incorporated in an Ordinance, 'as a measure of prudent caution if not absolute necessity'.[16]

Disallowing Ordinance No. 1 of 1833, which had been passed in the manner described above, the Secretary of State thought that the judges had attempted to make an incursion into the province of the Legislature.[17] He feared that 'the Ordinance

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15. Barnes to Bathurst, July 20, 1825. C. O. 54/89.
16. Horton to Col. Stanley, C. O. 54/134 (1834) p. 8.
17. Col. Stanley to Horton, ibid.

which has now been suggested and passed in so conciliatory a spirit will hereinafter be quoted as a precedent for acts conceived in a very different temper'.[18]

In 1846 an Ordinance was passed requiring any rules and orders made by the Supreme Court to be submitted to the Governor which would take effect only when enacted by him as an Ordinance.[19] However, in 1889 this Ordinance was repealed by the Courts Ordinance which provided that rules and orders made by the Supreme Court should be laid before the Legislative Council. If within forty days they had not been annulled by it, the rules would be published in the Gazette subject to any alterations that had been made by the Legislature. The rules were to take effect upon such publication (sec. 53).

The main argument against the conferment, in 1833, on the Supreme Court of 'uncontrolled power' to make rules and orders seems to have been that it would use such power to render nugatory important policy decisions of the government. For instance Governor Campbell pointed out in 1842, that while the Legislature had the power to regulate the qualifications of jurors, the Supreme Court was vested with the power of making rules as to the summoning and empanelling of jurors.[20] A rule made by the Supreme Court that no caste

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18. Ibid. Ordinance No. 1 of 1833 is found in L.A.C., Vol. II (1854), p. 1.

19. Ordinance No. 8 of 1846. L.A.C., Vol. II (1854), p. 290. Two such Ordinances may be mentioned: (i) Ordinance No. 9 of 1859 (Ibid., Vol. III /1859 Section/ p. 25) giving effect to certain rules and orders for the Courts of Requests, and (ii) Ordinance No. 8 of 1860 (Ibid., /1860 Section/ p. 17) to give effect to certain rules and orders made under Ordinance No. 13 of 1859.

20. Campbell to Stanley, April 18, 1842. C. O. 54/196.

distinctions should be taken into consideration in empanelling jurors had led the natives to regard it as an act on the part of the Government calculated to abolish caste distinctions.[21] Similarly, in 1887, Governor Gordon complained that Clarence, J., had interpreted section 288 of the Criminal Procedure Code, which gave the presiding Judge a discretion in choosing a jury when parties could not agree as to the composition of the jury, to mean that natives had a right to demand a native Sinhalese speaking jury.[22]

It is safe to conclude that the Supreme Court did not use its rule making power arbitrarily to annoy the administration. Whenever it departed from any government policy it was for the commendable object of protecting the rights of the individual. The repeal of Ordinance No. 8 of 1846 in 1889 amply demonstrates that by that time the Legislature had conceded that the Supreme Court would generally use its rule making power in a responsible manner.

The third issue relevant here related to the removal of the Chief Justice from the membership of the Legislative Council which apparently had its antecedent in the following incident. During a meeting of the Legislative Council which was not attended by the Chief Justice it was decided that the King's Advocate, the Chief Government Law Officer, who was a member of the Executive Council and was responsible for drafting Ordinances, would be requested to attend the next meeting in order that he could explain fully the effect of an

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21. Ibid.

22. Gordon to Stanley, December 23, 1886. C. O. 54/567.

Ordinance that was before the Legislative Council. At the next meeting, when the King's Advocate entered the Council room, the Chief Justice moved that strangers be directed to withdraw. He withdrew, but was allowed by the Council to take part in the meeting later.[23] (The Chief Justice then was Mr. Rough who had earlier entertained the view that the Supreme Court had the authority to pass rules of court even if they partook of a legislative character). Agreeing with Governor McKenzie that the King's Advocate should take the place of the Chief Justice in the Legislative Council, the Secretary of State insisted that this was not calculated as a personal victimisation at all.[24] As Governor McKenzie wrote, the exclusion of the Chief Justice from a seat in the Council was merely an act of extending a principle that had widely gained currency in many other colonies. He further explained that it was essential that the King's Advocate, who was a member of the Executive Council, should be present in the Legislative Council to clarify any doubts arising from discussions on Ordinances.[25]

A common feature of the period under review is the denial by Governors of any intention on their part to interfere with the duties and functions of judges. As Governor Gregory wrote in 1877:

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23. See Glenely to McKenzie, 7. 2. 1838. C. O. 54/161.

24. Ibid.

25. See the Governor's dispatch appearing before the Secretary of State's dispatch; and the address of McKenzie, Addresses Delivered in the Legislative Council of Ceylon by the Governors, Vol. 1, p. 69.

> Direct interference on the part of the Executive Government with a judge in the discharge of his judicial functions and in the discretion which he must of necessity be allowed where the course which he should follow is not positively and definitely laid down by law is obviously to be avoided and should only be resorted to in extreme cases. There may be grave reasons to be dissatisfied with the action of a judge, but in the absence of absolute impropriety of motive or conduct on his part, it may be the duty of Government to abstain from direct censure until their interference is imperatively called for in the interests of the public and the administration of justice.[26]

These remarks were occasioned by the 'capriciousness and perversity' of Mr. Berwick, District Judge of Colombo, which had brought the administration of justice in his court to a deadlock.[27] The enactment of Ordinance No. 7 of 1874[28] authorising with retrospective effect the entertainment by a District Court of prosecutions filed in by the Queen's Advocate, which was specially intended to stop the incessant refusal of Berwick, D.J., to try cases committed before him by the Queen's Advocate, had not succeeded in realising that object. The Governor was, therefore, now bringing the case up before the Secretary of State for his decision. He submitted that although he valued 'the importance of upholding the judicial independence of the Bench', there was another and equally important consideration:

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26. Governor Gregory to Earl of Camarvon, January 4, 1877. C. O. 54/506.

27. Ibid.

28. L.E.C., 1874-1875 (1875), p. 216-8.

> [T]he Government being responsible for the due conduct of public affairs and the proper administration of justice in the Colony would be neglecting their duty and abdicating the function entrusted to them, if they were to allow the vagaries of a judge to pass without comment when they had become matters of public notoriety and threatened to affect prejudicially the administration of criminal justice in the Island. And further it is evident that a judge should be scrupulously careful to conform to the law, and that if he fails to do so the government should require his compliance with it. In extreme cases the Government have the power of dismissal and are bound to exercise it, and it must therefore not only be proper but incumbent on them to exert a control in cases of grave necessity which may yet fall short of calling for the dismissal of the judge.[29]

In 1886, Governor Gordon vehemently denied any intention on his part to have interfered with judicial proceedings.[30] The facts leading to the Governor's statement may be briefly stated. In Dombe Budharakkita Terunnanse v. Mahapitigama Dhammatilaka Terunnanse, a case instituted before the District Court,[31] the plaintiff had sought an injunction against the defendant to restrain him from proceeding with the building of a library which interfered with the plaintiff's right of way. The counsel for the defendant stated in court that in response to his petition to the Governor the latter had inspected the site and replied in writing that he saw no objection to building the proposed library as long as it did not interfere with the right of way. It was furtheralleged that the Governor expressed his opinion being fully aware of the pending action. The District Judge was reported to have said:

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29. Dispatch cited in fn. 26.

30. Gordon to Earl of Granville, June 4, 1886. C. O. 54/565.

31. The Ceylon Observer, April 24, 1886.

> I do not believe that the Governor has given you any authority whatever. I don't care if he did, but I think he knows his duty better than to interfere with me in the discharge of my duties.[31a]

The defendant was jailed for failing to give an undertaking not to proceed with the building.[32] The Ceylon Observer of April 24, 1886, carried an article under the heading 'Authorities at Issue' which having referred to previous clashes between the Executive and the Judiciary, stated that the Governor had apparently encouraged and incited the priest 'to set a judicial tribunal at defiance'; for, the Governor should have known that the defendant would rely on his decision. On the Seventh of May, 1886 the District Judge wrote to the Ceylon Observer stating that the refusal by the Governor to release the defendant as prayed for by him negatived any allegation that the Governor intended to commit a contempt of court.

One last incident may be mentioned to illustrate the need the executive authorities felt to avoid any interference with judicial authorities. A sentence of imprisonment imposed on an accused person by the Magistrate's Court and affirmed by the Supreme Court, was remitted by the Governor, who had, upon being petitioned by the accused's wife, conducted an extra-judicial inquiry through a native officer and come to the conclusion that the charge had been a false one.[33] In response to a query made by the Secretary

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31a. The Ceylon Observer, April 24, 1886.

32. Ibid.

33. Walker to Chamberlain, September 30, 1899. C. O. 54/657.

of State respecting an article appearing in the Ceylon Standard of September 1, 1899 entitled 'the Executive and the Judiciary', the Governor informed the Secretary of State that he never intended to interfere with the judicial decision. The Governor was able to satisfy the authorities in London that he had acted in good faith and that the failure to refer the matter to the Magistrate for his advice was not significant since the allegation had related to the falsity of the charge. One Under-Secretary wrote, however: 'I think we should be most scrupulous to avoid the appearance of conflict between Executive and Judiciary in Ceylon'.[34]

Above discussion indicates how the government exercised its power and authority in respect of the judicial authorities. The attitude of the administration seems to have been to allow judicial officers to carry out their functions without hindrance, ensuring, however, at the same time that government activities were not unduly hampered by judicial behaviour. We may now proceed to look at how the judicial authorities escaped gradually from dependence on the government to independence.

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34. See the minute appended to the above dispatch dated 24.10.1899 and initialed A. F.

(ii) From Dependence to Independence

That the Judges of the Supreme Court should be professional lawyers who did not owe their tenure of office to the Governor had been officially recognized since the enactment of the Charter of Justice, 1801. But, as we have already seen, all inferior judicial officers, at the time of the proclamation of the Charter of Justice, 1833, belonged to the Civil Service. Cameron had rightly pointed out how unsatisfactory it was to have entrusted the judicial task to persons having no legal qualifications and judicial experience. The Secretary of State, Viscount Godrich, too appreciated the value of 'the general rule of confiding the administration of justice only to persons who have been trained to the study and practice of the law as a profession'. However, he reluctantly chose to depart, in some degree, from the general rule, in that he instructed the Governor to appoint as District Judges persons who had prior to 1833 held judicial office, thereby avoiding any claims for compensation which would result from their removal from office. Any future vacancies were to be filled with professional lawyers.[1]

But this instruction was not strictly adhered to: in 1835 the Colombo Observer protested against the appointment of an inexperienced civil servant as District Judge when there were more qualified and senior civil servants and proctors.[2] In 1837, the Governor informed the Secretary

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1. Instructions accompanying the Charter of Justice of 1833, March 23, 1833. Mendis, The Colebrooke-Cameron Papers, Vol. I, p. 350-373, at pp. 371-2.

2. See (1835) C. O. 54/140, pp. 515-6.

of State that he had appointed two Ceylonese lawyers as District Judges and insisted that he expected 'no reclamation from any quarter worthy of the slightest attention (if at all) against these late appointments founded either upon the incompetency moral or intellectual of the parties appointed'.[3] Having referred to an article appearing in Bengal Hurkaru stating that native judges in Bengal were unacquainted with English and that it was inadvisable to grant them extensive powers until native men could be found duly qualified, by knowledge and integrity to administer justice in important cases, the Governor went on to say that those comments could not be made of the Ceylonese.[4] However, barely two years later Governor McKenzie reported that natives 'so much distrust each other' and that 'some considerable time must elapse' before natives could be appointed--for the Ceylon Bar was 'entirely uneducated', nor had the practitioners in general had any opportunity to obtain a legal education.[5] He urged, therefore, that District Judges should be sent from England, even if they were not professionally educated. Governor Campbell shared this view when he wrote in 1842 that the general selection of

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3. Horton to Lord Stanley, September 2, 1837. C. O. 54/156.

4. Ibid.

5. Observations of the Governor on the reports of the Judges of the Supreme Court on the Charter of Justice, 1833. May 30, 1839. C. O. 54/170.

District Judges from the Ceylon Bar was for the time being entirely out of the question.[6] However, he was glad to be able to appoint Mr. Staples, a Ceylonese lawyer, as the District Judge of Kandy. And he indicated that he was willing to consider able and qualified lawyers for any future appointments.

Throughout the period under review there was vigorous and continuous agitation from lawyers, merchants, planters and leading inhabitants of Ceylon for the appointment of members of the local Bar as judicial officers. These demands were not readily granted, it is submitted, mainly because European civil servants enjoying judicial powers contributed in large measure to the preservation of British authority in Ceylon. Before we continue with our discussion on the gradual evolution of a separate judicial service in Ceylon, it is useful to examine how the revenue and judicial functions came to be separated--a step which necessarily had to precede the separation of judicial service from the civil service.

As Governors of Ceylon expressed their wish to refrain from undue interferences with the judiciary so did they disapprove the combination of revenue and judicial functions in the same person. Governor Campbell wrote in 1845 that the separation of judicial function from revenue was a matter that he had always tried to put into practice. A judicial officer, he pointed out, had to be stationed in one place while revenue officers had to go to all the parts of the area for the proper carrying out of their duties.

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6. Campbell to Lord Stanley, January 20, 1842. C. O. 54/196.

There were only four stations at that time where all different appointments had been concentrated in one person,[7] Later in 1856 the Legislative Council decided that in Batticoloa judicial functions must be taken away from the revenue and administrative officer as too much work had been thrusted on him.[8] This move was immediately followed by a memorandum from the inhabitants of Matara requesting inter alia that 'judicial functions should be separated from revenue function in the Matara area. The Governor replied that this request could be granted if there was financial provision by way of increasing taxes. In another dispatch Governor Ward observed that corruption and neglect had crept into administration due to the combining of judicial and revenue duties in the same person.[9] For these reasons he effected a separation of functions in Galle and Badulla too.[10]

The gradual process of the separation of judicial functions from administrative and revenue functions was necessitated by the rapid growth and success of the plantation industry. Therefore, although the appointment of separate judicial officers resulted in extra expenses to the government, the increased revenue more than adequately compensated the adoption of the new arrangement. The natural follow up from

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7. Campbell to Lord Stanley, October 13, 1845. C. O. 54/219.

8. Ward to Labouchere, April 12, 1856. C. O. 54/321.

9. Ward to Labouchere, November 10, 1856. C. O. 54/324.

10. Ward to Labouchere, December 8, 1856. C. O. 54/321.

this was the claim that justice could be properly administered, particularly in important cases--occa sioned by the rapid economic growth, only by judges drawn from professional lawyers.

By the middle of the century it had become a common practice to appoint as District Judge Colombo, 'a lawyer of some eminence'.[11] Governor Ward, who made that observation in 1855 recommended, however, in 1856 the appointment of a civil servant as the District Judge of Colombo.[12] The Secretary of State informed the Governor that in appointing District Judges, the most suitable person in the interests of the community should be selected.[13] Governor Ward who was instructed to appoint a lawyer as District Judge of Colombo[14] selected R. F. Morgan, a Burgher lawyer.

A major concession was made in 1872. In that year the local Bar represented to the Secretary of State strongly against the appointment of a civil servant as District Judge, Kandy.[15] The Secretary of State wrote to the Governor that members of the local Bar should be appointed to the two Principal Judgeships of Colombo and Kandy.[16] The memorial of the lawyers was followed immediately by one from the members of the Civil Service.[17] Withdrawal of the District

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11. Ward to Labouchere, May 2, 1855. C. O. 54/315.

12. See Ward to Labouchere, dispatch No. 24 of 1856. C. O. 54/321.

13. Ibid.

14. Labouchere to Ward, May 14, 1856. C. O. 55/98.

15. Memorial appended to Gregory's dispatch to Earl of Kimberley, May 28, 1872. C. O. 54/476.

16. Ibid.

17. Memorial enclosed with Gregory's dispatch to Earl of Kimberley, September 2, 1872. C. O. 54/478.

Judgeship of Kandy from the Civil Service, they submitted, was prejudicial to the administration of justice, since civil servants who functioned as inferior judicial officers would have no incentive of promotion to higher posts. They strongly urged that District Judgeship of Kandy should not be given to the local Bar exclusively. Governor Gregory thought that it was beneficial to gradually transfer the judicial work from the Civil Service to professional hands, and that the savings thereby effected would not be inconsiderable.[18] The Secretary of State replied saying that as a general rule practicing lawyers should be selected for higher judicial offices. However, in 1880 Lord Kimberley wrote that he would be prepared to consider from time to time whether 'an exception to this requirement might not be made in favour of an officer of proved ability and experience in a judicial appointment'.[19] This view was accepted later by his successors in 1884 and in 1891.[20]

In 1922, the Retrenchment Commission recommended the gradual removal of the judicial posts from the Civil Service mainly in order to achieve considerable savings. The Commission did not recommend the establishment of a 'judicial service with classes and automatic promotion'. Instead it recommended that each post should have a definite salary attached to it in accordance with its importance.[21]

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18. Ibid.

19. Quoted in the Secretary of State's draft reply to Governor Harelock's dispatch No. 31 of January 25, 1891. C. O. 54/592.

20. Ibid.

21. Sessional Paper III of 1923, pp. 10-11.

In 1926, it was moved in the Legislative Council that the judiciary be separated from the Civil Service.[22] After a lengthy discussion, however, the motion was amended to the effect that a select committee be appointed to consider the proposal for establishing a separate judicial service for Ceylon with a view to the appointment of trained lawyers in judicial posts.[23] The Select Committee of the Legislative Council recommended in the main that all judicial posts should in due course be filled by professional lawyers with at least six years' practice; that the number of civil servants holding judicial posts should be reduced to ten; and that all matters relating to the District Judges and Police Magistrates including appointment, transfer and promotions should be referred to the Attorney-General for his advice.[24] The last recommendation was adopted by the Government without reserve. As regards the first recommendation it was willing to gradually increase the number of judicial posts available to professional lawyers.so that only fourteen posts would be reserved to the members of the Civil Service.[25] However, within what time the transfers could be made, the government was not willing to say, although it expected a rapid transfer.

With the introduction of the Donoughmore Constitution administration of justice was placed under the Attorney-General and a Judicial Appointments Board (consisting of the Attorney-General and two Judges of the Supreme Court) created

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22. Ceylon Hansard, November 11, 1926, p. 1381.

23. Ibid., p. 1425.

24. See Ceylon Sessional Paper VIII of 1930 on 'Judicial Appointments'.

25. Ibid.

to recommend suitable practising lawyers to be appointed as inferior judicial officers.[26] The Judicial Service Commission recommended in 1936 that the Judicial Appointment Board should consist of the Chief Justice and two Puisne Justices. This would 'give to judges and magistrates that sense of independence which all judges and magistrates must have and which the present judges and magistrates do not feel'.[27]

This process was completed in 1939 when the Governor established a Judicial Service consisting of 46 judicial officers excluding the Judges of the Supreme Court.[28] It was declared that only proctors and advocates of the Supreme Court of Ceylon with at least six years practice would be eligible for judicial appointments; that appointments and promotions would be done by the Governor with the advice of the Judicial Appointments Board subject to the approval of the Secretary of State; that merit and not seniority would be the criterion for promotion; and that for the purposes of leave, discipline and administration, judicial officers would be under the general control of the legal secretary.[29] Thus at the time the Ceylon (Constitution) Order in Council, 1946 was drafted adequate spade-work had already been done for the introduction of a judicial service, in the true sense of the term, regulated by the Judicial Service Commission.

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26. Sessional Paper VI, 1936. The Report of the Judicial Commission, p. 104.

27. Ibid., p. 107-12.

28. See Ceylon Government Gazette, June 30, 1939, p. 484.

29. Ibid., paragraphs 2-8.

The agitation for the appointment of the members of the local Bar as judicial officers was undoubtedly a demand of the educated Ceylonese for responsible government jobs: the local Bar consisted nearly exclusively of Ceylonese.[30] The desirability of appointing lawyers practising in Ceylon as judicial officers was supported on the ground that they were better acquainted with the local laws and practices than a lawyer brought from overseas.[31] Aside from providing an avenue for the expression of the growing nationalism, the agitation for judicial reforms sought to realize the salutary object of liberating judicial officers from the shackles of executive control and interference. A member of the Legislative Council pointed out in 1926, during the discussion relating to judicial reforms, that a judicial service was urgently called for at least to eliminate 'the power that the executive invariably exercises over the judiciary, specially when the judges happen to be civil servants'.[32]

There was firstly a direct control over inferior judicial officers in the sense that until the reforms introduced towards the close of the British Colonial Rule in Ceylon, the power of appointment, transfer, promotion and discipline was, for all practical purposes, in the hands of the Governor.

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30. P. T. M. Fernando, The Legal Profession in Ceylon in the Early Twentieth Century: Official Attitudes to Ceylonese Aspirations, 19 Ceylon Historical Journal, pp. 1-15 (1970).

31. See the memorial from the legal profession enclosed in dispatch No. 83 of March 2, 1893. C. O. 54/607.

32. See Ceylon Hansard, November 11, 1926, p. 1387.

As regards the appointment of Judges of the Supreme Court, District Judges and the law officers of the Crown the Secretary of State generally acted on the advice of the Governor. In turn, lawyers and judicial officers made formal requests to the governor for judicial appointments and promotions respectively. For instance, in 1854 the Acting District Judge of Kurunegala submitted a memorial to the Governor requesting to be appointed as District Judge of Colombo (which in effect was a promotion). The Governor, however, had recommended the appointment of another civil servant which the Secretary of State disapproved of.[33] Even the Judges of the Supreme Court had made representations regarding promotions.[34] It was common practice for judicial officers to apply to the Governor for a variety of benefits such as the increase of their salaries,[35] a higher rate of pension[36] and reduction of the rate of contribution to the pension fund.[37]

The power of suspension exercised by the Governor and the power of removal exercised by the Crown generally on the advice of the Governor also threatened the independence of judicial officers. However it is to the credit of the

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33. See, Dispatch No. 123 of 1854 from Governor Anderson to Secretary of State, Duke of Newcastle. C. O. 54/308. The District Judge of Kandy too submitted his claim. See Anderson to Newcastle, April 22, 1854. C. O. 54/307.

34. See Dispatch No. 201 of November 3, 1856. C. O. 54/324.

35. Campbell to Lord Stanley, February 15, 1847. C. O. 54/233.

36. See dispatch No. 102 of April 14, 1873. C. O. 54/484.

37. See the memorial of Oliphant, C.J., to the Secretary of State, in dispatch No. 40 of February 14, 1850. C. O. 54/268.

authorities in London that extensive inquiries preceded any such removal.[38] On the other hand the manner in which the authorities in Ceylon exercised their powers came under attack. For instance the Chief Justice complained in 1893 that civil servants who held judicial office were liable to be transferred from one office to another at the will of the Executive.[39] It was alleged by a Member of the Legislative Council in 1926 that if a Police Magistrate adopted a lenient attitude towards convicted persons, the police authorities used to report such judicial officer to the administrative authorities.[40]

As British Colonial Rule drew to its end, then, we witness the emergence of a judicial service greatly protected from executive control and interference, and consisting of professional lawyers, deviating from the firmly held view that only civil servants who had been regularly trained in Ceylon made good judges due to their 'knowledge of native language, familiarity with the habits, manners and prejudices of the people, /and their/ capability of giving the amount of credibility to the evidence of the native witnesses'.[41]

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38. For instance the paper relative to the dismissal of R. Langslow, a District Judge in Ceylon, runs to 187 pages in British Parliamentary Papers (Accounts and Papers) Vol. XLI (1847).

39. See the letter of the Chief Justice enclosed in dispatch No. 38 of January 20, 1893. C. O. 54/606.

40. Ceylon Hansard, November 11, 1926, p. 1387.

41. See dispatch No. 106 of July 4, 1854 from Governor Anderson to the Duke of Newcastle. C. O. 54/308. Similar views had prevailed in the other parts of the British Empire too. See, for instance, James S. Read, 'The Search for Justice' in H. F. Morris and James S. Read, Indirect Rule and the Search for Justice: Essays in East African Legal History (1972), pp. 287-331, particularly pp. 295-308.

(3) Judicial Role: 1833-1948

The gradual evolution of a system of courts manned by professional lawyers belonging to a separate judicial service has been already witnessed. It must be noted here that the Judges of the Supreme Court stood in alliance with the lawyers and other leading citizens of Ceylon in defending the principle of entrusting judicial functions to trained lawyers. For instance Sir John Budd Phear, C.J., complained of the evils arising from the employment, as inferior judicial officers, of persons who 'manifest as a rule want of knowledge of the practice of courts, of the business of their office, and of the law which they have to conform to and carry out'.[1]

Aside from insisting on the need for the appointment of lawyer-judges, the Judges of the Supreme Court took the opportunity to make recommendations for the better administration of justice. For instance, Phear, C.J., pointed out in his above quoted representation the ill effects of the concentration in one person of 'the entire multiform machinery for the administration of civil and criminal justice'. The learned Chief Justice went on to propose the adoption of a complete civil and criminal Procedure Code based upon the Indian model. As 'few persons would be so bold as to assert that they knew what exactly is the existing criminal law of the Colony or where it is to be found', he strongly recommended the enactment of a Penal Code.

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1. Governor Longdon's dispatch No. 243 to Secretary of State, July 24, 1878. C. O. 54/514. See also dispatch No. 33 of January 1, 1893. C. O. 54/606.

During the early years of the period under review the Judges of the Supreme Court made a substantial contribution to the development of the law of Ceylon by way of drafting Ordinances. In 1833 Governor Horton acknowledged the assistance he had received from the Chief Justice in drafting a number of Ordinances including the Evidence Ordinance.[2] Governor Campbell informed the Secretary of State, in 1842, that the Judges of the Supreme Court were preparing, at his request, an Ordinance for the appointment of Police Magistrates.[3] The Judges of the Supreme Court continued to make their contribution to the codification of law, even after the law officers of the Crown were entrusted with the duty of drafting Ordinances. For instance, the Judges of the Supreme Court submitted their observations on a draft bill to introduce the English law of contract and tort into Ceylon.[4] There was general consensus that much doubt and confusion had resulted from the application of the Roman Dutch law in those two branches of the law, nevertheless, it was thought to be inadvisable to sweep away in one enactment the applicable law and to introduce the English law instead. That was a matter which needed careful consideration.[5]

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2. Blue Book for 1833, enclosed in C. O. 54/145.

3. Campbell to Lord Stanley, January 19, 1842, C. O. 54/196. See for the proposals of Marshall, C.J., on the Prescription Ordinance, C. O. 54/136, at p. 313.

4. Governor Longdon to Secretary of State, March 10, 1882. C. O. 54/538.

5. See the report of the Senior Puisne Justice and that of the Chief Justice and the two Junior Puisne Justices enclosed in the dispatch cited in fn. 4 above.

How much the Governors appreciated the cooperation of the Judges of the Supreme Court in codifying laws appears from the invitation by Governor Longdon of Clarence, C.J., to attend the Executive Council meetings to explain the Penal Code and the Criminal Procedure Code that he had drafted.[6] The significance of this invitation, which the Chief Justice accepted, lies in that in 1838 the Governor had caused the Chief Justice to be removed from his membership of the Legislative Council.[7]

The contribution made by the Judges of the Supreme Court to the development of law was not limited to their cooperation in codification. They did evolve the law of Ceylon, in the main, through judicial interpretation. In fact, the manner in which they modified and altered the application of the Roman Dutch law and thereby introduced or superimposed the English law provides a very rich area for an extensive research. Professor Nadaraja has, in his book, succinctly summarized the methods by which the Supreme Court brought about the metamorphosis in the Roman Dutch law as it would have prevailed at the time of the British occupation of Ceylon.[8] As B. L. Burnside, the Queen's Advocate, who later became the Chief Justice of Ceylon wrote:

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6. Longdon to Earl of Derby, June 12, 1883. C. O. 54/547.

7. This is discussed in Part (2)(i) of this Chapter.

8. See Nadaraja, Legal System, Chapter 6.

> The Courts, usurping the function of the Legislature, whenever difficulties have arisen, have had no hesitation in rejecting the Roman Dutch Law and deciding as if the English law were actually in force.[9]

As the Supreme Court was instrumental in evolving the judicial system of Ceylon, so did it continue to be the guardian of the freedoms of the subject. The celebrated decision of the Supreme Court in Bracegirdle's Case[10] alone provides ample evidence of the firm stand taken by the Supreme Court in defence of personal liberty. This case arose out of a deportation order made by the Governor against Bracegirdle which came under severe attack in the State Council.[11]

On April 20, 1937 the Governor, purporting to act in pursuance of the power vested in him by clause 3 of Article III of an Order of Her Majesty in Council of 1896, ordered Bracegirdle to leave the country within four days. Upon his refusal to comply with that order, the Governor, on the Seventh of May, authorised the Police to arrest him and to place him aboard any ship proceeding to Australia,

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9. The Queen's Advocate's report on the draft Bill to introduce English Law of Contract and Tort. Enclosed in dispatch No. 108 of March 10, 1882. C. O. 54/538.

10. In the Matter of an Application for a Writ of Habeas Corpus upon the Deputy Inspector-General of Police: In re Mark Anthony Lyster Bracegirdle (1937) 39 N.L.R. 193.

11. Ceylon Hansard, May 4, 1937 p. 903-944; May 5, 1937 p. 947-982.

Bracegirdle's last place of residence. Although the reasons which prompted the Governor had not been placed before the Court in detail, it assumed that the Governor was of opinion that Bracegirdle's actions and utterances reflecting on the current political and social situation in Ceylon justified his removal from Ceylon.[12] Immediately upon his arrest an application for a writ of Habeas Corpus was made on his behalf alleging that the Governor had acted ultra vires in issuing the order of arrest and deportation.

Briefly, the argument was that the Governor was authorised to make such an order only in an emergency situation: such an emergency, it was contended, did not then exist. The relevant Order in Council may first be outlined.

The Order of Her Majesty in Council of October 26, 1896 was enacted to be operative in certain places of strategic importance[13] such as Hong Kong, Malta and Ceylon, (specified in the Schedule), when proclaimed in any such Colony by its Governor. When proclaimed the Order would be in operation until the Governor issued another proclamation declaring its operation to have ceased.[14] Article III (3) of the Order in Council was as follows:

> The Governor may order any person to quit the Colony, or any part of or place in the Colony, to be specified in such order, and if any person shall refuse to obey any such order the Governor may cause him to be arrested and removed from the Colony, or from such part thereof, or place therein, and for that purpose to be placed on board any ship or boat.[15]

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12. In re Bracegirdle (1937) 39 N.L.R. 193 at p. 206.
13. Ibid., p. 211. 14. Ibid., p. 206.
15. Ibid., p. 207.

The rest of the articles in this Order in Council authorized the Governor, among others, to requisition food and fuel; to seize, use or destroy public buildings; and to control railways, light houses and water supply.[16]

The preamble to the Order in Council of March 21, 1916 which amended the previous Order in Council, in order to expand the scope of Article III (1), stated that the original Order in Council had been enacted 'to make provision for the security of the Colonies mentioned in the schedule to that Order in times of emergency'.

The Order in Council, 1896 was brought into operation in Ceylon, on August 5, 1914 by a proclamation issued by the Governor, who on the same day proclaimed a state of war between Great Britain and the German Empire. No steps had been taken by the Governor, after the war, to terminate the operation of the Order in Council in Ceylon.

It was argued on behalf of the applicant that the provisions contained in the Order in Council, 1896 were suitably meant for exigencies of a war, a civil strife or a similar type of emergency. Moreover, the preamble to the amending Order in Council, 1916 made it abundantly clear that these extensive powers were meant to be invoked by the Governor in an emergency alone. The mere fact that the Proclamation had not been repealed did not justify 'the exercise of powers which could properly be exercised only at a time of great public danger'.[17] As Professor Keith was quoted to have written:

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16. Ibid.
17. Ibid., p. 217, per Soertsz, J.

> /T_7he courts of the empire recognized the validity of such powers under war conditions, but it is clear that a complete change would be effected in the security of personal rights if executive officers in time of peace were permitted the discretion they exercised during the a war, and which in foreign countries they often exercise even in time of peace.[18]

Rejecting the argument raised by the Attorney-General that Article III, 3 must be read alone without any reference to the rest of the Order in Council or the Preamble, the Court relied on the well established rule of construction that the whole of an enactment must be considered in the construction of any of its parts.[19] Moreover there was 'strong authority to the effect that the Legislature does not intend to interfere with existing law and that it would require clear and unmistakable language to dislodge that presumption'.[20]

The Supreme Court did not agree with the submissions made by the Attorney-General that 'the elementary principle of Government is that the safety of the State is a matter of paramount concern and every other principle must give way to the safety of the State' and that 'if there was any infringement of any private right or private liberty, which is seldom likely to occur, there is always an appeal to the

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18. Ibid., p. 210, citing B. Keith, The Government of the British Empire ( ) Part I, Chapter VII, at p. 234.

19. Ibid., p. 210.

20. Ibid., p. 209.

Crown through the Secretary of State, and ultimately to Parliament. As to whether an emergency has arisen or not is a matter which cannot be canvassed in a Court of Law'.[21]

The three judges were unanimous in their decision that Bracegirdle had been illegally detained on the basis that the Governor could exercise the powers granted to him by the Order in Council only in an emergency and that at the time of Bracegirdle's arrest there was no such emergency.

With Bracegirdle's case may be contrasted Dias v. The Attorney-General.[22] In that case, military authorities had, during a time when martial law was in force, impressed two cars belonging to the plaintiff and later returned them with a small sum as compensation. The Supreme Court held that the Governor was empowered by the Order in Council we have seen above to order the requisition of the cars. According to that Order in Council the amount of compensation payable could be decided only by a compensation board if one is appointed by the Governor. It was not a matter that could be determined by a court of law.[23]

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21. Ibid., p. 195.

22. (1918) 20 N. L. R. 193.

23. Ibid., at p. 203. This decision was overruled by the Privy Council [(1920) 22 N. L. R. 161] following A. G. V. De Keyser's Royal Hotel Ltd., which had held that the Crown was not entitled to take possession of property of a subject in connection with the defence of the realm without paying compensation for their use and occupation. The Privy Council ordered that the amount which the District Judge thought was appropriate, had he recognised the right of the plaintiff to sue the Crown, should be paid as compensation.

Thus according to the Supreme Court decision, later overruled by the Privy Council, if the Governor decided not to pay compensation courts could not upset that decision. This decision indicates that in circumstances where the courts upheld the legality of governmental action they did not obstruct executive functions.

In the light of the above discussion it is safe to conclude that the Supreme Court duly appreciated the need to permit the government, in times of emergency, to assume certain powers, which if exercised during normal times would be regarded as obnoxious to fundamental principles of constitutional law.

Instances where a decision of the Supreme Court proved unacceptable to the government are not rare during the period under review. Two examples may be given. In 1834, the Supreme Court decided that a person had acted legally when he removed more than two bottles of

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24. It was not infrequently that colonial government sought the protection of Indemnity Acts to exclude liability during the subsistence of an emergency. For instance the Ceylon Indemnity Order in Council of 1915 provided thus:

> No action, prosecution, or legal proceeding whatever shall be brought, instituted, or maintained against the Governor of Ceylon, or the person for the time being or at any time commanding the troops in Ceylon, or against any person or persons acting under them . . . for or on account of or in respect of any acts, matters, or things whatsoever in good faith advised, commanded, ordered, directed, or done for the maintenance of good order and government or for the public safety of the Colony between the date of commencement of martial law and the date of the taking effect of this order [i.e., when martial law was terminated.].

arrack[25] with a permit issued by the renter. It was brought to the notice of the Governor by the Queen's Advocate that the Supreme Court decision had been given in the inadvertent absence of Crown representation and that the decision was wrong. A regulation was, then, made by the Governor to prevent the occurence of such events by prohibiting the renters to issue permits of the type in question.[26] In 1836, the Supreme Court set aside the conviction entered by the District Court on a person who had been charged for having unlawful possession of an article of clothing belonging to a soldier, on the ground that a particular local regulation was applicable to the case, but without any prejudice to fresh proceedings being instituted. An Ordinance was then passed repealing that regulation so that fresh proceedings could be instituted.[27]

There is no doubt that the role of the judiciary in its relationship with the administration was a very delicate one. On the one hand, the Judges of the Supreme Court, who cherished the great judicial traditions upholding the freedoms of the subject, were ever vigilant against any violation of such freedoms. On the other hand, they could not altogether ignore the safety of State and public safety.

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25. A locally distilled spirituous liquor.
26. See C. O. 54/136 (1834) pp. 259-81.
27. See C. O. 54/147 (1836).

PART II

FROM INDEPENDENCE TO AUTOCHTHONY

CHAPTER 4

THE CONSTITUTION AND THE COURTS

The Independence Constitution of Ceylon which was contained in the Ceylon (Constitution) Order in Council, 1946, as amended by the Ceylon Independence Order in Council, 1947,[1] is a fine example of what is commonly known as the 'Westminster Model'.[2] The Soulbury Commission report may be quoted at length to demonstrate the inclination on the part of the Commissioners to recommend, and the desire of the representatives of the Ceylonese people to favour, a constitution modelled on the British system of government:[3]

> The Constitution we recommend for Ceylon produces in large measure the form of the British Constitution, its usages and conventions, and may on that account invite the criticism so often and so legitimately levelled against attempts to frame a government for an Eastern people on the pattern of Western democracy. . . . At all events, in recommending for Ceylon a Constitution on the British pattern, we are recommending a method of government we know something about, a method which is the result of very long experience, which has been tested by trial and error and which works, and, on the whole, works well. . . . But be that as it may, the majority--the politically conscious majority of the people of Ceylon--favour a Constitution on British lines. .... we think that Ceylon is well qualified for a Constitution framed on the British model.

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1. The Bribery Commissioner v. Ranasinghe [1964], 2 W.L.R. 1301, at 1304; 66 N.L.R. 73, at 74 (per Lord Pearce).

2. See generally S. A. de Smith, The New Commonwealth and Its Constitutions (1964), Chapter 3.

3. Ceylon, Report of the Commission on Constitutional Reform, 1945, Cmd. 6677. Epilogue p. 109.

'The Soulbury Constitution', which had a commendable life span of nearly a quarter of a century, proved to be a successful system in spite of its abolition in 1972. The Republican Constitution promulgated in that year did in fact take over some of the basic features and institutions of the 'Soulbury Constitution', bearing evidence to the fact that the traditions and institutions which were rooted in the past were not altogether deracinated with the proclamation of the 'Autochthonous Constitution'.

(1) An Outline of the Soulbury Constitution

The legislative power, under this Constitution, was vested in the Parliament which consisted of the King, the House of Representatives and the Senate.[1] The executive power which was vested in the King was to be exercised by the Governor-General in accordance with the provisions of the Constitution.[2] Since the Governor-General representing the King was only the nominal Head of State, the executive power was in fact exercised by the Cabinet of Ministers.[3] The Constitution did not create a new system of courts, nor did it make any express mention of the existence of judicial power. Certain matters relating to the appointment, tenure and remuneration of judicial officers were, however, set out in a separate part of the Constitution.[4]

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1. The Ceylon (Constitution) Order in Council, 1946, secs., 29 (1) and 7.
2. Ibid., sec. 45.
3. Ibid., sec. 46.
4. Part VI.

The Lower House, the House of Representatives, consisted of elected members as well as nominated members.[5] The Upper House, the Senate,[6] on the other hand, was not a representative body. Its members were either elected by the House of Representatives or nominated by the Governor-General, and the Senate was intended as a permanent body in the sense that its life was unaffected by any dissolution of the House of Representatives.[7]

As regards the procedure for enacting laws, it was provided that a Bill had to be passed by both the Houses[8] except in specified circumstances where a Bill which had not been approved by the Senate could nevertheless be passed by the House of Representatives alone.[9] A Bill passed either by both Houses or, where permitted, by the House of Representatives alone became a law when the Governor-General on behalf of the King assented to it.[10]

In order to sustain a continuous link between the two Houses it was provided that not less than two Ministers, including the Minister of Justice, and not less than two of the Parliamentary Secretaries should be appointed from the Senate.[11]

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5. Ibid., sec. 11.
6. See generally Sir Ivor Jennings, The Constitution of Ceylon (2nd ed. 1951), pp. 78-86.
7. Ibid., sec. 8(1) and (2).
8. Sec. 32.
9. Secs. 33 and 34.
10. Sec. 36.
11. Sec. 48.

The Governor-General who was appointed by His Majesty was required to exercise all powers, authorities and functions vested in him 'as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions vested in His Majesty'.[12] This provision enabled the Governor-General to act at variance with the conventions which are rooted in the British constitutional structure and thereby meet novel situations which had no parallel in England.[13] No act or omission on the part of the Governor-General was justiciable on the ground that he had not complied with the provisions of section 4(2).[14] As indicated above, the executive power was in fact exercised by the Cabinet of Ministers collectively responsible to the Parliament.[15] Section 49(2) ensured that only a member of either House could become a Minister.

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12. Sec. 4(2).

13. See S. A. de Smith, The New Commonwealth and Its Constitutions (1964), pp. 83-84; A. J. Wilson, 'The Governor-General and the Two Dissolutions of Parliament, 5 December 1959 and 23 April 1960', 3 Ceylon Journal of Historical and Social Studies 187 (1960); L. J. M. Cooray, 'Operation of Conventions in the Constitutional History of Ceylon', 1 Modern Ceylon Studies 1-42 (1970).

14. Proviso to sec. 4(2).

15. Sec. 46(1).

A separate part of the Constitution, Part IV was devoted to the mode of delimitation of electoral districts based on the strict territorial principle modified, however, in favour of the minorities.[16] The election law of Ceylon[17] which was founded on adult universal suffrage did not form part of the Constitution.[18]

Being a 'Westminster Model Constitution', it established a Judicial Service Commission[19] and a Public Service Commission.[20] The modelling of the constitutional structure on the British pattern was completed when the Parliament was empowered to make provision for powers and privileges of the two Houses of Parliament provided that they did not exceed those enjoyed or held by the Commons House of Parliament of the United Kingdom or of its members.[21] An Act was, in fact, passed soon afterwards, based to a great extent on the English practice.[22] The Standing Orders of the House of Representatives faithfully reproduced their counterpart in England.

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16. Sir Ivor Jennings, The Constitution of Ceylon (2nd. ed. 1951), p. 209.

17. The Ceylon (Parliamentary Elections) Amendment Act, No. 19 of 1948, as amended by Act No. 48 of 1949.

18. Tambiah v. Kulasingham (1949) 50 N.L.R. 25, at p. 33.

19. Sec. 53. A detailed discussion follows shortly.

20. Part VII.

21. Sec. 27.

22. Parliamentary Powers and Privileges Act No. 21 of 1953, L.E.C. cap. 383.

Having outlined the structure of the Constitution it remains to examine the sovereignty or the legislative supremacy of the Parliament and then the position of the judiciary under the Constitution, leading to a discussion on how the Judiciary assumed the power of judicial review of legislation.

(2) The Sovereignty of Parliament

The starting point for this discussion is section 29 of the Constitution:

> 29. - (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.
>
> (2) No such law shall-
>
> (a) prohibit or restrict the free exercise of any religion; or
>
> (b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or
>
> (c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or
>
> (d) alter the constitution of any religious body except with the consent of the governing authority of that body:
>
> Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.
>
> (3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void.
>
> (4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of His Majesty in Council in its application to the Island:

> Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two thirds of the whole number of members of the House (including those not present).
>
> Every certificate of the Speaker under this subsection shall be conclusive for all purposes and shall not be questioned in any court of law.

The phrase 'peace, order and good government' used in section 29(1), far from being a description of the purposes for which legislation may be enacted,[1] connotes authority 'as plenary and as ample as the Imperial Parliament in the plenitude of its power can bestow'.[2] It has been judicially recognised that this phrase conferred unlimited power on the Parliament in Ceylon, and that any limitations on that were to be found in any constitutional provision other than section 29(1) itself.[3] It has rightly been pointed out that the power conferred by this subsection on the Parliament was not mere legislative power in a technical sense.[4]

Subsection (2) which sought to protect the interests of minority communities, but which failed to protect individuals against discrimination,[5] has been regarded as an

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1. See L. J. M. Cooray, Reflections, p. 62.
2. Hodge v. The Queen (1833) 9 Appeal Cases 117.
3. Ibbralebbe v. The Queen (1963) 65 N.L.R. 433 at p. 443; /1964_/ 1 All E. R. 251, at p. 260.
4. C. F. Amerasinghe, 'Sovereignty of Parliament Revisited', 1 The Colombo Law Review 91 (1969).
5. See Mudanayake v. Sivagnanasundaram (1951) 53 N.L.R. 25, at pp. 30 and 44.

entrenched provision by C. F. Amerasinghe in his pioneering work.[6] The obiter dictum of Lord Pearce in The Bribery Commissioner v. Ranasinghe[7] that the 'entrenched religious and racial matters, which shall not be the subject of legislation . . . represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and /that/ these are therefore unalterable under the Constitution', and the obiter dictum of Viscount Radcliffe in Ibbralebbe v. The Queen[8] that the power conferred on the Parliament by section 29(1) was "subject to certain protective reservations for the exercise of religion and the freedom of religious bodies", seem to support the contention that section 29(2) was unalterable. However, Jennings[9] and Marshall[10] held a contrary view. The uncertainty which prevailed regarding the nature of the prohibition couched in section 29(2) undoubtedly contributed to the inclination towards the replacement of the Constitution completely.[11]

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6. C. F. Amerasinghe, The Doctrines of Sovereignty and Separation of Powers in the Law of Ceylon (Colombo, 1970), pp. 53-56.

7. (1964) 66 N.L.R. 73 at p. 78.

8. (1962) 64 N.L.R. 385 at p. 387.

9. Sir Ivor Jennings, op. cit., at pp. 23 and 64.

10. Geoffrey Marshall, Parliamentary Sovereignty in the Commonwealth (1957), pp. 127, 128.

11. See the Ceylon Hansard August 16, 1969, col., 108; M. L. Marasinghe, Ceylon - A Conflict of Constitutions', 20 I.C.L.Q. (1971), pp. 645-74.

No statute has been declared invalid on the ground that it was inconsistent with section 29(2).[12] In Kodeeswaran v. The Attorney General[13] the Privy Council reversed the decision of the Supreme Court that a public servant could not sue the Crown for arrears of payment, and sent the case back to the Supreme Court to decide whether the Official Language Act[14] was inconsistent with section 29(2). The Supreme Court was relieved from the task of pronouncing upon the validity of this Act with the enactment of the Republican Constitution which declared that the courts did not have the power to question the validity of any laws in existence at the time of adopting the Republican Constitution.[15]

Subsection (3) declared that any law inconsistent with subsection (2) was void; there was the absence of any provision which declared that laws which were inconsistent with any other Constitutional provision were void.[16] Courts, however, assumed that this was the position. The procedure for amending or repealing the provisions of the Constitution was prescribed in subsection (4).

A reading of section 29 indicates that the Parliament of Ceylon had the power to pass any Act with a simple majority in the House of Representatives provided in section 18,

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12. See for unsuccessful attempts: Kodakan Pillai v. Mudanayake (1953) 54 N.L.R. 433 and Sundaralingam v. I. P. Kankasanthurai (1971) 74 N.L.R. 457; /1971/ A.C. 370.

13. (1969) 72 N.L.R. 337.

14. Act No. 33 of 1956, (L.E.C., Supplement, Vol. 2, 1967).

15. The Constitution of Sri Lanka, secs. 12(1) 48(2) and specially 18(3).

16. See infra p.117

except when an Act amounted to an amendment of any Constitutional provision; there was the likelihood of section 29(2) being held to be a substantial limitation and thus beyond alteration by the Parliament even acting under section 29(4).

The powers possessed by the Ceylon Parliament, then, are not comparable to those attributed to the Parliament of the United Kingdom. Jennings remarked that the Ceylon Parliament was not a sovereign legislature in the commonly used sense of having 'complete and unlimited legislative power'.[17] That the Ceylon Parliament was not sovereign in the sense in which the British Parliament is sovereign has been recognised.[18]

Sinnatamby, J., in P. S. Bus Company v. C. T. B. rightly observed that:[19]

> unlike the British Parliament the legislative bodies in the various dominions are creatures of statute. They are bound by the provisions of the Acts or Orders-in-Council by which they were created and they cannot act in contravention of those provisions.

These opinions suggest that the Ceylon Parliament was not sovereign because it could not make or unmake any law by a bare majority unlike the British Parliament. On the other hand, Lord Pearce in Liyanage v. The Queen[20] noted that the Parliament of Ceylon had 'the full legislative power of

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17. Jennings, op. cit., pp. 64-65.

18. P. S. Bus Co., v. C. T. B. (1958) 61 N.L.R. 491, at p. 494, (per Sinnatamby, J.), and The Queen v. Liyanage (1962) 64 N.L.R. 313, at p. 350, (per T. S. Fernando, J.).

19. (1958) 61 N.L.R. 491 at p. 493.

20. (1965) 68 N.L.R. 265 at p. 280; [1966] 1 All E. R. 250, at p. 657.

a sovereign independent state'. It has been pointed out that this merely meant that Ceylon was a Sovereign State before international law.[21] It was said in Kodakkan Pillai v. Mudanayake[22] that the case before the Privy Council involved 'a construction of a constitutional limitation upon the general sovereign power of the Ceylon legislature to legislate for peace, order and good government'. This seems to suggest that the Parliament of Ceylon enjoyed legislative supremacy in the sense that it had no rival legislative authority.

It is apparent that although the Parliament of Ceylon was not sovereign in the sense that it did not enjoy all the powers attributed to the British Parliament, it was not a subordinate legislature in any sense.[23] On the other hand, it has been suggested that the concept of 'sovereignty of Parliament', which is peculiar to English Constitutional law, was irrelevant in Ceylon, especially because the Ceylon Constitution did not refer to the concept. The proper question to ask was, what were the powers of Parliament under the Ceylon Constitution ?[24]

At all events the primary distinction between the respective powers of the Parliaments of Britain and Ceylon seems to be the existence of the power of judicial review of

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21. See Amerasinghe, Separation., p. 12.
22. (1953) 54 N.L.R. 433 at p. 439.
23. See Amerasinghe, Separation., p. 16.
24. L. J. M. Cooray, Reflections., p. 72.

legislation in Ceylon. It has been alleged that in the United States of America there exists a 'judicial supremacy' as opposed to the 'supremacy of the legislature'. How the judiciary assumed the power of judicial review of legislation will be discussed shortly.

(3) The Judiciary

Separate provision relating to the Supreme Court and other judicial officers was made in Part VI.

The judges of the Supreme Court were to be appointed by the Governor-General to hold judicial office during good behaviour, and to be removable only by the Governor-General on an address of the Senate and the House of Representatives.[1] The age of retirement of judges of the Supreme Court was sixty two years,[2] but the Governor-General could permit a judge who had reached the age of retirement to continue in office for a period not exceeding twelve months.[3] The salary of a Supreme Court judge could not be diminished during his term of office.[4]

The appointment, transfer, dismissal and disciplinary control of judicial officers other than judges of the Supreme Court was vested in the Judicial Service Commission,[5] which was to consist of the Chief Justice, a judge of the Supreme Court, and one other person who was or who had been a judge

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1. The Ceylon (Constitution) Order in Council, 1946, sec. 52(1) and (2).
2. Sec. 52(3).
3. Proviso to section 52(3).
4. Sec. 52(6).
5. Sec. 55(1).

of the Supreme Court.[6] Every member of the Commission, except the Chief Justice who was ex-officio the Chairman, was appointed for a period of five years and was eligible for reappointment.[7] The Governor-General had the power to remove any member of the Commission for cause assigned.[8] Any salary or allowance paid to a member could not be diminished during his term of office.[9]

The integrity and impartiality of the Judicial Service Commission was sought to be safeguarded when the Constitution declared it an offence to influence or attempt to influence any decision of the Commission or of any member of the Commission.[10]

It has been judicially held that the foregoing provisions envinced an intention that judicial functions should be discharged by persons whose independence and impartiality had properly been ensured by the Constitution.[11]

It has been alleged that the constitutional provisions relating to the judiciary were amenable to abuse by the executive.[12] However, it is to the credit of the judges

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6. Sec. 53(1).
7. Sec. 53(3).
8. Sec. 54(4).
9. Sec. 53(6).
10. Sec. 56.
11. See Liyanage v. The Queen /1966/ 1 All E. R. 650 at p. 658; (1965) 68 N.L.R. 265, at p. 282, per Lord Pearce.
12. See e.g., J. A. L. Cooray, 'The Supreme Court of Ceylon', The Journal of the International Commission of Jurists (1968).

of Ceylon that it has been recognised that the Supreme Court in particular has maintained a proud tradition of judicial independence.[13]

(4) 'Sovereignty of Parliament' v. 'Judicial Supremacy'

The sovereignty or the legislative supremacy of the United Kingdom Parliament is best represented by its immunity from judicial inquiry. As recent as in 1974, the House of Lords reiterated the cardinal principle of English Constitutional law that the courts in England have no power to declare enacted law invalid.[1] Lord Denning had, in the Court of Appeal,[2] expressed the opinion that if the court was satisfied that a private Bill had been improperly obtained it was the duty of the court to report that finding to the Parliament so that the matter could be put right. This, Lord Denning thought, was acting in aid of Parliament and, as he wished to add, in aid of justice.[3] The House of Lords disapproved of this opinion and held that it did not lie in the province of the judiciary even to express such an opinion as was in the contemplation of Lord Denning.[4]

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13. See L. J. M. Cooray, Reflections., p. 105 and The Debates of the House of Representatives, 29 August, 1969, column 115.

1. British Railway Board v. Pickin /1974/ 1 All E. R. 609, at p. 627, per Lord Simon of Glaisdale.

2. /1972/ 3 All E. R. 923 (C.A.) at p. 928.

3. See the House of Lords decision at p. 619 where Lord Morris of Borth-Y-Gest said: 'When an enactment is passed there is finality unless and until it is amended by Parliament. In the courts there may be arguments as to the correct interpretation of the enactment; there must be none as to whether it should be in the statute book at all'.

4. Ibid.

In fact, a judicial decision which declares an Act of Parliament invalid owing to an inconsistency with a fundamental principle of English Constitutional law is futile because, the United Kingdom Parliament may at will reverse any unpalatable judicial decision by a simple majority in the House of Commons.

The position in a country which has a written constitution containing procedural or absolute limitations is different. Wheare explains the position quite clearly:

> It is the function of the judges to decide what the law is, in disputed cases. A Constitution is part of the law and it therefore falls within the purview of the judges. Moreover it may happen that there appears to be some conflict between the Constitution and some other rule of law or some action, whether by the legislature or of the executive. If the judges are to decide what the law is in such a case, they must determine the meaning not only of the rule of ordinary law but also of the law of the Constitution. And if, in terms, a Constitution imposes restrictions upon the powers of the institutions it sets up, then the Courts must decide whether their actions transgress those restrictions, and in doing so, the judges must say what the Constitution means.[5]

Unlike the U. K. Parliament, the legislature of a country which has a 'Controlled Constitution'[6] cannot disregard with impunity a judicial decision which declares a statute unconstitutional.

From the above discussion it appears that judicial review of legislation is effective only in a country which has a constitution which is the paramount law, in the sense

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5. K. C. Wheare, Modern Constitutions (1951), p. 146.

6. In the words of Lord Birkenhead in McCawley v. The King (1920) A. C. 691, at p. 703 a controlled constitution is one in which the Constitution makers 'have created obstacles of varying difficulty in the path of those who would lay rash hands upon the ark, the Constitution'.

that a law which transgresses a constitutional provision is wholly void or can only be passed in a special way. Some Constitutions expressly confer the power of judicial review on the courts.[7]

That the Ceylon Constitution was the paramount law was assumed by the courts in the absence of an express provision.[8] Section 29(2) of the Constitution declared that any law inconsistent with section 29(2) was void. Section 29(4) merely declared, on the other hand, that any constitutional provision can be amended by a two thirds majority. Accordingly it was argued in Ranasinghe v. The Bribery Commissioner[9] that an Act of Parliament could properly be regarded as unconstitutional only if it transgresses the limitations stated in section 29(2), since there was no provision which rendered invalid statutes which infringed other constitutional provisions. The Supreme Court, however, found a solution in the term 'amendment': amendment may be either express or implied, and accordingly a statute which does not expressly purport to amend the Constitution but is nevertheless inconsistent with a constitutional provision is tantamount to an amendment of that constitutional provision by implication.[10] The position then is that, assuming that section 29(2) did not contain substantive limitations, the

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7. See e.g., Article 81 of the Constitution of Japan, 1946; Title VI "Unconstitutionality and Review" in the Constitution of the Republic of Honduras, 1965; Section 131 (A) and 32(1) of the Constitution of India.

8. See e.g., The Queen v. Liyanage (1962) 64 N.L.R. 313 at p. 355.

9. (1962) 64 N.L.R. 449.

10. Ibid., at p. 453.

Parliament of Ceylon was incompetent to pass a law inconsistent with any constitutional provision or to amend the Constitution except where it adhered to the procedure prescribed in section 29(4).

Once the courts agreed that the Constitution of Ceylon was the paramount or the fundamental law which took precedence over all other laws, judicial review of legislation which results from the traditional function of the courts, namely the interpretation of statutes, naturally followed. In fact, as Wynes has pointed out, invalidation of statutes is a natural incident of litigation:[11]

> In strict legal theory the judgment of the court does no more than decide inter partes and the statute remains as a subsisting law; in so far as the Court has refused to enforce it, because it is in conflict with the Constitution and it is assumed that the decision will be followed if subsequent proceedings under it are brought, the practical result is that the law becomes a dead letter.

The historical origins of judicial review in the Commonwealth countries seem to reduce to the fact that the Privy Council originally exercised that power in relation to the overseas empire, just as it did in relation to the thirteen American colonies before 1776, it has been said.[12] The essential premise on which the Privy Council proceeded was, as McWhinney rightly points out, that the colonial legislatures were subordinate legislative bodies vis-a-vis

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11. W. A. Wynes, Legislative Executive and Judicial Powers in Australia (5th ed. 1976), p. 30.

12. E. McWhinney, Judicial Review in the English Speaking World (3rd ed. 1965), pp. 13-14.

the United Kingdom Parliament, and that their enactments were therefore subject to review by the courts on the same basis as, for example, regulations passed by local government authorities within the United Kingdom.

That the Ceylon Constitution took precedence over all other laws, that it is the function of the courts to decide what the law is in disputed cases, that this function included that of determining any conflicts between the fundamental law and any other law, and that there is precedent in the Privy Council itself for invalidating the subordinate law in the event of a conflict with the higher law, amply justify the assumption by the courts of Ceylon of power of judicial review. The courts of Ceylon, however, did not explain the basis for such assumption.

(5) Judicial Review of Legislation in Ceylon

It is notable that only those provisions relating to the judiciary were successfully set up against the validity of Acts of Parliament of Ceylon, though in a number of cases statutes were unsuccessfully challenged as being inconsistent with some other constitutional provisions.[1] It is proposed to study the judicial role under the Independence Constitution of Ceylon especially in relation to the cases where statutes were impugned on the ground that they were in conflict with the constitutional provisions relating to the judiciary.

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1. See for a cross section of such cases H. L. de Silva, 'Some Reflections on the Interpretation of the Constitution of Ceylon and its Amendment', The Journal of Ceylon Law Vol. 1 No. 2 (Dec. 1970), fn. 15 p. 236.

The first series of successful cases came to be known as 'the Tribunal Cases'. These decisions were centred around section 55(1) which vested the power of appointing judicial officers in the Judicial Service Commission. Having held that any person who exercised judicial power came within the definition of 'judicial officer',[2] in each of the 'Tribunal Cases' the task of the court was to determine whether the tribunal or the officer in question was vested with judicial power. These cases will be discussed in the next two chapters.

A serious implication arising from the 'Tribunal Cases' was that judicial power was vested exclusively in the judiciary, meaning the ordinary courts of law and any validly constituted tribunals or 'special courts'.[3] As a result, the principle that neither the legislature nor the executive could exercise judicial power gained judicial recognition. Cases where the argument was raised that the legislature or the executive exercised judicial power are discussed in the seventh and eighth chapters respectively.

These cases which principally dealt with the question whether the legislature or the executive usurped the judicial power of the State which was vested in the judiciary, including the 'Tribunal Cases', are commonly known as the 'judicial power cases'. The last chapter briefly surveys the various aspects of the role played by the judiciary in the judicial power cases.

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2. Subject, of course, to the second requirement that such judicial officer held a 'paid' judicial office.

3. The term 'special courts' seems capable of representing those judicial tribunals which do not come within the definition of 'ordinary courts of law' as constituted by the Courts Ordinance No. 1 of 1889. See Nadaraja, Legal System., p. 119.

CHAPTER 5

THE JUDICIARY AND SPECIAL TRIBUNALS - PART I

A common feature of contemporary states has been the growth of systems of administrative tribunals. Making a deviation from the traditional theory that the legislative, executive and judicial functions of the State ought to be allocated to the three main organs of government so as to ensure a strict separation of powers, many countries of the world have readily accepted that it is inevitable in the interest of justice and expediency that specialised agencies should be created in various fields of activity, even if it means a denial of the jurisdiction that was previously enjoyed by ordinary courts of law: in fact many of these tribunals came to be known as 'special courts'.

This universal trend has had its impact in Sri Lanka too. Many statutes have or had the effect of conferring diverse powers such as dispute-settlement, imposition of penalties and punishment for committing an offence on administrative officers or tribunals. In a remarkably high number of Ceylon cases popularly known as the 'Tribunal Cases' the argument was raised that administrative tribunals could not consistently with the Independence Constitution of Ceylon exercise judicial powers.

As has been already mentioned,[1] this argument was founded on the premise that judicial officers, meaning those

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1. See supra Chapter 4, Part (3).

who exercised judicial power as against purely arbitral or administrative functions, were governed by the provisions of the Constitution relating to the judiciary, and that accordingly it was unconstitutional to vest judicial powers in any person not governed by those provisions.

Whether a particular tribunal was governed by the constitutional provisions relating to the judiciary depended on the answers given to two basic questions:

(i) Were those provisions applicable to the judges of the ordinary courts of law only or to a wider category of persons who, by the application of some criteria, could be regarded as 'judicial officers' within the meaning of section 52(1) of the Constitution?

(ii) Did the tribunal in question exercise 'judicial power', so that membership of it had to be regarded as a 'judicial office'?

It is proposed to examine first the meaning accorded to the term 'judicial officer' by the courts, followed by an examination of a number of relevant statutes with reference to the case-law in order to understand the meaning and content attributed to 'judicial power' by the courts.

The Meaning of the Term 'Judicial Officer'

The Constitution in Part VI made provision in respect of the judges of the Supreme Court and other 'judicial officers'. Section 55(1) read: 'The appointment, transfer, dismissal and disciplinary control of judicial officers is hereby vested in the Judicial Service Commission'. Section 55(5) declared that 'judicial officer' meant 'the holder of any judicial office'. Subsection (1) of section 3, the interpretation section, stated that 'judicial office means

any paid judicial office'. Thus the only assistance derived from the Constitution in elucidating the meaning of 'judicial officer' is that any person who held a paid judicial office was to be considered a judicial officer within the meaning of the relevant provisions. It appears from these provisions that there are two requirements in order to regard any officer as a judicial officer; (a) he must hold a judicial office and (b) that office must be a paid judicial office.

The second, and the less important, requirement may be disposed of first. The requirement seems to be that the officer should be paid for holding a judicial and not some other office. In determining whether a person is paid for a judicial office what is decisive is the nature, and not necessarily the designation, of office.

In Ranasinghe v. The Bribery Commissioner[2] H. N. G. Fernando, J., took the case of a hypothetical statute which provided that in specified circumstances Crown Counsel could function as Magistrates. When a Crown Counsel functions as a Magistrate under this statute for a period of time, and continues to draw the salary he usually receives as a Crown Counsel, he is, nevertheless, paid for such period for holding the office of a Magistrate. Here, as H. N. G. Fernando, J., pointed out, although his appointment by name is as a Crown Counsel, whenever he performs the functions of a Magistrate it is by office that of a judicial officer. The learned judge cited this example to controvert the argument raised on behalf of the Crown that the office created by the Bribery (Amendment) Act was merely the office of membership of the panel.

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2. (1962) 64 N.L.R. 449, at p. 451.

The argument was that the Governor-General appointed a panel which as such did not exercise judicial power; charges of bribery were tried by Bribery Tribunals constituted out of the panel.[3] In so far as the panel as such did not conduct any proceedings, the argument went, it was immaterial that a Bribery Tribunal whose members were drawn from the panel exercised judicial power. Thus, although the membership of the panel could be regarded as a paid office it could not be regarded as a paid judicial office. The learned judge unhesitatingly rejected this line of argument on the basis that when a member of such panel sat on a Bribery Tribunal he drew his salary for discharging the duties of the Tribunal, which was a judicial office; he drew attention to the cardinal principle of Constitutional law that 'you cannot do indirectly which you cannot do directly'.[4] The view held by H. N. G. Fernando, J., was approved by the Privy Council on appeal in The Bribery Commissioner v. Ranasinghe[5] and by the Supreme Court in Walker v. Fry.[6]

In Gunaseela v. Udugama, H. N. G. Fernando, S.P.J., came to the conclusion that membership of a Court Martial is not a judicial office:[7]

> /I/t is a body consisting of Service Officers convened ad hoc for trial of particular cases, and the duty to serve as a member of such a

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3. See the discussion on the Bribery Tribunals, infra pp. 132 - 144.

4. (1962) 64 N.L.R. 449, at p. 451.

5. (1964) 66 N.L.R. 73; /1964/ 2 All E. R. 785.

6. (1965) 68 N.L.R. 73, at p. 80 per Sansoni, C.J.

7. (1966) 69 N.L.R. 193, at p. 194

> Court is only one of the several kinds of duties which a Service Officer can under the relevant Statutes be called upon to perform. The office which entitles an Army officer to pay and other emoluments is his substantive office in the Army, and service as a member of a Court Martial is no more the basis of his entitlement to pay and emoluments than is his service in any other duty which the Army Act requires him to perform.

The distinction between a Bribery Tribunal and a Court Martial in respect of what is a paid judicial office seems to be that members of the panel under the Bribery Act had only one duty, namely to sit on a Tribunal when called upon to do so, whereas it was merely one of several duties of Service Officers to serve as a member of a Court Martial.

The views expressed by H. N. G. Fernando, S.P.J., in Gunaseela v. Udugama are in keeping with what he said in Walker v. Fry:[8]

> Section 55 of the Constitution . . . failed to preclude the possibility of the entrustment of judicial power to some authority bona fide established for administrative purposes. If administrative officials, the majority of whose powers and functions are administrative, are in addition entrusted on the grounds of expediency with judicial power, there would not in my opinion be conflict with Section 55. But if, under cover of expediency, judicial powers are vested in an office administrative only in name, then the principle that you cannot do indirectly that which you cannot do directly will apply.

Courts Martial and Bribery Tribunals seem to provide clear examples of the principles enunciated in the above quoted passage.

One other question remains: Could a person hold judicial office, and not be subject to the provisions relating to the judiciary, if that person received no payment at all?

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8. (1965) 68 N.L.R. 73, at p. 101.

H. N. G. Fernando, S.P.J., in Walker v. Fry thought that if an Act purported to vest judicial power in a person who did not receive any emolument the principle that you cannot do indirectly which you cannot do directly should apply, to render such statute unconstitutional.[9] This conclusion finds support in the fact that if the Constitution required judicial officers to be appointed and controlled in a particular manner such intention could not be negated by making substantially different provision in respect of a class of persons who would perform the functions generally entrusted to judicial officers.[10]

The primary requirement of holding a 'judicial office' may now be examined. In its narrow meaning 'judicial office' refers to ordinary courts of law which were in existence at the time of the enactment of the Constitution. In fact, the Soulbury Commission Report, on which the Constitution was largely modelled, recommended that the appointment, promotion, transfer and discipline of all District Judges, Magistrates, Commissioners of Request and Presidents of Village Tribunals should be dealt with by a Judicial Service Commission.[11] The Ministers' Draft,[12] which was followed by the Soulbury Commission whenever possible,[13] declared that the

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9. Ibid.

10. See C. F. Amerasinghe, Separation., p. 152.

11. Paragraph 397 of the Report, Cmnd. 6677.

12. Sessional Paper XIV - 1944. Section 68(3).

13. Paragraph 416 of the Soulbury Commission Report, Cmnd. 6677.

appointment to any judicial office (except membership of Supreme Court) should be made by the Governor-General on the advice of the Judicial Commission.

In Senadhira v. The Bribery Commissioner[14] Sansoni, J., refused to accept the narrow view that 'judicial officer' meant only the judges of ordinary courts of law. Such a meaning would have been the only acceptable one, if the court was confined to the Soulbury Commission Report alone. Sansoni, J., thought that there were more weighty considerations than the Soulbury Report which led him to conclude that 'judicial officer' included all persons who exercised judicial power. To hold otherwise, he observed, would be to hold that 'Parliament can establish new courts with powers as great as, or even greater than, those possessed by ordinary courts and devise a new method of appointing the judges who are to preside over them'.[15] He reiterated the principle that 'whether persons are judges, whether tribunals are courts, and whether they exercise what is now called judicial power depended and depends on substance and not on mere name'.[16]

That the phrase judicial officer was not limited to the judges of the ordinary courts of law was reaffirmed by the Privy Council in The Bribery Commissioner v. Ranasinghe, where Lord Pearce, rejecting the restricted interpretation, expressed the fear that:[17]

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14. (1961) 63 N.L.R. 313.

15. (1961) 63 N.L.R. 313 at 320.

16. Waterside Workers Federation of Australia v. Alexander (1918) 25 C.L.R. 434 at p. 451.

17. (1964) 66 N.L.R. 73 at p. 76; [1964] 2 All E. R. 785 at p. 789.

> if that argument were sound it might be open to the executive to appoint whom they chose to sit on any number of newly created tribunals which might deal with various aspects of the jurisdiction of the ordinary courts and thus, by eroding the courts' jurisdiction, render section 55 valueless.

A similar sentiment has been expressed in the Jamaican Case of Hinds v. The Queen when Lord Diplock delivering the majority decision of the Privy Council made the following observation:[18]

> A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law. If consistently with the Constitution, it is permissible for Parliament to confer the discretion to determine the length of custodial sentences for criminal offences on a body composed as the Review Board is, it would be equally permissible to a less well-intentioned Parliament to confer the same discretion on any other person or body of persons not qualified to exercise judicial power, and in this way, without any amendment of the Constitution, to open the door to the exercise of arbitary power by the executive in the whole field of criminal law.

The term 'judicial officer' was given a wider meaning in the Bribery Tribunal cases for the reasons underlined in the foregoing discussion. Thus section 55(1) of the Independence Constitution of Ceylon which enjoined that judicial officers should be appointed by the Judicial Service Commission was construed to be applicable not only to judges of the ordinary courts of law but also to any person who held a paid office involving judicial functions in the main.

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18. [1976] 1 All E. R. 353 at p. 370 ad. fin. Also cf. Liyanage v. The Queen [1966] 1 All E. R. 650 at p.660; (1965) 68 N.L.R. 265 at p. 285 (per Lord Pearce), cited infra p.293

Tambiah, J., in Walker v. Fry[19] did not agree with the position taken by the courts that any person who performed any judicial function solely or in addition to his executive functions should be appointed by the Judicial Service Commission. The learned judge pointed out that at the time the Ceylon (Constitution) Order in Council, 1946, came into operation, there existed certain statutes which conferred judicial powers on particular administrative officers or tribunals. Such administrative officers or tribunals were not considered to be judicial bodies, since their functions were overwhelmingly administrative. In order to leave out such administrative officers and tribunals from the scope of section 55(1) it was necessary, in the view of Tambiah, J., to construe that section in a strict manner.

Tambiah, J., was of the opinion that their Lordships did not, in The Bribery Commissioner v. Ranasinghe,[20] decide that the judicial power of the State was vested exclusively in the judiciary. This was a further reason why it should not be laid down that any person who exercised judicial power came within the ambit of section 55(1) which regulated the manner of appointment, transfer and disciplinary control of judicial officers other than judges of the Supreme Court. It is respectfully submitted that in the light of Liyanage v. The Queen,[21] where the Privy Council authoritatively laid

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19. (1966) 68 N.L.R. 73.
20. (1964) 66 N.L.R. 73; /1964/ 2 All E.R. 785.
21. (1965) 68 N.L.R. 265; /1966/ 1 All E.R. 650.

down that there existed in the Constitution of Ceylon a separation of powers and that as a result judicial power was vested exclusively in the judiciary, the view of Tambiah, J., is untenable.

In place of the generally accepted construction placed on section 55(1), Tambiah, J., suggested that judicial office meant the office held by judges of the courts of law that were in existence at the time the Constitution came into force, or the offices which might be held by those who presided or heard cases in analogous courts or courts performing similar functions.

Whether a tribunal is analogous to a court of law is one of the tests applied in determining whether it exercises judicial power. A tribunal which does not resemble a court of law may be regarded as a repository of judicial power in certain circumstances. Thus the fact that a tribunal is not analogous to a court of law does not by itself make it a non-judicial body. On the other hand, if it were accepted that section 55(1) applied only to courts of law and analogous bodies, the legislature could confer judicial powers on administrative tribunal as long as they did not resemble a court of law and thereby defeat the spirit of the constitutional provisions relating to the judiciary, namely that judicial functions should be performed only by persons whose independence and integrity had been secured by the special provisions contained in the Constitution. In order to prevent such a result the strict construction

advocated by Tambiah, J., had to give way to the wider interpretation that gained general acceptance in the Bribery Tribunal cases. Moreover, the Privy Council decision in Liyanage v. The Queen[22] which was decided soon after the judgment in Walker v. Fry was delivered made the view expressed by Tambiah, J., all the more untenable.

While there was general agreement, except for the minority view of Tambiah, J., that section 55(1) applied to any officer who exercised judicial power, unanimity was beyond reach as to what constituted judicial power in given circumstances, nor was there a universally applicable test to determine the nature and the content of judicial power.

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22. Ibid.

(1) The Bribery Tribunals

In the Bribery Tribunal cases the primary issue was whether a Bribery Tribunal exercised judicial power when it inquired into an alleged offence of bribery with a view to punishing any accused who in its view had committed any such offence. In Senadhira v. The Bribery Commissioner[1] and Don Anthony v. The Bribery Commissioner[2] the Supreme Court without quashing the findings of guilt the Tribunal had made against the accused persons merely set aside the sentences imposed on them, whereas in Piyadasa v. The Bribery Commissioner,[3] Ranasinghe v. The Bribery Commissioner[4] and The Bribery Commissioner v. Ranasinghe[5] it was held that a Bribery Tribunal exercised judicial power even at the stage of inquiring into alleged offences and that as a result, a Bribery Tribunal could not conduct any proceedings consistently with the constitutional provisions relating to the judiciary. A sixth case, Don Anthony v. Gunasekera,[6] was brought before the Supreme Court to bring the decision in Don Anthony v. The Bribery Commissioner[7] into line with the Privy Council decision in The Bribery Commissioner v. Ranasinghe.[8]

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1. (1961) 63 N.L.R. 313.
2. (1962) 64 N.L.R. 93.
3. (1962) 64 N.L.R. 385.
4. (1962) 64 N.L.R. 449.
5. (1964) 66 N.L.R. 73.
6. (1964) C.L.W. 84.
7. Supra note 2.
8. Supra note 5.

Here it is proposed to study only those parts of the relevant judgments which dealt with the meaning of "judicial power" in the context of Bribery Tribunals. A brief account of the Bribery Act is called for before embarking on an examination of the case law.

(i) The Bribery Act

The Bribery Act of 1954 which was intended to provide for the prevention and punishment of bribery[1] enabled the Attorney-General to indict before a court of law or arraign before one of the Boards of Inquiries created by the Act any public servant against whom, in the opinion of the Attorney-General, there was a prima facie case of bribery.[2] A Board of Inquiry was given the power to decide whether an accused person was guilty at the end of an inquiry;[3] a finding of guilt carried with it certain statutory penalties which automatically intervened.[4]

The legislature was not unmindful of the fact that the Bribery Act might be inconsistent with the Constitution for, the Act was passed after complying with the procedure prescribed in section 29(4) of the Ceylon (Constitution) Order in Council for constitutional amendment. Section 2

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1. Long Title of Act No. 11 of 1954.
2. Act No. 11 of 1954, sec. 5.
3. Ibid., sec. 47(1) (b).
4. See sec 28. Some such statutory penalties were disqualification for seven years from being registered as a voter and disqualification from being employed as a public servant.

declared that the provisions of that Act were to be operative notwithstanding any inconsistency with the Constitution as if they were contained in an Act properly passed as an amendment of the Constitution.

Significant changes were introduced in 1958 with the enactment of the Bribery (Amendment) Act No. 40 of 1958 which was passed, unlike the original Act, as an ordinary statute. This Act brought into being a new official known as the Bribery Commissioner who was empowered to conduct investigations into allegations of bribery.[5] If he was satisfied that there was a prima facie case of the commission by any person of a bribery offence as specified in Part II of the Act,[6] he should prosecute such person before a Bribery Tribunal.[7]

The Act of 1958 made provision for the appointment by the Governor-General of not less than 15 persons to a panel from which were constituted Bribery Tribunals whenever the need arose.[8]

A Bribery Tribunal had the power to impose a sentence of imprisonment not exceeding 7 years or a fine not exceeding Rs. 5000 or both.[9] The sentence of imprisonment was

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5. See section 4 of Act No. 40 of 1958.

6. These offences included offering a bribe to a judicial officer, a Member of Parliament or to a public servant and soliting or accepting a bribe by such persons.

7. Section 5(1), as amended by sec. 7 of Act No. 40 of 1958.

8. Sec. 24 of The Bribery Amendment Act No. 40 of 1958.

9. Secs. 14 to 23.

carried out, as by a court, on warrants of commitment signed by the President of the Bribery Tribunal addressed to the Fiscal of the Province and the Superintendent of Prison.[10] A fine imposed by a Bribery Tribunal could be recovered by the Attorney-General on an application made to a District Court.[11] Section 68 enabled a Bribery Tribunal to punish persons who committed a contempt of its authority as a contempt of court. For this purpose it had been given all the powers conferred on a court by section 57 of the Courts Ordinance[12] and chapter 65 of the Civil Procedure Code.[13]

Section 69 A of the Bribery Act as amended gave a convicted person a right of appeal to the Supreme Court against a conviction for any error in law or in fact. In the exercise of this power persons who had been convicted by Bribery Tribunals contested the validity of the appointments made to Bribery Tribunals in order to render such convictions null and void.

(ii) The Case Law

In one or the other of the Bribery Tribunal cases the following aspects relating to the validity of the conferment of judicial power on Bribery Tribunals were considered:

a. Did 'judicial officer' mean judges of ordinary courts of law alone?

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10. See sec. 17(1) of Act No. 40 of 1958 which makes sec. 311 of the Criminal Procedure Code applicable. Also see Senadhira v. The Bribery Commissioner (1961) 63 N.L.R. 313 at p. 316.

11. Sec. 28(2) of Act No. 11 of 1954.

12. Ordinance No. 1 of 1889 (L.E.C. cap. 6).

13. Ordinance No. 2 of 1889 (L.E.C. cap. 101).

b. Even if that term covered a wider category than judges in the ordinary sense, could a member of a Bribery Tribunal be regarded as the holder of a judicial 'office', in that, he received payment as a member of the panel and not as a member of a Bribery Tribunal?

c. Was it open for a person who attacked the validity of a statute to exercise the right of appeal which derived solely from that statute?

d. Were the powers conferred on a Bribery Tribunal judicial in nature?

Of these four aspects the first two have been discussed in the first part of this chapter. The third, which was the preliminary objection raised against the appellate jurisdiction of the Supreme Court to pronounce upon the validity of the Bribery Act was upheld in Don Anthony v. The Bribery Commissioner[1] but was dismissed in Piyadasa v. The Bribery Commissioner.[2] In the first relevant case, Senadhira v. The Bribery Commissioner,[3] in order to avoid the application of the preliminary objection the accused-appellant contended that he was challenging the validity of only those provisions which conferred penal powers on a Bribery Tribunal. Accordingly, the actual judgment itself was limited to a pronouncement that although a Bribery Tribunal might validly find a person charged before it guilty of a bribery offence any punishment imposed on him by the Tribunal had no legal effect. Once the preliminary objection was overruled in Piyadasa's case both the Supreme Court and the Privy Council

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1. (1962) 64 N.L.R. 93.
2. (1962) 64 N.L.R. 385.
3. (1961) 63 N.L.R. 313.

had no hesitation in deciding that unless appointments to a Bribery Tribunal were made by the Judicial Service Commission all proceedings before a Bribery Tribunal would be tainted with illegality.

Here we are concerned with the issue whether Bribery Tribunals could be said to have been vested with judicial power.

In Senadhira v. The Bribery Commissioner[4] Sansoni, J., conceded that it was difficult to define the precise limits of 'judicial power'.[5] There, however, existed certain judicial precedents which proved useful in determining whether a Bribery Tribunal was vested with Judicial powers.

Toronto Corporation v. York Corporation[6] was one such precedent. In that case the Privy Council had held that while the Municipal Board constituted under the particular Act was primarily entrusted with administrative functions, it was also entrusted, by certain provisions of the Act, with the jurisdiction and powers of a Superior Court, such as the power to set aside a contract and impose new terms upon the parties to it. In regard to such powers the Privy Council observed:[7]

> It is difficult to avoid the conclusion that, whatever be the definition given to a Court of Justice, or judicial power, the sections in question do purport to clothe the Board with the functions of a Court, and to vest in it judicial powers.

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4. Ibid.
5. Ibid., at p. 318.
6. [1938] A.C. 415.
7. Ibid., at p. 427.

It must be noted here that the Privy Council in Toronto Corporation v. York Corporation regarded the Municipal Board as an administrative body 'in pith and substance'.[8] Their Lordships found nothing to suggest that the Board would not have been granted its administrative powers without the addition of the judicial power complained of. Accordingly, such parts of the Act as purported to vest in the Board, the functions of a court were severable and such parts alone were invalid.[9]

Sansoni, J., in Senadhira v. The Bribery Commissioner then referred to the second relevant case, Attorney-General for Australia v. The Queen and the Boilermakers' Society of Australia.[10] The Privy Council was called upon in that case to determine whether the Dominion Parliament of Australia could confer on one body of persons--tribunal or court--arbitral and judicial functions together. Their Lordships affirmed the order of the High Court of Australia that the Constitution of the Commonwealth of Australia which is based on a separation of functions did not permit such a course. Accordingly, it was held that the conferment of judicial powers, such as powers to impose penalties for the breach of an order or award, and to punish contempts of its authority, on the Court of Conciliation and Arbitration--an

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8. Ibid., at p. 426.
9. Ibid., at p. 427.
10. /1957/ A.C. 288.

essentially non-judicial body--was inconsistent with the Constitution. Such provisions as purported to vest in the Court of Conciliation and Arbitration judicial power 'even to the extent of fining a citizen or depriving him of his liberty'[11] were held to be unconstitutional.

The third case relevant to the matter before Sansoni, J., in Senadhira's case was Waterside Workers' Federation of Australia v. J. W. Alexander Ltd.,[12] which had been cited with approval in Attorney-General for Australia v. The Queen and Boilermakers' Society of Australia.[13] Isaacs, J., and Rich, J., in Waterside Workers' case explained the difference between judicial and arbitral functions in the following terms:[14]

> Both of them rest for their ultimate validity and efficacy on the legislative power. Both presuppose a dispute, and a hearing or investigation, and a decision. But the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other. . . . The arbitral function is ancillary to the legislative function and provides the factum upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and proceeds if necessary to enforce the law.

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11. Ibid., at p. 309.
12. (1918) 25 C.L.R. 434.
13. /1957/ A.C. 288.
14. (1918) 25 C.L.R. 434 at p. 463.

Isaacs, J., and Rich, J., clearly emphasised that a judicial decision enforced rights and duties which the existing law recognised. Barton, J., in the same case explained that the power of enforcement was an essential part of judicial power, in that laws in themselves were of little force without bodies which would enforce them. He added that:[15]

> . . . . whether persons were judges, whether tribunals were courts, and whether they exercised what is now called judicial power, depended and depends on substance and not on mere name. Enforceable decisions by an authority constituted by law at the suit of a party submitting a case to it for decision is in character a judicial function.

Drawing assistance from the three judicial decisions referred to above, Sansoni, J., (with T. S. Fernando, J., agreeing) concluded that a Bribery Tribunal was required by the Bribery (Amendment) Act to exercise arbitral functions in conducting an inquiry into an alleged commission of an offence of bribery--an inquiry which resulted in a finding whether the accused person had committed such offence. The authority of the Tribunal to inflict punishment by way of a fine or a term of imprisonment or both had the character of a judicial function. These punitive powers were judicial for two reasons. Firstly, the Tribunal had been given a power of enforcing its decisions by way of inflicting punishment. Secondly, the power of imposing punishment appertained exclusively to judicial power.

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15. Ibid., at p. 451 ad. fin.

The Supreme Court in Senadhira's case held accordingly that the sentences entered by the Tribunal against the accused-appellants were inoperative without prejudice to the validity of the proceedings of the Tribunal up to the stage of pronouncing upon the guilt of the accused. Sansoni, J., did, however, entertain a doubt whether the conferment of judicial power on a Bribery Tribunal was proper:[16]

> It is right that we should preserve as much of the will of Parliament as possible: and so far as that will, as expressed in a Statute, is not repugnant to the Constitution, we should uphold those provisions which we consider not to conflict with the Constitution. I see no objection to the conferment of arbitral functions which involve the investigation and pronouncement of a finding on questions of fact, though I must confess that the manner in which arbitral and judicial functions have been conferred on Tribunals makes this a border-line case.

In Piyadasa v. The Bribery Commissioner,[17] Tambiah, J., (with Sri Skanda Rajah, J., agreeing) held that 'enforcement' was not an indispensable ingredient of judicial power, drawing support from an Australian authority--Dr. Wynes.[18] According to Dr. Wynes:[19]

> enforcement could not be a necessary attribute of a court exercising judicial power--for example the power to award execution might not belong to a tribunal, yet its determinations might clearly amount to an exercise of judicial power.

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16. (1961) 63 N.L.R. 313, at p. 321.

17. (1962) 64 N.L.R. 385.

18. W. A. Wynes, Legislative, Executive and Judicial Powers in Australia (2nd ed.), cited at p. 392.

19. op. cit., (5th ed.) at p. 423-4.

Tambiah, J., rightly pointed out that the power of enforcement was not regarded as an essential element of judicial power in the United States of America too.[20]

That the definition of the term 'judicial power' had caused much difficulty was duly appreciated by Tambiah, J.[21] In order to elucidate the meaning of 'judicial power', the distinction drawn in Alexander's Case between arbitral and judicial powers was referred to. So was the definition given by Griffiths, C.J., in Huddart, Parker & Co. v. Moorhead. Griffiths, C.J., said:[22]

> I am of opinion that the words "judicial power . . . means the power which every sovereign authority must of necessity have to decide controversies between his subjects or between itself and its subjects, whether the right relates to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision, whether subject to appeal or not, is called upon to take action.

The essential elements of judicial power as appear from the above mentioned authorities seem to be (a) settlement of a dispute (b) with reference to existing legal rights and liabilities and (c) with a view to pronouncing an authoritative or binding decision (d) even where the tribunal has no power to enforce its determination. Guided by these considerations Tambiah, J., held that a Bribery Tribunal which was required to 'hear, try and determine any prosecution

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20. See Nashville, Chattanooga & St. Louis Railway v. Wallace (1933) 288 U.S. 249; 77 L. ed. 730.

21. (1962) 64 N.L.R. 385, at p. 391.

22. (1908) 8 C.L.R. 330, at p. 357.

for bribery made against any person before the tribunal' (sec. 47(1) as amended by Act No. 40 of 1958) was conferred with judicial power. For, a Bribery Tribunal, it seems, (a) inquired into a dispute between the State (represented by the Bribery Commissioner) and the alleged offender (b) with reference to definitions of bribery found in Part II of the Bribery Act of offences which were previously triable in a court of law (c) in order to pronounce upon the guilt of the accused which pronouncement was final and conclusive subject only to the right of appeal. In view of the fact that (d) enforcement was not an essential element of judicial power, even at the stage of trying persons for bribery a Bribery Tribunal exercised judicial power.

In Piyadasa v. The Bribery Commissioner not only the sentence was set aside as in Senadhira v. The Bribery Commissioner, but the whole of the proceedings before the Tribunal was declared null and void.[23] In arriving at this conclusion the Supreme Court paid due regard to the fact that the legislature had purported to create a tribunal and had conferred upon it the judicial power exercised by the Supreme Court and the inferior courts with the result that the jurisdiction of the ordinary courts in regard to bribery offences was greatly curtailed.

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23. (1962) 64 N.L.R. 385, at p. 395.

The validity of the decision in Piyadasa v. The Bribery Commissioner was canvassed before another Bench of 2 judges of the Supreme Court in Ranasinghe v. The Bribery Commissioner.[24] H. N. G. Fernando, J., (with L. B. de Silva, J., agreeing) had no hesitation in subscribing to the opinion expressed by Tambiah, J., in Piyadasa v. The Bribery Commissioner. The Privy Council on appeal in The Bribery Commissioner v. Ranasinghe,[25] saw no occasion to detract from Tambiah, J.'s decision in any manner. Since the arguments before the Supreme Court and the Privy Council in Ranasinghe's Case were centred around certain other aspects relating to the validity of the Bribery Amendment Act, there is no discussion there on the content of judicial power.

By way of conclusion it may be said that in deciding that a Bribery Tribunal was a judicial office the Supreme Court took into account the following factors: (a) bribery was and continued to be an offence triable in a court of law; (b) Bribery Tribunals ousted the jurisdiction of the courts in respect of bribery offences specified in the Bribery Act;[26] (c) inflicting a penalty and imposing punishment are exclusively judicial powers; and (d) a Bribery Tribunal was more akin to a court of law and had little resemblance to a fact finding commission.

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24. (1962) 64 N.L.R. 449.

25. (1964) 66 N.L.R. 73; [1964] 2 All E.R. 785.

26. See e.g. Senadhira's case (1961) 63 N.L.R. 313, at p. 320 ad. fin. where Sansoni, J., said that 'the Bribery Tribunals were Courts set up in substitution for the established courts'. See also Piyadasa's case (1962) 64 N.L.R. 385 at p. 393.

(2) Quazi Courts

The first case to extend the principle enunciated in the 'Bribery Tribunal cases' to other areas of statutory law was Jailabdeen v. Danina Umma[1] (which was decided after Piyadasa v. The Bribery Commissioner[2] but before Ranasinghe v. The Bribery Commissioner[3]). It was successfully argued in that case that the appointment of Quazis by the Minister was inconsistent with the Constitution. In subscribing to that argument, the Supreme Court traced the history of local legislation relating to the creation of the office of Quazis and examined the powers and functions of Quazis.

The earliest attempt to reduce into a statute the laws relating to Muslim marriage and divorce was accomplished in 1806 with the promulgation of the Muslim Code of that year. It was not until 1929 that the law relating to Muslim marriage and divorce, which was in a 'very unsettled and complicated state',[4] underwent thorough revision.

The Ordinance No. 27 of 1929, among other changes, introduced a system of Quazi courts to deal with questions of Muslim marriages and divorces together with applications for the maintenance of Muslim wives and children and other connected matters.

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1. (1962) 64 N.L.R. 419 (S.C.)
2. (1962) 64 N.L.R. 385 (S.C.)
3. (1962) 64 N.L.R. 449 (S.C.)
4. N. H. M. Cader moving that a committee of the Legislative Council be appointed to consider and report on Muslim Law of marriages. Ceylon Hansard, February 5, 1926, p. 140.

The provisions contained in this Ordinance, which were re-enacted in the Marriage and Divorce (Muslim) Act of 1951,[6] gives a Quazi the jurisdiction, among other things, to entertain an application by a Muslim wife for a divorce[7] and to adjudicate on claims for the recovery of Mahr[8] as well as for the maintenance of wives and children.[9]

These powers had, prior to the Ordinance of 1929, been exercised by ordinary courts of law. For instance, in R. v. Miskin Umma[10] the Supreme Court had held that a Muslim wife could obtain a divorce, without the consent of her husband, only from a court of law. The court was not prepared to acquiesce in the submission that a local practice had grown whereby a Muslim wife could obtain a divorce from a Muslim priest in similar circumstances. The Ordinance of 1929 had the effect of transferring such powers as were exercised by the courts relating to Muslim marriage and divorce to the newly created Quazis.[11]

In support of the conclusion that the power of a Quazi to order a husband to pay maintenance to his wife and children involved the exercise of judicial power, H. N. G. Fernando, J., observed that prior to the enactment of the Ordinance of 1929,--

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6. Act No. 13 of 1951, (L.E.C. cap. 115).
7. Ibid., s. 28.
8. Ibid.
9. Ibid., s. 47(1) (b) and (c).
10. (1925) 26 N.L.R. 343.
11. Jailabdeen v. Danina Umma, supra n. 1, at p. 423.

> . . . in exercising it a magistrate was clearly exercising judicial power, for he had to administer the common law under which a person had the liability to maintain the wife and children; upon claims being made for maintenance, the magistrate had to decide upon the validity of alleged marriages and upon questions of paternity; to make enforceable orders; these are all matters involving the exercise of judicial power.[12]

The above passage amply demonstrates that the powers conferred on Quazis, previously enjoyed by courts of law, were powers that properly fall within the range of "judicial functions". It may be noted here that section 48 of the Marriage and Divorce (Muslim) Act of 1951 declared the jurisdiction exercisable by a quazi under section 47 exclusive. The Act, however, provided for an appeal from the decision of a Quazi to the Board of Quazis[13] and a further appeal therefrom to the Supreme Court.[14]

The following judicial observation lends support to the conclusion arrived at in Jailabdeen v. Danina Umma that Quazis exercise judicial power:

> In Islam all law was sacred, and the only person who judicially administered it (apart from the head of the state itself) was the Kazi (or Kathi) who was a judge in the fullest sense of the term, and the only judge whom the law recognised.[15]

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12. Ibid., at p. 423.

13. Section 60.

14. Section 62.

15. R. Miskin Umma (1925) 26 N.L.R. 343, at p. 355, per Bertram, C.J.

As regards the meaning of 'judicial power', the Supreme Court in Jailabdeen v. Danina Umma was inclined to agree with the judgment of Tambiah, J., in Piyadasa v. The Bribery Commissioner[16] that the definition given in Huddart, Parker and Company Proprietory Ltd., v. Moorhead[17] was the most acceptable. That 'enforcement' was not an indispensable attribute of judicial power also was approved of. H. N. G. Fernando, J., however, pointed out that under the Marriage and Divorce (Muslim) Act the order of a Quazi could be enforced as an order of a magistrate on application to him.

Here, as in the case of Bribery Tribunals, the Supreme Court was much influenced by the fact that a jurisdiction previously enjoyed by ordinary courts of law had been conferred on an extra-judicial tribunal whereby the jurisdiction of the courts was ousted. On the application of this principle Quazis, undoubtedly, exercise judicial power.

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16. (1962) 64 N.L.R. 385.
17. (1908) 8 C.L.R. 330, at p. 357. See supra p. 142.

(3) Arbitration and Adjudication under the Industrial Disputes Act

The Industrial Disputes Act No. 43 of 1950 introduced mediation, conciliation and arbitration as methods of preventing and expeditiously settling industrial disputes. It is the duty of the Commissioner of Labour, under this Act, to endeavour to settle industrial disputes by conciliation.[1] He is also empowered to refer an industrial dispute, with the consent of the parties to the dispute, to an arbitrator or a District Court for arbitration.[2] In the event that conciliation fails and the parties to the dispute do not consent to arbitration, the Minister has the power to refer such dispute to an arbitrator or an Industrial Court for arbitration.[3]

Significant changes in this legislative scheme were effected by the Industrial Disputes (Amendment) Act No. 62 of 1957. This Act created Labour Tribunals to which workmen could directly apply in respect of termination of employment. Labour Tribunals in addition took over the jurisdiction previously exercised by District Courts as arbitrators under the original Act.[4]

In a series of cases the Industrial Disputes Act, as amended in 1957, came under attack on the basis that arbitrators, Industrial Courts and Labour Tribunals were in

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1. The Industrial Disputes Act No. 43 of 1950, sec. 3(1).

2. Ibid. By section 2 of Act No. 62 of 1957, the District Court was replaced with a Labour Tribunal.

3. Ibid., sec. 4.

4. Act No. 62 of 1957, sec. 2.

fact courts and that accordingly the appointments to those bodies made otherwise than by the Judicial Service Commission were inconsistent with the Constitutional provisions which safeguarded the independence of the Judiciary.

Walker v. Fry,[5] was decided by a Divisional Bench of five judges of the Supreme Court of Ceylon, and came before the Privy Council as The United Engineering Workers Union v. Devanayagam.[6] These two decisions provide the leading judgments on this question. In the Supreme Court it was held by a majority of three judges that Labour Tribunals were judicial bodies. On appeal, the Privy Council laid down by a majority decision that none of the institutions which were created by the Act was intended as a judicial tribunal.

It is proposed to study the majority decision of the Supreme Court in Walker v. Fry with the minority view expressed by the Privy Council on appeal. The dissenting judgment in Walker v. Fry will then be discussed with the majority judgment in Devanayagam's case. This will provide an appropriate setting to evaluate briefly the respective merits of the differing views. First, the relevant statutory provisions will be outlined.

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5. (1966) 68 N.L.R. 73.
6. (1967) 69 N.L.R. 289.

(i) An Outline of the Industrial Disputes Act

Arbitration proceedings, which may be voluntary or compulsory, are initiated either by the Commissioner of Labour or the Minister, and not by any party to an industrial dispute.[1] In contrast, the amendments made in 1957 enable a workman to make an application to a Labour Tribunal in respect of termination of employment.[1a]

Provisions relating to arbitration on reference may be studied first. When an industrial dispute is referred to an arbitrator it is his duty to make all such inquiries as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and make such award as may appear to him just and equitable.[2]

The award is then transmitted to the Commissioner of Labour to be published in the Gazette.[3] Every award of an arbitrator shall come into force on the date of the award, or any other specified date not being earlier than the date on which the industrial dispute to which the award relates first arose.[4] Such an award has effect for a period specified in the award[5] or, where no such period is specified, for an indefinite period.[6]

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1. See p.149 supra. 1a. Ibid.
2. The Industrial Disputes Act, sec. 17(1).
3. Ibid., sec. 18(1).
4. Sec. 18(2).
5. Sec. 18(3).
6. Sec. 18(4).

Provision is made in the Act, however, for any party to the award to repudiate such award.[7] Similar provision is made in relation to Industrial Courts[8] except for the fact that an award of an Industrial Court cannot be repudiated. Instead, any party to an award may apply to the Minister to set aside, modify or vary it.[9] Such application, then, is referred by the Minister to an Industrial Court[10] which may confirm, set aside, vary or modify such award.[11]

Every award made by an arbitrator and an Industrial Court shall be binding on all the parties to the dispute (unless repudiated by a party or set aside by an Industrial Court as the case may be), and the terms of the award shall be implied terms in the contract of employment between the employer(s) and the workman(men) bound by the award.[12]

An arbitrator is either nominated by the parties to the dispute[13] or appointed by the Minister.[14] An Industrial Court is constituted by one person or three persons nominated by the Minister[15] out of a panel of five persons appointed by the Governor-General.[16]

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7. Sec. 27.
8. Secs. 24 to 27.
9. Sec. 27.
10. Ibid.
11. Sec. 28(1).
12. Secs. 19 and 26.
13. Sec. 3(1).
14. Sec. 4.
15. Sec. 22(3).
16. Sec. 22(1).

The amending Act of 1957 added a new Part IV A which deals with matters relating to the powers and functions of Labour Tribunals when inquiring into applications made to it by workmen.

The Minister is empowered to constitute such number of Labour Tribunals as he determines, each consisting of one person called the President.[17]

A workman, or a trade union on behalf of a workman who is a member of that union, can make an application to a Labour Tribunal for relief or redress in respect of:

(a) the termination of his services by his employer;

(b) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of such benefits; and,

(c) such other matters relating to the terms of employment, or the conditions of labour, of workman as may be prescribed.[18]

It is the duty of a Labour Tribunal, when an application is duly made to it, to make all such inquiries into that application and hear all such evidence as the Tribunal may consider necessary, and make such order as may appear to the Tribunal to be just and equitable.[19]

Any relief or redress may be granted by a Labour Tribunal to a workman upon an application duly made, notwithstanding anything to the contrary in any contract of service between him and his employer.[20] An order of a Labour

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17. Sec. 31A(1). 18. Sec. 31B(1).
19. Sec. 31C(1). 20. Sec. 31B(4).

Tribunal is conclusive,[21] subject to the condition that an appeal lies to the Supreme Court on a question of law.[22]

When the Tribunal is satisfied that a matter to which an application duly made relates is under discussion between a trade union to which the workman belongs and the employer, the Tribunal is required to suspend its proceedings until the conclusion of that discussion, and upon such conclusion to resume the proceedings and make an order according to the terms of any such agreement resulting from such discussion.[23] Again, if the application relates to a matter which has been referred to be settled by arbitration under section 4, the Tribunal shall dismiss such application.[24]

If a workman has resorted to a Labour Tribunal he shall not seek any legal remedy and, similarly, if a workman has resorted to any legal remedy he is not entitled to any remedy from a Labour Tribunal under Part IV A of the Act.[25]

(ii) The View that Labour Tribunals are Judicial Bodies

This is the view upheld by the majority in Walker v. Fry and by the minority in Devanayagam's case. The basic premise for this view seems to be the alleged difference between the dispute settlement machinery introduced by the original Act and the Labour Tribunals under Part IV A, introduced in 1957.

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21. Sec. 31D(1). 22. Sec. 31D(2).
23. Sec. 31C(2). 24. Sec. 31B(2) (b).
25. Sec. 31B(5).

An arbitrator, an Industrial Court or a Labour Tribunal when acting on a reference exercised arbitral and not judicial powers, said Sansoni, C.J., who, together with H. N. G. Fernando, S.P.J., and T. S. Fernando, J., formed the majority in Walker v. Fry. In reaching this conclusion he relied on 'enforcement' as an essential requirement of judicial power. Arbitration proceedings result in laying down conditions for the future which become terms in the contract of employment, whereas a Labour Tribunal is empowered to deliver a final and conclusive order in the exercise of its powers "to apply the law, to interpret the agreement, to decide the facts, and by its adjudication to create an instant right or liability, on the basis of some previously existing legal standard".[1]

Unlike an award of an arbitrator which may be repudiated or an award of an Industrial Court which may be set aside or modified on application to the Minister, an order of a Labour Tribunal is final and conclusive.[2]

The fact that a Labour Tribunal ascertains existing legal rights and liabilities and declares them conclusively prompted the majority of the judges in Walker v. Fry to equate a Labour Tribunal to a court of law, deriving further strength from the fact that a workman has direct access to a Labour Tribunal, but not to an arbitrator or to an Industrial Court.[3]

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1. (1966) 68 N.L.R. 73, at p. 80, (per Sansoni, C.J.).
2. Ibid., at pp. 85 and 86, (per Sansoni, C.J.).
3. Ibid., at p. 93, per, H. N. G. Fernando, S.P.J.

An industrial dispute is referred by the Minister or the Commissioner of Labour to an arbitrator or to an Industrial Court for the 'settlement' of such dispute, whereas a workman directly applies to a Labour Tribunal for 'relief or redress'. Redress, which means 'reparation for a wrong', as H. N. G. Fernando, S.P.J., observed, indicates that a Labour Tribunal is expected to remedy a violation of a law.[4] In fact, the redress claimed in an application to a Labour Tribunal can be identical with that claimed in a civil court.[5] Unlike an arbitrator or an Industrial Court which strives to reach a "settlement" a Labour Tribunal makes an "order", and the term "order" is "perfectly appropriate as an alternative for "decree" ".[6]

The words "just and equitable" when appended to an order that a Labour Tribunal is expected to make did not render such order non-judicial; in fact it is a just and equitable order that a court of law is generally expected to make. That a Labour Tribunal can order reinstatement and look outside the contract of service in search of justice and equity also did not make a Labour Tribunal non-judicial.[7]

The fact that a workman had to choose between judicial proceedings and an application to a Labour Tribunal,[8] was construed as an indication that Labour Tribunals were intended as courts to exist side by side with the then existing courts of law.[9] Similar provision did not exist in the original Act.

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4. Ibid. 5. Ibid. 6. Ibid., at p. 94.
7. Ibid., at p. 95. 8. See above at p.154.
9. Walker v. Fry, at p. 94.

Drawing a division line between the original Act, which created institutions to exercise arbitral powers, and the amending Act, which created a judicial tribunal, namely the Labour Tribunal, the Supreme Court in Walker v. Fry, by a majority decision, thus rendered invalid orders made by Labour Tribunals, which had been appointed by the Public Service Commission.

The dissenting judgment of Lord Guest and Lord Devlin, as delivered by Lord Devlin, in The United Engineering Workers Union v. Devanayagam,[10] which approves the majority judgment in Walker v. Fry, may now be discussed.

The basis for the dissenting opinion was stated as follows:

> Thus in our opinion the question whether a body is exercising judicial power is not to be determined by looking at its functions in conjunction with those of other bodies set up by the Act and forming a general impression about whether they are judicial or administrative. Nor is it to be answered by totting up and balancing resemblances between the Labour Tribunal and other judicial and administrative bodies. Judicial power is a concept that is capable of clear delineation.[11]

Unlike the majority judgment in Walker v. Fry, the dissenting opinion in Devanayagam's case refused to be guided merely by differences that existed between arbitration machinery and Labour Tribunals, and inclined in favour of applying the concept of judicial power, which their Lordships thought was clearly identifiable.

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10. (1967) 69 N.L.R. 289; /1967/ 2 All E.R. 367.

11. United Engineering Workers Union v. Devanayagam (1967) 69 N.L.R. 289, at p. 306; /1967/ 2 All E.R. 367, at p. 379, per Lord Devlin.

The fact that at least a single party to a dispute, namely, a workman, has access to a Labour Tribunal shows that the Tribunal was endowed with judicial power; for, an arbitral body can derive authority only from the consent of all the parties to a dispute, their Lordships pointed out.[12] It is respectfully submitted that the Industrial Disputes Act in its unamended form envisaged compulsory as well as voluntary arbitration, and that accordingly the criterion adopted as to the nature of the source of power is not conclusive as to whether the power ultimately exercised is arbitral or judicial.

The powers enjoyed by a Labour Tribunal, such as those to disregard the terms of a contract of employment or to order reinstatement, which are wider than those conferred on a court of law, did not deter Lord Devlin and Lord Guest from the conviction that Labour Tribunals exercised judicial power. While affirming the proposition that a court of law applies law to facts before it Lord Devlin had this to say:[13]

> But this does not mean that unless the tribunal from the first applies an existing law it cannot be judicial. The distinction is not between old law and new law but between law and no law. . . . What the statute appears to us to be doing is to substitute for the rigidity of the old law a new and more flexible system.

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12. Ibid., at p. 307 (N.L.R.); 380 (All E.R.).
13. Ibid., at p. 308 (N.L.R.); 381 (All E.R.).

On the other hand, a court of law should exclude altogether considerations of policy and expediency. A Labour Tribunal may not shun these consideration altogether, but the paramount consideration remains the need for a just and equitable solution.[14] In other words it is required 'to do justice between the parties to the application', which is also the criterion that guides a judge.[15]

Lord Devlin pointed out that:

> another and essential characteristic of judicial power is that it should be exercised judicially. Put another way, judicial power is power limited by the obligation to act judicially. Administrative or executive power is not limited in that way.

This criterion, it is submitted, is ill-conceived since it is widely recognised that the duty to act judicially and the exercise of judicial power are distinct and not co-extensive concepts.[16] The attempt made by Lord Devlin to place all situations where a duty to act judicially exists within the exclusive premises of judicial power is comparable to the view held by Sansoni, C.J., in Walker v. Fry that the words 'just and equitable order' connote the need to 'hold an even hand between conflicting interests' and that a Labour Tribunal 'has no power to act in a purely arbitrary manner'.[17] The true position is that whenever

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14. Ibid., at p. 310 (N.L.R.); 383 (All E.R.).

15. Ibid., at p. 311 (N.L.R.); 384 (All E.R.).

16. See Walker v. Fry (1966)68 N.L.R. 73 at p. 121 per Tambiah, J., and C.T.B. v. Gunasinghe (1968) 72 N.L.R. 76 at p. 81, citing Rola Co., (Aust.) Pty Ltd., v. The Commonwealth (1944) 69 C.L.R. at 203.

17. Ibid., at p. 79.

there exists a duty to act judicially the proceedings should conform to the principles of natural justice and not be arbitrary; and, that the duty to act judicially can apply to a judicial as well as an arbitral or administrative proceeding.

(iii) The view that Labour Tribunals are not Judicial Tribunals

In Walker v. Fry,[1] Tambiah, J., with Sri Skanda Rajah, J., agreeing, elected to view the Industrial Disputes Act as a whole to determine whether the Labour Tribunals fitted into the primary purpose of the Act, namely the prevention and settlement of industrial disputes, or marked a deviation so grave as to equate such Tribunals with courts of law.

Labour Tribunals, Tambiah, J., stated, do not perform the same functions as those of a court of law. For instance, a Labour Tribunal is not called upon to decide a lis between the parties. Only a workman, but not his employer, has access to a Labour Tribunal.[2]

Adopting the test of enforcement[3] to distinguish between arbitral and judicial functions, Tambiah, J., had no hesitation in holding that a Labour Tribunal, which in the main decides what ought to be the rights and duties of the parties to the application for the future, is not endowed with judicial power.

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1. (1966) 68 N.L.R. 73. 2. Ibid., at 108.
3. See supra pp. 139-40.

To obtain relief from a Labour Tribunal it is not necessary that the termination of the services was wrongful.[4] Thus, a Labour Tribunal may come to the assistance of an aggrieved workman who is unable to institute an action in a court of law in the absence of a cause of action.

The wider considerations that a Labour Tribunal may take into account, but which fall outside the purview of the courts of law, together with the unprecedentedly wide range of remedies which can be meted out by a Tribunal, prompted Tambiah, J., to assert that Labour Tribunals are merely arbitral bodies. The only limitation set on the arbitral power of a Labour Tribunal is that its order has to be "just and equitable". Such an order is wider in scope than a judicial decision.[5]

Tambiah, J., also drew attention to the provisions which require a Labour Tribunal to dismiss an application or to suspend its proceedings,[6] and held that those provisions clearly indicated that Labour Tribunals were not intended as additions to the existing courts system.[7]

Tambiah, J., received the unreserved approbation of the Privy Council in viewing the legislative plan in enacting the original as well as the amendment Acts as a whole in

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4. Shell Company of Ceylon Ltd., v. Pathirana (1962) 64 N.L.R. 71.
5. Walker v. Fry, supra, at p. 112.
6. See supra p.154.
7. Walker v. Fry, supra, at p. 112.

order to determine whether a Labour Tribunal was analogous to a court of law.[8] This approach of the Privy Council is opposed to that adopted by the majority in Walker v. Fry and by the minority in Devanayagam's case.

The test of analogy is succinctly stated in Labour Relations Board of Saskatchewan v. John East Iron Works Ltd:[9]

> It is as good a test as another of 'analogy' to ask whether the subject matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish the judges of the superior or other courts.

Viscount Dilhorne, delivering the majority opinion of the Judicial Committee of the Privy Council,[10] accepted the proposition that there are many features which are essential to the existence of judicial power, yet which by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also.[11]

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8. (1967) 69 N.L.R. 289, at p. 294; (1967) 2 All E.R. 367, at p. 371.

9. [1949] A.C. 134 (P.C.) at p. 151. Cited in Devanayagam's case, supra, at p. 293 (N.L.R.); 370 (All E.R.).

10. The other two judges were, Lord Upjohn and Lord Pearson.

11. Labour Relations case at p. 149, cited in Devanayagam's case at p. 293 (N.L.R.); 370 (All E.R.).

Having briefly examined the provisions relating to arbitrators and Industrial Courts, Viscount Dilhorne agreed with the unanimous view of the Supreme Court in Walker v. Fry that they were not intended by the legislature to exercise judicial power, but mere arbitral functions.[12] The powers and functions of a Labour Tribunal under the 1957 Act did not differ from those of an arbitrator or an Industrial Court; therefore, the Privy Council held that it was proper to infer that arbitrators, Industrial Courts and Labour Tribunals alike had been endowed with powers of arbitration.[13]

The proposition which found favour with the majority in Walker v. Fry, that a workman might apply to a Labour Tribunal only if he had a cause of action, was rejected on three counts: firstly, if that was the case one would not expect access to the Tribunal to be limited to one party to a dispute arising out of employment; secondly, a Labour Tribunal was empowered to make an order notwithstanding anything to the contrary in the contract of service; thirdly, the words 'relief' and 'redress' occurring in relation to Labour Tribunals did not limit the scope of the order which a Tribunal may make to a strictly legal one.[14]

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12. Devanayagam's case, at p. 297 (N.L.R.); 372 (All E.R.).

13. Ibid.

14. Ibid., at 299 (N.L.R.); 374 (All E.R.).

The fact that an application made to a Labour Tribunal debars legal proceedings, and vice versa, does not, in their Lordships' opinion, make a Labour Tribunal a court. Two alternatives are available to an aggrieved workman. If he has a cause of action he may sue in a civil court for legal relief; otherwise he may make an application to a Labour Tribunal even if he does not have a cause of action for a remedy which is wider in scope than a judicial remedy.

(iv) Concluding Remarks

The case law on the Industrial Disputes Act clearly indicates the difficulties involved in determining whether a particular office is a judicial office. The opinion was divided in both the cases discussed above: moreover, in Moosajees v. Fernando,[1] which was decided after Walker v. Fry but before Devanayagam's case, also the judges were divided.

In Moosajees v. Fernando[1a] a divisional Bench of five judges of the Supreme Court was convened to reconsider the decision in Walker v. Fry, in the light of the Privy Council decision in Liyanage v. The Queen,[2] which was delivered after the decision in Walker v. Fry. The Divisional Bench in Moosajees v. Fernando held that the decision in Walker v. Fry was inconsistent with the separation of powers which the Privy Council in Liyanage v. The Queen declared to be a fundamental feature of the Constitution to the extent that

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1. (1966) 68 N.L.R. 414, see the next paragraph.
1a. Ibid.
2. (1965) 68 N.L.R. 265; [1966] 1 All E.R. 650.

it held that arbitrators and Industrial Courts could be validly appointed by any authority other than the Judicial Service Commission. Accordingly, the decision in Walker v. Fry was revised to the effect that the position of an arbitrator, and membership of an Industrial Court and a Labour Tribunal alike constituted 'judicial office'.

The Privy Council in Devanayagam's case made no reference to either Moosajees v. Fernando or Liyanage v. The Queen. However, the Privy Council decision in Devanayagam's case clearly shows that Moosajees v. Fernando had been wrongly decided. As will be explained elsewhere,[3] the Legislature stepped in to extend the rule in Devanayagam's case to those cases which had been finally disposed of in pursuance of the incorrect decisions of the Supreme Court.

The differing views expressed in Walker v. Fry and Devanayagam's case illustrate how differently constituted courts may come to different conclusions by applying different criteria to the same factual situation. These two cases at least illustrate how difficult it is to define the limits of the rather amorphous phrase 'judicial power', although Lord Devlin thought that the concept could be clearly delineated.[4]

In fact there are factors which seem to support each of the opposing views. The view that a Labour Tribunal exercises judicial power may be supported on the following grounds: There need not be an industrial dispute to apply

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3. See infra pp. 314-19.

4. See Devanayagam's case (1967) 69 N.L.R. 289, at p. 306, /1967/ 2 All E.R. 367 at p.379.

to a Labour Tribunal. The individual workman goes before such a Tribunal to seek a remedy for a personal grievance. Judicial proceedings and an application to a Labour Tribunal are alternatives. A Labour Tribunal decides on justice as between the parties, without being unduely influenced by extra-legal factors such as industrial peace, since what is in issue is a grievance of an individual. It is not infrequently that courts take into account policy considerations. In fact, as Lord Devlin remarked, 'those who made equity were judges and not administrators'.[5] Finally, a decision of a Labour Tribunal is final and conclusive, subject to an appeal on a question of law.

On the other hand there are many factors which indicate that a Labour Tribunal is not analogous to a court. An intention to create a court in introducing the Labour Tribunal into the fabric of the Industrial Dispute Act is not so easily imputed to the legislature, since the paramount consideration had right through been the speedy disposal of disputes arising out of employment, without being limited to the strict legalities of courts of law. A just and equitable order is capable of extending far beyond the confines of a judicial decision. The power to look outside the contract of employment and the power to reinstate could

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5. It has recently been observed that "although the lawyer may lack the expertise or knowledge necessary to determine what is the right decision in specific cases, he has a very good idea of what is the best way of reaching fair and correct decisions in general because this is the essence of law". W. H. B. Dean, "Whither the Constitution?" inaugural lecture delivered on 2.10.1975. (New Series: No. 35, University of Cape Town) p. 9.

have been conferred on a District Court instead of a Labour Tribunal created for that purpose, if the legislative intent was to create a court possessing powers wider than those traditionally vested in a court of law. The legislature intended not to create a court but a new administrative tribunal in order to meet the increasing demands of a developing branch of the state economy.

In Liyanage v. The Queen[6] the Privy Council rightly observed that it is important to look at the cumulative effect of a statute or the legislative plan, in deciding whether a particular statute is tantamount to an exercise of judicial power. If this approach can be extended to the Industrial Disputes Act, the approach adopted by the minority in Walker v. Fry and by the majority in Devanayagam's case seems preferable.

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6. See infra pp.281-85.

(4) Power to Impose a Penalty - A Comparison of the Powers of the Commissioner of Inland Revenue with Those of a Licensing Authority

The two cases[1] we propose to discuss here, and which were decided concurrently by the Supreme Court of Ceylon, clearly demonstrate in what circumstances the imposing of a penalty may or may not amount to an exercise of judicial power. This is sufficient justification to discuss two different statutes under one heading, deviating from the general pattern adopted in this chapter of dealing separately with each statute.

(i) Money Penalty under the Income Tax Ordinance[2]

Section 80(1) of the Income Tax Ordinance provides as follows:

> Where in an assessment made in respect of any person the amount of income assessed exceeds that specified as his income in his return and the assessment is final and conclusive under section 79, the Commissioner may, unless that person proves to the satisfaction of the Commissioner that there is no fraud or wilful neglect involved in the disclosure of income made by that person in his return, in writing order that person to pay as a penalty for making an incorrect return a sum not exceeding two thousand rupees and a sum equal to twice the tax on the amount of the excess.

An appeal lies from such an order to the income tax board of review.[3] Where a penalty has been imposed on a person under section 80 such a person cannot be prosecuted

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1. Xavier v. Wijeyekoon (1966) 69 N.L.R. 197, and Ibrahim v. Government Agent, Vavuniya (1966) 69 N.L.R. 217.
2. Ordinance No. 2 of 1932. (L.E.C., cap. 242).
3. The Income Tax Ordinance, section 80(2).

under section 90(2) (a), which provides that the making of an incorrect income tax return is an offence summarily punishable by a magistrate with a fine not exceeding 2000 rupees or imprisonment not exceeding 6 months, or both, in addition to being ordered to pay a sum equal to double the amount of tax which has been undercharged.

In Xavier v. Wijeyekoon[4] the petitioner applied to the Supreme Court for a writ of prohibition to restrain the Commissioner from recovering the penalty which the latter had imposed on the petitioner for making an incorrect income tax return. It was contended in support of this application that the imposition of such a penalty amounted to an exercise of judicial power.

It was further argued that the imposition of a penalty under section 80 was intended as an alternative to legal proceedings envisaged in section 90, and that it firmly supported the fact that section 80 confers judicial power.

The Supreme Court did not subscribe to the view that every exercise of power to impose a penalty involved the exercise of judicial power. Following the decision of the Supreme Court of the United States of America in Ocean Steam Navigation Co., v. Stranham[5] the court held that executive officers could impose reasonable money penalties in order to sanction the enforcement of statutory obligations, without seeking the assistance of judicial proceedings.

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4. (1966) 69 N.L.R. 197.
5. (1909) 214 U.S. Reports 320, at 339.

In the Ocean Steam case[6] it was observed that the Act in question drew a clear distinction between those circumstances where it was intended that particular violations of the Act should be considered as criminal and be punished accordingly and those where it was contemplated that violations should not constitute crimes, but merely entail the infliction of penalties, enforceable in some cases by purely administrative action and in others by civil suit.[7] The sole purpose of section 9, which empowered an administrative officer to inflict a fine on the master of a ship who attempted to bring into the country 'aliens afflicted with loathsome or dangerous contagious diseases', was, the court held, to secure the efficient performance by those in charge of a ship of the duty to examine in the foreign country, before embarkation, all the would-be passengers so that the aliens referred to in section 9 were not brought into the United States.[8]

In the Ocean Steam case, thus, two points were stressed; firstly, that section 9, as distinguished from some other sections, did not create a criminal offence and secondly, that the prime purpose of that section was not to punish, but to secure the performance of a duty imposed by the Act.

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6. Supra fn. 5.
7. Ibid., at paragraph 337.
8. Ibid.

The Supreme Court of Ceylon in Xavier v. Wijeyekoon cited with approval the decision in Helvering v. Mitchell[9] to the effect that where a penalty is primarily intended as a safeguard for the protection of revenue it is a remedial sanction and not an exercise of judicial power.

In Helvering's case, Mitchell had been acquitted, by a Federal Court, of the offence of wilfully evading any tax. Later the Commissioner of Internal Revenue, who found that Mitchell had fraudulently deducted an amount from his taxable income, ordered him to pay the deficiency and 50% of the deficiency as a penalty under section 293(b) of the Revenue Act of May 29, 1928. It was contended before the Supreme Court that the Commissioner could not impose a penalty on the same facts that formed the basis of the judicial proceeding. In other words, the rule against double jeopardy was relied on. The imposition of the penalty, the Supreme Court held, was not a criminal proceeding, and, accordingly, the earlier acquittal was not a bar to the action of the Commissioner.

The penalty was imposed, the court observed, to 'ensure full and honest disclosure, to discourage fraudulent attempts to evade tax'[10] . . . 'and to reimburse the government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud'.[11] The Legislature

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9. (1938) 303 U.S. Reports 391. 82 Lawyers' Edition 917.

10. Ibid., para. 399.

11. Ibid., para 401.

could, it was further observed, impose both a criminal and a civil sanction in respect of the same act or omission. The imposition of a penalty by the Commissioner was only a civil incident of the assessment and collection of the income tax.[12]

These two American decisions were relied on by the Supreme Court of Ceylon in Xavier v. Wijeyekoon to emphasise that the penalty imposed by the Commissioner of Income Tax was a civil as distinguished from criminal sanction, and that the provision of alternative criminal legal proceedings did not change the civil nature of that penalty.

The decision of the Supreme Court in Xavier v. Wijeyekoon was subsequently approved by the Privy Council in Ranaweera v. Wickramasinghe[13] and in Ranaweera v. Ramachandran.[14]

One of the arguments before the Privy Council in Ranaweera v. Wickramasinghe was that under section 80 of the Income Tax Ordinance, the Commissioner of Income Tax had to determine whether a taxpayer had 'proved' the absence of fraud or wilful neglect, which was essentially a judicial function, and one which when performed led to either to his discharge from all liability for penalties, or the infliction of them upon him. On that account, it was argued that

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12. Ibid., para. 405.
13. (1969) 72 N.L.R. 553; [1970] A.C. 951.
14. (1969) 72 N.L.R. 562; [1970] A.C. 962.

section 80 so confirmed judicial power on the Commissioner. The Privy Council was not willing to accept that argument. Their Lordships pointed out that:

> Officers appointed by the Executive may find themselves hearing evidence, weighing it, testing it, and coming to a conclusion upon it: and all the time having to do their best to be fair and impartial. In a word they have to act judicially. . . . /W/here the resolution of disputes by some Executive officer can 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.[15]

Their Lordships concluded that a perusal of the Act indicated that the functions of the Commissioner of Income Tax were overwhelmingly administrative and that in any event section 80 which undoubtedly imposed on him a duty to act judicially was just one of the many sections which set out his various administrative duties and powers.

In Ranaweera v. Ramachandran[16] it was argued that the Income Tax Board of Review exercised judicial power whenever it entertained an appeal of a tax-payer against the determination of the Commissioner of Income Tax. In support of this argument it was contended that, unlike the Commissioner of Income Tax who performed many administrative duties, the Board of Review had only one function; namely to hear and determine appeals. The Board, it was argued,

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15. Supra fn. 13 at p. 558.
16. Supra fn. 14.

decided a dispute between the Commissioner and the tax payer. The Privy Council was not prepared to subscribe to such a view. Their Lordships pointed out that an appeal was allowed to the Board of Review so that it could re-examine the tax payer's claim and determine whether the Commissioner had made a proper assessment of the tax payer's income. In fact, the Commissioner could send a matter direct to the Board of Review, if he was of the opinion that no useful purpose would be served by his hearing it.[17]

The Privy Council came to the following conclusion:[18]

> On the whole of the material put before them on this part of the case their Lordships' conclusion is that the Board of Review does not exercise judicial power but is one of the instruments created for the administration of the Income Tax Ordinance, and that as such its work is administrative though judicial qualities are called for in its performance. It is irrelevant therefore that members of the Board were not appointed by the Judicial Service Commission.

(ii) The Infliction of a Penalty under the Licensing of Traders Act[1]

The relevant portions of section 5 of the Act are as follows:

> 5(1) (a) if the authority by whom a licence has been issued to any trader in any article is satisfied that such trader has contravened any of the provisions of this Act or of any regulations made thereunder; or
>
> (b) . . .
>
> (c) . . .

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17. Income Tax Ordinance, No. 2 of 1932 (L.E.C., cap. 242).

18. (1969) 72 N.L.R. 562, at p. 568; [1970] A.C. 962, at p. 970 (per Lord Donovan).

1. Act No. 62 of 1961.

> (d) if such authority is satisfied on information supplied by any member of the public that such trader had acted or is acting in contravention of any provision of this Act, the Control of Prices Act No. 20 of 1950, or the Food Control Act, No. 25 of 1950, then such authority may, without prosecuting or sanctioning a prosecution of that trader, by order (hereinafter referred to as a 'punitive order')--
>
> (i) suspend for any period specified in the order, or cancel, the licence issued to that trader, and
>
> (ii) require the trader to pay into the general revenue within such period, and in such manner as may be specified in the order, a sum not exceeding five thousand rupees.

One of the Regulations[2] made under this Act and published in the Gazette of 10 August, 1961 provided that a licensed trader shall not sell any article specified in the Schedule of the Regulations at a price higher than the maximum price fixed by Order under the Control of Prices Act, 1950.[3]

In Ibrahim v. Government Agent, Vavuniya[4] the respondent had ordered the petitioner to pay the sum of Rs. 5,000 for selling an article in excess of the controlled price in breach of Regulation 8(6). The order of the Government Agent was sought to be quashed on the ground that the Parliament had conferred judicial power on a licensing authority when it empowered such an authority to order a payment of money to the Consolidated Fund.

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2. Regulation 8(6), The Government Gazette of 10 August, 1961.

3. Act No. 29 of 1950 (L.E.C. cap. 173).

4. (1966) 69 N.L.R. 217.

H. N. G. Fernando, S.P.J., (with Sri Skanda Rajah, and G. P. A. Silva, JJ., agreeing) found that the alleged offence, namely, the selling of an article in excess of the maximum price prescribed under the Control of Prices Act, was an offence under that Act which was triable and punishable in the ordinary course by a magistrate. Though the petitioner had technically committed a breach of a regulation made under the Licensing of Traders Act, that regulation in fact sought to bring within the jurisdiction of a licensing authority the power to punish breaches of the Control of Prices Act.

> Price control is not a new invention of Parliament. Statutory control of prices and statutory provision for the trial and punishment by the judicature of contraventions of Price Control Orders existed well before the Constitution came into operation. Moreover the trial and punishment of offences of the nature of such contraventions has always, under our law, been committed to the judicature. In purporting to empower some authority other than a court, to punish such contraventions by the infliction of a penalty which is nothing more nor less than a fine, the Licensing of Traders Act constitutes in the language of the Privy Council, /Liyanage v. The Queen (1965) 68 N.L.R. 265_/, a usurpation and infringement of the separate power of the judicature.[5]

If it is not lawful for a licensing authority to try, determine and punish a contravention of a Price Control Order, the Court observed, the method of authorising that authority to inflict the punishment on the ground that the Licensing Regulation mentioned the same contravention, is the method of doing indirectly that which cannot be done directly.[6]

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5. Ibrahim v. G. A. Vavuniya, at p. 219. 6. Ibid.

The power of a licensing authority to make a 'punitive order' was clearly distinguishable from 'a remedial sanction' referred to in Xavier v. Wijeyekoon, the Court pointed out. In fact,

> having regard to the objects of the Licensing of Traders Act, as stated in the long title, the imposition of this penalty cannot be regarded as part of a composite legislative scheme to further those objects. This penalty has the same effect, whether as punitive or deterrent, as would a fine inflicted by a court for an offence under the Control of Prices Act.[7]

(iii) Criminal v. Civil Sanction

In Xavier v. Wijeyekoon[1] and Ibrahim v. The Government Agent, Vavuniya[2] the criterion was adopted that the nature of the sanction determines whether the imposition of a penalty amounts to an exercise of judicial power. In Xavier v. Wijeyekoon, as well as in the two American cases cited therein, a penalty had been imposed to secure the performance of a duty; the statutory provisions which formed the subject matter of each of the three cases instead of creating a criminal offence, merely contemplated an act or omission carrying with it some form of civil or administrative sanction, such as a penalty in default. On the other hand, in Ibrahim v. The Government Agent, Vavuniya a licensing authority had been empowered to impose a penalty for a breach of the Control of Prices Act, which had until then been regarded as a criminal offence cognisable in a court of law.

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7. Ibid., at p. 220.
1. (1966) 69 N.L.R. 197.
2. (1966) 69 N.L.R. 217.

The application of the principle that administrative officers could impose a penalty in certain circumstances without infringing upon judicial power[3] strongly indicates the willingness of the courts to recognise the ever-increasing need to entrust administrative officers with powers of enforcement in order to ensure that administrative regulations are adhered to by those to whom they apply.

The Supreme Court seems to have accepted the premise that the entrustment of some judicial powers upon an administrative officer does not change the administrative nature of his functions if the result of the exercise of all his powers is an administrative act. Conversely, where it does not appear that the purpose of the conferment of some judicial powers on an administrative officer is to facilitate the performance by him of an overwhelmingly administrative act, such conferment of judicial power is open to attack on the basis of the doctrine of separation of powers. Thus, in Ibrahim v. The Government Agent, Vavuniya the penalty in question which was nothing less than a criminal punishment could not be regarded as forming part of a composite legislative plan to further the objects of the Licensing of Traders Act.[4]

The fact that the power to punish infringements of Price Control Orders had formed part of the 'traditional jurisdiction of the courts' seems to have been instrumental in bringing about the decision that the fine in question before the Supreme Court in Ibrahim's case was an exercise of judicial power. On the other hand, there was no evidence

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3. Supra at 172.

4. Supra at 177.

that it formed part of the jurisdiction of the ordinary courts of law to impose penalties on persons evading tax in order to ensure that tax-payers duly fulfilled the obligations imposed on them by the Income Tax Ordinance. In Ibrahim v. The Government Agent, Vavuniya, 'judicial power' appears to have been understood as (a) a power that had generally been exercised by a court of law and (b) a punishment, deterrent or otherwise, for the commission of a criminal offence.

CHAPTER 6

THE JUDICIARY AND SPECIAL TRIBUNALS--PART II

In the previous chapter, we saw how the courts construed the constitutional provisions relating to the judiciary so as to require any person who came within the definition of a 'judicial officer' to be appointed by the Judicial Service Commission. A number of judicial decisions were then examined, under four sub-headings, in order to understand what factors determined, in a variety of factual contexts, whether an ostensibly administrative officer was in fact a judicial officer.

Two other important areas remain to be examined in this chapter. They provide good examples of how the courts, by way of interpretation, safeguarded their province of operation to the greatest possible extent in circumstances where a statute, the constitutionality of which was unassailable, nevertheless, seriously circumscribed the jurisdiction of courts of law. This is sufficient justification for discussing them apart from the instances that were studied in the previous chapter. These two areas, namely, conciliation under the Conciliation Boards Act and arbitration under the Co-operative Societies Ordinance will be discussed under the first two sub-divisions of this chapter.

In the third and last sub-division will briefly be surveyed the views expressed in the judicial decisions discussed in this and the previous chapter regarding the constituent elements and the boundaries of judicial power.

(1) Conciliation Boards*

The Conciliation Boards Act No. 10 of 1958, as amended by Act No. 12 of 1963,[1] 'was intended to provide an expeditious and inexpensive means of settling disputes between parties without the necessity of having recourse to the complicated process of a law suit'.[2] The provisions of the Act apply only in areas which are determined by the Minister of Justice to be Conciliation Board Areas. The Minister may appoint for each such area a Panel of Conciliators of not less than 12 persons.[3] Any person resident or any public officer engaged in work in a Conciliation Board area is qualified to be so appointed.[4] Although the Act specifies by designation certain persons and organizations that can recommend persons suitable to be appointed as members of the Panel,[5] in practice, recommendations of a wide variety of persons and organizations

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*For a thorough account of the historical background to the Conciliation Boards Act and a lucid and penetrating analysis of the provisions of the Act in their actual operation, see R. K. W. Gunasekere and Barry Metzger, 'The Conciliation Boards Act: Entering the Second Decade', The Journal of Ceylon Law (June 1971) Volume 2, No. 1, pp. 35-100. Another interesting and thought provoking discussion is found in M. L. Marasinghe, 'The Use of Conciliation Boards for Dispute Settlement: The Sri Lanka Experience', unpublished paper presented at Xth International Congress of Comparative Law, held in Budapest, Hungary on August 23-30, 1978.

1. L.E.C., 1967 Supplement, Volume II.

2. Wickramaratchi v. I. P. Nittambuwa (1968) 71 N.L.R. 121, at p. 123.

3. The Conciliation Boards Act, supra n. 1, sec. 2(1), 2(2) and 3(1).

4. Sec. 3(4).

5. Sec. 3(3), (4).

are considered and not infrequently had grossly unsuitable persons been appointed as conciliators.[6] One of the members of the Panel of Conciliators is appointed by the Minister to be the Chairman.[7]

The Chairman of the Panel shall constitute for that area any number of Conciliation Boards each consisting of three members of the Panel.[8] Section 6 of the Act together with the Schedule to the Act enumerates the civil disputes and criminal offences which may form the subject matter of an inquiry before a Conciliation Board. A matter is referred to a Board for inquiry by the Chairman either of his own motion or 'upon application made to him in that behalf'.[9]

Where a civil dispute or an offence is referred to a Conciliation Board for inquiry, it is the duty of the Board to summon the parties to such dispute or offence to appear before it and, after inquiring into such dispute or offence, make every effort to induce the parties, in case of a civil dispute, to arrive at an amicable settlement, and, in the case of an offence, to compound such offence.[10]

A settlement effected by a Conciliation Board in a civil dispute may be repudiated by any party to such dispute within thirty days after such settlement.[11] If a settlement is not so repudiated the Chairman of the Panel is under a

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6. See Gunasekere and Barry Metzger, op.cit., pp. 78-79.
7. Sec. 4(1).
8. Sec. 5.
9. Sec. 6.
10. Sec. 12.
11. Sec. 13(1).

duty to transmit a certified copy of such settlement to the relevant court of first instance to be filed of record in that court.[12] Such a settlement is deemed to be a decree of that court and may be executed as a decree or judgment of that court.[13]

No proceedings in respect of a civil dispute falling within the scope of section 6 of the Act can be instituted in a court of law unless a certificate is produced before the court issued by the Chairman of the Panel of Conciliators that a settlement could not be effected by a Conciliation Board or that the settlement made by the Board has been repudiated.[14] A similar restriction applies in respect of offences enumerated in section 6 in the absence of a certificate stating that the offence could not be compounded.[15]

The opinion was divided in the relevant decisions of the Supreme Court as to whether it was an infringment of the judicial power of the courts for a statute to make conciliation proceedings a condition precedent for legal proceedings. These decisions will now be examined, followed by an examination of the devices employed by the Supreme Court to circumscribe the application of the Act.

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12. Sec. 13(2).
13. Sec. 13(3) (a) and (b).
14. Sec. 14(1) (a).
15. Sec. 14(1) (b) and (c).

(i) Conciliation Boards: Did They Occasion an Erosion of the Judicial Power Vested in the Courts?

The first of the three relevant cases is Samarasinghe v. Samarasinghe[1] where the Supreme Court of Ceylon held that an action concerning a dispute falling within the ambit of section 6 of the Act and which arose in a Conciliation Board area could not be entertained in a court of law without the production of a certificate in compliance with section 14(1) (a) of the Act.

Section 14(1) (a) reads as follows:

> 14(1) Where a Panel of Conciliators has been constituted for any Conciliation Board area:
>
> (a) no legal proceedings in respect of any dispute referred to in paragraph (a) (b) and (c) of section 6 shall be instituted in, or be entertained by, a civil court unless the person instituting such proceedings produces a certificate from the Chairman of such Panel that such dispute has been inquired into by a Conciliation Board and it has not been possible to effect a settlement of such dispute by the Board, or that a settlement of such dispute made by a Conciliation Board has been repudiated by all or any parties to such settlement in accordance with the provisions of section 13.

In the legal proceedings taken before the District Court against him, the defendant raised a preliminary objection on the ground that section 14(1) (a) barred the action in the absence of the requisite certificate. Some time after the objection was raised, but before the conclusion of the proceedings, a certificate was produced before the

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1. (1967) 70 N.L.R. 276.

District Court to the effect that the dispute in issue had been referred to a Conciliation Board for inquiry and that a settlement could not be made.

The District Judge after referring to the obiter dictum of Basnayake, C.J., in Asiz v. Thondaman,[2] that the right of a citizen to invoke the aid of the courts was so fundamental that it could not be taken away even by the Legislature, had concluded that the Conciliation Boards Act in the absence of express and unambiguous words failed to take away the plaintiff's right to sue. It was accordingly held by the District Judge that the failure to obtain the requisite certificate before instituting the action did not affect its validity.[3]

The Supreme Court on appeal held that the Act in unambiguous terms made the production of a certificate, as envisaged in section 14, a condition precedent for the institution of legal proceedings. In any event, conciliation as a preliminary to adjudication did not in any sense deprive the citizen of his right of access to ordinary courts of law. T. S. Fernando, J., with Siva Supramanium, J., agreeing, made the following observation:[4]

> What [the Act] seeks to do is to place a bar against the entertainment by Court in certain stated circumstances of civil or criminal actions unless there is evidence of an attempt first made to reach a settlement of the dispute over which the parties appear set on embarking on litigation which is often expensive to the parties as well as to the State and which almost always finishes up in bitterness.

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2. (1959) 61 N.L.R. 217, at p. 222.
3. See Samarasinghe v. Samarasinghe (1967) 70 N.L.R. [276], at p. 277, 278.
4. Ibid., at p. 278, ad.fin.

Alles, J., in Wickramaratchi v. I. P. Nittambuwa,[5] an appeal arising from a criminal trial before a Magistrate's Court, expressed a different view. Rejecting the contention on behalf of the accused-appellant made for the first time before the Supreme Court that the Magistrate lacked jurisdiction in view of section 14(1) (b) of the Act and that he should not have entertained the police plaint in the absence of a certificate that the alleged offence had been inquired into by a Conciliation Board and had not been compounded, Alles, J., said:[6]

> Section 6 . . . contemplates that the only disputes and offences which can be referred for inquiry to a Conciliation Board, are such disputes and offences of the kind enumerated in section 6(a) to (d) which the Chairman may of his own motion refer to the Board or such disputes and offences which the parties desire should be referred to the Board. Disputes and offences of the kind enumerated in section 6 (a) to (d) which are not referred to a Board by either one or other of the two methods mentioned above would ordinarily be justiciable by the established Courts, even without the required certificate.

According to his interpretation of sections 6 and 14, conciliation as a preliminary to the institution of legal proceedings is merely voluntary, in that if the Chairman of the Panel refrains from making a reference to a Conciliation Board, either of his own motion or on an application made to him, legal proceedings can be instituted in spite of section 14 of the Act.

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5. (1968) 71 N.L.R. 121.
6. Ibid., at p. 124.

Alles, J., held further that even assuming that the failure to produce the Chairman's certificate prior to the institution of legal proceedings constituted an irregularity, it was only a procedural defect which was curable under section 425 of the Criminal Procedure Code. This section provided that a procedural defect would not affect the validity of a legal proceeding if the defect had not resulted in a 'failure of justice'.

Indeed, the acceptance of the objection founded on section 14 of the Act would have resulted in grave injustice:

> This point was not raised at the trial nor even in the petition of appeal and the only evidence in support was filed in this court in the nature of affidavits eight months after the appeal was filed. If the point taken by Counsel is entitled to succeed, it would mean that the present proceedings will have to be quashed and fresh proceedings taken in the Magistrate's Court, only if the offence cannot be compounded after inquiry by a Conciliation Board, in respect of an offence committed as far back as February 1966.[7]

Alles, J., went on to distinguish Samarasinghe v. Samarasinghe[8] on the ground that in that case, unlike the instance case, a reference had in fact been made to a Conciliation Board. In circumstances where a reference had not been made, section 14 of the Act did not apply. To hold otherwise would be to completely oust the jurisdiction of courts in respect of disputes and offences enumerated in section 6: unless that section was narrowly construed the

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7. Ibid., at p. 122.
8. (1968) 70 N.L.R. 276.

jurisdiction vested in the courts would be eroded.[9] In reaching this conclusion, Alles, J., cited with approval the obiter dictum of Basnayake, C.J., in Asiz v. Thondaman that the right of a citizen to invoke the aid of the courts was so fundamental that it could not be taken away even by the legislature.[10]

A Divisional Bench of Three Judges of the Supreme Court in Nonahamy v. Halgrat Silva[11] decided by a majority of two judges (with Alles, J., dissenting) that it was not open to the parties to a dispute to circumvent the application of section 14 by preventing a reference being made to a Conciliation Board, as was suggested by Alles, J., in Wickramaratchi v. I. P. Nittambuwa.[12]

In Nonahamy v. Halgrat Silva[13] the plaintiff had brought an action before the District Court claiming a right of way over the defendant's land and at the same time praying for an interim injunction restraining the defendants from obstructing the alleged right of way. The District Judge upheld the objection raised on behalf of the defendant that the court had no jurisdiction even to grant an interim injunction in view of section 14 of the Act. On appeal it was contended by the plaintiff-appellant before the Supreme Court that an application for an interim injunction did not

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9. (1968) 71 N.L.R. 121, at p. 122.
10. (1959) 61 N.L.R. 217, at p. 222.
11. (1970) 73 N.L.R. 217.
12. (1968) 71 N.L.R. 121.
13. (1970) 73 N.L.R. 217.

fall within the scope of section 14 of the Conciliation Boards Act and accordingly the non-production of a certificate was not fatal to the legal proceedings.

The majority decision in Nonahamy's case was that an application for an interim injunction was a proceeding within the meaning of that section. Moreover, section 86 and 87 of the Courts Ordinance which empowered a District Court to issue injunctions indicated that an application for an interim injunction could not be made to it unless it was accompanied by a plaint claiming a substantial relief.[14]

H. N. G. Fernando, C.J., with Wijayatilake, J., agreeing, disapproved of the interpretations placed by Alles, J., in Wickramaratchi v. I. P. Nittambuwa on section 6 and 14. The learned Chief Justice could not agree with the proposition that if a party did not desire a dispute to be referred to a Conciliation Board, then that dispute could be brought to the courts without the production of the certificate referred to in section 14:

> Section 6 does not mention the desire of parties to refer disputes for inquiry. When section 14 imposes a condition precedent of the production of a certificate from the Board, what is necessary is that the Board's functions have been antecedently exercised; this exercise can take place because of action taken by the Chairman of his own motion, or because the parties have desired to seek the mediation of the Board, or else because a party who wishes to come to Court is compelled as a first step to submit to an attempt at conciliation. Thus it seems to me that a dispute can be referred to a Conciliation Board under section 6, not by two methods but by three, the first and the third being compulsory so far as the party is concerned.[15]

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14. See ibid., pp. 219-20. 15. Ibid., at p. 221.

The construction placed on section 14 and 6 of the Act so as to make them applicable to any dispute or offence of the kind enumerated in section 6 without exception, in the opinion of the learned Chief Justice, did not occasion an erosion of the jurisdiction of the courts. Section 14 merely laid down a condition that legal proceedings in respect of matters falling within the ambit of section 6 should be preceded by an attempt at conciliation.

> If the Board's effort at making peace fails, and if recourse to the judicial power is not avoidable it is the Courts alone that can exercise that power. . . . There is no ousting or erosion of judicial power, unless such a power is taken away from the Courts and conferred on some other authority.[16]

Alles, J., on the other hand, thought that an application for an injunction should fall outside the scope of the Act. An interim injunction is issued by a court to give immediate relief to a party pending a judicial decision. To insist on the need to have exhausted the conciliation process would frustrate such object. Further, even if the dispute regarding the right of way had been referred for conciliation, 'it would not have been open to the Board to issue an enjoining order as this can only be done through the mediation of the Courts of law'.[17] To regard the conciliation process as mandatory in applications for injunctions, Alles, J., said, would only cause unnecessary delay--a delay that would be fatal to the interests of the party making the application.[18]

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16. Ibid., at p. 220-21.
17. Ibid., at p. 223.
18. Ibid.

That the insistence upon an inquiry before a Conciliation Board as a pre-condition to an application for an injunction prevented the subject from obtaining an effective remedy and made the law as laid down in sections 86 and 87 of the Courts Ordinance 'almost a dead letter', prompted Alles, J., to make the following observation:[19]

> When the relief . . . is circumscribed in this manner, being dependent on a certificate issued by the Chairman of [the Panel] of Conciliators, there is, in my view, an ouster of the jurisdiction of the District Court and a conference of such power, however limited it may be, on a Conciliation Board . . . in the sense that the subject is denied of an effective remedy.

The majority decision in Nonahamy v. Halgrat Silva did not share the sentiments expressed by the dissentient, Alles, J. The case is taken to have authoritatively laid down that the Counciliation Boards Act was not inconsistent with the Independence Constitution of Ceylon. However the result of a series of decisions of the Supreme Court has been to restrict the application of the Act. Such cases will now be discussed.

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19. Ibid., at p. 224.

(ii) The Scope of the Act Judicially Demarcated

In Nonahamy v. Halgrat Silva, the majority decision was that the Act introduced a mandatory, and not merely a voluntary, conciliation process. However, certain subsequent decisions seem to support the proposition that conciliation is voluntary and not compulsory, at least in certain circumstances. In fact, it appears to have been a rather common practice for parties to a dispute falling within the scope of section 6 to arrive at a 'gentlemen's agreement' to by-pass conciliation proceedings.[1] By such arrangement parties to a legal proceeding mutually agreed not to raise the issue of the applicability of the Act during the court proceedings. If each party honoured the agreement, or in the event of a breach, the court, nevertheless, inferred a waiver of objection due to a delay in raising it, the validity of the legal proceedings was unaffected by the absence of a certificate referred to in section 14 of the Act. This is a direct result of the proposition judicially upheld that:

> [W]hen a party relies on a plea that the court has no jurisdiction to entertain a plaint without a certificate from [the Chairman of the Panel of Conciliators], the burden is on him to show the existence of facts which deprive the court of such jurisdiction. In the absence of such facts being brought to its notice the court has no duty in every case to launch on an inquiry as to whether the dispute in question arose in a Conciliation Board area.[2]

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1. Jayawickrema v. Nagasinghe (1971) 74 N.L.R. 523, at p. 528.

2. Gunawardene v. Jayawardene (1971) 74 N.L.R. 248, head note,

The Conciliation Boards Act was intended to be applicable only in such areas as are determined by the Minister of Justice to be a Conciliation Board Area.[2a] It came to be accepted that the burden was on the person who alleged the application of the Act to prove that the dispute arose or offence was committed in a Conciliation Board area. The Supreme Court has refused to take judicial notice of such fact.[3] The effect of these decisions is that if an objection is not raised during court proceedings at any stage, the proceedings are valid in spite of the fact that a requisite certificate had not been produced.

The question arose as to the effect of an objection taken either at a late stage during the proceedings before the court of first instance or for the first time on appeal. In Wickremaratchi v. I. P. Nittambuwa[4] one of the factors that contributed to the rejection of the objection to jurisdiction was, as we have already seen, the late stage of raising it on appeal.[5] In Robison Fernando v. Henrietta Fernando,[6] some time after the plaintiff's case was closed, the trial judge had allowed the defendant to amend the answer in order to raise the objection based on section 14 of the Act. On appeal, it was held that the defendant was

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2a. Supra p. 181.

3. Wijewardane v. I. P. Panadura (1967) 70 N.L.R. 281, at p. 284. See also Samerawickrama v. Sebastian (1971) 74 N.L.R. 101.

4. (1968) 71 N.L.R. 121.

5. See supra p.187.

6. (1971) 74 N.L.R. 57.

precluded by delay and acquiescence from raising the objection to jurisdiction and that the defendant had in effect waived it. G. P. A. Silva, S.P.J., in Gunawardena v. Jayawardena,[7] affirmed the correctness of the ruling in Robison Fernando v. Henrietta Fernando, explaining that there was no inconsistency between that and the decision in Nonahamy v. Halgrat Silva:[8] Robison Fernando's case accepts the correctness of the decision in Nonahamy's case, but is based on a different principle of waiver by acquiescence.[9] These cases lay down the principle that an unreasonable delay in bringing to the notice of the court that the dispute arose or the offence was committed in a Conciliation Board area in order to invalidate the proceedings amounts to a waiver of the objection.

If the objection relates to a patent want of jurisdiction, on the other hand, it may be raised at any stage. In Nonahamy's case, for instance, it being mutually agreed that the dispute arose in a Conciliation Board area the issue was whether an interim injunction came within the operation of the Act. Again, in Peiris v. I. P. Crimes, Kalutara,[10] where the Police had filed a plaint in a Magistrate's Court without producing a certificate due to the ignorance of the fact that the offence in question was

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7. (1971) 74 N.L.R. 248.

8. (1970) 73 N.L.R. 217.

9. Gunawardena v. Jayawardena (1971) 74 N.L.R. 248. Also see Mathew Kurera v. Cyril Fernando (1972) 75 N.L.R. 179.

10. (1971) 74 N.L.R. 479.

governed by the Act, it was held that the objection could be raised for the first time on appeal. The lack of jurisdiction there was patent, since the offence in question had expressly been mentioned in the Schedule to the Act. This principle was approved by H. N. G. Fernando, C.J., and Samerawickrama, J., in Mathew Kurera v. Cyril Fernando.[11]

The position seems to be that where timely objection has not been raised as to the non-production of the certificate on the ground that the dispute arose or the offence was committed in a Conciliation Board area, conciliation proceedings cease to be a pre-condition of legal proceedings.[12] It is otherwise, if the objection is based on the nature of the dispute or offence and not on the occurrence of it within a Conciliation Board area.

The courts have narrowed the scope of the Act also by reference to the time when the dispute arose. In Coates and Co. Ltd. v. Jones and Co. Ltd.,[13] it was held that a dispute that arose before the appointment of a Panel of Conciliators did not fall within the scope of the Act. Likewise, it was held in Wijetunge v. Perera[14] that where the cause of action arose at a time when a Panel of Conciliators had not yet been appointed, it was open to the plaintiff to institute an action in a civil court, even if a Panel was appointed prior to the date of the plaint.

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11. (1972) 75 N.L.R. 179.

12. See Goonesekere and Metzger, op.cit., p. 67

13. (1968) 70 N.L.R. 359.

14. (1971) 74 N.L.R. 107. Also see Brohier v. Saheed (1968) 71 N.L.R. 151; and Wilsinahamy v. Karunawathie (1970) 79 C.L.W. 84 and the comment on that case in The Journal of Ceylon Law (June 1971) p. 55.

It has also been held in a number of cases that certain matters by their very nature could not be regarded as falling within the definition of 'disputes' for the purpose of the application of the Act. For instance, in Chandra de Silva v. Ambawatte,[15] the Supreme Court observed obiter that a unilateral act, even if it be a wrongful one, could not be considered a dispute, since a dispute necessarily involved a controversy between two or more parties and imported conflicting acts and statements by them.[16] In Arnolis v. Hendrick[17] it was held that a partition action could be instituted in a civil court without first complying with the provisions of section 14 of the Act. For, a partition action is not based upon a cause of action and there need not necessarily be a dispute between the parties to a partition action.

It appears that the courts by interpreting the Act narrowly excluded its application in the circumstances specified above, in order to avoid an injustice, or, in the absence of any real injustice. Thus, in Mathew Kurera v. Cyril Fernando[18] it was observed that since the parties had entered into an agreement before the District Court, the objection that a reference had not first been made to a

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15. (1968) 71 N.L.R. 348.
16. Ibid., at p. 350.
17. (1972) 75 N.L.R. 532.
18. (1972) 75 N.L.R. 179.

Conciliation Board was merely technical since the purpose of such a reference is merely to effect a settlement. Alles, J., in Wickremaratchi v. I. P. Nittambuwa[19] and expressing a minority view in Nonahamy v. Halgrat Silva[20] drew attention to the difficulties attendant upon the insistence upon a certificate in the particular circumstances. It is also of interest to note that the decision in Wickremaratchi's case that the absence of the certificate constituted a mere procedural defect[21] remains unaltered: this undoubtedly contributes to a weakening of the mandatory nature of the certificate.

It may be noted that Conciliation Boards had come under heavy attack from the legal profession.[22] This is primarily because conciliation succeeded in effectively reducing the otherwise heavy litigation. The present government has suspended the operation of the Act by removing the members of all the Panels of Conciliators. The future of the Conciliation Boards Act therefore is nothing but uncertain.

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19. See supra p. 187.
20. See supra p. 190.
21. See Goonesekere and Metzger, op. cit., at p. 66.

(2) Arbitration Under the Co-operative Societies Ordinance

Many of the cases relating to arbitration under the Co-operative Societies Ordinance[1] dealt with the extent of the jurisdiction of arbitrators exercising the powers granted to them by that Ordinance. It was not before the decision in Karunatilleke v. Abeyweera,[2] in 1966, that the Supreme Court entertained any doubt as to the validity of the empowering statutory provision. Consequently, in each of the early cases the decision was limited to a finding whether the arbitrator had in fact overstepped his jurisdiction and by such means acted ultra vires the statute. These early cases clearly demonstrate how the Supreme Court prevented the arbitrators from exercising such jurisdiction as was considered to be within the sole province of the ordinary courts of law, by interpreting the relevant statutory provisions narrowly.

Some of the early cases were decided before the original Ordinance was amended in 1949 granting wider powers to arbitrators. It is, therefore, proposed to examine the relevant provisions contained in the original Act followed by an examination of the relevant judicial decisions. The amendments introduced in 1949 will, then, be studied in the light of the case law.

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1. Ordinance No. 16 of 1936, as amended by Act No. 21 of 1946.

2. (1966) 68 N.L.R. 503.

Section 45(1) of the Ordinance reads as follows:

> If any dispute touching the business of a registered society arises--
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> (a) among members, past members, and persons claiming through members, past members and deceased members; or
>
> (b) between a member, past member or person claiming through a member, past member or deceased member, and the society, its committee or any officer of the society; or
>
> (c) between the society or its committee and any officer of the society; or
>
> (d) between the society and any other registered society,
>
> such dispute shall be referred to the Registrar for decision.
>
> A claim by a registered society for any debt or demand due to it from a member, past member or nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not, shall be deemed to be a dispute touching the business of the society within the meaning of this sub-section.

It was open to the Registrar, on receipt of a reference under sub-section (1), to decide the dispute himself or refer it for disposal to an arbitrator or arbitrators.[3] Any party aggrieved by the award of an arbitrator could appeal therefrom to the Registrar within a month.[4] A decision of the Registrar under sub-section (2) or in appeal under sub-section (3) was final and could not be questioned in a civil court.[5] Similarly, the award of an arbitrator was, in the absence of an appeal

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3. Co-operative Societies Ordinance, No. 16 of 1936, sec. 452.

4. Ibid., sec. 45(3) read together with rule No. 29.

5. Ibid., sec. 45(4).

final and could not be questioned in any civil court.[6] Rule 29(k) made under section 46 of the Ordinance provided that a decision or award shall, on application to any civil court having jurisdiction in the area in which the society carried on business, be enforced in the same manner as a decree of such court.

The effect of these provisions was to confer a jurisdiction, which was final and conclusive, on the Registrar and arbitrators in respect of disputes touching the business of a society that arise between such parties as mentioned in paragraphs (a) to (d) in the same section. The courts, however, inquired into the authority of an arbitrator or the Registrar to have made an award, in proceedings to enforce such an award[7] or to compel a person to act in accordance with such award,[8] or whenever the validity of such an award was in issue.

Cases where section 45(1) (b) was relied upon amply illustrate the determination of the Supreme Court to limit the jurisdiction of arbitrators under the Ordinance.

In Meera Lebbe v. Vannarponnai West Co-operative Society[9] the plaintiff was a member of the defendant society and had functioned as the manager at the relevant time. His action for the recovery of a security deposited by him with the society had been dismissed in the court of first instance.

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6. Ibid., sec. 45(5).

7. As in Nereus v. Halpe Katana Co-operative Society Ltd. (1956) 57 N.L.R. 505.

8. As in Ekanayake v. The Prince of Wales Co-operative Society Ltd. (1949) XXXIX C.L.W. 57.

9. (1947) 48 N.L.R. 113.

In the appeal taken by him to the Supreme Court, the defendant society pleaded that the action could not be entertained by a court of law in view of section 45(1) (b) and (c), in addition to its original defence that the plaintiff had misappropriated a sum of money exceeding his deposit while he acted as the manager of the society and that the society was entitled to a set-off against the claim of the plaintiff. In the absence of adequate evidence to show that the manager of a co-operative society was an officer of such a society, the court held that the dispute could not be brought within the ambit of section 45(1) (c).[10]

It then remained to be decided whether the dispute could be regarded as one between a member and the society, within the meaning of section 45(1) (b). Canekeratne, J., observed that certain sections of the Ordinance specified some disputes that could arise between a society and one of its members. As a general rule, section 45(1) (b) applied only to a dispute which could be said to arise out of the relationship between a society and one of its members. To hold that any dispute, irrespective of its nature, to which a society and one of its members were parties could be referred to arbitration was, in the opinion of the court, to strain the language of the Legislature far beyond its natural meaning.[11] Accordingly, it was held that neither

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10. In Sanmugam v. Badulla Co-operative Stores Ltd., (1952) 54 N.L.R. 16, however, where the Supreme Court examined the powers and functions of the manager who was a party to the dispute and held that the manager was an officer of the society within the meaning of section 45(1) (c).

11. Meera Lebbe v. Vannarponnai West Co-operative Society, (1947) 48 N.L.R. 113, at p. 115.

the plaintiff's claim for the recovery of the security deposited with the society nor the society's claim that the plaintiff did, in his capacity as the manager, misappropriate moneys belonging to the society could be regarded as a dispute that arose out of the relationship between the society and a member.

Mohideen v. Lanka Matha Co-operative Stores Ltd.,[12] is another case in point. There the plaintiff, who was admittedly a member of the defendant society and was employed by it at the material dates as a night watcher, alleging that his services had been wrongfully terminated, instituted an action for the recovery of arrears of salary and damages for wrongful dismissal. From the decision of the court of the first instance dismissing his action, the plaintiff appealed. The counsel for the defendant-respondent contended, inter alia, that the plaintiff could not have brought the action before a court of law and that the proper procedure would have been for him to make an application to the Registrar. The Supreme Court rejecting that contention held that the true test whether a particular dispute falls within the ambit of section 45(1) (b) was to ascertain whether the dispute arose between the society and the member qua member. Nagalingam, J., said:

> It is manifest that the dispute between the plaintiff and the defendant does not arise from his relationship to the society as member. Therefore the dispute is one which is not referable to the Registrar for decision but one that can properly be investigated by a court.[13]

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12. (1947) 48 N.L.R. 177.
13. Ibid., at p. 178.

The non acceptance of such a limited meaning of section 45:

> would lead to the necessity of having to attribute to the Legislature an intention to regulate dealings not merely between members and the society but also between third parties and the society--an intention which is difficult to conceive as ever having been in the mind of the Legislature.[14]

This restrictive interpretation placed on paragraph (b) of section 45(1) was followed in Ilangakoon v. Bogollagama[15] where Gratiaen, J., said that a statute which restricts a person's right to have his dispute investigated in a regular action must be strictly construed.[16] The object of that provision, it has judicially been observed,[17] was merely to provide a speedy and expeditious disposal of a dispute between a member in his capacity as a member and the society by referring the dispute to a domestic tribunal.

The effect of the amendments introduced in 1949 was to enhance the jurisdiction of arbitrators. Section 45(1)(b) was expanded to include a dispute between a member and an employee of the society, whether past or present, while paragraph (c) of the same section was enlarged to include a dispute between the society and an employee whether past or present. The proviso to the same section was amended to include a 'claim' by a society against an officer or employee, whether past or present. This revised section appears as section 53(1) of the Ordinance as amended.

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14. Ibid.
15. (1948) XXXIX C.L.W. 33.
16. Ibid., at p. 35.
17. Mohideen v. Lanka Matha Co-operative Stores Ltd., (1947) 48 N.L.R. 177, at p. 178.

At the least, the Supreme Court cast doubts on the validity of the amending Act of 1949 in the case of Karunatilleke v. Abeyweera[18] where the dispute was between a former manager of the respondent co-operative society, and that society. The Ordinance, as amended in 1949, defined the word 'officer' to include the manager of a co-operative society.[19] Thus the issue before the court was whether a claim by a society against one of its officers to account for goods or the value of goods shown by the books of the society to have been under his control could properly be the subject matter of arbitration. The principal ground on which the petitioner asked for the quashing of award made against him by an arbitrator is that 'the making and enforcement of the award involves the exercise of judicial power and conflicts with the principle of the separation of powers which prevails under our constitution'.[20]

The Supreme Court noted that the amending Act added the categories of officers and employees to the proviso to section 45(1) which, prior to that amendment, declared that a claim by a society for any debt or demand due to it from a member or past member should be deemed to be a dispute touching the business of the society.

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18. (1966) 68 N.L.R. 503.

19. Co-operative Societies Ordinance No. 16 of 1936, as amended by Act No. 21 of 1949, section. 65.

20. Karunatilleke v. Abeyweera, supra note 18, at p. 504.

H. N. G. Fernando, S.P.J., delivering the judgment of the Divisional Bench of three Judges in Karunatilleke v. Abeyweera, found it useful to consider the objects which were intended to be achieved by section 45(1) of the original Ordinance. He said:

> As between a society and its members, disputes can well arise as to the construction and effect of the rules governing relations between members inter se and the relations between a society and its members, as to whether a society had acted in breach of the rules, as to the qualification of members to hold office in the society, as to the validity of elections or appointments to office in society, as to the scope of the business which a society may lawfully carry on, and as to similar matters peculiar to associations of persons. It was clearly the intention of the Legislature that such disputes should be finally decided by the Registrar in the exercise of his supervisory functions, or by arbitrators appointed by him. Disputed claims by a society against its members, in their capacity as such, were also in contemplation, although it is arguable whether section 45 applied also to other claims against members, not arising by reason of their membership of a society, but arising instead upon transactions involving ordinary contractual rights and obligations or else arising in delict. Except in regard to claims of the nature lastly mentioned, I have no doubt that the determination by the Registrar or an arbitrator of a dispute affecting any of the matters just mentioned does not involve the exercise of the judicial power of the State.[21]

This passage affirms, in no uncertain terms, the view expressed in Meera Lebbe's case[22] and Mohideen's case[23] that a dispute between a member and a society means a dispute between such parties and arising out of that relationship; moreover, it explains lucidly the kind of disputes that can arise out of such relationship.

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21. Ibid., at p. 504.
22. Supra pp. 201-2.
23. Supra pp. 202-3.

H. N. G. Fernando, S.P.J., observed that an officer of a co-operative society was not necessarily in a contractual relationship with the society. But, when for instance the manager has custody or control of goods of the society contractual relations can exist. In the instant case, he observed, the liability of the manager arose at the least upon an implied contract, in the nature of an agency. 'The dispute concerning the existence of this liability and the duty to perform it is an ordinary civil dispute within the traditional jurisdiction of the courts'.[24]

Accordingly, he held that the dispute in issue was not one that might, prior to 1949, have been determined under the special procedure provided by the Co-operative Societies Ordinance. The court observed:

> The amending Act purported to oust the jurisdiction of the courts over disputes which at the time when the Constitution came into force were exclusively within that jurisdiction. In the language of recent judgments, there has thus been a clear encroachment of the powers exclusively vested in the Courts.[25]

The judgment does not specifically state that the amending Act is unconstitutional. The actual decision merely reads: 'the award made against the petitioner is quashed'. There is, however, no doubt that the result of this decision is that the amending Act is unconstitutional to the extent that it sought to confer judicial powers on arbitrators.[26]

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24. Karunatilleke v. Abeyweera, (1966) 68 N.L.R. 503, at p. 505.

25. Ibid.

26. C. F. Amarasinghe, Separation, at p. 259 and L. J. M. Cooray, Reflections, at p. 86.

The decision in Karunatilleke v. Abeyweera was taken a step further by a Bench of two judges in Jayasekera v. Minuwangoda Co-operative Society Ltd.,[27] where the issue was whether the claim of a society that a member of its committee of management had failed to account for moneys entrusted to him was a dispute that could properly be referred to arbitration under the Ordinance. Karunatilleke v. Abeyweera was sought to be distinguished on the ground that there the disputed 'claim' was between an officer and the society whereas in the instant case the 'claim' was by the society against a member of the committee, so that even the Ordinance in its unamended form could apply to the case. The Supreme Court refused to accept the argument that, despite the fact that adjudication upon a claim of the natue of that before the court did involve the exercise of judicial power, the exercise of such jurisdiction by an arbitrator was valid since the original Ordinance itself, which was in operation at the time the Independence Constitution was enacted, had conferred such a jurisdiction.

H. N. G. Fernando, C.J., following his own judgment in Karunatilleke v. Abeyweera said:

> The jurisdiction to adjudicate upon such a dispute is vested by the Constitution in the courts, and that jurisdiction is not ousted by any provision of the Co-operative Societies Ordinance which purports to vest it in an arbitrator.[28]

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27. (1970) 73 N.L.R. 354.
28. Ibid., at p. 357

Here again, the statute was not declared unconstitutional in specific terms, and the actual decision was to quash the order made by the District Judge for the enforcement of the award of the arbitrator. The effect of these two cases is, however, that an arbitrator has jurisdiction to conduct a domestic inquiry and not to exercise the powers which are within the traditional jurisdiction of the courts and that the Co-operative Societies Ordinance does not have the effect of conferring such judicial power on arbitrators acting on the powers granted to them by that Ordinance.

The change of the attitude of the judiciary that appears from the above comparison of the early and later case law is easily referable to the epoch making 'judicial power cases'. Those cases on co-operative arbitrators which were decided before the 'judicial power' cases accepted as valid a legislative measure that took away the jurisdiction of the ordinary courts. For instance, in Ceylon Coconut Producers Co-operative Union Ltd. v. Jayakody[29] T. S. Fernando, J., accepted as an undoubtedly correct proposition that the jurisdiction of the courts was ousted in the circumstances enumerated in section 45(1) of the Co-operative Societies Ordinance.

It is true that the Supreme Court in the absence of contrary argument assumed that Parliament could by an ordinary statute confer judicial power on extra judicial tribunals. The Supreme Court, however, succeeded in

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29. (1962) C.L.W. LXIII 48.

circumventing the powers of the arbitrators so that the ousting of the jurisdiction of the courts was kept to a minimum. We have already seen how the relevant provisions were strictly construed against this backdrop.

Aside from narrowing the province of an arbitrator's jurisdiction, the Supreme Court insisted upon being satisfied, first as to the legality of the award before it could be given any legal effect. As we have already seen, an award of an arbitrator was final and not justiciable in a court of law.[30] Therefore, a court could probe into the validity of an award only when it was called upon to enforce it as a decree of that court.[31] The procedure to be followed had not been prescribed. Commenting on this Gratiaen, J., said in Barnes de Silva v. Galkissa Watarappola Co-operative Stores Society:[32]

> . . . it is the clear duty of a Court of law whose machinery as a Court of execution is invoked to satisfy itself, before allowing writ to issue, that the purported decision or award is prima facie a valid decision or award made by a person duly authorised under the Ordinance to determine a dispute which has properly arisen for the decision of an extra-judicial tribunal under the Ordinance.[33]

An application must be made, the Court laid down, either in a regular action or at least by petition and affidavit setting out the facts that the award is prima facie entitled to recognition as a decree of court. The affected party must be served with notice so that he could raise objections, if any, to the validity of such an award.

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30. See supra p. 199.
31. Rule 29 (k) cited at supra p. 200.
32. (1953) 54 N.L.R. 326.
33. Ibid., at p. 328.

Explaining the role of the judiciary Gratiaen, J., thus observed:

> The Legislature had no doubt withdrawn from courts of law their jurisdiction to determine disputes touching the affairs of co-operative societies or even to scrutinise the correctness of decisions or awards made by extra-judicial tribunals properly exercising jurisdiction under the Ordinance. But the right and the duty to examine the validity of such decisions and awards is still vested in the courts which are empowered to enforce them. And unless that duty be vigilantly performed, there is great risk that the judicial process may be abused.[34]

This strict procedure prescribed in Barnes de Silva's case, which enables a court to closely examine whether an award is ultra vires, has been approved both by a Divisional Bench of three Judges of the Supreme Court and subsequently by a Full Bench.[35]

The determination of the Supreme Court to negate any award made without jurisdiction finds expression also in Sirisena v. Kotawera Udagama Co-operative Stores Ltd.,[36] where an application had been made to the Supreme Court for a writ of certiorari to quash an award made by an arbitrator. It was objected to on the ground that the petitioner could object to the award in the enforcement proceedings which were at that time pending before the District Court and that the writ should not be granted when another substantial remedy is available. Gratiaen, J., held that the principle had no application to the proceedings of a tribunal which

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34. Ibid., at p. 329.

35. Jayasinghe v. Boragodawatte Co-operative Society (1955) 56 N.L.R. 462, approved in Bandahamy v. Senayake (1960) 62 N.L.R. 313.

36. (1949) 51 N.L.R. 262.

had flagrantly exceeded the limited statutory powers conferred on it. Granting the writ Gratiaen, J., observed that it was the duty of a court to speedily wipe out an award made in such proceedings.

The Supreme Court insisted on the legality of the award so as to preserve the jurisdiction of the courts to the greatest possible extent. In addition, the courts emphasised that arbitrators should conduct their proceedings in a deliberate and cautious manner even when their jurisdiction was beyond attack.

A general remark was made by Basnayake, C.J., in Nereus v. Halpe Katana Co-operative Stores Society Ltd.[37]:

> Where matters which, but for the statute, would ordinarily have come before the courts are left to be decided by a special tribunal then its procedure should approximate as nearly as may be to the standards of the courts.[38]

The degree of supervision the Supreme Court exercised over arbitral proceedings is seen in Ekanayake v. The Prince of Wales Co-op. Society Ltd.[39] The awards of arbitrators were usually made by filling in the blanks of a standard award form. The award form in issue in that case had not been completed in full. Windham, J., observed thus:

> I may say that the leaving blank of some of the blank spaces in the above document indicates a most slovenly attitude on the part of the arbitrator or whoever was responsible for completing it, and it would be most disturbing to think that this was the manner in which awards made upon references made under the Co-operative Societies Ordinance or Rules were commonly drafted.[40]

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37. (1956) 57 N.L.R. 505.
38. Ibid., at p. 510.
39. (1949) XXXIX C.L.W. 57.
40. Ibid., at p. 58.

Illangakoon v. Bogollagama[41] provides another striking example. Here the petitioner had been deprived of his right of appeal to the Registrar, which had to be exercised within a month after the award is made, since the award was communicated to him after nearly six months. Gratiaen, J., had this to say:

> I earnestly hope that this deplorable state of affairs is not typical of the manner in which arbitrary proceedings under the very salutary provisions of the Co-operative Societies Ordinance are conducted.[42]

The foregoing discussion amply demonstrates how the judiciary, in circumstances where in its opinion an extra-judicial body had validly been created having the effect of restricting the jurisdiction of the courts, sought to ensure that such extra-judicial bodies functioned in a responsible and judicious manner so that justice is done to parties before them.

In none of these cases was an attempt made to define what is meant by 'judicial power'. The court being content merely with a reference to their traditional jurisdiction or the powers formerly exercised by them.

The significance of these cases lie in that well before the courts were presented with arguments based on the constitutional provisions relating to the judiciary, the judiciary did as a matter of course make an attempt to preserve their jurisdiction whenever and however possible, while recognizing at the same time, the Legislative Supremacy of Parliament.

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41. (1948) XXXVII C.L.W. 33.

42. Ibid., at p. 34.

(3) The Nature and Scope of Judicial Power as Emanating from the Tribunal Cases

The difficulties involved in defining the precise limits of the concept of 'judicial power', which has been said to 'defy, perhaps it were better to say transcend, purely abstract conceptual analysis',[1] have not been neglected by the courts in Ceylon.[2] However, when they were called upon to decide whether a particular tribunal exercised 'judicial power' for the purpose of the application of section 55 of the Constitution, the meaning and the scope of that concept had to be commented on.

As we shall see in due course, the courts of Ceylon derived guidance not merely from abstract definitions or explanations of that concept but also from practical considerations. An attempt is made here to outline the various tests adopted in the 'tribunal cases' which have been discussed in this and the previous chapter and to examine the practical considerations that influenced the judiciary in deciding those cases.

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1. R. v. Trade Practices Tribunal (1970) 123 C.L.R. 361, at p. 396, per Windeyer, J.

2. See, e.g., Senadhira v. The Bribery Commissioner, (1961) 63 N.L.R. 313, at p. 318, and, Piyadasa v. The Bribery Commissioner, (1962) 64 N.L.R. 385, at p. 391.

(i) Tests Adopted in the 'Tribunal Cases'

It must be said, at the outset, that an exhaustive discussion of these tests is not permitted by the volume of this work, nor is it essential for our purpose. However, there is abundant discussion of this aspect, especially in the Australian context.[1]

The most frequently cited definition in Ceylon,[2] as is the case in Australia,[3] is that formulated by Griffiths, C.J., in Huddart Parker & Co. Pty., Ltd. v. Moorhead,[4] which is said accurately to state 'the broad features' of judicial power, rather than attempt an exclusive definition.[5] Griffiths, C.J., understood judicial power to mean:

> the power which every sovereign must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[6]

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1. See, e.g., W. A. Wynes, Legislative, Executive and Judicial Powers in Australia (1976, 5th ed.), chapter 10, 'The Judicial Power of the Commonwealth'.

2. See, e.g., Piyadasa v. The Bribery Commissioner, supra, p. 392; Jailabdeen v. Danina Umma (1963) 64 N.L.R. 419, at p. 425; Walker v. Fry (1965) 68 N.L.R. 73, at p. 81; United Engineering Workers' Union v. Devanayagam (1967) 69 N.L.R. 289, at p. 306.

3. Essays on the Australian Constitution, ed. Else-Mitchell (1961), 2nd ed.), at p. 72.

4. (1908) 8 C.L.R. 330, at p. 357.

5. Labour Relations Board of Sasketchewan v. John East Iron Works, (1949) A.C. 134, at p. 139, per Lord Simonds.

6. (1908) 8 C.L.R. 330, at p. 357.

This definition is the starting point but not the finishing point, since judicial power may exist in the absence of any one element integral to that definition, and arbitral power, which is outside the realm of judicial power, may satisfy that definition without losing its extra-judicial character.

In those cases where the court had to demarcate between judicial power and arbitral power further ramifications had to be read into the above definition. The following remarkable attempt has found favour in Ceylon:[7]

> The essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist or are deemed to exist at the moment the proceedings are instituted, whereas the function of arbitral power in relation to industrial disputes is to ascertain and declare but not enforce what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other.[8]

This definition emphasises the enforcement of existing legal rights and liabilities as opposed to the creation of new rights and duties which is the function of the legislator. In fact, it has been said that 'the arbitral function is ancillary to the legislative function, and provides the factum upon which the law operates to create the right or duty'.[9] That,unlike the case of arbitral power,

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7. See e.g., Walker v. Fry, supra, at p. 84; Senadhira v. The Bribery Commissioner, supra, at p. 319.

8. Waterside Workers' Federation of Australia v. J. W. Alexander Ltd. (1918) 25 C.L.R. 434, at p. 463, per Isaacs and Rich, JJ.

9. Ibid., at p. 464 ad.fin.

enforcement forms an inseparable part of judicial power seems a natural deduction from the above definition in Waterside Workers' case.[10] In Senadhira's case,[11] this position ran to the basis of the actual decision.[12] However, in later cases the Supreme Court of Ceylon, in keeping with the judicial authority in the United States of America and Australia, expressly stated that enforcement was not an indispensable attribute of judicial power.[13]

In essence, the Waterside Workers' definition distinguishes between a tribunal which gives effect to legal rights and duties and another which grants a remedy which is a novel creation.

The observations of Lord Simonds in Shell Co. of Australia v. Federal Commissioner of Taxation[14] takes this matter further ahead. There was no doubt, his Lordship said, in the opinion of the Privy Council:

> that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also.[15]

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10. Whether enforcement was indispensable was left open in Waterside Workers' case. See at p. 451, per Barton, J.

11. (1961) 63 N.L.R. 313.

12. See the discussion on the Bribery Tribunals, supra, pp. 135-44.

13. Supra pp.141-44.

14. (1931) A.C. 275, at p. 297.

15. Ibid.

This definition stresses that 'trappings' are not conclusive and that the nature of the considerations involved, i.e. whether legal or broader policy considerations, holds the key to the decision whether a tribunal exercises judicial power. The emphasis on policy consideration presents in a new dress the distinction highlighted in Waterside Workers' case between pre-existing legal rights and rights taking effect in future in terms of an arbitral award. The view that the 'trappings' are not conclusive has had a mixed reception in Ceylon.[16] It is wrong, however, to assume that the courts neglected similarities that existed between a court and a tribunal in deciding whether the latter did in fact exercise judicial power irrespective of the name by which such tribunal was known.[17]

The observations of the Privy Council in the Shell Co. case quoted above had a considerable effect on the final outcome in Devanayagam's case,[18] where the Privy Council held that none of the authorities created by the Industrial Disputes Act of Ceylon[19] for the settlement of

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16. This negative approach was rejected by Sansoni, C.J., in Walker v. Fry, supra, at p. 82, but referred to in Devanayagam's case, supra, at p. 294.

17. The discussion of specific areas in relation to the applicability of section 55 of the Constitution makes it clear that the courts nearly always compared the procedure in and the powers possessed by tribunals.

18. (1967) 69 N.L.R. 289; [1967] 2 All E.R. 367.

19. Act No. 43 of 1950, as amended by Act No. 62 of 1957.

industrial disputes exercised judicial power primarily because they were intended to exercise a wider administrative discretion taking into consideration not only legal matters but also the overriding policy consideration of maintaining industrial peace.

The 'analogy test' propounded in Labour Relations case also was approved in Ceylon cases.[20] Lord Simonds had said there that:

> it is as good a test as another of 'analogy' to ask whether the subject matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish the judges of the Superior or other courts.[21]

Applying this test it was held in Devanayagam's case that arbitrators and members of industrial courts and of labour tribunals should have qualifications different from those of judges of ordinary courts, having due regard to the functions performed by them.

From the above, though brief, discussion it appears that the basic test has been whether a particular tribunal gave effect to legal rights and duties which involved judicial power or granted a remedy by reference to wider considerations than those of law and by exercising broad discretionary powers of a kind not normally exercised by a court of law.

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20. Per Tambiah, J., dissenting, in Walker v. Fry, supra, at p. 108; Devanayagam's case, supra, at p. 297.

21. (1949) A.C. 134, at p. 151.

Enforcement as the essential attribute that distinguishes judicial power from arbitral power, as has been mentioned earlier, was expressly rejected in the Bribery Tribunal cases. In Ibrahim v. The Government Agent Vavuniya,[22] however, the Supreme Court seems to have been influenced, in deciding that the authority in question exercised judicial power, by the fact, inter alia, that the authority enforced a criminal sanction as opposed to a civil or administrative sanction such as was the case in Xavier v. Wijekoon.[23]

It may also be noted that in the cases where enforcement was not regarded as an essential element of judicial power the authority concerned, namely, a Bribery Tribunal and a Quazi, did in fact have the power of enforcing its decision either directly or on application to a court of law.

One point remains to be mentioned. In the tribunal cases the approach adopted by the courts of Ceylon was not stubborn adherence to definitions or general formulations, but an overall assessment of the powers and functions conferred on the tribunal in issue. This approach is commendable in view of the fact that, as we shall see in the succeeding part, the task of the courts was to draw a dividing line between administrative tribunals which are a social necessity and courts of law which, in the opinion of the courts, stand as the guardian of the citizen's rights.

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22. (1966) 69 N.L.R. 217.

23. (1966) 69 N.L.R. 197. See the foregoing discussion on these two cases, supra, at p. 168-72.

(ii) Factors that influenced the judges in the 'Tribunal Cases'

Faced with the task of drawing the dividing line between judicial functions on the one hand and arbitral and administrative functions on the other, the courts of Ceylon, undoubtedly, derived much assistance from the definitions and criteria outlined in the foregoing discussion. At the same time, the important role played by certain considerations, legal and practical, in the area of the Tribunal cases cannot be discounted. An examination of such considerations or factors amply demonstrates how the judges endeavoured to reconcile their deep-rooted commitment to the preservation of the jurisdiction of the courts of law with the ever-growing and inescapable need to entrust extensive powers of inquiry, dispute-settlement and sanction to the executive branch of government. Although those factors which influenced judges are inter-connected and inter-dependent, it is not a vain undertaking to attempt a categorisation of those factors. Five such factors which are discernible will be discussed separately.

(a) The most important factor seems to be the issue whether the statute in question purported to confer on any authority other than a properly constituted court a power that had traditionally been exercised by courts of law. Thus, in an attempt to distinguish Labour Tribunals from Bribery Tribunals, Tambiah, J., had this to say in Walker v. Fry,[1] in his dissenting judgment:

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1. (1965) 68 N.L.R. 73.

> There was a clear usurpation of the jurisdiction of the courts by the Bribery Tribunal which performed the same functions as a court. . . . The effect of the legislation creating the Bribery Tribunals is in pith and substance an attempt to create a rival court. . . . [In creating Labour Tribunals] it would never have been the intention of the legislature to provide an additional court which administers the law of contract since such courts were in existence and are still functioning.[2]

In Ibrahim v. G. A. Vavuniya it was said that the Licensing of Traders Act constituted a usurpation and infringement of the separate power of the judicature.[3]

Whenever the court came to the conclusion that the tribunal in question did in fact oust or usurp the jurisdiction of the ordinary courts of law, it was inevitably decided that judicial power had been conferred on that tribunal. This rule of 'the ouster of jurisdiction' springs from the premise that the powers that traditionally belonged to the courts fall within the meaning of 'judicial power'. It is submitted that this rule is both practical and safe: practical, because, by confining to the courts alone the powers traditionally exercised by them, the status quo would not be disturbed; safe, because the phrase 'judicial power' is given a strict meaning, without extending it beyond the normal jurisdiction of a court, thereby avoiding probable controversies.

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2. Ibid., at pp. 105-6. See also Senadhira v. The Bribery Commissioner (1961) 63 N.L.R. 313, at p. 320.

3. (1966) 69 N.L.R. 217, at p. 219. A similar observation was made in respect of Co-operative Societies Ordinance 1951, in Karunatilleke v. Abeyweera, (1966) 68 N.L.R. 503, at p. 505, per H. N. G. Fernando, S.P.J. See also Jailabdeen v. Danina Umma (1963) 64 N.L.R. 419, at p. 423.

It is interesting to note that in respect of the validity of the appointment of the President of a Labour Tribunal the Supreme Court in Walker v. Fry[4] and the Judicial Committee of the Privy Council in Devanayagam's case[5] were not unanimous in their decisions. This is a telling example of an instance where a rule which is simple and uncomplicated to all its outward appearances gives rise to great difficulty in its practical application. As Windeyer, J. said in the Australian case of R. v. Trade Practices Tribunal[6] the differing views in Devanayagam's case demonstrate how amorphous really is the concept of judicial power.

(b) Secondly, the courts seem to have attached much weight to the consideration that certain powers by their very nature are essentially judicial. In Walker v. Fry[1] Sansoni, C.J., who subscribed to the majority view there that a Labour Tribunal was endowed with judicial power, cited with approval the following Australian judicial observations:

> [S]ome functions are appropriate exclusively to the judicial power, for example, the punishment of crime or adjudication in actions in tort or contract.[2]
>
> The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power.[3]

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4. (1965) 68 N.L.R. 73.
5. (1967) 69 N.L.R. 289.
6. (1970) 123 C.L.R. at 361.

1. (1965) 68 N.L.R. 73.
2. Federal Commissioner of Taxation v. Munro, (1926) 38 C.L.R. 153, at 175; cited by Sansoni, C.J., at p. 80.
3. The Queen v. Davison, (1954) 90 C.L.R. 353, at 369.

Accordingly, Sansoni, C.J., held that Labour Tribunals were given judicial power to try disputes, to modify existing legal relationships, to make orders which confer legal rights and impose legal liabilities, and to determine, as between a workman and his employer, whether one of them possessed as against the other some existing legal right or was subject to some existing legal liability.[4]

In Senadhira v. The Bribery Commissioner[5] Sansoni, C.J., recalled that the Privy Council in The Attorney-General for Australia v. The Queen[6] regarded certain powers 'such as powers to impose penalties for a breach of an order or award and to punish contempts of its powers and authority' as matters appertaining exclusively to the judicial power and held that judicial power 'even to the extent of fining a citizen or depriving him of his liberty'[7] was not permissible.

C.T.B. v. Samastha Lanka Motor Sevaka Samithiya[8] provides a striking example of the tendency of the courts to regard certain powers as being intrinsically judicial. In that case Sri Skandha Rajah, J., ruled that the power conferred on such a tribunal to punish contempts of its authority amounted to judicial power. Similarly in In Re Ratnagopal[9] it was contended that the power reposed

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4. Walker v. Fry, (1965) 68 N.L.R. 73, at p. 80.
5. (1961) 63 N.L.R. 313, at p. 319.
6. /1957/ A.C. 288.
7. Ibid., at p. 309.
8. (1963) 65 N.L.R. 491.
9. (1968) 70 N.L.R. 409.

in a Commissioner of Inquiry to refer to the Supreme Court for decision what he determines to be a contempt of the authority of the Commission amounted to judicial power. This argument was rejected, however, on the ground that the determination of the Commissioner did not bind the Supreme Court when deciding whether in fact the accused committed the offence. Hinds v. The Queen[10] provides a recent example of 'intrinsically judicial functions', where it was held that 'a discretion to determine the severity of the punishment to be inflicted on an individual member of a class of offenders' could not be conferred on an executive body, following Deaton v. Attorney-General and Revenue Commissioners.[11]

It may be said that the notion that certain powers are essentially judicial emanates from the idea that powers which are traditionally exercised by courts are to be regarded as judicial powers, because a power comes to be considered as inherently judicial by its long continued and exclusive association with courts of law.

(c) The third factor, like the first two, is based on historical criteria, but unlike the first two it has the effect of excluding from the judiciary certain functions which might properly be regarded as judicial power. The rule, as relied upon in Gunaseela v. Udugama,[1] is that if certain powers which are judicial in nature have, nevertheless,

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10. [1976] All E.R. 353, at pp. 370-71.
11. [1963] I.R. 170 at 182, 183.

1. (1968) 69 N.L.R. 193.

been historically vested in the executive or the legislative branch of Government and there is sufficient justification to treat such vesting as valid, the judiciary ought not to disturb such historical vesting.

In Gunaseela v. Udugama the question arose whether the officers constituting a Court Martial could validly exercise punitive powers, which the court agreed were clearly judicial powers, in the absence of such officers being appointed by the Judicial Service Commission. The provisions relating to judicial officers did not apply to members of a Court Martial since they did not hold a 'paid judicial office'[2] and on this ground alone the validity of the jurisdiction of a Court Martial could have been upheld. But the Supreme Court ventured to examine whether a Court Martial could validly exercise judicial power.

H. N. G. Fernando, S.P.J., pointed out that for a long time before Independence the law of Ceylon had provided for the trial by Courts Martial of certain offences committed by 'persons subject to military law'. It was rightly observed that the constitution, powers and functions of Courts Martial functioning in independent Ceylon were not substantially different from those of the Courts Martial constituted under British rule.

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2. See, supra, p. 124.

Having observed that it had long been recognised in Ceylon that Courts Martial could exercise punitive powers, H. N. G. Fernando, S.P.J., went on to find a reason sufficient to justify that position. In the United States of America as far back as in 1858, he pointed out, the Supreme Court had held in Dynes v. Hoover[3] that Congress had the power to provide for the trial and punishment of military and naval officers 'in the manner then and now practised by civilised nations' and, further, that that power was entirely independent of the judicial power of the United States. This case had been followed by the High Court of Australia in R. v. Beven ex p. Elias and Gordon,[4] which decided that the power to make laws for the defence of the Commonwealth and the control of the armed forces was independent of the judicial power of the Commonwealth. Following these decisions H. N. G. Fernando, S.P.J., had no hesitation in concluding that the legislative power of the Parliament of Ceylon included the power to make laws for the good government of the armed forces and that Courts Martial in Ceylon were traditionally distinct from the judicial system of Ceylon.

It is safe to assume that the Supreme Court of Ceylon appreciated the need to safeguard the interest of the State, by way of recognizing the validity of the internal disciplinary machinery of the armed forces, as an exception to the exclusive vesting of judicial power in the ordinary courts of law. Sawer's observation that the decisions,

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3. (1858) U. S. Reports 15, Lawyers' Edition, p. 838.

4. (1942) 66 C.L.R. 452.

quoted above, from the United States of America and Australia aimed at avoiding 'practical inconvenience'[5] is, it is submitted, equally true of the Ceylon decision.

(d) The fourth factor was considered in two cases[1] which were decided concurrently by the Supreme Court. In these two cases where the validity of the imposition of a penalty by an administrative authority was in issue, the court acted on the principle that whether the imposition of a penalty was or was not a judicial power depended on the nature of the sanction. If the penalty served the purpose of securing compliance with an administrative regu regulation or order, such as the duty of an assessee to return a duly completed income tax declaration, then the imposition of such a penalty, which at the same time compensates the State for the loss caused to it by any wilful evasion of tax, was not to be regarded as a judicial function, but merely as an administrative sanction.

Ordinarily, the imposition of a penalty is associated with judicial functions. The judiciary, however, did recognise the need to regard as valid the entrustment of such a power to an administrative authority when such power was exercised in the furtherance of an administrative object but not for the punishment of an offence.[2]

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5. Sawer, 'Judicial Power under the Constitution', Essays on Australian Constitution, ed. R. Else-Mitchell (1961), p. 76.

1. Ibrahim v. G. A. Vavuniya, (1966) 69 N.L.R. 217 and Xavier v. Wijekoon (1966) 69 N.L.R. 197.

2. Supra, pp. 169-71.

(e) Lastly, the courts appreciated the ever-growing need for administrative tribunals to supply a need inadequately met by courts of law. Accordingly, there came into being a judicial tolerance of the conferment of some judicial powers on an administrative authority for the purpose of effectively securing the object of the establishment of the office.

This factor was instrumental in arriving at the decision that a Commissioner of Workmen's Compensation was not a judicial officer in Panagoda v. Budinis Singho.[1] The Workmen's Compensation Ordinance created a liability not based on any breach of law but arising simply by the reason o of injury sustained out of and in the course of employment. The Supreme Court entertained no doubt that in deciding whether an employer is liable to pay compensation a Commissioner might be called upon to determine disputed questions of fact. But, the decision of such disputes forms only a small part of the duties and functions entrusted to such Commissioners, the Court held. The element of dispute settlement, which in the opinion of the Supreme Court in this case savoured of judicial power, thus, formed a part of a legislative plan to secure an improved scheme for the payment of compensation to workmen, which in its entirety was a commendable administrative device.

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1. (1966) 68 N.L.R. 490.

This principle was formulated in Walker v. Fry, by H. N. G. Fernando, S.P.J., who later decided Panagoda v. Budinis Singho, in the following terms:

> Section 55 of the Constitution . . . failed to preclude the possibility of the entrustment of judicial power to some authority bona fide established for administrative purposes. If administrative officials, the majority of whose powers and functions are administrative, are in addition entrusted on grounds of expediency with judicial power, there would not in my opinion be conflict with Section 55. But if, under cover of expediency, judicial powers are vested in an office administrative only in name, then the principle that you cannot do indirectly that which you cannot do directly will apply.[2]

Tambiah, J., also expressed a similar opinion in Walker v. Fry, citing a number of examples from statutory laws of Ceylon in support.[3] In Devanayagam's case the Judicial Committee of the Privy Council recognised the validity of this view when they said:

> The holder of a judicial office exercises judicial power but the fact that some judicial power is exercised does not establish that the office is judicial.[4]

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2. Walker v. Fry (1965) 68 N.L.R. 73, at p. 101, ad.fin.

3. Ibid., p. 104.

4. United Engineering Workers' Union v. Devanayagam (1967) 69 N.L.R. 289, at p. 294, per Viscount Dilhorne.

Of the five factors we have discussed above, the first two tend to preserve certain powers solely within the province of the ordinary courts of law, whereas, the other three factors tend to read some exceptions into the exclusive vesting of judicial power in the judiciary. The emphasis the judiciary placed on the need for circumstances that justified a deviation from the general rule shows the manner in which the courts leant in favour of the exclusive jurisdiction of the courts while not altogether discounting the demands of social progress.

An application of these five factors, except the second one (i.e. that some powers are essentially judicial), results in a decision which takes account of the overall effect of the legislative plan rather than some particular power that has been bestowed upon an authority. Thus, a Commissioner of Income Tax was held entitled to impose a penalty as an incidental power, a Commissioner of Workman's Compensation was held entitled to determine questions of fact as an aid to performing his overwhelmingly administrative functions, and a Labour Tribunal was held not to be analogous to a court, although some judicial functions were entrusted to it since it was part of a legislative scheme to provide for industrial peace through conciliation, arbitration and amicable dispute settlement. On the other hand, when in substance a substitute court had been created, the courts were quick to strike out as invalid any mode of appointment to such tribunal which is inconsistent with section 55 of the Independence Constitution.

CHAPTER 7

THE JUDICIARY AND THE EXECUTIVE

In the 'Tribunal Cases' the validity of appointment to certain ostensibly administrative tribunals was challenged on the basis of a specific constitutional provision, namely section 55(1) of the Ceylon (Constitution) Order-in-Council, 1946, which enjoined that judicial officers should be appointed by the Judicial Service Commission. In this Chapter and in the next will be examined a number of cases where certain acts on the part either of the executive or of the legislature were challenged on the basis that they amounted to an exercise of or an interference with judicial power. These decisions rest on the premise that as a matter of necessary inference arising from the basic structure of the Independence Constitution of Ceylon judicial power was vested in the judiciary to the exclusion of the other two branches of the State. This inference had already been recognised in the 'Tribunal Cases'. This inference, however, is of special significance in respect of the cases discussed in this and more specially in the next chapter, for there was not in existence any one specific constitutional provision of direct relevance.

In this chapter three instances of alleged interferences with judicial functions by the Governor-General, a Minister or by the Attorney-General are examined. These three instances clearly indicate that the most fundamental consideration common to them was that the judiciary should be free from any undue governmental interference. A fourth instance where the decision rested on the difference between judicial and administrative powers is then studied. That case, namely Silva v. Jayasuriya,[1] is best understood in the light of the principles emerging from the case law examined in the next chapter.

Certain comments are made at the end of each case discussed in this chapter, but there is no general concluding part in this chapter; the general conclusions are presented at the end of the next chapter.

It must be noted that in the cases discussed under sub-headings (2) and (3) of this chapter the constitutionality of a statute was not in issue. The sole question in each of those cases was whether in the particular circumstances the action of the executive could be regarded as an attempt to undermine the independence of the judiciary.

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1. (1965) LXIX C.L.W. 54.

(1) Nomination of Judges by the Minister of Justice

The nomination of the judges to constitute a Bench of the Supreme Court was held in The Queen v. Liyanage[1] to be an exercise of the judicial power. Accordingly, the Criminal Law (Special Provisions) Act No. 1 of 1962, which conferred this power on the Minister of Justice, was held to be inconsistent with the Constitution which vested the judicial power of the State exclusively in the judiciary.

The Criminal Law (Special Provisions) Act No. 1 of 1962, which will be discussed in detail later by section 4 brought offences against the State within section 440A of the Criminal Procedure Code, which empowered the Minister of Justice to direct that the defendants be tried by three Judges of the Supreme Court without a jury in the case of certain offences. In pursuance of this statutory power the Minister of Justice, on the 23rd of June 1962, directed the trial of the 24 persons, an information against whom was exhibited to the Supreme Court by the Attorney-General on the same day, before the Supreme Court at Bar by three Judges without a jury.

In The Queen v. Thejawathee Gunawardene,[2] the first Trial-at-Bar since Independence, the Supreme Court had held that section 440A of the Criminal Procedure Code was a valid statutory provision, however objectionable it

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1. (1962) 64 N.L.R. 313.
2. (1954) 56 N.L.R. 193.

would seem to be. There the Supreme Court made the following observation:[3]

> It is not, in our opinion, for us to consider the desirability or otherwise of this particular provision of the law, which was introduced in 1915 in a year of stress,[4] being retained upon the Statute Book. That is a question of policy with which this Court is not concerned. It is not, in our opinion, for this Court to consider the desirability or the wisdom of the power retained in the Statute Book being invoked by the executive.

The Supreme Court had no hesitation in rejecting the argument that the Minister's power to direct a Trial-at-Bar was unconstitutional, inasmuch as it followed the decision in The Queen v. Thejawathie Gunawardene without reservation.

A novel provision appearing in the Criminal Law (Special Provisions) Act No. 1 of 1962 had conferred an additional power on the Minister of Justice. That section may be reproduced here:

> 9. 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, and the Chief Justice if so nominated or, if he is not so nominated, the most senior of the three Judges so nominated shall be the president of the Court.

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3. Ibid., at p. 207.

4. This is a reference to the Sinhalese-Muslim riots of 1915 which led to a declaration of Martial Law. See, P. V. J. Jayasekera, Social and Political Change in Ceylon 1900-1919 (unpublished Ph.D. Thesis, London, 1969).

> The Court consisting of the three Judges so nominated shall, for all purposes, be duly constituted, and accordingly, the constitution of that Court and its jurisdiction to try that offence, shall not be called in question in any Court, whether by way of writ or otherwise.

It was not disputed that the second half of the section which purported to oust the jurisdiction of the Courts could operate only if that section was intra vires the Constitution.[5]

In order to assail the validity of the above quoted section, it was contended on behalf of the defendants that the Constitution of Ceylon recognised a separation of powers of Government. The Supreme Court decided this issue in the following terms:[6]

> [I]f by a separation of powers or functions of Government is meant a mutually exclusive separation of such powers or functions as obtains in the American Constitution or even in the Constitution of the Commonwealth of Australia, which was itself based on the American Constitution, there is no such mutually exclusive separation of governmental functions in our Constitution. Nor, on the other hand, do we have a sovereign Parliament in the sense in which that expression is used in reference to the Parliament of the United Kingdom. That a division of the three main functions of Government is recognised in our Constitution was indeed conceded by the learned Attorney-General himself. For the purposes of the present case it is sufficient to say that he did not contest that judicial power in the sense of the judicial power of the State is vested in the Judicature, i.e., the established Civil Courts of this country.

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5. (1962) 64 N.L.R. 313, at p. 348.
6. Ibid., at p. 350.

In The Queen v. Liyanage, the Supreme Court thus laid down the principle that a separation of powers existed in the Independence Constitution of Ceylon at least to the extent that the judicial power of the State was vested in the Judicature alone. Having recognised this principle as one that ran to the foundation of the Constitution, the Court went on to determine whether the power of nomination amounted to an exercise of judicial power.

The court rejected the argument that when the Minister purported to nominate a particular Bench of the Supreme Court he in fact appointed three Judges of the Supreme Court to a new court which, apart from such nomination, had no existence. As the Supreme Court rightly observed the Judges nominated by the Minister were already Judges of the Supreme Court and in holding a Trial-at-Bar under section 440A of the Criminal Procedure Code they functioned as Judges of the Supreme Court and in no other capacity. In fact, the power of nomination which the impugned Act conferred on the Minister was no different in substance from the power exercised by the Chief Justice in nominating a Bench of Judges. Had the Minister purported to nominate any person other than a Judge of the Supreme Court to officiate as a Judge at the Trial-at-Bar, he would undoubtedly have been purporting to appoint a person to the office of a judge in contravention of the provisions of the Constitution relating to the appointment of judicial officers.[7] This line of reasoning

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7. Ibid., at p. 352.

led itself to the conclusion that the Minister, by the act of nomination, did not create a new tribunal distinct and separate from the Supreme Court.

The position is then that since a Trial-at-Bar was just one of the modes in which the Supreme Court exercised its jurisdiction, it could not be said that the Chief Justice was appointing judges or constituting new tribunals whenever he directed that a Divisional or a Full Bench nominated by him should assemble. It inevitably followed from this position that when the Minister claimed such powers of the Chief Justice on a particular occasion it could not bring about a different result.

It was further argued unsuccessfully that the power of nomination given to the Minister violated the unity and indivisibility of the Supreme Court.[8] But, by far the most important argument was that the act of nomination itself was an exercise of judicial power.

The Supreme Court was content, for the purposes of the case, to accept the broad classification of judicial power attempted by the Attorney-General himself. According to that classification 'Judicial Power' is used in three senses.

1. in the sense of the essence of judicial power, the strict judicial power;
2. in the sense of the power of judicial review;
3. in a loose sense, as meaning the powers of a judge, e.g., disciplinary powers and powers ancillary to the judicial power.[9]

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8. Ibid., at pp. 352-353. 9. Ibid., at p. 353.

'Strict judicial power' as explained by Griffiths, C.J., in Huddart Parker Pty., Ltd. v. Moorhead,[10] meaning the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the rights and liabilities of one or more parties, did not include the power of nomination of judges, nor did the power of nomination form part of the power of judicial review.[11] Therefore, the Supreme Court confined itself to a determination whether the power of nomination fell within the third category shown above.

The Attorney-General submitted that within the third category were included both powers ancillary to judicial power and powers not ancillary to judicial power. Neither of these powers was judicial. He contended that the powers ancillary to judicial power were given to judicial officers, whereas powers not ancillary to judicial power, such as the power to nominate judges, could be reposed in a person who formed no part of the Judicature.[12]

The Supreme Court, however, leant in favour of the contention made on behalf of the defendants. According to that view, where a power that ordinarily falls within the third category (that is, judicial power in a loose sense) is consistent with executive or administrative power and is consistent also with judicial power, the matter has to be considered further in order to see whether that particular

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10. (1908) 8 C.L.R. 330, at p. 357, cited in (1962) 64 N.L.R. 348, at p. 353.

11. (1962) 64 N.L.R. 313, at p. 348.

12. Ibid.

power falls actually within judicial power itself or outside it. It was claimed by the defence that the power to nominate judges, although it might have the appearance of an administrative power, was itself so inextricably bound up with the exercise of strict judicial power or the essence of judicial power that it was itself part of the judicial power.[13] This claim found support in a judgment delivered by the High Court of Australia which declared that:

> Many functions perhaps may be committed to a Court which are not themselves exclusively judicial, that is to say, which considered independently might belong to an administrator. But that is because they are not independent functions but form incidents in the exercise of strict judicial power.[14]

The power to nominate a Bench of Judges resided solely with the Chief Justice prior to the enactment of the impugned Act in 1962, either by virtue of his statutory powers under section 51 of the Courts Ordinance, No. 1 of 1889 or by convention. The impugned Act sought to change this practice which had prevailed for about a century and a half in Ceylon.[15] In the opinion of the Court, this historical setting attracted the historical test propounded by Dean Roscoe Pound:

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13. Ibid.

14. Queen Victoria Memorial Hospital v. Thornton (1953) 87 C.L.R. 144, at p. 151. Cited in (1962) 64 N.L.R. 313, at p. 354.

15. (1962) 64 N.L.R. 313, at p. 355.

> In doubtful cases, however, we employ a historical criterion. We ask whether, at the time our Constitutions were adopted, the power in question was exercised by the Crown, by Parliament, or by the judges. Unless analysis compels us to say in a given case that there is a historical anomaly, we are guided chiefly by the historical criterion.[16]

The Supreme Court of Ceylon also cited with approval[17] a somewhat differently formulated test that had been introduced by Kitto, J., in the Australian case of The Queen v. Davison:[18]

> Where the action to be taken is of a kind which had come by 1900 /when the Commonwealth of Australia Constitution Act, 1900, came into operation/ to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it.

These two tests, when applied to the factual situation in Ceylon that the power to nominate judges had been reposed in the judiciary without exception, resulted in the conclusion that such power was inextricably interwoven with the strict judicial power of the State which was vested in the judiciary and in the judiciary alone.

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16. 'The Rule Making Power of the Courts', 12 American Bar Association Journal (1926) 599, p. 601.

17. (1962) 64 N.L.R. 313 at p. 355.

18. (1954) 90 C.L.R. 353, at pp. 381-383.

The 'purpose test' laid down by Holmes, J., in the American case of Prentis v. Atlantic Coast Line Co., that 'the nature of the final act determines the nature of the previous inquiry',[19] was also applied by the Supreme Court of Ceylon to fortify its conclusion that the power of nomination belonged to the judiciary alone. The Supreme Court had no doubt that the end or purpose in view in making the nomination was to exercise the strict judicial power of the State.[20] In arriving at this conclusion the Supreme Court was influenced by the consideration that the Minister in the exercise of his power of nomination could prevent certain judges, including even the Chief Justice, from exercising any part of the strict judicial power.[21]

The Supreme Court took into account the fears that might be entertained as to whether the Minister would use his power of nomination to nominate a Bench that would not conduct a fair trial. That justice should not only be done but should manifestly and undoubtedly be seen to be done is the principle involved here.[22] The Order of the Supreme Court may be cited extensively:

> /P_7rior to 1962 the Minister had merely the right to direct that the trial be held before the Supreme Court by three Judges without a jury. But the new legislation, passed, with retrospective effect, after the commission of

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19. (1908) 211 U.S. 210, at p. 227.

20. The Queen v. Liyanage, supra fn. 17, at p. 359.

21. Ibid., at p. 358.

22. R. v. Sussex Justices, ex parte McCarthy, (1924) 1 K.B. 256, at p. 259.

> the offences alleged, thus purported to vest in the Minister, a member of the Government which the defendants are alleged to have conspired to overthrow by unlawful means and who, it was not disputed, had participated in the investigation and interrogation of some of the defendants, the additional power to nominate the three judges. . . . This is the first occasion on which an attempt has been made to vest this power in such an outsider, and that too in circumstances where the propriety of the nomination becomes, by reason of the doctrine of ministerial responsibility, discussable in Parliament involving, perhaps, the merits and demerits of respective judges, whereas under the previous law the judges enjoyed freedom from being the subject of such a discussion. . . . Will he, the ordinary or reasonable man, harbour the impression, honestly though mistakenly formed, that there has been an improper interference with the course of justice? In that situation will he not suspect even the impartiality of the Bench thus nominated?[23]

The particular circumstances leading to the enactment of the impugned Act and the very nature of the Act itself did, in the opinion of the Supreme Court, give rise to a reasonable suspicion that the power of nomination conferred on the Minister might be abused.

In spite of the fact that the three Judges could have declined to enter upon a Trial-at-Bar of the defendants on the sole ground that the nomination of the Bench was invalid, they proposed to examine the 'objection of a fundamental character',[24] centred on the principle that 'justice should be so administered as to satisfy reasonable persons that the tribunal is impartial and unbiased'.[25] This principle was,

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23. The Queen v. Liyanage (1962) 64 N.L.R. 313, at pp. 359-360.

24. Ibid., at p. 359.

25. Ibid., at p. 360, citing R. v. Essex Justices, ex parte Perkins (1927) 2 K.B. 475, at p. 490.

in the opinion of the Court, so fundamental that even had the Court decided the nomination was valid, it 'would have been compelled to give way to this principle which has now become ingrained in the administration of common justice in this country'.[26]

The preliminary objection to the jurisdiction of the three Judges who constituted the Bench could thus succeed on two distinct and alternative grounds, namely:

(a) the power of nomination conferred on the Minister being a judicial power, in the sense that it was an ancillary power which was inextricably bound up with the strict judicial power of the State, he could not, consistently with the Constitution, exercise that power; and

(b) the nomination of the three Judges by the Minister offended the cardinal principle that a court should not only be impartial and unbiased but also should appear to be so.

There is no doubt, that the Court relied heavily on historical factors to designate the power of nomination as a judicial power. Nevertheless, the Court seems to have been much influenced by the fact that the vesting of that power in a person outside the judicature would constitute an undue interference with the duties and functions of the judges. In fact it was said:

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26. Ibid.

> Then, again, if the power to nominate or select judges can be constitutionally reposed in the Minister on the ground that it is no more than an exclusively administrative act, we can see nothing in law to prevent such a power being conferred on any other official, whether a party interested in the litigation or not. The fact that the power of nomination so conferred is capable of abuse so as to deprive a judge of the entrenched power vested in him by virtue of his appointment under section 52 of the Order in Council, or at least to derogate from that power, is a consideration which is not an unimportant one in deciding whether the conferring of this power by section 9 on a person who is not a judge of the Supreme Court is ultra vires the Constitution. It may, of course, be contended that the power is capable of abuse if it is granted to a Judge of the Supreme Court or, for that matter, to the entire court. However, the proper authority under the Constitution to exercise this power appears to be the Judicature itself.[27]

The Queen v. Liyanage thus is authority for the proposition that the executive could neither exercise nor interfere with the judicial power of the State, which was held to be exclusively within the province of the judiciary.

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27. Ibid., at 358.

(2) An Inappropriately Worded 'Free Pardon' by the Governor-General of Ceylon

The law of Ceylon in no uncertain terms enabled the Governor-General to grant a free pardon.[1] That the Governor-General intended to grant a free pardon, however, had to be manifest in the instrument of such grant. If the instrument was ambiguous or was inappropriately worded, it could not be judicially recognised as a grant of free pardon, in spite of strong but extraneous evidence of such intention. This was the view that formed the ratio decidendi of the decision of the Supreme Court of Ceylon in The Queen v. Wimaladharma.[2]

In that case a government teacher had been convicted of causing hurt and fined Rs.100 by a Magistrate. On appeal the Supreme Court had affirmed the decision of the Magistrate. Thereafter, the accused made representations to the Governor-General. In reply he received a letter dated 7th November 1963, stating that 'the sentence imposed on him has been set aside'.[3] Not being satisfied with this letter which merely set aside the sentence leaving unaffected the conviction, he further petitioned the Governor-General on 20th July 1964. He received a reply dated 5th August 1964 in Sinhala which when translated read as follows:

> With reference to his petition dated 20th July 1964, Mr. S. S. Wimaladharma of Menerepitiya, Warakapola, is informed that not only the

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1. Section 10 of the Ceylon (Office of Governor-General) Letters Patent, 1947.
2. (1965) LXVIII C.L.W. 14.
3. Ibid., at p. 14.

sentence imposed on him but also his conviction was quashed by His Excellency the Governor-General's order which was conveyed to him by letter No. M/J-R 148/63 of 7th November, 1963.

By His Excellency's Command.[4]

The accused produced this letter of the Governor-General before the Magistrate who had passed the sentence on the accused and moved that the conviction be set aside. The Magistrate, who entertained doubts whether he had jurisdiction to deal with such an application, referred the issue to the Supreme Court. The decision of the Supreme Court on this matter is reported sub nomine The Queen v. Wimaladharma.[5]

Sri Skanda Rajah, J., who heard the case in The Queen v. Wimaladharma, pointed out that the first communication from the Governor-General's office merely stated that the sentence imposed on the accused had been set aside by the Governor-General. Therefore, the second communication which explained that the first communication had also the effect of setting aside the conviction was ill-conceived. The first communication was capable of only one construction, the learned Judge observed; it remitted the sentence the Magistrate had imposed on the accused.

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4. Ibid., at p. 14.
5. (1965) LXVIII C.L.W. 14.

Section 10 of the Ceylon (Office of Governor-General) Letters Patent, 1947 which is the key provision of law relevant to the matter in issue may be quoted:

> 10. When any offence has been committed for which the offender may be tried in the Island, the Governor-General may, as he shall see fit, in Our name and on Our behalf, grant a pardon to any accomplice in such offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such principal offenders if more than one, and further may grant to any offender convicted of any such offence in any Court within the Island, a pardon, either free or subject to lawful conditions, or any respite, either indefinite or for such period as the Governor-General may think fit, of the execution of any sentence passed on such offender, and may remit the whole or any part of such sentence or of any penalties or forfeitures otherwise due to Us.

The relevant parts of the above provision enable the Governor-General to grant to any convicted person a free or conditional pardon, an infinite or limited respite of the execution of any sentence, or a remission in whole or in part of such sentence. The Court held that in order to determine which of these several and distinct remedies was intended by the Governor-General, the words used in the communications should be given their ordinary meaning. Accordingly, the first communication had to be regarded as a remission of the sentence.[6]

The second communication from the Governor-General's office claimed that the first communication quashed the conviction too. As regards this communication, Sri Skanda Rajah, J., said that quashing a sentence involved the

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6. Ibid., at p. 15

exercise of judicial power. Citing The Home Office by Sir Frank Newsam, the learned Judge conceded that:

> A free pardon wipes out not only the sentence or penalty, but the conviction and all its consequences, and from the time it is granted leaves the person pardoned in exactly the same position as if he had never been convicted.[7]

The communications from the Governor-General, however, the Court observed, did not mention that a free pardon had been granted. He could grant a free pardon which had the effect of wiping out both the conviction and the sentence: but, he could not direct that the conviction and the sentence be set aside. Such a direction amounted to an exercise of judicial power:

> Judicial power is exclusively vested by the Ceylon (Constitution) Order-in-Council in the Supreme Court and other Courts and tribunals to which the Judicial Service Commission alone makes appointments. Judicial power cannot lawfully be exercised by the executive.[8]

The Supreme Court accordingly held that the directions contained in the second communication amounted to an exercise of judicial power and were therefore invalid.

On the same day, December 2, 1965, that the court made the above Order, an application was made 'under extra-ordinary circumstances', on behalf of the accused, in that certain facts which were not before the Supreme Court during the proceedings were then brought to its notice. The Order dealing with the second application is appended to the original Order.

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7. Cited at p. 15. 8. Ibid., at pp. 14-15.

It was stated in the second application that the Minister of Justice, on whose advice the Governor-General exercised his prerogative power, had in fact advised the Governor-General in a communication written in English that a free pardon be given. When the Governor-General received the second petition from the accused seeking an explanation it was referred to the Minister. His advice written in English was as follows:

> His Excellency the Governor-General has granted a Free Pardon, in this case in which he was convicted and fined. The Honourable Minister advises His Excellency to inform the petitioner that by the said order of His Excellency not only the penalty imposed on the petitioner but even the conviction gets wiped out.[9]

It was shown that the Governor-General acted on this advice when he sent the second communication to the accused. In the light of this new evidence Sri Skanda Rajah, J., agreed that 'it was not intended by His Excellency the Governor-General to exercise judicial power. In truth and in fact a free pardon had been granted'.[10] The communications from the Ministry of Justice addressed to the Governor-General, which constituted extraneous evidence, did not deter the learned Judge from adhering to the original Order he made that the Governor-General had not granted a free pardon.

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9. At p. 16.
10. Ibid.

In spite of the fact that the Governor-General had, as appears from the advice of the Minister of Justice on which His Excellency acted, intended to grant a free pardon, such intention did not find expression in the communications issued from the Governor-General's office. This was the result of the use of 'rather inappropriate terms due to the inadequacy of legal terminology coined in Sinhala'.[11] Even the Governor-General's office was not to blame, the learned judge observed, because the vocabulary at their disposal was inadequate.

Sri Skanda Rajah, J., seems to have given much weight to the rule that what matters is the manifest intention and not the true but undisclosed intention. This led him to completely discount the evidential value of the advice of the Minister which seems to have been regarded as extraneous evidence.[12] Unmoved by the additional material placed before him, the learned judge reaffirmed the validity of the order he had originally made.

It is respectfully submitted that this decision is incorrect in law, because there was sufficient evidence, although extraneous in a strict sense, as emerging from the communications from the Ministry of Justice addressed to the Governor-General, to sufficiently support the belief

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11. Ibid., at p. 16.

12. The judgment does not expressly exclude the advice of the Minister on the ground that it constituted extraneous or irrelevant evidence. However, this is the only basis on which is explicable the unwillingness of the learned judge to give effect to the true intention.

of Sri Skanda Rajah, J., that the Governor-General had granted a free pardon 'in truth and in fact'.[13] Moreover, Wimaladharma's case is not a commendable decision of policy, for it failed to take account of the difficulties involved in finding or creating Sinhala equivalents for English terminology. Specially in the field of law, numerous difficulties have been encountered in translating concepts and principles which are alien to Sri Lanka. It is unfortunate that the learned Judge based his decision on a highly technical point--namely the use of an inappropriate word--when all other indications squarely pointed to just one conclusion; that the Governor-General had granted a free pardon.

Apart from the assumption made, on the basis of the use of inappropriate language, that the Governor-General unduly interfered with the judiciary in a technical sense, it appears that any such interference was not in the contemplation either of the Governor-General or of the Minister of Justice. The importance of this case therefore is limited to its recognition of the principle that the executive could not exercise judicial power under Ceylon (Constitution) Order-in-Council, 1946.

A somewhat similar incident came before the Supreme Court in the case of In re Agnes Nona,[14] the facts of which were as follows. The accused, who had been convicted and sentenced by a Magistrate's Court, appealed against that

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13. (1965) LXVIII C. L. W. 14, at p. 16.
14. (1951) 53 N. L. R. 106.

decision to the Supreme Court which dismissed the appeal. Thereafter the Magistrate ordered the accused to appear before him so that he could give effect to the order of the Supreme Court dismissing the appeal. The accused failed to appear before the Magistrate, and in the meantime, petitioned the Governor-General who granted a conditional pardon; the condition being that she (the accused) should enter into a bond in Rs.250 to be of good behaviour for a period of one year.[15] This, Dias, S.P.J., observed, was a lawful order, but the Governor-General did not direct before whom that bond was to be executed.

The Permanent Secretary to the Ministry of Justice forwarded a copy of the memorandum of the Governor-General granting the conditional pardon to the Magistrate 'for favour of necessary action'. He further requested the Magistrate to let him know when the accused had entered into the bond. On receipt of this letter the Magistrate caused the accused to appear before him and enter into the bond. The Magistrate then informed the Ministry of Justice that the accused had duly entered into the bond.

Having seen a report of these proceedings in the Daily Press, Dias, S.P.J., considered that this was a case in which he should call for and examine the record of the proceedings under section 356 of the Criminal Procedure Code which provided that the Supreme Court could call for and

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15. Ibid., at p. 108.

examine the record of any case, whether already tried or pending trial in any Court, for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed therein or as to the regularity of the proceedings of such Court.

Dias, S.P.J., explained his action in the following terms:

> On a perusal of the record it appeared to me that this was a case in which it was desirable that the relative legal position which the executive government as represented by the Minister of Justice bears towards the Courts should be clarified. The accused lady and the Attorney-General were therefore notified and the matter has been fully argued.[16]

It was argued on behalf of the State that the order of the Magistrate that the accused should enter into the bond referred to in the conditional pardon was merely an administrative act, and accordingly the Supreme Court could not exercise its revisionary powers in respect of it. Revisionary powers, it was contended, could be exercised only in respect of the exercise of judicial powers by the inferior Courts. Dias, S.P.J., was not inclined to agree with that contention. In any case statutory provision existed which empowered a Magistrate to order an accused to enter into a bond in certain specified circumstances. Therefore, in the instant case the Magistrate had exercised a power which necessarily had a judicial character, although there was no statutory provision which applied to the situation in hand.[17]

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16. Ibid., at p. 109.
17. Ibid., at p. 110.

The learned Judge recognised that the Minister of Justice possessed certain 'administrative' powers, relating to the appointment of the subordinate staff of a Court, the emoluments to be paid to judicial officers and the hours during which the office of the Court should be open, etc.

> These 'administrative' powers are difficult to define, and there may arise cases in which the Minister may inadvertently overstep the bounds and encroach either on the functions of the Judicial Service Commission on the one hand, or on the judicial functions of the Court on the other. In cases where there is ground to believe that the Minister has improperly encroached on the judicial functions of a Court, it is the undoubted right of the Supreme Court to examine the position, and fearlessly to say so, if there has in fact been any illegal encroachment.[18]

The Magistrate's Court in the discharge of its duties as a Court was not under the administrative control of the Minister. Nor was there a statutory provision which enabled the Minister to give a direction of the nature that was in issue in the instant case. The learned Judge emphasised that:

> The point to be noted, however, is that whenever on grounds of public policy it is considered expedient that the Judge should render assistance to the executive, the law provides for it in unmistakable terms by imposing a statutory duty on the Judge to do so.[19]

Accordingly, the proper course would have been for the accused to have the memorandum of the Governor-General brought to the notice of the Court. The intervention of the Minister was wholly inappropriate and illegal.

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18. Ibid., at p. 113.
19. Ibid., at p. 115.

> The Solicitor-General concedes that if the Minister has, in fact, acted illegally, there is no distinction between a slight interference by the executive with the judiciary and a major interference. In either case the independence of the judiciary would be affected and must be condemned.[20]

It was open to the Supreme Court to quash all the proceedings and to restore the status quo ante. Nevertheless, in view of the fact that the accused was then lawfully at liberty, Dias, S.P.J., did not propose to take any action.[21] The whole purpose of his exercising the revisionary powers was to lay down the principles applicable.

The principles laid down in this case were that a person who had been granted a conditional pardon should himself initiate proceedings necessary to fulfill the condition; that no executive officer could intervene in such a situation and direct a Court to take proceedings; and that as a general rule the executive should not interfere with judicial functions.

In spite of the illegality of the Minister's direction to the Magistrate, the Supreme Court did not propose to quash the proceedings before the Magistrate. The fact that the grant of the conditional pardon had been valid dissuaded the learned Judge from nullifying the proceedings. This case thus provides a striking example of

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20. Ibid., at p. 116.
21. Ibid.

the deep-rooted antipathy of the judiciary towards any interference with the performance of judicial functions and shows how a Court will go to the extent of initiating a judicial proceeding by itself, even where its final decision will not make a substantial impact on the subject matter of the proceeding.

There are two distinctions between In re Agnes Nona and The Queen v. Wimaladharma. Firstly, the grant of pardon by the Governor-General was held valid in the former and invalid in the latter. The Supreme Court overlooked the technical illegality in the former, whereas in the latter it refused to recognise the validity of the grant. In re Agnes Nona amply fortifies the submission previously made that the final order in Wimaladharma's case rests on insecure grounds.

A feature common to both cases is that there was no real intention on the part of the executive to interfere with the judiciary. On the other hand, in The Queen v. Liyánage the Supreme Court entertained a reasonable doubt as to whether the executive did intend such an interference.[22] The significance of Agnes Nona's case and Wimaladharma's case is, therefore, limited to the judicial recognition of the importance of ensuring that the judicial function can be exercised free from undue governmental interference.

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22. See the discussion in Part 1 of this chapter.

(3) The Attorney-General's Power to give directions to a Magistrate

The Attorney-General could under the law of Ceylon direct a Magistrate who had discharged an accused after a preliminary inquiry to commit him for trial before the Supreme Court. So was decided in The Attorney-General v. Don Sirisena.[1]

In that case the Magistrate had discharged three out of four persons who had appeared before him at a preliminary inquiry, on the basis that there was no prima facie case against them. The Attorney-General then directed the Magistrate to commit the three persons who had been discharged by him for trial before the Supreme Court, but he refused to give effect to this direction on the ground that it constituted an interference with the discharge of his judicial functions. The matter was then brought before the Supreme Court, in the exercise of its revisionary powers, for a binding decision whether the Attorney-General could validly issue such a direction.

The main argument was that the Magistrate in discharging the accused persons performed a judicial function and that the Attorney-General who was part of the executive could not interfere in the exercise of judicial power by a judicial officer.

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1. (1968) 70 N.L.R. 347.

The Supreme Court firmly rejected the argument that a Magistrate exercised judicial power when he discharged an accused at a preliminary inquiry. A preliminary inquiry was held solely for the purpose of finding whether there was sufficient evidence to commit a person for trial. Such an inquiry did not result in a determination of either guilt or innocence. Section 162(1) of the Criminal Procedure Code provided that 'if the Magistrate considers that the evidence against the accused is not sufficient to put him on trial, the Magistrate shall forthwith order him to be discharged'. Citing an Australian authority,[2] the Supreme Court of Ceylon held that, in the absence of a determination by the Magistrate as to whether the accused person had committed an offence, a preliminary inquiry did not involve the exercise of judicial power.

In the absence of an exercise of judicial power by the Magistrate the Attorney-General could not be said to have interfered with any exercise of judicial power. Further, the Supreme Court observed that historically the Attorney-General had always been vested with this power:

> Our law has, since 1883 if not earlier, conferred on the Attorney-General in Ceylon powers, directly to bring an alleged offender to trial before a Court, to direct a Magistrate who has discharged an alleged offender to commit him for trial, and to direct a Magistrate to discharge an offender whom he has committed for trial. These powers of the Attorney-General which have commonly been described as quasi-judicial, have traditionally formed an integral part of our system of Criminal Procedure, and it would be quite unrealistic to

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2. Appleton v. Moorhead (1908) 8 C.L.R. 330.

> hold that there was any intention in our Constitution to render invalid and illegal the continued exercise of those powers. This Court has, upon similar considerations, upheld the validity of statutes conferring criminal jurisdiction on Courts Martial and conferring on revenue authorities the power to impose penalties for the breach of revenue restrictions.[3]

It appears from the above quoted passage from the judgment in The Attorney-General v. Sirisena that beside the ruling that a Magistrate did not act in a judicial capacity in conducting a preliminary inquiry, the overwhelming consideration was that for at least nearly one hundred and fifty years this power, a quasi-judicial power as the Court preferred to call it, had been exercised by the Attorney-General. However, both these two grounds were instrumental in bringing about a decision favourable to the Attorney-General. Therefore it follows that if a similar power had been granted in a post-independence statute the decision might have perhaps been different. For, the Court could possibly resort to an analogy with the principle enunciated in The Queen v. Liyanage[4] that powers ancillary to judicial powers were also to be regarded as judicial powers in certain circumstances: accordingly, it might have been held, relying on the historical test, that traditionally the preliminary inquiries had been so connected with strict judicial proceedings that the preliminary inquiries did 'in a loose sense' fall within the ambit of judicial power.

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3. The Attorney-General v. Don Sirisena (1968) 70 N.L.R. 347 at p. 355.

4. (1962) 64 N.L.R. 313.

However, it is of interest to note here that as far back as in 1898, the District Court of Ceylon in Dadabhoy Nusserwanjee v. Nana Moona Sheriffdeen[5] had held that a Magistrate's Court inquiring into a non-summary charge was not a court within the meaning of section 834 of the Civil Procedure Code. Under that section a party to a case pending before a court having jurisdiction therein was exempt from arrest under civil process while going to or returning from such court.

The decision in The Attorney-General v. Sirisena provides a striking example of the willingness of the Courts to recognise that the executive did have the power to control the working of the judiciary in respect of certain restricted areas. In permitting such controls or regulations the Courts, however, first satisfied themselves that the independence of the judiciary was not thereby in any sense impaired.[6]

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5. (1898) 1 Browne's Reports 3.

6. Elsewhere in this thesis reference has been made as to how the judiciary ensured through judicial scrutiny that the Attorney-General did not improperly use his powers. See the discussion on The Queen v. Abeysinghe (1965) 68 N.L.R. 385, infra p. 348-351.

(4) Removal of the Chairman of an Urban Council by the Minister

It was argued unsuccessfully in Silva v. Jayasuriya[1] that the Minister of Local Government exercised judicial power when he removed the Chairman of an Urban Council. One of the consequences of such a removal was that by reason of section 9(3) of the Local Authorities (Elections) Ordinance[2] the deposed Chairman became disqualified for a period of five years from being elected as, or voting at any election of, a Senator or Member of Parliament or a Member of any local authority. On this ground it was alleged by the petitioner that the order was an exercise of judicial power and the court was requested to defer a decision until a Bench of five Judges rendered its decision dealing with certain tribunals. (This is undoubtedly a reference to the Supreme Court Proceedings in Walker v. Fry.[3]).

On the other hand, the Crown Counsel argued that the Minister was entrusted with the supervision of the administration of local authorities and with the executive power to be exercised in the course of such supervision. Removing a person from the office of Chairman, it was submitted, was one of such administrative powers. The learned Judge was inclined to agree with this proposition when he said:

> Even if it be correct that the disqualification created by section 9(3) (c) of the Local Authorities (Elections) Ordinance

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1. (1965) LXIX C.L.W. 54.
2. Chapter 262, L.E.C.
3. (1965) 68 N.L.R. 73.

> can attach only to an order made by the holder of a judicial office, the validity of the Order for removal from the office of Chairman is not thereby impaired. In so far, therefore, as the Order has the effect of removal from office, I must hold that the Minister was duly empowered to make it. The petitioner can take such steps as he may be advised to do if it is thought that the Minister's Order cannot deprive him of electoral and voting rights.[4]

The learned Judge seems to have separated the civic disabilities which followed the removal from the act of removal, and regarded the latter as clearly involving administrative functions. He left open the issue whether civic disabilities could validly ensue from such a removal. We may recollect here that in Sendhira v. The Bribery Commissioner[5] the Supreme Court came to the conclusion that a Bribery Tribunal could find a person guilty, with the result that he became liable to civic disabilities statutorily imposed. Later it was held that a Bribery Tribunal could not even find a person guilty on the ground that 'enforcement' was not an essential ingredient of judicial power. As we have noted, the decisions in the Bribery Tribunal cases were strongly influenced by the fact that such tribunals were created to exercise jurisdiction in respect of certain penal offences. Therefore, no definite answer is to be found there as to whether an administrative act which results in civic disabilities is to be regarded as an exercise of judicial power. However,

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4. (1965) LXIX C.L.W. 54, at p. 56.
5. (1961) 63 N.L.R. 313.

the decision in Kariapper v. Wijesinha,[6] where it was held that a statute which imposed civic disabilities on certain Members of Parliament who had been found to have committed certain bribery offences did not amount to a 'legislative judgment', might by analogy be applied here. As in Kariapper v. Wijesinha the dominant purpose of the Act was to 'keep public life clean', so too it seems was the overriding intention behind entrusting the Minister with certain regulatory powers, including that of removal from office in Silva v. Jayasuriya.

From the judgment it appears that the action of the Minister followed a finding by an Assistant Commissioner of Local Government that allegations of maladministration which had been referred to him for inquiry by the Commissioner of Local Government had been proved against the petitioner. The Court was satisfied that the rules of natural justice has been followed all throughout the proceedings. This might have weighed heavily in favour of the validity of the removal of the petitioner from office.

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6. (1967) 70 N.L.R. 49; [1967] 3 All E.R. 485.

CHAPTER 8

THE JUDICIARY AND THE LEGISLATURE

The 'Tribunal Cases', where the principle was upheld that the legislature could not validly confer judicial power on extra-judicial bodies, undoubtedly established a significant limitation on the legislative powers of the Ceylon Parliament. The cases that are discussed in this chapter, however, had far more serious implications. The principle emerging from these decisions was that it was not open to Parliament itself to assume judicial power or even to interfere with its exercise by the courts. For, under the Constitution the judicial power of the State had been vested exclusively in the judiciary.

The story begins with the epoch-making decision of the Privy Council in Liyanage v. The Queen;[1] in effect, with regard to Ceylon at least, the story also ends with that case. For although that decision was the basis of argument in a number of later cases, the Liyanage principle was not applied in any such local case in order to invalidate an Act of Parliament.

It is proposed in this chapter to explain the Liyanage principle followed by a review of its aftermath.

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1. (1965) 68 N.L.R. 265; [1966] 1 All E.R. 650.

(1) The Liyanage Principle

The celebrated 'Judicial Power' cases in Ceylon, that series of cases where the primary issue was the competence of any person other than a duly appointed 'judicial officer' to exercise the judicial power of the State, and which are discussed in this and the two preceding chapters, reached their zenith in the well-known Privy Council decision in Liyanage v. The Queen.[1]

It is far from an exaggeration to say that no other Ceylon case attracted so much attention, admiration and criticism as did Liyanage v. The Queen,[2] from both local and overseas legal circles. This case had five hearings before the Supreme Court. The first three were on preliminary points,[3] and the fourth on an application for bail,[4] the fifth being the trial proper.[5] The Order of the Supreme Court in the trial proper runs to 227 pages in the New Law Reports[6] and is the lengthiest judgment in the area of the criminal law of Sri Lanka.

One of the major changes introduced into the constitutional structure by the Republican Constitution of Sri Lanka of 1972 was, as we shall see later, specifically

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1. (1965) 68 N.L.R. 265; [1966] 1 All E.R. 650.
2. Ibid.
3. Reported in (1962) 64 N.L.R. 313, (1963) 65 N.L.R. 73 and (1963) 65 N.L.R. 337 under the title The Queen v. Liyanage.
4. The Queen v. Liyanage (1963) 65 N.L.R. 289.
5. The Queen v. Liyanage (1965) 67 N.L.R. 193.
6. Ibid., from page 198 to page 424.

directed to the deracination of the principles ordained in Liyanage v. The Queen.[7] Nevertheless frequent attempts were made, though unsuccessfully, before the Constitutional Court to resuscitate some of the doctrines expressed in that case.[8] The interest aroused by 'the most remarkable exercise in judicial activism ever performed by the Privy Council'[9] in Liyanage v. The Queen[10] has gained new heights elsewhere,[11] and no standard text book on constitutional law in the Common Law world can now afford to omit a mention of Liyanage v. The Queen.[12]

The Privy Council in Liyanage v. The Queen[13] held that there existed a separation of powers under the Independence Constitution of Ceylon, at least to the extent that judicial power was vested exclusively in the judicature, and that it was not open for the Parliament to pass an ordinary law amounting in substance to a usurpation of, or an interference with, that judicial power. The Criminal Law (Special Provisions) Act No. 1 of 1962, as amended by Act No. 31 of the same year, which had been enacted specially to be applicable to the apprehension, trial and punishment

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7. Supra note 1.

8. See the discussion of the decisions of the Constitutional Court, Chapter 11, Part (2), infra.

9. S. A. de Smith, 'The Separation of Powers in a New Dress', (1966) 12 McGill L. J. 491 at p. 492.

10. Supra note 1.

11. See Hinds v. The Queen [1976] 1 All E.R. 353 discussed in Chapter 12, Part (3), infra.

12. S. A. de Smith, 'The Separation of Powers in a New Dress', (1966) 12 McGill L. J. 491 at p. 492.

13. Supra note 1.

of the defendants who were alleged to have participated in a conspiracy to stage a Coup d'Etat, was held by the Privy Council to be such a usurpation or infringment: accordingly the conviction entered against the defendants by the Supreme Court at Bar was set aside.

It is imperative, in order to view the Privy Council decision in its proper perspective, that the background to that decision should be briefly examined. The circumstances leading to the enactment of the impugned Acts of Parliament and the provisions of such Acts will now be outlined, followed by a short account of the Trial before the Supreme Court.

(i) The Circumstances Leading to the Enactment, and an Outline, of the Acts Nos. 1 and 31 of 1962

According to the prosecution case,[14] some time in January 1962 or thereabouts some of the twenty-four defendants conceived a plan to arrest Members of Government, certain prominent Leftist politicians, and a few key officials, and, relying on the military and police power available to them,[15] to replace the then existing Government of the country by some authority not constituted under the then existing law.

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14. The Queen v. Liyanage, (1965) 67 N.L.R. 193 at 198.

15. Thirteen of the defendants were high-ranking members of the Regular Army or the Voluntary Force; six were serving or retired senior officials or planters. The Queen v. Liyanage (1965) 67 N.L.R. 193 at p. 199.

All the defendants, according to the prosecution, at some stage or other agreed to participate in carrying out the plan. Two of the principal defendants conceded that they indeed prepared a plan for certain Army and Police action, but only for the purpose of preventing certain other parties from carrying out a Coup d'Etat.

The attempt to overthrow the Government was foiled at the last moment as a result of some 'inside information' reaching the Prime Minister. Arrests and interrogations followed, and it appeared that the existing substantive and adjective criminal law was inadequate to effectively try and punish the perpetrators of the alleged crimes against the State. A White Paper issued by the Ceylon Government which set out the story of the unsuccessful coup together with the names of the alleged participants, ended with the following observation:[16]

> It is also essential that a deterrent punishment of a severe character must be imposed on all those who are guilty of this attempt to inflict violence and bloodshed on innocent people throughout the country for the pursuit of reactionary aims and objectives. The investigation must proceed to its logical end and the people of this country may rest assured that the Government will do its duty by them.

The Criminal Law (Special Provisions) Act No. 1 of 1962, '[a]n Act to make special provision for the apprehension, detention and trial of persons suspected of having committed, or charged with, offences against the State,

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16. Issued on February 13, 1962. Cited in Liyanage v. The Queen (1965) 68 N.L.R. 265, at p. 273; [1966] 1 All E.R. 650, at p. 652.

to amend the Penal Code, the Criminal Procedure Code and the Courts Ordinance, and to make provision for matters connected therewith or incidental thereto',[17] was passed on the 16th of March, 1962. The Act had four Parts. Part I dealt with the arrest and detention of persons suspected of committing offences against the State, Part II made amendments to the Criminal Procedure Code and the Penal Code, Part III contained general provisions and Part IV set out the miscellaneous provisions.

Two sections of the Act may be cited to show that the Act was intended to be applicable retrospectively to the events in issue, and to them alone.

> 19. The provisions of this Act, other than the provisions of section 17, shall be deemed, for all purposes, to have come into operation on January 1, 1962:
>
> Provided, however, that the provisions of Part I of this Act shall be limited in its application to any offence against the State alleged to have been committed on or about January 27, 1962 or any matter, act, or thing connected therewith or incidental thereto.
>
> 21. The preceding provisions of this Act, save and except Part I and section 17, shall cease to be operative after the conclusion of all legal proceedings connected with or incidental to any offence against the State committed on or about 27th January, 1962, or from 1 year after the date of commencement of this Act, whichever is later, provided that the Senate and the House of Representatives may by resolution setting out the grounds therefor extend the operation of this Act from time to time for further periods not exceeding one year at a time.

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17. Long Title to Act No. 1 of 1962.

The cumulative effect of these two provisions was to make section 17[18] the only exception to the retroactivity of the provisions of Act No. 1 of 1962. The provisions relating to arrest and detention were to be applicable only in respect of the alleged coup attempt, whereas the other provisions, which were designed to be confined to the proceedings arising from the coup, could, by a resolution of both the Houses of Parliament, be extended beyond the conclusion of the proceedings. However, in effect the whole Act was applicable only to the alleged coup and the proceedings arising therefrom.

Part I of the Act legalised the arrest and detention of the defendants. Section 2 allowed arrest without a warrant for the offence of waging war against the Queen, whereas under the previously existing law a warrant had been necessary. Certain rules of general law--that an arrested person must without unreasonable delay be taken or sent before a Magistrate,[19] that if he is arrested without a warrant the reasonable period shall not exceed twenty-four hours[20] and that the police should report the arrest to the Magistrate's Court[21]--were superseded and the impugned Act

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18. This section provided for the addition of two more judges to the Supreme Court on such date as the Minister might appoint.

19. Criminal Procedure Code, Ordinance No. 15 of 1898 (L.E.C., cap. 20), sec. 36.

20. Ibid., sec. 37.

21. Ibid., sec. 38.

legalised the detention for sixty days of any person having committed offences against the State, but the fact of his having been arrested had to be notified to the Magistrate's Court.[22]

Section 115 of the Penal Code dealing with offences against the State was widened to include conspiring to overthrow otherwise than by lawful means the Government of Ceylon,[23] in an attempt to embrace certain acts attributed to the defendants within the scope of section 115 of the Penal Code.[24] Not only was the scope of the offence enlarged but the punishment therefor was enhanced. Previously the Court could impose a period of imprisonment of either description up to a maximum of 20 years and a fine, under section 115 of the Penal Code. Act No. 1 of 1962 prescribed a period of not less than 10 years and not more than 20 years and a compulsory forfeiture of all property.[25]

The impugned Act effected changes in the law of evidence too. The Evidence Ordinance[26] provides that no confession made to a police officer shall be proved in evidence as against a person accused of any offence;[27] that no confession made by an accused person in the custody of a

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22. Act No. 1 of 1962, sec. 2(2).

23. Ibid., sec. 6(2) (a).

24. See The Queen v. Liyanage (1963) 65 N.L.R. 73 at p. 80 and Liyanage v. The Queen /1966/ 1 All E.R. 650 at p. 653; (1965) 68 N.L.R. 265 at p. 275.

25. Supra note 23.

26. Ordinance No. 14 of 1895, (L.E.C. cap. 14).

27. Ibid., sec. 25(1).

police officer shall be proved against him unless made in the immediate presence of a Magistrate;[28] and that a confession made by one of several co-defendants shall not be used against the other.[29] The Criminal Procedure Code excludes from admission all statements to a police officer in the course of an investigation.[30]

These protections were removed by the impugned Act in respect of offences against State,[31] which allowed statements made in the custody of a police officer to be admitted provided the police officer was not below the rank of assistant superintendent.[32] Deviating from the general practice[33] which requires the prosecution to prove a confession to be voluntary, Act No. 1 of 1962 laid on the accused the burden of proving that a confessional statement made by him was not voluntary.[34]

Section 12(2) provided that:

> In the case of an offence against the State, a statement made by any person which may be proved under subsection (1) of this section /i.e., whether or not in the custody of a police officer/ as against himself may be proved as against any other person jointly charged with such person if, but only if, such statement is corroborated in material particulars by evidence other than a statement proved under that subsection.

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28. Ibid., sec. 26(1).

29. Ibid., sec. 30.

30. Ordinance No. 15 of 1898 (L.E.C., cap. 20), sec. 122(3).

31. Act No. 1 of 1962 sec. 12(4) and 12(5).

32. Ibid., sec. 12(1).

33. See for instance The Queen v. Gnanaseeha Thero (1968) 73 N.L.R. 154 at p. 161.

34. Supra note 32 sec. 12(3).

The Attorney-General was empowered to grant a conditional pardon to any accomplice before or at any stage during the trial, with a view to obtaining his evidence.[35] This section is wider than the generally applicable provision, section 284 of the Criminal Procedure Code, in that under the latter a pardon may be granted only to an accused person and 'at any time after commitment but before the judgment is pronounced'. Again, the latter provision was applicable only where a non-summary proceeding had been held.

The mode of the trial for the offences in question was changed by bringing them within the scope of section 440 A of the Criminal Procedure Code which empowered the Minister to direct that the defendants be tried by three Judges of the Supreme Court at Bar without a jury.[36] Further, the Minister was empowered to nominate the three Judges to preside over the Trial-at-Bar whenever he issued such a direction.[37] The Act took away the right of appeal to the Court of Criminal Appeal in the case of Trials-at-Bar,[38] but the right of appeal to the Privy Council remained unaffected.

We have already seen how the three Judges of the Supreme Court nominated by the Minister to preside over the Trial-at-Bar upheld the preliminary objection to their jurisdiction.[39] The Court, however, did not discharge the accused. Act No. 1 of 1962 was thereafter amended by Act No. 31 of the same year.

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35. Ibid., sec. 11. 36. Ibid., sec. 4.
37. Ibid., sec. 9. 38. Ibid., sec. 15.
39. Supra pp. 233-44.

The Trial-at-Bar held under the provisions of Act No. 1 of 1962 as amended by Act No. 31 of the same year may now be discussed.

(ii) The Trial-at-Bar No. 2 of 1962

The first three of the four Orders[1] made by the Supreme Court during the Trial-at-Bar No. 2 of 1962 in The Queen v. Liyanage dealt with certain objections to the propriety of the proceedings.

One of the objections was that the Parliament had no power to withdraw the first information filed by the Attorney-General under Act No. 1 of 1962 and accordingly when the Attorney-General exhibited an information on the 21st November, 1962 acting under Act No. 31 of 1962 there came to be pending before the Supreme Court two informations. It was held that section 6 of Act No. 31 of 1962 effectively rendered null and void the first information and the Minister's nomination of the Bench. The Court held, further, that since the first Bench did not exercise judicial power in the sense of conducting a judicial proceeding, Parliament could not be said to have interfered with any judicial act.[2] Even if the first information had not been withdrawn the only plea available to the accused was one of protection against double jeopardy. This plea could not, however, be set up successfully since no order of acquittal or conviction had been made.

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1. Reported in (1963) 65 N.L.R. 73; (1963) 65 N.L.R. 337 and (1965) 67 N.L.R. 193.

2. The Queen v. Liyanage (1963) 65 N.L.R. 73, at p. 78.

The second objection related to the retrospective amendment of section 115 of the Penal Code. It was argued that the third charge against the defendants, based on an offence added to section 115 of the Penal Code by the impugned Act, was invalid. The Court said:[3]

> We share the intense and almost universal aversion to ex post facto laws in the strict sense, that is laws which render unlawful and punishable acts which, at the time of their commission, had not actually been declared to be offences. And we cannot deny that in this instance we have to apply such a law. Indeed, it is remarkable that this particular law has only a retroactive effect; that it is applicable only to an alleged conspiracy in January 1962; and that Parliament has not thought it necessary to provide that a similar conspiracy against the State which may be planned in the future will be punishable by law. Nevertheless it is not for us to judge the necessity for such a law.

The Court which held that the Parliament of Ceylon had the power to pass retrospective laws, rejected the objection to the retroactive amendment of the offence.

The second Order of the Supreme Court in the course of the Trial-at-Bar No. 2 of 1962[4] was in respect of the application made by the defendants requesting copies of statements made by prosecuting witnesses and defendants, copies of documents the prosecution proposed to produce and inspection of documents.

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3. Ibid., at p. 84.

4. The Queen v. Liyanage (1963) 65 N.L.R. 337.

In trials on Information, the Court pointed out, there was no proceeding at all before the information was exhibited, whereas in a trial on indictment non-summary proceedings preceded, so that the accused knew beforehand the nature of evidence there was against him. The Court observed that offences of a more serious nature were tried upon indictments after non-summary proceedings and that only less serious offences were triable summarily in a Magistrates Court.[5]

> It offends our sense of justice that persons should be put on their trial on Capital offences in a summary manner without even knowing what evidence is proposed to be led against them in proof of the charges against them. We are satisfied that they will be hampered in their defence by this mode of trial. An innocent man may find it difficult to vindicate his innocence in such circumstances.
>
> The purpose of the Legislature in providing for trial by Information before the Supreme Court instead of trial on indictment, was clearly and solely to expedite the trial, It cannot be conceived that the Legislature intended in such cases, to deprive the defendants of a fair trial and of a reasonable opportunity to vindicate his innocence, if they are innocent.[6]

'In the interest of justice and with a view to affording the defendants a fair trial'[7] the Supreme Court utilised section 440 A (5) of the Criminal Procedure Code, as enacted by Act No. 31 of 1962, requiring that a Trial-at-Bar should proceed as far as possible in the

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5. Ibid., at p. 338-339.
6. Ibid., at p. 339.
7. Ibid., at p. 341.

manner provided for other trials before the Supreme Court, subject to modifications as might be ordered by the Court, and ordered that the Attorney-General should supply the defendants with copies of all statements of prosecution witnesses and of the defendants and the documents the prosecution proposed to put in evidence.[8]

The effect of this ruling was that the accused persons were given the advantage that accrues to an accused who is tried on indictment. In other words the rigour of the impugned Acts was to some extent mitigated.

The third Order in the course of the 2nd Trial-at-Bar dealt with the unsuccessful application for bail.[9] We now come to the trial proper.

The trial proper[10] commenced on the 3rd June, 1963 and after almost 300 sittings the Court delivered its Order on the 6th April, 1965 with unanimity on every finding. The Court was firm about its attitude:[11]

> To the Courts, which must be free of political bias, treasonable offences are equally heinous, whatever be the complexion of the Government in power or whoever be the offenders.

It must be noted here that the trial proper commenced on the basis that it was within the legislative competence of the Parliament to have passed the two impugned

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8. Ibid.
9. (1963) 65 N.L.R. 289.
10. (1965) 67 N.L.R. 198.
11. Ibid., at p. 424.

Acts of 1962, a finding the Court arrived at an earlier hearing.[12] Consequently much of the Order of the Court deals with various pertinent aspects of substantive and adjective criminal law. These are outside the scope of this work. Certain aspects, however, need mention here.

Firstly, the amendment of section 115 of the Penal Code, which defined offences against the State, was not considered by the Court to be a serious peril to the defendants:

> The third charge, that of conspiring to overthrow the Government, was framed in terms of the retroactive amendment of section 115 of the Penal Code made by the Criminal Law (Special Provisions) Act No. 1 of 1962. This circumstance has not in fact been seriously disadvantageous to the defendants, because we hold in any event that those defendants whom we convict are guilty on the other charges, which do not depend on the amendment. Probably also, the proved conspiracy would have been punishable under other sections of the Code.[13]

Secondly, section 12(2) of Act No. 1 of 1962, which made admissible in evidence as against the other accused an out-of-court statement made by a co-accused falling within the scope of section 12(1), was narrowly construed.

> It is not necessary for us to decide what the true meaning of this provision exactly is. The law has always been that a statement made outside the witness box is inadmissible

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12. See supra pp.274-5 (1963) 65 N.L.R. 73.
13. (1965) 67 N.L.R. 198, at pp. 423-424.

> against anyone except the person making it. Even if it is the statement of a fellow conspirator, it will not be admissible except against the person making it if at the time it was made the conspiracy had come to an end. We do not think that the legislature, in enacting section 12(2), intended to depart from this salutary rule.[14]

In effect the Court acted in disregard of that provision which was gravely prejudicial to the accused. As regards the sworn evidence of the defendants the Court had this to say:[15]

> There is no such thing as a cut-throat defence here, and we consider the evidence of any defendant may be treated in the same way (although with much caution) as that of any other witness who came to the witness stand not from the dock but from the witness room.

Fourthly, the Supreme Court interpreted the section, which laid on the accused the burden of proving that a confession made by him was not voluntary, in favour of the defendants by requiring only the bare minimum evidence to discharge the burden of proof on a balance of probabilities. As a consequence certain confessionary statements were excluded.[16]

Fifthly, the Court, whenever it opted to conduct its proceedings in the absence of any defendant as specially provided by Act No. 10 of 1963, obtained the consent of the absent defendant to the conduct of proceedings in his absence.[17]

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14. Ibid., at p. 205. cf. the earlier view quoted at note 3 supra.

15. Ibid., at p. 206.

16. Ibid., at p. 262.

17. Ibid., at p. 198.

These instances clearly indicate how the Trial Court construed statutes and applied rules of law having the interest of justice as the primary consideration. In the light of these protections it extended to the defendants, the Supreme Court seems to have assumed that they were given as fair a trial as possible within the confines of the specially amended law.

The Court, however, expressed its dissatisfaction with the provision relating to punishment of the offenders:[18]

> But we must draw attention to the fact that the Act of 1962 radically altered ex post facto the punishment to which the defendants are rendered liable. The Act removed the discretion of the court as to the period of the sentence to be imposed, and compels the Court to impose a term of ten years' imprisonment, although we would have wished to differentiate in the matter of sentence between those who organised the conspiracy and those who were induced to join it. It also imposes a compulsory forfeiture of property. These amendments were not merely retroactive; they were also ad hoc, applicable only to the conspiracy which was the subject of the charges we have tried. We are unable to understand this discrimination. To the Courts which must be free from political bias, treasonable offences are equally heinous, whatever be the complexion of the Government in power or whoever be the offenders.

It may be noted in passing that in Hinds v. The Queen,[19] the Privy Council reiterated the principle that the legislature, under a Westminster Model constitution, cannot prescribe the sentence to be imposed in an individual citizen's case.

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18. Ibid., at p. 424.

19. [1976] 1 All E.R. 353 at p. 371, per Lord Diplock.

The Court accordingly imposed on the eleven defendants it found guilty the minimum period of imprisonment it could impose, a period of ten years and compulsory forfeiture of property.[20]

(iii) The Privy Council Decision

The eleven appellants who had all been found guilty by the Supreme Court raised many points which demanded a very extensive consideration of evidence and factual detail. All the appeals, however, shared a common submission that, whatever be the details of fact or evidence, the convictions should be quashed owing to the invalidity of Acts Nos. 1 and 31 of 1962. It was agreed between the parties that if the impugned Acts were invalid the convictions could not be sustained. Their Lordships, therefore, decided that before embarking on an investigation of the facts and evidence they should first decide as a primary point whether the impugned Acts were valid.[1]

Their Lordships examined the provisions contained in the two Acts[2] and came to the conclusion that the Acts were intended to be applicable to the alleged conspiracy alone and therefore ex post facto, ad hoc and ad hominem. Lord Pearce, delivering the opinion of the Privy Council, observed that by the time the proceedings came to an end

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20. Ibid., at p. 424.

1. (1965) 68 N.L.R. 265, at p. 273; [1966] 1 All E.R. 650, at p. 652.

2. see supra p. 267-74.

the Acts would have served their purpose, which appeared to be the fulfilment of the promise implied in the White Paper,[3] namely to impose a deterrent punishment of a severe character on all those guilty of the alleged offences against the State.

The principal contention on behalf of the appellants was that:

> the Acts of 1962 offended against the Constitution in that they amounted to a direction to convict the appellants or to a legislative plan to secure the conviction and severe punishment of the appellants, and thus constituted an unjustifiable assumption of judicial power by the legislature, or an interference with judicial power, which is outside the legislature's competence and is inconsistent with the severance of power between the legislature, executive and judiciary which the Constitution ordains.[4]

The Privy Council was, thus, called upon to decide (a) whether the impugned Acts amounted to a usurpation or infringment of judicial power and (b) if so, whether it was inconsistent with the Constitution which recognised the existence of a separation of powers.

(a) Were the two Acts judicial in nature? The major premise for the Privy Council decision on this aspect clearly appears from the following passage:[5]

> It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by

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3. Quoted supra p. 268.

4. (1965) 68 N.L.R. 265 at p. 278; [1966] All E.R. 650, at p. 655.

5. (1965) 68 N.L.R. 265 at p. 283-4; [1966] 1 All E.R. 650, at p. 659.

> enacting rules relating to evidence. But the Acts of 1962 had no such general intention. They were clearly aimed at particular known individuals who had been named in a White Paper and were in prison awaiting their fate.
> . . .
>
> Such a lack of generality, however, in criminal legislation need not, of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design or restriction, the discretion or judgment of the judiciary in specific proceedings.

It is abundantly clear that the Privy Council was not willing to commit itself to a general exposition of what amounts to a usurpation or infringement of judicial power. The method adopted by the Privy Council was to determine whether the Acts in issue amounted to an exercise of judicial power.

Much emphasis was placed by the Privy Council on the cumulative effect of the relevant statutory provisions, as appears from the following passage:[6]

> The pith and substance of both Acts was a legislative plan ex post facto to secure the conviction and enhance the punishment of those particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their

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6. (1965) 68 N.L.R. 265, at p. 284; [1966] 1 All E.R. 650, at p. 660.

> statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered ex post facto the punishment to be imposed on them. . . . The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences.

It is worth mentioning here that the impugned Acts were attacked before the Supreme Court[7] on the basis that the Parliament of Ceylon could not pass ex post facto laws. This was unacceptable to the Court. The Privy Council too did not think fit to hold otherwise. The Parliament could pass a law not only with retrospective effect, it could also pass ad hoc or ad hominem laws, the Privy Council observed.[8] However, the statutory provisions contained in the two Acts of 1962 were of an exceptional nature so as to constitute a serious inroad into the exclusive province of the judicature. The refusal of the Supreme Court to recognise a limitation on the powers of Parliament, preventing the passage of ex post facto laws, rested on the following reasoning:[9]

> If upon considerations of what may appear to be unjust or inexpedient, we were to read into the Constitution a restriction against ex post facto

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7. (1963) 65 N.L.R. 73.

8. (1965) 68 N.L.R. 265, at p. 284; [1966] 1 All E.R. 650, at p. 659.

9. (1963) 65 N.L.R. 73, at p. 83.

> law which is not expressed therein either directly or by necessary implication, we would be adding to our Constitution, a limitation directly stated in the Constitutions of India, France and the United States, which for good reasons or bad was not stated in our Constitution. That would be to arrogate to the Court the power to legislate.

In contrast to the self-restraint exhibited by the Supreme Court in refusing to read into the Constitution a limitation which the Court held could not be attributed to the Constitution at least as arising by necessary implication, the Privy Council ventured to gather from the Constitution a binding principle which prohibited what have been termed 'legislative judgments'.[10]

How the Supreme Court interpreted laws and applied principles to the best advantage of the defendants, and how this resulted in reducing the severity of the impugned Acts has earlier been referred to.[11] It is unfortunate that the Privy Council did not have occasion to refer to the part played by the Supreme Court. It is respectfully submitted that this is a very pertinent consideration in view of the fact that their Lordships, instead of laying down a general principle, examined whether in that particular instance an injustice was caused to the defendants. On the other hand, it may be argued that the changes made in the law of evidence

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10. 'These acts were legislative judgments; and an exercise of judicial power', per Chase, J., in the Supreme Court of the United States in Calder v. Bull (1789) 3 Dallas U.S.S.C. 386. Cited in Liyanage v. The Queen [1967] 1 All E.R. 650, at p. 660; 68 N.L.R. 265, at p. 285.

11. See supra pp. 276-9.

so as to make admissible evidence which is otherwise inadmissible, and the removal of the judicial discretion as to the degree of punishment to be imposed on a convicted person, were by themselves sufficient to support the conclusion of the Privy Council that the impugned Acts usurped or at least unduly interfered with the administration of justice.

It must also be noted that some of the arguments[12] raised by the Solicitor-General received little attention. He argued that the amendment of section 115 of the Penal Code did not have the effect of making which was innocent before an offence; that it became necessary to empower the Minister to grant a conditional pardon in the absence of a Magisterial inquiry which was necessary under the then existing law to tender such a pardon:[13] that the right of appeal to the Court of Criminal Appeal was taken away as the trial was held without a jury but an adequate right existed in the right of appeal to the Privy Council; and, that although the impugned Acts made admissible certain types of evidence which under the general law were inadmissible, sufficient safeguards were provided.

These arguments, perhaps with the exception of the last, seem to be substantial. As was pointed out earlier, their Lordships could have paid more attention to the way

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12. These arguments are summarised in (1966) 68 N.L.R. 265, at p. 270. See also [1967] A.C. at pp. 269-275.

13. See supra p. 273.

the two Acts in fact affected the particular defendant-appellants rather than viewing the nature of the statutory provisions as an academic exercise. That this omission is not to be easily over-looked is all the more clear in view of the absence of a general test to determine what amounts to usurpation or infringement of judicial power by the legislature.

(b) Did the Constitution of Ceylon prohibit the exercise of judicial power by the Legislature? The affirmative answer to this question given by the Privy Council was founded on the basis that the Constitution of Ceylon embodied the doctrine of the separation of powers and as a consequence that judicial power resided with the judiciary, and with the judiciary alone.

That the Parliament of Ceylon was sovereign, the Privy Council thought, had been well established.[1] The powers of the legislature, however, had to be exercised in accordance with the terms of the Constitution from which the power derived.[2]

The fact that there was no express vesting of judicial power in the Courts, such as in the United States of America or Australia, their Lordships pointed out, was not necessarily decisive. For, in the latter two countries

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1. /1966/ 1 All E.R. 650, at p. 657; 68 N.L.R. 265, at p. 281. Citing Ibralebbe v. Reginam /1964/ 1 All E.R. 251; (1963) 65 N.L.R. 433.

2. Ibid.

the federal courts were introduced in each country by the Constitution which also created the executive and the legislature. 'Unless such courts were created and vested with power by the Constitution they had no existence or power'.[3]

> In Ceylon, however, the position was different. The change of sovereignty did not in itself produce any apparent change in the constituents or the functioning of the judicature. So far as the courts were concerned their work continued unaffected by the new constitution, and the Ordinances under which they functioned remained in force.[4]

The Privy Council traced the history of the judicial system of Ceylon back to the Charter of Justice of 1833. Ordinances which later replaced the Charter had in fact continued the jurisdiction and the procedure of the courts established in 1833. 'There was no compelling need therefore to make any specific reference to the judicial power of the courts when the legislative and executive powers changed hands'.[5]

The Independence Constitution of Ceylon, 1946, did not make provision for the constitution, jurisdiction and the powers of the judiciary. Owing to the fact that an independent judiciary was already in existence. Nevertheless, those who framed the Constitution did not overlook the

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3. Ibid.
4. Ibid.
5. [1966] 1 All E.R. 650, at p. 658; (1965) 68 N.L.R. 265, at p. 282.

importance of securing the independence of the judges and maintaining the dividing line between the judiciary on the one hand and the executive and also the legislature on the other hand, the Privy Council noted.[6]

In the absence of a specific provision which expressly vested judicial power in the judiciary, the Privy Council ventured in search of an implied provision. They noted that the Constitution was 'significantly' divided into parts, variously dealing with the executive, legislature and the judiciary etc. Further, provision had been made with the intention of securing the independence of the judiciary.[7]

Their Lordships made the following observations regarding the constitutional provisions which were intended as safeguards of the independence of the judiciary:[8]

> 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 shall 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.

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6. Ibid., citing The Bribery Commissioner v. Ranasinghe /1964/ 2 All E.R. 785, at p. 787; (1964) 66 N.L.R. 73, at pp. 74-5.

7. Ibid.

8. /1966/ 1 All E.R. 250, at p. 658; (1965) 68 N.L.R. 265, at p. 282.

The conclusion arrived at by the Privy Council that judicial power was exclusively vested in the judiciary, thus, was founded on two factors, namely, (a) that historically judicial power had been exercised by the judiciary alone and (b) that the constitutional provisions which safeguarded the independence of the judiciary were consistent solely with an intention that the historical vesting of judicial power was not to be disturbed.

That in pre-independence Ceylon judicial power resided solely in the judicature, as has been observed earlier,[9] seems not without sufficient ground, at least to the extent that the courts very often asserted their power and sternly resisted any interferences with or control over their functioning. But, as regards the second factor, it has been doubted whether the conclusion drawn was entirely correct.[10] It is an open question whether the conferment of sovereign legislative power on the Parliament of Ceylon did not affect the exclusive vesting of judicial power in the pre-independence period, when Ceylon did not have a sovereign local legislature.

A clear distinction exists between the notion that the judiciary must be independent from undue external influences and the doctrine that the legislature is not

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9. See generally Part I of this thesis.

10. S. A. de Smith, 'The Separation of Powers in a New Dress', (1966) 12 McGill L. J. 491, at p. 494; and Garth Nettheim, 'Legislative Interferences with the Judiciary', The Australian L. J. Vol. 40 (1966) 221-231.

competent to exercise what may be termed, in a given situation, judicial power. The former does not, but the latter inevitably does, depend on a strict application of the doctrine of the separation of powers. Moreover, during the Colonial period when the administration controlled the judiciary to a greater extent than in the post-independence period in Ceylon, the judiciary emphasised over and over again the need for independence in carrying out its duties. And it has been argued that in the Colonial times a separation of powers did not exist, on the basis that there existed then certain tribunals and administrative offices which were entrusted with some judicial functions.[11]

Their Lordships in Liyanage v. The Queen were, however, firm in their conviction that a separation of powers did exist in Ceylon:[12]

> /But in their Lordships' view that decision /The Queen v. Liyanage, (1962) 64 N.L.R. 313/ was correct and there exists a separate power in the judicature which under the constitution as it stands cannot be usurped or infringed by the executive or the legislature.

A distinction, however, may be made between the earlier Supreme Court decision approved by the Privy Council and the Privy Council decision itself. In the former the power of the Minister of Justice, a member of the executive, to nominate judges was in issue whereas in the latter the

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11. See, for instance Tambiah, J., in Walker v. Fry (1966) 68 N.L.R. 73, at p. 104.

12. /1965/ 1 All E.R. 650, at p. 659; (1966) 68 N.L.R. 265, at p. 283.

competence of the legislature itself to exercise judicial power was challenged. It must be noted that certain factors existed in favour of the legislature, namely that it was sovereign and could pass retrospective, ad hoc or ad hominem laws, and, that the Parliament could by an ordinary statute create courts and confer or take away the jurisdiction of the courts. Such powers could not be attributed to the executive branch of the State.

The Privy Council seems to have treated any attempt either by the executive or the legislature to exercise judicial power on an equal footing, owing to the recognition it accorded to the existence of a separation of powers in the Independence Constitution of Ceylon.

(iv) An Assessment of the Liyanage Principle

That the legislature was incompetent to exercise or interfere with judicial functions, as we have seen above, rested not on any specific prohibition contained in the Constitution, but on what the Privy Council regarded as a necessary implication arising from its general structure and its provisions relating to the judiciary. Therefore, the existence of a separation of powers forms part of the ratio decidendi as much as the conclusion that the impugned acts amounted to an erosion of the judicial power does.

Accordingly, the Liyanage Principle may be formulated as follows:

> The existence of a separation of powers is a fundamental feature of the Ceylon (Constitution) Order-in-Council, 1946, and as a result judicial power is exclusively vested in the judiciary.

> A legislative enactment which assumes or interferes with judicial power, such as a legislative judgment, violates those principles which are necessarily implied in the Constitution.

This principle has been severely criticised. It has been said that 'a weighty conclusion was thus drawn from relatively slender constitutional foundations'[1] and that '[t]he more closely the argument of the Board is examined, the more sweeping appear the inferences supporting its conclusions'.[2] But, S. A. de Smith added that '[t]his is not to say that the decision in the instant case is to be deprecated, but rather that the necessity of the implications on which it rests ought to be viewed with a wary scepticism'.[3]

In laying down this principle the Privy Council seems to have given much thought to the desirability of generally preventing undue interferences with judicial power:[4]

> If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly; but that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances; and thus judicial power may be eroded.

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1. Garth Nettheim, op.cit., at 225.

2. S. A. de Smith, "The Separation of Powers in a New Dress", (1966) 12 McGill L. J. 491, at p. 494.

3. Ibid.

4. Liyanage v. The Queen [1966] 1 All E.R. 650, at p. 660; (1965) 68 N.L.R. 265, at p. 285.

This is similar to the caution sounded by Lord Pearce himself in The Bribery Commissioner v. Ranasinghe,[5] that if the term 'judicial officer' was construed to include only judges of the ordinary courts,

> it might be open to the executive to appoint whom they chose to sit on any number of newly created tribunals which might deal with various aspects of the jurisdiction of the ordinary courts and thus, by eroding the Court's jurisdiction, render section 55 valueless.[6]

In Ranasinghe's case, unlike Liyanage's case, the Privy Council sought to sustain the applicability of a clearly defined principle in different factual circumstances; the principle there was that a judicial officer, meaning any person who held a judicial office and not merely the judges of the ordinary courts, should be appointed by the Judicial Service Commission. Further, there existed some general criterion as to what constituted a judicial office. In Liyanage's case, however, there was lacking a general criterion as to what constituted an exercise of judicial power by the legislature. Accordingly, the propriety of relying on the likelihood of future violations of the Constitution as one of the justifications for invalidating the impugned Acts in Liyanage's case seems not entirely beyond question.

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5. [1964] 2 All E.R. 785; (1964) 66 N.L.R. 73.

6. [1964] 2 All E.R. 785, at p. 789; (1964) 66 N.L.R. 73, at p. 76.

One last comment may be made on a remark made by Lord Pearce in Liyanage's case:

> During the argument analogies were naturally sought to be drawn from the British Constitution; but any analogy must be very indirect, and provides no helpful guidance. The British Constitution is unwritten whereas in the case of Ceylon their Lordships have to interpret a written document from which alone the legislature derives its legislative power.[7]

This indicates not merely that one constitution is written and the other unwritten. It also brings to light the fact that a constitution patterned on the 'Westminster Model'[8] may in certain circumstances deviate so much from its model that the model itself becomes irrelevant in the matter of the interpretation of the constitution which is supposedly based on it. The reason for this is not difficult to apprehend: although the British lawyers were committed to the doctrine of the sovereignty of Parliament, the only real control of which remained with the electorate, when it came to the creation of legislatures for newly independent states, they placed limitations on both the legislature and the executive, due to the widespread belief that the inhabitants of the former colonies were not sufficiently mature to use a proper political judgment.

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7. [1966] 1 All E.R. 650, at p. 658; (1965) 68 N.L.R. 265, at p. 282.

8. See generally S. A. de Smith, The New Commonwealth and its Constitutions, (London, 1964) at 77.

Whatever the merits of such a belief, the result of the built-in limitations was that developments were to take place enabling the Privy Council to discern elements in such constitutions which cannot readily be attributed to the English Constitutional jurisprudence.[9]

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9. See also the discussion of Hind's case in chapter 12, Part (3).

The Aftermath of Liyanage v. The Queen

The local response to the creative judicial innovations of the Judicial Committee of the Privy Council in Liyanage's case was a number of cases brought both before the Supreme Court of Ceylon and the Privy Council in an attempt to apply or extend the principles enunciated in that case. None of these attempts met with success. Nevertheless an examination of these cases is not without its rich reward, for they amply illustrate the caution and exactness with which both the Supreme Court and the Privy Council set about their delicate task of pronouncing upon the constitutionality of Acts of Parliament, the bold venture of the Privy Council in Liyanage's case notwithstanding.

The most outstanding of those cases will be reviewed now, classifying them into three categories:

(1) The Kariapper situation;

(2) The Tuckers situation; and

(3) The conceptual difference between judicial power and jurisdiction.

(2) The Kariapper Situation

(i) The Facts and Setting of Kariapper v. Wijesinha[1]

A Commission of Inquiry was appointed in 1959, under the warrant of Governor-General, during the late Mr. Bandaranayake's government, to inquire into, and report upon, allegations of bribery made against certain persons who were

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1. (1966) 68 N.L.R. 529 (S.C.); [1967] 3 All E.R. 485, (1967) 70 N.L.R. 49.

or who had been members of the Senate, the House of Representatives or the State Council.[2] In the report of the Commission, tabled in Parliament in December 1965 during Mrs. Bandaranayake's government, were stated the names of the six persons found by the Commission to be guilty of the charges made against them. Two of these six persons had been elected to the House of Representatives at the General Election held in July 1960, and both relinquished their seats, understandably at the request of their party leadership.[3] However, no formal steps (such as a legislative enactment) were taken by the government to give effect to the findings of the Commission.

It was the coalition government led by the United National Party which came into power at the July 1965 General Election[4] which introduced the Imposition of Civic Disabilities Act,[5] designed to impose civic disabilities on the six persons named in the Commission report. All the political parties acquiesced in the passage of the Bill, and it was passed unanimously except for just one vote against it at the first reading.

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2. The State Council was the Legislative Assembly that existed in Ceylon at the promulgation of the Ceylon (Constitution) Order in Council, 1946.

3. Ceylon Daily News of August 5, 1978, published a collection of extracts from the Hansard directly relevant to this issue.

4. For a stimulating account of the policies of Ceylon between 1948 and 1972, see A. J. Wilson, Politics in Sri Lanka (1972), specially chapter 4.

5. Act No. 14 of 1965.

The Act which applied only to the six persons named by the Commission and listed in the Schedule to the Act had the effect of imposing civic disabilities such as disqualification from being a voter or candidate at a Parliamentary or local government election[6] for a period of seven years from the commencement of the Act,[7] and disqualification for life from being employed as a public servant.[8] Section 7 of the Act, which had the most direct bearing on Kariapper's case, is as follows:

> Where, on the day immediately prior to the relevant date,[9] a person to whom this Act applies was a Senator, or a member of the House of Representatives or of any local authority, his seat as a Senator or such member as the case may be, shall be deemed, for all purposes to have become vacant on that date.

Kariapper, who was not returned at the General Election held in July 1960, and another, both of whom were among the six persons named by the Commission, had been duly elected to the House of Representatives at the July 1965 elections. Both of them belonged to the Sri Lanka Freedom Party which had to cross the floor to lead the opposition, as a result of the General Elections held in 1965. By virtue of section 7 of the Act quoted above, Kariapper and the other member became disqualified from sitting in Parliament. Kariapper applied to the Supreme Court of Ceylon[10] for a writ

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6. Ibid., secs. 2 to 6.
7. November 16, 1965.
8. Sec. 8.
9. i. e., the day of the commencement of the Act. see sec. 11, the interpretation section.
10. Kariapper v. Wijesinha (1966) 68 N.L.R. 529.

of Mandamus against the Clerk to the House of Representatives and his assistant ordering them to recognise him as a Member of Parliament and to pay him his remuneration and allowances which had been withheld from him since the passing of the Act. The Supreme Court, whose decision on this point received the unreserved approbation of the Privy Council,[11] unanimously held that Mandamus was not available to the petitioner on two grounds: namely,

(i) that there was no legal duty on the Clerk of the House to pay the petitioner his remuneration and allowances; and,

(ii) that the Clerk, when he paid Members of Parliament their remuneration and allowances, acted as a servant or agent of Crown and Mandamus did not lie against a servant or agent of Crown to compel him to perform a duty he owed to the Crown.[12]

Inspite of the fact that the action could have been dismissed on the preliminary objection alone, the Supreme Court went on to examine the arguments relating to the alleged unconstitutionality of the Act 'in deference to the arguments'.[13] Similarly the Privy Council thought it proper to deal with the merits of the appeal before considering whether the procedure actually adopted (i.e. an application for a mandate in the nature of Mandamus) was appropriate.[14] This indicates the willingness of both the Supreme Court and the Privy Council

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11. (1967) 70 N.L.R. 49 at p. 64; [1967] 3 All E.R. 485 at 496.

12. (1966) 68 N.L.R. 529 at p. 533.

13. (1966) 68 N.L.R. 529 at p. 535, per Sansoni, J.

14. [1967] 3 All E.R. 485 at p. 496; 70 N.L.R. 49 at p. 64.

to pronounce their considered opinion on matters of great constitutional importance, in appropriate circumstances, notwithstanding the well established rule of constitutional interpretation that a constitutional issue will not be decided if the matter can be disposed of on some other ground.[15]

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15. See Ashwarder v. Tennessee Valley Authority (1936) 297 U.S. 288 at p. 345-48. The judgment of Lord Denning, M. R., in the Court of Appeal decision in Gouriet v. Union of Post Office Workers /1977/ 1 All E.R. 696 (revsd. /1978/ A.C. 435 House of Lords) deserves mention here although it is not strictly relevant. In that case, Lord Denning held, inter alia, that where the Attorney-General had refused his consent to a relator action, his action could be overriden, indirectly, by the court to the extent that if he refused leave in a proper case, the plaintiff could himself apply to the court for a declaration or an injunction, in particular when the proceeding had been taken to enforce the law. Faced with an 'impending breach of the law', his Lordship asked whether courts were 'to stand idly by' when there was involved 'a matter of great constitutional principle' (at p. 702). Although the decision was overruled by the House of Lords, which found certain views of the Court of appeal 'regrettable' (/1978/ A.C. 435 at p. 506), it stands as a telling example of the initiative the Courts are some times willing to show, deviating from long established tradition in a crisis situation involving matters of great constitutional importance. Lord Denning in his recent book asks a very pertinent question: 'Were we wrong to grant that injunction that Saturday Morning?' (The Discipline of Law, 1979, London, Butterworths, at p. 142).

(ii) The Constitutional Issues Raised before the Supreme Court and the Privy Council

As a prelude to a detailed examination of the constitutional issues involved in Kariapper's case, they may first be summarised. Both the Supreme Court and the Privy Council reiterated the position that the Ceylon Parliament could pass ex post facto, ad hoc or ad hominem laws. The argument that the impugned Act amounted to a legislative judgment or an act of attainder was rejected on the grounds, (a) that Parliament neither determined the guilt of the affected persons nor indirectly influenced the inquiry into the allegations, (b) that the imposition of disabilities in the civic life was not a punishment but a mere exercise of the inherent powers of Parliament to regulate its discipline, and, (c) that since the constitutional provisions relating to the judiciary, or any necessary implication arising therefrom, were not unalterable, Parliament could pass a law even if it amounted to an assumption of judicial power provided it satisfied the requirements laid down in section 29 (4), namely, those relating to amendment of the Constitution.

The constitutional issues summarised above will now be examined under the following two heads:

(a) was the impugned Act tantamount to an exercise of judicial power by Parliament; and

(b) could the Independence Constitution be amended by implication?

It must be mentioned that since the decisions of the Supreme Court and the Privy Council have much in common, they will be discussed not separately but together under the above two heads.

(a) Was the Act tantamount to an assumption of judicial power by Parliament?

The primary argument seems to have been that, the acceptance of a bribe being an offence punishable under the Penal Code,[1] the impugned Act, which had as one of its objects the disqualification of a Member of Parliament for acceptance of a bribe, indirectly had the effect of convicting a person whereas there should properly be a conviction by a court of law.[2] If this argument were sound, the impugned Act could have amounted to a blatant usurpation of the judicial power which was vested in the judiciary alone. In order to label the impugned Act as an unwarranted assumption of judicial power, Liyanage v. The Queen[3] was heavily relied upon.

G. P. A. Silva, J., entertained little doubt that Liyanage's case was authority for the proposition that the passing of an act of attainder against a particular person, or of an act instructing a Judge to bring in a verdict of guilt against someone under trial, would patently be usurpations of judicial power. However, the Imposition of Civic Disabilities Act could not be equated with the Criminal Law (Special Provisions) Act, which had been, described by the Privy Council in Liyanage's case a legislative judgment.

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1. Ordinance No. 2 of 1883.
2. (1966) 68 N.L.R. 529 at p. 545 per G. P. A. Silva, J.
3. (1965) 68 N.L.R. 265; [1967] 1 All E.R. 650.
4. (1966) 68 N.L.R. 529 at p. 546-47 per Silva, J., and at p. 536-37 per Sansoni, C.J.

In Liyanage's case, the impugned Acts which were ex post facto had the effect of securing the conviction and enhanced punishment of certain persons who were awaiting trial with the presumption of innocence operating in their favour. But in the instant case, although the impugned Act operated with retrospective effect (a view not shared by the Privy Council which thought that disabilities were imposed prospectively)[5] and applied to certain named individuals, it did not seek to change any substantive or procedural laws, as did the Acts successfully impugned in Liyanage's case, in order to facilitate the conviction of the affected persons. They had been found guilty by a Commission of Inquiry appointed, independently of the impugned Act, at the instance of a previous government. The Commission which, to the satisfaction of both the Supreme Court of Ceylon and the Privy Council, had conducted its proceedings in an unquestionably impartial manner,[6] alone made the declaration of their guilt; Parliament did not modify or qualify the Commission Report to any degree.[7] The fact that the finding of guilt and the imposition of disabilities were carried out under two different governments prompted the Supreme Court to observe that there was obviously lacking a legislative plan

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5. /1967/ 3 All E.R. 485 at p. 492; (1967) 70 N.L.R. 49 at p. 58.

6. (1966) 68 N.L.R. 529 at p. 547 per Silva, J., and at p. 531-32 per Sansoni, C.J. It may safely be assumed that the Privy Council did not disagree with this view in the absence of any contrary comment by their Lordships.

7. Ibid., at p. 547.

directed against the six persons named in the schedule to the Act resulting in their conviction and punishment undermining to that extent the exclusive jurisdiction of the courts.[8]

> When one considers all the qualifications contained in the conclusions arrived at by the Privy Council in /_Liyanage's_/ case it seems to me that their Lordships did not base their decision on one particular fact or circumstance. Like the necessity for the presence of all the links in a chain of circumstances the totality of which goes to prove a case of circumstantial evidence it is the presence of a number of circumstances at the same time in the coup case . . . that made the Privy Council characterise the Acts as legislative judgments. Just as a case of circumstantial evidence would fail owing to the absence of a necessary link in the chain of circumstances, the absence of any one of these essential circumstances may have led the Privy Council to take a different view and to hold the impugned provisions to be _intra vires_ the Constitution. It will therefore be unsafe on the authority of the Privy Council decision to rush to a conclusion that Parliament has enacted a legislative judgment by reason of the mere presence of one or more of the features that are present in the Criminal Law (Special Provisions) Act in such an enactment.[9]

Perhaps, the admirably convincing manner in which the Supreme Court distinguished _Liyanage's case_ prompted the appellant to shift the emphasis from _Liyanage's case_ to certain American cases relating mainly to acts of attainder, in the appeal before the Privy Council. It was argued that, since the appellant's seat was vacated on a ground not found in the Constitution as it stood before the Act came into force,[10] Parliament had in effect passed

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8. _Ibid._, at p. 547 _per_ Silva, J., and at p. 537 _per_ Sansoni, C.J.

9. _Ibid._, at p. 550-51, _per_ Silva, J.

10. /_1967_/ 3 All E.R. 485 at p. 488; 70 N.L.R. 49 at p. 53.

an act of attainder whereby punishment in the nature of civic disabilities was imposed, with retrospective effect, on certain persons. The Privy Council in rebutting this argument adopted the following definition of an act of attainder:

> A bill of attainder is a legislative act which inflicts punishment without a judicial trial. . . . In these cases the legislative body . . . assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence.[11]

Following the decision of the Supreme Court of the United States of America in United States v. Lovett,[12] Sir Douglas Menzies, delivering the opinion of the Privy Council, found two essential elements of an act of attainder; namely, declaration of guilt for an offence specified and imposition of punishment. It was reiterated that 'the deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact'.[13]

The Privy Council pointed out that Parliament made no finding of its own against the affected persons and that the disabilities imposed by the Act lacked the character of punishment. The imposition of disabilities, their Lordships

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11. Cumming v. State of Missouri (1866) 4 Wall. 277 at p. 323.

12. (1945) 328 U. S. 303.

13. Ibid., at p. 323-24. Cited in Kariapper's case at p. 490 (All E.R.) and p. 56 (N.L.R.).

thought, should properly be regarded as an exercise of the inherent power of Parliament to regulate its own internal matters and to maintain discipline among its members. Such powers had been regarded throughout the course of the English history,

> as not strictly judicial but as belonging to the legislature, rather as something essential, or, at any rate, proper for its protection. . . . It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative functions, notwithstanding the fact that considered more theoretically--perhaps one might even say, scientifically--they belong to the judicial sphere.[14]

Both the Supreme Court and the Privy Council concluded that Parliament did not directly or in any indirect manner make any finding of guilt and that the imposition of civic disabilities was effected in the exercise of the special powers of the legislature and did not partake of the exaction of retribution.[15]

Moreover, the acts of bribery relevant to the impugned Act were different from the offences of bribery defined in the Penal Code:

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14. R. v. Richards, Ex parte Fitzpatrick and Browne (1955) 92 C.L.R. 157 at p. 167. Cited by the Supreme Court--68 N.L.R. 529 at p. 538 and by the Privy Council--at p. 491 (All E.R.) and p. 57 (N.L.R.).

15. See, Privy Council decision pp. 490-92 (All E.R.) and 56-59 (N.L.R.), and Supreme Court decision 68 N.L.R. 529 at pp. 536-38 and 547-48.

> /B/ribery among Senators and Members of Parliament is an area where each House by virtue of the Constitution itself exercise a sort of special jurisdiction and a finding by a Commission appointed with the approval of the Senate or the House of Representatives or a Committee thereof will have the same force as an adjudication by a competent Court. What the present Act seeks to achieve is to extend this disqualification to certain persons found guilty of this same offence by a Commission of Inquiry appointed under the Commissions of Inquiry Act.[16]

The cumulative effect of the two decisions in Kariapper's case is that the impugned Act did not amount to an exercise of judicial power by Parliament because (a) the Commission, without any constraints or compulsions,[17] inquired into certain alleged acts (and not penal offences) of bribery and (b) Parliament imposed civic disabilities, however serious, on persons proved to have committed the acts of bribery, in the exercise of its special powers, in order to 'keep the public life clean for the public good'.[18]

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16. (1966) 68 N.L.R. 529 at p. 550. This view is shared by the Privy Council. See /1967/ 3 All E.R. 485 at p. 492; 70 N.L.R. 49 at p. 57 ad.fin.

17. Ibid.

18. /1967/ 3 All E.R. 485 at p. 491.

(b) Could Ceylon Parliament exercise judicial power even with a two thirds majority in the House of Representatives, without first amending the Constitution?

Section 10 of the Imposition of Civic Disabilities Act provided that any provisions of the Act which were inconsistent with any constitutional provision were to be operative notwithstanding such inconsistency as if such inconsistent statutory provisions were contained in an Act for the amendment of the Constitution enacted after compliance with the requirement imposed by the proviso of sub-section (4) of section 29 of the Ceylon (Constitution) Order in Council (namely, the requirement of a two-thirds majority). There was endorsed on the Bill, when it was presented for the Royal assent, the necessary certificate of the speaker that the number of votes cast in favour of it in the House of Representatives amounted to not less than two-thirds of the whole number of the Members of Parliament (including those not present).

It was argued before the Supreme Court that the legislature could not even after compliance with section 29 (4) exercise judicial power which had solely been committed to the judiciary. This argument did not find favour with either of the two presiding judges of the Supreme Court. Sansoni, C.J., having observed that an act of attainder as known in American jurisprudence could be imported into the constitutional jurisprudence of Ceylon through the notion of 'usurpations of judicial power', cautioned that a distinction, however, had always to be drawn between Acts passed in the

ordinary way and those passed under section 29 (4) of the Constitution.[1] Accordingly, the learned Chief Justice remarked that the Legislature was well within its authority when it enacted the impugned Act 'with the necessary two-thirds majority'.[2]

The position is explicitly stated in the judgment of Silva, J. Having referred to the words of Pearce, L.J., in Liyanage's case that 'in so far as any Act passed without recourse to section 29 (4) of the Constitution purports to usurp or infringe the judicial power it is ultra vires',[3] Silva, J., said that 'where an Act is passed after due recourse to section 29 (4) of the Constitution, even though that Act usurps or infringes the judicial power it is intra vires'.[4] For, the powers of the judicature as set down in Part VI of the Constitution were not unalterable.[5]

Counsel for the appellant sought to attack the procedure by which Parliament had passed the impugned Act. The argument was that the proper procedure would have been for Parliament to have amended the Constitution first, empowering Parliament to exercise judicial power, and then to have enacted the objectionable clauses by a separate Act.

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1. (1966) 68 N.L.R. 529 at p. 536.
2. Ibid., at p. 538.
3. Liyanage v. The Queen (1965) 68 N.L.R. 265 at p. 283; /1966/ 1 All E.R. 650 at p. 659.
4. (1966) 68 N.L.R. 529 at p. 548. See also Sansoni, C.J., at p. 538.
5. Ibid.

The proviso to section 29 (4) was to the following effect:

> Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two thirds of the whole number of members of the House (including those not present).

The words 'Bill for the amendment or repeal of any of the provisions of this Order' were sought to be construed as a reference to a Bill which specifically amended or repealed a constitutional provision and not a Bill containing any provision inconsistent with the Constitution. Sansoni, C.J., met this argument by referring to the Privy Council decision in McCawley v. The King[6] which had authoritatively laid down that a Constitution could be amended by implication too. The Ceylon Constitution was 'controlled' in the sense that it could be altered only 'with some special formality'. It was held by the Supreme Court that the only special formality required in Ceylon was that contained in Section 29 (4). Therefore, it was wrong to insist on any additional formalities not expressly mentioned there.[7]

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6. (1920) A.C. 691.

7. (1966) 68 N.L.R. 529 at p. 539-40 per Sansoni, C.J. and 551-52 per Silva, J.

(iii) Concluding Remarks

The Imposition of Civic Disabilities Act, No. 14 of 1965 shared certain features in common with the statute that was successfully impugned in Liyanage v. The Queen. Nevertheless, both the Privy Council and the Supreme Court came to the conclusion that the imposition of civic disabilities on certain persons, who had been found guilty by a Commission of Inquiry of bribery offences, could not be regarded as a legislative judgment. This conclusion was based on the grounds, inter alia, that the Commission, which made the declaration of guilt of the affected persons, was appointed by one government whereas the impugned Act, which imposed civic disabilities on the persons named by the Commission, was enacted by another government and that, although the imposition of civic disabilities might in certain circumstances be regarded as an exercise of judicial power, in the particular circumstances of the case it had to be recognised that Parliament was entitled to exercise certain powers, which are in a strict sense judicial, as incidents of its inherent powers. Another significant factor has been the near unanimity with which the Act had been passed.

It appears that in place of creative law making in Liyanage v. The Queen what we witness in the decisions of the Privy Council and The Supreme Court in Kariapper's case is what is commonly known as 'judicial restraint'.

> It is not for the Court to say that a law passed by two-thirds of the whole number of members of the House does not conduce to peace, order and good government. The Court is not at liberty to declare an Act void because it is said to offend against the spirit of the Constitution though that spirit is not expressed in words. 'It is difficult upon any general principles to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority'.
>
> per Kania, C.J., in Gopalan v. The State of Madras (1950) 63 L.W. 638.[1]

Reference was also made to the oft-quoted words of Sir Owen Dixon highlighting the need for 'strict and complete legalism'.[2]

Kariapper's case also provides an example of the general unwillingness of courts to decide issues which are not directly relevant to the decisions before them. In response to the argument that specific provisions contained in the American Constitution prohibiting the passage of acts of attainder and ex post facto laws were superfluous, in that the general doctrine of separation of powers itself was sufficient to prevent the passage of such laws in that country, Sir Douglas Menzies said that their Lordships were not prepared to express any opinion on the hypothetical question.[3] Nor was he willing to decide whether the impugned Act would fall within the category of acts of attainder in the United States of America, because 'it is unwise in the sphere of constitutional law to go beyond what is necessary for the determination of the case in hand'.[4]

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1. (1966) 68 N.L.R. 529 at p. 537.
2. (1952) 26 Australian L.J., at p. 4.
3. /1967/ 3 All E.R. 485 at p. 490; 70 N.L.R. 49 at p. 55.
4. Ibid., at p. 490 (All E.R.); at p. 55 (N.L.R.).

It is submitted that two factors influenced the two decisions in Kariapper's case. Firstly, since the Act had been passed with near unanimity in the House of Representatives, a judicial decision denying legal validity to the Act would amount to a serious undermining of the deliberate and unanimous action of the representative body. Secondly, a decision to the effect that the Act amounted to a legislative judgment would have had little practical effect, for there was no opposition to the passage of the Bill in Parliament. However the overriding motivation seems to have been the declared adherence to 'positivism' and 'judicial restraint'.

(3) The Tuckers Situation

In Tuckers Ltd. v. Ceylon Mercantile Union,[1] the Supreme Court of Ceylon was called upon to determine the constitutionality of an enactment of a type of which there had been no previous instance in Ceylon. The impugned Act, The Industrial Disputes (Special Provisions) Act, No. 37 of 1968, was enacted in order to remove certain difficulties in the settlement of industrial disputes and other matters under the Industrial Disputes Act which had arisen in consequence of certain decisions made by the Supreme Court and the Privy Council,[3] namely, Walker v. Fry,[4] Moosajees v. Fernando[5] and United Engineering Workers Union v. Devanayagam,[6] and certain cases which had been decided on the basis that Walker v. Fry and Moosajees v. Fernando represented correct laws.

In Walker v. Fry the Supreme Court held that the President of a Labour Tribunal, when he inquired into an application made by a workman, exercised judicial power. In Moosajees v. Fernando the Supreme Court held that an arbitrator and an industrial court also likewise exercised judicial power and therefore that the Act was ultra vires to the extent that these bodies were provided to be appointed or nominated otherwise than by the Judicial Service Commission.

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1. (1970) 73 N.L.R. 313.
2. Ibid., at p. 324.
3. See the Long Title of Act No. 37 of 1968.
4. (1965) 68 N.L.R. 73.
5. (1966) 68 N.L.R. 414.
6. (1967) 69 N.L.R. 289.

This position was reversed when the Privy Council held in Devanayagam's case, overruling the Supreme Court decision in Walker v. Fry, that none of the bodies created by the Industrial Disputes Act for the settlement of industrial disputes consisted of judicial officers.

While the constitutional issue whether section 55(1) of the Independence Constitution applied to the president of a labour tribunal was being judicially considered, Parliament intervened to remove the administrative difficulties which had arisen as a result of the judicial decisions.

In response to the decision in Walker v. Fry, the power to appoint members of labour tribunals was transfered from the Public Service Commission to the Judicial Service Commission.[7]

However, when the opinion of the Privy Council decision was delivered, the resulting position was so complex that Parliament felt obliged to pass the impugned Act by recourse to section 29(4) of the Independence Constitution, which provided that any law amending any constitutional provision had to be passed by a two thirds of the members of the House of Representatives (including those not present).

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7. 'Report of the Commission on Industrial Disputes: Ceylon', Sessional Paper IV of 1970, para. 80.

The difficulties that arose as a result of the conflicting decisions of the Supreme Court and the Privy Council may be stated 'thus':

(a) The decisions of the Supreme Court, which were founded on the basis that the presidents of labour tribunals were invalidly appointed, in keeping with the decision in Walker v. Fry, represented incorrect law. These decisions remained unaffected by the contrary decision given by the Privy Council in Devanayagam's case since they were res adjudicatae. There was no method of agitating the matters which had been incorrectly disposed of in such cases.[8]

(b) The appointments to labour tribunals made by the Judicial Service Commission following the decision in Walker v. Fry could not be sustained after the decision in Devanayagam's case. In fact any award made by a labour tribunal so appointed could have been successfully challenged on the ground that a non-judicial officer could not be appointed by the Judicial Service Commission.

(c) In the light of the decision of the Privy Council in Devanayagam's case to the effect that appointments under the Industrial Disputes Act were not to any Judicial Office, provision had to be made to relieve the Judicial Service Commission from the duty of appointing such non-judicial Officers.

(d) Lastly, the decision in Moosajees v. Fernando, which purported to extend the rule in Walker v. Fry to industrial courts and arbitrators was equally wrong in law. As a result, such decisions which followed Moosajees case were untenable in law.

The Industrial Disputes (Special Provisions) Act No. 37 of 1968 was passed in order to overcome the above difficulties. It declared that all decisions of the Supreme Court which relied on the premise that the presidents of labour tribunals were judicial officers were null and void;[9] that the Public Service Commission should have the power to appoint presidents of labour tribunals;[10] and that any

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8. Tuckers case (1970) 73 N.L.R. 313; at p. 320.
9. Act No. 37 of 1968, sec. 6.
10. Sec. 2(2).

appointments that had been made by the Judicial Service Commission were valid.[11] The impugned Act provided that any decisions of the Supreme Court based on the principle that arbitrators and members of industrial courts were judicial officers were null and void.[12]

The impugned Act undoubtedly sought to nullify certain decisions of the Supreme Court, and, as a result, it was contended that the Act was an exercise of judicial power; for, the nullification of such decisions solely belonged to the Privy Council, the highest appellate court of Ceylon. It was contended that on previous occasions when the legislature had stepped in to correct an erroneous view of the law taken by the courts or to restate the law contrary to the view taken by the courts, care was taken while correcting or restating the law for the future, not to interfere with previous judicial decisions which were found unacceptable to the legislature and which gave occasion to such enactment.[13] Although the legislature had

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11. Ibid.

12. Secs. 4 and 7.

13. For instance Act No. 11 of 1965, which retrospectively validated the appointment of Quazis by the Minister, declared that it did not affect the decision of the Supreme Court in Jailabdeen v. Danina Umma [(1962) 64 N.L.R. 419] which had quashed an order made by a Quazi on the ground that he was a judicial officer and had not been appointed by the Judicial Service Commission. Here, the legislature validated a statutory provision, as an implied amendment to the Constitution, leaving the judicial decision which warranted the enactment undisturbed. See further: The Kandyan Succession Ordinance No. 23 of 1917 necessitated by Mudiyanse v. Appuhamy [(1913) 16 N.L.R. 117] but left unaffected by the Ordinance; and other instances cited by Weeramantry, J., in Tuckers' case, at pp. 324-326.

the indisputable right to alter or redirect the law, judicial decisions which had already been entered, the argument went, were inviolable.

The Supreme Court, in rejecting the above argument, emphasised that it was the duty of the court to look at the substance rather than the form of the impugned Act.[14]

To understand the true nature of the impugned Act some sections may be examined. Section 6 is as follows:

> Where any order of any labour tribunal was subsequently quashed by a relevant decision of the Supreme Court on appeal or on application by way of writ on the ground that the president of such tribunal, not having been validly appointed, had no jurisdiction to make such order, the following provisions shall apply in the case of such appeal or application by way of writ, as the case may be:
>
> (a) such decision of the Supreme Court shall be deemed to have been, and to be, null and void;
>
> (b) such appeal or application by way of writ shall be deemed to be an appeal or application which was not decided by the Supreme Court, but to be an appeal or application made de novo to such court on the relevant date;[15]
>
> (c) the Supreme Court is hereby empowered and authorised, and shall have jurisdiction, to entertain, hear and decide such appeal or application de novo; and
>
> (d) the practice and procedure to be followed by the Supreme Court in entertaining, hearing and deciding such appeal or application de novo shall be as determined by order of the Chief Justice.

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14. Tuckers case, at p. 323 per Tennekoon, J.

15. Relevant date means March 9, 1967. See the interpretation section.

Similar provision was made in section 7 in respect of industrial courts and arbitrators.

Thus, although it appears at first sight that the impugned Act was intended to have the negative effect of nullifying certain decisions of the Supreme Court, the Act had a commendably positive effect too: namely, it enabled the Supreme Court to rehear appeals or applications which had been incorrectly disposed of but which had become res adjudicatae. Accordingly, being far from entertaining an intention to interfere with the exercise of judicial power by the courts, the legislature was bent on removing a technical bar to correcting an error committed by the Supreme Court.

The Act had the salutary effect of empowering the courts to decide the substantive issues involved in the wrongly dismissed cases, and thereby assisting the courts in the discharge of their duties.[16] In fact, the Act is unambiguous that any decision of the Supreme Court based on any ground other than the binding effect of Walker v. Fry was not to be perturbed,[17] the impugned Act did not validate orders of labour tribunals that had been quashed by the Supreme Court in pursuance of Walker v. Fry, but merely facilitated their being re-examined de novo.

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16. See Tuckers case at 319, per Sirimane, J.

17. Ibid., at 318, per Sirimane, J., Act No. 37 of 1968, secs. 2(2), 4(3), and 5(3).

In arriving at the conclusion that the impugned Act did not violate the exclusive vesting of the judicial power of the State in the judiciary, both the Liyanage case and the Kariapper case were referred to. The words of wisdom expressed in Liyanage's case, that, in view of the difficulty of laying down general rules as to what amounts to an exercise of judicial power by the legislature, each case must be decided on its own merits and that the Act must be viewed in its entirety, were acted upon.[18] Tennekoon, J., observed that as in Kariapper's case, Parliament exercised its own disciplinary powers and not judicial power, so in the instant case did the Parliament grant a new jurisdiction to courts and alter the rules relating to precedent and res judicata.[19]

Sirimane, J., and Weeramantri, J., were strongly of the opinion that as a result of The Queen v. Liyanage,[20] Liyanage v. Queen[21] and Kariapper v. Wijesinha[22] it was beyond controversy that the principle of separation of powers was a settled feature of the Ceylon Constitution.[23] Tennekoon, J., on the other hand, merely referred to 'a supposed application of the doctrine of separation of powers'.[24]

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18. Tuckers case, at 317-318 and 331.
19. Ibid., at 321-322.
20. (1962) 64 N.L.R. 331.
21. (1965) 68 N.L.R. 265; [1966] 1 All E.R. 650 (P.C.).
22. (1967) 70 N.L.R. 49; [1967] 3 All E.R. 485.
23. See Tuckers case at p. 316 per Sirimane, J., and at p. 327 per Weeramantri, J.
24. Ibid., at 323.

As was mentioned in the beginning, the impugned Act was passed under section 29(4) of the Independence Constitution. In fact it had been passed unanimously in the House of Representatives.[25] The argument was pressed, as in Kariapper's case, that the legislature could not exercise judicial power even after complying with the procedure prescribed for constitutional amendment. Since the Supreme Court held that the impugned Act did not amount to an exercise of judicial power, this argument was left undecided.[26]

The issue before the Supreme Court in Tuckers case, namely, whether the Legislature could step in to correct an erroneous view of the law laid down in certain judicial decisions in order to overcome certain administrative difficulties created by such judicial decisions, did not as such directly involve any sensitive political controversies. In Kariapper's case, on the other hand, the impugned Act which imposed civic disabilities on certain persons including some Members of Parliament was not devoid of party political implications.[27]

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25. Ibid., at 316.

26. Ibid., at 319 per Sirimane, J., at 324 per Tennekoon, J., and at 331 per Weeramantri, J.

27. See case note on Kariapper v. Wijesinha, (1968) Juridical Review 66, especially at 67.

Judicial activism which eminently characterises the Privy Council decision in Liyanage v. The Queen is evidently lacking in the Supreme Court decision in Tuckers case. For instance, Sirimane, J., said:

> In dealing with this question one must bear in mind that a court should be slow to strike down an Act of Parliament unless there is a clear encroachment on the judicial sphere.[28]

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28. (1970) 73 N.L.R. 313.

(4) The Conceptual Difference between Judicial Power and Jurisdiction

The distinction that the Supreme Court of Ceylon so finely marked between judicial power and jurisdiction halted the vigorous attempts to invalidate two important pieces of legislation, namely, The Rent Restriction (Amendment) Act No. 12 of 1966 and the Conciliation Boards Act No. 10 of 1958. The words of Tambiah, J., succinctly state the principle acted upon in the relevant judicial decisions:

> The power to vest jurisdiction in courts is conferred on the Legislature and could be exercised by an ordinary majority of Parliament. The power to confer jurisdiction also includes the power to take away the jurisdiction conferred on the courts. If, however, the Legislature confers jurisdiction on other tribunals which have to exercise judicial power then it can only be done in the manner contained in the provisions of the Constitution.[1]

The case law under the two relevant Acts will be discussed separately in order to properly appreciate how the above principle was applied in two different sets of circumstances.

(i) The Rent Restriction (Amendment) Act

This Act of 1966 had the principal effect of restricting the grounds on which a landlord could bring an action in a court of law for the ejectment of a tenant

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1. Anthony Naide v. Ceylon Tea Plantations. (1966) 68 N.L.R. 558, at p. 571.

of premises the standard rent of which did not exceed Rs.100. Section 4 of the Act, which purported to make the Act operative retrospectively from the twentieth of July, 1966, further declared that:

> (a) any action which was instituted on or after the date of the commencement of this Act for the ejectment of a tenant from any premises to which the principal Act as amended by this Act applies shall, if such action is pending on the date of commencement of this Act, be deemed at all times to have been and to be null and void;
>
> (b) any appeal preferred to the Supreme Court from any judgment or decree of a court in any such action as is referred to in paragraph (a) and is pending before the Supreme Court on the date of commencement of this Act shall be deemed at all times to have been and to be null and void; and
>
> (c) proceedings shall not be taken for the enforcement of any judgment or decree in any such action as is referred to in paragraph (a), and where such proceedings have begun before the date of commencement of this Act but have not been completed on the date of commencement of this Act, such proceedings shall not be continued.

Objection was taken to this section on the ground that it nullified decrees that had already been entered and that it directed the courts as to how the cases pending before them were to be disposed of: this, it was alleged, was tantamount to a usurpation of the judicial power exclusively vested in the judiciary.

It was rightly held that the Act did not have the effect of nullifying cases which had been finally disposed of; the Act applied only to such cases as were pending before an original or appellate court and to such decisions which were the subject matter of pending enforcement proceedings.

As H. N. G. Fernando, S.P.J., observed, the intention of the legislature was to protect tenants who, on the date of commencement of the Act, were in occupation of premises having a standard rent not exceeding Rs.100 against ejectment except on the grounds specified in the impugned Act. This protection was extended to those tenants, ejectment proceedings against whom were pending, so that their occupancy too received the benevolent assistance of the impugned Act.[1]

It was not argued that the legislature was incompetent partially to abolish the jurisdiction of the civil courts to execute decrees; it was, however, forcefully contended that the abolition of jurisdiction to execute decrees previously entered constituted an improper exercise of, or an interference with, the judicial power of the State, which was exclusively vested in the judiciary.[2]

Unforgetful of the ability of the Parliament of Ceylon to pass retrospective laws, the Supreme Court had no hesitation in rejecting that argument. There existed no similarity between Liyanage v. The Queen[3] and the instant case, the Supreme Court observed. The impugned Act was not ad hominem nor did it disclose a legislative plan to mete out a discriminative punishment.[4] The Act in fact was designed to achieve the salutary object of relieving a class of people who were undergoing hardships.[5]

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1. (1966) 68 N.L.R. 558, at p. 568.
2. Ibid., at p. 569.
3. (1965) 68 N.L.R. 265; [1967] 1 All E.R. 650 (P.C.).
4. (1966) 68 N.L.R. 558, at p. 569.
5. Ibid., at p. 572, per Tambiah, J.

The following observations made by Sansoni, C.J., are representative of the stand taken by the Supreme Court in respect of the distinction that exists between judicial power and jurisdiction:[6]

> The Legislature for its part cannot dictate to the Court how it should decide a dispute. It can, however,mprescribe the conditions that govern the jurisdiction of the Courts, and declare the terms under which a justiciable dispute can or cannot arise, since under our Constitution the jurisdiction of all the Courts is purely statutory. This is not to be confused with an assumption of judicial power. The two concepts are distinct. "Jurisdiction is the authority of a Court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a court exercises when it assumed jurisdiction and hears and decides a case. --See the Commentary on the Constitution of the United States of America (1963 Edition) p. 563.

Anthony Naide v. The Ceylon Tea Plantations Co. Ltd.,[7] is not, however, authority for an unqualified proposition that since the jurisdiction of the courts had been conferred by ordinary enactments the Parliament could take away completely the jurisdiction of the courts, without creating new institutions to replace them. Tambiah, J., said:[8]

> No doubt if there is a legislative plan or design by the Legislature to take away the judicial power conferred on the judicature then such legislation may be ultra vires.

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6. Ibid., at p. 560.
7. (1966) 68 N.L.R. 558.
8. Ibid., at p. 571.

H. N. G. Fernando, S.P.J., entertained some doubt whether the Parliament could by an ordinary enactment, for instance, abolish the jurisdiction of the Supreme Court to issue prerogative writs.[9] He pointed out that section 52 of the Independence Constitution recognised the existence and the jurisdiction of the Supreme Court.[10] The argument seems to be that as long as the Constitution remained unaltered the jurisdiction of the Supreme Court could not be taken away so as to destroy the identity of that court as enshrined in the Constitution. It also flows from the reasoning in this case that since the Constitution recognised the exclusive vesting of judicial power in the judiciary, an ordinary law which completely abolished the jurisdiction of the courts and thereby wound up the judiciary was bound to be unconstitutional.

It is of interest to note how the distinction between the jurisdiction of the Supreme Court on the one hand, and the jurisdiction of the inferior courts on the other hand, was heavily relied on by the Privy Council in the the Jamaican Gun-Court case.[11] There, the Privy Council held that whenever a new court was created by an ordinary statute to exercise the jurisdiction of a type which had previously been allocated to the Supreme Court to the exclusion of the inferior courts, the members of such new court should be appointed in the same manner and entitled to the same security of tenure as the judges of the Supreme Court.

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9. Ibid., at p. 568. 10. Ibid., at p. 570.
11. Hinds v. The Queen [1976] 1 All E.R. 353.

Hinds case may be said to have carried a step further the principles evolved in the judicial power cases in Ceylon, inasmuch as it recognized a distinction between the judicial power of the superior courts and the judicial power belonging to inferior courts.[12]

(ii) The Conciliation Boards Act

The Conciliation Boards Act No. 10 of 1958, which has been considered elsewhere in this work, directed that petty disputes that arise in Conciliation Board areas should first be brought before a Conciliation Board for amicable settlement. An action could not be instituted in a court of law in respect of a dispute or offence covered by the Act unless a certificate was issued by the Chairman of a Conciliation Board that a settlement could not be made by the Board or that the settlement made by the Board had been duly repudiated.

The argument was presented to the Supreme Court that the impugned Act deprived the citizen of his right to invoke the assistance of the judiciary. Alles, J., whose views on this question were not shared by other judges of the Supreme Court who decided the cases arising in this area, firmly asserted that the insistence on a certificate issued by a person appointed by the Executive before judicial proceedings could be initiated was a threat to the independence of the judiciary from legislative and executive control.[1]

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12. See further chapter 12, part (3).

1. Nonahamy v. Halgrat Silva (1970) 73 N.L.R. 217, at p. 223.

The majority opinion, as here represented by H. N. G. Fernando, C.J., was clear:

> . . . if the Board's effort at making peace fails, and if recourse to the judicial power is not avoidable it is the courts alone that can exercise that power.[2]

Accordingly, the Supreme Court authoritatively held that a Conciliation Board did not exercise judicial power.

The Rent Restriction Act had the effect of restricting the grounds on which a land lord could bring an action in a court of law to eject a tenant of certain prescribed premises, whereas the Conciliation Boards Act made the production of the requisite certificate mandatory for the institution of judicial proceedings in respect of certain specified matters. In both the areas the jurisdiction of the courts was affected in a particular area of the law.

It has aptly been said:[3]

> It is conceivable, however, that the argument that where there is a right there must be a remedy should apply, in the sense that where a substantive right exists which is meant to be enforceable there must be access to the courts to facilitate its enforcement.

This lends support to the proposition that, although Parliament had the undoubted power to alter the jurisdiction of courts in certain areas, the jurisdiction of the courts could not have been completely ousted without impinging upon the constitutional vesting of judicial power in the judiciary.

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2. Ibid., at p. 220.

3. C. F. Amerasinghe, Separation, at 232.

(5) Concluding Remarks

In the 'tribunal cases', which are discussed in chapters 5 and 6, the issue was whether judicial power could be exercised by any other than a judicial officer, appointed by the Judicial Service Commission; the substantive principle here being that judicial function should be performed by legally qualified persons whose independence and impartiality is constitutionally guaranteed. The rule that judicial power should be exercised only by judicial officers who are appointed in accordance with the relevant constitutional provisions might itself exclude the exercise of judicial power by the legislature. However, different considerations apply here. In Tribunal cases the central issue can be said to be 'who may be regarded as members of the judiciary?' (or in other words, are they to be appointed and disciplined in a special way?), whereas in the cases, which are discussed in this chapter, the relevant question is 'is the judicial power exclusively vested in the judiciary so that neither the legislature nor the executive shall exercise it?'.

To accept that the judicial power of the State is exclusively vested in the judiciary is to recognise the existence of a separation of legislative, executive and judicial powers. Once the existence of the exclusive vesting of judicial power in the judiciary, together with the separation of powers, was upheld it followed that

in addition to the inability of Parliament to sit as a court of law Parliament also could not indirectly influence the manner in which a particular case was to be disposed of . Parliament could not, in keeping with that principle, exercise any powers which are ancillary to the exercise of judicial power. These observations made in respect of the legislature applied equally to the executive too.

The Ceylon (Constitution) Order in Council, 1946, as amended in 1947, contained only one limitation as to the subject matter for legislation, namely section 29 (2), which was designed to protect minority rights.[1] Otherwise, the legislative competence of the Ceylon Parliament was as ample as could be.[2] The actual effect of the Liyanage Principle is to prescribe another limitation, this time by implication, on the legislative supremacy of the Ceylon Parliament. The majority decision of the Privy Council in Hinds v. The Queen[3], as we shall see later, strongly defends the propriety of implying a separation of powers in a 'Westminster Model Constitution'.[4]

The Liyanage Principle, it is submitted, marks the most significant deviation in a 'Westminster Model

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1. Section 39 of the Constitution, which related to laws dealing with Ceylon Government Stock had ceased to be of any importance.

2. Section 29 is quoted in full at 107-8 and discussed at 107-111 supra.

3. [1976] 1 All E. R. 353 at p. 360.

4. See infra pp. 470-75 (majority decision) and 478-80 (Dissenting Judgment).

Constitution' from the Constitutional system in the United Kingdom, where the traditional theory of the Sovereignty of Parliament precludes the application where of anything like Liyanage's Principle.

> The legislative Supremacy[5] of the British Parliament, as well as being a legal concept, is also the result of political history and is ultimately based on fact, that is, general recognition by the people and the courts. It is therefore at the same time a legal and a political principle.[6]

The fact that the authority of the British Parliament is referable to history whereas in a country having a written constitution based on the 'Westminster Model' the authority of Parliament is that which is derived from the Constitution itself is the only possible explanation for this difference.

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5. The modern tendency is to use the term 'legislative supremacy' in place of 'Sovereignty of Parliament. See for instance O. Hood Phillips, 'Self Limitation by the United Kingdom Parliament', Hastings Constitutional Law Review, Vol. 2, No. 2 (Spring 1975), 443-478. 'If Sovereignty is used merely for legislative competence it is ambiguous and confusing. A better term is legislative supremacy,' at p. 450.

6. O. Hood Phillips, Constitutional and Administrative Law, ed. 6, 1978, at p. 52.

CHAPTER 9

THE JUDICIAL ROLE IN CEYLON 1948-1972

The most outstanding feature of constitutional developments during the period under review is undoubtedly the contribution made by judicial interpretation as an agency of growth. The courts, however, repeatedly asserted that their function was merely that of interpreting the Constitution and not that of law making. The words of Sir Owen Dixon,[1] cited in Kariapper v. Wijesinha[2] are well representative of this view:

> /T/he Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and . . . it has nothing whatever to do with merits or demerits of the measure. . . . There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.

In spite of the reluctance of judges to admit to being law makers, as Roscoe Pound has observed, they evolve law in a creative fashion:

> A process of judicial law making has always gone on and still goes on in all systems of law, no matter how completely in their juristic theory they limit the function of adjudication to the purely mechanical.[3]

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1. Sir Dixon Owen on his appointment as Chief Justice of the High Court of Australia in 1952, reported in (1952) Aus. L.J. 3-5.

2. (1966) 68 N.L.R. 529 at p. 537.

3. Roscoe Pound, The Spirit of the Common Law (1921) p. 172.

Our survey of the 'judicial power cases' clearly indicates how intensive analysis and creative exposition of principles led the courts to uphold as a basic feature of the Independence Constitution of Ceylon the doctrine of separation of powers, at least to the extent of committing judicial power to the judiciary alone, as a matter of necessary implication. Although the evolution of this principle by the courts of Ceylon, reaching its high water mark in Liyanage v. The Queen,[4] has attracted much criticism from academic circles,[5] Lord Diplock in Hinds v. The Queen[6] has more recently gallantly championed the cause of upholding certain constitutional doctrines which are said to be necessary ingredients of a 'Westminster Model Constitution':

> /I_7t is well established as a rule of construction applicable to constitutional instruments under which this governmental structure /namely, one based on the 'Westminster Model'_7 is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable by the legislature, by the executive and by the judicature respectively.[7]

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4. (1965) 68 N.L.R. 265; /1967 1 All E.R. 650.

5. S. A. de Smith, 'The Separation of Powers in a New Dress', (1966) 12 McGill L. J. 491; Garth Nettheim, 'Legislative Interference with the Judiciary', (1966) 40 Australian Law Journal 221-231; S. A. de Smith in (1966) Annual Survey of Commonwealth Law, 57-59.

6. /1967 1 All E.R. 353.

7. Ibid., at p. 359-60.

In the performance of their duty as interpreters of the Constitution, courts seek the assistance of a wide variety of well-established rules of interpretation, as a matter of course. An examination of the types of rules frequently adopted by Ceylon Courts will be of much assistance in understanding the judicial attitude towards the supremacy of Parliament and certain other matters of constitutional importance.

(i) Rules of Interpretation Followed in Ceylon Cases

One of the basic rules of interpretation which have been followed by the Courts of Ceylon seems to be that constitutional issues will be decided only if it is absolutely necessary to do so.[1] Secondly, the courts were inclined to presume the constitutionality of an Act of Parliament until the contrary was proved.[2] It has been recognised that, being general in nature, constitutional provisions must be given a broad interpretation as against a narrow interpretation.[3] Allied to this is the fundamental consideration that a constitution must be interpreted in a generic manner so that it applies to changing circumstances.[4] Alles, J., brings this idea forward very clearly in Peiris v. Perera.[5]

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1. Podiapou v. The Assistant Commissioner of Agrarian Services (1970) 73 N.L.R. 225.

2. The Queen v. Liyanage (1962) 64 N.L.R. 355, citing Federal Commissioner of Taxation v. Munro (1926) 38 C.L.R. 153 at 180: 'Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the expression of the national will' (per Isaacs, J.).

3. Peiris v. Perera (1968) 71 N.L.R. 481 citing Martin v. Hunters Lessees (1861) 1 Wheat 304, at 326.

4. Ibid., citing Maxwell, Interpretation of Statutes (10th ed.), p. 79.

5. Ibid.

> The Constitution was intended not only as a document that was to be efficacious in 1947, but was intended to serve future generations of the subjects of the country under changing conditions. Law is never static and must develop with changing times and it should be the endeavour of all persons interested in the progress of the country to ensure that changing legislation is always in conformity with the provisions of the Constitution. It is for this reason that Chief Justice Marshall in Cohens v. Virginia ((1821) 6 Wheat., 264 at p. 387) remarked that 'a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it'.[6]

Implicit in the above statement is the need for a Constitution to be interpreted as a living institution, so that it suits the ever-changing needs of the society without becoming static and dated. At the same time, in interpreting a Constitution reference must necessarily be made to history and tradition. Tambiah, J., drew attention to this rule in Piyadasa v. The Bribery Commissioner:[7]

> A Constitution must be interpreted by attributing to its words the meaning which they bore at the time of its adoption and in view of the commonly accepted cannons of construction, its history, early and long continued practices under it. Louis Myers v. U.S. (/1926/ 272 U.S. Rep. at 238).

This observation was particularly relevant in the Ceylon context since the type of constitutional development in Ceylon was one of gradual evolution.

The rules of interpretation stated above, which have been followed by the courts of Ceylon, have, undoubtedly, been formulated to ensure that courts will not without compelling

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6. Ibid., at p. 489.
7. (1962) 64 N.L.R. 385, at p. 390.

reason nullify laws enacted by the legislature which, as a basic principle of democracy, is said to represent the will of the electorate. The words of Isaacs, J., in Federal Commissioner of Taxation v. Munro,[8] which have been repeated more than once in Ceylon,[9] succinctly declare the duty of the court:

> It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliament, representing the whole people of Australia, has considered necessary or desirable for the public welfare.

Even in circumstances where a statute appeared to be inconsistent with a constitutional provision, the courts acted on the principle that whenever possible the objectionable clauses should be severed from the innocuous ones, so that only the objectionable portions of the statute were rendered nugatory. Sansoni, C.J., delivering the judgment of the Supreme Court in Senadhira v. The Bribery Commissioner[10] explained the duty of the court:

> It is right that we should preserve as much of the will of Parliament as possible; and so far as that will, as expressed in a statute, is not repugnant to the Constitution, we should uphold those provisions which we consider not to conflict with the Constitution.[11]

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8. (1926) 38 C.L.R. 153, at p. 180.

9. See e.g. The Queen v. Liyanage (1962) 64 N.L.R. 313 at p. 355; Tuckers Ltd., v. Ceylon Mercantile Union (1970) 73 N.L.R. 313, at p. 319; and Peiris v. Perera (1968) 71 N.L.R. 481 at p. 490.

10. (1961) 63 N.L.R. 313.

11. Ibid., at p. 321.

Again, as H. N. G. Fernando, C.J., asserted in Ranasinghe v. The Bribery Commissioner:

> In examining an enactment with reference to any alleged constitutional invalidity, a court must strive to reach a conclusion which will render the will of the Legislature effective, or as effective as possible.[12]

This attitude of the courts--namely that of making the greatest possible allowance, to respect the supremacy of the legislature, as the circumstances permit--is clearly born out by the insistence of the courts that an impugned Act must be viewed as a whole.[13] This rule becomes all the more relevant when a statute, valid upon its face, is alleged to be directed to achieving indirectly something which the legislature has no power to perform directly. Applying this rule to the Ceylon Parliamentary Elections (Amendment) Act, No. 48 of 1949 and the Citizenship Act, No. 18 of 1948, both the Supreme Court[14] and the Privy Council[15] held that those two Acts did not impose any disability on a particular community which had not been imposed on other communities and, accordingly, they were not inconsistent with section 29 (2) of the Ceylon (Constitution) Order in Council, 1946.

> If there was a legislative plan, the plan must be looked at as a whole and when so looked at it is evident in their Lordships' opinion that the legislature did not intend to prevent Indian Tamils from attaining citizenship provided that they were sufficiently connected with the Island.[16]

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13. See foot note 12 below.

12. (1962) 64 N.L.R. 449 at 450, cited with approval in Peiris v. Perera (1968) 71 N.L.R. 481 at p. 493.

14. Mudanayake v. Sivagnanasunderam (1951) 53 N.L.R. 25.

15. Kodakan Pillai v. Mudanayake (1953) 54 N.L.R. 433.

16. Ibid., at p. 439.

On the other hand, in Liyanage v. The Queen[17] the Privy Council detected the existence of a legislative plan in viewing the Criminal Law (Special Provisions) Act,[18] and declared it unconstitutional.

The idea of looking at the actual effect, or the pith and substance, of an impugned Act necessarily imports the need to examine, and whenever possible give effect to, the policy behind such enactment. Certain instances when courts drew heavily on policy considerations have already been referred to in the concluding part of the preceding chapter.[19] Even when the constitutionality of an Act was not in issue, courts have examined the policy behind it so that the legislative intent could accurately be fulfilled.[20] In order to discern the policy background of a legislative enactment, it has been judicially held permissible to make reference to White Papers,[21] Commission Reports[22] and other matters which are extraneous to the legislation itself. To what extent this principle was in conflict with 'strict legalism', Weeramantry, J., left

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17. (1965) 68 N.L.R. 265; /1966/ 1 All E.R. 650.

18. Ibid., at p. 284 (N.L.R.); 660 (All E.R.).

19. See supra pp. 330-32.

20. See e.g. Dias v. Peries (1950) 53 N.L.R. 51 at p. 53; Andiris v. Wanasinghe (1950) 52 N.L.R. 83, specially at p. 86; and Ceylon State Mortgage Bank v. Fernando (1970) 74 N.L.R. 1.

21. Liyanage v. The Queen (1965) 68 N.L.R. 265 at p. 273; /1966/ 1 All E.R. 650 at p. 652.

22. Soulbury Commission Report was referred to in Kodakan Pillai v. Mudanayake (1953) 54 N.L.R. 433 at p. 438-39; Senadhira v. The Bribery Commissioner (1961) 63 N.L.R. 313 at p. 321; and The Queen v. Liyanage (1962) 64 N.L.R. 313 at p. 349.

open in Tuckers Ltd., v. Ceylon Mercantile Union.[23] However, in the light of the judicial pronouncements in favour of examining such documents to shed light on the real legislative intent and policy, Weeramantry, J., firmly asserted that 'it would be legitimate for a court to have regard to such matters'.[24]

One thing is clear. The courts recognised that their duty was to validate as much legislation as was reasonably possible under whatever firmly established rules there were. The rationale for such a course is not difficult to apprehend.

> The high responsibility involved in the process and the fallibility of human judgment combine to make the courts entrusted with the duty of adjudicating upon questions of constitutionality reluctant to refuse to give effect to the expressed will of the legislature.[25]

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23. (1970) 73 N.L.R. 313 at p. 330.

24. Ibid.

25. Wynes, Legislative, Executive and Judicial Powers in Australia (5th ed.), at 80.

(ii) The Judiciary as the Guardian of the Constitution and of Liberty

While recognising the need to preserve the will of the legislature, the judiciary was committed, at the same time, to another and no less important cause, namely, the protection of the rights of the citizen from undue encroachments either by the legislature or the executive. It is this commitment that explains the sternness with which the judiciary safeguarded its independence free from legislative and executive interferences. The words of Blackstone, quoted more than once in the New Law Reports,[1] provide the classic statement of this principle:

> In this distinct and separate existence of the judicial power, in a peculiar body of men, nominated indeed, but not removable at pleasure, by the Crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.[2]

Broadly speaking, a constitution prescribes the limits within which the executive and the legislature may operate. Transgressions of such boundaries invariably conflict with the rights of the subject which that constitution protects. Accordingly, being the interpreter of the constitution, the judiciary is also entrusted with the duty of upholding whatever rights which may reasonably be attributed to the citizen.

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1. Senadhira v. The Bribery Commissioner (1961) 63 N.L.R. 313 at p. 317; Piyadasa v. The Bribery Commissioner (1962) 64 N.L.R. 385 at p. 389-90.

2. Blackstone's commentaries Vol. 1 (7th ed.) at 269.

As was pointed out in The Bribery Commissioner v. Ranasinghe[3] 'the court has a duty to see that the Constitution is not infringed and to preserve it inviolate'.

Certain interesting aspects of the performance by the judiciary of its interconnected roles as interpreter of the constitution and legislation, guardian of the Constitution, and 'final bulwark'[4] of the liberty of individual deserve reference here.

Firstly, courts were willing on more than one occasion to overlook technicalities in the interests of justice. In Moosajees v. Fernando[5] the decision of the Supreme Court in Walker v. Fry[6] was altered in order to bring that decision in line with the Privy Council decision in Liyanage v. The Queen.[7] The Bench of Five Judges of the Supreme Court specially convened to decide Moosajees v. Fernando overruled the technical objections raised against reagitating the issues in Walker v. Fry on the ground that the Privy Council decision in Liyanage's case, delivered after the decision in Walker v. Fry, had materially altered the legal position and that it was necessary to bring the decisions of the Supreme Court in line with the decisions of the highest court of Ceylon.

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3. (1964) 66 N.L.R. 75 at p. 78.
4. In re Agnes Nona (1951) 53 N.L.R. 106 at p. 112.
5. (1966) 68 N.L.R. 414.
6. (1965) 68 N.L.R. 73.
7. (1965) 68 N.L.R. 265; [1966] 1 All E.R. 650.

Instances when courts overlooked technical irregularities in the interest of justice abound the Ceylon New Law Reports, in areas not involving constitutional issues. Raju v. Jacob[8] is a fine example. In that case a person who had been sentenced to a term of one year's rigorous imprisonment by the Magistrate applied to the Supreme Court to revise that sentence. The Supreme Court ordered the stay of the execution of the sentence pending the hearing, and, after the hearing, concluded that the sentence had been validly passed. Then there was a delay in taking steps to execute the sentence of imprisonment. The accused pleaded in the instant case that time he had spent in remand, from the time of the staying of the execution ordered by the Supreme Court to his ultimate committal to the prison, must be set off against his term of imprisonment. Statutory provision existed for such a set-off in regard to a period of time spent in respect of an appeal, but none in regard to any time spent on a revision action. Weeramantry, J., held that in the absence of a specific provision, a remedy must be provided by way of drawing an analogy with the provisions relating to appeals:

> I do not think that it would be correct to deny relief to the applicant on the mere technicality that what came before this court was a revision application and not an appeal.[9]

Accordingly, the court remitted a period of time that the court thought was called for by the facts.

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8. (1968) 73 N.L.R. 517.
9. Ibid., at p. 519.

The initiative taken by judges of the Supreme Court in convening a judicial hearing without an application by the affected parties is another interesting feature of the judicial role. In Bandiya v. Rajapaksa[10] the Chief Justice, who had read a newspaper report of a District Court decision, detected that the decision was untenable in law and called on the parties to show cause why it should not be set aside. In the course of the judgment reversing the incorrect decision, which related to an important aspect of election law, the learned Chief Justice explained that he undertook 'the unusual course' of initiating legal proceedings as the case involved a matter of 'public importance'. We may recall here that In re Agnes Nona--a case we have already examined in detail[11] --was also decided by a Supreme Court Judge on his own motion, in the exercise of his statutory power to call and examine the record of any case.

The manner in which the Supreme Court supervised and instructed the inferior courts so that they conducted their proceedings impartially and according to the well established traditions is indicative of how conscious the Supreme Court was of the functions and duties of courts. Although a thorough account of this aspect falls outside a work of this nature, the following words of wisdom, addressed to a magistrate in Narthupana Tea and Rubber Estates Ltd., v. Perera, at least, must be quoted:[12]

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10. (1967) 69 N.L.R. 508.
11. See supra pp. 251-256.
12. (1962) 66 N.L.R. 135, at p. 138.

> Precisely because judicial power is unfettered, judicial responsibility should be discharged with finer conscience and humility than that of any other agency of Government.

How the courts went to great lengths to ensure that administrative officers whose decisions materially affected the rights of the subject, but who did not come within the definition of a 'judicial officer', performed their functions in keeping with justice and fairness is another aspect of the judicial role which cannot be discussed in detail here. However, the discussion of arbitration under the Co-operative Societies Ordinance in Chapter 6 provides ample evidence of this judicial attitude.[13] Moreover, there is already a rich literature on this aspect.[14]

Discharging its duty as guardian of the citizen's rights, the Supreme Court rightly assumed that it was its inescapable duty to ensure that the police did not encroach upon such rights. Allied to this in a broad sense is the manner in which the judiciary assumed supervision over the functioning of the Attorney-General's Department in matters affecting legally protected rights of the subject. This kind of supervision--supervision in a very general and broad sense --was all the more important because the Constitution of Ceylon did not contain a Bill of Fundamental Rights, unlike the more recent constitutions on the Westminster Model.[15]

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13. See supra pp. 209-12.

14. See generally, J. A. L. Cooray, Constitutional and Administrative Law of Sri Lanka (1973), Cap. 19.

15. See Hinds v. The Queen [1976] 1 All E.R. 353. at p. 360.

In The Queen v. Gnanaseeha Thero and Others,[16] a case where the court was concerned with the propriety of the recording of statements, under section 134 of the Criminal Procedure Code, by a magistrate, the three Judges of the Supreme Court who presided at the Trial-at-Bar made certain observations, by way of obiter dictum, in regard to the detention under the Emergency Regulations of certain accused persons without serving on them the detention orders. Three accused persons had been arrested without a warrant and the fourth had been arrested by a police officer armed with a warrant, which, however, had not been served on the arrested person, nor was he informed of the existence of the warrant. The Supreme Court observed that since the accused persons had not committed an offence for which they could be arrested without a warrant under the Criminal Procedure Code, their arrest and detention was illegal inasmuch as detention orders had not been served on them, and that the service of detention orders some time after their arrest did not legalise their detention until the orders were served on them. Although this illegality 'did not have a significant bearing' on the issue before it,[17] the Supreme Court expressed its considered opinion on this matter:

> The liberty of the subject is a sacred right that courts of law have to safeguard and the least that a police officer who interferes with that right can do is to inform a person arrested of the reason therefor and no court should countenance a police officer acting in contravention of that requirement.[18]

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16. (1968) 73 N.L.R. 154.
17. Ibid., at p. 171.
18. Ibid., at p. 170.

The Supreme Court which examined, in determining whether the confessions in issue had been made voluntarily, the manner in which the police had conducted its investigations and interrogations, disapproved strongly of certain methods of interrogation adopted by police officers.

Seneviratne v. The Attorney General[19] is also relevant here. Examining an application to quash a finding made by a Magistrate at the conclusion of an inquest into the death of a person which occurred during a police interrogation, the Supreme Court disapproved of certain methods 'which our police are not unknown to use in the course of their investigations'.[20] Tennekoon, J., thought it highly improper for the Attorney-General's Department to have provided a Crown Counsel to look after the interests of the police at the inquiry into the death:

> It is hardly necessary to add that the Attorney-General's Department (and its members) should avoid, at the early stages of any death in unusual circumstances, allying itself with any persons who are interested in establishing a particular cause of death; this can only lead to stultifying that department, much to the public disadvantage, in the performance of any duties that may arise for it under the Criminal Procedure Code in relation to that death. If a police officer or group of police officers wish to have their interests watched at an inquest they should retain private counsel for that purpose.[21]

From the above observations, which stress the necessity for the Attorney General's Department to maintain impartiality so as to win public confidence, we may now proceed

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19. (1968) 71 N.L.R. 439.
20. Ibid., at p. 449.
21. Ibid., at pp. 449-50.

to look at the order of the Supreme Court-at-Bar in The Queen v. Abeysinghe,[22] a case involving the power of the Attorney-General to withdraw a conditional pardon he had previously granted. The two defendants were among those who were suspected of conspiring to stage an unsuccessful coup d'etat in 1962 and had turned witnesses for the State in the Trial-at-Bar following the alleged coup attempt.[23] Each of them was granted on becoming a State witness a pardon by the Attorney-General 'on the condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to that offence and to every other person concerned whether as principal or abettor in the commission thereof'.[24]

Later, the Attorney-General exhibited an information in the Supreme Court charging the two defendants, who in his opinion had violated the condition attached to the pardon, with offences identical to those appearing in the information filed against the twenty four defendants in Liyanage's case. At their Trial-at-Bar it was argued, inter alia, that the Attorney-General did not have an unfettered and non-reviewable discretion in determining whether the grantee of a conditional pardon had failed to fulfill the condition attached to it. The argument went that a conditional pardon could be withdrawn by the Attorney-General only when upon a reference made to the Supreme Court it determines that there has been a breach of the condition.

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22. (1965) 68 N.L.R. 386.

23. See supra pp. 267-8.

24. Criminal Law (Special Provision) Act, No. 1 of 1962, Section 11(1).

The Supreme Court pointed out that there was no express provision which authorised the Attorney-General to launch on a prosecution in the event of a breach of the condition attached to a pardon tendered by him. Nor was there a provision which stated whether the correctness of the Attorney-General's decision was justiciable. Further there existed no known instance of the Attorney-General prosecuting a person for such a breach. Reasoning, therefore, from first principles, the Supreme Court agreed that

> in the absence of any specific provision to the contrary, a court should decide whether there has been a failure by the person pardoned to keep his undertaking, if the two parties are at issue as to whether there has been a breach by one party or not.[25]

Although the determination of the Attorney-General was justiciable, as the Supreme Court held, his authority to prosecute a person who, in his opinion, had committed a breach of the condition was not dependent on a judicial decision preceding such prosecution. Whether the Attorney-General had sufficient reason to make the determination adverse to the pardoned person could properly be decided as a preliminary issue by the court before which such person is ultimately prosecuted.

The Supreme Court had no hesitation in rejecting the argument advanced on behalf of the State that the power of the Attorney-General to tender a conditional pardon, in fact, was in the nature of a prerogative power and, thus, beyond review by a court of law. Having observed that, unlike the power of the Governor-General to grant a pardon which he

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25. (1965) 68 N.L.R. 386 at p. 390.

exercised by virtue of the prerogative powers of the Crown, the powers of the Attorney-General were purely statutory, the Supreme Court expressed the following sentiment:

> The courts are the watchdog of the liberty of the subject and have ever to be vigilant against any arbitrary or pretended use of prerogative powers and should be slow to accept any implied powers resting on the prerogative or anything in the nature of a prerogative.[26]

In this case the Supreme Court expressed its reluctance to extend judicial immunity to any acts of the Attorney-General, except those which, by express statutory provision or long established tradition, were beyond judicial scrutiny.[27] This restrictive interpretation of the Attorney-General's powers inevitably resulted, at the other end of the spectrum, in enhancing the freedom of the subject.

Our discussion has so far brought out, through a perusal of case law, whether or not involving constitutional issues, certain patterns of judicial behaviour during the period under review. To summarize them: the courts were faced with two equally important, and not too infrequently conflicting, values, namely, that of giving effect to the legislative intent and that of protecting the rights of the subject as enshrined in the Constitution. In order to reconcile these two interests or to prefer one of them the courts acted in disregard of technical irregularities, paid due attention to policy behind legislation and initiated judicial proceedings on their own motion. In order to protect the freedoms of the subject to the greatest possible extent,

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26. Ibid., at p. 392.
27. Ibid., at pp. 390-91.

especially in the absence of a bill of fundamental rights, the Supreme Court was ever vigilant to ensure that inferior courts did not depart from treasured traditions of the judiciary, that administrative officers observed certain minimum standards when their decisions affected human rights and that government agencies, such as the Attorney-General and members of his department and the police, carried out their duties and exercised their powers so as not to conflict with the basic rights that are enjoyed by the subject in a democratic society.

There now remain to be discussed certain difficulties that arose as a result of the exercise of the power of judicial review of the constitutionality of legislation. This discussion will lead to the conclusion that the Republican Constitution of Sri Lanka, 1972 was enacted mainly to redeem the supremacy of the legislature from what has in America been called 'judicial supremacy'.[28]

(iii) Difficulties Connected with Judicial Review

In the absence of a constitutional provision vesting the power of judicial review of legislation in a particular court, the power came to be used not only by the Supreme Court but also by the District Court,[1] and even by administrative officers.[2] If the refusal by administrative officers to give effect to statutory provisions on the ground of their

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28. See Bickel, The Least Dangerous Branch, (1962), specially at pp. 16-17.

1. As in Kodeeswaran v. The Attorney General D.C. Colombo 1026/Z.

2. As by a revising officer in Mudanayake v. Sivagnanasunderam (1951) 53 N.L.R. 25.

unconstitutionality became common practice, government activities could have been subjected to undue delay if not rendered ineffective. Fortunately, perhaps, the only instance where an administrative officer so acted seems to have been that mentioned in Mudanayake v. Sivagnanasunderam.

An inevitable consequence of the assumption of the power of judicial review by the courts was the introduction of an element of uncertainty into the laws of Ceylon. The outstanding example is provided by the Official Language Act, No. 33 of 1956. In The Attorney-General v. Kodeeswaran[3] the Supreme Court was called upon to examine the validity of the decision of the District Court[4] that the Official Language Act was inconsistent with section 29 (2) of the Ceylon (Constitution) Order in Council, 1946. Disposing of the case on the ground that a public servant had no right to sue the Crown for the payment of arrears of salary, the Supreme Court did not consider it necessary to pronounce its opinion on the constitutional issue. When the case came before the Privy Council, it reversed the decision of the Supreme Court on the availability of an action against the Crown in the particular circumstances and sent the case back to the Supreme Court so that full argument could be heard on the validity or otherwise of the impugned Act. Until the Supreme Court had the first opportunity of hearing arguments on the constitutional issue the Privy Council was not willing to give a ruling on it.

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3. (1967) 70 N.L.R. 121.
4. D. C. Colombo 1026/Z.

Meanwhile the United Front under the leadership of Mrs. Bandaranaike, which returned to power with a clear two-thirds majority in the House of Representatives, took measures to implement one of its election pledges, by setting up a Constituent Assembly to draft and adopt a new Constitution, which among other things, would protect legislation from judicial review. These events naturally had the effect of delaying a further decision of the Supreme Court in Kodeeswaran's case, which, as was widely believed, would uphold the decision of the District Court. The unsatisfactory nature of this state of affairs was adverted to by the then Minister of Constitutional Affairs, Dr. Colvin R. de Silva:

> Fifteen years after [its enactment in 1956] the position is that the Official Language Act is under challenge in the Courts, the only judgment by any competent Court in the matter being the judgment of the District Court that the Official Language Act is invalid, and in the meantime, quite rightly, the Government of Ceylon continue to apply the Official Language Act, for the matter is on appeal and therefore the decision is not binding on the Crown. . . . If we have [the power of judicial review of legislation], if the Courts do declare this law invalid . . . the chief work from 1956 will be undone. You will have to restore the egg from the omelette into which it was beaten and cooked.[5]

Uncertainty of law resulting from the exercise of the power of judicial review generates confusion in its most acute form when over a period of time judicial opinion itself becomes divided with regard to the constitutionality of a particular legislative enactment. Although a strict adherence

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5. Constituent Assembly Debate, Vol. 1, 2833-4.

to stare decisis would, in theory, militate against such inconsistent decisions, experience has shown how frequently courts arrive at conclusions clearly contrary to previous authorit by resorting to the devices of overruling, distinguishing and refusal to follow.

An interesting argument was advanced before the Supreme Court in Perera v. Peiris.[6] There it was argued that a previous decision of the Supreme Court holding a particular statutory provision to be unconstitutional should not be reviewed by the Supreme Court to test its correctness. The acceptance of this argument, which, however, was not supported by any authority, would have had the effect of attributing certainty to a decision of the highest Court of original jurisdiction in Ceylon on a matter of the constitutional validity of a statute by ensuring that such decision would not thereafter be departed from. (If this argument were sound, it would have been possible to apply this rule in regard to Privy Council decisions; i.e. the Privy Council would in all circumstances be bound by its previous decisions on matters concerning the constitutionality of a statute).

The Supreme Court, however, did not think that the argument was tenable, at all, in law:

> /That argument/ is contrary to the attitude of the United States Supreme Court, which on several occasions departed from precedent in order to uphold the validity of statutes. It implies that this court must stubbornly adhere to previous error, even if the rule of stare decisis does not prevent review of a former decision. If accepted, the proposition will tend to place the judiciary in a position of obstructive opposition to the Legislature, which is not the position which the judiciary in my understanding occupies under our Constitution.[7]

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6. (1969) 72 N.L.R. 217.
7. Ibid., at pp. 222-23 per H. N. G. Fernando, C.J.

Aside from the difficulties that might arise as a result of the uncertainty of law, which undoubtedly is an inherent characteristic of judicial review of legislation, a number of other difficulties were experienced in Ceylon. One of them arose from the need to make legislative or administrative adjustments in order to bring the law in conformity with a judicial decision declaring some constitutional provision ultra vires. The discussion under the sub-heading The Tuckers Situation, contained in the last chapter, provides the most vivid example of this. There the Parliament had to enact a law (i) nullifying certain judicial decisions, (ii) extending the law stated in a Privy Council decision to a number of Supreme Court decisions which were res adjudicatae, (iii) revoking an administrative regulation which proved untenable in the light of the Privy Council decision and (iv) legalising certain appointments made under the authority of the revoked regulation prior to the enactment of the statute.

When a statutory provision was declared unconstitutional by the courts, Parliament could, in order to ensure the uninterrupted operation of the statute, either pass such statutory provision as a constitutional amendment or remove the inconsistency by altering or repealing the objectionable provision with a simple majority. Generally, it was not without a long delay that the legislature intervened to put things right. The interval between the judicial decision and the legislative enactment formed the basis of certain interesting, though unsuccessful, arguments.

Karunaratne v. The Queen[8] provides a telling example. There the accused had allegedly committed a bribery offence in 1960 when Bribery Tribunals were in operation. In response to the decisions of the Supreme Court as approved by the Privy Council that members of Bribery Tribunals had not been validly appointed, Parliament passed a law in 1965 transfering the jurisdiction conferred on Bribery Tribunals back to the District Court. When the accused was prosecuted before the District Court after the passage of the Bribery (Amendment) Act, No. 2 of 1965, he took objection to the jurisdiction of the court on two accounts.

First, he argued that an offence consists of two indispensable elements namely, (a) an act or omission punishable (b) with a certain penalty. It was argued that, since the amending Act enhanced the punishment that might be imposed on an accused for an offence which previously attracted a lesser punishment, what obtained under the amending Act was a new offence. Without any hesitation, the Supreme Court rejected this argument, recollecting that at the time when capital punishment had been temporarily suspended the offence of murder did not become a lesser or different offence.[9] Thus, even after the enactment of the amending Act, the accused stood charged with the same offence that he might have been charged with at the time of its commission.

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8. (1973) 76 N.L.R. 121.
9. Ibid., at p. 122.

Further advancing on his first argument the accused contended that a particular act or omission constituted an offence only when, at the time of its commission, there existed machinery to enforce the prescribed punishment. Since, from the time of creating Bribery Tribunals in 1958 there was not such machinery (the Bribery Tribunals with exclusive jurisdiction having been declared invalidly constituted) the act for which the accused stood charged could not be regarded as an offence. This argument too did not convince the Supreme Court. As T. S. Fernando, J., had observed in Karunaratne v. The Queen,[10] a previous case where the identical arguments had been raised unsuccessfully:

> By an offence is meant an act or omission made punishable by law. This much is the substantive part of the law and must not be confused with its procedural part. That the machinery devised for trial and punishment is illegal, unconstitutional or otherwise defective cannot have the effect of rendering such act or omission not an offence.[11]

The above decision received the unreserved approbation of the Divisional Bench of Three Judges of the Supreme Court in Karunaratne v. The Queen,[12] where G. P. A. de Silva, J., added the following explanation:

> The provision that offences were to be tried before a tribunal could well have been implemented if the tribunal was appointed by the proper authority in terms of the constitution. There was therefore in law a Court or Tribunal which could validly take cognisance of the offence of bribery if only it had been properly appointed. In the circumstances, even if the counsel's premise was sound that there would be no offence without a tribunal to try it, the answer to that is that there was a tribunal though the mode of appointment was misconceived.[13]

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10. (1966) 69 N.L.R. 10.
11. Ibid., at p. 14.
12. (1973) 76 N.L.R. 121.
13. Ibid., at pp. 123-24.

The arguments raised before the Supreme Court in the two cases appearing under the same title Karunaratne v. The Queen[14] did not add a real difficulty to those already emanating from judicial review, merely because they were rejected by the court. If such arguments had become acceptable to the courts at a later time the picture would have certainly been different.

Another, but somewhat similar, problem arose in Ismail v. Muthu Maraliya.[15] There the defendant-appellant, against whom the magistrate had made an order for maintenance in favour of the applicant-respondent, contended in appeal before the Supreme Court that the order was a nullity because the Magistrate had no jurisdiction in view of section 48 of the Marriage and Divorce (Muslim) Act, No. 13 of 1951, which was to the following effect:

> Sec. 48. Subject to any provision in that behalf contained in this Act, the jurisdiction exercisable by a Quazi under section 47 shall be exclusive and any matter falling within that jurisdiction shall not be tried or inquired into by any other court or tribunal whatsoever.

The Supreme Court observed that the matter in dispute between the parties, namely, a claim for maintenance, fell within section 47 (1) (b) and that section 48, which conferred exclusive jurisdiction in respect of matters falling within section 47 on Quazies, was entirely valid before law. However, as had been held in Jailabdeen v. Danina Umma,[16] the provision relating to the manner of the appointment of Quazies was unconstitutional.

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14. (1966) 69 N.L.R. 10; (1973) 76 N.L.R. 121.
15. (1963) 65 N.L.R. 431.
16. (1962) 64 N.L.R. 419.

> The mere fact that the appointment of any particular quazi is void does not invalidate the jurisdiction conferred by our legislature upon the office of Quazi created by it and upon the valid creation of the exclusive jurisdiction given in certain matters. That question of exclusive jurisdiction has nothing to do with the validity of any particular appointment.[17]

Accordingly, the Supreme Court held that the order made by the magistrate was a nullity inasmuch as the subject matter of the order fell within the exclusive jurisdiction of the quazies. The resulting position was that, until the legislature intervened to regularise the method of appointing quazies there was, in effect, no tribunal which could inquire into matters which were reserved exclusively for the determination of quazies.

This unsatisfactory state of affairs was brought to an end in 1965, three years after the decision in Jailabdeen v. Danina Umma, with the passage of Act No. 1 of 1965, which vested in the Judicial Service Commission the power of appointing quazies, who were held to be judicial officers in Jailabdeen v. Danina Umma.

Ismail v. Muthu Maraliya clearly indicates that the exercise by the courts of the power of judicial review resulted in disadvantages also to individuals, as it did to Parliament, such as in relation to the Official Language Act. Inasmuch as judicial review has its inescapable disadvantages, it also served the worthy cause of being the most significant method by which the courts safeguarded the liberty of the subject. The inevitable question is: did the disadvantages outweigh the merits of judicial review?

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17. (1963) 65 N.L.R. 431 at p. 432.

It is only in respect of the independence of judiciary that the courts of Ceylon used its power of judicial review to nullify statutes. These cases, although they undermined the wishes of the legislature to the extent that certain statutory provisions were declared invalid, did in fact seek to ensure that a fair and impartial mode of settling disputes and of administering criminal, as well as civil, justice was available to the ordinary citizen. This no doubt is a salutary object to those who wish to see the powers of the legislature and the executive curbed in order to uphold what are often referred to as fundamental or inalienable rights of the subject.

It could, however, be argued, as was in fact done by those who favoured the enactment of a new Constitution in 1972, that the conferment of the power of judicial review on the courts was to create a third Chamber, to replace the supremacy of Parliament with judicial supremacy. These arguments were fortified by reference to the case law relating to the Official Language Act, as we have already noted. Moreover, there was no guarantee that the courts would not venture to render nugatory important social legislation. So, at last, in 1972 the courts were expressly denied the power to declare invalid any law that had been passed by the legislature. This was a significant feature of the Republican Constitution, 1972, and one which has not been abandoned with the adoption of the Presidential Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

PART III

THE REPUBLICAN ERA

CHAPTER 10

THE REPUBLICAN CONSTITUTION OF 1972: A COMPLETE SEVERANCE FROM THE PAST?

In the Sri Lanka Press Council Bill decision, the Constitutional Court stated that the Constitution of Sri Lanka, 1972 involved a complete severance from the past or from any preceding constitution.[1] As the Minister of Constitutional Affairs was quoted to have said in an interview he gave to the press:

> This is not a matter of tinkering with some Constitution. Nor is it a matter of constructing a new superstructure on an existing foundation. We are engaged in the task of laying a new foundation for a new building which the people of this country will occupy.[2]

In this Chapter an attempt will be made to find out to what extent the then existing Constitution underwent change. It will be shown that as to its method of creation the Constitution was undoubtedly autochthonous. After a brief discussion of the major features of the Constitution we will discuss the extent to which it can be regarded as an autochthonous constitution in substance.

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1. Decisions of the Constitutional Court of Sri Lanka, Vol. I (1973), p. 5.

2. Ibid.

(1) An Autochthonous Constitution

Justice will not be done if reference is not made to what Wheare had to say about 'autochthony'.[1]

> For some members of the Commonwealth it is not enough to be able to say that they enjoy a system of government which is in no way subordinate to the government of the United Kingdom. They wish to be able to say that their Constitution has the force of law and, if necessary, of supreme law within their territory through its own native authority and not because it was enacted or authorised by the law making authorities of the United Kingdom: that is, so to speak 'home-grown', sprung from their native soil, and not imported from the United Kingdom. They assert not the principle of autonomy only: they assert also a principle of something stronger, of self-sufficiency, of constitutional autarky or, to use a less familiar but accurate word, a principle of constitutional autochthony, of being Constitutionally rooted in their own native soil.'

The foregoing, and oft-quoted, words of K. C. Wheare are self-explanatory and need no further comment here. We may now examine whether the Republican Constitution of Sri Lanka was an autochthonous Constitution in relation to the method of its adoption.

> We seek your mandate to permit the members of Parliament you elect to function simultaneously as a Constituent Assembly to draft, adopt and operate a new Constitution. This Constitution will declare Ceylon to be a free, sovereign and independent Republic pledged to realise the objectives of a socialist democracy; and it will also secure fundamental rights and freedoms to all citizens.

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1. Wheare, K. C., The Constitutional Structure of the Commonwealth, (1960, Clarendon Press, Oxford) at p. 89. See for the origin and meaning of 'autochthony', V. O. Achimu, Autochthony: An Aspect of Constitutionalism in Certain African Countries (London, Ph.D., 1972).

The foregoing clause contained in the election manifesto of the United Front led by Mrs. Sirimavo Bandaranaike, which won 115 out of the 151 seats at the general election of May 27, 1970, holds the key to the legal and political source of the Constitution of the Republic of Sri Lanka, 1972.

Pursuant to the mandate sought from the electorate and the election pledge given by the United Front to enact a new Constitution, The Prime Minister, Mrs. Sirimavo Bandaranaike, extended an invitation to all the 157 members[2] of the House of Representatives to participate in a meeting of the members of Parliament at the Navarangahala[3] on July 19, 1970 in order to function as a Constituent Assembly in the exercise of the clear mandate given by the people by democratically casting their vote. At this meeting Mrs. Bandaranaike explained why the meeting was convened outside the House of Representatives:[4]

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2. The communication is dated July 11, 1970. The House of Representatives consisted of 151 elected members and 6 members appointed by the Governor-General. (See Chapter 4).

3. This is an auditorium cum Concert Hall.

4. The proceedings of a meeting of the Members of the House of Representatives at the Navarangahala, Royal Junior School, Colombo, on the 19th day of July, 1970, at 11 a.m. and continued in the House of Representatives at 3 p.m.

> We have met here in this hall to emphasise the fact that this is a meeting of the Members of the House Representatives as representatives of the people of Sri Lanka, but not a meeting of the House of Representatives. We have adopted this course to underline the fact that both the Constituent Assembly which we have met to establish, and the Constitution which the Constituent Assembly will draft, enact and establish, will derive their authority from the people of Sri Lanka and not from the power and authority assumed and exercised by the British Crown and Parliament in establishing the present Constitution they gave us.[4a]

At this meeting, the Prime Minister moved the resolution to set up the Constituent Assembly, which motion was carried unanimously on July 21, 1970.[5]

The Constituent Assembly as a matter of priority debated, and on August 11, 1970 unanimously adopted, the Standing Orders of the Constituent Assembly.[6] Acting under Standing Order No. 1, the President of the Assembly[7] nominated 15 members, including the Prime Minister and the Minister of Constitutional Affairs, after consulting the Prime Minister, to serve on the Steering and Subjects Committee.

4a. The Senate, the Upper House of Parliament, had not been officially informed of the meeting at Navarangahala since it was not a meeting of the House of Representatives. See Senate Official Report, August 5, 1970.

5. Ibid., July 21, 1970 column 508.

6. Constituent Assembly : Official Report, Volume 1 No. 2, August 11, 1970, at column 133.

7. The Speaker of the House of Representative had been elected unanimously as the President of the Constituent Assembly on July 19, 1970.

This committee was entrusted with the serious task of preparing the basic resolutions. On January 17, 1971 the Minister of Constitutional Affairs placed before the Committee the draft basic resolutions[8] which were subsequently adopted by the Committee. The delay in submitting the draft, the Minister explained, was mainly due to the fact that the opportunity had to be made available to the public to voice their opinions which then received the careful consideration of the Committee.[9]

On March 14, 1971 commenced the debate in the Constituent Assembly on the Basic Resolutions adopted by the Steering and Subjects Committee. The Constituent Assembly completed its debate on the Basic Resolutions on July 10, 1971. The Minister of Constitutional Affairs explained on that day that the next stage was the preparation of the first draft of the Constitution. The Steering and Subjects Committee would finalize that draft to be in accordance with the basic principles the constituent Assembly had adopted. The draft would then be placed before the Constituent Assembly.[10] If it be resolved by the National State Assembly that the draft was in accordance with the Basic Resolutions adopted by it, it would divide itself into a number of committees.

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8. The Minister so placed the draft at the request of the Committee to prepare and place before it such a draft. See Constituent Assembly: Official Report, Vol. 1, No. 8, 22.1.1971, col. 162.

9. Ibid., at colomns 162-3.

10. Constituent Assembly: Official Report, Vol. 1, No. 35, col. 2995. See also the Standing Orders of the Constituent Assembly.

Each such Committee would examine a particular part of the Constitution. Committees were also required at this stage to receive written memoranda and oral evidence from the public. Then the draft Constitution would be finalized by the Steering and Subjects Committee on the lines suggested by the Committees. This draft would be open to a clause by clause examination, then, by the Constituent Assembly.[11]

The draft Constitution, which had been prepared by the Minister of Constitutional Affairs at the invitation of the Steering and Subjects Committee, and later approved by it, was presented before the Constituent Assembly on December 29, 1971. This draft was approved unanimously to be in accordance with the Basic Resolutions on January 3, 1972. On the same day the Constituent Assembly agreed to the motion put by the Minister of Constitutional Affairs that the Assembly be divided up into eleven committees, each to consider that part of the Draft Constitution which would be assigned to it in the motion.[12] Each Committee considered the part assigned to it and prepared its report with or without amendments. The eleven committee reports were then forwarded to the Steering and Subjects Committee. These reports and certain recommendations of the Minister of Constitutional Affairs were considered by the Steering and Subjects Committee which approved the Draft Constitution in a revised form. On May 8, 1972 the revised draft was placed before the Constituent Assembly sitting as a committee of the whole Assembly

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11. Ibid., coln. 2995-7. See also Standing Orders of the Constituent Assembly.

12. See for the names of the M.P.s who constituted each of the 11 Committees Constituent Assembly: Official Report, Vol. 2, No. 3.

for it to be examined clause by clause. The Constituent Assembly agreed by a majority of 119 to 16 that the Draft Constitution as discussed in the Assembly sitting as a whole be adopted 'as the Constitution of the Free Sovereign and Independent People of Sri Lanka'. On the same day the members of the Constituent Assembly met at the Navarangahala where the President of the Constituent Assembly certified that the Constitution had been adopted and enacted by the Constituent Assembly.

Having, thus, briefly examined the events leading upto the adoption of the Constitution of the Republic of Sri Lanka, 1972 in chronological order, it is fair to conclude that the drafting of that Constitution was the outcome of serious and thorough deliberation. Moreover, the various acts done, from the seeking of the electoral mandate through to the final certification of the Constitution, were all performed in such a manner so as to declare unambiguously that the proposed Constitution would not derive its authority under the then existing Soulbury Constitution. In fact the Constitution begins with assertion of its autochthonous origin:

> We the people of Sri Lanka being resolved in the exercise of our freedom and independence as a nation to give to ourselves a constitution . . . which will become the fundamental law of Sri Lanka its power and authority solely from the people do . . . acting through the Constituent Assembly established by us hereby adopt, enact and give to ourselves this Constitution.[12a]

12a. See further on the making of the Republican Constitution: J. A. L. Cooray, Constitutional and Administrative Law of Sri Lanka (1973) Chapter 3; L. J. M. Cooray, Reflections, Chapter 8 ; and John Kirkwood, 'Constitutional Change in Sri Lanka: a Peaceful Revolution', Lawasia Vol. 3, No. 1 (April 1972), p. 194.

It is useful to examine briefly, at this stage, why an attempt was not made to bring about the constitutional innovations acting under the provisions of the Ceylon (Constitution) Order in Council, 1946. In the first place, there existed certain doubts as to whether Parliament of Ceylon was competent to alter section 29(2) of the Soulbury Constitution, which protected minority rights.[13] It could have, however, been possible to request the United Kingdom Parliament to enact a new Constitution for Ceylon, since under section 1(1) of the Ceylon Independence Act, 1947 the Parliament of the United Kingdom retained the power to legislate for Ceylon at her request and with her consent.[13a] This alternative, however, did not prove readily acceptable. As Mr. Jaya Pathirana, M. P., (who was later appointed a Judge of the Supreme Court and a member of the Constitutional Court) said in 1962: 'we can give this consent, but I think it will be derogatory to our sense of independence'.[14]

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13. See supra Chapter 4, Part (2), specially at foot notes 7 - 11.

13a. Section 1 (1) of the Ceylon Independence Act, 1947: 'No Act of the Parliament of the United Kingdom passed on or after the appointed day [February 4, 1948] shall extend, or be deemed to extend, to Ceylon as part of the law of Ceylon, unless it is expressly declared in that Act that Ceylon has requested, and consented to, the enactment thereof'.

14. The Parliamentary Debates (Hansard), March 9, 1962, col. 5132.

Mrs. Bandaranaike said at the meeting of the Members of Parliament convened by her to adopt the resolution to establish a Constituent Assembly:

> Our people have clearly expressed their desire to have a Constitution of their own making, of which, as a self-respecting nation, they can be proud--a Constitution which will reflect their highest aspirations and help to ensure the well being and happiness of future generations.[15]

Before we proceed to examine the salient features of the Republican Constitution of Sri Lanka, 1972 we may briefly look at why the then existing Constitution did not prove acceptable to the United Front led by Mrs. Bandaranaike. As Peter Keuneman, a Minister of the United Front government, observed, the Independence Constitution, which had been imposed on the people of Ceylon, sought to protect vested interests and to perpetuate the status quo. It not only limited the Sovereignty of Parliament but also acted as a brake on progressive development. The bureaucratic administrative structure then existing was another evil that had to be swept away. Mr. Keuneman said that the country needed 'a Constitution that will be an accelerator and not a brake on progressive development', and he added this reminder:

> Let us be quite clear in our minds about this question of the independence of the judiciary. It does not and cannot deprive the legislature of its rightful supremacy in the constitutional order of things.[16]

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15. Quoted by the Constitutional Court in the Sri Lanka Press Council Bill Decision. Decisions of the Constitutional Court of Sri Lanka Vol. I (1973), p. 5.

16. The proceedings of a meeting of the Members of the House of Representatives at the Navarangahala, Royal Junior School, Colombo, on the 19th day of July, 1970 at 11 a.m. and continued in the House of Representatives at 3 p.m. July 21, 1970. Columns 386-390.

We may now examine how and to what extent these views found expression in the Constitution of Sri Lanka, 1972.

(2) The Salient Features of the Constitution of the Republic of Sri Lanka, 1972

The Republican Constitution of 1972 did not abandon altogether the system of Parliamentary democracy which had first been introduced in 1946. The major institutions of government then in existence were adapted with necessary modifications to suit the new constitutional structure. The Parliament, which as introduced in 1946 consisted of the two houses of Parliament and the Queen,[1] was replaced with the National State Assembly as the new Legislature of Sri Lanka. The President, Head of State, took the place of the former Governor-General, who was the Queen's representative in Ceylon. Together with the Cabinet of Ministers, the President exercised the executive powers. The President, however, did not have any part in the legislative process, as will be seen later. As regards the judiciary and the public service, provision was made in such a manner that the legislature and the executive had more control over the members belonging to these two bodies. If the major institutions of the constitutional system in existence were not materially altered, the question arises as to the nature of the major changes brought about by the Republican Constitution of Sri Lanka, 1972. To answer that question it

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1. Ceylon (Constitution) Order in Council, 1946. Sec. 7.

is necessary to examine the provisions relating to the constitutional principles which constituted the foundation of the Constitution, followed by an examination of the composition, powers and functions of the various organs of government created by the Republican Constitution.

(i) The Doctrinal Basis of the Constitution

Supremacy of Parliament operating within a framework which recognized the doctrines of separation of powers and independence of the judiciary provided the essential basis of the Soulbury Constitution of Ceylon. The practical effect of this was to confer on the courts the power to review either an executive or a legislative measure in order to determine whether there had been an overstepping of the authority granted to the legislature or the executive. Thus legislation enacted by Parliament had only a provisional effect in the sense that the courts had the power to declare laws unconstitutional and invalid.

In order to overcome these difficulties firstly the doctrine of separation of powers was rejected.[1] The Constitution provided that 'in the Republic of Sri Lanka, Sovereignty is in the people'[2] and that 'the Sovereignty of the people is exercised through a National State Assembly of elected representatives of the people'.[3] Section 5 is the pivotal section:

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1. But as will be shown in the next chapter, the Constitutional Court decided that the National State Assembly could not directly exercise judicial power.

2. The Constitution of Sri Lanka, 1972, sec. 3.

3. Ibid., sec. 4.

> 5. The National State Assembly is the supreme instrument of State power of the Republic. The National State Assembly exercises--
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> (a) the legislative power of the People;
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> (b) the executive power of the People, including the defence of Sri Lanka, through the President and the Cabinet of Ministers; and
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> (c) the judicial power of the People through courts and other institutions created by law except in the case of matters relating to its powers and privileges, wherein the judicial power of the People may be exercised directly by the National State Assembly according to law.

Reading the three sections referred to above, namely sections 3, 4 and 5, together it may be said that the sovereignty of the people, which included the legislative, executive and judicial powers, was to be exercised by the National State Assembly representing the people of Sri Lanka. However, since it was impractical for the National State Assembly to exercise all the diverse powers of State, the executive and judicial powers were to be exercised through the institutions referred to in 5(b) and 5(c), respectively.

As a doctrine, separation of powers was not enshrined in the Constitution. The Constitutional Court made the following observation in <u>The Associated Newspapers of Ceylon Ltd., (Special Provisions) Bill Decision:</u>

> In our view, the doctrine of Separation of Powers has no place in our Constitution. The National State Assembly is the Supreme Instrument of State Power and exercises the legislative power of the people, the executive power of the people, and also the judicial power of the people.[4]

The question arises whether the rejection of the doctrine of separation of powers carried with it the consequence of entrusting all powers--judicial, executive and legislative--to the National State Assembly. Dr. Colvin R. de Silva, the Minister of Constitutional Affairs, reminded the Constituent Assembly that instead of discussing the merits and demerits of the abstract theory of separation of powers, the Members should examine the concrete proposals relating to the sovereignty of Parliament. Having observed that separation of powers in a strict sense does not exist in any modern state he went on to emphasize the need to 'keep at least the judiciary completely separate in so far as they should act independently'. It was, however, necessary, he added, that the Constitution should be drafted in such a way that it does not hinder the progress of the country. Mr. Felix R. D. Bandaranaike, the Minister of Public Administration and Local Government explained the proposed change quite clearly:

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4. Decisions of the Constitutional Court of Sri Lanka, Vol. 1 (1973), at p. 53. Affirmed in the Administration of Justice Bill Decision, Ibid., at p. 67.

> We are trying to reject the theory of Separation of Powers. We are trying to say that nobody should be higher than the elected representatives of the people, nor should any person not elected by the people have the right to throw out the decisions of the people elected by the people. Why are you saying that a judge once appointed should have the right to declare that Parliament is wrong? That you must have judges to do the job of judging is true. We do not want to be judges.

From what we have quoted above two specific issues may be formed, namely (a) should the courts have the power to nullify legislation? and (b) is it desirable that the legislature should assume judicial functions that had till then been discharged by judicial officers? The intention of the makers of the Constitution seems to have been to remove the power of judicial review but not to enable the legislature to perform the duties of judicial officers. The conclusion then is warranted that the rejection of the doctrine of separation of powers amounted no more than to a removal of the power of judicial review. Section 48(2) is the excluding clause:

> 48(2) No institution administering justice and likewise no other institution, person or authority shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question the validity of any law of the National State Assembly.

Having removed the power of judicial review which acts as a fetter on the supremacy of legislature, the Republican Constitution sought to place as little restriction

as possible on the powers of the National State Assembly. It was for this purpose that the legislative powers of the National State Assembly were clearly specified:

> Sec. 44. The legislative power of the National State Assembly is supreme and includes the power--
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> (a) to repeal or amend the Constitution in whole or in part; and
>
> (b) to enact a new Constitution to replace the Constitution.
>
> Provided that such power shall not include the power--
>
> (i) to suspend the operation of the Constitution or any part thereof; and
>
> (ii) to repeal the Constitution as a whole without enacting a new Constitution to replace it;

According to section 51(5) the Constitution could be replaced, repealed or amended with a two-thirds majority, subject, however, to the requirements laid down in section 44. Section 52(1) permitted the enactment of a law inconsistent with any constitutional provision provided, however, that such legislative measure was passed in accordance with the procedure prescribed for constitutional amendment.

Unlike the Soulbury Constitution under which doubts lingered as to whether the Parliament of Ceylon was competent to pass laws contravening certain express or implied provisions of that Constitution or to amend it, the Republican Constitution prescribed in unambiguous terms the procedure for amending or repealing or replacing the Constitution with a new one: the main requirement being two-thirds majority.

Therefore, in circumstances where the concurrence of two-thirds at least of the whole number of members of the National State Assembly (including those not present) could be secured, the National State Assembly was able to pass a law of any description as long as certain other technical requirements were fulfilled.[5] However, it must be noted that, according to the proviso to section 44, the National State Assembly could neither suspend the operation of the Constitution, in whole or in part, nor repeal the Constitution as a whole without enacting a new Constitution to replace it, This proviso then is an absolutely entrenched provision incorporated in the Constitution to ensure that at no time would Sri Lanka be without a Constitution or with a Constitution suspended in whole or in part.

In spite of the fact that the Judiciary was deprived of the power to invalidate laws enacted by the National State Assembly, it was recognized that the interpretation of laws falls within the province of the judiciary. It is this recognition that led to the introduction of the Constitutional Court which would determine whether any Bill duly submitted to it was inconsistent with any constitutional provision.[6] A Bill declared by the Constitutional Court to be in conflict with any constitutional provision could be passed only if the

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5. Such as for instance that any Bill for the amendment of the Constitution should expressly state such object in its long title (sec. 51(1)). See sections 51 and 52.

6. Whether the Constitutional Court was 'a court' is a matter open to argument. See the discussion in the next chapter.

procedure prescribed for constitutional amendment was adhered to. Once a law was enacted it enjoyed complete immunity from judicial review. This arrangment, while allowing the Constitutional Court to perform the role of interpreter of the Constitution, ensured that laws enacted by the Legislature would not later be rendered nugatory by courts of law.

We may now examine the provisions relating to (a) the Legislature (b) the Executive and (c) the Judiciary in order to find out how the doctrines and principles referred to above had in fact been given effect to.

(ii) The Legislature

The National State Assembly replacing the Ceylon Parliament became the sole legislature in Ceylon. Section 45(1) provided that the National State Assembly could not abdicate, delegate or alienate its legislative power. Nor could it set up any authority with any legislative power other than the power to make subordinate laws. However, as an exception to this rule the National State Assembly could delegate to the President the power to make, in accordance with the law for the time being relating to public security and for the duration of a state of emergency, emergency regulations.[1] Section 134(2) provided that the President should declare a state of emergency only upon the Prime Minister advising him of the existence or the imminence of a state of public emergency, and that he should act on

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1. The Constitution of Sri Lanka, 1972. Sec. 45(4).

the advice of the Prime Minister. With the other safeguards intended to secure the control of his powers by the National State Assembly the President, when exercising the emergency powers, could not be regarded as a rival legislative authority.[1a]

A Bill introduced, read and passed according to the Standing Orders of the National State Assembly and the Constitution, became law when the Speaker endorsed on it the certificate that it had been duly passed by the National State Assembly.[2] Thus whereas under the Soulbury Constitution laws could be enacted only with the approval of both Houses of Parliament (exceptionally with the House of Representatives alone) and with Royal assent, now a legislative measure duly approved by the National State Assembly became a law at once without any further approval.

We have noted in Chapter 4 that Section 29(2) of the Ceylon (Constitution) Order in Council, 1946, which related to the protection of minority rights, was regarded by some as an unalterable provision--as a provision which imposed an absolute limitation on the legislative power of the Legislature.[3] While leaving no room for the existence of

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1a. See further, on the emergency powers of the President, J. A. L. Cooray, Constitutional and Administrative Law of Ceylon (1973), pp. 554-9.

2. See Sections 46-49.

3. See C. F. Amerasinghe, Separation, pp. 53-6; and the obiter dictum of Lord Pearce in The Bribery Commissioner v. Ranasinghe (66 N.L.R. 73 at p. 78) that the 'entrenched religious and racial matters' were 'unalterable under the Constitution'. According to Professor M. L. Marasinghe, when an electoral mandate was sought to set up a Constituent Assembly: 'Poised in that manner, the Bribery Commissioner's Case went up, as it were on a further appeal, to the electorate'. 'Ceylon: a Conflict of Constitutions', 20 I.C.L.Q. 645-74 at p. 650,(1971).

any such unalterable provision limiting the legislative competence of the National State Assembly in respect of minority rights, the Constitution of Sri Lanka, 1972 introduced a Bill of Fundamental Rights.

The inclusion of a Bill of Fundamental Rights in the Republican Constitution was intended to allay 'those worries and anxieties'[4] of the minority communities and those who had been consistently engaged in demanding the replacement of section 29(2) of the Soulbury Constitution with a more comprehensive Bill of Rights.[5] As the Minister of Constitutional Affairs emphatically stated, the protection of fundamental rights could not, however, be allowed to 'prevail absolutely';[6] in other words, fundamental rights could constitutionally be safeguarded only in so far as the supremacy of the National State Assembly was not unduly curtailed thereby. Accordingly, the fundamental rights and freedoms which were enumerated in Chapter VI of the Republican Constitution were not justiciable in a court of law. The only opportunity there was for someone to object to the constitutionality of a particular legislative measure on the basis of an infringement of fundamental rights came in the form of obtaining a decision of the Constitutional Court, while the legislative measure was in its Bill-stage.

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4. Constituent Assembly Official Report, column 2917.

5. See for a brief account of the long standing agitation for a Bill of Fundamental Rights, J. A. L. Cooray, Constitutional and Administrative Law of Sri Lanka (1973) pp. 508-13; the debate in the Constituent Assembly on fundamental rights is contained in the Official Report of the Constituent Assembly, Nos. 20 and 21. See also Nos. 14-17 on the position of Buddhism.

6. Constituent Assembly Official Report, column 2917.

Section 18(2) of the Republican Constitution provided that the exercise and operation of fundamental rights and freedoms:

> shall be subject to such restrictions as the law prescribes in the interests of national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others or giving effect to the Principles of State Policy set out in section 16.

The restrictions contained in Section 18(2) seem to have been drafted in very broad terms, and the objection had been raised that this categorisation would allow any law to be interpreted as being covered by one or the other of the various subjects referred to in that section.[7] In spite of the fact that the Principles of State Policy, according to Section 17, did not confer legal rights and were not enforceable in courts of law, they could be, and had in fact been, relied on in determining the validity of Bills referred to the Constitutional Court.[8]

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7. S. Nadesan, Some Comments on the Constituent Assembly and the Draft Basic Resolutions (1971), at p. 34.

8. See e.g., the Sri Lanka Press Council Bill decision and the Places and Objects of Worship Bill decision; Decisions of the Constitutional Court of Sri Lanka, Vol. 1 (1973), at pp. 14-15 and 34 respectively.

Since the restrictions contained in Section 18(2) were vague and broad it was not easy, in the generality of cases,[9] to successfully impugn the constitutionality of a Bill on the ground of a breach of fundamental rights; even if a Bill was declared by the Constitutional Court to be inconsistent with a constitutional provision, it could find its way into the statute book provided that not less than two-thirds of the whole number of M.P.'s supported its way through.

It is clear from the above discussion on the legislative powers of the National State Assembly that the National State Assembly could pass laws either with a simple majority or in the special circumstances we have witnessed above after having resort to the amendment procedure: the only absolute prohibition being that contained in the proviso to section 44 which prohibited total or partial suspension of the Constitution or the total repeal of the Constitution without replacement.[10] The relaxation of the restrictions that prevailed over the power of the legislature prior to

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9. In each of the following decisions and in some others the Bill in question was held to violate fundamental rights, although in many of these decisions Section 18(2) was not applicable: The Church Union Bill decision (Ceylon Hansard, November 21, 1975, column 2048); The Pirivena Education Bill decision (Ceylon Hansard, Vol. 18, No. 7, February 19, 1976, column 1001); and The Local Authorities (Imposition of Civic Disabilities) Bill decision (Ceylon Hansard, Vol. 28, No. 15 of 1978, column 1655-1681).

10. Could it not have been possible for the National State Assembly to repeal that provision first and then suspend or repeal the Constitution in the manner prohibited by that provision?

1972 provides the essential theme of the Republican Constitution. We may now proceed to see how this theme is sustained throughout the Constitution, through our discussion of the executive and the judiciary.

(iii) The Executive

The executive power vested in theory in the National State Assembly was exercised in fact through the President, the Head of the State,[1] and the Cabinet of Ministers.[2]

The President, nominated by the Prime Minister,[3] was the Head of Executive and the Commander in Chief of the Armed Forces.[4] His powers and functions were to a great extent similar to those exercised and performed by his predecessor the Governor-General; a notable difference being that he did not take part in the legislative process by way of signifying his assent to a Bill passed by the National State Assembly. The practice of inviting the Head of the State, to read the statement of government policy--or make 'the throne-speech' as it was widely known before 1972--was abandoned. Instead, the Prime Minister read the statement in the National State Assembly.[5]

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1. The Constitution of Sri Lanka, 1972. Sec. 19.
2. Ibid., sec. 5.
3. Ibid., sec. 25.
4. Ibid., sec. 20.
5. See National State Assembly Debates, Vol. 1 p. 190.

Required by the Constitution to act on the advice of the Prime Minister[6] or of such other Minister to whom the Prime Minister might have given authority to advise the President on any particular function assigned to that Minister,[7] the President had very few functions he could perform on his own initiative. It was in his own discretion that the President appointed a Prime Minister 'who, in the President's opinion, is most likely to command the confidence of the National State Assembly'.[8] Likewise, if the National State Assembly rejected the Statement of Policy at its first session and the Prime Minister advised the President to dissolve the National State Assembly, the President could refuse to accept such advice; then, the Prime Minister was deemed to have resigned.[9]

While prior to 1972 the rules governing the relationship between the Governor-General and the two Houses of Parliament were in the form of conventions, they were incorporated as constitutional provisions in 1972. However, it was specifically provided that the President would be immune

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6. E.g., in appointing the Cabinet of Ministers (Sec. 92(1)), and Judges of the Supreme Court (Sec. 122(1)), and in summoning, proroguing and dissolving the National State Assembly.

7. Proviso to Section 22 laid down that in granting a pardon to an offender sentenced to death, the President should act on the advice of the Minister of Justice.

8. Constitution of Sri Lanka, 1972, sec. 92(2).

9. Ibid., sec. 100(1)

from civil or criminal proceedings in respect of anything done or omitted to be done by him in either his official or private capacity[10] and that no act or omission on the part of the President could be inquired into or called in question by any authority on the ground that the President had not complied with the provisions of Section 27(1).[11] These provisions ensured that while certainty was achieved by reducing the conventions into writing, the fundamental nature of conventions, namely that they are not justiciable in a court of law, was retained.

In addition to the requirement that unless otherwise provided by the Constitution the President should act on the advice of the Prime Minister or a Minister, the President was made responsible--

> to the National State Assembly for the due execution and performance of the powers and functions of his office under the Constitution and any other law, including the law for the time being relating to public security.[12]

This section which did not have its counterpart in the Soulbury Constitution highlights how the central theme of the Constitution, namely, the preservation of the supremacy of the National State Assembly, was maintained in respect

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10. Ibid., Sec. 23(1).

11. Ibid., Sec. 27(2). Section 27(1) laid down that generally the President should act on advice.

12. Ibid., Sec. 91.

of the Head of State, who could be removed by the National State Assembly.[13] Section 92(1), which laid down the principle of the collective responsibility of the Cabinet of Ministers, completed the requirement of the theoretical subjugation of the executive to the Legislature.[14]

Deviating from the Soulbury Constitution which vested the power of appointment, transfer, dismissal and disciplinary control of public officers in the Public Service Commission,[15] the Republican Constitution vested such power in the Cabinet of Ministers.[16] Of course, there was established a State Services Advisory Board[17] and a State Services Disciplinary Board[18] to advise the Cabinet of Ministers in the exercise of such powers. Whereas under the Soulbury Constitution matters relating to appointment, transfer, dismissal and disciplinary control of public officers could not come up for discussion in Parliament,

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13. This could be done by passing a vote of no confidence proposed by the Prime Minister (Sec. 26(2)(d)); if the resolution was proposed by any other Member of the National State Assembly it had to be passed by a two-thirds majority. The Prime Minister could remove the President on account of 'mental or physical infirmity' (Sec. 26(2)(c)).

14. But, in fact, the Cabinet of Ministers controls the legislature through the majority in the legislature it wields. See Sir Ivor Jennings, Cabinet Government (Cambridge 1965, 3rd. ed.) Chapter XV 'Government and Parliament'. 'The Continuation in Power of any particular Government depends upon the contunued support of Parliament, or, more particularly, of the Commons, and thus the legislature and the executive are closely dovetailed in the British Constitution'. D. C. M. Yardley, Introduction to British Constitutional Law (5th. ed., Butterworths, 1978) p. 39. This was true of the position under the Republican Constitution of Sri Lanka, 1972 too.

15. Ceylon (Constitution) Order in Council, 1946. Sec. 60(1).

16. The Constitution of of Sri Lanka, 1972, section 106(1).

17. Ibid., sec. 111.

18. Ibid., sec. 112.

it was now possible to discuss such matters in the National State Assembly since the Cabinet of Ministers was made answerable to the National State Assembly.[19] The effect of this arrangement was to confer on the Cabinet of Ministers a greater degree of control over state officers, while at the same time ensuring, in theory at least, that through the concept of answerability of the Cabinet to the National State Assembly the latter had the final decision in respect of the tenure of state officers.

It is clear from the above discussion of the provisions relating to the executive that the Constitution of Sri Lanka, 1972 restricted the opportunities that the President would have of exerting any control over the Legislature: his powers were closely defined with the requirement that subject to specific exceptions he should act on ministerial advice, he was answerable to the Legislature and could be removed by a resolution of the Legislature. The Constitution also gave expression to the rule that the executive would, in theory, operate within the framework of the supremacy of the legislature.

We now come to the relationship between the legislature and the judiciary--'perhaps the single most crucial relationship in a constitutional system'.[20]

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19. Ibid., sec. 106(1).

20. Geoffrey Marshall, Constitutional Theory, (Clarendon Law Series, ed. H. L. A. Hart., Oxford, 1971) p. 97.

(iv) The Judiciary

> /B/y the long and uniform usage of many ages, our kings have delegated their whole judicial power to judges of their several courts . . . In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removeable at pleasure by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.[1]

These well known words of Blackstone, who in the same treatise said that the United Kingdom Parliament could do 'everything that is not naturally impossible', indicate in no uncertain terms that while recognizing the supremacy of Parliament it is equally important to uphold the independence of the judiciary. Independence of the judiciary, however, does not imply that the Legislature or the Executive should have no form of control over the Judiciary. Prior to 1972 it had been recognized in Ceylon that the legislature could, for instance, take away the jurisdiction of the courts even with retrospective effect, as long as that jurisdiction was not conferred on a non-judicial body.[2] Further it is recognized that as the representative of the electorate Parliament should possess

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1. Blackstone, Commentaries. Vol. 1, p. 267 and 269.

2. See the discussion in Chapter 8 Part 4.

some power in respect of the appointment, at least, of judicial officers: how far this power could travel, in keeping with the independence of the judiciary, it is not easy to determine. An attempt is made here to examine the provisions contained in the Republican Constitution of Sri Lanka, 1972 relating to the judiciary in order to find out the degree of independence secured to the judiciary in comparison with the position obtaining before 1972.

As before 1972,[3] the judges of the Superior Courts were to be appointed by the Head of the State.[4] Every such Judge held office during good behaviour and was not removable except by the President upon an address of the National State Assembly.[5] The salaries of such judges were determined by the National State Assembly and became a charge on the Consolidated Fund.[6] Not only the salary payable, as before 1972,[7] to any such judge but also the age of retirement could not now be reduced during his term of office.[8] Prior to 1972 the age of retirement was sixty-two years, renewable for a period not exceeding twelve months.[9] Removing this objectionable provision the Republican Constitution fixed

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3. Ceylon (Constitution) Order in Council, 1946, Sec. 52(1).

4. Constitution of Sri Lanka, 1972, Sec. 122(1).

5. Ibid., Sec. 122(2); Ceylon (Constitution) Order in Council, 1946, Sec. 52(2).

6. Constitution of 1972, Sec. 122(4); Constitution of 1946, Sec. 122(4).

7. Constitution of 1946, Sec. 52(6).

8. Constitution of 1972, Sec. 122(5).

9. Constitution of 1946, Sec. 52(3).

the age of retirement at sixty-three years and to be non-renewable.[10] This comparison shows that as regards the Judges of the Supreme Court the Republican Constitution has made improved and less objectionable provision, although as before 1972 it was still open for the Government to make political or patronizing appointments.

In place of the Judicial Service Commission the Republican Constitution introduced a Judicial Services Advisory Board and a Judicial Services Disciplinary Board.

The Judicial Services Advisory Board consisted of five members with the Chief Justice as Chairman. The other four members, including a Judge of an inferior court and a President of a Labour Tribunal, were appointed by the President.[11] A Member of Parliament could not be appointed to this Board.[12] Every member except the Chairman was appointed for a period of six years,[13] and could be removed from office by the President without assigning any reason.[14] The salary or allowance paid to a member was determined by the National State Assembly and became a charge on the Consolidated Fund. Such salary would not be diminished during the term of office of such member.[15]

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10. Constitution of 1972, Sec. 122(3).
11. Ibid., Sec. 125(2) and (3).
12. Ibid., Sec. 125 (4).
13. Ibid., Sec. 125(5).
14. Ibid., Sec. 125(6).
15. Ibid., Sec. 125(9).

The Judicial Services Advisory Board was a consultative body which advised the Cabinet of Ministers in respect of appointing inferior judges and judicial officers.[16] In addition, the Board had the power to transfer such officers, subject to an appeal to the Cabinet of Ministers against such order of transfer.[17]

To exercise the powers of dismissal and disciplinary control of inferior judges and judicial officers, was created the Judicial Services Disciplinary Board consisting of the Chief Justice and two other judges of the highest court nominated by the President.[18]

The Cabinet of Ministers had the power in consultation with the Disciplinary Board to make

> (a) rules of conduct for such inferior judges and judicial officers;
>
> (b) rules of procedure for matters connected with the holding of disciplinary inquiries; and
>
> (c) provision for such other matters as are necessary or expedient for the performance of the duties of the Judicial Services Disciplinary Board.[19]

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16. Ibid., sec. 126(1). The term judicial officer is used here to denote 'all state officers, the principal duty or duties of whose office is the performance of functions of a judicial nature. See sec. 124(1)(c).

17. Ibid., sec. 130(1) and (2).

18. Ibid., sec. 127(1) and (2). Similar provision had been made in 1946 in respect of the Judicial Service Commission. Constitution of 1946, sec. 53(1).

19. Ibid., sec. 127(5).

The National State Assembly retained the power to remove an inferior judge or judicial officer for misconduct: this could be done by way of presenting an address to the President in that behalf.[20] This power was, however, subject to a significant qualification:

> 129(3). No motion for such removal shall be placed on the Agenda of the National State Assembly until the Speaker has obtained a report from the Judicial Services Disciplinary Board on such particulars of the Charge as are alleged in the motion against a judge or state officer who is the subject of such motion.
>
> 129(4). The findings of the Judicial Services Disciplinary Board on the particulars of the charge referred to it under sub-section (3) of this section shall be final and shall not be debated by the National State Assembly.

These two sub-sections reserved the right of inquiring into any allegations of misconduct brought against an inferior judicial officer exclusively to the Disciplinary Board. Its report could not be debated by the National State Assembly with a view to contradicting the findings of the Board. It is implied by these two provisions that if the Board decided in any particular case that the allegations had not been proved against the judicial officer in question, the National State Assembly would not proceed to cause him to be dismissed: for, there would then be no misconduct within the meaning of section 129 for which the judicial officer could be dismissed. The real value of this provision, then, lies

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20. Ibid., Sec. 129(1).

in that the National State Assembly could at any time set in motion disciplinary proceedings against a judicial officer, against whom the Disciplinary Board, perhaps by oversight, failed to initiate inquiries of its own motion: in other words, the National State Assembly had a kind of residual power in respect of the removal of inferior judicial officers.

Section 127(6) provided that whenever the Disciplinary Board dismissed a judicial officer, it had to forward a report on it to the Cabinet of Ministers with a copy to the Speaker of the National State Assembly. This provision ensured that in the exercise of its power of removal the Board was ultimately answerable to the National State Assembly. It must be noted, that there was no corresponding provision in the Soulbury Constitution, nor, was there a provision enabling Parliament to remove an inferior judicial officer.

As regards the powers of removal and disciplinary control the Disciplinary Board was allowed a fair degree of independence subject, however, to the limitations referred to above. As regards the appointment of judicial officers, on the other hand, the power was more in the hands of the Executive than in the Advisory Board.

The appointment of inferior judicial officers was made by the Cabinet of Ministers which acted on the recommendations of the Advisory Board. However, as section 126(4) declared:

> The Cabinet of Ministers may appoint an applicant not in the recommended list, and, if such appointment is made, the Cabinet of Ministers shall table in the National State Assembly the name of the person appointed and the reasons for not accepting the recommendation of the Judicial Service Advisory Board and the list of persons recommended by the Judicial Services Advisory Board.

Thus the Cabinet of Ministers had a wide discretion as to the minor judicial appointments, the only limitation on that discretion being that the Cabinet was responsible and answerable to the National State Assembly.

That the legislature and the executive should play a leading role in respect of judicial appointments whereas in respect of discipline--an essential internal matter--their influence should be kept within reasonable limits seems to form the theoretical background to the provisions relating to the judiciary.

The Republican Constitution of 1972 laid down in no uncertain terms that judges, in the performance of their duties and functions, should be placed beyond any undue and unlawful interference. Section 131(1) provided that every judge or any person entrusted with judicial powers should exercise such judicial powers 'without being subject to any direction or other interference preceding from any other person, except a superior court or institution entitled under law to direct or supervise' such judge or person. It was made an offence, by section 131(2) to interfere or attempt to interfere with the exercise of judicial powers, without legal authority.

We have seen that the above provision applied to judges of inferior courts and judicial officers. The term judicial officer is not used in the Republican Constitution and has been used in this essay to signify 'all state officers the principal duty or duties of whose office is the performance of functions of a judicial nature' referred to in section 124(1) (c). Section 124(1) specifies the officers to whom the provisions relating to the two Boards apply. It must be noted here that whether an officer came within the definition of section 124(1) (c) was to be determined finally and conclusively by the Cabinet of Ministers.

> No institution administering justice and likewise no other institution, person or authority shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question any such decision.[21]

This provision effectively avoided any possibility of the emergence of cases of the 'tribunal cases' category, since whether a particular office was a judicial office to which the relevant constitutional provisions applied was to be determined by the Cabinet of Ministers and not by the courts.

As we concluded in respect of the provisions relating to the legislature and the executive, so we may confirm here that the general theme of the Republican Constitution was the need to uphold the Supremacy of the Legislature. It must, however, be added that the fact that the judiciary in the performance of its functions should be kept free of interference had not been lost sight of.

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21. The Constitution of Sri Lanka, 1972, Section 110(2).

(3) Concluding Remarks

In the foregoing discussion it has been shown that the primary object of adopting a new Constitution in 1972 was to remove the fetters that operated on both the legislature and the executive under the Soulbury Constitution. Among the changes introduced with a view to realizing this object, the denial to the courts of the power of reviewing the constitutionality of laws passed by the legislature stands out as the single most crucial innovation: the Constitutional Court which was given restricted powers of review is the subject matter of the next chapter.

An examination of the concepts and doctrines that formed the basis of the Republican Constitution clearly discloses that the Republican Constitution was intended to mark a significant deviation from the constitutional system then in operation. But, it is equally true that the Republican Constitution did not abandon the machinery of government that had been in operation for nearly twenty-five years. That the President merely took the place previously occupied by the Governor-General, subject of course to certain changes, has already been shown in Part (2) (iii) of this chapter.[1] The Judicial Service Commission introduced by the Independence Constitution of Ceylon survived, subject to alteration, in the form of the two Boards--Advisory and Disciplinary.

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1. As Dr. W. Dahanayake, a former Prime Minister of Ceylon, said in the Constituent Assembly: 'What change is there except that a high-sounding word--the President--is used instead of the Governor-General?' Constituent Assembly: Official Report, column 2675.

Parliamentary democracy, the essential foundation of the Soulbury Constitution, in fact, was adopted in 1972. The House of Representatives served as the model for the National State Assembly. Its powers and privileges,[2] the standing orders,[3] the officers,[4] conventional and traditional rules had their counterpart in the previous Constitution. The members of the National State Assembly were designated Members of Parliament.[5] Given the continuation of the House of Representatives under a new name (in respect of its proceedings)[6] it was natural to expect that the members of the National State Assembly, many of whom had been Members of Parliament for quite some time, including the veteran statesmen, could continue to cherish and uphold the traditions of the Ceylon Parliament.

It is a truism that the Westminster Model that characterized the Constitution of 1946 provided the basic structure for the Republican Constitution too. Although it is true that the Constitution of 1972 sought to bring the National State Assembly closer to the United Kingdom Parliament in respect of Supremacy of the Legislature, the basic constitutional frame underwent only minor changes in 1972. As a veteran statesman remarked:

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2. The Constitution of Sri Lanka, 1972, sec. 38(1).

3. Ibid., sec. 37(1).

4. Cf. sec. 28 (1946 Constitution) and sec. 35 (1972 Constitution); sec. 17 (1946) and Sec. 32 (1972).

5. Ibid., sec. 29.

6. Cf. Sec. 41 (1972) and sec. 15 (1948)--Sessions of Parliament.

> The system which the Hon. Minister proposes to introduce is the same existing one. If we call it the 'Westminister Model' what the Minister plans to do is merely to redecorate it. [7]

The question was asked at the beginning of this chapter--was the Republican Constitution autochthonous in substance? This in fact is a question that a political scientist rather than a lawyer would ask.[8] It has been said that a truly indigenous constitution is extremely difficult to find, for it is inevitable that in drafting a Constitution guidance must be sought from the previous experiences of other systems.[9] Naturally, the Republican Constitution too is based on the experience of Ceylon and other countries and therefore cannot be called autochthonous in substance. But, it is submitted, the Republican Constitution introduced very significant changes relating to the power and authority of the legislature as well as of the executive. In this sense the Republican Constitution was not merely a redecoration of the Constitution of Ceylon of 1946.

One last word remains to be said: the supremacy of the National State Assembly could not be said to be equal to the Supremacy of Parliament as that term is used in respect of the United Kingdom Parliament. Because, being a creature of the Constitution, the National State Assembly could operate only as long as it acted according to the Constitution. In a sense then the Constitution 'stands supreme'.[10]

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7. Dr. W. Dahanayake, a former Prime Minister of Ceylon. Constituent Assembly: Official Report, column 2671.

8. Leslie Wolf-Phillips, Comparative Constitutions, (1972) p. 34.

9. Ibid., at p. 19.

10. Colvin R. de Silva, Constituent Assembly: Official Report, column 2914.

CHAPTER 11

CONSTITUTIONAL ADJUDICATION UNDER THE REPUBLICAN CONSTITUTION OF SRI LANKA OF 1972: AN ASSESSMENT OF THE ROLE OF THE CONSTITUTIONAL COURT

It is necessary, at the outset, to mention that objection may be taken to the use of the phrase 'constitutional adjudication' to describe the function performed by the Constitutional Court under the Republican Constitution of Sri Lanka of 1972. Since no court of law and likewise no other institution had the authority to question the validity of a law on account of its unconstitutionality it may be argued that there was no scope for 'constitutional adjudication' in the sense that term is popularly understood, for instance, in the United States of America or in India.

If the power of the courts to declare a law invalid is an indispensable attribute of constitutional adjudication, then, the Constitutional Court may be said to have performed an advisory rather than an adjudicatory function. It is submitted that this is not so. As will be shown in the course of this chapter, the decisions of the Constitutional Court share many features that inhere in decisions of courts of law. Apart from the fact that the machinery of constitutional adjudication could be invoked only when a legislative measure was in its Bill stage and not after it had entered the statute book, not many significant differences could be found between a court of law in the exercise of its constitutional jurisdiction

and the Constitutional Court. The question we will try to answer in the final part of this chapter -- 'was the Constitutional Court 'a court'?'-- is crucial in determining whether we have used the term 'constitutional adjudication' with sufficient justification.

As a prelude to an examination of the decisions of the Constitutional Court, we shall first look at the provisions relating to the constitution and the working of the Constitutional Court.

(1) The Constitutional Court

(i) Composition

The Constitutional Court consisted of five members appointed by the President for a term of four years. In accordance with the rules of the Constitutional Court, three members were chosen to inquire into and decide upon the constitutionality of a Bill referred to it.[1]

As to what qualifications such members should have, the Constitution was silent. Introducing the proposals relating to the Constitutional Court, the Minister of Constitutional Affairs emphasized in the Constituent Assembly that the members of the Constitutional Court should be drawn not only from among Judges of the Supreme Court but also from persons of proven ability and experience: proper attitudes were as important as legal expertise, the Hon. Minister added.[2] It must be mentioned that the general practice was to appoint Judges of the Supreme Court as members of the Constitutional Court.

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1. The Constitution of Sri Lanka, 1972, sec. 54(1).

2. Constituent Assembly: Official Report, column 2920.

The Constitutional Council of France, which served as a model for the Constitutional Court of Sri Lanka, is not a judicial body at all. All former Presidents of the Republic, who are ex-officio members, together with nine other members, each appointed for a term of nine years, constitute the Council. The latter nine members are appointed by the President of the Republic, the President of the National Assembly and the President of the Senate, in equal proportions. No qualifications are specified for membership except that a Member of Parliament or a Minister is ineligible for appointment.[3]

Apart from being a non-judicial body, it performs functions other than that of determining the constitutionality of Bills referred to it.[4] Thus, the Constitutional Council appears to be an essentially political institution whereas the Constitutional Court of Sri Lanka, which consisted of judges and lawyers[4a] and had the function only of determining the constitutionality of Bills, can be likened more to a court of law than to a political organ of the government.

The salaries of members of the Constitutional Court, determined by the National State Assembly, prior to their appointment, were to remain throughout the four year term for which they (p.t.o)

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3. The Constitution of France, art. 56.

4. For instance, the Constitutional Council ensures the regularity of the election of the President (art.58) and rules in case of disagreements relating to the regularity of referendum procedure (art.60) and of the election of deputies and senators (art.59).

4a. Only judges or former judges of the Supreme Court had been appointed to the Court with the exception of the leading constitutional lawyer, Mr. J. A. L. Cooray.

were appointed and be a charge on the Consolidated Fund.[5] No member could be removed except by the President on account of 'ill-health or physical or mental infirmity'.[6] The safeguard as to the tenure of office, though it fell short of what was accorded to judges, was of sufficient degree to permit the Constitutional Court to function as an independent body.

(ii) Procedure of the Constitutional Court

The Clerk to the National State Assembly was the Registrar of the Constitutional Court and convened it.[1]

The Constitutional Court was authorised to make rules regulating its practice and procedure.[2] Such rules became effective when published in the Gazette[3] subject, however, to the subsequent disapproval of the National State Assembly.[4]

All hearings before it were to be open to the public.[5] The decision of the Constitutional Court was by majority vote:[6] no member present at a session could refrain from voting,[7] but a member could enter a dissenting decision.[8]

The Attorney-General had the right to be heard on all matters before the Constitutional Court.[9] Who else could appear before the Constitutional Court was a matter left entirely to its discretion:[10] it could summon and hear witnesses and order the production of any document or other thing.[11] That legal representation was in the contemplation

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5. The Constitution of Sri Lanka, 1972, sec. 57.
6. Ibid., sec. 56(1)(c).

1. Ibid., sec. 58.
2. Ibid., sec. 59(1)
3. Ibid., sec. 59(2).
4. Ibid., sec. 59(3)
5. Ibid., sec. 62.
6. Ibid., sec. 61(1)
7. Ibid., sec. 61(2).
8. Ibid., sec. 65.
9. Ibid., sec. 63(1). At what stage he would be allowed to address it seems to have been determined by the Court. See Hansard Vol. I 4(1) No. 7, Columns 543-6.

of the draftsmen is clear from the express prohibition that no Member of the National State Assembly should appear before it as an Advocate or a Proctor.[12]

(iii) Scrutiny of Bills by the Constitutional Court

For the purposes of scrutiny by the Constitutional Court different rules applied to urgent Bills and to ordinary Bills. We will first look at the position in respect of ordinary Bills.

An ordinary Bill could come before the Constitutional Court firstly for its determination whether the Bill involved any question of inconsistency with the Constitution: this happened when a citizen petitioned the Constitutional Court, within a week of the Bill being placed on the Agenda of the National State Assembly, alleging any inconsistency with the Constitution. The Constitutional Court should, thereupon, advise the Speaker as to the existence or otherwise of any question of inconsistency.[1] (Here, the Court does not finally decide the issue of inconsistency, which would be done when the speaker referred the Bill to it for its decision as to the constitutionality of the Bill).[2]

Secondly, a Bill could come before the Constitutional Court for a determination as to its constitutionality. Any question as to whether any provision in a Bill contravened

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10. Ibid., sec. 63(2). 11. Ibid., sec. 63(3)
12. Ibid., sec. 63(4).

1. Ibid., sec 55(2)(e). 2. Ibid.

the Constitution was required to be referred to the Constitutional Court by the Speaker if --

> (a) the Attorney-General communicated to the Speaker his opinion that a particular Bill should be referred to the Constitutional Court for a decision as to any inconsistency between that Bill and the Constitution;[3] or
>
> (b) the Speaker received within a week of the Bill being placed on the Agenda of the National State Assembly a written notice signed by the leader in the National State Assembly of a recognised political party raising a question of inconsistency with the Constitution;[4] or
>
> (c) such question was raised within a week and signed by at least such number of members of the National State Assembly as would constitute a quorum of the National State Assembly; or
>
> (d) the Speaker took the view that there was such a question; or
>
> (e) the Constitutional Court, on being moved by any citizen within a week of the Bill being placed on the Agenda of the National State Assembly, advised the Speaker that there was such a question.[5]

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3. Such as in respect of the Associated Newspapers of Ceylon Ltd., (Special Provision) Bill. See the decision of the Constitutional Court reported in Decisions of the Constitutional Court Vol. I, p. 35.

4. For instance, in respect of the Sri Lanka Press Council Bill, Mr. J. R. Jayewardene, the leader of the United National Party, submitted such a notice. See Decisions of the Constitutional Court Vol I, p. 1.

5. As in respect of the Places and Objects of Worship Bill. See Decisions of the Constitutional Court Vol I, p. 27.

The above five methods of making a reference to the Constitutional Court are laid down in section 54(2) of the Constitution of Sri Lanka, 1972.

The availability of these five methods ensured that access to the Constitutional Court was within easy reach of any interested party. By contrast, in France a Bill other than a prospective Organic Law,[6] which had compulsorily to be submitted to the Constitutional Council,[7] could be referred to it only by the President of the Republic, or the Premier or the President of one or the other Assembly.[8]

No proceedings could be had in the National State Assembly in relation to a Bill referred to the Constitutional Court in the manner stated above until the decision of the Constitutional Court had been given.[9] The decision of the Constitutional Court was final and conclusive:

> No institution administering justice and likewise no other institution, person or authority shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question a decision of the Constitutional Court.[10]

These two provisions ensured that the National State Assembly could not ride roughshod over a decision handed down by the Constitutional Court and thereby preserved the Supremacy of the Constitution, while at the same time excluding any possibility of judicial review by way of revising or scrutinizing a decision of the Constitutional Court.

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6. Laws dealing with certain specified matters are regarded as organic laws. For instance, it is only an organic law that can determine the term for which each assembly is elected, the number of its members, their emolument etc., (arti. 25), or the conditions under which finance Bills may be passed (arti. 47), or the composition etc., of the High Court (arti. 67).

7. Constitution of France, arti. 61. 8. Ibid.

9. The Constitution of Sri Lanka, 1972, sec. 54(3).

10. Ibid., sec. 54(4).

Due to the fact that the Speaker and the National State Assembly were bound by a decision of the Constitutional Court, a Bill declared to be inconsistent with a constitutional provision could be passed only if the procedure for constitutional amendment was adhered to. To state the principle in a different way, a Bill declared by the Constitutional Court to be unconstitutional could nevertheless be enacted provided that not less than two thirds of the whole number of members of the National State Assembly (including those not present) voted in favour of such enactment.

In France, on the other hand, a decision of the Constitutional Council declaring a Bill submitted to it to be unconstitutional had a more serious effect: such a Bill could not be promulgated or implemented at all.[11] This rule was not adopted in Sri Lanka mainly because it was one of the basic principles of the Republican Constitution that the Constitution could be amended in whole or in part by the National State Assembly, which also had the power to pass a law inconsistent with the Constitution leaving, however, the Constitution intact.

In the case of an urgent Bill -- that is, a Bill which bears an endorsement that in the view of the Cabinet of Ministers it is urgent in the national interest[12] -- different rules applied. Such a Bill had to be referred by the Speaker

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11. The Constitution of France, arti. 62.
12. The Constitution of Sri Lanka, 1972, sec. 55(1)

to the Constitutional Court which had to advise him[13] whether -

> (a) in its opinion the provisions of the Bill were inconsistent with the Constitution; or
> (b) in its opinion the Bill or any provision therein was inconsistent with the Constitution; or
> (c) it entertained a doubt that the Bill or any provision therein was inconsistent with the Constitution.[14]

If the Constitutional Court advised the Speaker that the Bill was inconsistent with the Constitution or that it entertained a doubt whether the Bill or any provision therein was inconsistent with the Constitution such a Bill could be passed only with the special majority required for Constitutional amendment.[15]

Unlike in respect of ordinary Bills, here the Constitutional Court was required merely to express an opinion on an urgent Bill without the assistance of parties appearing before it.[16] The advice had to be communicated within twenty-four hours[17] whereas in respect of ordinary Bills the Constitutional Court had fourteen days to arrive at a decision.[18] In France, the time limit is one month for an ordinary Bill and eight days for an urgent Bill.[19]

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13. In respect of urgent Bills, the words 'decide' and 'decision' were carefully avoided in describing the opinion of the Constitutional Court. This is perhaps because the Constitutional Court had to deliver its opinion within twenty-four hours of the assembling of the court and without a hearing as in respect of ordinary Bills.

14. The Constitution of Sri Lanka, 1972, sec. 55(2).

16. Ibid., secs 55(1) and 63(2) which have the cumulative effect of excluding the appearance of interested parties.

15. Ibid., sec. 55(4).

17. Ibid., sec. 55(2).

18. Ibid., sec. 65.

19. The Constitution of France, arti. 61.

Next, we will look into a dispute that arose between the Constitutional Court and the government as to the nature of the fourteen day time limit.

(iv) The Fourteen Day Rule: Mandatory or Directory?

The very first reference made under the Republican Constitution to the Constitutional Court for its decision gave rise to a sharp division of opinion between the members of the Constitutional Court and the government. While inquiring into the Sri Lanka Press Council Bill, the Chairman of the Constitutional Court, Mr. T. S. Fernando, a former Judge of the Supreme Court, expressed the view that section 65 of the Republican Constitution which enacted that 'the decision of the Constitutional Court shall be given within two weeks of the reference together with the reasons' was merely a rule of guidance. He was quoted to have said that the Constitutional Court would conduct its proceedings for any length of time as was necessary -- even for four years.[1] It is interesting to note that he said to a newspaper that he who had spoken against the concept of a Constitutional Court to examine Bills, replacing the traditional method of judicial review, had now been appointed the Chairman of that institution -- the bad boy had been made the monitor of the class, as he wished to put it.[2]

The Minister of Justice, Mr. Felix R. Dias Bandaranaike, explaining the events connected with this dispute said in the National State Assembly that the Attorney-General as well as

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1. See the speach of Mr. Felix R. Dias Bandaranaike, Hansard Vol 4(1) No. 7 of December 12, 1972, column 1543.

2. 'Sun' newspaper of November 27, 1972.

the leading lawyer for the petitioners had submitted that the two week time limit was mandatory.[3] In order to break the deadlock the Hon. Minister had suggested to the Chairman of the Constitutional Court that if he made a request to the National State Assembly for an extension of the time limit for that particular occasion, the Minister would personally take the responsibility of moving a resolution in the Assembly to be seconded by the Leader of the Opposition acceding to such request.[4]

As the Constitutional Court showed no signs of altering its view, a meeting was arranged between the three members of the Constitutional Court and the President of the Republic, which was attended also by the Minister of Justice, the permanent secretary to the ministry of justice and the Speaker.[5] This long discussion failed to make any impact on the three judges. As Mr. T. S. Fernando had said:

> We are clear in our own minds about the interpretation of this section. We do not admit that anybody has the right to give an extension of time or that we are obliged to ask for time.[6]

The refusal by the members of the Constitutional Court to make a request to the National State Assembly, Mr. Felix R. Dias Bandaranaike thought, prevented the creation of a 'healthy convention'.[7] Moreover, the insistence of the Constitutional Court that it was not bound by the constitutional provision amounted to a challenge to the legislative Supremacy of the National State Assembly.[8]

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3. Hansard Vol 4(1) No. 7 of December 12, 1972, column 1543
4. Ibid., column 1546-7.
5. Ibid., column 1550.
6. Ibid., column 1553.
7. Ibid., column 1547.
8. Ibid., column 1535.

After the expiry of the fourteen days the Minister withdrew the Attorney-General from the proceedings before the Constitutional Court which the Minister characterized as a mock trial.[9] On December 7, 1972,the Speaker informed the National State Assembly that since the Constitutional Court had failed to communicate its decision within two weeks, the proceedings in the House could continue.[10] This ruling may be objected to on the ground that it had the effect of nullifying the constitutional provision that 'no proceedings shall be had in the National State Assembly . . . until the decision of the Constitutional Court . . . has been given'.[11]

Soon afterwards, the three members of the Constitutional Court resigned from their office. Three members were appointed in their place, and the Bill was referred de novo to a newly constituted Court which communicated its decision well within fourteen days to the Speaker.[12] The making of a fresh reference to a newly constituted Court clearly shows that the National State Assembly was not willing to create the impression that it was leap-frogging constitutional adjudication.

The events leading to the resignation of the members of the first Constitutional Court came up for discussion before the Special Presidential Commission, established to inquire into maladministration particularly during the

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9. Ibid., column 1553-4.

10. Hansard., Vol 4(1) No. 4. column 854.

11. The Constitution of Sri Lanka, 1972, sec. 54(3).

12. The Sri Lanka Press Council Bill Decision, where it was held that the time limit of 'within two weeks' was mandatory. Decisions of the Constitutional Court Vol I (1973), p. 1, at p. 3.

period commencing May 28, 1970 and ending July 23, 1977, when Mrs. Bandaranaike's Government was in power.[13] The events under discussion here were cited as an example of the manner in which that government had attempted to interfere with the judiciary.[14]

One may conclude that this incident is evidence of executive interference with judicial functions (if we may use that term in respect of the function performed by the Constitutional Court). On the other hand, it may be argued that this was a situation where the legislature and the executive were faced with an unforeseen exigency and where a mutually acceptable solution had to be found without imparing the supremacy of the legislature. Aside from the issue whether the Constitutional Court was correct in making that ruling as to the nature of the time limit, what we can clearly see is the adamant insistence of each of the authorities on its primacy over the other.

Having examined how the Constitutional Court was constituted and how it worked, we may proceed to examine some of the decisions of that Court.

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13. The Commission was established by the President by Warrant dated March 29, 1978 and published in Gazette Extraordinary No. 310/9 of March 30, 1978, under sec. 2(1) of the Special Presidential Commissions of Inquiry Law No. 7 of 1978. See also the Special Presidential Commissions of Inquiry (Special Provisions) Act No 4 of 1978 specifically stating that the original law has retrospective effect.

14. The Commission acquitted Mr. Hector Kobbekaduwa, a former Minister, of allegations of his involvement in the events leading to the resignation of the members of the Constitutional Court. See Dinamina (a Sinhala Daily) of November 28, 1978, front page.

(2) The Decisions of the Constitutional Court with Special Reference to the Meaning Attributed to 'Judicial Power'

In view of the fact that the constitutional experience of the post-independence period was heavily drawn upon in the drafting of the Republican Constitution of 1972, the introduction of the Constitutional Court stands out as the single most significant constitutional innovation of 1972: even the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978, which has as one of its principal objects the guarantee of the independence of the judiciary, accepts the desirability of a Constitutional Court when it confers on the Supreme Court of Sri Lanka powers and functions similar to those exercised and performed by the Constitutional Court.

Being a novel institution, the Constitutional Court had to develop its own method of performing the functions entrusted to it. Its most obvious model was the manner of proceeding that had traditionally been observed in the courts of law. However, in view of the fact that it was not a court in the strict sense of the term, it was open to the Court to have deviated from the general practice of the courts. What choice the Constitutional Court made must of necessity precede an examination of the various decisions of that Court.

(i) The Procedure Adopted by the Constitutional Court in Determining the Constitutionality of a Bill

The constitutional provisions relating to the procedure of the Constitutional Court have already been outlined. What is proposed to be done here is to determine to what extent the Constitutional Court acted in the manner in which an ordinary court of law would set about deciding a constitutional issue, in relation to (a) rules of interpretation and (b) precedent.

(a) Rules of Interpretation: In the first decision of the Constitutional Court[1] this matter, naturally, attracted argument and comment. It was submitted on behalf of the petitioners that due regard must be paid to the fact that the Constitutional Court was required to perform a function different from that of the courts: it determined the constitutionality of a Bill whereas a court of law would decide upon the constitutionality of a law in operation. In view of this basic distinction, it was contended, the following two principles of statutory interpretation were inapplicable: (a) that all laws are presumed to be constitutional until the contrary is proved and (b) that when two interpretations are possible, the court would lean in favour of that which is consistent with the validity of the statute.[2]

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1. Sri Lanka Press Council Bill Decision, Decisions of the Constitutional Court Vol. I, p. 1.

2. Ibid., p. 4.

These two rules have been acted upon by courts of law in order that the Sovereignty of the Legislature is duly respected unless it is clearly proved that it had stepped beyond its legislative competence: for, a decision that the legislature acted beyond its authority inevitably resulted in negating the effect of the statute involved. In view of the fact that a decision of the Constitutional Court did not have this serious effect, it is reasonable to suppose that these two rules of interpretation were not applicable in an inquiry before the Constitutional Court.

This view seems to have been accepted by the Constitutional Court when it said:

> In deciding whether a provision in a Bill presented to the National State Assembly and referred to this Court by the Hon. Speaker under section 54(2) of the Constitution is inconsistent or not, we take the view that the correct approach is to examine the provisions vis-a-vis the Constitution and thereafter decide the question without resort to presumptions and counter presumptions.[3]

While conceding that precedents, principles and practices in the interpretation of other constitutions were of undoubted value, the Constitutional Court emphasized that in the task of interpreting the Republican Constitution the principles and concepts that underlie the Constitution should receive primary consideration. In other words, the Constitutional Court had to decide whether the various relevant constitutional provisions would, in the light of the basic concepts of the Constitution, uphold the validity of any

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3. Ibid., p. 6.

particular Bill. In determining this issue reference could legitimately be made to general constitutional principles and practices.

While hesitant to rely on the 'presumptions or counter presumptions' the Constitutional Court, nevertheless, pointed out the need to interpret the constitution in such a manner so as not to unduly hamper the efficacious operation of the Constitution:

> /W_/e should interpret the Constitution as far as possible in a manner that will make the Constitution work and not in a manner that will place impediments and obstacles to the working of the Constitution.[4]

The Constitutional Court pointed out that the Soulbury Constitution proved to be an obstacle to solving the problems of the people.[5] It was in order to overcome this difficulty that the Republican Constitution was conceived. Therefore, particularly when a private right or freedom was alleged to have been infringed,it was imperative to find out whether that ostensible infringement was justifiable as an implementation of the duty of the State to safeguard the interests of the people as a whole -- since the Republican Constitution had as its conceptual background the development of the society as a whole, even undermining to that extent certain rights and freedoms of the individual, particularly the right to private property, which the Constitution did not recognise as a fundamental right.

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4. Ibid.

5. Ibid., at p. 4.

This is what the Constitutional Court seems to have said: in determining the constitutionality of a Bill, the Constitutional Court must find out whether or not the Bill comes within the protection of any constitutional provision; and, in arriving at that conclusion, it should always be mindful of the principles and concepts that underlie the Republican Constitution; it is not right to start with pre-conceived notions of what a Constitution or a statute in general ought or ought not to do.

The view of the Constitutional Court on the correct approach to constitutional interpretation, it is submitted, is unobjectionable, to say the least, on two accounts. Firstly, Bills had to be tested against a Constitution which preferred public rights to personal rights and the advancement of the society to that of an individual. Secondly, an ordinary court, in determining the effect of a statute, tries to construe it as innocuously as circumstances permit so that while upholding the wishes of the legislature the freedoms and rights of the subject could be accorded the fullest possible operation, whereas such a course was not called for when the Constitutional Court advised the legislature whether it would be within its authority to pass the impugned Bill: for, a Bill inconsistent with the Constitution could only be enacted if the Bill was either amended excluding the objectionable features or passed in its original form as a constitutional amendment. It is right to say that the members of the Constitutional Court were not called upon, nor did they have the occasion, to be the guardian of the freedoms of the subject to the same great extent an ordinary judge would reach.

It is not necessary to mention the various principles of interpretation which were acted upon by the Constitutional Court: those rules of interpretation, followed by the Courts of Ceylon, and mentioned in Chapter 9, above, proved generally acceptable to the Constitutional Court. One such rule, however, needs comment. The relevant paragraph from the Sri Lanka Press Council Bill Decision is as follows:

> Objection has been taken to the constitution of the Press Council on the ground that the members of the Press Council are to be appointed by the President on the advice of the Minister. It was argued that the Minister can pack the Council with nominees of his choice and of his political persuation. . . . Must we in considering this Bill presume that the Minister will act mala fide and not in the interests of the country? To give such an interpretation and to hold that therefore this is a violation of the Constitution would be doing injustice to the Constitution.[6]

The above view is based on the rule of interpretation that the mere possibility of future abuse should not constitute ground for declaring a statute unconstitutional. Such a rule is justifiable when a court of law examines an already operative law in relation to a concrete factual situation before it. But, since the function of the Constitutional Court was to determine whether a particular legislative measure had the prospect of being an infringement of the Constitution, it could not rule out the relevance of any possibility of future abuse of powers conferred by such Bill. Moreover, there is ample judicial opinion to show

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6. Decisions of the Constitutional Court Vol. I, p. 1, at p. 17.

that the likelihood of future violations of the Constitution are not altogether irrelevant in a decision as to the constitutionality of a law.[7] With regard to the particular circumstances before it in the Sri Lanka Press Council Bill reference, the Constitutional Court might probably have been justified in refusing to accept as a basis of the invalidity of the Bill the possibility of the abuse of powers by the Minister. But as a general rule it does not seem commendable in proceedings before the Constitutional Court.

(b) Precedent: As we have already seen, there was a fundamental difference between courts of law in the exercise of their constitutional jurisdiction and the Constitutional Court. This distinction, however, did not deter the Constitutional Court from placing reliance on judicial decisions in arriving at a decision as to the constitutionality of a Bill: in fact, there is hardly a decision of that Court where interpretations placed by the courts, both local and foreign, on provisions or concepts similar to those contained in the Republican Constitution were not referred to.

A number of such decisions will be referred to in sub-division (ii) of this part of the chapter, and it will become clear that by their reliance on such judicial decisions, the decisions of the Constitutional Court themselves rightly took the appearance of decisions of ordinary courts of law.

It must, however, be noted that previous judicial decisions were not regarded as being in any sense binding on

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7. See for instance Liyanage v. The Queen [1966] 1 All E. R. 650, at p. 660; (1965) 68 N. L. R. 265, at p. 285, and The Bribery Commissioner v. Ranasinghe [1964] 2 All E. R. 785, at p. 789; 66 N. L. R. 73 at p. 76. These passages are quoted in Chapter 8(1)(iv) supra.

the Constitutional Court: the doctrine of stare decisis was not applicable to it for the simple reason that it did not form part of the system of courts in Sri Lanka. Be that as it may, previous judicial decisions carried with them a kind of persuasive authority.[1]

Apart from the frequent reference to local and foreign judicial decisions, the Constitutional Court resorted to its own previous decisions, thereby evolving a sort of 'judicial precedent' in the Constitutional Court itself. For instance, in the Associated Newspapers of Ceylon Ltd., (Special Provisions) Bill Decision[2] the Constitutional Court in interpreting the phrase 'in the interests of' occuring in section 18(2) of the Constitution referred to the interpretation placed by the Constitutional Court in the Sri Lanka Press Council Bill Decision[3] and said that 'we see no reason to depart from the view we have already expressed' in that case.[4] Likewise in the Administration of Justice Bill Decision[5] the Constitutional Court cited with approval the view expressed by it in a previous decision.[6]

That the Constitutional Court would set about interpreting the Constitution generally in the manner as if it were a court seems to have been taken for granted. As J. A. L. Cooray,

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1. Even the term 'persuasive authority' is not strictly applicable since in ordinary courts of law a previous decision is regarded as 'persuasive authority' due to the fact that such authority carried with it the possibility of being adopted as a binding precedent in a judicial decision directly requiring the support of such authority.

2. Decisions of the Constitutional Court Vol I, p. 35.

3. Ibid., p. 1. 4. Ibid., at p. 52.

5. Ibid., p. 57, at p. 64.

6. The Sri Lanka Press Council Bill Decision, Ibid., at p. 17

a distinguished constitutional lawyer who participated in the drafting of the Constitution and was later appointed as one of the first members of the Constitutional Court (one of the three who resigned over the fourteen day time limit issue), wrote:

> The Constitutional Court naturally follows the well-accepted rules of interpretation of statutes for the purpose of deciding whether a provision in a Bill is inconsistent with the Constitution. The Court will also develop its own rules of interpretation having regard to the nature of our Constitution.[7]

One last comment remains to be made before we proceed to examine some of the decisions of the Constitutional Court. In the Sri Lanka Press Council Bill Decision[8] the Constitutional Court having referred to the fact that the Republican Constitution did not derive its authority from any past constitution or from a foreign authority, remarked that that factor justified the exclusion, if necessary, of rules and principles that have been developed by courts in respect of other constitutions. This argument is not convincing in the least, it is repectfully submitted. The mere fact that the Republican Constitution was autochthonous in respect of its origin does not justify the exclusion of rules and principles that are applicable in respect of constitutional provisions from other jurisdictions which are similar in effect to those contained in that Constitution.

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7. J. A. L. Cooray, Constitutional and Administrative Law of Sri Lanka (1973), at p. 200 (stress added).

8. Decisions of the Constitutional Court Vol. 1, at p. 6.

In determining whether guidance is to be derived from interpretations placed on, and concepts underlying, another constitution, the proper question to be asked is: 'are there similarities between the two constitutions in the general design and particular details?'. If the answer is in the affirmative, the Court would be justified in inquiring further as to the relevance of the authorities in question to the issue before it. The fact that in respect of the method of adoption the Constitution maintained no link with the past is no ground for refusing to derive assistance from previous judicial decisions, when the Republican Constitution had so freely drawn upon the constitutional experience of Ceylon as well as some other countries such as the United Kingdom, the United States of America, France and India.

In any event, it is to the consolation of all those interested in preserving the traditional method of judicial process that the Constitutional Court referred to and derived assistance from interpretations placed on, and rules and practices relating to, other constitutions.

(ii) Some Aspects of Constitutional Interpretation by the Constitutional Court

When the Republican Constitution was enacted in 1972, there was a general feeling of triumph and achievement following the landslide victory of the United Front -- the People's Government as it was popularly known -- at the general election of 1970. (This jubilation, however, was stained to a considerable extent by the 'eruption of the volcano',[1] the outburst of the insurrection of April 1971). The euphoria prevalent in the country did not fail to leave its impression on the members of the Constitutional Court.

The earlier decisions of that Court expressed the sentiments of liberation 'after over 400 years of foreign, imperialist and colonial domination'[2] and referred extensively to how the Republican Constitution came to be enacted in pursuance of the mandate referable to the 'clear majority given to the United Front Parties'.[3]

The initial impression created by the expression of such views by the Constitutional Court is that it was generally committed to the preservation of the Republican Constitution in such a fashion as to lead to the realisation of the hopes and aspirations that found expression through the enactment of that autochthonous constitution.

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1. In November 1971, the Prime Minister said: 'We are all sitting on top of a volcano today. We are unable to say at what moment this terrible volcano will erupt'. Hansard, Vol. 96, No. 10, column 2211.

2. Decisions of the Constitutional Court Vol.I at p. 4.

3. Ibid., at p. 38.

We must find out, through a discussion of a cross-section of the decisions of the Constitutional Court, whether the Constitutional Court remained a passive observer or assumed the role of a creative critic.

The Constitutional Court has been called upon to interpret a number of constitutional provisions and to determine their application in a wide variety of circumstances. Its attention was frequently drawn to the provisions relating to the fundamental rights, the judicial power and the sovereignty of the people. Before we embark on a discussion of some such decisions, it is advisable to find out how the Constitutional Court viewed the constitutional provisions as a whole.

It was argued by Counsel for the State in the Associated Newspapers of Ceylon Ltd., (Special Provisions) Bill Reference[4] that the Republican Constitution did not guarantee the fundamental rights enumerated in section 18(1) inasmuch as they were not enforceable in a court of law. This argument, which was a personal view and not representative of the position taken by the government on that issue, did not find favour with the Constitutional Court. Refusing to accept the proposition that the Constitution merely declared the rights and freedoms which previously existed, the Constitutional Court pointed out that the inclusion of a Bill of Fundamental Rights in the Constitution was the result of serious deliberation and that within the framework of the supremacy of the National State Assembly fundamental rights were protected.

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4. Decisions of the Constitutional Court at pp. 38-9.

The Constitutional Court was cautious, however, to point out that the fundamental rights guaranteed by section 18(1) of the Constitution were subject to the limitations laid down by the other relevant provisions:

> What is granted, however, is not an absolute right but a right subject to permissible limitations. These rights represent the claims of the individual. The limitations protect the claims of other individuals and the claims of society or the State. To say that the rights are fundamental and the limitations are not is to destroy the balance which subsection (2) was designed to achieve.[5]

In the recent decision of the Constitutional Court on the Local Authorities (Imposition of Civic Disabilities) Bill,[6] of which more shall be said later on, a very interesting argument was commented upon. According to this argument certain provisions of the Constitution were fundamental and the other provisions were incidental to the fundamental provisions. If any Bill was inconsistent with a fundamental provision, such a Bill could be passed only if the fundamental constitutional provision was first amended.

Disagreeing with the above proposition, the Constitutional Court pointed out that its sole duty was to decide on inconsistencies: it could not advise the Speaker that the Constitution should first be amended in certain particular cases.

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5. Ibid., at p. 40.
6. Hansard Vol. 28, No. 15, Part 1, col. 1655-81 (1978).

> Nor can we by reference to a nebulous concept of an all-pervading spirit in the Constitution declare certain matters fundamental and others merely incidental to it. . . . It being the fundamental law of the land, every section in it must be given weight as being fundamental and not merely incidental to it. Where the Constitution itself does not expressly so state, it is not competent to us by a process of interpretation to give more weight to a section being fundamental to it and less weight to another as being merely incidental.[7]

Ironically this argument was raised before the Constitutional Court by Mr. Colvin R de Silva, under whose direction as the Minister of Constitutional Affairs the Republican Constitution was drafted, and who had time and again referred to the difficulties arising from certain pre-1972 cases where the view had been expressed that the Soulbury Constitution contained some entrenched provisions. Here he was advocating the view that section 52(1), which enabled the National State Assembly to enact a law inconsistent with the Constitution with the special majority prescribed for constitutional amendment, was subject to a limitation, though not expressed, arising from what has been termed the basic structure or the spirit of the Constitution.[8] This is the type of problem that the Republican Constitution was intended to eliminate!

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7. Ibid., column 1662.

8. See Kesavananda Bharati v. State of Kerala (1973) 4 S. C. C. 225, particularly at pp. 225, 366 per Sikiri, C.J., on the meaning of basic structure of the Constitution.

The refusal of the Court to accept this argument meant that the National State Assembly had the unrestricted power either to amend the Constitution or to pass a law inconsistent with the Constitution provided that the special majority prescribed for constitutional amendment could be procured: the National State Assembly, however, lacked authority to suspend the operation of the constitution in whole or in part, nor could it repeal the constitution without replacement.[9]

This is how the Constitutional Court viewed the effect of the various provisions of the Constitution: having regard to the particular circumstances leading to the enactment of, and the basic concepts underlying, the Constitution, it was with caution that precedents and rules evolved elsewhere could be used in the interpretation of the Constitution; each provision in the Constitution was as fundamental as any other provision; and, in determining the constitutionality of a Bill the right method would be to test the Bill against the applicable provisions. These rules were to be applied, however, having reference to the overriding consideration that the Constitution ought to be interpreted in such a manner as to ensure its efficacious operation. For instance, fundamental rights could be safeguarded in so far as that would not violate the Principles of State Policy or the restrictions placed on such rights in the common interest.

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9. See <u>supra</u> chapter 10 (2) (i), text at footnote 5.

It was not infrequently that the Constitutional Court was called upon to decide on alleged violations of fundamental rights, such as equality before the law[10] and the freedom of speech,[11] of assembly,[12] of thought, conscience and religion.[13] A survey of the decisions dealing with fundamental rights is outside the scope of this work. Certain aspects of equality before the law, however, will be dealt with in the discussion of the cases dealing with the judicial power of the people.

The rejection of the doctrine of separation of powers, as we have already seen, was central to the constitutional innovations of 1972.[14] To what extent the Republican Constitution succeeded in fusing powers we will examine now with reference to the relevent decisions of the Constitutional Court.

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10. See e.g., the Sri Lanka Press Council Decision and the Associated Newspapers of Ceylon Ltd., (Special Provisions) Bill Decision reported in Decisions of the Constitutional Court of Sri Lanka Vol. I (1973) pp. 1 and 35 respectively; and the Local Authorities (Imposition of Civic Disabilities) Bill Decision, National State Assembly Debates Volume 28, No. 15 (Part 1) of August 11, 1978, columns 1655-81.

11. See e.g., the first two decisions mentioned in the preceding footnote; and the Places and Objects of Worship Bill Decision, Decisions of the Constitutional Court Vol. I, p. 27.

12. See e.g., the Associated Newspapers of Ceylon Ltd., (Special Provisions) Bill, Decisions of the Constitutional Court Vol. I, p. 35.

13. See e.g., the Places and Objects of Worship Bill Decision, Decisions of the Constitutional Court Vol. I, p. 27; and the Pirivena Education Bill Decision, National State Assembly Debates, Vol. 18, No. 7, of February 19, 1976, columns 1001-43.

14. See Chapter 10 (2) (i) supra.

In Part I of this thesis we saw how the courts authoritatively laid down that, under the Soulbury Constitution of Ceylon, the judicial power of the State was vested exclusively in the judiciary. Under the Republican Constitution, on the other hand, judicial power was to be exercised, though indirectly, by the National State Assembly. Notwithstanding the fact that the Republican Constitution was intended to overcome difficulties of the type that arose before 1972 from the 'judicial power cases', arguments identical to those advanced before the courts in the 'judicial power cases', based on the premise that judicial power could be exercised only by such persons as governed by the constitutional provisions relating to the judiciary, were presented to the Constitutional Court.

The first Bill referred to the Constitutional Court was impugned, though unsuccessfully, on the ground, inter alia, that it sought to confer judicial powers on an essentially non-judicial body. The Sri Lanka Press Council Bill, which was subsequently enacted as the Sri Lanka Press Council Law, No. 5 of 1973, provided for the appointment of a Sri Lanka Press Council to regulate and tender advice on matters relating to the Press in Sri Lanka, for the investigation of offences relating to the printing or publication of certain matters in newspapers and for incidental and connected matters. The Council was to consist of the Director of Information and six other persons appointed by the President.[15]

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15. Clause 3 of the Bill; sec. 3 of the Law.

Clause 9 of the Bill provided that where the Press Council had reason to believe that there had been published in a newspaper a statement, picture or other matter which was untrue, distorted or improper, the Council might hold an inquiry and order a correction approved by the Council to be published in the appropriate newspaper, or, censure the proprietor, printer, publisher, editor, journalist or other officer or authority of such newspaper, or, order that an apology be tendered by such proprietor, printer, publisher, editor, journalist or other officer or authority to the appropriate party. Any order or censure of the Council, according to clause 9(5), was final and conclusive and could not be questioned in a court of law.

It was argued that when the Press Council ordered a censure, apology or correction it in fact inflicted a 'punishment'. The Constitutional Court, having pointed out that certain persons were empowered to inflict a censure or an admonition or a correction, such as when the Head of a Department censured a public servant, concluded that 'by no stretch of imagination can it be said that that is exercise of judicial power'.[16]

Clause 12 provided that if in the opinion of the Council a person had committed a contempt of its authority, it could send to the Supreme Court a certificate setting

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16. Decisions of the Constitutional Court Vol. I, at p. 11.

out the facts on which its determination was based. In determining whether a contempt had in fact been committed, the Supreme Court had a discretion to take cognizance of the facts stated in the certificate. As the Constitutional Court pointed out, the Supreme Court, which was not bound by the certificate of the Council, decided whether a contempt had been committed after having conducted its own inquiry. In view of the fact that it was the Supreme Court which finally decided whether a contempt of the authority of the Council had been committed, the Constitutional Court was unwilling to acquiesce in the argument that the Council had been given judicial power in respect of contempts of its authority. The case of In Re Ratnagopal,[17] where the Supreme Court of Ceylon had arrived at a similar conclusion in repect of provisions similar to those discussed above, was relied upon by the Constitutional Court to support its decision.

Neither the power to order a censure etc., nor the power to commit a person for contempt of authority was considered to be a judicial power by the Constitutional Court. In determining what is meant by 'judicial power' reference was made to the various tests that had been adopted in the 'tribunal cases'[18] particularly in The United Engineering Workers Union v. Devanayagam.[19] We may

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17. (1968) 70 N. L. R. 409.

18. The 'tribunal cases' are discussed in chapters 5 and 6 supra.

19. (1967) 69 N. L. R. 289; [1967] 2 All E. R. 367.

recall here that the concept of judicial power is given rather a narrow meaning in 'the tribunal cases', limited only to the aspect of dispute settlement. In any event, it is abundantly clear that the powers such as those possessed by the Press Council would not have been held to be judicial powers if they came up for decision before a court of law prior to 1972.

Since the Constitutional Court could dispose of the matter on the ground that no judicial powers had been conferred on the Press Council the Court did not have occasion to make a deliberate statement as to whether the National State Assembly could, consistently with the Constitution, confer judicial powers on a non-judicial body. However, it did not let the matter pass unnoticed:

> Assuming that Clause 9 confers judicial power on the Press Council, the Attorney-General submitted that there is no provision in the Constitution which prevents an institution created by law from performing judicial functions by officers other than those appointed under Section 124 of the Constitution. We are in total agreement with this submission.[20]

The Constitutional Court went on to point out that section 124 made special provisions applicable to those state officers whose office was the performance of functions of a judicial nature. In view of this section which required the state officers of the category mentioned in that section to be governed by the constitutional provisions

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20. Decisions of the Constitutional Court Vol. I, p. 17.

relating to the judiciary, it is submitted, the statement quoted above is untenable. When the Constitution empowered the National State Assembly, by section 121, to 'create and establish institutions for the administration of justice and for the adjudication and settlement of industrial and other disputes and institutions vested with the power of making decisions of a judicial or quasi judicial nature', 'subject to the provisions of the Constitution', it is not correct to say that the National State Assembly could confer judicial powers and functions on a person or a body of persons in contravention of the relevant constitutional provisions.

On two occasions the Constitutional Court was called upon to decide whether judicial powers had been conferred on a Minister. Firstly, in the Bribery (Special Jurisdiction) Bill Reference[21] it was argued that the power given by Clause 2 of the Bill to the Minister of Justice, where he considered it expedient to do so, by Order published in the Gazette, to nominate an appropriate Court or Courts situated anywhere in Sri Lanka for the purposes of trial and disposal of offences under the Bribery Act, irrespective of the place where such offences had been committed amounted to a 'judicial power'.

Having observed that if the power to nominate a court was judicial, then, the Clause in question would contravene the Constitution, the Constitutional Court went on to determine whether that clause conferred any judicial powers on the Minister.

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21. Decisions of the Constitutional Court Vol.I, p. 23.

Here too, as in the Sri Lanka Press Council Decision, the Constitutional Court was not willing to travel beyond the oft-quoted definition of Griffiths, C. J., in Huddart Parker Pty., Ltd. v. Moorhead[22] which is limited to what may be called 'strict judicial power'.[23] In The Queen v. Liyanage[24] the Supreme Court of Ceylon attributed a wider meaning to 'judicial power' so as to include powers ancillary to the exercise of strict judicial powers in deciding that the power given to the Minister of nominating a Bench of the Supreme Court amounted a usurpation of the judicial power exclusively vested in the judiciary.[25] The Constitutional Court in the Bribery (Special Jurisdiction) Decision sought to distinguish the decision in The Queen v. Liyanage on the basis that in the latter case the nomination of the judges by the Minister was for a special case in a special situation to try specific offences against specific defendants, whereas the Bribery (Special Jurisdiction) Bill did not give the power to the Minister to nominate a particular court to hear a particular case.

It must be pointed out that the decision in The Queen v. Liyanage was not founded on the basis that the nomination of judges was applicable to a particular case alone. The major premise of the decision was that the

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22. /1908/ 8 C. L. R. 330, at p. 357.

23. As to the meaning of 'strict judicial power', see Liyanage's case (S. C.) cited in the following footnote.

24. (1962) 64 N. L. R. 313.

25. See Chapter 7 (1) supra for a discussion of the decision of the Supreme Court in The Queen v. Liyanage.

power of nominating judges to hear any particular case had traditionally been exercised by the Chief Justice. In other words it was the 'historical criterion' that determined that the power of nominating judges was a judicial power.

The Attorney-General had been granted by the Courts Ordinance[26] the power to transfer any inquiry or trial to a court chosen by him for reasons which he considered sufficient. Any possible abuse of this power by the Attorney-General, who was an executive officer, was sought to be prevented when the proviso to section 43 of that Ordinance provided that a party aggrieved by such a transfer could apply to the Supreme Court for the review of such order of transfer.

Under the Bribery (Special Provisions) Law the Minister's order would not be justiciable. This fact did not, as the Constitutional Court decided, make the power of the Minister any different from the power possessed by the Attorney-General. It is submitted that the conferment of non-reviewable powers of nomination on the Minister could have easily been considered an interference with the judicial function, if the reasoning in The Queen v. Liyanage proved acceptable to the Constitutional Court.

Our second relevant decision is the one given in respect of the Administration of Justice Bill.[27] This

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26. Ordinance No. 1 of 1889, L. E. C., cap. 6.
27. Decisions of the Constitutional Court Vol. 1, p. 57.

Bill, which provided for the establishment and constitution of a new system of courts, empowered the Minister of Justice, by regulation, to nominate 'a court or courts situated anywhere in Sri Lanka for the purposes of trial and disposal of such categories of actions, proceedings or matters as shall be specified in such regulation'.[28] Such regulations became operative only when approved by the National State Assembly.[29] Following its decision in the Bribery (Special Jurisdiction) Bill Reference, the Constitutional Court held that this power of nomination was not the exercise of judicial power.[30]

Arriving at the above conclusion, the Court yet again attributed a narrow meaning to 'judicial power'. On the basis that the Republican Constitution was a complete breakaway from the past constitutions, the Constitutional Court refused to apply the historical test and the Holmes test, which is also known as the end purpose test.[31]

> To consider the meaning of judicial power in the light of the Charter of 1801 and so forth, which were imposed on us by the British Crown, will be in our view to put the clock back many years.[32]

The Republican Constitution did not define 'judicial power'. It is, therefore, imperative that when interpreting that phrase guidance must be derived from elsewhere. The Constitutional Court limited itself to the dispute settlement aspect of judicial power alone.

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28. Clause 47 (1). 29. Clause 62.
30. Decisions of the Constitutional Court Vol 1, p. 69.
31. These tests are discussed in The Queen v. Liyanage.
32. Decisions of the Constitutional Court Vol 1, p. 68.

Griffiths, C. J.'s definition is appropriate when the question is whether a particular tribunal is judicial or not: in other situations, such as that presently under consideration, that definition is neither appropriate nor adequate. If that definition could be relied on, it is submitted, the other definitions and criteria were also equally relevant in determining the content of 'judicial power' under the Republican Constitution. Moreover, in view of the provisions incorporated in the Republican Constitution so as to safeguard judicial independence which were much similar to those contained in the Soulbury Constitution, it is difficult to understand the reluctance of the Constitutional Court to recognise the true extent of 'judicial power' as laid down by judges and jurists. It is well to repeat that how the Constitution was adopted should not be the sole criterion in determining the scope of the substantive provisions of that Constitution.[33]

So far we have examined two aspects of the argument that judicial power could not be conferred on non-judicial officers. Whether the National State Assembly could, by way of legislation, exercise judicial power remains to be discussed now.

It was argued before the Constitutional Court that the Associated Newspapers of Ceylon Ltd., (Special Provisions) Bill was unconstitutional on the ground, inter alia, that by enacting that law the National State Assembly would in fact be exercising judicial power,

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33. See Part (2) (i) of this Chapter, supra.

in contravention of section 5 of the Constitution, which prescribed that the National State Assembly should exercise its judicial power indirectly through the courts and other institutions created by law.

The impugned Bill had been designed to alter the status of the Associated Newspapers of Ceylon Ltd., as a private company and vest not less than seventy-five per cent of the shares in the Public Trustee, thereby reducing the shareholdings of the persons, who were shareholders on January 4, 1972, to a maximum of twenty-five per cent. These restrictions and limitations were imposed only on that particular company. It was argued that in the absence of any reasonable basis to justify the differential treatment of the Company, the Bill amounted to a denial of the equal protection of the law guaranteed by section 18 (1) (a) of the Constitution. Relying on the findings of a Royal Commission[34] the Constitutional Court held that certain violations of the foreign exchange regulations by certain directors of the affected Company provided sufficient basis for 'an intelligible differentia' which distinguished that company from other companies.[35]

Allied to the arguments based on the alleged violation of the equal protection of the law was the contention that the provisions of the Bill were in their

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34. Sessional Paper VIII of 1971.

35. Reference was made to the decision of the Supreme Court of India in Chiranjit Lal v. Union of India 1951 A. I. R. (S.C.) 41.

totality punitive and imposed on the directors and its members punishment. Disagreeing with this contention the Court pointed out that adequate compensation had been provided to all the affected shareholders and that if the State wanted to punish the company it could have acquired the company under the Business Acqusitions Act. The contention that the National State Assembly was in fact exercising judicial power by passing the punitive Law was not apparently put forward seriously.

Having referred to the Imposition of Civic Disabilities (Special Provisions) Act, No. 14 of 1965, the validity of which had been upheld in Kariapper v. Wijesinha,[36] the Constitutional Court made the following observation:

> The principle has been accepted in Ceylon to disqualify persons from holding office in public institutions who have been found to have contravened the laws of the land involving moral turpitude or who have been found by tribunals or commissions of inquiry to be guilty of anti-social or corrupt conduct.[37]

The Constitutional Court concluded that no provision of the Bill conferred judicial powers on anybody. In 1978 the Constitutional Court was afforded the opportunity to determine whether the Local Authorities (Imposition of Civic Disabilities) Bill amounted to an exercise of judicial power by the National State Assembly.

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36. (1967) 70 N. L. R. 49; [1967] 3 All E. R. 485. See Chapter 8 (2) supra.

37. Decisions of the Constitutional Court Volume 1, at p. 54.

The Local Authorities (Imposition of Civic Disabilities) Bill, No. 2 of 1978[38] was designed to impose civic disabilities on those persons who, being responsible in some way for the local government administration, had been found guilty by a Commission of Inquiry of abuse of power, corruption or other irregular acts. A list of the persons on whom the Bill imposed civic disabilities appeared in the Schedule to the Act. It was contended on behalf of the petitioners-

(i) that there were persons against whom no specific findings had been made in the report of the Commission of Inquiry, but, nevertheless, whose names appeared in the Schedule to the Bill as relevant persons on whom disabilities had been imposed by the Bill; and

(ii) that there were persons against whom there were findings by the Commission of Inquiry but whose names were not included in the schedule to the Bill as revelant persons--that is, persons to whom the Bill applied.

The argument, then, was that although the Bill had the ostensible object of imposing civic disabilities on those persons who had been found guilty by the Commission of Inquiry, the Bill, in truth, arbitrarily selected certain persons who were to be visited with the disabilities prescribed in it.

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38. Hansard, Vol. 28, No 15, Part 1, col. 1655-81, (1978).

Agreeing with this contention, the Constitutional Court went on to determine whether such arbitrary selection was contrary to section 18(1)(a) of the Republican Constitution of 1972, which guaranteed equality before the law. Having referred to previous judicial authorities on the distinction between reasonable classification and discrimination, the Constitutional Court had no hesitation in concluding that the arbitrary selection of certain specific persons for the purposes of the application of the Bill was discriminatory since such selection or classification had no relation to the object of the Bill, namely to impose disabilities on those found guilty by the Commission. On that account the Bill was inconsistent with section 18(1)(a) of the Constitution.

As a corollary to the above contention it was further argued that the Bill which altered the legal rights of the named persons was inconsistent with section 5(b) of the Constitution (which declared that judicial power should be exercised by courts and other similar institutions)[39] inasmuch as it was a legislative judgment which imposed punishment on the named persons. The Solicitor-General argued, echoing the reasoning of Sir Douglas Menzies in Kariapper v. Wijesinha,[40] firstly that the Bill did not contain a declaration of guilt since it merely attracted the findings of the Commission of Inquiry, and

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39. See supra Chapter 10, Part 2(i).

40. See fn. 36 above and Chapter 8 Part (2) supra.

secondly that it imposed no punishment as the imposition of civic disabilities could not be regarded as punitive. The first half of this argument had necessarily to be rejected on account of the Court's finding that the persons against whom findings had been made by the Commission of Inquiry and the persons named in the Schedule to the Bill were not the same. In order to assess the validity of the second half of the argument, the Constitutional Court examined in some detail the decision of the Privy Council in Kariapper v. Wijesinha.

It was contended on behalf of the petitioners that the decision in Kariapper v. Wijesinha, which held that Parliament could validly impose civic disabilities on its members who had been found guilty by a Commission of Inquiry of bribery offences, should be limited to the facts of that case since one of the major premises of that decision was the special jurisdiction which Parliament possessed in respect of its internal matters: in the instant case, it was contended, Parliament was not acting in the exercise of that special jurisdiction. Therefore, if in the instant case it could be proved that the imposition of civic disabilities amounted to an exercise of judicial power, then, there was no ground on which the legislature could plead exception, unlike in Kariapper v. Wijesinha, where the Privy Council accepted that Parliament has a special jurisdiction as an exception to the exclusive vesting of judicial power in the judiciary. With this preliminary contention the Constitutional Court agreed.

The substantial question was whether the imposition of civic disabilities could be regarded as punishment and consequently an exercise of judicial power. In order to answer this question the Constitutional Court referred to the following quotation from Cumming v. State of Missouri:[41]

> The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of deprivation determining this fact.

In Kariapper v. Wijesinha the above quoted observation was referred to. The Privy Council found:

> (a) that the Commission of Inquiry had been appointed by one government whereas the findings of that Commission were implemented by another government; and
>
> (b) that there was near unanimity in Parliament as to the need for the enactment of the Act impugned in that case.

In those circumstances the Privy Council could not resist the conclusion that the impugned Act, far from being a punitive legislative measure, was a valid exercise of the power of Parliament to keep the public life clean for the public good.

In the Local Authorities (Imposition of Civic Disabilities) Bill Decision those circumstances which existed in Kariapper v. Wijesinha were absent. This

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41. (1866) 4 Wall., 277 at p. 323.

prompted the Constitutional Court to make the following observations:

> We are of the view that when the present Bill directly deprives a state officer or employee of local government from holding such office for all time, it is the severest punishment that could be inflicted on such a public officer.[42]

> /The deprivation of the right to vote at local elections for seven years is/ more than a mere disqualification. It is a clear punishment depriving him of the right to participate in the democratic process of choosing those who will guide the destinies of his city or his town or his village.[43]

In order to hold that the imposition of civic disabilities could be rightly regarded as punishment, the Constitutional Court rejected a restricted meaning of 'judicial power' contended on behalf of the State. The Solicitor-General argued that the term 'judicial power' should be understood in the sense that term is defined by Griffiths C. J., in Huddart Parker Ptv., Ltd. v. Moorhead. In spite of its previous refusal to go beyond that definition which adopts only the aspect of dispute settlement, the Constitutional Court,[44] in the Local Authorities (Imposition of Civic Disabilities) Bill Decision, was willing to attribute a wider meaning to 'judicial power'.

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42. Hansard Vol. 28, No. 15, Part 1, col. 1677-8, (1978).

43. Ibid., col. 1679-80.

44. This is the view taken by the Constitutional Court in all the previous cases, which have been discussed earlier in this part of the chapter.

The most crucial question was whether the National State Assembly could, consistently with the Constitution, exercise judicial power in a legislative form. In view of section 5 of the Republican Constitution of 1972, and the constitutional provisions dealing with the method of appointment and security of tenure of judges and those state officers who performed, in the main, judicial functions, the Constitutional Court concluded that judicial power could not be directly exercised by any other than judges and those who may be called 'judicial officers'. In the result the National State Assembly was not competent, under the Republican Constitution of 1972, to directly exercise judicial power. Having referred to the American cases on 'legislative judgments' the Constitutional Court observed:

> By parity of reasoning, section 5(b) of the Constitution prohibits the direct exercise by the National State Assembly of passing legislative judgments, punishments and penalties on specified individuals as this is a direct exercise of judicial power in a legislative form.[45]

This decision of the Constitutional Court laid down the principle that under the Republican Constitution of 1972, judicial power could be exercised only by persons whose appointment and tenure of office were governed by the constitutional provisions relating to the judiciary, and that, accordingly, neither the legislative nor the

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45. Hansard Vol. 28, No. 15, Part 1, col. 1678, (1978).

executive could exercise judicial power. This principle was extracted from a Constitution which embodied the doctrine of concentration or fusion of powers in the legislature. In the 'judicial power cases' of Ceylon, on the other hand, the exclusive vesting of the judicial power in the judiciary was considered to be an inevitable incident of the separation of powers, which formed the foundation of the Soulbury Constitution.

The question then arises whether this decision did not render nugatory the attempt made in 1972 to depart from the doctrine of separation of powers, thereby equalling the position under the Republican Constitution of 1972 to that which prevailed under the Soulbury Constitution with regard to the exercise of judicial power. Or, is it that the principle that the legislature should not exercise judicial power does not necessarily hinge on the doctrine of separation of powers? However, in view of the recent pronouncement of the Privy Council's opinion in Hinds v. The Queen[46] indicating that the exclusive vesting of the judicial power in the judiciary is a necessary corollary of the doctrine of separation of powers--an essential feature of a Wesminster Model Constitution-- , it is submitted that the effect of the decision of the Constitutional Court was to recognize the doctrine of separation of powers at least to the extent that judicial power could be exercised only by the judiciary.

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46. [1976] 1 All E. R. 353. This case is discussed in Part (3) of the next chapter.

With this apparent resuscitation of the Liyanage Priciple[47] by the Constitutional Court which, undoubtedly, would not have been approved by the creators of the 1972 Constitution, we may in the next, and the last, part of this chapter examine whether the Constitutional Court could be regarded as a 'court'.

(3) The Constitutional Court: Was It a Court?

In determining whether it is justifiable to regard the Constitutional Court as a Court in the sense that term is generally used we must look at -

(a) the functions performed by it; and

(b) its composition and actual working.

(a) Its only function was to determine whether a Bill referred to it was inconsistent with the Constitution and advise the Speaker accordingly. This was not a function that the Courts of Ceylon had exercised before. However, as we shall see in Part (2) of the next chapter, the Supreme Court today performs this function. And, in the performance of this function, the Supreme Court does not assume a character different from its fundamental character, namely that of a court of law. It follows, then, that the mere fact that the Constitutional Court performed its function of interpretation prior to the enactment of the Bill does not necessarily prove that it was merely a type of an advisory body, and not a court. As has been pointed out earlier in this

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47. See supra chapter 8 part 1 for a discussion of the Liyanage Principle.

chapter, if the power to declare laws invalid is a necessary attribute of constitutional adjudication, then, the Constitutional Court can not be regarded as a Court.

(b) As regards the composition of the Constitutional Court we have noted that, inspite of the fact that the Constitution did not specify the qualifications its members should possess, the general practice was to appoint Judges or former Judges of the Supreme Court.[1] The provisions relating to their appointment, tenure of office and removal were designed to secure a commendable degree of independence to the members of the Court;[2] firmly-rooted independence is an outstanding characteristic of a court of law.

We also have seen that the Constitutional Court made frequent reference to previous judicial decisions and other authorities, in addition to evolving a type of precedent in the Constitutional Court itself. For instance, in the Local Authorities (Imposition of Civic Disabilities) Bill Decision[3] a number of decisions from the United States of America and Ceylon were referred to in arriving at the conclusion that the legislature could not exercise judicial power. This decision, together with a number of other decisions, declaring certain Bills inconsistent with the Constitution, provides ample evidence that the Constitutional Court performed the

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1. See part 1 (i) of this chapter.
2. Ibid.
3. Hansard Vol. 28, No. 15, Part 1, col. 1655-81 (1978).

function of interpreting the Constitution and Bills in accordance with judicial practice instead of merely acting in aid of the legislature providing its seal of approval.

It is true that the Constitution- makers, in 1972, intended to create an institution in the form of the Constitutional Court--which would be different from a court of law. That is why a Constitutional Court was specially created, instead of conferring that jurisdiction on the Supreme Court. On the other hand, it may be said that the main object in creating that court was to introduce a type of judicial tribunal consisting of persons who had special acquaintance with Constitutional matters. This, together with the fact that in practice its members were chosen from among Judges and former Judges of the Supreme Court, fortifies our contention that it was a court, and if one needs to be quite specific, 'a special court'.

In part (1) (iv) of this chapter we made a passing reference to the proceedings before the Presidential Commission where the events leading to the resignation of the three members of the first Constitutional Court were cited as an example of the manner in which the previous government, of the 1970-1977 period, interfered with the independence of the judiciary. Is this not indirect evidence of the fact that, in general practice, the Constitutional Court was regarded as a Court, the independence of which had been constitutionally guaranteed?

The decisions of the Constitutional Court are not as wholesome as one expects a decision of a superior court to be, perhaps because the Constitutional Court had to deliver its decision within a short period of time. This, however, cannot detract much from the judicial nature of the Constitutional Court, which was generally referred to even in the Constitution as 'the court',[4] since the quality of judgment cannot determine conclusively whether the institution delivering the judgment is a court or not.

In conclusion it may be said that, although strictly speaking the Constitutional Court was not a 'Court' since it did not form part of the system of ordinary courts of law, and performed a function till then unknown to the courts of Ceylon, having examined its composition and its actual operation one could hardly deny that it is no different from a court of law.

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4. The Constitution of Sri Lanka, 1972, secs. 55(2) ad. fin., 56(3) and 58.

EPILOGUE

CHAPTER 12

THE JUDICIARY OF SRI LANKA: THE PAST, THE PRESENT AND THE FUTURE

(1) Preliminary

It is a truism that the modern administrative and judicial system of Sri Lanka has its origins in the institutions introduced by the British in Ceylon at the time it was ruled by them. The absence in this book of a detailed account of the native administrative and judicial system that existed in Sri Lanka prior to the British occupation follows from that historical fact.

In view of the fact that the colonial rulers were particularly interested in the material benefits that accrued from Ceylon, it is not surprising to come across mounting criticism of British policy as a whole in Ceylon, especially when the critic is motivated by nationalist fervour. The present writer confesses that he has not delved into the historical records sufficiently to enter into that debate. However, from the material that has been seen in the archives, it is difficult to disagree with what Mills said:

> The record of British policy in Ceylon is not free from blemishes, but on the whole it is one of which the Empire has no occasion to be ashamed.[1]

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1. L. A. Mills, Ceylon under British Rule: 1795-1932 (1933), p. 121.

This is particularly true of the attitude of the colonial officers in London and the administrative officers in Ceylon towards the administration of justice. In Part 1 of this thesis we have shown how the Governors of Ceylon expressed their respect for an independent judiciary, which many Governors thought was an indispensable requirement in order to uphold justice and order. We have also noted that these convictions of the Governors could find expression in the form of specific policies only to the extent permitted by the overriding considerations of economy and the safety of the state.

It is in this context that we must assess, particularly, the entrustment of judicial functions to civil servants during the early years of British rule. The combination of civil and military functions with judicial functions was prompted by the need to ensure that the government officers commanded the respect and obedience of the native people: in fact, under the Sinhalese kings the Ceylonese had been used to an administrative system which did not make a clear delineation between judicial and administrative functions.[2]

The observations that have been made on the colonial system of administration in East Africa by Read warrant mention here. He says:

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2. See Sir John D'Oyly, A Sketch of the Constitution of the Kandyan Kingdom, ed., L. J. B. Turner, Colombo, 1929.

> Administrative officers, closer to the distinctive realities of African life, sought to modify alien methods of justice by a process of adaptation which they saw themselves alone as being fitted to carry out.[3]

In Ceylon, too, claims had been made that it was only a civil servant-judge, familiar with the language, habits and the way of life of the native people, who could administer justice in a manner readily acceptable in the Island.[4]

The question may be asked whether the fusion of judicial and administrative functions or the appointment of civil servants as judges was prompted by anything other than expediency, economy and convenience. It has been suggested that it is possible to gather from communications between the authorities in London and the administrative officers in African Colonial territories, which were often confidential and were not meant, in any event, for publication, that it was assumed by them that their aim was to find a more just system for the administration of justice.[5]

> It appears to have been commonly understood by administrative officers, colonial officers in London, and the

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3. Prof. J. S. Read, 'The Search for Justice', H. F. Morris and J. S. Read, Indirect Rule and the Search for Justice: Essays in East African Legal History, (1972), at p. 293.

4. See, e.g., C. O. 54/514, Dispatch No. 243 of July 24, 1878.

5. H. F. Morris and J. S. Read, op. cit., pp. 290-1.

> lawyers and judges with whom they were often to disagree concerning policies, not merely that they all had a common aim in the devising of a sound and appropriate system for the administration of justice, but that their success in attaining that object was likely to be a crowning achievement of British Colonial rule.[6]

In the light of our discussion in Part 1 of this thesis, the above view is strikingly applicable in the Ceylon context too.

During one hundred and fifty years of British occupation of Ceylon we witness a gradual evolution towards responsible self-government. Advancement in economy and literacy, together with the emergence of a powerful free press, did much to militate against the conferment of wide powers on the administration. A gradual weakening of the powers of the Governor brought with it a strengthening of the position of the representatives of the people--elected or nominated. At the same time this meant that the administration became more and more reluctant to interfere with the judicial process, deviating from the general practice in the early years of British rule.

Together with the political, administrative and social reforms was evolved the judicial system,

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6. Ibid., at p. 291.

which by Independence took the form of a system of courts manned by judicial officers who were protected from legislative and executive interference.

During colonial rule, the independence and the powers of the judiciary were upheld only so far as the supreme authority of the colonial administration was not impaired thereby.[6a] As independence drew near, however, the colonial authorities changed their attitude towards the relationship that ought to exist between the administration and the judiciary: they realized the importance of checks and balances to the authority of the legislature and the executive Ceylon was about to be endowed with, and, as a result, the judiciary of independent Ceylon was to be immune from legislative and executive control in order to guarantee its independent authority. With the grant of independence, as the colonial authorities believed, it was necessary to place restrictions on the law-making and law-enforcing authority of the government in order to prevent misuse or abuse of power, especially in violation of the rights of the minorities. The colonial authorities seem to have been preoccupied with the following question:

> In granting full self-government, what limitations must be prescribed in the Constitution of Ceylon ?

6a. See for instance supra pp. 72-74.

In fact, during the twenty-two years the Soulbury Constitution was in operation, it was subjected to serious criticism, especially by politicians of the left and centre-left parties. In Chapters 9 and 10 we saw the various objections raised against the suitability of that constitution for the needs of the Ceylonese community.

So, in 1972, when the Republican Constitution was adopted by the Constituent Assembly, this was the relevant question:

> How are the limitations placed on the authority of Parliament to be removed?

In other words, the powers of the legislature and of the executive were sought to be enhanced, thereby reviving more or less the position that existed in Ceylon under Colonial rule: a central government to whose power and authority all other institutions and authorities should defer. It is with this object in mind that the doctrine of separation of powers was categorically rejected in drafting the Republican Constitution. In its place was ordained the concept of the fusion of powers in the National State Assembly. Further, the power of judicial review of legislation, which was regarded as a stumbling-block to progressive legislation, was taken away from courts.

The result, then, was, as we saw in the previous chapter, a judiciary deprived of the power of judicial review-- but ensured of the exclusive exercise of other judicial functions.

How was this position changed in 1978?

(2) The Constitution of the Democratic Socialist Republic of Sri Lanka and the Judiciary

The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 made many fundamental changes in the constitutional structure of Sri Lanka. It introduced an elected, executive President with substantial powers, in place of the nominal Head of the State under the Soulbury Constitution and the Republican Constitution of 1972.[1] The National State Assembly was replaced with a Parliament whose members are to be elected according to proportional representation, instead of merely by territorial representation as before.[2] The general features of the Constitution cannot be discussed in detail in this thesis: it may be said that the Constitution of 1978 adopts the Parliament as the legislature of Sri Lanka subject to the essential qualification that the President possesses a high degree of control over it.

The provisions relating to the judiciary may now be examined. Article 4 of the 1978 Constitution is similar to section 5 of the Republic Constitution of 1972.

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1. The Constitution of the Democratic Socialist Republic of Sri Lanka,1978, Chapter VII.

2. Ibid., Chapter XIV.

4. The Sovereignty of the People shall be exercised and enjoyed in the following manner:

(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

(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;

(d) _____

(e) _____

Section 5 of the 1972 Constitution declared that the National State Assembly exercised legislative power directly, and executive and judicial powers indirectly, whereas article 4 of the 1978 Constitution declares the manner in which the Sovereignty of the People of the Republic of Sri Lanka is to be exercised, namely

that Parliament exercises the legislative power directly and the judicial power indirectly while the President of the Republic directly exercises the executive power. It is correct to assume, following the decision of the Constitutional Court in the Local Authorities (Imposition of civic disabilities) Bill Reference,[2] that Parliament today is, as the National State Assembly was, incompetent to exercise directly the judicial power which is to be exercised only through courts and similar institutions. Thus, what we witness in the present Constitution is a separation of the legislative, executive and judicial functions. It is interesting to note that the structure of section 5 of the 1972 Constitution was used in drafting article 4 of the present Constitution to establish a fundamental principle, namely, that of separation of powers, which is diametrically opposed to that contained in its model section, section 5 of the 1972 Constitution.

The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978 established the Supreme Court of the Republic of Sri Lanka, and the Court of Appeal of the Republic of Sri Lanka, each of which is a superior court of record.[3] Provision was made by the

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2. National State Assembly Debates: Hansard., Vol. 28, No. 15, Part 1 (1978), col. 1655-81.

3. The Constitution of Sri Lanka, 1978, article 105 (1) and (3).

Judicature Act, No 2 of 1978 to establish the following courts of original jurisdiction.

(I) The High Court;
(II) District Courts;
(III) Family Courts;
(IV) Magistrates Courts; and
(V) Primary Courts.

The provisions contained in the 1978 Constitution relating to the Judiciary, together with the Judicature Act, No 2 of 1978, replace the system of courts introduced by the Administration of Justice law, No 44 of 1973. Since it is not possible to examine the present judicial structure here, our discussion must be limited to an examination of the constitutional provisions relating to the Judiciary, particularly to the Supreme Court.

(i) The Supreme Court

The Supreme Court is to consist of the Chief Justice and of not less than six and not more than ten other Judges, appointed by the President.[4] It must be noted here that all Judges of the Supreme Court and the High Courts established by the Administration of Justice law, No 44 of 1973, holding office on the day immediately before the commencement of the Constitution of 1978 ceased to hold office, by virtue of article 163 of the Constitution. As a result of this provision a

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4. Ibid., arts. 119(I) and 107(I).

number of Judges of those two courts lost their office when they were not appointed to the Supreme Court, the Court of Appeal or the High Court by the President.[5]

Every Judge of the Supreme Court holds office during good behaviour and is removable only by the President upon address of Parliament on the ground of 'proved misbehaviour or incapacity'.[6], Parliament shall provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution and the investigation and proof of the alleged misbehaviour or incapacity.[7] Neither the Soulbury Constitution of Ceylon nor the 1972 Constitution limit the power of the legislature to make an address to specified grounds. The introduction of such a limit on the power of Parliament indicates how the 1978 Constitution strives to protect the independende of the judiciary to a greater extent than before. The age of retirement of Judges of the Supreme Court is sixty-five years, and not sixty-three as before 1978.[8] Their salaries, determined by Parliament, shall be charged on the consolidated fund,[9] and the salary of a Judge of the Supreme Court shall not be reduced after his appointment.[10]

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5. This aspect will be discussed in Part 4 of this Chapter.

6. The Constitution of Sri Lanka, 1978, art. 107(2)

7. Ibid., art. 107(3)

8. Ibid., art. 107(5); cf sec. 122(3) of the Constitution of Sri Lanka, 1972.

9. Ibid., art. 108(1)

10. Ibid., art. 108(2)

The Supreme Court, the highest and final superior Court of record in Sri Lanka, exercises:

> (a) jurisdiction in respect of constitutional matters;
> (b) jurisdiction for the protection of fundamental rights;
> (c) final appellate jurisdiction;
> (d) consultative jurisdiction;
> (e) jurisdiction in election petitions;
> (f) jurisdiction in respect of any breach of the privileges of Parliament; and
> (g) jurisdiction in respect of sush other matters which Parliament may by law vest or ordain.[11]

(a) The Constitutional Jurisdiction of the Supreme Court: The function of determing the constitutionality of Bills referred to it is vested in the Supreme Court. A Bill comes up before the Supreme Court for its determination as to whether the Bill or any provision thereof is inconsistant with the Constitution either when the President refers a Bill in writing addressed to the Chief Justice or when a citizen by petition alleges that a Bill is, in whole or in part, inconsistent with the Constitution. Where the constitutional jurisdiction of the Supreme Court has been so invoked, no proceeding shall be had in Parliament in relation to such Bill until the determination of the Supreme Court has been made; such determination has to be made within three weeks. (The Constitutional Court under the Constitution of 1972 had to arrive at a decision within two weeks)

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11. Ibid., art. 118.

Where the Supreme Court determines that a Bill is, in whole or in part, inconsistent with the Constitution, it should also inform the Speaker whether such Bill ought to specify that it is for the amendment of the Constitution, or whether such Bill can or cannot be passed by the special majority prescribed for constitutional amendment (two-thirds) without being approved by the people at a referendum.[12] A Bill declared to be inconsistent with the constitution can be passed only in the manner stated in the determination of the Supreme Court.[13] Once a Bill has been passed by Parliament it is not competent for any court or tribunal to pronounce upon, or call in question in any manner, the validity of such Act on any ground.[14]

These provisions also apply, mutatis mutandis, to an urgent Bill--a Bill bearing an endorsement to the effect that in the view of the Cabinet of Ministers it is urgent in the national interest, but the determination of the Supreme Court has to be made within twenty-four hours. The President may, however extend this time-limit upto three days.[15]

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12. Ibid., art. 123(1).
13. Ibid., art. 123(4).
14. Ibid., art. 80(3).
15. Ibid., art. 122.

The present Constitution, like its predecessor, then, excludes judicial review of the constitutionality of legislation. The Supreme Court replaces the Constitutional Court, which did not strictly form part of the judicial structure, and determines whether a Bill is inconsistent with the Constitution. Article 120 of the Constitution of 1978 has the effect of preventing the Supreme Court from deciding whether or not a particular Bill is inconsistent with the Constitution in certain specified circumstances, such as when the Cabinet of Ministers has certified that a Bill is intended to be passed with the special majority prescribed for constitutional amendment; there the sole determination of the Court is to be whether the Bill should be approved at a referendum or whether it should be passed as an express constitutional amendment.[16] For instance, while a Bill intituled 'an Act to Amend the Compulsory Public Service', No. 70 of 1961 was being examined by the Supreme Court to determine its validity, the President of the Republic of Sri Lanka informed the Supreme Court that the Cabinet of Ministers had decided to pass it with a two-thirds majority. Accordingly the Court limited its inquiry only to the question whether a referendum was required to validly pass that Bill which the Court answered in the negative.[17]

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16. Ibid., art. 120 (c).

17. The decision of the Supreme Court is reported in Hansard Vol. 4, No. 4, of February 6, 1979, col. 435-8.

It appears that the Supreme Court, in the exercise of its constitutional jurisdiction, has not been slow to declare Bills inconsistent with the Constitution. For instance, in the Licensing of Produce Brokers Bill Decision[18] the Supreme Court declared that some of the provisions of the Bill in question were inconsistent with the Constitution.

In determing whether a Bill contains any provision inconsistent with the Constitution the Supreme Court is free to draw upon previous judicial decisions, rules and practices, for the Supreme Court, unlike the Constitutional Court of the 1972-1978 era, is a court of law in the true sense of the term. And, in the performance of this constitutional function, the Supreme Court does not cease to be the Supreme Court and engage in performing an extra-judicial advisory function.

> [t]he jurisdiction of the Supreme Court may be exercised in different matters at the same time by the several judges of that Court sitting apart.[19]

The sole and exclusive jurisdiction in respect of the interpretation of the Constitution is another aspect of the constitutional jurisdiction of the Supreme Court. Article 135(1) of the Constitution provides that whenever a question relating to the interpretation of the Constitution arises in any other court , tribunal or similar institution, such question 'shall forthwith be referred to the Supreme Court for determination'.[20]

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18. Hansard, Vol 3(2), No. 6, of December 20, 1978, col. 1254-8.
19. The Constitution of Sri Lanka, 1978, art. 132(2).
20. Ibid., art. 125.

(b) Other jurisdictions of the Supreme Court:

The Supreme Court has the sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive and administrative action of any fundamental right or language right enshrined in the Constitution.[21] Its consultative jurisdiction is exercised when the President of the Republic refers to it any question of law or fact of public importance to obtain the opinion of the Court thereon.[22] In addition to the exercise of the jurisdiction in election petitions[23] and in respect of the breaches of Parliamentary privileges,[24] the Supreme Court functions as the final court of civil and criminal appellate jurisdiction.[25]

(ii) Provisions Relating to the Inferior Courts and General Provisions

The Judges of the High Court are appointed by the President of the Republic and can be removed by him on the recommendation of the Judicial Service Commission.[26] The appointment, transfer, dismissal and disciplinary control of judicial officers,(excluding the Judges of the Supreme Court, the Court of Appeal and the High Court, to each of which special provisions apply), is vested in the Judicial Service Commission,[27] which consists of the Chief Justice, who shall be the Chairman,

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21. Art. 126.
22. Art. 129.
23. Art. 130.
24. Art. 131.
25. Art. 127.
26. Art. 111 (2)
27. Art. 114.

and two Judges of the Supreme Court appointed by the President of the Republic.[28] A Judge of the Supreme Court appointed as a member of the Commission holds office for a period of five years from the date of his appointment and is eligible for reappointment.[29] The salary payable to a member of the Commission is determined by Parliament and cannot be diminished during his term of office.[30]

The provisions outlined above clearly indicate that the present Constitution of Sri Lanka is designed to confer a greater degree of independence on the judiciary than under the Republican Constitution of Sri Lanka, 1972. Article 115, which makes it an offence to interfere with the Judicial Service Commission, and article 116, which makes it an offence to interfere with the judiciary, add strength to that proposition.

It is one thing to guarantee the independence of the judiciary by incorporating provisions in the Constitution to that effect; it is quite another to say that in the general practice the judiciary is not subject to excessive or objectionable control or influence by the legislature as well as the executive. This is the aspect that we will discuss in the last part of this chapter. Before we embark on that discussion we will briefly examine the impact made by the judicial power cases of Ceylon on other jurisdictions.

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28. Art. 112 (1). 29. Art. 112 (4).
30. Art. 112 (7).

(3) The 'Judicial Power Cases' of Ceylon: Their Implications Abroad

Creative law-making by the Supreme Court of Ceylon and the Judicial Committee of the Privy Council in Ceylon cases, particularly the 'judicial power cases', led to the constitutional changes brought about in 1972 especially in respect of the Judiciary. In the Local Authorities (Imposition of Civic Disabilities) Bill Decision, the Constitutional Court decided, as we saw in the previous chapter, that the legislature could not exercise judicial power in a legislative form, thereby applying the Liyanage Principle to the Republican Constitution which was designed so as to make that principle inapplicable. The present constitution, although it does not reintroduce the power of judicial review, seeks to guarantee a greater degree of judicial independence than that obtained under the 1972 Constitution. Further the revival of the term 'judicial officer'[1], omitted from the 1972 Constitution, makes the 'judicial power cases' of the 1948-1972 era all the more relevant today.

The 'judicial power cases' of Ceylon did not pass unnoticed in foreign jurisdictions. In fact, the Jamaican Gun Court case heavily relies on Liyanage's case for its conclusion in repect of the concept of judicial power.

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1. See the Constitution of Sri Lanka, 1978, art. 114 (1): The appoinment, transfer, dismissal and disciplinary control of judicial officers, ... is vested in the [Judicial Service] Commission.

The Judicial power cases of Ceylon have been referred to in some judicial decisions from Canada and Australia and attracted academic discussion. First the Jamaican Gun Court case.[2]

In Hinds v. The Queen[3] it was argued before the Privy Council that the Gun Court Act of 1974, passed by the Parliament of Jamaica as an ordinary Act of Parliament, under which each of the appellants had been convicted, amounted to an infingement of the provisions contained in the Constitution of Jamaica relating to the Judicature.

The Gun Court Act of 1974, the impugned statute, established a new court called the Gun Court with power to sit in three divisions: a Resident Magistrate's Division, a Full Court Division and a Circuit Court Division. Provision was made to confer an exclusive jurisdiction in firearm offences on the Gun Court. While inquiring into a firearm offence, the Gun Court could also try the offender for any other kind of offence he might be changed with. Prior to the creation of the Gun Court, criminal offences were triable either in a resident Magistrate's court or in a circuit court of the Supreme Court of Jamaica.

It was held by the Privy Council that the Gun Court, in establishing the Resident Magistrate's Division and the Circuit Court Division, merely enhanced the powers

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2. [1976] 1 All E. R. 353.
3. Ibid.

which were exercised by the resident magistrates and the circuit court of the Supreme Court respectively under the general law. The Gun Court Act, however, sought to create a new court when it provided for a Full Court Division consisting of three resident magistrates. The Full Court Division had a criminal jurisdiction, except for capital offences, and its sentencing powers for such offences were coextensive with those of a circuit court. It was argued that the impugned Act was unconstitutional to the extent that it purported to confer on a court consisting of persons qualified and appointed as resident magistrates a jurisdiction which under the Constitution was exercisable only by a person qualified and appointed as a judge of the Supreme Court.

Their Lordship observed that the constitutional provisions dealing with the appointment and security of tenure of all persons holding any salaried judicial office drew a distinction between

> (a) a higher judiciary, consisting of the judges of the Supreme Court and judges of the Court of Appeal; and
>
> (b) a lower judiciary, consisting of resident magistrates etc.

Having outlined the relevant provisions , the Privy Council pointed out that:

> the distinction between the higher and the lower judiciary is that the former are given a greater degree of security of tenure than the latter.[4]

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4. Ibid., at p. 364.

The difference in the degree of the security of tenure, their Lordships thought, was attributable to the difference of importance of the jurisdiction that higher and lower courts exercised. Therefore, if a person is granted a jurisdiction that is generally exercised by the judges of the superior courts, then, such person must be appointed in the same manner and entitled to the same security of tenure as a judge of a superior court.[5]

In Hinds v. The Queen the Privy Council went a step further than deciding that judicial power should be exercised by judicial officers: it decided that the judicial power generally vested in a superior court cannot be exercised by a judge of an inferior court. It is interesting to note that in the judicial power cases of Ceylon this issue did not come up for decision, except in Ratwatte v. Piyasena.[6] In that case the Supreme Court had to decide whether it was constitutional to vest in election judges, selected from judges of the Supreme Court and of certain District Courts, election jurisdiction which was exclusively exercised by the Supreme Court previously. It was held that 'the Constitution does not vest the jurisdiction to try election petitions in the Supreme Court'.[7] As H. N. G. Fernando, S. P. J., explained:

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5. Ibid., at p. 365.
6. (1966) 69 N. L. R. 49.
7. Ibid., at p. 52, per Sansoni, C. J.

> If it can properly be said that there has thus been an encroachment upon the jurisdiction previously enjoyed by judges of Supreme Court exclusively, those who thus encroach are themselves members of the judicature. There has been no encroachment by the legislature or the executive.[8]

Thus, while the Ceylon cases were primarily concerned with legislative and executive encroachments upon judicial power, the decision in Hinds v. The Queen seeks to declare it illegal to effect an encroachment by lower courts upon the jurisdiction of the higher courts.

In Hinds v. The Queen it was also argued that the power of the Gun Court to impose a mandatory sentence of detention at hard labour from which the detainee can only be discharged at the discretion of the Governor-General acting in accordance with the advice of the Review Board, a non-judicial body established by the Act, was inconsistent with the Constitution. The Privy Council pointed out that, in substance, the power to determine the length of any custodial sentence imposed for firearm offences was vested in the Board of Review: the Gun Court could only make recommendations regarding the length of the custodial sentence but such recommendations did not bind the Board. As their Lordship pointed out, although the legislature may impose limits on the discretion of the judge in imposing a sentence, it could not divest the courts of their sentencing power and vest it in a non-judicial body.

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8. Ibid., at p. 57, per H. N. G. Fernando, S. P. J. This is the view entertained by the dissenting judges in Hind's case.

> If consistently with the Constitution, it is permissible for Parliament to confer the discretion to determine the length of custodial sentences for criminal offences on a body composed as the Review Board is, it would be equally permissible to a less well-intentioned Parliament to confer the same discretion on any other person or body of persons not qualified to exercise judicial powers, and in this way, without any amendment of the Constitution, to open the door to the exercise of arbitrary power by the Executive in the whole field of criminal law.[9]

In arriving at these conclusions their Lordships, in Hinds v. The Queen, made certain general propositions. Firstly, a Westminster Model Constitution generally embodies the concept of separation of powers. As a consequence of this, judicial power is exclusively vested in the judiciary. The fact that the Constitution does not expressly refer to separation of powers or to the exclusive vesting of judicial power in the judiciary is not conclusive because:

> a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and a judicature . . . [I]t is well established as a rule of construction applicable to constitutional instruments under which this

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9. Hinds v. The Queen [1976] 1 All E. R. 353, at p. 370.

> governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.[10]

It is right to say that Hinds v. The Queen represents the high water mark in the judicial power cases of the Commonwealth. And, undoubtedly, the decision is based on a reformulation of the principles emerging from the judicial power cases of Ceylon.

With Hinds v. The Queen may be contrasted the Canadian decision of R v. Ganapathi,[11] where it was held that the principle of separation of powers in Liyanage v. The Queen did not invalidate a scheme empowering a magistrate to determine whether a traffic offence had occurred and then remit the case to an administrative officer or tribunal to fix the penalty.

In R v. Humby[12] the issue was whether the Matrimonial Causes Act of 1971 (Australia) which purported to validate maintenance orders made by the Master of Supreme Court, which the Supreme Court of Southern Australia had held to be beyond his authority, was constitutional. The argument, based on Liyanage v. The Queen, that the validation of orders was a usurpation of judicial power was rejected

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10. Ibid., at p. 359, 360.
11. (1973) 34 D. L. R. (3d) 495.
12. 2 A. L. R. 297, (1973-74).

on the ground that the legislature made no determinations in respect of maintenance claims, but merely gave legal effect to determinations that had been made in the invalid orders. It was held that the Privy Council decision in Liyanage v. The Queen, which was given in a special factual situation, had no application to the instant case.[13]

The relevance of the Liyanage Principle, namely that under the Soulbury Constitution of Ceylon there existed a separation of powers and that neither the legislature nor the executive could usurp the judicial power that exclusively belonged to the judiciary, for other Commonwealth countries has been the subject of academic discussion too.

Various similarities that existed between the constitutional systems of Ceylon and Australia, it has been pointed out, naturally makes Liyanage's case relevant for Australia. However, the difficulties involved in applying that case to new factual situations appears to be a great obstacle to its relevance:

> The decision appears to go a long way. However, its weight as an authoritative precedent is qualified by the Judicial Committee's disinclination to lay down any general rules about what might amount to usurpation or infringement of the judicial power.[14]

The relevance of Liyanage's case for Canada is not beyond controversy either.

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13. Liyanage's Case was discussed but not followed in: Gragnon and Valliers v. The Queen, 14 Criminal Reports, New Series 321 (1971); and Talga Ltd. v. M. B. C. International Ltd., and Others 50 A.L.J.(Reports) 629 (1976).

14. Garth Nettheim,'Legislative Interference with the Judiciary', 40 A. L. J. 221 (1966).

on the basis that the provisions contained in the Canadian Constitution relating to the judiciary are similar to those contained in the Soulbury Constitution it has been suggested that Liyanage's case is relevant in Canada. This suggestion, however, is qualified by the writer's doubt whether Liyanage's case is sound in principle:

> If the decision in Liyanage v. The Queen is sound in principle, it points to the conclusion that the B. N. A. vests judicial power exclusively in the judiciary as a matter of law, so that constitutional amendment, not just an Act of Parliament or of a provincial legislature, would be required before such power could be exercised by the legislative or executive branches of government.[15]

Disagreeing with the view expressed above, Peter Hogg points out that unlike in Ceylon legislative and executive interference with judicial process is not precluded in Canada.[16]

The judicial decisions and the legal writings that have been briefly examined above clearly indicate that the contribution made by the 'judicial power cases' of Ceylon to the development of the constitutional law of the Commonwealth is not inconsiderable. Particularly, the decision of the Privy Council in Hinds v. The Queen bears ample evidence to the fact that what S. A. de Smith predicted has come true:

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15. J. N. Lyon, 'The Central Fallacy of Canadian Constitutional Law', 22 McGill Law Journal (1976) 40, at 47.

16. P. W. Hogg, Constitutional Law of Canada (1977), at p. 200.

> /G/iven the major premise that an exclusive domain is reserved to the judiciary by the Constitution tendencies to take a restrictive view of legislative power to vest judicial functions in bodies other than courts or judges will surely be reinforced.[17]

The above discussion indicates that, except in Hinds' case, Liyanage's Principle has not been applied outside Sri Lanka. It is interesting to note that even in Hinds' case opinion was divided as to the constitutionality of the Jamaican Gun Court Act.

Viscount Dilhorne and Lord Fraser of Tullybelton, disagreeing with the majority opinion delivered by Lord Diplock, held that the impugned Act had validly conferred on the Full Court Division of the Gun Court a jurisdiction which had previously been exercisable by the Supreme Court alone. In arriving at this conclusion, their Lordships placed much emphasis on the fact that 'the creation of the Full Court Division with its jurisdiction and powers did not involve any transfer of judicial power to the executive'.[18] While conceding that the Gun Court was vested with an exclusive jurisdiction in respect of firearm offences as well as any other offences committed by persons convicted by it of firearm offences, their Lordships could not find anything in the Jamaican

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17. S. A. de Smith, 'The Separation of Powers in a New Dress', 12 McGill Law Journal (1966) 491.

18. Hinds v. The Queen /1976/ 1 All E. R. 353, at p. 375.

Constitution which prohibited the exercise by a magistrate or other inferior judicial officer of a jurisdiction generally exercised by the Supreme Court of Jamaica. Having observed that under section 97(1) of the Jamaican Constitution Parliament could confer, by an ordinary statute, jurisdiction on the Supreme Court, their Lordships went on to say that:

> [t]here is nothing in the Constitution to indicate that it cannot by a Bill passed in that way reduce or alter the jurisdiction and powers (other than those given by the Constitution) which by virture of the Jamaica (Constitution) Order in Council the Supreme Court had when the Constitution came into force. There is also nothing in the Constitution to suggest that unless the Constitution was amended, the Supreme Court was to continue to possess all the powers and jurisdiction it had at that time.[19]

This is exactly the position taken by the Supreme Court of Ceylon in respect of the power of Parliament to alter the jurisdiction of the courts of Ceylon. The discussion under the major sub-heading 'the Conceptual Difference between Judicial Power and Jurisdiction' in chapter 8 of this thesis has revealed that the Supreme Court had held that Parliament could take away from the Courts a jurisdiction it was empowered to confer, although it was doubted whether certain powers which were inseparably connected with the Supreme Court could thus

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19. Ibid., at p. 377.

be taken away. The decision of the Supreme Court of Ceylon in Ratwatte v. Piyasena[20] which we had occasion to refer to earlier in this chapter clearly indicates that Parliament could confer on a judicial officer other than a judge of the Supreme Court a jurisdiction that had previously been exercised exclusively by the Supreme Court of Ceylon. Their Lordships in Hinds' case, thus, refused to recognize a distinction between the jurisdiction of the Superior and inferior courts, a distinction significant enough to affect the constitutionality of an Act of Parliament: their Lordships, however, appreciated that the jurisdiction of the Supreme Court could not be taken away so as to materially affect the identity of the Supreme Court as a superior court of record.[21]

Their Lordships agreed with the majority decision that the conferment of the power on the Board of Review to determine the length of a mandatory custodial sentence imposed by the Gun Court contravened the principle of separation of powers. This principle, their Lordships thought, had been given effect by the written terms of the Constitution and did not arise by implication as was held by the majority.[22]

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20. (1966) 69 N. L. R. 49.
21. [1976] 1 All E. R. 353, at p. 378.
22. Ibid., at p. 380.

It has very correctly been pointed out by Hood Phillips that in Britain which provided the 'Westminster Model' evidence of 'a negation of the doctrine of the separation of powers in most of its meanings'[23] is not difficult to find. He asserts that the English principle of the independence of the judiciary from executive interference is not related historically to the doctrine of the separation of powers.[24]

The innumerable difficulties which are encountered in defining the concept of judicial power seem to be in his mind when the learned writer says about the position in England:

> Our institutions may recognise in a general way three kinds of governmental powers, but no precise classification of their contents can be made; and also three kinds of governmental bodies, though it is not possible to make a logical allotment of powers among them.[25]

In part 1 of this chapter we have explained that when Independence was granted, colonial authorities abandoned the firmly held belief that the power of the central government should be maintained against any other institution in favour of providing checks and balances on the legislative and executive authorities Ceylon was to be endowed with. One must not forget that a

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23. O. Hood Phillips, 'A Constitutional Myth: Separation of Powers', 93 Law Quarterly Review (1977) 11-13, at p. 12.

24. Ibid., at p. 13

25. Ibid.

'Westminster Model Constitution', which is inevitably written, prescribes limits on the legislative competence of Parliament unknown to English constitutional lawyers. These observations indicate that, as Hood Phillips seems to believe, in determining the conceptual basis of a 'Westminster Model Constitution', any assistance that may be derived from the British constitutional experience should not be over-emphasized.

(4) Lions or Jackals: the Independence of Judges in Sri Lanka *

Judicial power, which essentially means the power to settle disputes between the subjects themselves or between the subject and the State, is generally entrusted to judges not just because they are legally qualified but because the law provides them with a degree of independence which is not enjoyed by state officers.[1] Therefore, if the independence of the judiciary is not respected in a country, one cannot expect the courts to do justice by the subject, especially when dealing with disputes between him and the State. That is why the last

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* This heading is suggested by the following article: L. Noble, 'Lions or Jackals: the Independence of Judges in R. v. Hampden', 14 Stanford Review (1962) 711.

1. As Blackstone says in his Commentaries: 'In this distinct and separate existence of the judicial power, in a peculiar body of men, . . . consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power'. (7th ed. at p. 269).

few pages of this thesis must mainly be on how far judges are immune from legislative and executive interference.

Reference has already been made to the proceedings before the Presidential Commission of Inquiry which dealt with corruption and abuse of power committed during the period 1970-1977. A recurrent feature of these proceedings is that high ranking officers, including Ministers, are alleged to have interfered with judges in the performance of their duties.[2]

The Judges of the Supreme Court, established by the present Constitution of Sri Lanka, who exercise powers very much similar to those exercised by the judges of the Supreme Court as constituted under the former Constitution, areappointed by the President in keeping with the earlier practice. Thus the most appropriate course would have been to provide for the continuance in office of the judges of the Supreme Court, which was abolished by the 1978 Constitution, as judges of the newly constituted Supreme Court. However, the constitution-makers have thought fit to do otherwise: the judges of the abolished Supreme Court ceased to be judges of the Supreme Court with the commencement of the 1978 Constitution and the President made fresh appointments to the newly constituted Supreme Court which resulted in the loss of office to certain judges of the former Supreme Court.

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2. See supra pp. 410-11.

The practical consequence of this procedure is that those judges who were not reappointed ceased to hold office in a manner not provided for in the former Constitution under which they were appointed. Removal of Judges of the Supreme Court was to be by the President on an address by Parliament alone and this rule continues to apply under the present Constitution in a more rigid form.[3] When the existing Constitution recognises, more firmly than before, that the tenure of judges should be guaranteed in order to ensure their independence, is it consonant with the spirit of the Constitution that the Constitution itself should be used as a method of terminating the services of a judge otherwise than in accordance with the current constitutional provisions relating to the removal of judges ?

This incident is not strictly without precedent. Inquiring into the constitutionality of the Administration of Justice Bill, the Constitutional Court upheld the argument that the provision contained in that Bill, which declared that each judge who on the day preceding the commencing day of the Administration of Justice Law held office on the Court of Appeal or the Supreme Court, unless he has reached the age of sixty-three years, would continue to be a judge of the newly constituted Supreme Court, was inconsistent with the Constitution which declared that the judges of the Supreme Court should be appointed by the President.

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3. See supra p. 461.

This decision of the Constitutional Court[4] is not sound in principle either; for when the impugned Bill provided for the continuance in office of the existing judges it did not appoint any judges but merely guaranteed the office of existing judges who had been appointed by the President in accordance with the relevant constitutional provisions. If the decision of the Constitutional Court that the President should make new appointments because the Supreme Court to be established by the impugned Bill was a new court is anything to go by, then, the non-appointment of certain judges following the adoption of the present Constitution is legally justified. It is submitted that both these instances are far from being consistent with the proper degree of independence that judges should enjoy.

How the legislature has attempted to circumvent difficulties created by judicial decisions is relevant to our discussion. In 1974 the Supreme Court of Sri Lanka decided by a majority that an order of the Minister to acquire land was ineffective since he had not acted in good faith. Immediately after the decision was pronounced the National State Assembly prepared a Bill amending the Interpretation Ordinance on which the decision was based and nullifying the judgment, referred it to the Constitutional Court as an urgent Bill and, having obtained the approval of the Constitutional Court as to the Bill's constitutionality, proceeded to pass it with the clear

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4. The decision is reported in The Decisions of the Constitutional Court, Vol 1 (1973), 57.

two-thirds majority the government commanded at the time.[5] This incident was criticised especially by the opposition political parties as an attempt to undermine the independence of the judiciary. Recently, while the the decision of the High Court that the Special Presidential Commission had no authority to inquire into any incidents previous to the enactment of the relevant law was being inquired into by the Supreme Court, the President publicly declared that the government would respect any decision that the Supreme Court would pronounce.[6] However, before the Supreme Court delivered its judgment an Act was passed expressly conferring the power on the Commission to inquire into any past events. The Act also validated the proceedings before the Commission that had been adversely affected by the High Court decision.[7] Is this not a reenactment of what happened in 1974 in respect of the Interpretation Ordinance ?

The instances mentioned above are only a few of the examples which are available. One needs hardly to say that it is in the interest of the independence of the judiciary that such deeds ought to be avoided to the greatest possible extent.

What are the reasons for clashes between the judiciary and the administration? When one looks at such clashes, which start from the early days of colonial rule in Ceylon, the conclusion is irresistable that very often these

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5. For a discussion of this incident see L. J. M. Cooray, 'The Twilight of Judicial Control of Executive Action in Sri Lanka', 18 Malaya Law Journal (1976) 230.

6. See Dinamina (Sinhala daily) September 16, 1978.

7. Special Presidential Commissions of Inquiry (Special Provisions) Act, No. 4 of 1978.

are referable to a clash of social values respected by judges and the administration.[8] As Griffith points out judges are 'primarily concerned to protect and conserve certain values and institutions'.

> They are protectors and conservators of what has been, of the relationships and interests on which, in their view, our society is founded.[9]

Therefore, particularly when a government is committed to radical or progressive changes in the social structure, there seems to be prepared ground for disagreement between the judges and the government leading to a strained relationship. Judges who are bred in the common law tradition upholding the rights and freedoms of the individual will not easily become adjusted to radical reforms of society. Therefore, these disagreements will continue until such time that there is a change of attitude in the mind of the judges. Such a change will not easily come because judges do tend to be very cautious in deviating from previous rules and practices.

When one talks about the role of the judiciary especially in the field of constitutional law it is extremely difficult to set an imaginary pattern against which the actual operation of courts can be tested. The best that can be done is to review the past and present it so that we may learn from the past and build upon it.

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8. See generally J. A. G. Griffith, The Politics of the Judiciary (1977)

9. Ibid., at p. 52.

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